

BEFORE THE  
SURFACE TRANSPORTATION BOARD

FD 35496

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236625  
ENTERED  
Office of Proceedings  
September 8, 2014  
Part of  
Public Record

PETITION FOR DECLARATORY ORDER

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

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**PETITION FOR RECONSIDERATION**

Respectfully submitted,  
On Behalf of the D.& R.G. R.H.F.

*Donald H. Shank* /s/

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September 8, 2014  
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## PETITIONER'S PETITION FOR RECONSIDERATION

Comes now your Petitioner, the Denver & Rio Grande Railway Historical Foundation, Inc. (DRGHF), which petitions the Surface Transportation Board ("Board") to **reconsider** the decision rendered by the Board on **August 18, 2014**, and in support hereof states:

### GROUNDINGS FOR RECONSIDERATION

49 CFR 1115.3(b) states:

"The petition [for reconsideration] will be granted only upon a showing of one or more of the following points:

- (1) The prior action will be affected materially because of new evidence or changed circumstances.
- (2) The prior action involves material error."

Petitioners for reconsideration are due within 20 days after a decision is served.

The decision the Petitioner is asking the Board to reconsider was served on **August 18, 2014**. Twenty days after August 18, 2014, would be **September 7, 2014**, a Sunday. When the due date falls on a weekend, the due date becomes the following Monday, or in this case, the due date would be **Monday, September 8, 2014**. See 49 CFR 1104.7(a).

### POINTS OF AGREEMENT

The Board, in its August 18, 2014 decision, made the following findings, which the Petitioner **agrees with**:

- A. Petitioner is a Class III rail carrier. Opinion ("Op.") at 1.
- B. "As for the Parcel in Monte Vista, DRGHF states that it is used 'for the storage of rail cars, rail car parts, and **other railroad related equipment and materials ...**.'" Op. at

5. Bold added.
- C. “DRGHF asserts that it conducts these activities on the Parcel because there is no space for them at any point on the Creede Branch.” Op. at 5.
- D. Respondents argued that Petitioner “uses the Parcel in Monte Vista (as well as adjoining land owned by Mr. Shank in his individual capacity) **to store numerous pieces of ... railroad-related equipment ...**” Op. at 7. Bold added.
- E. The Board’s statement that “to be within the Board’s jurisdiction and thus covered by preemption under §10501(b), an activity: (1) must be performed by, or under the auspices of, a ‘rail carrier,’ and (2) must constitute ‘transportation.’” Op. at 8.
- F. “[T]ransportation’ includes property facilities, and equipment ‘related to the movement of passengers or property, or both, by rail ... and services related to that movement’ including the receipt, delivery, **storage**, transfer, and handling of property, 49 U.S.C. §10102(9).” Op. at 8. Bold added.
- G. “However, the Board’s jurisdiction over transportation by rail carrier ... only extends to transportation between, among other things, ‘a place in ... a State and a place in the same or another State as part of the interstate rail network.” Op. at 8.
- H. “[T]he Board and the courts have found that it categorically prevents states or localities from intruding into matters that are directly regulated by the Board (e.g. ... construction ...)” Op. at 8.
- I. “It also prevents states and localities from imposing requirements that, by their nature, could be used to deny a rail carrier’s ability **to conduct rail operations.**” Op. at 9. Bold added.
- J. “Thus, state or local permitting or preclearance requirements, including **building permits, zoning ordinances, and environmental and land use permitting requirements, are categorically preempted as to any facilities that are an integral part of rail transportation.**” Op. at 9. Bold added.
- K. “State and local action, however, must not have the effect of foreclosing or unduly restricting the rail carrier’s ability to conduct its operations ... .” Op. at 9.
- L. “Thus, if DRGHF is using the Parcel to support transportation subject to the Board’s jurisdiction, a City ordinance prohibiting or unreasonably interfering with that use would be preempted as applied to the Parcel. ... (‘zoning ordinances and local land

use permit requirements are preempted where the facilities are an integral part of the railroad's interstate operations').” Op. at 9.

- M. “Accordingly, as long as that [DRGHF’s present or foreseeable future use of the Parcel does not further the provision of transportation subject to the Board’s jurisdiction] remains the case, the city’s rail car storage ordinance is not preempted.
- N. “[W]holly intrastate passenger-excursion operations do not constitute rail operations as ‘part of the interstate rail network.’ ” Op. at 10.

