

February 28, 2022

EXPEDITED ACTION REQUESTED

By Electronic Filing

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:

Macquarie Infrastructure Partners V GP LLC (“MIP GP”), for the benefit of Macquarie Infrastructure Partners V fund vehicle (“MIP V”) and MIP V Rail (“MIP Rail”) (collectively, “Macquarie”), submits this letter to update the Board on the status of litigation between International Rail Partners, LLC (“IRP”) and American Rail Partners LLC (“ARP”) before the Court of Chancery of Delaware (the “Court”). As discussed below, the Court has denied IRP’s motion for preliminary injunction and its December 2, 2021 Status Quo Order has expired. As a result, there exists no legal or contractual impediment to closing the transaction that is the subject of this proceeding. Accordingly, the Board should promptly lift its order postponing the effectiveness of the Notice of Exemption so that the parties can consummate the sale and RailUSA’s carrier subsidiaries can benefit from their new ownership.

On November 24, 2021, Macquarie filed in the above-captioned proceeding a Notice of Exemption pursuant to 49 C.F.R. § 1180.2(d)(2) to acquire control of RailUSA’s two common carrier freight railroads: Grenada Railroad, LLC (“GRYR”) and Florida, Gulf & Atlantic Railroad, LLC (“FGA”). On December 17, 2021, IRP filed a Verified Petition to Reject Notice of Exemption Or, in the Alternative, For Stay of Effectiveness (the “IRP Petition”). IRP asserted that the Notice of Exemption should be rejected because it “clearly raises unresolved issues or questions that require considerable scrutiny. . . .”¹ Specifically, IRP alleged that a settlement agreement between it and ARP “guaranteed [IRP’s] ability to be the purchaser of the railroads if it wished to do so.”² In the alternative, IRP asked the Board to stay the effectiveness of the

¹ IRP Petition at 6.

² *Id.* at 4-5.

Notice of Exemption pending completion of litigation between IRP and ARP regarding the settlement agreement, arguing that “[g]ranting the stay would allow the litigation to proceed and eventually permit the rightful party to obtain the proper authority to control these railroads.”³

Macquarie replied to the IRP Petition (the “Macquarie Reply”) on December 20, 2021. In its Reply, Macquarie demonstrated that the claims underlying IRP’s stay request “raise[] issues of contract law that are the province of the Delaware Chancery Court, not this agency,”⁴ and that longstanding Board precedent holds that contract disputes like the one between ARP and IRP do not provide a basis for rejecting a Notice of Exemption.⁵ Moreover, Macquarie explained that an STB stay was unnecessary because the Court – *at the request of both IRP and ARP* – had already entered a Status Quo Order prohibiting the sale of RailUSA until the Court ruled on IRP’s motion for a preliminary injunction.⁶

Thereafter, on December 22, 2021 (three days before the Christmas holiday), the Board issued a decision postponing the effective date of the Notice of Exemption “[t]o provide sufficient time for the Board to fully consider the arguments presented.”⁷

IRP has now had its day in court. The Court heard argument on IRP’s motion for a preliminary injunction on February 10, 2022. On February 22, 2022, the Court issued a bench ruling denying IRP’s motion.⁸ In doing so, the Court reiterated its prior holding that:

*“the settlement agreement [between IRP and ARP] did not guarantee that ARP would ultimately select IRP’s bid if it were the highest bid submitted. (citation omitted). Discovery has only confirmed that plaintiff [IRP] failed to secure this right for itself following extensive negotiations.”*⁹

The Court also held that IRP would not suffer irreparable harm in the absence of an injunction. Specifically, the Court rejected IRP’s claim that a sale of RailUSA to Macquarie would deprive IRP of “the opportunity to acquire a unique asset,” because IRP itself was not a bidder for RailUSA and “has no binding agreement with IIF (the actual bidder).”¹⁰ The Court concluded that

³ *Id.* at 11-12.

⁴ Macquarie Reply at 13.

⁵ *Id.* at 4-7.

⁶ *Id.* at 11.

