

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C



Finance Docket No. 35705

233654

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

AMENDED
VERIFIED NOTICE OF EXEMPTION

ENTERED
Office of Proceedings
JAN - 8 2013
Part of
Public Record

James Riffin and Eric Strohmeyer, (Applicants), non-carriers, provide the following as their verified exemption notice to acquire and operate exemption of approximately 7 miles of Denver & Rio Grande Railway Historical Foundation line within Rio Grande and Mineral Counties, CO This action comes within the class of transactions which are exempt from regulation under 49 U.S.C. §10901.

1. The following 49 CFR §1150.33 details are provided:

(a) and (b): **APPLICANT** and representative to whom correspondences should be sent:

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

Eric Strohmeyer
81 Century Lane
Watchung, NJ 07069
(908) 361-2435

(c): An agreement has been reached. A redacted copy is appended hereto. An unredacted copy has been provided to the Board under seal pursuant to a Protective Order. Two separately-filed signature pages are being filed with the Board, since the parties do not live in the same State.

(d): James Riffin and Eric Strohmeyer, in their individual capacities, jointly, will be the operator (singular – there will be only one operator) of the property. The Applicants reserve the right to designate another entity to be the operator of the line that is the

subject of this Notice of Exemption ("NOE"). In the event the Applicants elect to designate another entity to be the operator of the line that is the subject of this NOE, such as a limited liability company controlled by the Applicants, such entity will file for authority to acquire and operate, and will not become the operator, unless and until the Board grants the entity authority to acquire and operate

- (e): The following is a brief summary of the proposed activity. A more detailed summary of the proposed activity is included in the appendix hereto.

The Applicants propose to acquire (via commodity-specific trackage rights), approximately 7 miles of line, known as the Denver & Rio Grande Railway Historical Foundation line ("DRGRHF"), 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, near Milepost 306.38, approximately 7 miles north of South Fork, CO, and to operate (carry) specific commodities. The Applicants propose to interchange with the San Luis and Rio Grande Railroad ("SLRG") in Derrick, CO. Since the SLRG may not have sufficient right-of-way to interchange on SLRG's tracks in Derrick, CO, Applicants propose to interchange on the DRGRHF's tracks, in Derrick, CO. (Applicants have been told that the SLRG sold the majority of its right-of-way in Derrick, CO, to a developer. SLRG's right-of-way in Derrick, CO, presently is only about 30-feet wide. The DRGRHF's right-of-way in Derrick, CO, is about 150 feet wide.)

Presently, the DRGRHF is the sole common carrier operator on the Line. The DRGRHF will remain the sole common carrier operator on the Line between the south side of the trestle bridge at MP 306.38, and Creede, CO.¹ Between Derrick, CO and the south side of the trestle bridge, the Applicants will become the primary common carrier on the Line. The DRGRHF will retain its residuary common carrier rights and obligations over this portion of the Line, including the obligation to carry Toxic by Inhalation ("TIH") commodities. In *Eric Strohmeyer and James Riffin – Acquisition and Operation Application – Valsir Industrial Track in Middlesex and Union Counties, NJ*, Finance Docket No. 35527, Served May 14, 2012, slip op at 4, the STB

¹ The line ends at MP 321.88. In *Denver & Rio Grande Railway Historical Foundation – Adverse Abandonment – In Mineral County, CO*, STB Docket No. AB-1014, Served May 23, 2008, the STB granted the City of Creede's Adverse Abandonment Application, granting authority to abandon that portion of the Line that lies within the City Limits of Creede, CO, or between MP 319.9 and MP 320.9. There appears to be a stranded segment between MP 320.9 and MP 321.88.

made the following statements, which the Applicants rely upon in electing to transport all non-exempt commodities other than TTH commodities: "But the fact that a host carrier can grant another carrier commodity-specific trackage rights over the host's line Under a trackage rights arrangement, a grant or exchange of trackage rights does not extinguish the granting carrier's broad underlying common carrier obligation. In such situations, the granting rail carrier retains the § 11101 common carrier obligation to provide transportation for commodities that have not been exempted from regulation, even if it has granted another carrier the right to conduct commodity-specific operations on its line." The Applicants expressly disavow any obligation to carry TTH commodities, and expressly limit their common carrier obligations to carrying non-TTH commodities, such as, but not limited to, coal, cement and lumber. The DRGRHF will retain overhead trackage rights, will retain the exclusive right and obligation to carry TTH commodities, and will retain the right to carry less-than-carloads of rail freight, and livestock, over the portion of the Line that is the subject of this NOE.

Applicants propose to commence these activities within 30 days after the Exemption becomes effective. The transferor of the line will be the Denver and Rio Grande Railway Historical Foundation, the present owner and operator of the Line. Acquisition of the trackage rights will be pursuant to Colorado law and Board precedent. Pursuant to the Board's prior decisions, this Notice will merely authorize the Applicants to consummate acquisition and operation of the line once the Applicants have acquired commodity-specific trackage rights over the line from the present owner of the line

- (f): A map is attached hereto.
 - (g): The Applicants certify that the projected annual revenues of the line of railroad the Applicants seek to acquire via this Verified Notice of Exemption, will not exceed the limits for a Class III railroad (will not exceed \$5,000,000.00).
 - (h): No agreements exist between the DRGRHF, and / or the Applicants, and the SLRG, that would limit, or potentially limit, an interchange agreement with the adjacent SLRG.
2. Caption Summary required by 49 CFR §1150.34, is attached.
 3. Environmental and Historical Impact.

Per 49 CFR §1105.6 (c) (2) no environmental documentation need be prepared. (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

Labor protection: Any employees affected by the trackage rights will be protected by the conditions imposed in *Norfolk and Western Railway – Trackage Rights– Burlington Northern, Inc* , 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Railway – Lease and Operate – California Western Railroad*, 360 I C.C. 653 (1980)

Respectfully submitted,



James Riffin

Date: January 7, 2013

Eric Strohmeyer's signature appears on a separate piece of paper.

VERIFICATION

I, James Riffin, being over the age of 21, and being competent and authorized to execute this Amended Verified Notice of Exemption, state, under the penalties of perjury, that I have read the foregoing Amended Notice of Exemption, and that its contents are true and correct to the best of my personal knowledge and belief.



James Riffin

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D C.

Finance Docket No. 35705

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

AMENDED
VERIFIED NOTICE OF EXEMPTION

I, Eric Strohmeyer, herewith join with James Riffin, in the Amended Acquisition and Operation Exemption dated January 7, 2013, filed with the Surface Transportation Board by James Riffin in Finance Docket No. 35705.

