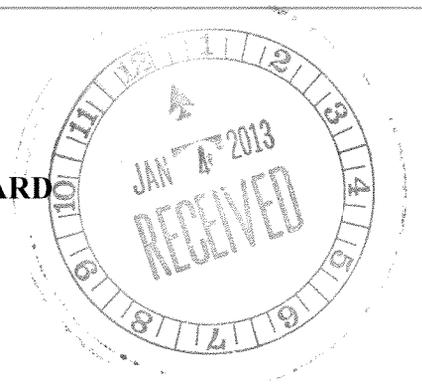


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BEFORE THE SURFACE TRANSPORTATION BOARD

FD 35705

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

RIFFIN’S PARTIAL ANSWER TO

**SLRG’S REPLY AND COMMENTS IN OPPOSITION TO
VERIFIED NOTICE OF EXEMPTION**

ENTERED
Office of Proceeding

JAN 04 2013

Part of
Public Record

1. Comes now James Riffin, one of the Parties in the above entitled proceeding, who partially answers the San Luis & Rio Grande Railroad Company’s (“**SLRG**”) “Reply and Comments in Opposition to Verified Notice of Exemption,” filed at 3:45 pm on January 2, 2013, posted on the Board’s Website sometime after 5 pm on January 2, 2013 (after normal East Coast business hours).

2. The SLRG titled its document a “reply.” Presumably this was done to prevent Riffin from filing a response to its ‘reply.’ [A reply to a reply is prohibited by the Board’s rules. See 49 CFR 1104.13(c).]

3. If the SLRG had merely limited its comments to ‘comments,’ and had the SLRG merely stated that it opposed the Notice of Exemption (“**NOE**”), and provided the reasons for its opposition, then perhaps SLRG’s document may have passed muster as a ‘reply.’ However, that was not the case. The SLRG, through its attorneys, inartfully attempted to disguise as a ‘reply,’ its Motion to Dismiss, its Motion to make more definite, and its Motion for a Stay. See 49 CFR 1104.13(a) and 1111.5, and see FRCP Rule 7(b)(1) (“An application to the court for an order shall be by motion”)

4. The true intent of SLRG’s document, seeking an order dismissing the NOE, or in the alternative, a stay of the proceeding, is expressly disclosed in the first line on p. 3 of its

document, where the SLRG states:

“[SLRG] asks the Board to dismiss Applicants’ request for operating authority”

5. SLRG repeats its Motion to Dismiss in the Conclusion section of its document, p. 14, and further states that in the alternative, the Board “should postpone the effectiveness of this exemption... .”

6. Riffin addresses the nature of the SLRG’s document at the outset, since what the document is, directly impacts what rights Riffin has to respond to the document.

7. Riffin argues that the SLRG document is in fact, and at law, a Motion to Dismiss, a Motion for a more definitive statement, and a Motion for Stay. As such, Riffin would have 20 days to respond to the SLRG’s motions. See 49 CFR 1104.13(a). While Riffin would have 20 days within which to respond, he does not plan to take the full 20 days. He plans to provide to the Board far more information than is required by the Board’s NOE regulations (and far more than is needed to address the merits of the NOE), within the next seven days.

8. If the Board decides that the SLRG document is a ‘reply,’ then Riffin would ask for leave to file a reply to a reply, in order to make the record in this proceeding more complete. (Riffin acknowledges that the SLRG has raised some questions which the Board may like to see answered.)

THE NOE IS NOT ‘DEFICIENT’

9. The SLRG falsely alleges that “the content of the NOE is deficient under the Board’s regulations,” P. 3, ¶ (i), and that “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.” ¶ 1, p. 8.

10. **49 CFR 1150.33(h)** states:

“(h) *Transactions imposing interchange commitments.* (1) **If** a proposed acquisition or operation of a rail line or change of operators involves a provision or agreement that may limit future interchange with a third-party connecting carrier, whether by outright prohibition, per-car penalty, adjustment in the purchase price or rental, positive economic inducement, or other means (‘interchange commitment’), **the following additional information must be provided:**” Bold added.

11. Paragraph (h) of 1150.33 is quite explicit: It states that **if** there is some agreement that does, or might, limit future interchange with a third party, **then** the specified information must be provided. None of the preceding paragraphs begin with the word ‘if.’ Consequently, the indicated information must be provided, since the heading states: “Information to be contained in notice.” Paragraph (h) on the other hand, is conditional. The paragraph expressly states that the indicated information must be provided **only if** the condition precedent is met, i.e., there is an agreement that might limit interchange.

