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JOHN D. HEFFNER
(202) 742-8607
Direct Fax (202) 742-8697
John.Heffner@strasburger.com

BY E-FILING

Ms. Cynthia T. Brown
Chief of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423

**RE: FD 35496, Denver & Rio Grande Railway Historical Foundation, Inc.,
d/b/a Denver & Rio Grande Railroad, LLC, Petition for Declaratory
Order**

Dear Ms. Brown:

On behalf of the City of Monte Vista, CO, and the San Luis & Rio Grande Railroad, I am e-filing their Joint Motion to Strike and Reply to James Riffin's Notice of Intent to Participate with Comments and Motion to Intervene and Reply.

Sincerely yours,

A handwritten signature in blue ink, appearing to read "John D. Heffner", with a long horizontal line extending to the right.

John D. Heffner

Cc: All parties of record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35496

PETITION FOR DECLARATORY ORDER

**DENVER & RIO GRANDE RAILWAY
HISTORICAL FOUNDATION, INC.
D/B/A DENVER & RIO GRANDE RAILROAD, LLC**

**JOINT MOTION TO STRIKE AND REPLY OF
THE CITY OF MONTE VISTA, CO,
AND THE SAN LUIS & RIO GRANDE RAILROAD
TO JAMES RIFFIN'S
NOTICE OF INTENT TO PARTICIPATE WITH COMMENTS
AND MOTION TO INTERVENE AND REPLY**

Submitted by

John D. Heffner
Strasburger & Price, LLP
1025 Connecticut Ave., N.W.
Suite 717
Washington, D.C. 20036
(202) 742-8607

Due: November 18, 2014

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SURFACE TRANSPORTATION BOARD**

FD 35496

PETITION FOR DECLARATORY ORDER

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**I.
INTRODUCTION**

The City of Monte Vista and the San Luis & Rio Grande Railroad (“Respondents”)¹ submit this Joint Motion to Strike and Reply to the “Notice of Intent to Participate with Comments and the Motion to Intervene and Reply”² filed with the Surface Transportation Board (“the Board”) by James Riffin on October 29, 2014. This represents the latest, but probably not the final submission by Eric

¹ Individually “the City” or “Monte Vista” and “SLRG.”
² Mr. Riffin’s entire filing will be referred to as “the Notice.”

Strohmeyer and James Riffin in this seemingly endless proceeding before the Board. Specifically, Mr. Riffin seeks to participate as a party of record in the above-captioned proceeding, or alternatively, to intervene on behalf of the Petitioner, Denver & Rio Grande Railway Historical Foundation, Inc. (“DRGRHF”). He also purports to submit a reply to the previously-filed comments of Mr. Strohmeyer and to the pleadings previously filed by the Respondents.³

The Board should not allow Mr. Riffin to participate in the subject reconsideration proceeding as a party or as an intervener as he does not have standing. He is not a railroad customer, an adjacent landowner, an affected political subdivision, an affected local citizen, or railroad employee. Moreover, his comments and reply, to the extent even allowable, are untimely and out of order. Accordingly, Respondents request that Mr. Riffin’s filing be rejected. If the Board denies this Motion, Respondents request that the Board accept this Reply.

II. BACKGROUND

The facts of this dispute are well known and need only be repeated for the sake of clarity. This proceeding involves DRGRHF’s continuing attempts to obtain a Board ruling that “railroad-related” activities it allegedly conducts on

³ On September 25 in Respondents’ Joint Reply and on October 20 in Respondents’ Joint Motion to Strike.

2. Reply

While Mr. Riffin asserts that the activities that DRGRHF conducts at Monte Vista support the transportation of persons and property by rail, he misses the basic point that the subject transportation must be in interstate or foreign commerce under the Board's jurisdiction. Unless he can tie the subject transportation to interstate or foreign commerce subject to Board jurisdiction, all of his arguments about whether DRGRHF's activities at Monte Vista or elsewhere support transportation are totally irrelevant.