Respectfully submitted,



Eric Strohmeyer

Date January 7, 2013

VERIFICATION

I, Eric Strohmeyer, being over the age of 21, and being competent and authorized to execute this Amended Verified Notice of Exemption, state, under the penalties of perjury, that I have read the foregoing Amended Notice of Exemption, and that its contents are true and correct to the best of my personal knowledge and belief



Eric Strohmeyer

NOTICE OF EXEMPTION

Finance Docket No. 34982

**AMENDED
CAPTION SUMMARY**

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

James Riffin and Eric Strohmeyer, both non-carriers, have filed an Amended Notice of Exemption under 49 U.S.C §10901 to acquire commodity-specific trackage rights from the owner of the line (the Denver and Rio Grande Railway Historical Foundation), and to operate, jointly, in their individual capacities, approximately 7 miles of line in Rio Grande and Mineral Counties, CO, between Derrick (South Fork), CO, at Milepost 299.30, and the south side of the trestle bridge near Milepost 306.38. This action comes within the class of transactions which are exempt from regulations under 49 U.S.C §10901.

Comments must be filed with the Surface Transportation Board and served on James Riffin, 1941 Greenspring Drive, Timonium, MD 21093, and upon Eric Strohmeyer, 81 Century Lane, Watchung, NJ, 07069.

This Notice is filed under 49 CFR §1150.31. If the notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemptions under 49 U.S.C. §10505 (d) may be filed at any time. Filing petitions to revoke will not automatically stay the transaction.

Dated:

By the Board

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.



Finance Docket No 35705

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

AMENDED
VERIFIED NOTICE OF EXEMPTION

APPENDIX – JANUARY 5, 2013 VERIFIED STATEMENT OF JAMES RIFFIN

- 1 My name is James Riffin I am over the age of 21 I am competent and authorized to make this Verified Statement.

2. This Verified Statement contains more information than is required by 49 CFR 1150.33 I hope that this additional information will assist the Board and interested persons in understanding what the Applicants propose to do, and the legal basis for the terms and conditions contained in our Notice of Exemption.

- 3 **Operator:** James Riffin (“Riffin”) and Eric Strohmeyer (“Strohmeyer”), collectively, the Parties, jointly, in their individual capacities, will be the Operator (singular) on the Subject Trackage. They will jointly and severally have common carrier rights and obligations At some date in the future, they plan to create a limited liability company, to which they plan to assign their operating rights on the Subject Trackage Prior to the assignment of their operating rights to the putative limited liability company, the limited liability company will seek authority from the Surface Transportation Board to acquire their rights, and to operate the Subject Trackage. No common carrier rights or obligations will be assigned to any entity that has not obtained authority to acquire and operate the Subject Trackage

4. **How the Parties came to decide to acquire the Subject Trackage.** Mr Strohmeyer follows all proceedings before the Board, and frequently contacts parties involved in proceedings that interest him. Some years ago, he noted the City of Creede's efforts to cause the adverse abandon of that portion of the Denver & Rio Grande Railroad Historical Foundation's ("DRGRHF") Line that is within the City Limits of Creede, CO. He found the proceeding to be interesting, and had telephone conversations with Donald Shank, the President of the DRGRHF, and with Tom McFarland, the DRGRHF's railroad attorney (whom Strohmeyer has known and spoken with for a number of years). Later, Strohmeyer noted the proceeding involving Mr Shank and the City of Monte Vista. During the course of a telephone conversation with Mr. Shank, Mr. Shank said: "Wait a moment. A coal truck is driving by." To which Strohmeyer replied: "Tell me about the coal truck." Strohmeyer then asked many questions regarding the truck-borne coal traffic that was moving on Highway 160. After doing a considerable amount of research, Strohmeyer ascertained that 120,000 tons of coal per year were being trucked from a coal mine 100 miles west of South Fork, CO, to a cement plant in Pueblo, CO, some 150 miles east of South Fork. Strohmeyer ascertained that the cement plant was rail served, had the capability of unloading rail coal cars, had the ability to accommodate about 50 open hopper cars, and had attempted to obtain coal rail service. It used rail to ship cement to the central part of the United States. Strohmeyer further learned that the coal mine trucked coal to New Mexico, where it was transloaded onto BNSF rail cars, then railed to Texas and other locations. The coal mine had attempted to truck its coal to the New Mexico rail site, then rail the coal to Pueblo, CO. Due to the number of miles involved, it was less expensive to truck the coal from the mine to Pueblo than to truck it to New Mexico, then rail it to Pueblo.

5. Strohmeyer learned how much it cost to truck the coal from the mine to the cement plant. He then calculated that it could be railed for less. He learned that all of the silver mining claims around Creede had been bought by a large mining company, which was assaying the rock to determine how much gold and silver remained. (A lot More than what has been removed.) He looked at the assays. He studied the mining company. He learned that the mining company intended to begin mining and processing ore, and intended to construct a large ore-processing plant. He learned that after ore was removed, the spent ore was mixed with cement, then put back into the mine shafts. The nearest cement plant was in Pueblo, CO. He realized that some day in the near future, coal could be railed to Pueblo, and cement could be carried on the back-

haul. He determined that unit trains could haul coal for less than it cost to truck the coal.

6 During September, 2012, he drove to Colorado, where he looked at the cement plant, surveyed the SLRG and DRGRHG lines, and looked for potential truck-to-rail sites. He looked at the SLRG's Hanna transload site. He concluded that site was unsuited for a coal transload site. It was bisected by Hanna Lane. The loading ramp could only accommodate one hopper car. Only 8 hopper cars could be loaded, before they would have to be switched out. The track was a stub-ended spur track. (It had been a passing track, but the eastern switch had been removed.) Farms and dwellings were nearby. (Adjacent property owners would likely complain about the noise and coal dust coming from a coal truck-to-rail transload site at Hanna.) He surveyed the DRGRHF line. About three miles north of South Fork, was a good transload site. Unfortunately, the bridge serving the site was more than 100 years old, and was weight restricted. Another good site was just south of the trestle bridge at MP 306.38. This site was served by a recently-built bridge that had no weight restrictions. There were no farms nearby. Very few dwellings were nearby. The DRGRHF right-of-way was 200 feet wide, more than enough room for a transload site. Much of the rail from South Fork to MP 306.38 was 90 lb rail. He knew 70 lb rail can handle 286,000 lb rail cars and locomotives. (During the summer of 2012, he observed 70 lb rail being actively used by Norfolk Southern, in Hazelton, PA.) He contacted Donald Shank, President of the DRGRHF. He began negotiating a trackage agreement. That trackage agreement has now been executed.

TRAFFIC

7. Coal: The coal mine ships 120,000 tons of coal per year to the cement plant. It is more energy efficient to ship coal via rail. Transloading the coal to rail cars in South Fork, would remove 10,000 trucks per year from Highway 160, a two-lane State highway that passes through numerous cities before it reaches Walsenburg, CO, where it intersects I-25. The cement plant is off of I-25, a few miles south of Pueblo. Coal would continue to be trucked from the mine to South Fork. At South Fork, the coal trucks would turn north, drive 6 miles, then use the new bridge to drive from Highway 149 over the Rio Grande, to the DRGRHF's right-of-way. This would reduce the truck haul from 250 miles to 100 miles. Truck traffic through all of the cities on Highway 160, from South Fork to Walsenburg, would be reduced by 10,000 trucks per year.