12. In this proceeding, there are no agreements between the Owner of the Line, the Denver and Rio Grande Railroad Historical Foundation (“**DRGRHF**”), and the SLRG, nor are there any agreements between the Applicants and the SLRG. Since there are no agreements of any kind, there was nothing the Applicants had to provide. Had the regulation stated: “Indicate if there are any agreements, and if so, provide details of the agreements,” **then** the Applicants would have had to at least make a statement that there were no agreements. But since the regulation does not contain this, or a similar statement, Applicants were under no obligation to provide any kind of response with regards to paragraph (h).

13. The fact that there are no agreements between the Owner and SLRG and there are no agreements between the Applicants and the SLRG, was verified by Ed Ellis, the ultimate person in charge of the SLRG.

14. Had the Board desired a definitive statement, it could have done as it has done in the past when NOE’s do not provide all required information: Telephone the Applicants, then indicate

what information was needed. No such telephone call was made.

15. The SLRG complains that the NOE does not contain detailed traffic information, nor does it contain Applicants' financial statements. 49 CFR 1150.33 does not require detailed traffic information, nor does it require the filing of financial statements. Paragraph (e) states the NOE is to contain a "**brief summary** of the proposed transaction, including (1) the name and address of the railroad transferring the subject property, (2) the proposed time schedule for consummation of the transaction, (3) the mile-posts of the subject property, (4) the total route miles being acquired, (f) a map showing the area to be served, and a certificate that projected revenues would not exceed Class III carrier revenues. **All** of this information the Applicants provided.

16. The SLRG falsely complains that the NOE was filed under 49 CFR 1150.33, rather than 49 CFR 1180.2. ¶1, p. 8. The language in 1180.2 is quite specific: This regulation is to be complied with whenever 49 U.S.C. 11323 is involved, and more than one common carrier is involved. 49 U.S.C. is not relevant in this proceeding, since only one common carrier is involved: The DRGRHF. (Neither Riffin nor Strohmeyer are presently common carriers by rail.)

17. The SLRG falsely complains that the NOE merely contains a 'conclusory' environmental statement. ¶1, p. 8. The NOE contains the following statements, which provide as much 'detail' as is required:

"(The thresholds in §1105.7 (e) (4) or (5) will not be exceeded. The Applicants propose to operate only one or two trains per day.) The proposed activities will not affect any historic structures."

18. The NOE, as filed, is decidedly **not** 'deficient.'

EXCLUSION OF TIH

19. The SLRG falsely argues that a carrier obtaining limited trackage rights has an obligation to carry TIH commodities. ¶2, p. 8. The Board, and its predecessor, the Interstate Commerce Commission, has repeatedly held that a trackage rights agreement may limit not only the commodities that are permitted to be carried, but the number of cars, and even the hours when the tracks may be used. Applicants plan to provide the Board with a Memorandum of Law which cites numerous cases where a trackage rights agreement has been approved, even though it severely limits what the recipient of those trackage rights may carry. The Applicants will even cite a recent Board decision, involving the same attorney hired by the SLRG (John Heffner), and involving the SLRG, wherein a NOE **was not** rejected by the Board, even though the primary (and only) common carrier, limited what it held out to carry, to non-C&D (construction and demolition debris) and non-municipal solid waste commodities. (The Board even admonished the carrier, that such contractual limitations were against Board policy. But significantly, the Board **did not** reject or revoke the NOE.) See: *Saratoga and North Creek Railway, LLC – Acquisition and Operation Exemption – Delaware and Hudson Railway Company, Inc. d/b/a Canadian Pacific*, FD 35500, slip op. at 3, footnote 5, Served June 1, 2011.

20. The Applicants will remind the Board that the DRGRHF will retain the common carrier obligation to carry those commodities that the Applicants are not holding out to carry.

COMMON CARRIER STATUS OF DRGRHF

21. The SLRG falsely argues, p. 9, that the common carrier status of the DRGRHF is the issue in *Denver & Rio Grande Railway Historical Foundation d/b/a Denver & Rio Grande Railway, L.L.C. – PETITION FOR DECLARATORY ORDER*, FD 35496. The only issue in this declaratory order proceeding, is whether 49 U.S.C. 10501(b) preempts the City of Monte Vista's local zoning laws.

22. On p. 5 of its document, the SLRG states:

“Although DRGRHF holds common carrier authority for its line of railroad”

23. Having admitted that the DRGRHF has common carrier authority for its line of railroad, the SLRG is judicially estopped from arguing in this proceeding, or in the FD 35496 Declaratory Order proceeding, that the DRGRHF is not a common carrier by rail.

24. There are no restrictions on what trackage rights the Owner of a line of railroad may convey to another rail carrier. The SLRG cites no precedent which holds otherwise.

