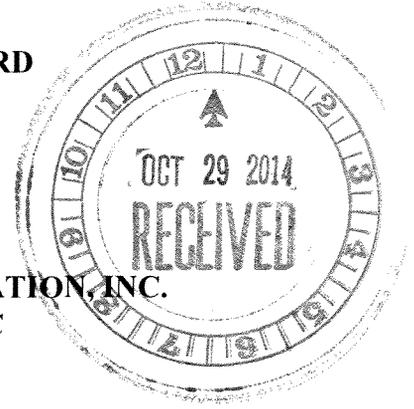


BEFORE THE SURFACE TRANSPORTATION BOARD

FD 35496

PETITION FOR DECLARATORY ORDER

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



JAMES RIFFIN'S

236926

**NOTICE OF INTENT TO PARTICIPATE
AS A PARTY OF RECORD WITH COMMENTS**

**ENTERED
Office of Proceedings
October 29, 2014
Part of
Public Record**

OR IN THE ALTERNATIVE

MOTION TO INTERVENE

AND

JAMES RIFFIN'S REPLY

TO ERIC STROHMEYER'S VERIFIED STATEMENT, AND

THE SLRG'S, ET. AL.'S OCTOBER 20, 2014 MOTION TO STRIKE

1. Comes now, **James Riffin ("Riffin")**, 1941 Greenspring Drive, Timonium, MD 21093, (443) 414-6210, who herewith gives Notice of his Intent to Participate as a Party of Record, with Comments, in the above entitled proceeding, or in the alternative, if he does not have a right to participate as a party of record, then he herewith files his Motion to Intervene in the above entitled proceeding, and in support hereof states:

2. The SLRG and City of Monte Vista ("**Respondents**"), have made a number of blatantly false statements in their joint September 25, 2014 Reply and in their joint October 20, 2014 Motion to Strike, and have made a number of highly misleading statements in their Reply and Motion to Strike. Many of these false and misleading statements implicate Riffin.

3. To decide the issue in this proceeding, the STB needs an **accurate** record. The purpose to be served by Riffin's Comments, is to highlight the false and misleading statements, then provide the STB with accurate and non-misleading information.

4. The STB's regulations define the word 'party,' but do not delineate the criteria one must meet to become a 'party.' The STB's regulations do state that the regulations are to be 'liberally construed.' In abandonment proceedings, the regulations state that "**interested persons**" may become parties by filing written comments or protests with the Board. See 49 CFR 1152.25. **No place in any** of the STB's regulations, does it state that a 'party' must be one of the following, as the SLRG argued on p. 5 of its Motion to Strike: "[A]n affected railroad, railroad customer, landowner, political subdivision, local citizen, or railroad employee"

5. The STB's October 16, 2014 decision stated that "interested persons" would be permitted to respond.

6. As discussed in detail below, due to false and misleading statements made by the SLRG, and due to the invocation by Respondents and Mr. Strohmeyer of Riffin's name, Riffin's motives, the Santa Cruz Branch, and one of Riffin's cases (*Riffin v. STB*), Riffin has become an "interested person," and feels compelled to respond, in order to provide the STB with **accurate** and **non-misleading** evidence. Riffin's comments **are not** redundant nor irrelevant. Riffin's comments will not unduly delay this proceeding, nor will his comments enlarge the issue before the STB. On the contrary, Riffin's comments will attempt to refocus the STB on the only issue before the STB: Has / is the Petitioner using its Monte Vista parcel for 'transportation' purposes?

BACKGROUND INFORMATION

7. On **September 8, 2014**, the Petitioner filed a Petition to Reconsider the Surface Transportation Board's ("STB") decision rendered on **August 18, 2014**.

8. In a Decision Served on **October 16, 2014**, the STB granted Eric Strohmeier permission to submit a Verified Statement, and further stated that “interested persons will be permitted to respond to the Strohmeier verified statement by no later than 10 days after it is filed.”

9. Mr. Strohmeier’s verified statement was due to be filed on October 20, 2014. Replies were due no later than **October 30, 2014**. This Reply is being overnighted to the STB on Monday, **October 27, 2014**.

ARGUMENT / REPLY

10. James Riffin (“**Riffin**”) is an “interested person.” He has an “interest” in this proceeding for several reasons:

A. The San Luis & Rio Grande Railroad and the City of Monte Vista, Colorado (“**SLRG**”), in their Motion to Strike, **falsely** stated, **twice**, that “Strohmeier’s pleadings [is] an attempt to resurrect the Strohmeier / Riffin trackage rights request previously rejected by the Board in FD 35705.” Motion to Strike at 3 and 6.