A significant reduction in truck traffic. A significant reduction in truck emissions. A significant energy savings.

8. Unit coal trains of about 40 cars each, would travel between South Fork and Pueblo, three times per month / 10 months per year. (12,000 tons per month / 120,000 tons per year) The Applicants would crew the train for the first seven miles. A SLRG crew would crew the train between South Fork and Walsenburg. A UP crew would crew the train between Walsenburg and the Cement plant. A different crew would unload the train at the cement plant. After unloading, the train would return to South Fork, using a UP crew, a SLRG crew and Applicants' crew.

9. **Track charts:** Applicants have a complete set of track charts between Creede and Pueblo, CO. From these track charts Applicants have ascertained the grades and elevations of the lines. Between Pueblo and Walsenburg, the elevation rises about 1,000 feet. Maximum grade is 1%. Between Walsenburg and La Veta Pass, the elevation rises from 6,000 feet to 9,242 feet, a change of 3,240 feet. Maximum grade: 3%. From La Veta to Alamosa, the elevation drops 1,700 feet to 7,546 feet. Maximum grade: 2.5%. From Alamosa to South Fork, the line rises 642 feet to 8,188 feet. Maximum grade: 1%. From South Fork to MP 306.38, the maximum grade is 1%.

10. **Cement:** Sometime in the next few years, mining around Creede will re-commence. The mining company that owns the claims, back-fills mine shafts with spent ore and cement. Applicants propose to back-haul cement from the Pueblo cement plant to the mines in Creede. (Applicants will carry the cement from South Fork to MP 306. The DRGRHF will carry the cement the rest of the way to Creede. Or it can be transloaded to trucks at MP 306.)

11. **Lumber:** There is a lumber company in Creede that used to get rail-car-loads of lumber. Applicants intend to solicit that lumber traffic.

12. **Mining equipment:** The mining company plans to build a \$150 million ore processing plant in Creede. This mining equipment is large, and heavy. Applicants intend to solicit this mining equipment traffic, and the traffic associated with the material and supplies the mining operation will consume.

13. Notes: Coal traffic: The coal traffic Applicants have identified, did not exist when the City of Creede was prosecuting its adverse abandonment application. The cement plant was recently built. It opened in 2008. The coal mine is owned by the cement plant Mining equipment: Getting mining equipment through Creede, on trucks, will be a challenge, since Highway 149 makes two sharp, 90-degree turns in the middle of Creede. Had the southern 2,000 feet of the DRGRHF line that is within the city limits of Creede not been abandoned, mining equipment could have been railed to the end of the line, in Creede, then transloaded onto trucks, then driven straight thru Creede (no turns) to the mine portal Creede may want to consider putting tracks back on the southern portion of the former right-of-way, to eliminate this heavy, oversize-load truck traffic from having to travel through the center of Creede's business district.

INTERCHANGE

14 The Applicants propose to interchange on DRGRHF's right-of-way, in South Fork. Some years ago, the SLRG sold all of its right-of-way in Derrick, to a developer, retaining only a 30-foot right-of-way. Consequently, there is little room to interchange on SLRG's tracks

15. As noted above in ¶ 8, the line from Creede to Alamosa, drops in elevation, the maximum grade being 1% At Alamosa, the line rises in elevation, until it tops the La Veta pass The maximum grade from Alamosa to the top of the La Veta pass, is 2.5% The maximum grade from the top of the La Veta pass to Walsenburg, is 3%. Consequently, it takes little power to move a loaded coal train from MP 306 to Alamosa. (It is all downhill) It takes a significant amount of power to pull a loaded coal train up the mountain from Alamosa to the top of the La Veta pass It then takes a significant amount of dynamic braking to control a loaded coal train as it descends from the top of the La Veta pass to Walsenburg From Walsenburg, the line continues to drop, the grade being 1/4% to 1%.

16 Donald Shank owns a functional B-30-7 locomotive. It is stored in South Fork. It was in service by the SLRG until it was stored in South Fork The Applicants intend to lease that locomotive from Donald Shank, and to use that locomotive on the subject trackage

17. The B-30-7 has the ability to control the descent of a loaded coal train from MP 306 to Alamosa. It has the ability to pull an empty 40-car hopper train from Alamosa to MP 306. (The controlling grade is only 1%. The sharpest curve is only 5 degrees.) The Applicants will propose to the SLRG, that the SLRG crew Applicants' B-30 from South Fork to Alamosa. At Alamosa, the SLRG can add power, and crew its power (and continue to use the B-30.)

18. The most efficient plan would be: Use the B-30-7 to pull a loaded coal train from MP 306 to South Fork. (It is a down-hill run.) Applicants' crew would de-board the B-30 at South Fork. SLRG's crew would drive a vehicle from Alamosa to South Fork. Park the vehicle, then board the B-30. Use Applicants' B-30 to pull the train to Alamosa. At Alamosa, the SLRG would add power, to pull the loaded coal train over the La Veta pass. UP would crew SLRG's power, then pull the coal train to Pueblo, and return the empty coal train to Walsenburg. SLRG would crew its power at Walsenburg, for the return trip to Alamosa. At Alamosa, SLRG would de-couple its power, then crew Applicants' B-30, using the B-30 to pull the empty coal train back to South Fork. At South Fork, SLRG's crew would use its parked vehicle to return to Alamosa. Applicants' crew would board the B-30 at South Fork, then pull the empty train back to MP 306.

19. Very efficient. Even operating over excepted track, no crew would run out of hours. There would be no need to exchange locomotives at South Fork, which would eliminate the need for a long passing track. Because the operation is so efficient, it can be performed for less than the cost to truck coal from South Fork to Pueblo.

20. The SLRG has informed Riffin that it has sufficient power at Alamosa, to add sufficient power at Alamosa, to pull a loaded 40-car coal train over La Veta pass.

TRANSLOAD AT HANNA VS. ON SUBJECT TRACKAGE

21. If one were to attempt to load and build a 40-car coal train at Hanna, the operating crew would likely run out of operating hours, due to the constraints of the Hanna site, and due to the fact that there are 20 miles of excepted track¹ between Monte Vista and Hanna (2 operating hours

¹ Speed limits excepted and Class I track 10 mph. Class II track 25 mph

out. 2 operating hours back). 10 miles of excepted track between Hanna and Derrick (the nearest location of a passing track, needed to put an SLRG locomotive on the pulling end of the train on the way from Hanna to Alamosa (one operating hour out and one operating hour back) and another 17 miles of Class II track between Monte Vista and Alamosa (where SLRG crews would come from; 45 minutes out and 45 minutes back.) Total time, without switching the Hanna site, without switching the Derrick passing track, and without prepping the locomotive in Alamosa 7 5 hours Since the Derrick SLRG passing track is only about 500 feet long, it would take several switching moves to put a locomotive on the opposite end of a 40-car coal train. And since the Hanna transload site can only accommodate 8 cars at a time, it would take 5 switching moves at a minimum, to load 40 coal cars Plus the actual time to load the coal cars, one car at a time (the loading ramp can only accommodate one car at a time.)

