



# CNJ RAIL CORPORATION

81 Century Lane \* Watchung, NJ 07069

Tel: (908) 361 – 2435

September 30, 2014

US Surface Transportation Board  
Office of Proceedings

236754

Chief – Section of Administration  
395 E Street SW  
Washington, DC 07302

ENTERED  
Office of Proceedings  
September 30, 2014  
Part of  
Public Record

Re: STB Docket # **FD 35496**  
Denver & Rio Grande Railway Historical Foundation  
Petition for a Declaratory Order

Pleading  
Request for an extension of time.

**\*\*\*ERRATA\*\*\***

Dear Ms. Brown,

I am **re-transmitting** to you today my formal **Notice of Intent To Participate** (with Comments) as a party of record in the above referenced proceeding. Yesterday, I transmitted to the Board two pleadings. The first was a letter request for an extension of time. The second was a Notice of Intent to Participate which included comments.

It has been brought to the undersigned's attention that the PDF file transmitted to the parties, and possibly the Board, contained an **earlier draft version** of the Notice of Intent. The actual **final version** for submission to the Board was properly served via US Mail. However, the draft version was transmitted electronically by mistake.

I want to personally apologize to the Board for the oversight. Due to the massive discovery requests CNJ Rail Corporation is dealing with from another unrelated proceeding, the oversight was not timely caught until late last night, and was immediately addressed first thing this morning.

Yesterday's Letter Motion remains the same and is unchanged. Only the Notice of Intent contains significant changes.

The Document has been electronically re-served this morning. If the Board requires a new certificate of service in order to comply with the appropriate regulations, please advise, and I will comply with your request.

Once again, I apologize for our oversight. The error was inadvertent and I respectfully ask that you replace yesterday's submission with today's.

Also, despite being on CNJ letterhead, the submissions are being made by me personally, except for the soon-to-be submitted verified statement, which is being made by me in my role as the Director - Freight Services for Foundation.

Respectfully,



Eric S. Strohmeier  
Vice President, COO  
CNJ Rail Corporation

Direct Line: (908) 361 – 2435

Email: E.Strohmeier@CNJRail.com  
Email: CNJRail@yahoo.com

Cc: Mr. John Heffner, Esq.  
Mr. Eugene Farrish, Esq.

Before the  
SURFACE TRANSPORTATION BOARD

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FD # 35496

DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION  
d/b/a

**DENVER & RIO GRANDE RAILROAD**

PETITION FOR A DECLARATORY ORDER

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**ERIC S. STROHMEYER**

NOTICE OF INTENT TO PARTICIPATE

With

COMMENTS

Respectfully Submitted,



Eric S. Strohmeyer  
Director – Rail Freight Services  
**Denver & Rio Grande Railroad**

c/o CNJ Rail Corporation  
81 Century Lane  
Watchung, NJ 07069

Dated: September 29, 2014

PETITION FOR A DECLARATORY ORDER

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NOTICE OF INTENT TO PARTICIPATE

With

COMMENTS

Pursuant to the applicable regulations of the US Surface Transportation Board (“Board” or “STB”), the undersigned respectfully submits his formal Notice of Intent to Participate as a **party of record** in the above entitled proceeding. In addition to holding a position within the Denver & Rio Grande Railway Historical Foundation (“Foundation”), the undersigned will also participate in this proceeding in his individual capacity.

Parties are respectfully directed to serve copies of all pleadings upon the undersigned at the address provided herein below:

**Mr. Eric S. Strohmeyer**  
Director – Rail Freight Services  
Denver & Rio Grande Railroad

c/o CNJ RAIL CORPORATION  
81 Century Lane  
Watchung, NJ 07069

Tel: (908) 361 - 2435  
Email: E.Strohmeyer@CNJRail.com  
Email: CNJRail@Yahoo.com

**BACKGROUND**

The facts of the case have already been well established in this proceeding. For the purpose of framing the comments contained herein below, the following brief synopsis is provided.

In 2000, the Foundation acquired approximately 20 miles of line of railroad from the Union Pacific Railroad (“UP”) pursuant to the Board’s Offer of Financial Assistance (“OFA”) procedures. With the consummation of the acquisition of the line from UP, the Foundation became a Class III short line railroad subject to the Board’s exclusive jurisdiction. In 2003, the

Foundation leased certain parcels of land, complete with buildings, in the City of Monte Vista, Colorado (“City”), and established a maintenance facility thereat, to support operations on the Foundation’s nearby rail line.

