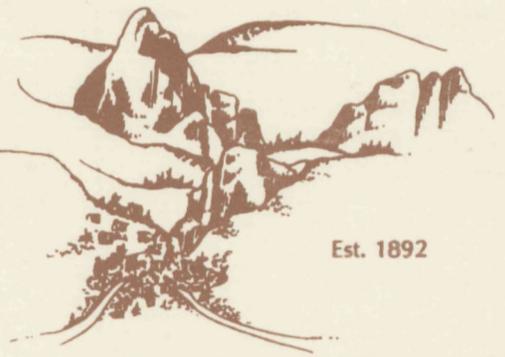


City of Creede

A Colorado Town

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ENTERED
Office of Proceedings
January 4, 2013
Part of
Public Record

The Honorable Cynthia Brown
Chief of the Section of Administration
Surface Transportation Board
395 E. Street SW
Washington, DC 20423-0001

Re: STB Finance Docket No. 35705, James Riffin and Eric Strohmeyer—Acquisition and Operation Exemption—In Rio Grande and Mineral Counties, CO

Dear Ms. Brown:

I am transmitting via electronic filing in the above docket the Petition for Exemption and Comments of the City of Creede, CO, Mineral County, CO, Elk Creek Ranch, Wason Ranch Corporation, and Certain Individuals with Homes in Masonic Park to Reject Notice of Exemption and Certificate of Service of same.

Sincerely,

Clyde Dooley
City Manager

Cc: James Riffin
Eric Strohmeyer
John Heffner
Mark J. Andrews
Mack H. Shumate, Jr.

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35705

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

PETITION AND COMMENTS OF THE CITY OF CREEDE, CO, MINERAL
COUNTY, CO, ELK CREEK RANCH, WASON RANCH CORPORATION, AND
CERTAIN INDIVIDUALS WITH HOMES IN MASONIC PARK TO REJECT
NOTICE OF EXEMPTION

James Riffin and Eric Strohmeyer filed a Notice of Exemption pursuant to 49 CFR § 1150.33, seeking “to acquire and operate over approximately 7 miles of Denver & Rio Grande Railway Historical Foundation line” Once their Notice becomes effective, they will become rail carriers subject to Board jurisdiction.

Applicants’ Notice should be rejected. As a threshold matter, the class exemption in 49 CFR §§ 1150.31-1150.33 is not available for this transaction. Applicants have structured the proposed transaction as an acquisition solely of trackage rights by non-carriers from a rail carrier, the Denver & Rio Grande Railway Historical Foundation (“Foundation”).¹ As Protestants will discuss, Applicants apparently did so in an attempt to avoid the Board’s decision in Eric Strohmeyer and James Riffin—Acquisition and Operation Application—Valstir Industrial Track in Middlesex and Union

¹ The Protestants recognize that there is an issue whether the Foundation is a rail carrier. The Board need not reach this issue if it rejects Applicants’ Notice for the reasons set forth in this Petition and in the Reply and Comments in Opposition filed by the San Luis & Rio Grande Railway Company.

Counties, NJ, STB Finance Docket No. 35527 (served Oct. 20, 2011), appeal pend'g, James Riffin v. Surface Transportation Board, No. 11-1480 (D.C. Cir. Filed Dec. 19, 2011). However, they may have been too clever, because, regardless of their motivation, the class exemption in Section 1150.31 is only available for the acquisition of “incidental” trackage rights.

Even if available, their Notice must still be rejected because it fails to comply with Board regulations governing the class exemption for the creation of a new class III rail carrier. The Notice lacks detail and fails to identify with specificity the operator.

The Notice is also facially deficient because Applicants would limit the scope of their common carrier obligation as new carriers by excluding Toxic Inhalation Hazard (“TIH”) material and possibly other commodities.

In addition, statements in the Notice regarding Applicants’ proposed operation may be inconsistent with the Foundation’s description of its planned operations over these same seven miles of track in Finance Docket No. 45396, Denver & Rio Grande Railway Historical Foundation D/B/A Denver & Rio Grande Railroad, LLC—Petition for Declaratory Order.

Since each Applicant would become a rail carrier, it is also possible that Applicants may need to seek approval under or exemption from the requirements of 49 USC §§11323-11325 regarding their joint operation over the trackage rights.

The Notice also raises issues whether Applicants are proposing a bona fide transaction. Their proposed transaction presents the unusual situation of an alleged rail carrier, which has never had and does not now have shippers or freight operations, the Foundation, granting trackage rights to non-carriers, which have offered no evidence that

they will have any better luck in identifying shippers or actually provide rail transportation service.