22 Loading the coal train on the Subject Track would be far easier The B-30 would always be there The crew would be based nearby. There is plenty of room. No houses or farms are nearby.

23. The ideal location for a transload facility would be along / at the end of. Mineral County Road 430H The nearest house is a mile or so away. The drawback to this ideal site, is the bridge that carries Mineral County Road 430 over the Rio Grande River was built more than 100 years ago, and is weight restricted. To use his site, the County Road 430 bridge would have to be rebuilt, or strengthened. Since this bridge is the only means by which fire trucks can access the adjacent forest lands, the replacement of this bridge may be already planned.

24. Another good transload site is at MP 306, just south of the railroad trestle bridge that carries the line over the Rio Grande river. Mineral County Road 430A (Forrest Road) is served via a new bridge over the Rio Grande, which bridge is not weight-restricted. (It was built to carry fire trucks) This site is not quite as ideal, since it requires trucking the coal an additional mile or two (almost insignificant), and since there are a few summer cabins about ½ mile away. However, the fact that it is served via a new, non-weight-restricted bridge, weighs heavily in its favor, at least in the near term.

TIIH

25. The Applicants are limiting their 'holding out' to carry to non-TIIH commodities. Were the Applicants proposing to limit their 'holding out' to carry to one commodity, such as stone, or just a few commodities, there would be no controversy. A vast number of trackage rights agreements have limited the commodities that can be carried. All without any controversy regarding the commodities to be carried.

26. There is one basic reason why the Applicants do not want to have the obligation to carry TIIH commodities: If TIIH commodities and passengers are carried on the same line, Federal law requires the carrier to equip its line with Positive Train Control. Positive Train Control is outrageously expensive. The Owner of the Line, DRGRIF, carries passengers on the Line. If the Owner has the exclusive obligation to carry TIIH commodities, it may be able to avoid installing Positive Train Control, since the Owner can dictate that passengers and TIIH will not be carried simultaneously.

MEMORANDUM OF LAW

27. Applicants are providing the Board with a Memorandum of Law, which cites numerous cases which support the Applicants' desire to limit what they propose to hold out to carry, and which support the Applicants' desire to acquire trackage rights via a Notice of Exemption and via 49 CFR 1150.31, *et seq*.

FINANCIAL STATEMENTS

28. Evidence of Applicants' financial fitness was not submitted, for it is not required to be submitted. However, Riffin has filed under seal a copy of his personal financial statement.

APPLICANTS' ABILITY TO CARRY

29. The Subject Trackage is substantially 90-pound rail. Some of the Subject Trackage is 70-pound rail. Some of the Subject Trackage is excepted track. (Excepted track is not the same

as out-of-service track. None of the DRGRHF's track is out-of-service.) Some is Class I track. The Applicants have observed (summer, 2012) 70-pound rail being used in active freight service by Norfolk Southern in Hazelton, PA. The 70-lb rail line is handling 286,000 pound rail cars, and is being operated on by GP-40's, which weigh about 300,000 pounds. All without incident.

30. Applicants propose to use 263,000 pound rail cars, and a B-30-7 locomotive (which weighs about 290,000 pounds). The rail on the Subject Trackage can handle the cars and locomotive the Applicants propose to utilize. The Applicants expect to replace a number of cross ties, and expect to add ballast to portions of the Subject Trackage.

31. The Applicants, collectively, have a large quantity of rail maintenance-of-way equipment (tamper, ballast equilizer, spike remover, spike inserter, track liner, scarifiers, track undercutter, etc.), a tandem-axle dump truck, several 200-series excavators, a road grader, several backhoes, a Bob Cat, and several hydraulic cranes. They have several thousand yards of 100-pound rail and several turnouts. They also have three 89-foot flat cars. They have the equipment and material, and the means to transport that equipment and material, to the Subject Trackage. Riflin has the requisite skills and licenses to operate all of this equipment. With their own equipment, Applicants could construct a transload facility on the Subject Trackage at minimal cost, and in a short period of time.

MONTE VISTA DECLARATORY ORDER PROCEEDING

32. The DRGRHF has instituted a Declaratory Order proceeding, FD 35496, wherein it has asked the Board to render a decision regarding whether a parcel in Monte Vista, being used by the DRGRHF, is subject to Monte Vista's zoning regulations. The Declaratory Order proceeding has no bearing on whether the DRGRHF may grant to Applicants trackage rights over a portion of DRGRHF's line. Monte Vista is some 30-miles east of the Subject Trackage. Applicants use of the Subject Trackage has no bearing on the sole issue in the Declaratory Order proceeding, namely, has Monte Vista's Zoning Regulations been preempted by 49 U.S.C. 10501(b)

33. The SLRG has admitted, "... DRGRHF holds common carrier authority for its line of railroad. " When the DRGRHF obtained its line from Union Pacific, it acquired all of Union

Pacific's common carrier rights with regard to the line. In effect, the DRGRHF stepped into the shoes of the Union Pacific. This issue was heavily litigated by the City of Creede. The Board upheld the transfer of the Line to the DRGRHF.

ENVIRONMENTAL PERMITTING / HISTORIC REVIEW

34. The Board's environmental regulations are discussed in the Memorandum of Law. Since the Applicants propose to operate less than 3 trains per day, the Board has held no environmental review will be triggered. In addition, since the granting of trackage rights does not involve the construction of additional line, only the use of existing line, no environmental review is necessary.

35. The Board and its predecessor, the Interstate Commerce Commission, has held that since no salvage operations are associated with the granting of trackage rights, and since historic structure review will occur if the line is proposed for abandonment at some future date, historic structure review is not done when trackage rights are transferred. See Memorandum of Law.

TRACKAGE RIGHTS AGREEMENT

36. A redacted copy of Applicants' Trackage Rights Agreement is being filed in the public record, and an unredacted copy of the Applicants' Trackage Rights Agreement is being filed under seal pursuant to a Protective Order.

RAILROAD TRANSPORTATION POLICY

37. The criteria for a notice of exemption are:

- A. Does it contravene 49 U.S.C. 10101 rail transportation policy?
- B. Is the transaction either:
 - a. Limited in scope; or
 - b. Do shippers need protection from the abuse of market power?

38 Applicants' Notice of Exemption is in accordance with at least ten of the fifteen railroad policy statements found at 49 U.S.C. 101 01. The remaining policy statements are not relevant to the proceeding. The NOE is not contrary to any of the rail transportation policies found in 49 U.S.C 10101 Applicants' NOE is both limited in scope and will not subject any shipper from an abuse of market power This is extensively discussed in the Memorandum of Law.

OPERATIONS

39. Applicants propose to operate their transload facility during normal daylight business hours. Applicants do not propose to let their locomotive(s) idle during prolonged periods of non-use. (It is a waste of fuel.) Applicants are attempting to locate their transload site some distance from farms and dwellings, to reduce / minimize any noise or dust impacts on adjacent properties.

