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January 2, 2013

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VIA HAND DELIVERY

Ms. Cynthia T Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S W.
Washington, DC 20423-0001

ENTERED ON 1/6
Office of Proceedings

JAN 02 2013

Part of
Public Record

RE: STB Docket No. FD 35705, James Riffin et al. - Acquisition and Operation Exemption -
In Rio Grande and Mineral Counties, CO

Dear Ms. Brown:

This office represents the San Luis & Rio Grande Railroad Company ("SLRG") in this proceeding. Pursuant to 49 CFR 1104.13(a), we enclose an original and ten (10) paper copies of SLRG's Reply and Comments in Opposition to Verified Notice of Exemption in this matter, together with an accompanying Affidavit of Edwin Ellis. An extra copy of this transmittal letter is enclosed for the convenience of your office in acknowledging receipt of this filing. Kindly have that copy receipt-stamped and returned to our delivery person.

Please do not hesitate to contact me with any questions about this matter. Thank you for your assistance.

Sincerely,

Mark J. Andrews
Attorney for San Luis & Rio Grande Railroad Company

Enclosures

- cc: Mr. Edwin Ellis
- Mr. James Riffin
- Mr. Eric Strohmeyer
- Mack Shumate, Esq.
- John D. Heffner, Esq. (intra-office)

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ORIGINAL

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. FD 35705

JAMES RIFFIN AND ERIC STROHMEYER –
ACQUISITION AND OPERATION EXEMPTION –
IN RIO GRANDE AND MINERAL COUNTIES, CO

**REPLY AND COMMENTS IN OPPOSITION TO
VERIFIED NOTICE OF EXEMPTION**



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**SAN LUIS & RIO GRANDE RAILROAD
COMPANY**

By its Attorneys

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**I.
INTRODUCTION**

This Reply is filed pursuant to 49 CFR 1104.13(a) for the purpose of commenting in opposition to the above-referenced exemption notice. On December 13, 2012, James Riffin and Eric Strohmeyer (“Applicants”) filed a verified notice of exemption (the “NOE”) invoking the class exemption set forth at 49 CFR 1150.31 (“the class exemption”).¹ The NOE purported to acquire “nonexclusive local commodity specific trackage rights” over approximately 7 miles of railroad owned by the Denver & Rio Grande Railroad Historic Foundation (“DRGRHF”) between MP 299.30 near Derrick, CO, and ending before the first trestle at MP 306.38. Protestant San Luis & Rio Grande Railway Company (“SLRG”), a class III short line railroad with which Applicants’ proposed

¹ Although the Board did not publish the NOE within the 16-day period specified in 49 CFR §1150.32(b), this reply is submitted out of an abundance of caution in view of the 20-day reply period specified in sec 1104.13(a). Protestant reserves the right to submit further comments with respect to any published exemption notice and/or any supplemental filing by Applicants

operation would connect, asks the Board to dismiss Applicants' request for operating authority on the following grounds:

- (i) the content of the NOE is deficient under the Board's regulations;
- (ii) the legal capacity of DRGRHF to grant common-carrier "trackage rights" over the subject rail line is presently at issue in a pending petition for declaratory relief filed by DRGRHF's owner Donald Shank (*Denver & Rio Grande Railway Historical Foundation – Petition for Declaratory Order*, FD 35496, STB filed April 28, 2011);
- (iii) the transaction is controversial because of applicant Riffin's dubious history as a perennial pretender to common-carrier status before the Board, and therefore is not suitable for handling under the expedited class exemption procedures;
- (iv) the NOE raises numerous unanswered questions requiring the Board to protect its jurisdiction and safeguard the integrity of its procedures by issuing a housekeeping stay while it institutes a proceeding to investigate Applicant's claims in light of the related issues in FD 35496, *supra*, and
- (v) Applicants' scheme fails to satisfy the exemption standards of the ICC Termination Act of 1995, Pub. L. No. 104-88 ("ICCTA").

II.
STATEMENT OF FACTS

Protestant SLRG is a class III common carrier short line railroad established in 2003 to acquire rail lines from the Union Pacific Railroad Company that extend between MP 180 near Walsenburg, CO, and MP 299.30 near Derrick, CO (also known as South Fork) and between MP 251.7 at Alamosa, CO and MP 281.78 at Antonito, CO. *See S. L. & R. G. Ry. – Acq. & Op. Exemp. – U. P. R.R.*, FD 34350, STB served July 18, 2003. SLRG's present owner is Iowa Pacific Holdings, LLC, a short line railroad holding company which purchased the company from its former owner RailAmerica, Inc., in January 2006. *See Permian Basin Rys. – Acq of Control Exemp. – S. L. & R. G. Ry.*, FD 34799, STB served Dec. 23, 2005. SLRG has continuously provided a common carrier freight service and an excursion passenger railroad service over the line, connecting with both the Union Pacific and the BNSF Railway Company at Walsenburg.