On or about 2008-2009, the City introduced a **zoning ordinance**, which attempts to restrict the storage of railcars within certain sections of the City, if those railcars are not on rail sidings connected to the national rail system. Shortly after passing the ordinance, the City began certain actions seeking enforcement of the ordinance against the Foundation. The City prevailed in getting a local municipal court to enter an order enforcing the ordinance. The Foundation appealed the decision. The appellate court stayed the enforcement action and permitted the Foundation to refer the question of Federal preemption, to the STB.

On August 18, 2014, the Board issued a decision which found that the Foundation was a Class III rail carrier. Despite evidence in the record to the contrary, the Board found that the Foundation’s activities on its Monte Vista parcel, were not “transportation,” and thus were not subject to the Board’s exclusive jurisdiction. The Board then stated that its decision might change in the future.

On September 8, 2014, the Foundation asked the STB to reconsider its decision. The Foundation argued that the decision contained material error. The Foundation also submitted substantial new evidence into the record.

## ARGUMENT

This case in many ways is virtually identical to a case adjudicated in the U.S. Court of Appeals, D.C. Circuit, in 2010. See *Riffin v. STB*, 592 F3 195 (D.C. Cir. 2010) (“*Riffin*”). In the *Riffin* case, Riffin’s maintenance-of-way (“MOW”) facility was in Cockeyville, Maryland, while his line of railroad was approximately 150 away in Allegany County, Maryland. In the *Riffin* case, the STB held that Riffin’s Cockeyville MOW facility was not subject to the STB’s exclusive jurisdiction, and was subject to local regulation, since Riffin’s Cockeyville facility was not adjacent to Riffin’s line of railroad. That holding is nearly identical to the holding in this proceeding. In the *Riffin* case, the the D.C. Circuit held that:

“The STB did not explain why, in order for it to have jurisdiction, Riffin must transport his maintenance-of-way equipment by rail using tracks he owns or operates, rather than transporting the equipment by truck or as a shipper over track he does not own or operate. At oral argument, Riffin represented that, contrary to the STB’s unexplained assumption, he plans to move equipment between the Cockeyville site and the Allegany line not by rail but by truck, following industry practice. Counsel for the STB then argued *ex tempore* that moving maintenance-of-way equipment between Cockeyville and the Allegany line by truck is not ‘a reasonable,

... commercially practicable plan.’ The STB, however, did not address the commercial practicability of trucking maintenance equipment in its decision and hence we cannot uphold its decision upon that basis. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1575, 91 L. Ed. 1995 (1947) (‘a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency’).

... The APA requires the agency to ‘articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’

The STB’s decision rested upon Riffin’s inability to transport maintenance equipment over rail lines he controlled even though he contemplated transportation by truck. The decision of the Board offers no rationale for assuming Riffin would transport equipment by rail or, having made that assumption, for denying preemption on the ground that he would not control the entirety of the rail lines over which he would have to move equipment. If, following the lead of its counsel, the agency intends to rest its decision upon a standard of commercial practicability for transporting equipment by truck, then it must state its reasons for doing so and conduct an appropriate analysis.

We conclude the Board’s order is arbitrary and capricious because it does not adequately explain why Riffin’s activities at the Cockeysville property do not fall under the Board’s jurisdiction and within the preemptive ambit of § 10501(b).

The petition for review is therefore granted, the order of the Board vacated, and this matter remanded to the Board for further proceedings.” 592 F. 3d at 198.

City of Monte Vista's Argument

In the City of Monte Vista's reply, the City took the position that the Foundation had failed to establish a "nexus" between the Foundation's use of its Monte Vista property, and the Foundation's operation of its Board-regulated rail line.

An appropriate "nexus" has been clearly established

The record contains substantial evidence that the Monte Vista facility is used as the Foundation's maintenance facility. The STB has consistently held that a rail carrier's maintenance facilities which are related to its line-or-railroad are subject to the STB's exclusive jurisdiction.

In the Board's decision, the Board failed to acknowledge evidence in the record that the Foundation's Monte Vista facility was being used as the Foundation's maintenance-of-way facility. The STB exclusively focused on the non-transportation activities occurring on the Foundation's Monte Vista property. The Board then concluded that since non-transportation activities were occurring on the Monte Vista property, **no** 'transportation' activities were occurring. And the absence of 'transportation' activities on the Monte Vista site, required the Board to find that the Monte Vista site was not subject to the Board's exclusive jurisdiction. The Board then qualified its decision by stating that if evidence of 'transportation' activities were brought to the Board's attention, it might find that the site was in fact subject to the Board's exclusive jurisdiction.