CONCLUSION

40. Applicants operation on 7 miles of DRGRHF's line will have no adverse impact on rail transportation policy, and will have no adverse impact on any adjacent property owners, other than those normally associated with the operation of a line of railroad.

41 Applicants' coal transload activities will reduce the number of trucks driving on Highway 160, between South Fork and Walsenburg, by 10,000 trucks per year, a very substantial reduction in heavy truck traffic over a two-lane highway that goes through the center of every city between South Fork and Walsenburg Applicants' operation will result in a substantial reduction in fuel used, noise, and emissions It will also foster public safety, since 60 trains per year, on tracks not near populated areas, is a lot safer than 10,000 heavy trucks per year driving on a 2-lane highway that goes through heavily congested areas.

42. I certify under the penalties of perjury that the foregoing is true and correct to the best of my personal knowledge, information and belief.

Executed January 6, 2013


James Riffin

**REDACTED VERSION OF
OPERATING AND TRACKAGE RIGHTS AGREEMENT**

BETWEEN THE

DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION, INC., AND

JAMES RIFFIN AND ERIC STROHMEYER



1 **THIS AGREEMENT**, made this 7th day of January, 2013, by and between the Denver & Rio Grande Railway Historical Foundation, Inc. ("Owner"), and James Riffin and Eric Strohmeyer, jointly, in their individual capacities ("Users"), collectively, the Parties.

2. WHEREAS Owner acquired a line of railroad from the Union Pacific Railway Company on May 24, 2000 known as the Creede Branch ("Line"), see *Union Pacific Railroad Company - Abandonment Exemption - In Rio Grande and Mineral Counties, CO - In the Matter of an Offer of Financial Assistance*, STB Docket No. AB-33 (Sub-No. 132X), STB Served May 11, 1999 and see *City of Creede, CO - Petition for Declaratory Order*, STB Finance Docket No. 34376, STB Served November 3, 2003, and

3 WHEREAS, the Line of Railroad Owner acquired extended from Derick, CO, near the town of South Fork, CO, at Milepost ("MP") 299.3, to the end of the Line on the north side of the City Limits of Creede, CO, at MP 321.88, and

4. WHEREAS, in a decision served by the Surface Transportation Board ("STB") on May 23, 2008, see *Denver & Rio Grande Railway Historical Foundation - Adverse Abandonment - In Mineral County, CO*, STB Docket No. AB-1014, Served May 23, 2008, the STB granted the City of Creede's Adverse Abandonment Application, granting authority to abandon that portion of the Line that lies within the City Limits of Creede, CO, or between MP 319.9 and MP 320.9, and

5 WHEREAS the Users desire to obtain from the Owner non-exclusive, local, commodity-specific trackage rights over approximately 7 miles of the Line, between the beginning of the Line at Derick, CO, at MP 299.3, extending to and ending at a point approximately 10 feet south of the trestle bridge that carries the Line over the Rio Grande River, near MP 306.38, and

6 WHEREAS the Owner is willing to grant to the Users non-exclusive, local, commodity-specific trackage rights over approximately 7 miles of the Line, between the beginning of the Line at Derrick, CO, at MP 299.3, extending to and ending at a point approximately 10 feet south of the trestle bridge that carries the Line over the Rio Grande River, near MP 306.38.

7. NOW THEREFORE, in consideration of the promises and mutual covenants contained herein, the Parties agree as follows

GRANT OF TRACKAGE RIGHTS

8 Owner grants to the Users the non-exclusive use of the portion of Owner's Line of Railroad that lies between the beginning of the Line at Derrick, CO, at MP 299.3, extending to and ending at a point approximately 10 feet south of the trestle bridge that carries the Line over the Rio Grande River, near MP 306.38, a distance of approximately 7 miles ("Subject Trackage"), subject to the following terms and conditions:

A. The term of this Agreement shall be for ten years, and shall be renewable, at the option of the Users, for two additional ten-year periods of time.

B. In the event the Users desire to renew this Agreement, Users shall provide the Owner with at least 60 days written notice of their intention to renew

C It is expressly understood that the Users plan to become freight-only common carriers by rail on the Subject Trackage

D. It is expressly understood that Owner shall have the exclusive right to carry passengers on any portion of Owner's Line, including the portion of Owner's Line that is subject to this Trackage Rights Agreement.

E It is expressly understood that Owner shall have the exclusive right to carry freight on the portion of the Line not subject to this Trackage Rights Agreement, and shall have the exclusive right to carry overhead freight traffic, the exclusive right and obligation to carry local

toxic by inhalation ("TIH") commodities, and the non-exclusive right to carry less-than-carloads of rail freight and livestock, on the portion of Owner's Line that is subject to this Agreement.

F On the Subject Trackage, Users shall have the right to operate, in freight service, their trains, locomotives, cars, and equipment with their own crews, over the following segment of Owner's railroad:

The portion of Owner's Line of Railroad that lies between the beginning of the Line at *Derrick, CO.* at MP 299.3, extending to and ending at a point approximately 10 feet south of the trestle bridge that carries the Line over the Rio Grande River, near MP 306.38, a distance of approximately 7 miles.

G. Users' use of the Subject Trackage shall be in common with Owner and any other user of the Subject Trackage, and Owner's right to use the Subject Trackage shall not be diminished by this Agreement, Except as provided below

9. **Restrictions on Use of Line.** A On the Subject Trackage, Users shall have the exclusive right to provide local common carrier by rail freight service for all commodities, except livestock and TIH commodities, such as, but not limited to, chlorine or anhydrous ammonia

B It is expressly understood that Owner shall have the exclusive right and obligation to transport all TIH commodities. Users understand that the reason for Owner's desire to have the exclusive common carrier by rail right and obligation to carry all TIH commodities, is so that Owner may coordinate the movement of TIH commodities with the movement of passengers, and so that Owner may ensure that no TIH commodities are moved at the same time that passengers are being carried on any portion of Owner's Line. This will ensure that Owner and Users stay in compliance with applicable present and future Federal law that restricts the movement of TIH commodities over lines that are also used to transport passengers

C. It is expressly understood that Owner shall have the absolute right to use the Subject Trackage, exclusively, whenever Owner needs to move TIH commodities over any portion of Owner's line, or needs to move empty cars that had TIH commodities in them, and that may still

contain some residue of a TIIH commodity. During Owner's movement of rail cars containing TIIH commodities, Users shall not use the Subject Trackage, without the express written consent of Owner. Owner's exclusive use of the Line shall not exceed 24 hours continuously, and shall not exceed more than two exclusive uses of the Line in any seven day period of time. Users expressly understand and agree that such use of the Line for the movement of TIIH commodities, shall not constitute an 'undue burden' on Users' interstate commerce activities, and expressly agree not to argue in any legal proceeding that such use by Owner, constitutes an 'undue burden' on Users' ability to comply with their obligation to provide interstate-commerce-by-rail services.

