

EXPEDITED TREATMENT REQUESTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35622

**STEELRIVER INFRASTRUCTURE PARTNERS LP,
STEELRIVER INFRASTRUCTURE ASSOCIATES LLC,
STEELRIVER INFRASTRUCTURE FUND NORTH
AMERICA LP and PATRIOT FUNDING LLC**

—CONTROL EXEMPTION—

PATRIOT RAIL CORP., ET AL.

**SIERRA RAILROAD COMPANY and SIERRA NORTHERN RAILWAY'S
MOTION FOR ACCESS TO MATERIALS FILED UNDER SEAL**

Sierra Railroad Company and Sierra Northern Railway (“SERA”) (collectively, “Sierra”) hereby move for an order granting Sierra immediate access, pursuant to the proposed protective order submitted by SteelRiver Infrastructure Partners LP, SteelRiver Infrastructure Associates LLC, Steel River Infrastructure Fund North America LP, and Patriot Funding LLC (collectively “SteelRiver”) and Patriot Rail Corp. (“Patriot”), to the unredacted May 4, 2012 Stock Purchase Agreement (the “SPA”) filed under seal by SteelRiver and Patriot in support of their May 7, 2012 Verified Notice of Exemption. As explained below, Sierra is concerned that Patriot may be misusing the Board’s exemption procedures to preclude effective review by any legal authority of the impact of certain anti-competitive conduct on SERA’s common carrier rights to operate over certain rail facilities in California. Access to the unredacted SPA is necessary for Sierra to determine whether Sierra’s concerns are justified and, if so, whether to seek to stay or revoke the

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exemption. Because a petition to stay would be due by May 30, 2012 under the Board's rules, Sierra asks that the Board promptly enter the proposed protective order and instruct SteelRiver and Patriot to make a copy of the complete, unredacted SPA, including any exhibits, schedules, or other attachments thereto, immediately available to Sierra, subject to the terms of the protective order.

I. BACKGROUND

Sierra Railroad Company of Davis, California, is a non-carrier that wholly owns and controls SERA. SERA, a California corporation, is a Class III rail carrier subject to the Board's jurisdiction. SERA operates approximately 105 miles of track in northern California's industrial areas. Patriot is a non-carrier holding company that controls 13 Class III railroads that operate over approximately 500 miles of track in 13 states. The SteelRiver entities invest in and operate core infrastructure assets in North America.

Since 2008, Sierra and Patriot have been involved in a dispute as to whether Patriot wrongfully used Sierra's confidential information to interfere with SERA's operation as a common carrier serving an industrial business park in California. From 2001 through February 2008, SERA and its predecessor provided common carrier rail service over seven miles of track on the former McClellan Air Force Base in the County of Sacramento, California. The property is owned by the County and operated by McClellan Business Park, LLC. In 2007, Sierra and Patriot were in the process of negotiating the proposed purchase of Sierra by Patriot. During the negotiations and subject to a Non-Disclosure Agreement between the parties, Sierra provided Patriot with confidential, proprietary information regarding SERA's business and operations at McClellan Business Park. Patriot and its affiliates wrongfully used Sierra's confidential information to organize the Sacramento Valley Railroad, Inc. ("SAV") to bid for the McClellan

Business Park business. As a result of the unfair competitive advantage gained by the use of Sierra's confidential information, SAV, in March 2008, replaced SERA as the rail service provider to the McClellan Business Park.¹

In a lawsuit pending in a California federal court, *Patriot Rail Corp. v. Sierra R.R. Co.*, U.S. Dist. Ct. E.D. Cal. Case No. 2:09-cv-00009, Sierra Railroad Company asserts that Patriot illegally used Sierra's confidential information to unfairly compete with SERA for the provision of freight rail service to McClellan Business Park. Sierra Railroad Company seeks damages that could amount to \$100 million, including compensatory damages that would be trebled under California's unfair competition statute, and punitive damages. In addition, Sierra Railroad Company seeks an order that would restore SERA's rights to operate as a common carrier to provide freight rail service to the McClellan Business Park.²

On May 7, 2012, SteelRiver and Patriot filed with the Board a Verified Notice of Exemption, seeking to exempt from the prior approval requirements of 49 U.S.C. §§ 11323-11325 a transaction in which SteelRiver would acquire control of Patriot and its rail carrier subsidiaries, which include SAV, SERA's competitor with respect to the McClellan Business Park business. The Notice indicates that the transaction will be consummated on or after June 6, 2012, which is the effective date of the exemption.