⁷ *Macquarie Infrastructure Partners V, GP LLC—Acquisition of Control Exemption—Grenada Railroad, LLC and Florida, Gulf & Atlantic Railroad, LLC*, Finance Docket No. 36566 (STB served December 22, 2021).

⁸ Excerpts from the transcript of the Court’s ruling are set forth in Attachment 1 to this letter.

⁹ Attachment 1, Transcript at 22 (emphasis added). *See also* Macquarie Reply, Exhibit 1, Transcript of December 2, 2021 hearing at 14 (“The settlement agreement did not guarantee that ARP would ultimately select IRP’s bid if it were the highest bid submitted.”).

¹⁰ Attachment 1, Transcript at 29-30.

*“the record demonstrates that plaintiff [IRP] can be adequately compensated through money damages.”*¹¹

Finally, the Court recognized that a preliminary injunction could inflict harm on other interested parties. Specifically, the Court observed that “[t]he purchase agreement between ARP and Macquarie expires on April 30, 2022,” so that an injunction could threaten the transaction agreed to by ARP and Macquarie.¹²

In short, the Court has – for the second time – rejected the contract claim upon which IRP premised its request that the Board stay the transaction between Macquarie and ARP – *i.e.*, that IRP’s settlement agreement with ARP somehow “guaranteed” IRP the right to acquire RailUSA. The Court has also determined that any damages that IRP may ultimately be able to prove in its litigation with ARP can be remedied by a monetary award. The Court’s ruling (and the expiration of the Status Quo Order) eliminate any legal or contractual obstacle to the ability of ARP and Macquarie to close the sale transaction.

Moreover, as Macquarie has previously shown, the IRP Petition fails to articulate any legitimate basis for the Board to reject the Notice of Exemption or to stay its effectiveness on regulatory grounds.¹³ The remaining issues in the litigation between IRP and ARP do not render Macquarie’s proposed acquisition of RailUSA and its carrier subsidiaries ineligible for the class exemption set forth at 49 C.F.R. § 1180.2(d)(2). Nor has IRP demonstrated that further regulatory scrutiny of that transaction is necessary to carry out any element of the Rail Transportation Policy at 49 U.S.C. § 10101, or that the Notice of Exemption did not comply in any respect with the Board’s class exemption regulations.

Accordingly, Macquarie respectfully requests that the Board expeditiously issue an order denying the IRP Petition and lifting its December 22, 2021 decision postponing the effective date of the Notice of Exemption, so that the class exemption can take effect and Macquarie and ARP can close the sale transaction.

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

¹¹ Attachment 1, Transcript at 31 (emphasis added). *See also* Transcript at 46 (“I am not persuaded that any harm to IRP cannot be remedied by money damages.”)

¹² *Id.*, Transcript at 37-38.

¹³ *See* Macquarie Reply; Letter dated December 23, 2021 from Terence M. Hynes to Scott M. Zimmerman.

ATTACHMENT 1

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

INTERNATIONAL RAIL PARTNERS, LLC,	:	
	:	
Plaintiff,	:	
	:	
v	:	C. A. No.
	:	2021-1029-PAF
AMERICAN RAIL PARTNERS, LLC,	:	
RAILUSA, LLC, and NEWCO SBS HOLDINGS,	:	
LLC,	:	
	:	
Defendants.	:	

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Chancery Court Chambers
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Tuesday, February 22, 2022
4:00 p.m.

- - -

BEFORE: HON. PAUL A. FIORAVANTI, JR., Vice Chancellor

- - -

TELEPHONIC RULINGS OF THE COURT ON PLAINTIFF'S MOTION
FOR PRELIMINARY INJUNCTION

CHANCERY COURT REPORTERS
Leonard L. Williams Justice Center
500 North King Street - Suite 11400
Wilmington, Delaware 19801
(302) 255-0524

1 defendants should have factored in the value of the
2 reimbursement agreement when disclosing Macquarie's
3 bids.