25. The SLRG makes the unfounded, unsupported statement, that the DRGRHF is incapable of providing common carrier service on its Line. Nothing is further from the truth. The Applicants know from first hand knowledge,¹ that the first seven miles of the Line, from Derrick, CO at MP 299.3, to the south side of the trestle bridge at MP 306.38, are at least excepted track, and portions are Class I track. In addition, Don Shanks, the President of the DRGRHF owns a functioning B-30-7 locomotive, which is located in South Fork, CO, and which was in locomotive service by the SLRG before it was placed in storage in South Fork, CO. To date, no one has requested rail freight service. The Applicants intend to reverse that, by actively marketing the Line they propose to acquire and operate.

26. In the last three lines on P. 9 (¶ 2) of its document, the SLRG makes the following statement:

“As will be demonstrated in paragraphs 5(a) and 5(b) of this Reply, **DRGRHF is devoid of such ability** [to carry for hire] and therefore is incapable of conferring that ability on others through ‘trackage rights’ or any other means.”

27. The first sentence in ¶5(a) reads:

¹ In September, 2012, Eric Strohmeyer drove to South Fork Colorado, where he inspected the first seven miles of the Line. He also inspected the Hanna CO transload site the SLRG states (incorrectly) that it has recently ‘reopened.’ More on that later.

“(a) **Applicants** have not established their financial fitness or the viability of their proposed service.”

28. The remainder of ¶5(a) mostly addresses **the Applicants, not** the DRGRHF. The SLRG makes unsupported statements about unsupported statements it made in the Declaratory Order proceeding, FD 35496. The SLRG then attempts to reach the conclusion that the Applicants are unlikely to generate any freight rail traffic. **None** of which relates to the **ability of the DRGRHF** to provide common carrier by rail service on its Line.

29. SLRG’s ¶5(b) likewise is devoid of any evidence regarding **the DRGRHF’s** ability to provide common carrier by rail service on its Line.

THE NOE IS NOT ‘CONTROVERSIAL,’ ‘COMPLICATED,’ NOR ‘UNUSUAL’

30. The SLRG attempts to argue that the NOE is ‘controversial,’ ‘complicated,’ or ‘unusual.’ The only support for this argument, is its arguments that (A) the Applicants’ other proceedings, have become ‘controversial,’ ¶3, p. 10; (B) the Applicants seek to limit what they propose to carry, ¶4, p. 10; and (C) the **DRGRHF, NOT the Applicants**, has a Declaratory Order proceeding before the Board, FD 35496, to resolve a dispute between the DRGRHF and the City of Monte Vista. (Why the SLRG is involved in that proceeding, eludes Riffin. The dispute is clearly between Monte Vista and Don Shanks over the city’s zoning regulations.)

31. Yes. The Applicants’ other proceedings have become controversial. But that does not mean that this proceeding will become controversial. Unless there are things going on behind the scenes which people would rather not reveal. Such as the City of South Fork’s desire to eliminate the portion of the Line that goes through South Fork, so that it can sell the Line to a developer, who, according to the plan, will spend multi-millions of dollars developing the land adjacent to the Line. Or the SLRG’s desire to capture all of the coal traffic, and not permit the DRGRHF to profit from, or be a part of, the rail movement of that coal traffic.

32. A trackage rights agreement is incapable of being controversial, except when other parties perceive that granting the trackage rights agreement, will somehow infringe on their economic well-being. Such as existing rail carrier employees objecting, since the new carrier's employees will perform the rail services, rather than the existing rail carrier's employees performing the work. A trackage rights agreement does not create any additional rights. It merely reallocates existing rights. It is a division of an existing pie. It does not involve the making of more pies.

33. The SLRG argues, ¶5, p. 11, that the subject trackage rights agreement and putative operating authority, somehow violates "Rail Transportation Policy," but cites no 49 U.S.C. 10101 rail transportation policy that will be adversely affected. Just because the Applicants will not have the obligation to carry all commodities, does not mean that all commodities tendered would not be carried. Those commodities that the Applicants chose not to carry, will be carried by the Owner, the DRGRHF.

34. The SLRG argues that the Applicants have not established their financial fitness or the viability of their proposed service. Evidence of Applicants' financial fitness was not submitted, for it is not **required** to be submitted. However, Riffin would incorporate by reference herein, as if fully reproduced herein, the Personal Financial Statement that he filed on October 10, 2012, in *Stewartstown Railroad Company – Adverse Abandonment – In York County, PA*, STB Docket No. AB-1071.