D Users further agree that (I) Owner shall have the exclusive right to use the Subject Trackage for the carriage of passengers, and (II) Owner shall have the non-exclusive right to use the Subject Trackage for the carriage of livestock and less-than-carloads of rail freight commodities, so long as such movement of passengers, livestock or less-than-carloads of freight, does not unreasonably interfere with Users' use of the Line for freight rail service. Users agree to make a good faith effort to not schedule the movement of Users' trains during such periods of time that Owner needs to move passengers, livestock or less-than-carloads of freight commodities over the Subject Trackage, and Users further agree not to block the main line with their trains, rail cars, locomotive(s) or other rail equipment for more than two hours continuously, without the express written consent of Owner, which consent may not be unreasonably withheld.

10. **Additions, alterations and retirements.** Owner, from time to time and at its sole cost and expense, may make such changes in, additions and betterments to, the Subject Trackage as the Owner shall, in its judgment, be necessary or desirable for the economical or safe operation thereof or as shall be required by any law, rule, regulation, or ordinance promulgated by any governmental body having jurisdiction. Such additions and betterments shall become a part of the Subject Trackage. Owner shall not retire any portion of the main line without the Users' consent, which consent may be withheld at Users' sole discretion.

11. **Operations.** A. Users shall have the exclusive right and the common carrier obligation to provide all local common-carrier-by-rail freight service over that portion of Owner's Line that is the subject of this Agreement, except for the movement of passengers or TIIH commodities, and except that Owner shall have the right to use the Subject Trackage for the carriage of

livestock and less-than-carloads of rail freight. Users agree to seek authority from the Surface Transportation Board ("STB") to acquire the right to acquire and operate the portion of Owner's Line that is the subject of this Agreement. Users agree to begin marketing and offering freight rail service no later than 30 days after their Notice of Exemption in STB Finance Docket No. 35705 becomes effective

B. When operating over the Subject Trackage, User's locomotives and crews will be equipped to communicate with Owner on radio frequencies normally used by Owner on the Subject Trackage.

C. Procedures for qualification and occupancy of the Subject Trackage will be arranged by the local supervisor of each carrier. All control and usage will be subject to the approval of Owner's representative or its designee.

D. Before Users' locomotives or other rail equipment enter onto the Subject Trackage, Users shall request permission from Owner's dispatcher or other designated representative at Owner's rail traffic control center, or such other location as Owner may designate. Further, Users shall ascertain that said Subject Trackage is clear and shall await confirmation from said Owner's representative that such permission has been issued to allow Users' movements on or over the Subject Trackage. Upon completing its operations and clearing the Subject Trackage, Users will notify Owner's designated representative that it has completed its operations and that its equipment has cleared the Subject Trackage. Once Users have notified Owner's representative that it has cleared the Subject Trackage, Users shall not reenter the Subject Trackage without again obtaining permission from Owner's representative. Users shall provide and maintain at its expense all communication facilities needed as may be required by Owner to permit Users to use the Subject Trackage.

E. Users shall comply with the provisions of the Federal Locomotive Inspection Act and the Federal Safety Appliance Acts, as amended, and all other federal and state laws, regulations, and rules respecting the operation, condition, inspection, and safety of its trains, locomotives, cars, and equipment while such trains, locomotives, cars and equipment are being operated over the Subject Trackage. Users shall indemnify, protect, defend, and save harmless

Owner, and all of its respective directors, officers, agents, or employees under such laws, rules and regulations by any public authority or court having jurisdiction in the premises, when attributable to the failure of Users to comply with its obligations in this regard

F. Users, in their use of the Subject trackage, will comply in all respects with the safety rules, operating rules and other regulations of Owner, and the movement of Users' trains, locomotives, cars, and equipment over the Subject Trackage shall at all times be subject to the orders of the transportation officers of Owners. Users' trains or equipment shall not include locomotives, cars or equipment which exceed the width, height, weight or other restrictions or capacities of the Subject Trackage as published in Railway Line Clearances, and no train shall contain locomotives, cars or equipment which require speed restrictions or other movement restrictions below the authorized freight speeds as provided by Owner's operating rules and regulations, without the prior consent of Owner, which consent shall not be unreasonably withheld. Users shall indemnify, protect, defend, and save harmless Owner and its directors, officers, agents and employees from and against all liabilities when attributable to the failure of Users to comply with the provisions of this subsection.

G. All employees, agents, or volunteers of Users engaged in or connected with the operations of Users on or along the Subject Trackage shall be required to pass periodic examinations on the rules of Owner related to the Subject Trackage, provided, with respect to such examinations that, upon request of Users', Owner shall qualify one or more of Users's supervisory officers on Owner' rules and such supervisory officer or officers so qualified shall examine all employees or volunteers of Users engaged in or connected with Users's operations on or along the Subject Trackage. Pending qualification of train and engine crews of Users, Owner shall furnish a pilot or pilots, at the expense of Users, as deemed necessary by Owner, to assist in operating trains of Users over the Subject Trackage. Users shall pay to Owner, upon receipt of bills therefore, any cost incurred by Owner in connection with the qualification of such employees or volunteers of Users, as well as the cost of pilots furnished by Owner, until such time as such employees or volunteers are deemed by the appropriate examining officer of Owner to be properly qualified for operation as herein contemplated.

H. Owner may request an investigation, at its option, if Users's employee or volunteer working on the Subject Trackage is alleged to have violated Owner' rules, regulations,

orders, practices or instructions, or if an incident occurs which requires an investigation under applicable agreement rules. Users will schedule the investigation and notify Owner's Local Transportation Officer in the territory. Users's scheduling of the investigation must comply with the time limits provided in the applicable agreement. Owner will provide its regulations, supplements and safety rules to Users' at no cost.

I. If Owner request an investigation, Owner shall have the right to exclude from the Subject Trackage, any employee or volunteer of Users', except officers, determined by Owner as the result of Users' investigation or hearing described below, to be in violation of Owner' rules, regulations, orders, practices or instructions

J. In a major offense, including, but not limited to, dishonesty, insubordination, or a serious violation of operating rules or other offenses of comparable magnitude, wherein Owner desires to bar Users' employee or volunteer from service on the Subject Trackage pending an investigation by Users, immediate verbal notification will be given to the appropriate Transportation Officer of Users so that proper written notice can be issued to the employee or volunteer

K. If Owner request an investigation, an Officer of Users will conduct the investigation, but an officer of Owner may be present. After the investigation is concluded, a Transportation Officer of Users will arrange to assess discipline, within the applicable time limits. If Owner recommend dismissal, Users reserve the right to change the recommendation to the extent of barring the individual from operating over the Subject Trackage. Users shall release, indemnify, defend and save harmless Owner and its officers, agents and employees from and against any and all claims and expenses resulting from such exclusion.

L. If the disciplinary action is appealed by the employee or volunteer of Users to the National Railroad Adjustment Board or other tribunal lawfully created to adjudicate such cases, and if the decision of such board or tribunal sustains the employee's or volunteer's position, such employee or volunteer shall not be barred from service on the Subject Trackage by reason of such occurrence (unless an arbitration concerning such matter is held pursuant to an agreement and this arbitration upholds Owner's continued exclusion of such employee or volunteer).

