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Scott M. Zimmerman
Acting Director
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: *Macquarie Infrastructure Partners V, GP LLC—Acquisition of Control
Exemption—Grenada Railroad, LLC and Florida, Gulf & Atlantic Railroad, LLC,
STB Finance Docket No. 36566*

Dear Mr. Zimmerman:

This letter is in response to the “Reply to Macquarie Infrastructure Partners V GP LLC’s Reply to International Rail Partners, LLC’s Petition” (“IRP Reply”) and the accompanying Motion for Leave to File Reply, filed in the above-captioned proceeding on December 22, 2021 by International Rail Partners, LLC (“IRP”). For the reasons set forth herein and in MIP GP’s December 20, 2021 Reply (the “MIP GP Reply”) to the Verified Petition of IRP To Reject Notice of Exemption or For Stay (the “IRP Petition”), the Board should promptly lift the housekeeping stay and deny the IRP Petition in its entirety.

The IRP Reply does not respond to any new substantive issue raised by the MIP GP Reply. Rather, the IRP Reply largely reiterates IRP’s claim that the existence of a contract dispute between IRP and American Rail Partners, LLC (“ARP”) currently pending before the Delaware Chancery Court somehow renders the proposed acquisition of control of two small shortline carriers (GRYR and FGA) by MIP GP and its affiliate, MIP Rail – *which are not parties to that litigation* – ineligible for exemption pursuant to 49 C.F.R. § 1180.2(d)(2). In doing so, IRP introduces new arguments that attempt to rewrite both basic principles of corporate law and the Board’s regulations at 49 C.F.R. § 1180.4(g)(4)(i). If the Board accepts the IRP Reply into the record, MIP GP respectfully requests that it also include this brief response to those new arguments.

First, IRP claims that “MIP GP completely mischaracterizes IRP’s purpose for filing its Petition.” See IRP Reply at 1. Specifically, IRP takes issue with MIP GP’s statement that the IRP Petition seeks to litigate its contract claims before this Board. Yet, IRP touts those contract claims as the reason why the Notice of Exemption involves “non-routine, controversial and other complicating matters” that warrant rejection of the Notice. *Id.* at 3. Likewise, IRP relies on the purported merits of its claims against ARP, and the court’s statement that certain of those claims

are “colorable,” to support its assertion that it will suffer irreparable harm in the absence of an STB stay. Thus, IRP’s contract claims against ARP are, in fact, central to its request that the Board reject or stay the Notice of Exemption.

IRP notably fails to mention that, in denying a Temporary Restraining Order, the Delaware court found not “colorable” IRP’s claim that the IRP/ARP settlement agreement entitled it to acquire RailUSA if it submitted the highest bid. *See* MIP GP Reply, Exhibit 1 at 14 (“settlement agreement did not guarantee that ARP would ultimately select IRP’s bid...”) Based on that ruling, there are no contractual grounds to force ARP to sell RailUSA to IRP – the remedy for any remaining “colorable” IRP claims against ARP would be money damages, which are legally insufficient to support the finding of irreparable harm that is prerequisite to issuance of a stay. *See* MIP GP Reply at 12, n.33.

Second, IRP’s assertion that MIP GP failed to address the (rare) cases cited by IRP where the Board has issued a stay pending the resolution of state court litigation is simply wrong. The MIP GP Reply addressed each case cited by IRP in its original, correctly timed petition, and demonstrated that those cases are inapposite. *See* MIP GP Reply at 5-6. The additional cases cited in the IRP Reply are equally unavailing.¹

IRP ignores the most pertinent Board precedent – *Ohio River Partners LLC—Acquisition and Operation Exemption—Hannibal Dev., LLC*, STB Finance Docket No. 35984 (STB served April 1, 2016) (“*Ohio River Partners*”) – which was discussed in MIP GP’s Reply (at 7-8). In *Ohio River Partners* – which involved a contract dispute regarding which of two parties was entitled to operate a rail line – the Board squarely held that “*the existence of such a dispute is not grounds for rejecting an exemption.*” *Ohio River Partners* at 3 (emphasis added). *See also City of Alameda—Acquisition Exemption—Alameda Beltline R.R.*, STB Finance Docket No. 34798, at 3 (STB served April 3, 2006) (litigation over the validity of a repurchase option in state court did not prevent an exemption from going into effect).

Third, IRP asserts a new – and utterly preposterous – argument that, as a minority owner of ARP, IRP’s consent was required for MIP GP to file its Notice of Exemption. According to

¹ In *Winamac Southern Railway—Trackage Rights Exemption—A. & R. Line, Inc.*, STB Finance Docket No. 35208 (STB served Jan. 9, 2009), the Board rejected a notice seeking trackage rights because a key component of the trackage rights class exemption is that there be a written agreement and in that case it was not clear that any agreement existed. In *Black Hills Transportation, Inc.—Modified Rail Certificate*, STB Finance Docket No. 34924 (STB served Jan. 27, 2010), the Board found that abandonment of the line had been consummated prior to filing and therefore the state’s representation that it had a property interest in the right-of-way was false. *Burlington Northern & Santa Fe Railway—Acquisition & Operation Exemption—South Dakota*, STB Finance Docket No. 34645 (STB served Jan. 14, 2005), involved complicating issues relating to the level of service that would be provided over the line and to competitive access for small carriers. These cases are distinguishable from the present situation for the same reason that the Board distinguished them in *Oakland Global Rail Enterprise, LLC—Acquisition Exemption—Rail Line in Alameda County, Cal.*, STB Finance Docket No. 36301 et al. (STB served Oct. 28, 2019).