Even if the notice exemption process were available for this transaction (which it is not), the Protestants note that in other proceedings where Mr. Riffin and Mr. Strohmeyer have attempted to achieve rail carrier status, the Board has concluded that the class exemption process was not adequate to address the various factual and legal issues, determine whether a grant of operating authority was consistent with the public interest, and to protect the integrity of the Board's processes.² The Protestants suggest that this is the case here as well given the significant deficiencies in the Notice, lack of any evidence of shippers, and the various legal and factual issues raised by their proposed transaction. The Board has also found that notices of exemption "are intended to be used for routine and non-controversial cases."³ Applicants' proposal to achieve rail carrier status solely on the basis of trackage rights over a long dormant line is certainly not routine and is controversial in nature.

In the alternative, if the Board does not reject the Notice, the Protestants request that the Board stay the effective date of the proposed exemption and direct Applicants to submit additional information describing their proposed transaction and submitting all necessary agreements.

² See James Riffin D/B/A The Northern Central Railroad—Acquisition and Operation Exemption—in York County, PA, STB Finance Docket No. 34501 (served Feb. 25, 2005); James Riffin D/B/A The Northern Central Railroad—Acquisition and Operation Exemption—in York County, PA and Baltimore County, MD, STB Finance Docket No. 34484 (served April 20, 2004).

³ FPN-USA, Inc.—Operation Exemption—Tiluan-Tecate Shortline, STB Finance Docket No. 35155 (served Aug. 8, 2008), 2008 WL 3200079 (S.T.B.) at * 2. That is certainly not the case here in light of this Petition and the Reply and Comments in Opposition filed by the San Luis & Rio Grande Railway Company.

I. Interests of the Protestants

The Protestants are local area governments and ranches and home owners who have property in the vicinity of the Creede Branch, including along the seven miles over which Applicants are seeking to acquire trackage rights.⁴ The Creede Branch, including the seven miles subject to the Notice, follows the Rio Grande River and is an environmentally sensitive area. Most of the Branch runs through or adjacent to federal forest land. There are no industries located along the Branch. Protestants have an interest in the responsible use of the federal, state and privately owned land along the Rio Grande River and in Rio Grande and Mineral Counties, CO, where the Branch is located. One of their concerns is that Messrs. Riffin and Strohmeyer may use the status of a rail carrier subject to Board jurisdiction to assert that their activities are exempt from state and local zoning, permitting, environmental, and other regulation for the public good. That was the experience with the Foundation, which led in part to the City's Application for Adverse Abandonment of the Foundation's track within the city limits of Creede. See Denver & Rio Grande Railway Historical Foundation—Adverse Abandonment—In Mineral County, CO, STB Finance Docket No. AB-1014 (served May 23, 2008)

⁴ Protestants are the City of Creede, CO., Mineral County, CO, Elk River Ranch, Wason Ranch Corporation, and individuals with homes in Masonic Park. Elk Creek Ranch is a corporation that owns 1400 acres of land in Mineral and Rio Grande Counties, CO, which is used for recreational and agricultural purposes. Masonic Park is a residential community immediately north of South Fork. Elk River Ranch and Masonic Park have property that is adjacent to the seven miles of track over which Applicants are seeking trackage rights. Wason Ranch is adjacent to the Branch between South Fork and Creede. Creede is at the north end of the Branch.

(hereinafter “Adverse Abandonment Decision”). A review of Board decisions involving Messrs. Riffin and Strohmeier indicates that they have sought to assert rail carrier status in other proceedings in order to escape federal, local and state regulation relating to environmental, zoning and other matters.⁵

II. Background of the Creede Branch

The seven miles of track which are the subject of the Notice are the southernmost part of the 20-mile Creede Branch. As the Board knows from other proceedings, the Creede Branch was part of the former Denver & Rio Grande Western Railroad Company (“DRGW”). The Branch eventually became part of the Union Pacific Railroad Company (“UP”) after the DRGW properties were merged into UP. The Creede Branch, however, had been out of service since the 1980’s. When the UP applied to abandon the Branch in 1998, Donald Shank d/b/a as the Denver & Rio Grande Railway Historical Foundation (hereinafter “Foundation”), a non-profit historical society, was allowed to acquire the Branch through an offer of financial assistance. The Foundation asserted then that it would restore freight service and rehabilitate the Branch, even though there were no shippers on the Branch, no prospects for new freight traffic, and the Foundation possessed no freight equipment and lacked the financial resources to rehabilitate and operate the Branch.