DRGRHF is a class III railroad established in 1999 by Donald Shank to acquire a light density rail line between MP 299.3 at Derrick (SLRG's western terminus) and the end of the line in the City of Creede, CO, that the Union Pacific was seeking to abandon. DRGRHF purchased that rail line through an offer of financial assistance ("OFA"). *See U. P. R.R. – Aband. Exemp. – in Rio Grande and Mineral Counties, CO*, AB-33 (Sub-no. 132X), STB served May 11, 1999. While DRGRHF's line physically connects with SLRG's line at Derrick, these

companies have never executed an interchange agreement and have never interchanged any common carrier traffic. Although DRGRHF holds common carrier authority for its line of railroad, it has never provided any interstate common carrier freight or passenger service. Nonetheless, DRGRHF is the very same company that filed a petition with the Board on July 12, 2011, for a declaratory ruling that certain facilities DRGRHF owns at Monte Vista, CO, adjacent to SLRG's rail line should be preempted from Monte Vista's land use and zoning ordinances because of their purported use for common-carrier railroad purposes. *See* FD 35496, *supra*. The City of Monte Vista (CO) and SLRG oppose that petition.

Applicants James Riffin and Eric Strohmayer are two individuals who have repeatedly (and mostly unsuccessfully) sought Board authority to acquire and operate various railroad lines in the United States. Examples include:

James Riffin d/b/a The Northern Central R.R. – Acq. & Op. Exemp. – in York County, PA & Baltimore County, MD, FD 34484, STB decided April 20, 2004;

James Riffin d/b/a The Northern Central R.R. – Acq. & Op. Exemp. – in York County, PA, FD 34501, STB decided Feb 23, 2005;

James Riffin d/b/a The Northern Central R.R. – Acq. & Op. Exemp. – in Baltimore City, MD, FD 34982, STB decided Oct. 9, 2007;

James Riffin – Pet. For Decl. Order, FD 34997, STB decided May 2, 2008, aff'd after judicial remand on procedural grounds, STB decided July 13, 2011;

James Riffin – Pet. For Decl Order, FD 35245, STB decided Sept. 15, 2009;

James Riffin – Acq. & Op. – Veneer Spur – in Baltimore County, MD, FD 35246, STB decided Feb. 4, 2011; and

Eric Strohmeyer & James Riffin – Acq & Op. Exemp. – Valstir Ind Track in Middlesex & Union Counties, NJ, FD 35527, STB decided Oct. 20, 2011 and May 14, 2012.

Indeed, only one of Mr. Riffin's many attempted acquisitions of rail lines met with even temporary success. That transaction involved an OFA for the so-called "Allegany County Rail Line" that CSX Transportation had sought to abandon. See *CSX transportation, Inc. – Aband. Exemp. – Allegany County, MD*, AB-55 (Sub-no. 659), STB served Dec. 14, 2005 and Aug. 18, 2006. Mr. Riffin, however, never attempted to restore to operation or provide service over this flood-damaged rail line during the five or more years that he owned it. Ultimately Mr. Riffin filed for personal bankruptcy on January 20, 2010; see *Eighteen Thirty Group, LLC – Acq Exemp. – Allegany County, MD*, FD 35438, STB decided April 5, 2012, slip op. at 6. In 2012, Mr. Riffin's bankruptcy trustee sold the Allegany County Rail

Line to the Eighteen Thirty Group, thereby divesting Mr. Riffin of the only common carrier railroad line he ever owned. *See id.*, slip op. at 8.

Protestant submits that there is a single ulterior motivation for all of these serial acquisition attempts, including the present effort to acquire "trackage rights." That motivation is to buttress Mr. Riffin's claim for federal preemption from efforts by Maryland and Baltimore County officials to enforce zoning, land use and clean water laws at a facility he owns at or near Cockeysville, MD. Although this facility is on a former Northern Central Railroad line now owned by the Maryland Transportation Authority, Riffin merely stores an assortment of railroad car parts, tools, and machinery at that location. *See* Feb. 5, 2008 decision in FD 34997, *supra*.