35. The SLRG argues that Applicants have not filed detailed traffic projections. 49 CFR 1150.33 (e) states that a **brief summary** of the proposed transaction is to be filed, **not** detailed traffic projections. In a later filing, to be filed within seven days, the Applicants will file a more detailed outline of the traffic potential for the Line, as well as how they propose to capture that traffic, and where they intend to capture it. This additional information is being provided, not because it is required, but to inform those who are following this proceeding, more precisely what the Applicants propose to do, and how their activities will benefit the surrounding community.

36. The SLRG argues that the NOE should be denied because the Applicants have not obtained any “state or local environmental or land use approvals that would be a prerequisite to constructing facilities for shipping or receiving traffic.” ¶5(b), p. 12. 49 U.S.C. 501(b)(2) expressly grants to the Board exclusive regulatory authority over the construction of railroad facilities. The Board, and the courts, have held on numerous occasions that State and local permitting requirements have been preempted by Federal law. The only requirement that has been imposed to date, is that the rail carrier inform the local / state authorities what the rail carrier intends to do, which the Applicants will do. Besides, attempting to get State / local permits before one has authority to operate a line of railroad, would be putting the ‘cart before the horse.’

37. In the SLRG’s ¶5(b), p. 12, the SLRG admits that “substantial coal traffic currently is being trucked ... on U.S. Highway 160 ... 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.” The SLRG then states that it desires to capture this traffic at its Hanna transload facility, and argues that its Hanna location is the “logical location for such a facility.” The SLRG then argues, that anything the Applicants would attempt to do, “lack[s] viability.”

38. What the SLRG failed to reveal is that the previous owner of the SLRG Line, Rail America, tried to use the Hanna site to transload coal from trucks to rail cars, without success. The Hanna site has a very short spur track (it used to be a 2,000 foot passing track, until the eastern switch was permanently removed). The site is bisected by Hanna Lane. The transload dock can only accommodate one hopper car at a time, and only 8 hopper cars at most can be loaded, before switching out the cars. The site is surrounded by farms and dwellings. Noise and coal dust from the Hanna site would likely arouse great animosity from the adjacent land owners. The Applicants considered this site, then rejected it as unsuitable.

39. The Applicants have located several sites north of South Fork where a transload facility would likely not adversely affect adjacent land owners. (The nearest home is more than ½ mile

away. There are no farms.)

40. The Applicants know that 120,000 tons of coal per year are being trucked via Highway 160 from South Fork to Pueblo, CO. That is about 10,000 trucks per year passing through the cities along Highway 160, a two-lane State highway. Removing 10,000 trucks per year from this 2-lane highway would significantly positively affect the quality of the environment along this portion of Highway 160. As the Board stated in *Norfolk Southern Railway Company – Adverse Abandonment – St. Joseph County, IN*, STB Docket No. AB-290 (Sub-No. 286) (STB served Feb. 14, 2008), the most efficient way to move coal is via rail. That is what the Applicants propose to do.

41. The SLRG attempts to make the argument that the reason Riffin is attempting to acquire the Colorado Line, is to bolster his ‘preemption argument’ in Cockeyville, MD. ¶6, p. 13. The Board has made it known, that it will not extend its preemption umbrella more than a few miles away from a line of railroad. It held in Riffin’s case, that 150 miles was too far away. So it is a bit of a stretch to argue that Riffin would attempt to use a rail facility 1,800 miles away, to bolster his Cockeyville, MD preemption argument.

CONCLUSION

42. The NOE is not deficient. If it was, the only ‘deficiency’ (failure to expressly state that there are no §1150.33(h) interchange agreement that would limit future interchange), has been corrected.

43. The NOE is not controversial. It is a straight-forward trackage rights agreement. The SLRG would like to make it controversial, to prevent potential competition.

44. WHEREFORE, Riffin would ask that the Board (A) permit this reply to the SLRG’s *de facto* motions; (B) not dismiss or reject the NOE; (C) not hold this NOE in abeyance (the SLRG has failed to argue any of the four prongs associated with a request for a stay); and (D)

for such other and further relief as would be appropriate.

Respectfully submitted,



James Riffin
1941 Greenspring Drive
Timonium, MD 21093
(443) 414-6210

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of January, 2013, a copy of the foregoing, was served by first class mail, postage prepaid, upon the parties noted below.



James Riffin

John Heffner
Strasburger
1700 K Street NW Ste 640
Washington, DC 20006-3817

Eric Strohmeyer
81 Century Lane
Watchung, NJ 07069

MACK SHUMAT
UP - SR GENL ATTY
101 N WACKER DR
RM 1920
CHICAGO IL 60607

I certify under the penalties of
perjury that the above is true to
the best of my personal
knowledge & belief.

Executed 1/3/13 