This is not the first time that a party has provided railroad operations or service exempt from Board or Interstate Commerce Commission jurisdiction over a regulated line of railroad. The fact that exempt service is conducted over a common carrier line of railroad does automatically bring that service within the Board's jurisdiction. While DRGRHF did acquire a piece of common carrier railroad at the time it purchased the Creede Branch from the Union Pacific Railroad through an abandonment-related offer of financial assistance, DRGRHF has done nothing to use that line for interstate common carrier railroad purposes. As the Respondents have previously shown and the Board itself has found, DRGRHF is not holding out to perform railroad service in interstate or foreign commerce. It has no executed interchange agreement with SLRG or any Class I connecting railroad, has never moved any revenue freight or passengers in

The Alaska Railroad is an interstate carrier subject to the Board's jurisdiction as it regularly interchanges traffic with other interstate carriers in the rest of the United States through barge transportation. The ICC Termination Act at 49 U.S.C. §10102(6) defines the term "railroad" to include both barge facilities and barge movement of railroad freight and equipment.⁶ Similarly the ICCTA at 49 U.S.C. §10102(9) defines "transportation" to encompass maritime equipment and facilities such as a vessel, warehouse, wharf, pier and dock related to the movement of passengers or property or both, by rail. As to Hawaii, there are no common carrier railroads operating there. The only remaining carrier is an intrastate excursion operator.

Regarding the New York Cross Harbor Railroad, the undersigned has been counsel for that carrier and its successor the New York New Jersey Railroad for the past 25 years. The Board can take official notice of the fact that these carriers connect and interchange traffic with CSX Transportation and the New York & Atlantic Railway at Fresh Pond in the Borough of Queens, NY, and through the Conrail Shared Assets Organization at Greenville, NJ, with CSX Transportation and Norfolk Southern Railway Company. *See, New York Cross Harbor Railroad v. STB*, 374 F.3d 1177 (D.C. Cir. 2004)(describing that carrier's operations and railroad connections).

⁶ "a railroad includes-(A) a bridge, car float, lighter, ferry, and intermodal equipment used by or in connection with a railroad."

property located in the City of Monte Vista preempt a City zoning ordinance. That ordinance forbids the storage of railcars on property not connected to a rail line. DRGRHF claims that its activities consisting of storing and maintaining railroad parts and equipment support excursion passenger operations it conducts on its own line some 30 miles west of Monte Vista. The subject parcel is adjacent to but not attached to SLRG's line that extends between the connection with DRGRHF at Derrick (near South Fork) and Walsenburg, CO.

In the most recent round of filings, Mr. Riffin and Mr. Strohmeyer assert that the activities which DRGRHF conducts at Monte Vista are entitled to preemption because they constitute "transportation" as they are related to the movement of passengers and freight by rail. *See*, Riffin Notice at 6, 8, and 9, and Strohmeyer filings dated October 29.⁴ Respondents will demonstrate the falsity of this argument.

III. ARGUMENT

1. Motion to Strike

The Board's rules at 49 CFR §§1104.6, 1104.10, and 1104.13 require the timely filing of documents including replies and motions addressed to a pleading. Mr. Riffin's Notice appears to address statements in Respondents' September 25 Reply, Eric Strohmeyer's extension requests and Notices of Intent to Participate

⁴ The Board docketed both filings on September 30.

with Comments dated September 29, and Respondents' Joint Motion to Strike and Reply filed on October 20. As Mr. Riffin must be aware from his many submissions to the Board over the past few years, a reply or other pleading addressed to another filing must be submitted within 20 days of the filing of that pleading. 49 CFR §1104.13(a). Accordingly, his Notice is out of time and should be rejected insofar as it is directed at either the pleadings submitted on September 25 and September 29 (or 30). Moreover, to the extent his Notice responds to the verified statement that the Board had authorized Mr. Strohmeyer to submit by October 20, this Notice must be rejected as Mr. Strohmeyer has never filed a verified statement. Finally, to the extent that Mr. Riffin's Notice constitutes a timely response to Respondents' Joint Motion and Reply dated October 20, that filing must also be rejected insofar as it is an impermissible reply to a reply. 49 CFR §1104.13(c). Although the Board occasionally accepts a response to a reply where necessary for the full development of the record, Mr. Riffin has not shown any basis for relief here other than to rebut what he considers some false and misleading statements by Respondents. Riffin at 1. Therefore the Notice should be rejected. Should the Board deem otherwise, Respondents request acceptance of the following reply arguments.