REPLY: Mr. Strohmeier’s pleadings **is not** an attempt by Mr. Strohmeier “to resurrect the Strohmeier / Riffin trackage rights request previously rejected by the Board in FD 35705.” That proceeding has concluded. Riffin has no interest whatsoever in resurrecting that proceeding.

B. Both Mr. Strohmeier, September 30, 2014 Comments at 2, and counsel for the SLRG, Motion to Strike at 6, cite *Riffin v. STB*, 592 F.3d 195 (D.C. Cir. 2010). This is a case Riffin is intimately familiar with. Anytime anyone cites this case, Riffin becomes an “interested person.”¹

¹ In *Rail-Term Corp. – Petition for Declaratory Order*, FD 35582, the STB’s decision in Riffin’s FD 35245 proceeding, was cited. That too caught Riffin’s attention, particularly since the STB, in its **November 19, 2013** decision in the Rail-Term proceeding, held that Rail-Term was a carrier, even though it had **no ability whatsoever** to provide any type of rail service.

11. **REPLY:** In *Riffin v. STB*, the DC Circuit **vacated** the STB’s decision which had held that for a facility to be subject to the STB’s exclusive jurisdiction, the facility had to be adjacent to a carrier’s line of railroad. Riffin’s Cockeyville railroad maintenance-of-way (“**MOW**”) facility was located in Cockeyville, MD, about 150 miles east of Riffin’s Allegheny rail line. The DC Circuit held that it was industry practice to truck MOW equipment 150 miles. Since the Petitioner’s Monte Vista MOW facility is only 30 miles from Petitioner’s line of railroad, and since the DC Circuit vacated the STB’s decision in *Riffin v. STB*, it would appear to be indefensible for the STB to base its decision of non-preemption for Petitioner’s Monte Vista MOW facility, on the basis that Petitioner’s Monte Vista MOW facility is not adjacent to Petitioner’s line of railroad.

12. **REPLY:** On p. 7 of the SLRG’s Motion to Strike, the SLRG cites *Suffolk & Southern Rail Road LLC – Lease and Operation Exemption*, **FD 35036**, STB served **December 20, 2007**. In the *Suffolk & Southern* proceeding, the STB held that a rail facility on Long Island, NY, was not subject to the STB’s exclusive jurisdiction (the Long Island facility was not under the STB’s protective preemption ‘umbrella.’), due to the fact that the line of railroad it was affiliated with, was located in Ohio. Evidently counsel for the SLRG is not aware that the STB made the same argument before the DC Circuit in the *Riffin v. STB* proceeding, which argument was **rejected** by the DC Circuit. Had Suffolk & Southern LLC appealed the STB’s adverse decision to the DC Circuit, it is highly likely that the DC Circuit would have vacated the STB’s *Suffolk & Southern* decision, just as the DC Circuit vacated the STB’s Riffin decision. (Mr. Heffner, counsel for the SLRG, was also counsel for the Suffolk & Southern LLC.)

Riffin reminds the STB that the STB held that Riffin **was not** a carrier on his Allegheny County, MD line, **solely** because the deed to Riffin’s line was not in Riffin’s name. (It was wrongly deeded by CSX to WMS LLC, an entity owned and controlled by Riffin.) Other than the deed was not in Riffin’s name, Riffin provided **everything** associated with his Allegheny County line, including the funds to purchase the line, maintenance of the way, signaling maintenance, a locomotive, rail cars, and marketing. If the STB does not vacate its November 19, 2013 decision, and then find that Rail-Term **is not** a carrier, Riffin is highly inclined to reopen his FD 35345 proceeding, then argue that the STB has elected to overturn its precedent requiring “ability to carry,” as one of the two primary criteria for determining whether an entity is a common carrier.

13. Both Mr. Strohmeier, September 30, 2014 Comments at 6, and counsel for the SLRG, Motion to Strike at 8-9, make reference to Iowa Pacific's Santa Cruz and Monterrey Bay Railway. This is a case Riffin is also intimately familiar with.² Anytime anyone, and in particular, anytime Mr. Heffner or Mr. Ed Ellis, make reference to the Santa Cruz & Monterrey Bay Railway, Riffin becomes an "interested person."

14. **REPLY:** The Santa Cruz County Regional Transportation Commission ("RTC"), acquired the Santa Cruz Branch from Union Pacific. See the STB's December 15, 2011 decision in FD 35491. The RTC published a Request for Proposal, seeking someone who would provide **a tourist train operation** on the line, particularly in the vicinity of Santa Cruz, which is located at approximately MP 15. The agreement between the RTC and UP, mandated that the RTC also provide common carrier service on at least a portion of the line. Riffin and Strohmeier submitted a proposal, offering to provide common carrier rail service between MP 0.41, in Watsonville, CA,³ the beginning of RTC's line, and MP 6.8, where the last active rail shipper existed. (It was highly unlikely that any demand for rail freight would be made past MP 6.8.) Riffin and Strohmeier expressly stated in their proposal that they had no interest in providing any type of tourist train operation, and also expressly stated that they would not object to anyone else providing tourist train services, providing the tourist train did not materially interfere with their freight rail activities. Riffin and Strohmeier were aware that Iowa Pacific had also submitted a proposal, **primarily to provide and operate a tourist train**. Riffin telephoned Mr. Luis Mendez, the Deputy Director of the RTC, and recommended that the RTC accept Iowa Pacific's proposal, if its main goal was to obtain a tourist train operator. The RTC took Riffin's advice, and accepted Iowa Pacific's proposal.