While the Foundation has been unable to provide any freight service, the Foundation and its chief executive officer, Mr. Shank, have tried to use the Foundation’s status as a Board-regulated carrier to avoid local regulation, force businesses and

⁵ See, e.g., James Riffin d/b/a The North Central Railroad—Acquisition and Operation Exemption—In York County, PA, STB Finance Docket No. 34552, slip op. at 6 (served Feb. 23, 2005).

residential owners to pay rent to the Foundation, and prevented the City from using publicly-owned land under the out-of-service railroad right of way within the city limits of Creede for uses that benefited the community. The controversies surrounding the activities of Mr. Shank's Foundation lead to prolonged litigation in court and before the Board. After the City pursued an application for adverse abandonment, the Board granted that application in its May 23, 2008 Adverse Abandonment Decision. The Board found that the Foundation had failed to show that it had any realistic prospects to provide freight service over or to rehabilitate the Branch.

Nothing has changed in that regard since 2008. There are still no shippers, real or imagined, to be served by the Creede Branch. The Foundation has never operated any freight trains. The Branch has not been rehabilitated. The only so-called operations, if they can be called that, are the occasional tourist excursions over part of the Branch operated by the Foundation in a homemade, self-propelled vehicle that can carry several persons.

Even though the Foundation has been unable, in the nearly 13 years since it acquired the Branch, to restore any freight service, the Foundation's claim to rail carrier status has continued to generate new controversies, including several currently pending before the Board, where the Foundation is involved in disputes with the City of Monte Vista, CO and the San Luis & Rio Grande Railway Company ("SL&RG"). See Denver & Rio Grande Railway Historical Foundation D/B/A Denver & Rio Grande Railroad LLC-Petition for Declaratory Order, STB Finance Docket No. 35496. The Protestants have reviewed the filings in that docket. Mr. Shank, as the Executive Director of the Foundation, continues to make unsupported statements about the prospects for freight

movements on the Branch, as he did in the adverse abandonment proceedings. In the Foundation's Petition for Declaratory Order at 2, he states that the "potential for ore shipments on the Creede Branch is looking better and better." Better than what? The Foundation does not identify any prospective shippers, any request for service, or the amounts of ore that might be shipped some day. In its Reply, at page 14, the Foundation asserts that it is rebuilding four stock cars in Monte Vista "for use in moving stock intra-line on the DRGR and eliminate stock drives on Colorado Highway 149. This request for moving stock by rail has been made to Petitioner, through Petitioner's counsel." Again, no support is offered for this supposed traffic potential. Nor does the Foundation identify the person who supposedly requested this service or what it might entail.

III. Applicants Do Not Qualify for the Class Exemption in Section 1150.31

While the Notice initially states that Applicants are proposing to "acquire" a portion of the Creede Branch, the Notice shows that Applicants will not actually acquire any ownership or leasehold interest in the Branch. Rather, they "propose to acquire non-exclusive local commodity-specific trackage rights over approximately 7 miles of the line of railroad owned by the [Foundation] between the beginning of the Line in Derrick (South Fork), CO, at Milepost 299.30, and ending about 10 feet before the first railroad trestle bridge that crosses the Rio Grande River" Notice at 1. As explained *infra*, Applicants have apparently structured the proposed transaction as solely an acquisition of trackage rights in order to avoid the Board's decision in Eric Strohmeyer and James Riffin—Acquisition and Operation Application—Valstir Industrial Track in Middlesex and Union Counties, NJ, STB Finance Docket No. 35527 (served Oct. 20, 2011). There, the Board rejected these same Applicants' application under 49 USC § 10901 to acquire

an 800-foot line segment and become carriers, because they excluded TIH from the commodities that they would handle as common carriers. The Board found that the common carrier obligation required a carrier to handle all commodities and the only methods to excuse or limit that obligation were “abandonment, discontinuance, or embargo.” Slip op. at 2. Applicants are here again trying to limit their common carrier obligation to exclude TIH and possibly other commodities. Protestants believe that Applicants have misread the Board’s decision in Docket No. 35527. But their strategy creates a more fundamental problem for them. The class exemption is not available for the acquisition by a non-carrier solely of trackage rights.

Board precedents provide that a non-carrier can acquire trackage rights in a transaction governed by 49 USC § 10901 when those trackage rights are “incidental” to track that the non-carrier is purchasing or leasing and the incidental trackage rights are necessary to operate the acquired track. See, e.g., Missouri & Northern Arkansas Railroad Co. Inc.—Lease, Acquisition and Operation Exemption—Missouri Pacific Railroad Co. and Burlington Northern Railroad Co., Finance Docket No. 32187 (served Dec. 15, 1992), 1992 ICC LEXIS 255, *2-3 (“The law is well-settled that acquisition of a line of railroad and incidental trackage rights by a non-carrier, as here, is governed by section 10901.”). These precedents are reflected in the scope of the class exemption as defined in 49 CFR § 1150.31(a)(4) (“Acquisition of incidental trackage rights.”). See also, e.g., I&M Rail Link—Acquisition and Operation Exemption—Certain Lines of Soo Line Railroad Co. d/b/a Canadian Pacific Ry., STB Finance Docket No. 33326 (served April 2, 1997) slip op. at 12 (“[I]t has been long understood that both 49 U.S.C. 10901

and the 49 CFR 1150.31 class exemption encompasses the acquisition of incidental trackage rights . . .”) (emphasis added).