2. Reply

While Mr. Riffin asserts that the activities that DRGRHF conducts at Monte Vista support the transportation of persons and property by rail, he misses the basic point that the subject transportation must be in interstate or foreign commerce under the Board's jurisdiction. Unless he can tie the subject transportation to interstate or foreign commerce subject to Board jurisdiction, all of his arguments about whether DRGRHF's activities at Monte Vista or elsewhere support transportation are totally irrelevant.

This is not the first time that a party has provided railroad operations or service exempt from Board or Interstate Commerce Commission jurisdiction over a regulated line of railroad. The fact that exempt service is conducted over a common carrier line of railroad does automatically bring that service within the Board's jurisdiction. While DRGRHF did acquire a piece of common carrier railroad at the time it purchased the Creede Branch from the Union Pacific Railroad through an abandonment-related offer of financial assistance, DRGRHF has done nothing to use that line for interstate common carrier railroad purposes. As the Respondents have previously shown and the Board itself has found, DRGRHF is not holding out to perform railroad service in interstate or foreign commerce. It has no executed interchange agreement with SLRG or any Class I connecting railroad, has never moved any revenue freight or passengers in

interstate commerce, has no tariffs in place covering interstate movements, does not appear to maintain its track and right of way in a condition that would allow the movement of modern railroad equipment, and does not appear to own or possess locomotives or rolling stock in an operable condition capable of providing such transportation. *See, Denver & Rio Grande Railway Historical Foundation-Petition for Declaratory Order*, FD 35496, slip op. at 6, 7, 9, and 10 (STB served Aug. 18, 2014). At best, DRGRHF is an intrastate common carrier. The Board and the ICC have on many occasions found that intrastate carriers operating over common carrier lines of railroad are not subject to its regulatory jurisdiction. *See, e.g., Magner-O'Hara Scenic Ry .v. ICC*, 692 F.2d 441 (6th Cir. 1982); *All Aboard Fla.—Operations LLC—Constr. & Operation Exemption—in Miami, Fla. & Orlando, Fla.*, FD 35680, slip op. at 3 (STB served Dec. 21, 2012); *Napa Valley Wine Train, Inc.—Pet. for Declaratory Order*, 7 I.C.C. 2d 954, 965-68 (1991); and *Fun Trains, Inc.—Operation Exemption—Lines of CSX Transp., Inc. & Fla. Dep't of Transp.*, FD 33472 (STB served Mar. 5, 1998)).

Mr. Riffin claims that SLRG's corporate parent, Iowa Pacific Holdings, LLC, submitted a proposal "primarily to provide and operate a tourist train" on a line of railroad being acquired by the Santa Cruz County Regional Transportation Commission ("RTC"). This is false as Iowa Pacific's President Edwin Ellis had previously testified in his statement submitted with SLRG's Joint Motion to Strike

and Reply dated October 20. Mr. Riffin references a conversation that he had with RTC's Deputy Director, Luis Mendez, as to Iowa Pacific's plans for the RTC railroad line. SLRG attaches to this Reply a short verified statement from Mr. Mendez that makes clear that Iowa Pacific desired to provide *both freight and passenger service* over RTC's line.