² On April 3, 2012, Riffin and Mr. Strohmeier, jointly filed a "proposal" to operate the first 6.8 miles of the 31 miles of line between Watsonville, CA and the end of the line at MP 31.90. The line, known as UP's Santa Cruz Branch, was acquired by the Santa Cruz Regional Transportation Commission. See FD 35491, STB Served December 15, 2011.

³ Watsonville, CA is a major shipping point for California produce, particularly strawberries. Next time you are in the produce section of a supermarket, note where the produce came from. It probably came from Watsonville, CA, or the nearby Salinas Valley.

15. **REPLY:** Mr. Heffner's reiteration of Mr. Ellis' statement, [the "Saratoga & North Creek Railway in New York and the Santa Cruz & Monterey Bay Railway in California, were acquired for the purpose of providing freight service"], see P. 9 of the SLRG's Motion to Strike and see ¶ 4 of Mr. Ellis' verified statement, are very misleading. The **primary** reason Mr. Ellis acquired these two rail lines, was to provide a tourist train operation. In the case of the Santa Cruz Branch, operation of a tourist train, was the **primary** criteria in the 'request for proposal.' Providing common carrier rail freight service was decidedly a secondary criteria. In the case of the Santa Cruz branch, it was made clear that operation of freight trains beyond MP 6.8 was not desired.

16. **REPLY:** The Petitioner also acquired its line of railroad for the purpose of providing freight rail service. Unfortunately, to date, no shipper has made a demand for interstate rail service. [Had Riffin and Strohmeier been successful in their attempt to acquire trackage rights over the first seven miles of Petitioner's line, there is a high likelihood that coal would be transloaded on Petitioner's line, rather than on the SLRG's line, since the transload site proposed by Riffin and Strohmeier would have been larger than the transload site that was resurrected by the SLRG. (It is now obvious that the coal shipper did in fact want rail service, since the coal shipper is now in fact shipping its coal via rail, just not on Petitioner's rail.)]

17. **REPLY:** Petitioner's operation of a 'tourist train' on its line has no bearing on whether Petitioner's Monte Vista parcel is subject to the STB's exclusive jurisdiction. The only question is: Has / is Petitioner using the Monte Vista parcel for 'transportation' purposes? The record contains **uncontroverted** substantial evidence that the Monte Vista parcel **is used to store Petitioner's MOW material and equipment**, and that some of that MOW material and equipment is stored, as is standard industry practice, in out-of-service rail cars, which are sitting on rails disconnected from the National Rail System. Since the rail cars are out-of-service, and cannot be used in interchange service (but can be used on Petitioner's own line), there is no 'operational' need to have the out-of-service cars on track that is connected to the National Rail System.

18. **REPLY:** On p. 4 of Respondent’s Motion to Strike, the Respondents **falsely** state that the “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 Petitioner stated that the Petitioner uses the Monte Vista parcel to store its Maintenance-of-way (“**MOW**”) equipment and material, which MOW equipment and material **is used to maintain the Petitioner’s line of railroad**, as all common carriers are required to do. It would take very little MOW activity to maintain Petitioner’s line sufficiently to support Petitioner’s excursion activities, since those excursion activities utilize modified MOW equipment, rather than rail cars. Petitioner does far more than maintain its line to excursion standards. Petitioner maintains its line to at least ‘excepted’ standards, and for the first seven miles, to Class I standards, which standards are sufficient to handle rail cars and locomotives.

19. The Respondents spend much time discussing the Railroad Retirement Board, Tarrifs, Interchange agreements, and Petitioner’s movement of rail cars. None of this discussion is relevant to the issue before the STB: Has / is Petitioner using its Monte Vista parcel for ‘transportation’ purposes. The issue of whether Petitioner is a rail carrier, was decided in Petitioner’s favor. The August 18, 2014 decision found that Petitioner **is** a rail carrier.

20. Likewise, what the SLRG does / has done (p. 9 of Respondents’ Motion to Strike) is irrelevant to the issue before the STB. Since Motions to Strike are disfavored by the STB, Riffin would ask that the STB give **no weight** to representations made by the Respondents that do not directly address the issue before the STB.

