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**BEFORE THE
SURFACE TRANSPORTATION BOARD** ENTERED

STB Docket No. FD 35705

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January 11, 2013
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Public Record

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

**MOTION TO STRIKE
OF THE SAN LUIS & RIO GRANDE RAILWAY**

Respectfully submitted,

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Dated: January 11, 2013

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Pursuant to 49 CFR §§1100.8, 1100.10, and 1100.13 of the Board's Rules of Practice, the San Luis & Rio Grande Railway ("SLRG") moves the Board to strike a pleading entitled "Riffin's Partial Answer To SLRG's Reply and Comments in Opposition to Verified Notice of Exemption" (hereafter "the Partial Answer") filed in this proceeding by Applicants James Riffin and Eric Strohmeyer.¹ The Board should waste no time in seeing the Partial Answer for what it is, a prohibited reply to a reply, and strike it accordingly.

**I.
BACKGROUND**

Briefly, the subject notice of exemption ("NOE") proceeding involves an attempt by Applicants to acquire what they call "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 MP 306.38. DRGRHF owns the balance of that line

¹ Hereafter the Applicants or Mr. Riffin and Mr. Strohmeyer as the case might be.

between MP 299.30 and its western terminus near the City of Creede. SLRG is a class III short line railroad common carrier that owns and operates the line between MP 299.30 and MP 180 near Walsenburg, CO, where the line connects with both the Union Pacific Railroad Company and BNSF Railway Company.

After Applicants filed their NOE, various parties including SLRG, the Union Pacific Railroad Company, the Town of South Fork, Mineral County, and the City of Creede, CO (“Creede”)² filed responses in the form of comments and protests. Creede’s comments included a petition to reject. On January 4, 2013, Applicants submitted their “Partial Answer,” followed on January 8 by a series of pleadings including a Motion to Strike Creede’s filing insofar as it relates to several individual protestants, a motion for a protective order, a motion for leave to amend their NOE, and an amended NOE accompanied by a verified statement from Mr. Riffin.

The gist of Applicants’ rambling Partial Answer is that SLRG had attempted to disguise as a reply what really amounted to, in its words, “its Motion to Dismiss, its Motion to make more definite, and its Motion for Stay.” Accordingly, Applicants assert they are entitled to respond. Should the Board accept SLRG’s response here, Mr. Riffin seeks leave to reply in order to insure a complete record.

II.

² Creede’s pleading reflects the comments of Mineral County and several local citizens. References to Creede include those other parties as well.

ARGUMENT

Board policy generally precludes the filing of a reply to a reply except where specifically allowed. §49 CFR 1100.13. The Board on occasion allows parties to submit a reply to a reply when necessary for clarity or to ensure a complete record. See, BNSF Railway Company-Discontinuance of Trackage Rights Exemption-In Peoria and Tazewell Counties, ILL, et al, FD 35404, STB slip op. at 5, footnote 9, served April 26, 2011. But where a transaction is likely to present many questions or raise unique issues, the Board has a policy of requiring the parties to file either a formal application for authority or an individual petition for exemption. Riverview Trenton Railroad Company — Acquisition and Operation Exemption — Crown Enterprises, Inc., FD 33980, STB slip op. at 10, served Feb. 15, 2002 (cited as Riverview Trenton); and Ozark Mountain Railroad-Construction Exemption, FD 32204, ICC served Dec. 15, 1994). Had Applicants done sufficient due diligence relating to their transaction such as meeting with the affected communities, they would have learned of the potential opposition and should have filed either an application or a petition. The fact that SLRG, Union Pacific, South Fork, and Creede have all submitted either comments or protests suggests that this proceeding is highly controversial and unusual and requiring a more detailed filing than an NOE.

That said, SLRG responds to each of Applicants' allegations as follows:

1. The NOE is not 'deficient':

SLRG Response: Applicants excuse their failure to satisfy the requirement of 49 CFR §1150.33(h) of identifying any limitations or prohibitions on interchange by conceding that no agreements even exist between SLRG and either DRGRHF or themselves. Partial Answer at 3. Then if there is no agreement or prospect of an interchange agreement, the traffic, if any even exists, is purely intrastate over the subject 7 miles of track. That raises the question of what sort of business Applicants intend to conduct and why they seek Board authority. In response to SLRG's complaint that the NOE does not contain more detailed information about the transaction, Applicants assert that the regulations do not require the submission of such information. But Board precedent requires Applicants to submit more detailed information whenever it has finds a transaction to be complicated, unique, or controversial. Cf. GNP Rly Inc.—Acquis. and Operation Exemption—Redmond Spur and Woodinville Subdivision, FD 35407 STB slip op. at 5-6, served June 15, 2011. Regarding trackage rights authority, Applicants contend that 49 CFR §1150.31 *et seq.* rather than 49 CFR §1180.2(d) (7) is the operative regulatory provision because neither they or Mssrs. Riffin and Strohmeyer individually are rail carriers and §1180.2(d) (7) just applies to rail carriers. Id. at 4. But the use of §1150.31 is limited to

the acquisition or lease of rail lines or rights in lines and trackage rights “incidental” to the operation of such lines. Thus Applicants are seeking authority for a transaction not contemplated by the Board’s regulations and outside the scope of any NOE. Finally, insofar as environmental and historic compliance matters are concerned, it has generally been the practice of most parties filing NOE’s to include in their submissions the language of 49 CFR §1105 pertaining to environmental and historic impacts.