SteelRiver and Patriot filed under seal in support of their Notice an unredacted version of the May 4, 2012 Stock Purchase Agreement that governs their control transaction. The public

¹ This is the type of anticompetitive conduct that would support a claim under the Board's competitive access rules. *See* 49 C.F.R. § 1144.

² Sierra has also filed a complaint with the Board asserting that Patriot, McClellan Business Park, and the County of Sacramento engaged in an unreasonable practice by interfering with SERA's common carrier obligations while at the same time failing to seek adverse discontinuance of SERA's operating authority. *See Sierra R.R. Co. v. Sacramento Valley R.R., LLC*, NOR 42133 (STB served Apr. 23, 2012) (denying motion to dismiss).

version of the SPA is heavily redacted and does not contain any of the attachments to the SPA, including the Disclosure Schedules referenced in the redacted SPA. SteelRiver and Patriot also filed a proposed protective order that would allow access to the unredacted SPA subject to the Board's standard confidentiality restrictions.

II. ARGUMENT

Sierra is concerned that Patriot may be misusing the Board's exemption procedures to put anti-competitive conduct of Patriot beyond the reach of both the California federal court and the Board. Two recent developments in the California federal court action involving the dispute between Sierra and Patriot highlight this concern. First, less than two months before Patriot announced its transaction with SteelRiver, Patriot sought and obtained a continuance of the federal court trial date from July 2012 to February 2013 without notifying the court that Patriot's owner was in the process of selling Patriot and all of Patriot's assets, including SAV. Indeed, when Sierra raised a concern with the court about a possible sale of SAV, Patriot responded that Sierra's concerns were speculative. Second, when the sale was announced, Sierra asked the court to enjoin the sale transaction to ensure that Sierra's rights would be fully protected. Patriot responded that the Board has exclusive jurisdiction over the transaction and that the federal court therefore lacks any authority to review the sale or the effects of the sale on Sierra or SERA's rights as a common carrier.

These actions by Patriot have created a serious concern on Sierra's part that Patriot may be misusing the Board's exemption procedures to insulate Patriot's anti-competitive conduct from any review by either the California court or the Board. The Board has a clear interest in ensuring that competition between SAV and SERA for the McClellan Park freight business is maintained based on honest, non-exclusionary conduct. Moreover, the Board also has a clear

interest in protecting the integrity of its processes and ensuring that its exemption procedures are not used for improper purposes.

At this time, Sierra does not know whether the proposed transaction may be a device to permanently frustrate Sierra's access to the McClellan Park business or to foreclose access to remedies for the loss of that business that would otherwise be available from the federal court in California. Without access to an unredacted copy of the SPA and its attachments, Sierra cannot determine whether Patriot is seeking to use the transfer of control, and the Board's approval of that transfer of control through a perfunctory exemption procedure, to deprive Sierra of its rights. The terms of the control transaction and its potential effect on Sierra's common carrier rights and remedies cannot be understood based on the heavily redacted version of the SPA that was submitted with the Notice of Exemption.

Therefore, Sierra asks that the Board immediately issue an order giving Sierra access to a complete copy of the unredacted SPA and all attachments to allow Sierra to determine whether it is necessary to file a petition to revoke and/or stay the exemption.³ To ensure the confidentiality of the SPA, the Board should enter the protective order proposed by SteelRiver and Patriot. Sierra will execute the required certifications and agree to be bound by the terms of the protective order.

³ Sierra requests expedited consideration of this motion so that it will have sufficient time to review the SPA and, if necessary, file a petition to stay the exemption by the May 30 deadline for seeking a stay. However, depending on how this proceeding develops, it may become necessary to seek a short housekeeping stay of the May 30 deadline.

III. CONCLUSION

For the reasons stated above, Sierra Railroad Company and Sierra Northern Railway respectfully request that the Board promptly enter the proposed protective order submitted on May 7, 2012, and instruct SteelRiver and Patriot to make a copy of the complete, unredacted SPA, including any exhibits, schedules, or other attachments thereto, immediately available to Sierra.

Respectfully submitted,

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Dated: May 18, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2012, I caused a copy of the foregoing to be served by e-mail and first-class mail, postage prepaid, upon all parties of record in this case as follows:

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