21. What is significant, are the “facts” recited by the Respondents on p. 5 of their September 25, 2014 Reply, and the fact that **the Respondents DO NOT dispute or challenge any of those listed ‘facts,’** particularly the following ‘admitted’ ‘stipulated’ facts:

- A. “DRGRHF conducts its storage and maintenance activities on the parcel (the property in Monte Vista adjacent to SLRG’s line) because it lacks storage space on the Creede Branch.”

- B. “The Creede Branch is a ‘line of railroad’ as that term is understood under ICCTA precedent and is therefore automatically entitled to preemption.”
- C. “The Board has overlooked language alleged to be in the record as to the alleged use of the parcel. Footnote 4: Indicating that Petitioner’s rail cars located on the parcel are used to store tools, equipment, and material needed on the Creede Branch, that it is common for railroads to use old cars to store such materials, that the rehabilitation of a rail car for use as a storage shed is an ‘integral part of the railroad’s interstate operations,’ and that Petitioner’s use of the parcel constitutes ‘transportation’ under the law.” End footnote 4.
- D. “While conceding that it does not have a ‘formal’ interchange agreement with SLRG, DRGRHF claims to have an ‘informal’ interchange agreement under which it moved its locomotive and concession car for lease to SLRG back in 2006-7. DRGRHF urges that the leasing of rail equipment constitutes an ‘integral part of a railroad’s interstate operations,’ ‘transportation,’ and ‘car service.’ ”

NATIONAL RAIL SYSTEM

22. There has been much discussion about the fact that some of Petitioner’s out-of-service rail cars are sitting on track that is not connected to the National Rail System. Respondents **incorrectly** argue that for track to be ‘transportation,’ it must be connected to the National Rail System.

23. **None** of the track situated in Alaska and situated in Hawaii, is connected to the National Rail System. (It is not connected to track in Canada, nor to track in the continental U.S.) Likewise, the track in the *New York Cross Harbor* case, **is not** connected to the National Rail System. These tracks are accessed via water. I would not expect anyone to argue that none of the Alaska Railroad’s rail activities are not ‘transportation.’ If the track in Alaska and in Hawaii constitutes ‘transportation,’ then Petitioner’s track on Petitioner’s Monte Vista parcel constitutes

‘transportation.’ The relevant question **is not**, is the track connected to the National Rail System? **The relevant question is: Is the track “related to the movement of passengers or freight by rail?”** If the **use** of the track is “related to the movement of passengers or freight by rail,” then the track is ‘transportation.’ And since the track on Petitioner’s Monte Vista parcel is used to hold out-of-service rail cars that are being used to store Petitioner’s MOW equipment and material, and since MOW equipment and material are “related to the movement of passengers or freight by rail,” the use of the track on Petitioner’s Monte Vista parcel constitutes ‘transportation,’ and such use **is not subject** to local zoning laws.

CONCLUSION

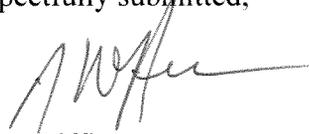
24. There is substantial, uncontroverted, evidence in the record, that the Petitioner has been, and currently is, using its Monte Vista parcel to store Petitioner’s MOW equipment and material in out-of-service rail cars, on track that is not, and operationally need not, be connected to the National Rail System, and that such use is standard industry practice.

25. Since Petitioner’s use of Petitioner’s Monte Vista parcel has been, and currently is, related to the ‘movement of passengers or freight by rail,’ and since such use constitutes ‘transportation by rail carrier,’ and since zoning laws are categorically preempted when they restrict / prohibit the use of a rail carrier’s real estate for transportation-related uses, it is clear, Petitioner’s past use, and present use, of Petitioner’s Monte Vista parcel, **is not**, pursuant to 49 U.S.C. 10501(b), subject to Monte Vista’s land use regulations.

AFFIRMATION

26. I certify, under the penalties of perjury, that I am over the age of 21, I am competent and authorized to make the foregoing statements of fact, and that the foregoing statements of fact are based on my personal knowledge, to the best of my personal knowledge, information and belief.

Respectfully submitted,



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

CERTIFICATE OF SERVICE

I certify that on Monday, October 27, 2014, I caused a copy of the foregoing Notice of Intent to Participate as a Party of Record, with Comments, to be mailed via first class mail, to John Heffner, Strasburger & Price, Suite 717, 1025 Connecticut Ave., N.W., Washington, D.C. 20036, counsel for the SLRG and the City of Monte Vista, CO, and a copy was mailed to Donald Shank, Executive Director, DRGRHF, P.O. Box 1280, South Fork, CO 81154, and a copy was mailed to Eric Strohmeier, 81 Century Lane, Watchung, NJ 07069.



James Riffin