2. Exclusion of TIH

SLRG response: Applicants confuse limitations frequently imposed in trackage rights agreements on the ability of a carrier to handle certain types of traffic or limit their operations with the regulatory authority sought for the trackage rights. Under Board precedent a carrier may not limit the scope of the authority for which it is applying;³ however, the “owning carrier” frequently restricts the operations of the “using carrier” in the agreement. Applicants imply that here SLRG affiliate Saratoga & North Creek Railway attempted to narrow the scope of the authority it sought in FD 35500. In fact, it merely represented that its agreement with the Town of Corinth restricted the types of traffic it could handle but it did not seek to

³ Eric Strohmeyer and James Riffin – Acquisition and Operation Application – Valstir Industrial Track, FD 35527, STB served May 14, 2012 (on reconsideration) and October 20, 2011.

limit the scope of its exemption. SLRG does not surmise whether or not that restriction is against public policy. In any event, SLRG understands that Applicants would be the *primary* carrier on this segment of track so they would be required to handle all types of traffic should they obtain operating authority.

3. DRGRHF common carrier status:

SLRG response: Again Applicants misunderstand what SLRG has stated. SLRG recognizes that DRGRHF obtained the authority to acquire the former Union Pacific Railroad line between Derrick and Creede in an offer of financial assistance proceeding.⁴ However, DRGRHF has not conducted itself as a common carrier in the ensuing years from 1999 to the present and therefore may not be in a position to convey common carrier trackage rights to Applicants. As SLRG has explained in great detail in its filings in the DRGRHF declaratory relief proceeding, FD 35496,⁵ DRGRHF's track, facilities, and equipment are not presently in a condition to provide common carrier railroad service and both DRGRHF and, to the

⁴ Union Pacific Railroad Company-Abandonment Exemption-In Rio Grande and Mineral Counties, CO, Docket No. AB-33 (Sub-No. 132X), STB served May 11, 1999,

⁵ Docketed as Denver & Rio Grande Railway Historical Foundation et al – Petition for Declaratory Order.

best of SLRG's knowledge,⁶ Applicants lack the financial means to place that track in an operable condition to handle freight shipments in interstate commerce.

4. Applicants' NOE is controversial, complicated and unusual:

SLRG's response: Now that the political subdivisions of South Fork, Mineral County, and Creede have intervened as protestants, it is obvious that this case is controversial. Little more need be said. The Board should reject their NOE and require them to proceed by formal application or individual petition if at all. Riverview Trenton and other cases cited at page 4, *supra*.

5. Applicants have not submitted additional information establishing a need for their service:

SLRG's response: In response to objections by SLRG and Creede, Applicants argue that they have provided all of the information that the regulations pertinent to the class exemption of 49 CFR §1150.31 requires them to furnish. But as SLRG has explained above, whenever a proceeding is likely to be controversial, complicated, or unusual, the Board expects

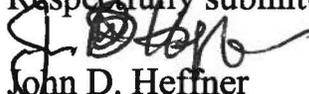
⁶ SLRG has executed and sent to Mr. Riffin a highly confidential undertaking to allow its outside counsel to review Mr. Riffin's financial statements.

applicants to use more formal procedures and provide additional supporting information. While Applicants have filed “an amended” NOE which purports to provide additional information, SLRG has not had a chance to review it in detail. In any event SLRG does not believe that an amended NOE complies with Board policy on controversial transactions because the class exemption procedure does not provide sufficient time for the agency to develop an adequate record on which to make a decision. Riverview Trenton, supra.

III.

CONCLUSION

Accordingly, SLRG joins with South Fork, Mineral County, and Creede in opposing Applicants’ NOE. It is controversial, complicated, and unusual and should be denied or rejected out of hand. The Board should regard Applicants’ Partial Answer as an unauthorized reply to a reply and should reject it as it does not present any information that could not have been presented in a properly filed petition or application for authority.

Respectfully submitted,

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Dated: January 11, 2013

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Strike was served on the following parties to this proceeding by first class mail and, when available electronic mail, this 11th day of January 2013:

James Riffin (US mail only)

Eric Strohmeyer

The City of Creede and related parties

The Town of South Fork, CO

Mack Shumate, Esq., on behalf of the Union Pacific Railroad Company

By: 
John D. Heffner