4 Among the claims that the Court
5 determined were not colorable for expedition was IRP's
6 claim that defendants breached the implied covenant of
7 good faith and fair dealing. Additionally, the Court
8 held that "[t]he settlement agreement did not
9 guarantee that ARP would ultimately select IRP's bid
10 if it was the highest bid submitted." Docket 70 at
11 page 14, lines 19 to 21. Discovery has only confirmed
12 that plaintiff failed to secure this right for itself
13 following extensive negotiations. See Defendant's
14 Exhibits 19, 20, and 41.

15 After expedited discovery and
16 briefing, the Court held oral argument on the
17 plaintiff's motion for a preliminary injunction on
18 February 10, 2022.

19 Now to the legal analysis. "A
20 preliminary injunction is an extraordinary remedy" and
21 is "granted sparingly." That's from a long list of
22 cases, including *Lawson v. Meconi*, 2005 WL 5755653,
23 from this Court on May 27, 2005. To succeed on a
24 motion for a preliminary injunction, the movant must

1 conclusion of my ruling.

2 "To demonstrate irreparable harm, a
3 plaintiff must present an injury of such a nature that
4 no fair and reasonable redress may be had in a court
5 of law and must show that to refuse the injunction
6 would be a denial of justice." That's from *Aquila,*
7 *Inc. v. Quanta Services, Inc.*, 805 A.2d 196, at 208,
8 from this court in 2002. A plaintiff thus has not
9 established irreparable harm if she could otherwise be
10 adequately compensated through money damages. That's
11 *Gradient OC Master, Ltd. v. NBC Universal, Inc.*
12 930 A.2d 104, at page 131, from this court in 2007.
13 Furthermore, a plaintiff must demonstrate that the
14 alleged harm is not merely speculative. That's from
15 the aforementioned *Cantor Fitzgerald* case, 724 A.2d at
16 page 586.

17 The plaintiff contends it will suffer
18 two forms of irreparable harm absent a preliminary
19 injunction. The first harm plaintiff alleges is the
20 opportunity to acquire a unique asset, i.e., a
21 railroad. I find this harm, however, to be somewhat
22 speculative in the context of this case. IRP is the
23 only plaintiff here and it is not the bidder or the
24 potential buyer of RailUSA. The bidder is nonparty

1 IIF. Any benefit to IRP from the sale process --
2 other than the compensation it might receive as a
3 result of its being a member of ARP -- derives from a
4 sale to IIF. IRP stands to obtain those benefits only
5 if numerous conditions are met.

6 First, IIF and IRP would need to
7 finalize their "non-binding," "tentative conditional"
8 MOU that was contingent upon IIF's acquiring RailUSA.
9 Defendants' Exhibit 4 at page 36, lines 22 to 23, 268,
10 lines 15 to 17.

11 Second, IIF would need to win the
12 auction for RailUSA.

13 Third, IIF and defendants would have
14 to agree on a final set of terms and close the
15 transaction.

16 Marino has conceded that IRP has no
17 binding agreement with IIF. IIF is under no
18 obligation to purchase RailUSA. Defendants' Exhibit 4
19 page 315, lines 6 to 12. Furthermore, IIF is not a
20 party to this litigation, even though, between itself
21 and IRP, IIF is the only entity willing to contribute
22 capital in the event that it can acquire RailUSA. And
23 Li has stated that he has "no interest in being a
24 party to a legal dispute here." Plaintiff's Exhibit

1 6, page 281, lines 22 to 23.

2 At oral argument, counsel for the
3 plaintiff stated that "[w]e know the relationship with
4 IIF, and we're content to rest on it" and implored the
5 Court to, at a minimum, grant a preventive injunction
6 for 20 days so that IIF and defendants could reach an
7 agreement and "put us to the proof." That's oral
8 argument transcript, page 130, lines 5 to 6, page 56,
9 lines 21 to 22. The plaintiff must establish the
10 threat of irreparable harm before I decide the motion,
11 not afterward. I am not persuaded that such
12 extraordinary relief based on plaintiff's assurances
13 that the results will speak for themselves.