IRP, “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.” IRP Reply at 3. As an initial matter, the majority owner of RailUSA (ARP) is not “at the Board” – the Notice of Exemption was filed only by the proposed buyer, MIP GP and its affiliate, MIP Rail. Nor is there any STB regulation that requires the selling party (much less a minority shareholder of seller) to join in or consent to the filing of Notice of Exemption. Rather, Section 1180.2(d)(2) provides a procedure pursuant to which a party acquiring control of nonconnecting carriers (*i.e.*, the “buyer”) can obtain the requisite regulatory control authority. IRP fails to cite a single case in which the Board has suggested that the selling party (much less a minority shareholder of seller) must consent to the filing of a Section 1180.2(d)(2) Notice of Exemption. Indeed, such a requirement would stand on its head the basic principle of corporate law that corporate action is determined by majority rule (unless the shareholders provide otherwise in the company’s governing documents).

Finally, IRP’s Reply attempts to rewrite the Board’s regulation regarding interchange commitments. The plain language of 49 C.F.R. § 1180.4(g)(4)(i) states that the regulation applies “*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. . . .*” (emphasis added). The transaction that is the subject of the Notice of Exemption is not “a proposed acquisition or operation of a rail line,” but rather is an acquisition of control pursuant to 49 C.F.R. § 1180.2(d)(2). Moreover, no interchange commitment is created by, or involved in, the proposed transaction. *See* MIP GP Reply at 8-10.

In a desperate attempt to manufacture some technical deficiency in the Notice of Exemption, IRP speculates that the Board must have intended to treat change of control transactions as transactions involving “a proposed acquisition or operation of a rail line.” IRP Reply at 4. In support of that theory, IRP posits a hypothetical transaction in which a noncarrier acquiring control of multiple carriers agrees to a new “paper barrier” in the purchase agreement – a state of facts that does not apply to the transaction before the Board in this proceeding. IRP also argues that “none of the decisions cited [by MIP GP in support of its interpretation of Section 1180.4(g)(4)(i)] mention interchange commitments.” IRP Reply at 4. But that is precisely the point – none of those decisions mentioned “interchange commitments” or “paper barriers” for the simple reason that the interchange commitment provision is inapplicable to such transactions.² The cited cases are just a few examples of Notices of Exemption for control transactions that did not include interchange commitment certifications but were authorized pursuant to the same class exemption invoked in the MIP GP Notice of Exemption.

In short, IRP has not shown that regulation of the transaction at issue in the Notice of Exemption is necessary to carry out the Rail Transportation Policy, or that the Notice of Exemption is false, misleading or otherwise deficient. Nor has IRP demonstrated that it will suffer irreparable harm if the Board does not grant its request to “stay this proceeding until the

² In one of the cited cases, the filing party stated explicitly that the provisions of § 1180.4(g)(4) were inapplicable. *See Ringneck & W. R.R., L.L.C.—Acquisition & Operation Exemption—R.R. Line in Davison, Aurora, Brule, Lyman, Jones, Jackson, & Pennington Counties, S.D.*, STB Finance Docket No. 36512 at 4 (STB filed April 16, 2021).

state court can rule on the complex questions regarding the transaction” *See* IRP Reply at 1. To the contrary, continuing the STB stay pending completion of the state contract litigation would be both redundant and unnecessary because the Delaware Chancery Court has issued – *at the request of both ARP and IRP* – a Status Quo Order that prohibits a sale of RailUSA until the court rules on IRP’s motion for preliminary injunction or otherwise vacates the Status Quo Order.

Conversely, allowing the “housekeeping stay” issued on December 22, 2021 to remain in effect until the state court proceedings are completed, as IRP requests, would inflict substantial harm on MIP GP. As MIP GP’s Reply and the foregoing discussion make clear, IRP has failed to articulate any legitimate public interest basis for rejecting the Notice of Exemption. The Delaware Chancery Court is currently scheduled to hear IRP’s motion for preliminary injunction on February 10, 2022. If the court denies the injunction and confirms its prior determination that ARP was not required to sell RailUSA to IRP, or otherwise acts to vacate the Status Quo Order prior to that date, the transaction between ARP and MIP Rail may go forward as a matter of contract law. In that event, there would be no reason why MIP Rail and ARP should not be permitted to close their transaction. Accordingly, MIP GP respectfully requests that the Board promptly lift its housekeeping stay and leave the ultimate determination of “who is the proper buyer here” (IRP Reply at 5) to the Delaware Chancery Court.

Sincerely,

/s/ Terence M. Hynes

Terence M. Hynes

*Counsel for Macquarie Infrastructure Partners V
GP, LLC, Macquarie Infrastructure Partners V and
MIP V Rail, LLC*

CC: Daniel R. Elliott, Attorney for International Rail Partners, LLC