Mr. Riffin again wants the Board to believe that there is coal traffic "out in them thar hills" and that had the Riffin-Strohmeyer trackage rights proposal been successful there would have been a high likelihood that coal traffic would be transloaded onto the Creede Branch owned by DRGRHF. Riffin at 6. Such remarks are speculative as Respondents have previously advised the Board about the difficulties associated with transporting that traffic by rail originating on and travelling over that the portion of the Creede Branch owned by DRGRHF.⁵

Finally, Mr. Riffin suggests that if track situated in Alaska and Hawaii and track owned by the New York Cross Harbor Railroad is not "connected to the National Railroad System" but is still "transportation" for preemption purposes, then DRGRHF's track likewise constitutes "transportation" eligible for preemption. Again, he is wrong.

⁵ See the statement of Edwin Ellis filed on January 2, 2013, in *James Riffin and Eric Strohmeyer-Acquisition and Operation Exemption-In Rio Grande and Mineral Counties, CO*, FD 35705.

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⁶ "a railroad includes-(A) a bridge, car float, lighter, ferry, and intermodal equipment used by or in connection with a railroad."

IV.
CONCLUSION

The Board should strike Mr. Riffin's "Notice" as late-filed in contravention of Board rules and as unresponsive to any pleadings that have been filed. If the Board denies this Motion, Respondents request that the Board accept this Reply.

Respectfully submitted,



John D. Heffner
Strasburger & Price, LLP
1025 Connecticut Ave., N.W.
Suite 717
Washington, D.C. 20036
(202) 742-8607

Due: November 18, 2014

CERTIFICATE OF SERVICE

I, John D. Heffner, hereby certify that I have sent a copy of the foregoing Joint Motion to Strike and Reply of the San Luis & Rio Grande Railroad and the City of Monte Vista, CO, to the “Notice of Intent to Participate with Comments” filed by James Riffin to the following parties by US Mail and electronic mail, this 18th day of November 2014:

Donald Shank
Executive Director
P.O. Box 1280
South Fork, CO 81154

Eugene L. Farish, Esq.
Law Office of Eugene L. Farish, PC
739 1st Avenue
Monte Vista, CO 81144

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

James Riffin
1941 Greenspring Drive
Timonium, MD 21093
(no email sent, no known address)

/s/ John D. Heffner
John D. Heffner

VERIFIED STATEMENT
OF
LUIS MENDEZ

Luis Mendez, being duly sworn, deposes and states as follows.

My name is Luis Mendez. I am currently employed by the Santa Cruz County Regional Transportation Commission ("SCCRTC"), a regional transportation planning agency in the State of California, which owns a line of railroad extending between milepost 0.433 and milepost 31.39 in Santa Cruz County, Cal, a distance of 30.957 miles. SCCRTC selected Iowa Pacific Holdings, LLC ("IPH"), to provide common carrier freight and excursion passenger service on the line through its subsidiary, the Santa Cruz and Monterey Bay Railway ("SC&MB").

I have been informed by counsel for IPH and its subsidiary railroad, the San Luis & Rio Grande, that it is involved in some litigation before the Surface Transportation Board docketed as FD 35496. I have been further informed that in that proceeding an individual named James Riffin questioned whether IPH's motivation for submitting a bid to SCCRTC was primarily limited to operating a tourist passenger service.

My sole purpose in submitting this statement is to make clear that IPH had advised SCCRTC it desired to provide *both freight and passenger service* on SCCRTC's line through its subsidiary SC&MB. SC&MB anticipates it will extend the currently limited freight operations on the line in the future.

VERIFICATION

STATE OF CALIFORNIA)
)
COUNTY OF SANTA CRUZ)

SS

Luis Mendez, being duly sworn according to law, hereby
deposes and states that (s)he is holds the position of Deputy
Director with SCCRTC,
is authorized to make this Verification, has read the foregoing document, and
knows the facts asserted therein are true an accurate as stated, to the best of (~~her~~)
his knowledge, information, and belief.

Luis Mendez

Subscribed to and sworn to before me, a Notary Public, in and for the County of
Santa Cruz, in the State of California, this 17th day of November 2014.



Maria G. Vargas
Notary Public

My commission expires:
Sept. 30, 2016