Your Intervenor believes there are a number of infirmities with the Board's decision. First, as the Board did in the *Riffin* case, it failed to adequately explain its decision. Second, as the Board did in *New York Cross Harbor RR v. STB*, 374 F.3d. 1177 (D.C. Cir. 2004) ("*Cross Harbor*"), the Board failed to acknowledge substantial evidence in the record. Third, the Board failed to adequately explain its reasoning for not complying with the D.C. Circuit's admonition in the *Riffin* case. And fourth, the Board's decision totally disregards the U.S. Supreme Court's holding in *Pike v. Bruce Church*, 397 US 137, 145-146, 90 S.Ct. 844, 849 (1970) ("*Pike*") wherein the Supreme Court held that a state may not regulate where a rail carrier locates its interstate resources.

The City of Monte Vista argued that the Foundation's Monte Vista facility is not related to, nor a necessary adjunct of, the Foundation's line of railroad, due to the fact that the Foundation's Monte Vista property is located 30 miles distant from the Foundation's rail line. The fact that the Foundation's Monte Vista property is not located adjacent to the Foundation's line of railroad, appears to be the primary reason why the Board ruled the City's zoning regulations were not preempted.

In the *Pike* case, Bruce Church began growing cantaloupes in Parker, Arizona. A 1926 Arizona statute required all Arizona-grown cantaloupes to be packed in Arizona. Church had existing packing facilities in Blythe, California, 31 miles west of Parker. It would have cost Church \$200,000 to build a packing facility in Parker. The Supreme Court held that a State statute dictating how an interstate commerce entity allocates its interstate resources, unduly burdens interstate commerce.

The Foundation presently has its maintenance-of-way facility in Monte Vista, Colorado. It would cost the Foundation several hundred thousand Dollars to build a second maintenance-of-way facility adjacent to its line of railroad. This is similar to Church's dilemma: Church had an existing packing facility in Blythe, California. Arizona said that if Church wanted to grow cantaloupes in Arizona, Church had to build a second packing plant in Arizona. The Supreme Court held that a state may not dictate where an interstate entity places its interstate facilities, for such a restriction would unduly burden interstate commerce.

In this proceeding, Monte Vista has argued that for a rail carrier's facility to be subject to the STB's jurisdiction, the facility must be adjacent to the rail carrier's line of railroad. In this proceeding, the City is clearly attempting to dictate where the Foundation locates its interstate resources. Monte Vista is effectively arguing that if a rail carrier locates its interstate resources adjacent to its rail line, then the facility will receive the benefits associated with being subject to the STB's exclusive jurisdiction, namely, preemption from State and local regulation. Whereas, if the rail carrier does not locate its interstate resources adjacent to its line of railroad, or places its MOW railcars on panel tracks,<sup>1</sup> then the rail carrier will lose its STB-jurisdiction benefits.

The undersigned respectfully argues that the Supreme Court has held that any restrictions placed on **where** an interstate entity allocates its interstate resources, unduly burdens interstate commerce, and thus is preempted by 49 U.S.C. 10501(b).

For the benefit of those parties unfamiliar with the *Pike* case, pertinent portions of the *Pike* decision are reproduced below:

“But in *Toomer v. Witsell*, supra, [334 U.S. 385], the Court indicated that such a burden upon interstate commerce is unconstitutional. ... What we said there [in *Toomer*] applies to this case as well:

“There was also uncontradicted evidence that appellants' costs would be materially increased by the necessity of having their shrimp unloaded and packed in South Carolina ports rather than at their home bases in Georgia where they maintain their own docking, warehousing, refrigeration and packing facilities. ... The necessary tendency of the statute is to impose an artificial rigidity on the economic pattern of the industry.”

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<sup>1</sup> Panel tracks are tracks isolated from, or not connected to, the National Rail System. Sometimes this is done to prevent the rail cars from inadvertently being moved onto 'active' tracks.

“While the order issued under the Arizona statute does not impose such rigidity on an entire industry, it does impose just such a straitjacket on the appellee company with respect to the allocation of its interstate resources.”

397 U.S. 145-146, 90 S.Ct. 849.

In this proceeding, there is ample **undisputed evidence** that maintenance activities directly related to the Foundation’s operation of its line-of-railroad have occurred in the past, continue to occur, and will continue to occur in the future, at the Foundation’s Monte Vista site. As in *Cross Harbor*, the Board failed to note the evidence in the record indicating that the Foundation’s maintenance-activities directly related to its line-of-railroad have occurred, continue to occur, and will continue to occur, at the Foundation’s Monte Vista property. In *Cross Harbor*, the D.C Circuit held that the Board’s failure to note evidence in the record constituted being arbitrary and capricious. Maintenance of a rail carrier’s line of railroad, is clearly an essential part of a rail carrier’s operations. The Supreme Court has held that where a carrier locates those facilities, is solely at the discretion of the carrier, and may not be regulated by a State or local government entity.