But here, Applicants are not acquiring “incidental” trackage rights.⁶ All they are proposing to acquire are trackage rights. The trackage rights will not be “incidental” to the purchase or lease of a line. Section 1150.31(a)(4), by using the limiting word “incidental,” clearly does not apply to the acquisition solely of trackage rights. Thus, the class exemption is not available to the Applicants. The exemption for trackage rights transactions otherwise is in 49 CFR § 1180.2(d)(7), which is not available to non-carriers.

IV. The Notice Lacks Basic Information Describing the Transaction

Even if the class exemption were somehow available, Applicants’ Notice still must be rejected because it fails adequately to provide the information required by 49 CFR §§ 1150.32 and 1150.33. Section 1150.32(a) requires that Applicants’ Notice “provid[e] details about the transaction . . . “ Section 1150.33 requires “a brief summary of the transaction.” The Notice provides no details regarding the proposed transaction.

Applicants state that they will be the “primary common carrier” on the seven-mile segment, except for TIH traffic, with the Foundation retaining responsibility for operating the rest of the Branch (and presumably handling any TIH traffic anywhere on the Branch. However, Applicants do not identify any shippers that will use the service they propose to provide using the trackage rights they seek. If there is no freight traffic or prospects for same to be handled on the Creede Branch, there is then the question of

⁶ “Incidental trackage rights” have been defined as a grant of trackage rights by the seller, or the assignment of trackage rights to operate over the line of a third party, that occurs at the time of the acquisition or operation.” Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901, Ex Parte No. 392 (Sub-No. 1), 1 ICC2d 810, 816 (1985), 1985 WL 56040 (I.C.C.) at *6.

why Messrs. Riffin and Strohmeyer would be seeking trackage rights on a segment of an out-service Branch, which is far removed from any of the track locations that have been the subject of their prior attempts to achieve rail carrier status.

Applicants' Notice also fails to explain why any new prospects for traffic would not be handled by the Foundation. It is a mystery why, after 13 years of no freight traffic, if there finally is traffic, the Foundation would grant trackage rights to a non-carrier to handle any of that traffic. In that regard, Applicants' statement that they will be the primary common carrier for the first seven miles of the Branch may be inconsistent with the Foundation's view of its role. The statements quoted above from the Foundation's filings in Docket No. 35496 seem to indicate that the Foundation plans to provide common carriage over the entire Branch in the unlikely event that any freight traffic might materialize. The purported agreement between Applicants and the Foundation may provide more clarity on how they would divide traffic on the Branch, but Applicants do not yet have such an agreement.

In addition to lacking any information about realistic freight business, Applicants do not describe how they propose to conduct any operations on the seven-mile segment even if shippers were to materialize. The Creede Branch's only connection to the interstate rail network is at South Fork (Derrick), where the Foundation's line connects to the SL&RG. The SL&RG owns and operates a line between Walsenburg, CO and South Fork, CO. The Applicants recognize that they will need to interchange traffic with the SL&RG. They do not state that they have any agreement with the SL&RG for the interchange of traffic or the movement of traffic over the SL&RG, which originated on the Creede Branch, even though such an agreement is essential to their transaction.

V. Applicants Do Not Identify the Operator

The Notice is also deficient because it fails specifically to identify the operator as required by 49 CFR § 1150.33(d). The Notice states that “James Riffin and Eric Strohmeyer, or their designee, will be the operator of the line.” Notice at 1 (emphasis added).

Messrs.’ Riffin and Strohmeyer are applying for operating authority in their individual capacities. They do not describe any form of business organization other than two sole proprietorships. Thus, Mr. Riffin would be a rail carrier and Mr. Strohmeyer would be a rail carrier. Will they both be the operator or just one of them? Or neither? If joint operators, they make no mention of any agreement between them for the joint operation over the line.

They also fail to identify the entity that will operate the line if not them, but their “designee.” Such “designee” may also need to seek authority to operate on the line. And, Messrs. Riffin and Strohmeyer would need to explain that they have an agreement with that operator.