M. It is understood that Owner shall reimburse Users for all payments that Users might be required to make as a result of a successful challenge being made by the employee or volunteer or his representative as to the discipline recommended by Users and assessed by Users. Users agree to notify Owner before committing itself to making payment of any claim. In the event a claim is progressed to an Adjustment Board, Owner will be given an opportunity to review Users' submission. Any payments made to employees or volunteers, as a result of an investigation being 'overturned,' shall include not only actual wages, but in addition, shall include expenses which Users may be required to pay covering vacation allowances, Railroad Retirement taxes, unemployment insurance taxes and any other payroll tax or fringe benefits.

N. Owner does not guarantee or otherwise promise to provide any particular transit or running times over the Subject Trackage. Further, Owner does not guarantee or otherwise promise that operations over the Subject Trackage will not be interrupted. However, Owner shall make best efforts to ensure that any interruptions will be kept to a minimum.

O. If by reason of any mechanical failure, insufficient hours of service remaining among Owner's or Users' crew, or for any other cause not resulting from an accident or derailment, a train or locomotive of Owner or Users becomes stalled or unable to proceed under its own power, or fails to maintain the speed required by Owner on the Subject Trackage, or if in emergencies crippled or otherwise defective cars are set out of Owner's or Users' trains on the Subject Trackage, Users and Owners, as appropriate, shall have the option to furnish motive power or such other assistance (including but not limited to the right to recrew Owner's or Users' train) as may be necessary to haul, help, or push such trains, locomotives, or cars, or to properly move the disabled equipment off the Subject Trackage, and Owner / Users, as appropriate, shall reimburse the one providing the assistance, for the cost of rendering any such assistance.

P. If it becomes necessary to make repairs to or adjust or transfer the lading of a crippled or defective car(s) in order to move them off the Subject Trackage, the cost of such work, if done by the carrier not responsible for movement of the car, shall be reimbursed by the carrier with the responsibility for movement of the car.

Q. In the event that Owner and User agree that Owner should retain employees or provide additional employees for the sole benefit of Users, the parties hereto shall enter into a

separate agreement under which Users shall bear all cost and expenses for any such additional employees, including without limitation all cost and expense associated with labor protective payments which are made by Owner and which would not have been incurred had the additional employees not been provided

12 Clearing of wrecks. Whenever use of the Subject Trackage requires rerailling, wrecking service or wrecking train service due to the negligence of Owner or Users, Owner shall perform such service, including the repair and restoration of roadbed, track and structures. The cost, liability and expense thereof, including without limitation, loss of, damage to, and destruction of any property whatsoever and injury to or death of any person or persons whomsoever or any damage to or destruction of the environment whatsoever, including without limitation, land, air, water, wildlife, and vegetation, resulting therefrom, shall be apportioned in accordance with the percentage of negligence of the Owner and Users.

13 Compensation. Users agree to pay to Owner Base Compensation in the amount of (REDACTED), for the use of the Line that is the subject of this Agreement. Users further agree to pay to the Owner as Additional Rent, the sum of (Redacted) per revenue-car movement over the Line. A revenue-car movement shall be defined as the movement of a loaded freight rail car over the Line from a point where the car is loaded, if loaded on the Line, to a point where the rail car is interchanged with another rail carrier, or the movement of a loaded freight rail car from the point of interchange with another rail carrier, to the point where the rail car is unloaded, irregardless of whether the movement of the loaded rail car is a few feet, or the entire seven miles, or something less than the entire seven miles. If a rail car is loaded, or unloaded, in more than one location, the movement of that rail car shall constitute one 'movement.' The movement of empty rail cars, or the movement of locomotives or other equipment over the rails, shall not constitute a 'revenue movement,' and shall not be subject to any Additional Rent.

14. Payment of compensation . The initial payment of Base Compensation shall be paid upon execution of this Agreement. Thereafter, the yearly Base Compensation shall be mailed to the Owner no later than January 15 of each succeeding calendar year. Additional Rent shall be remitted to Owner no later than 45 days after the close of each quarter (to be remitted no later than May 15, August 15, November 15, and February 15).

15 Storage of rail cars. The Users expressly agree not to store any rail cars or other equipment, on the main line tracks, or within 15-feet of the centerline of the main line tracks, without the express written consent of the Owner. 'Storage' shall be defined as leaving a rail car or other equipment on the main line tracks, or within 15-feet of the centerline of the mainline tracks, for more than 24 hours. Owner herewith grants to Users the right to store rail cars on any tracks that Users place in the right-of-way of the portion of Owner's Line that is the subject of this Agreement, so long as such storage does not encroach upon the area within 15-feet of the centerline of the mainline tracks.

16 Additional tracks. Users shall have the right to lay additional tracks within the right-of-way of the portion of the Owner's Line that is the subject of this Agreement, and to connect such tracks to the mainline via turnouts or other connections, at Users' sole cost and expense, subject to Owner's prior written consent, which consent shall not be withheld unless Owner can demonstrate that such tracks would impair Owner's ability to provide passenger service on the portion of Owner's Line that is the subject of this Agreement.

17 Accessory structures. Users shall have the right to construct and / or place, at their sole cost and expense, within the right-of-way of the portion of Owner's Line that is the subject of this Agreement, either below grade, at grade, or above grade, or any combination thereof, any of the following, but not limited to the following: Structures, including living quarters, conveyors, chutes, wires, pipes, roadways, bridges, loading docks and retaining walls, so long as such item is not within 15-feet of the centerline of the main line tracks, or if within 15-feet of the centerline of the mainline tracks, is below grade, or at least 25 feet above the top of rail of the main line, or is to be used to load rail cars, in which case the edge shall be no closer than 5-feet 3-inches from the centerline of the mainline tracks. Users shall also have the right, at their sole cost and expense, within the right-of-way that contains the portion of Owner's Line that is the subject of this Agreement, to grade, to excavate, to change the elevation of the existing grade, and to relocate the main line tracks to another portion of the right-of-way, so long as such re-alignment of main line tracks does not impair the ability to move freight or passenger traffic over the Line. The rights contained in this paragraph shall be subject to Owner's prior written approval, which approval shall not be withheld unless the exercise of such right will prevent the Owner from transporting passengers over the portion of Owner's Line that is the subject of this Agreement.

18 Maintenance of the Line. Users agree to accept the portion of Owner's Line that is the subject of this Agreement, in the condition it was in on December 1, 2012. Users are aware that portions of the Line that is subject to this Agreement, are 'excepted track' Users have the right, but not the obligation, to upgrade the condition of the Line that is subject to this Agreement, by replacing railroad ties, by adding ballast, by replacing rail with similar sized, or heavier, rail, by realigning or altering the elevation of the Line, by welding rail or by replacing existing rail with welded rail, or by any combination of the above. Users shall be solely responsible for any damage done to the existing, or to any replacement, rail, crossties, ballast or structures, which damage is caused by the Users' use of such existing or replacement rail.