14 On the other hand, the record
15 demonstrates that plaintiff can be adequately
16 compensated through money damages if IIF does not
17 purchase RailUSA. During his deposition, Marino
18 testified that under the MOU with IIF, IRP would have,
19 (1) been entitled to a 10 percent ownership interest
20 in the holding company that would own RailUSA, and the
21 resulting profits from that interest, and (2) been
22 retained by IIF as RailUSA's management team.
23 Defendants' Exhibit 4 at page 37, line 16 to page 38,
24 line 16. Marino explained that if the MOU had been

1 "comparatively weak" when measured against the other
2 preliminary injunction factors.

3 Our case is neither one that concerns
4 the preferred rights of debt or equity holders, nor
5 one involving plaintiff's internal corporate
6 governance. In my view, as I've said, plaintiff's
7 alleged harm can be remedied by money damages. Under
8 the facts and circumstances of this case, plaintiff
9 has made, at best, a weak showing of irreparable harm.
10 And as I will explain momentarily, because the balance
11 of harms tips in favor of the defendants, I am further
12 convinced that a preliminary injunction is not
13 warranted.

14 "[A] court must be cautious that its
15 injunctive order does not threaten more harm than
16 good." That's from *Lennane v. Ask Computer Systems,*
17 *Inc.*, 1990 WL 154150, at *6 from this court on
18 October 11, 1990. When ruling on a preliminary
19 injunction, the Court "must consider all of the
20 foreseeable consequences of its order and balance
21 them. It cannot, in equity, risk greater harm to
22 defendants, the public or other identified interests,
23 in granting the injunction, than it seeks to prevent."

24 The purchase agreement between ARP and

1 Macquarie expires April 30, 2022. An injunction risks
2 Macquarie walking away after that date. An injunction
3 also risks uncertainty at RailUSA among employees and
4 contracting parties. IRP counters that the defendants
5 and Macquarie suffer no harm from enjoining what IRP
6 calls a corrupt deal process. IRP contends IIF can
7 close a deal based on its prior bids. But there is
8 ample evidence that gives me pause as to IIF's
9 commitment.

10 As explained in greater detail earlier
11 in this ruling, IRP cannot guarantee that IIF will be
12 able to close with the defendants. Additionally,
13 knowing that the purchase agreement with Macquarie
14 expires soon, IIF could delay the closing to leverage
15 a better deal for itself.

16 The so-called elephant in the room --
17 or, better stated, not in the room -- is IIF. IIF is
18 not a party to this suit and IRP does not otherwise
19 have commitments from IIF. At his deposition, Li
20 stated that IIF was willing to execute a purchase
21 agreement to purchase RailUSA. That's Plaintiff's
22 Exhibit 6, page 36, line 18 to page 308, line 4. But
23 it is unclear how far IIF's eagerness runs. Besides
24 stating that IIF's willingness to close on a deal

1 implied covenant claim colorable, which I anticipate
2 being repleaded in an amended complaint.

3 As for the present motion, as I said,
4 I am not persuaded that any harm to IRP cannot be
5 remedied by money damages. Accordingly, the motion
6 for the preliminary injunction is denied.

7 Counsel, thank you for your patience.

8 ATTORNEY PREMO-HOPKINS: Your Honor --

9 THE COURT: Yes?

10 ATTORNEY PREMO-HOPKINS: This is
11 Mark Premo-Hopkins. I don't mean to jump in, but your
12 voice faded, I think, when you said "the motion for
13 the preliminary injunction," and then it faded out. I
14 did not hear it.

15 THE COURT: "Is denied." Period.
16 Thank you, Mr. Premo-Hopkins.

17 Counsel, that is my ruling. Thank you
18 for your patience. It's been almost an hour, but I
19 wanted to get it to you as promptly as I could. It's
20 not as polished as it would be in a written decision,
21 but I wanted to be comprehensive so that you
22 understood my reasoning.

23 I'm not asking for reargument, but if
24 there are any questions as to my ruling, I'm happy to