The fact that the Foundation runs a tourist train is irrelevant to the Board’s analysis. Many common carrier railroads operate tourist trains to supplement their common carrier revenues. The San Luis and Rio Grande Railroad’s parent company, Iowa Pacific Holdings (“IPH”), operates a number of tourist trains over the lines of its various railroad subsidiaries. For example, one well noted operation is the tourist train operation located on Saratoga and North Creek Railway<sup>2</sup> located in North Creek, NY.

As it turns out, the vast majority of Iowa Pacific’s revenue derived from its Adirondack line comes from its tourist train operations, not from its common carrier operations. About 90% of Iowa Pacific’s line of railroad is used exclusively by its tourist train. (There are currently no common carrier freight operations over significant portions of its line.) No one has argued, nor is anyone likely to argue, that the entirety of Iowa Pacific’s Adirondack line, is not a line of railroad, and that the entirety of that line is subject to the Board’s exclusive jurisdiction, even though most of line are used exclusively for tourist train operations.

Like wise, another IHP subsidiary, the Santa Cruz and Monterrey Bay Railway<sup>3</sup> is another tourist hauling railroad located in Santa Cruz, CA. Its common carrier activities are limited to the three miles or so of its roughly 31 mile long line.) No one has argued, nor is anyone likely to argue, that the entirety of Iowa Pacific’s 31 miles of Santa Cruz line, is not a line of railroad, and that the entirety of that 31 miles of line is subject to the Board’s exclusive

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<sup>2</sup> See: *Saratoga and North Creek Railway, LLC--Operation Exemption--Tahawus Line* STB Docket No.# FD 35631.

<sup>3</sup> See: *Santa Cruz & Monterey Bay Ry.—Acquis. & Operation Exemption—Union Pac. R.R.*, STB Docket No.# FD 35659.

jurisdiction, even though 28 of those 31 miles of line are used exclusively for tourist train operations.

The Foundation uses the proceeds from its tourist train operations to fund its track maintenance program, and to subsidize its common carrier operations. Maintenance of the Foundation's track is without a doubt, a part of "transportation."

#### Judicial Review

The Foundation has already indicated that if the Board fails to find that the Foundation's Monte Vista MOW facility is not subject to the Board's exclusive jurisdiction, it will seek judicial review in the 10<sup>th</sup> Circuit Court of Appeals. Since Circuits typically follow decisions rendered by sister Circuits, it is anticipated that the 10<sup>th</sup> Circuit would follow the D.C. Circuit's ruling in the *Riffin* proceeding, to wit: Find that the Board failed to articulate a reason why the Foundation should be required to locate its MOW facility adjacent to its Line. According to *Pike*, neither the Board nor a State or local government may regulate where a rail carrier elects to locate its facilities.

In the *Riffin* case, Riffin's MOW facility was 150 miles from his line of railroad. In this case, the Foundation's MOW facility is a mere 30 miles away via highway. It should also be noted that the distance from the Foundation's Monte Vista facility to its line of railroad, is virtually the same distance between the two packing facilities in the *Pike* case. .

#### CONCLUSION

I respectfully ask the Board to reconsider its decision in this proceeding, and ask that the Board find that there is substantial evidence in the record to support a finding that the Foundation is using its Monte Vista property as its MOW facility, that MOW activities constitute 'transportation,' and that pursuant to 49 U.S.C. 10501(b), the City's Zoning regulations, as applied to the Foundation's Monte Vista site, are preempted.

Respectfully submitted,



Eric S. Strohmeier

Dated: September 29, 2014

**CERTIFICATE OF SERVICE**

I hereby certify that on September 29, 2014, I served via both first class mail, postage prepaid, and via electronic mail, a copy of my **Notice of Intent to Participate** as a Party of Record and a **Request for an Extension of Time** on upon the following:

Mr. Eugene L. Farish, Esq.  
Law Office of Eugene L. Farish, Esq. PC

739 1<sup>st</sup> Avenue  
Monte Vista, CO 81144

Email: [gene@farishlaw.com](mailto:gene@farishlaw.com)

Counsel for the  
City of Monte Vista, CO

John D. Heffner, Esq.  
Strasburger & Price LLP

1700 K Street NW  
Suite 640  
Washington, DC 20006

Email: [John.Heffner@strasburger.com](mailto:John.Heffner@strasburger.com)

Counsel for the  
San Luis and Rio Grande Railway

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Mr. Donald H. Shank  
Executive Director

Denver& Rio Grande Railway Historical Foundation  
P.O. Box 1280  
South Fork, CO 81154  
(719) 873-5901

Email: [DHShank@yahoo.com](mailto:DHShank@yahoo.com)

  
Eric S. Strohmeyer