Applicants submit very limited information about the purpose of their proposed trackage rights acquisition, other than to state that they will not transport any toxic by inhalation ("TIH") commodities. There is no indication on the record (and precious little off the record, as will be seen) concerning what traffic their operation might handle, the identity of the proposed customers, traffic volumes, or even whether these customers have satisfied any sort of local zoning, land use, or environmental regulations. This is important here as no such customers currently exist, and facilities would have to be constructed by any future customers to handle their traffic.

III.
ARGUMENT

1. Applicants' NOE is deficient on its face in at least three respects. First of all, it does not address the requirement in sec. 1150.33(h) of the Board's class exemption regulations for noncarrier acquisitions that an applicant identify any interchange commitments, nor does the NOE even indicate whether Applicants have executed an interchange agreement with SLRG, their sole available connection with the national railroad system. In fact, they have not done so; see accompanying affidavit of Edwin Ellis ("Ellis Aff."). Union Pacific, one of SLRG's two connecting carriers, has filed comments with the Board stating that it has no agreement for interchange with Applicants either. Secondly, Applicants indicate that they are seeking "trackage rights", a type of authority normally governed by a different Board procedure, 49 CFR 1180.2. Finally, Applicants' NOE does not appear to satisfy the requirements of the Board's environmental and historic regulations at 49 CFR Part 1105. Applicants merely state in a conclusory fashion that no environmental document need be prepared and that no historic structures will be affected, rather than providing the specific information called for in the regulations.

2. Substantively, Applicants' NOE runs contrary to Board policy and precedent by excluding TIH traffic from the commodities to be handled, which violates a railroad's common carrier obligation. Applicants had attempted in a

previous proceeding, FD 35527, *supra*, to exclude TIH from the commodities to be handled in that particular unsuccessful bid to bootstrap themselves into common-carrier status. There the Board found that railroads have a common carrier obligation to handle TIH.

Although the present NOE shamelessly attempts to twist the Board's holding in FD 35527 into an endorsement of Applicants' attempt to exclude TIH here, Applicants succeed only in further tarnishing their already damaged credibility before the Board.² While it might be true that a bona fide common carrier railroad could grant commodity-specific trackage rights to other carriers on its line, the NOE fails to note that *the very status of DRGRHF as a common carrier railroad capable of granting such rights is among the matters being contested in FD 35496, its declaratory order proceeding.* The Board previously has made it clear to Mr. Riffin that an entity seeking "to qualify as a rail carrier" must satisfy two tests, *i e.*, "it must (1) hold itself out as a common carrier for hire, and (2) *have the ability to carry for hire.*" FD 35245, *supra*, slip op. at 5 (emphasis supplied), citing cases collected at *id.* n. 9. As will be demonstrated in paragraphs 5(a) and 5(b) of this Reply, DRGRHF is devoid of such ability and therefore is incapable of conferring that ability on others through "trackage rights" or any other means.

² *See, e.g.*, FD 34484, *supra*, slip op. at 3 and n 1 (referring to Board's "responsibility to protect the integrity of its processes"); FD 35245, *supra*, slip op. at 2 n 4 (noting that inconsistent representations made in different proceedings "undermine[] Mr Riffin's credibility with the Board")

3. Applicants' NOE also is unacceptable for several other reasons. The Board has a longstanding policy of rejecting NOEs for controversial transactions. Going back to the decision in *Riverview Trenton RR. – Acq. & Op Exemp – Crown Enterprises, Inc.*, FD 33980, STB decided Feb. 15 2002, the Board has consistently held that parties seeking approval for unusual, complicated, or controversial transactions must obtain authority by filing either a formal application or an individual petition for exemption. The fact that the Board has applied this doctrine to other transactions filed by Applicants and/or Mr. Riffin, and repeatedly has questioned the credibility of claims made by Mr. Riffin that bear close resemblance to claims he advances here, necessarily makes this a controversial matter as well. See FD 34484, FD 34501 and FD 34982, *supra*..

4. This transaction is controversial for two additional reasons. First, as noted above, Applicants seek to avoid handling TIH commodities in violation of their common carrier obligation. Second, Applicants seek trackage rights over a rail line owned by DRGRHF, an entity which (as noted earlier) has a long pending petition for a declaratory order opposed by both SLRG and the City of Monte Vista. That case involves the question of whether the owner of a common carrier railroad line whose operations are limited to providing an intrastate, noncommon carrier tourist excursion operation is entitled to seek preemption from local zoning and permitting laws.