VI. The Notice Is Deficient Because Applicants Seek to Limit the Commodities That They Will Handle As Common Carriers

Applicants admit in their Notice that they have crafted their proposed trackage rights transaction in an attempt to avoid the problem they encountered in Eric Strohmeyer and James Riffin—Acquisition and Operation Application—Valstir Industrial Track in Middlesex and Union Counties, NJ, STB Finance Docket No. 35527 (served Oct. 20, 2011). As discussed, there, the Board rejected their application under 49 USC § 10901 because they excluded TIH from the commodities that they would handle as common

carriers. The Board found that the common carrier obligation required a carrier to handle all commodities and the only methods to excuse or limit that obligation were “abandonment, discontinuance, or embargo.” Slip op. at 2.

Applicants claim support for how they have structured this trackage rights arrangement in language from the Board’s decision, served May 14, 2012, in Docket No. 35527, denying their petition to reopen. According to Applicants, in responding to their hypothetical trackage rights scenario, the Board stated that a carrier that received trackage rights from another carrier would only be obligated to carry commodities authorized by the host railroad’s grant of trackage rights. Applicants are trying to argue that they can become common carriers in the instant transaction even if the commodities they can handle, in particular TIH, are limited by the grant of trackage rights from the Foundation because they can only handle commodities allowed by the Foundation in its grant. As the host railroad, the Foundation will still have the common carrier duty to transport TIH and other commodities that Applicants decline to handle. There are multiple problems with Applicants’ attempt to come within the Board language in the May 14, 2012 decision.

First, as discussed above, there is the problem that Applicants’ strategy disqualifies them from the class exemption altogether.

Second, the Board’s discussion was in the context of a grant of trackage rights by one existing carrier to another. Applicants, as non-carriers, will be new entrants and their sole source of operating authority will be the trackage rights from the Foundation.

Third, Applicants’ argument that they can limit their common carrier obligation in this fashion is inconsistent with the transaction as described in the Notice. They state that

they will be the “primary common carrier” over the seven-mile segment. As the primary common carrier, they arguably should have a full common carrier obligation.

Fourth, it is not even clear that a carrier can grant trackage rights to a non-carrier in a section 10901 transaction if the trackage rights are not incidental to the section 10901 transaction. The Board has found that, in some situations, a person that does not own track can be a rail carrier. For example, in American Orient Express Ry. Co. LLC—Petition for Declaratory Order, STB Finance Docket no. 34502 (served Dec. 29, 2005), the Board found that a passenger excursion company was a rail carrier even though it did not have any tracks of its own. It contracted with Amtrak to operate its trains over trackage rights that Amtrak had with freight carriers. Thus, the trackage rights arrangements were between Amtrak, a rail carrier, and the railroad owning the tracks. Applicants have not shown that the Board has approved the use of section 10901 by a non-carrier to acquire trackage rights when those rights will constitute the non-carrier’s only operations.

Fifth, while denominated as trackage rights, the arrangement as described in the Notice sounds more like joint operations than traditional trackage rights.

Sixth, since we have not yet seen the agreement between the Foundation and Applicants, there is no substantiation of their claim that the trackage rights to be granted by the Foundation will contractually limit the commodities that can be handled under those trackage rights.

In any event, whether the manner in which Applicants have structured this transaction is bona fide trackage rights and avoids the Board’s ruling in Docket No. 35527 are issues, like other issues raised by Applicants’ Notice, which should be

handled, if at all, in the context of a petition for exemption or application, not an expedited class exemption proceeding or after the fact through a petition to revoke.

VII. Applicants May be Required to file an Application or Exemption under 49 USC §§ 11323-11325

Under the Applicants' structure of the transaction, they will each be a separate rail carrier. Thus, there will be two carriers jointly operating over the same trackage rights. "Riffin Railroad" and "Strohmeyer Railroad" necessarily will have to enter into some kind agreement for such joint operation. That agreement may need to obtain some Board authorization under 49 USC §§ 11323-11325 since it will be an agreement between two carriers to operate over the track of a third carrier (the Foundation).

Conclusion

For the reasons set out in this Petition, the Board should reject the Applicants' Notice or, alternatively, stay the effective date of the requested exemption until the various factual and legal issues described above can be fully developed and addressed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Clyde Dooley, City Manager, City of Creede, CO, hereby certify that on this day, January 4, 2013, a copy of the foregoing Petition and Comments of the City of Creede, CO, Elk Creek Ranch, Wason Ranch Corporation, and Certain Individuals with Homes in Masonic Park to Reject Notice of Exemption was served by first class mail postage prepaid, and electronic e-mail if known, on the following persons:

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