

BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket No. 36566

**MACQUARIE INFRASTRUCTURE PARTNERS V GP, LLC —ACQUISITION OF
CONTROL EXEMPTION— GRENADA RAILROAD, LLC AND FLORIDA, GULF &
ATLANTIC RAILROAD, LLC**

**REPLY TO MACQUARIE INFRASTRUCTURE PARTNERS V GP, LLC’S REPLY TO
INTERNATIONAL RAIL PARTNERS, LLC’S PETITION**

International Rail Partners, LLC (“IRP”) respectfully submits to the Surface Transportation Board (“Board”) its reply to the Reply of Macquarie Infrastructure Partners V GP, LLC (“MIP GP”), for the benefit of Macquarie Infrastructure Partners V fund vehicle and MIP V Rail, LLC (“Reply”), to the Verified Petition of IRP to Reject Notice of Exemption Or, In The Alternative, For Stay Of Effectiveness (the “Petition”) filed in the above-captioned proceeding. IRP addresses herein various issues raised by MIP GP in its Reply including, among others: (1) the MIP GP Reply completely mischaracterizes IRP’s purpose for filing its Petition; (2) the MIP GP Reply does not address the complexity of the IRP’s minority ownership of American Rail Partners, LLC (“ARP”) and RailUSA (“RailUSA”); and (3) the MIP GP Reply raises a novel argument about the interchange commitment notice requirements for acquisitions. Moreover, a stay of this proceeding until the state court rules whom the proper party is to buy RailUSA makes sense here considering the complexities involved in this matter.

MIP GP leads off by claiming that IRP is attempting “to litigate before this agency a contract claim currently pending before the Delaware Chancery Court.” Reply at 1. This argument is completely off the mark. In fact, IRP is asking the Board as an alternative to stay this proceeding until the state court can rule on the complex questions regarding the transaction at

issue involved in that case. It is difficult to surmise how MIP GP arrives at this position, but IRP wants to clarify that it is baseless.

Second, MIP GP argues that IRP's Petition runs counter to "Board precedent holding that contract disputes like the one between ARP and IRP are not matters for adjudication before this agency and do not provide a basis for rejection of a Notice of Exemption." Reply at 4. In making this argument, MIP GP fails to mention Board precedent where the Board has rejected notices of exemption based on litigation or disputes regarding the pertinent transaction. *See Winamac Southern Railway—Trackage Rights Exemption—A. & R. Line, Inc.*, FD 35208, slip op. at 2 (STB served Jan. 9, 2009) ("the more extensive record afforded in an application or petition for exemption proceeding likely would be needed to allow [the owner of the line] to air its objection [regarding the serious contractual dispute] and the Board to fully consider the matter."); *Black Hills Transp., Inc.—Modified Rail Certificate*, FD 34924, slip op. at 4 (STB served Jan. 27, 2010) (finding that State's failure to disclose property interest disputes warranted revocation of modified certificate); *U S Rail Corp.—Lease & Operation Exemption—Shannon G., a N.J. LLC*, FD 35042, slip op. at 3-4 (STB served Oct. 8, 2008) (rejecting notice of exemption because failure to disclose the existence of a condemnation proceeding regarding the property at issue was misleading); *Burlington N. & Santa Fe Ry.—Acquis. & Operation Exemption—S. Dakota*, FD 34645, slip op. at 2-3 (STB served Jan. 14, 2005) ("fact that this transaction is now tied up in state court litigation respecting BNSF's rights under the 1986 Operating Agreement, [among other facts] indicates that the transaction contemplated by BNSF is not 'routine'"); *Riverview Trenton Railroad Company—Acquisition and Operation Exemption—Crown Enterprises, Inc.*, FD 33980, and *Riverview Trenton Railroad Company—Petition for an Exemption from 49 U.S.C. 10901 to Acquire and Operate a Rail Line in Wayne County, MI*, FD

34040 (STB served Feb. 15, 2002) (class exemption revoked where transaction involved local government's interest in condemning property); *Jefferson Terminal Railroad Company—Acquisition and Operation Exemption—Crown Enterprises, Inc.*, FD 33950 (STB served Mar. 19, 2001) (found troubling that filing party failed to disclose property was about to be condemned).

This proceeding clearly involves non-routine, controversial, and other complicating matters that are more like these cases above than the cases relied on by MIP GP in arguing the transaction is appropriate for the class exemption process here. First, IRP is a minority owner of ARP, RailUSA, and, therefore, the two railroads that are being acquired in this transaction. As a result, all of the owners of these two railroads have not consented to the filing of this Notice of Exemption. It is controversial and non-routine that one owner of the two railroads is at the Board without the authorization of the other owner involved in the transaction.

Moreover, the litigation now pending in state court is not the first time these parties have had to litigate over the majority owner's rights to sell these railroads. As discussed in the Petition, the pending case in Delaware state court stems from the alleged violation of a settlement agreement ending two prior cases between Defendants ARP and RailUSA and Plaintiff IRP. An issue raised in one of those prior cases was whether ARP and RailUSA were improperly attempting to sell the same railroads. IRP asked the court to stop the sale process because of a violation of an existing agreement. The parties settled that claim in part by agreeing to certain procedures to be followed leading up to the sale. But again, Defendants attempted to sell the railroads without following the terms of their agreement with IRP. This resulted in the pending litigation filed by IRP where the Court has expedited a preliminary injunction hearing based in part on its finding that IRP has asserted "colorable" claims. *See* Petition, Exhibit A. This trail of litigation involving this transaction certainly cannot be seen as routine or non-controversial.

The sale of these two railroads involves over \$200 million and 600 miles of rail lines. This transaction which MIP GP paints as ordinary is clearly not routine and warrants careful review by the Board through a petition or an application.

Third, MIP GP argues that it does not have to comply with the Board's rules regarding notice of interchange commitment disclosures, 49 C.F.R. § 1180.4(g)(4)(i), because the transaction here involves an acquisition of control. This reading of this regulation is unfounded. MIP GP argues that the regulation applies only if "*a proposed acquisition or operation of a rail line* involves a provision or agreement that may limit future interchange with a third-party connecting carrier. . . ." Reply at 8 (quoting 49 C.F.R. §1180.4(g)(4)(i)). In support, MIP GP cites three cases for the proposition that "the Board has interpreted the requirements at Section 1180.4(g) as not applying to control transactions." Reply at 9. However, none of the decisions cited mention interchange commitments.

MIP GP appears to argue that this transaction is not a "a proposed acquisition or operation of a rail line" because it is an acquisition of control of two rail carriers. *Id.* Therefore, MIP GP seems to be saying that any acquisition of control of a rail carrier under 49 C.F.R. § 1180.2(d) does not require certification of whether the transaction involves an interchange commitment. This interpretation would mean that, if a noncarrier acquired control of two Class III railroads, it would not have to disclose an interchange commitment that the noncarrier agreed to in the purchase agreement with the seller that owned a connecting railroad. This loophole is not what the Board had in mind when it devised these notice regulations. Obviously, the Board's use of the word "acquisition" applies to an acquisition of control or assets. Therefore, MIP GP's argument should be rejected.

CONCLUSION

Therefore, based on the foregoing and the Petition, IRP respectfully asks the Board to reject the Notice or alternatively, to stay this proceeding until the Delaware Court issues a decision about who is the proper buyer here.

Respectfully submitted,

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Dated: December 22, 2021

Certificate of Service

I certify that I have, this 22nd day of December 2021, served by email copies of the foregoing document on all parties of record in this proceeding, including:

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/s/ Daniel R Elliott
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