5. Applicants' NOE does not satisfy the first element of the exemption standards of the ICC Termination Act ("ICCTA") at 49 USC 10502, because it is contrary to the Rail Transportation Policy ("RTP") of that Act in certain respects. Aside from violating the Board's common carrier service requirements that a carrier be available to handle all commodities tendered to it for transportation, Applicants' proposal is deficient in these other respects:

(a) Applicants have not established their financial fitness or the viability of their proposed service. As SLRG has shown through evidence submitted in DRGRHF's preemption proceeding (FD 35496, *supra*), and as the City of Creede previously established in an adverse abandonment proceeding involving the northern end of this same line (*see D. & R. G. Ry. Hist Found. – Adverse Aband – in Mineral County, CO*, AB 1014, STB served May 23, 2008, slip op. at 11-12, 14), that carrier's line of railroad is seriously deteriorated to the point that it cannot handle interstate common carrier freight traffic or standard railroad equipment (including locomotives). Similarly, the Board has acknowledged that Mr. Riffin is currently in bankruptcy and was forced by the trustee to sell his interest in the Allegany County Rail Line (FD 35438, *supra*). Applicants' NOE does not identify any shippers, car loadings, or other traffic-related information. In the above-cited adverse abandonment proceeding (AB 1014), the Board found that estimates of potential traffic provided by DRGRHF owner Donald Shank lacked any credibility.

The fact that DRGRHF has not generated any common carrier freight in 13 years of ownership of its line, and that Mr. Riffin likewise did not generate any common carrier freight in the five or more years that he owned the Allegany County Rail Line, should make the Board skeptical of their traffic projections, if any exist. Even if freight customers exist, there is no evidence that they have obtained any state or local environmental or land use approvals that would be a prerequisite to constructing facilities for shipping or receiving traffic.

(b) As described in the accompanying affidavit (Ellis Aff. at 1-2), recent off-the-record representations by Applicants regarding possible coal traffic do not improve the viability of their proposal. It is true that substantial coal traffic currently is being trucked from New Mexico mines in a northeasterly direction on U.S. Highway 160 over Wolf Creek Pass, thence via Derrick/South Fork to Walsenburg, CO, and that both SLRG and local governments in its service area have expressed interest in diverting a portion of these movements to rail. In fact, SLRG has re-opened a truck-to-rail coal transfer facility at a point known as Hanna, which is located on SLRG's main line east of Derrick/South Fork and is directly on U.S. 160. This is a logical location for such a facility – unlike any potential transfer location on DRGRHF's line. To do truck-to-rail transfers on DRGRHF, coal trucks descending from Wolf Creek Pass would have to turn off U.S. 160 at Derrick/South Fork and proceed *northwesterly* along State Highway

149 to the transfer facility (if one existed, which it does not) – after which the loaded rail cars would have to be pulled *southeasterly* back to the junction with SLRG's main line at Derrick/South Fork. Thus all coal movements would pass through that community twice, rather than once as in an all-truck routing or in a truck-rail routing via Hanna. Moreover, the coal shipper would have to pay freight charges to two railroads instead of one. Merely to describe the circuitous routing necessary to give DRGRHF a haul is to demonstrate that such proposals lack viability.

6. As shown above, Applicants Riffin and Strohmeier seek to bootstrap a flimsy case for commodity-specific trackage rights into "common carrier" status that would support the ongoing preemption battles Mr. Riffin is fighting thousands of miles away from the Colorado Rockies. Likewise, we have the spectacle of DRGRHF and Mr. Shank trying to bolster their preemption claims against Monte Vista, CO by granting trackage rights that Protestants submit are not theirs to give in view of DRGRHF's patent inability to provide rail common carrier service. In short, we have here an unholy alliance between parties who seek to exploit the Board's procedures to create "something from nothing." In view of the foregoing facts and circumstances, the Board has ample reason to dismiss the NOE out of hand. At the very least, it should protect its own jurisdiction by imposing a housekeeping stay as it did in one of Mr. Riffin's prior cases (FD 34982, *supra*,

slip op. at 1), which would enable it to scrutinize Applicant's claims here while also completing an orderly resolution of DRGRHF's preemption petition. *See also Pro-Go Corp. – Operation Exemp. – in Suffolk County, NY, FD 35126, STB* (Chairman Nottingham) decided April 16, 2008, slip op. at 1 (granting a housekeeping stay “to allow the Board time to consider issues” relating to previously filed exemption notices).

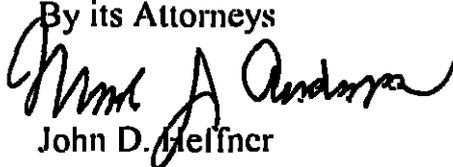
IV.
CONCLUSION

The Board should deny outright Applicants' request for operating authority. Should it deem otherwise, it should postpone the effectiveness of this exemption in order to permit orderly resolution of Applicant's claims here and those of DRGRHF in FD 35496.