19. Workmanship. All work performed by Users, or their contractors, subcontractors, agents or employees, shall be at Users' sole cost and expense, and shall be of good quality and workmanship

20 Liability. Users shall be liable for their acts of negligence, and for the acts of negligence of their contractors, subcontractors, agents, employees, business invitees and guests, and shall indemnify and hold harmless Owner from all such acts of negligence Likewise, Owner shall be liable for Owner's acts of negligence, and for the acts of negligence of Owner's contractors, subcontractors, agents, employees, business invitees and guests, and shall indemnify and hold harmless Users from all such acts of negligence In the event a claim is lodged against Users, Owner, or both, and such claim is based on the negligence of Users and Owner, or such claim is the result of the negligence of Users and Owner, Users and Owner shall be liable in proportion to their respective negligence, as determined by agreement, a court or a jury, whichever occurs first

21. Insurance. The Owner requires the Users to obtain a minimum of (Redacted) in liability insurance, or to have some combination of assets and liability insurance, when combined, equals a minimum of (Redacted). Users agree to have such liability coverage prior to commencing revenue freight operation over the portion of Owner's Line that is the subject of this Agreement. The Users are free to obtain liability coverage in excess of the minimum liability coverage required by Owner

22. **Utilities.** Users shall obtain, at their sole cost and expense, whatever utilities they need or desire.

23 **Taxes and Government Assessments.** Users shall be liable for any taxes or government assessments that are solely due to Users' use of Owner's Line that is the subject of this Agreement. Owner shall be liable for any taxes or government assessments that would be levied on the portion of Owner's Line that is the subject of this Agreement even if Users were not using the Line that is subject to this Agreement.

24. **Material breach and cure.** The failure of either Users or Owner to abide by the terms and conditions of this Agreement, shall be deemed a 'default.' Upon notice by the non-defaulting party to the defaulting party, the defaulting party shall have 30 days within which to correct said default, or if not correctable within 30 days after notice of default, the defaulting party shall commence cure of the default within 30 days after notice of default. In the event default continues for more than 60 days, the non-defaulting party shall have the right to terminate this Agreement, at the end of 30 days after notice from the non-defaulting party to the defaulting party of the non-defaulting party's intention to terminate this Agreement, unless such default is due to something not within the control of the defaulting party, such as an Act of God, war, riot, insurrection, civil disturbance, land / rock / mud / snow slide, flood, or such other calamity not within the reasonable control of the defaulting party.

25. **Damage to Line.** In the event the Line that is the subject of this Agreement is damaged due to land / rock / mud / snow slide, flood, earthquake, earth movement, fire, or other event outside the control of the Parties to this Agreement, Owner shall be solely liable for the cost of repairing said damaged Line. In the event Owner is unable or unwilling to repair said damage to the Line, Users may either elect to make such repairs, and to deduct the cost of said repairs from future Rent payments, or terminate this Agreement, subject to approval from the Surface Transportation Board granting Users the right to cease providing freight common carrier by rail service.

26 **Assignment.** Users shall have the right to assign their rights under this Agreement. Such assignment shall not occur prior to the assignee obtaining authority from the Surface Transportation Board to acquire and operate that portion of Owner's Line that is the subject of

this Agreement.

27. Records. Owner and Users agree to prepare and file, in a timely manner, all reports, returns, and information returns associated with the portion of Owner's Line that is the subject of this Agreement. Owner and Users agree to provide each other a copy of any report, filing, or other writing that may affect the portion of Owner's Line that is the subject of this Agreement, excluding income tax returns.

28 Termination of Agreement. Upon the termination of this Agreement, Users shall have the right to remove any improvements made by Users, including all personal property, providing the removal of said improvement(s) will not cause permanent damage to the Line. Users will have the obligation to remove, at their sole cost and expense, any improvements made by Users, which Owner does not permit to remain after termination of this Agreement.

29 Notices. Notice to Owner shall be sent to: Donald H. Shank
President & Executive Director
DRGRHF
29 N. Broadway
Monte Vista, CO 81144
(970) 749-7575

Notice to Users shall be sent to

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

Eric Strohmeyer
81 Century Lane
Watchung, NJ 07069
(908) 361-2435

30 Notice of casualty. Other than for de minimis damage or injury, Users and Owner shall give notice to the other party of any damage to the Line, within 24 hours of learning of the damage or injury.

31 Signs. Owner and Users shall have the right to erect and maintain signs appropriate to their respective uses of the Line. Owner and Users will endeavor to ensure that their signs do not unduly interfere with the other Party's signs. Users shall not have the right to erect revenue-producing signs (billboards) without the Owner's prior written consent, which consent shall not be unreasonably withheld.

32. Waiver. The failure of either party to insist upon strict compliance with every term and condition of this Agreement, shall not be deemed a waiver of the party's right to insist upon strict compliance with every term and condition of this Agreement

33. Return of premises. Upon the termination of this Agreement, the Users agree to return the Line in substantially the same condition that the Line was in on December 1, 2012, normal wear and tear excepted. Users' removal of their personal property and Users' improvements is subject to paragraph 28 above.

34. Eminent Domain, Condemnation, Bankruptcy. In the event that all or a portion of the Subject Trackage, is taken by eminent domain or condemnation, the Users shall have the right to terminate this Agreement, or such portion of the Agreement that is no longer viable due to the taking or condemnation. In the event any party shall become the subject of a bankruptcy proceeding, the party that is the subject of the bankruptcy proceeding, agrees not to oppose any lifting of the Automatic Stay, and agrees not to oppose any efforts to secure use of the Line, free of the bankruptcy proceeding.

35. Labor protection: Any employees affected by the trackage rights will be protected by the conditions imposed in *Norfolk and Western Railway – Trackage Rights– Burlington Northern, Inc*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Railway – Lease and Operate – California Western Railroad*, 360 I.C.C. 653 (1980).

36. Paragraph headings. The paragraph headings herein are for ease of reference only and shall have no bearing on the construction or interpretation of this Agreement.

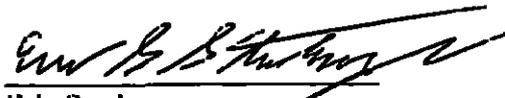
37. Entire Agreement. This Agreement is the entire agreement between the parties. Any promises, agreements, conditions or understandings, either oral or written, made by any party prior to the execution of this Agreement, shall not be binding upon the parties to this Agreement. This Agreement may not be changed or modified without the prior written consent of all of the parties.

38 **Illegality.** If any portion of this Agreement is held to be void as against public policy, the remaining portions of this Agreement shall remain in effect.

39. **Governing Law.** This Agreement shall be governed by the laws of the State of Colorado, and by the Surface Transportation Board's rules, regulations and precedent

WITNESS THE HANDS AND SEALS OF THE PARTIES:

The Owner's (DRGRIIF) signature appears on a separate page.


Eric Strohmeier
User


James Riflin
User