Respectfully submitted,

SAN LUIS & RIO GRANDE RAILROAD
COMPANY

By its Attorneys



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Date Due and Filed: January 2, 2013

CERTIFICATE OF SERVICE

I hereby certify that on the second day of January, 2013, a copy of the foregoing Reply and Comments in Opposition to Verified Notice of Exemption (including the accompanying Affidavit of Edwin Ellis) was served via first class mail, and also via electronic mail where e-mail addresses were known, on each of the following:

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SAN LUIS & RIO GRANDE RAILROAD
COMPANY

By its Attorney


Mark J. Andrews

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STB Docket No. FD 35705

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ACQUISITION AND OPERATION EXEMPTION –
IN RIO GRANDE AND MINERAL COUNTIES, CO**

**AFFIDAVIT OF EDWIN ELLIS
ON BEHALF OF PROTESTANT
SAN LUIS & RIO GRANDE RAILROAD**

1 My name is Edwin Ellis. I am president of Iowa Pacific Holdings, LLC, a short line railroad holding company that owns a series of short line common carrier railroads. One of our properties, the San Luis & Rio Grande Railroad (SLRG), is affected by Applicants' filing in this docket for trackage rights over the Denver & Rio Grande Railway Historic Foundation's railroad line as Applicants' proposed operation would contact with SLRG at Derrick (South Fork), CO.

2 I have reviewed Applicants' filing and have prepared the following comments in support of our protest.

3 Applicants have engaged in informal communications with SLRG which suggest, but don't state outright, that the purpose of their filing is to transport coal from a source off the rail line but near their proposed operation. It is true that substantial coal traffic currently is being trucked from New Mexico mines in a northeasterly direction on U.S. Highway 160 over Wolf Creek Pass to

Walsenburg, CO, and that both SLRG and local governments in its service area have expressed interest in diverting a portion of these movements to rail. In fact, SLRG has re-opened a truck-to-rail coal transfer facility at a point known as Hanna, which is located on SLRG's main line east of Derrick and is directly on U.S. 160. This is a location where coal coming down from Wolf Creek Pass has historically been transferred from truck to rail. This is a logical location for such a facility – unlike any potential transfer location on DRGRHF's line. To do truck-to-rail transfers on DRGRHF, trucks descending from Wolf Creek Pass would have to turn off U.S. 160 at Derrick/South Fork and proceed northwesterly along State Highway 149 to the transfer facility (if one existed, which it does not) – after which the loaded rail cars would have to be pulled southeasterly back to the junction with SLRG's main line at Derrick/South Fork. Thus all coal movements would pass through that community twice, rather than once as in an all-truck routing or in a truck-rail routing via Hanna. And, the coal shipper would have to pay freight charges to two railroads instead of one. Merely to describe the circuitous routing necessary to give DRGRHF a haul is to demonstrate that such proposals lack viability.

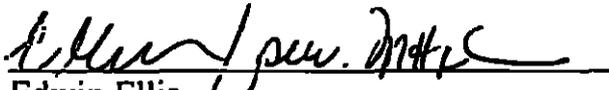
4. Moreover, Applicants do not identify any actual or proposed location for a facility to transfer coal traffic, or any other traffic, from truck to rail. As a practical matter, that transfer would likely take place near the Rio Grande

River in or near South Fork. However, such an operation would likely adversely affect the town's future development of its downtown area which the tracks divide. SLRG has no evidence that Applicants (or any other parties) have sought any sort of local building permits or obtained environmental permits from either South Fork or from Mineral or Rio Grande County for the construction of those facilities. Such permits usually involve a long lead time and Applicants would have had to begin that process long before they could become a railroad with any possible right to preempt such local requirements.

5. Furthermore, no interchange currently exists between DRGRHF and SLRG at Derrick and neither DRGRHF nor Applicants have requested an interchange or negotiated an interchange agreement. The Union Pacific Railroad, with which SLRG interchanges at Walsenburg, advises that it has no arrangements in place for interchange with Applicants. Operationally, there is no place to construct interchange facilities at Derrick as SLRG's right of way there is too narrow to accommodate interchange tracks.

6. While SLRG is completely supportive of legitimate efforts to develop freight that could ultimately move across the SLRG lines, SLRG believes that there is more to Applicants' proposal than it discloses and requests that the Board either deny its exemption request outright or postpone its effectiveness while instituting a proceeding to resolve the numerous questions it raises.

I, Edwin Ellis, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this affidavit. Executed on January 2, 2013.


Edwin Ellis