The Board, in its August 18, 2014 decision, made the following findings, which the Petitioner **disagrees with** and thus respectfully requests reconsideration of the following points:

- A. “We further find that DRGHF has not shown that its activities on the Parcel in Monte Vista constitute rail transportation under the Board’s jurisdiction ... .” Op. at 8.
- B. “[W]e conclude on the record before us that the City’s ordinance prohibiting the storage of rail cars in a residential, industrial, or commercial zone of the City when not connected to a rail line is not preempted with respect to the Parcel.” Op. at 8.
- C. “The record before us does not demonstrate that the DRGHF’s present or foreseeable future use of the Parcel furthers the provision of transportation subject to the Board’s jurisdiction.”
- D. “[T]he evidence of record shows that since acquiring the Line in 2000, DRGHF has used the Creede Branch **only** to provide seasonal, intrastate passenger excursion service.” Op. at 9. Bold added.
- E. “DRGHF does not contend, nor does it present evidence to show, that it has entered into interchange agreements with any interstate carrier ... or plans to seek agreements with any other carrier.” Op. at 10.
- F. “DRGHF claims that in recent years it has hauled ‘less-than-carload ... intra-line freight for three local shippers’ on the Creede Branch. According to the evidence of record, however, the only ‘freight’ movements on the Creede Branch have involved the transportation of river rafts and other gear for passengers as part of DRGHF’s excursion train operations.” Op. at 10.
- G. “DRGHF has provided no evidence to show that it conducts, or has specific plans to

- conduct, any freight movements as part of the interstate rail network.” Op. at 10.
- H. Moreover, DRGHF has not provided evidence to show that it has, **or plans to seek**, any interchange, haulage, or other commercial arrangements or agreements with any other rail carrier.” Op. at 10.
- I. “Thus, the activities taking place on the Parcel provide no basis for finding the City’s ordinance is preempted under §10501(b).” Op. at 10.
- J. “In sum, the evidence of record fails to show that DRGHF’s present or foreseeable future use of the Parcel is in support of activities that constitute transportation conducted under the Board’s jurisdiction – that is, transportation ‘between a place in ... a State and a place in the same or another State as part of the interstate rail network.’” Op. at 11.
- K. “Because DRGHF’s use of the Parcel to store and rehabilitate rail cars is unrelated to rail common carrier service under the Board’s jurisdiction, we conclude that enforcement of Municipal Code §12-17-110(3) is not preempted under §10501(b).” Op. at 11.

### **EVIDENCE IN THE RECORD**

The Board found that Petitioner is a Class III rail carrier. Op. at 1. Once the Board has found that the Foundation is a Class III rail carrier, the Board is bound by its finding. A common carrier rail carrier is thus found to be engaged in transportation. If a party is not engaged in transportation, then finding that they are common carrier produces a result inconsistent with the Board’s finding that they are a carrier. A party can’t be one without the other.

### **EVIDENCE REGARDING HOW THE PARCEL IS USED**

The Petitioner asserted that the Parcel in Monte Vista, is used “for the storage of railcars, rail car parts, and **other railroad related equipment and materials.**” Op. at 5. Opening Statement (“O.S.”) at 4, that the Parcel is petitioner’s Maintenance-of-way (“MOW”) facility, O.S. at 2, and the Parcel is used “to support operations on the line the Foundation was authorized to acquire and operate.” O.S. at 3.

Respondents argued that Petitioner “uses the Parcel in Monte Vista (as well as adjoining land owned by Mr. Shank in his individual capacity) to store numerous pieces of ... railroad-related equipment ... .” Op. at 7.

“DRGHF asserts that it conducts these activities on the Parcel because there is no space for them at any point on the Creede Branch.” Op. at 5.

On September 9, 2011, Petitioner filed a ‘Response to a Reply to our Petition for Declaratory Order.’ The Board noted the ‘Response’ was missing pp. 13-15. The missing pages were filed on **October 24, 2011**. Petitioner directs the Board’s attention to the **fourth paragraph** on p. 14 (third page of four pages submitted), and to the **fifth paragraph** on p. 14, wherein the Petitioner made the following statements:

“Four of the old historic wooden car bodies located on the Subject are simply awaiting paint and will then be transported to DRGR for placement along the line as M-O-W storage sheds to relocate unsightly track materials from public view. The materials will move from being stacked on the ground to inside closed and locked boxcars.”

“Four standard gauge stock cars are awaiting rehab for use in moving stock intra-line on the DRGR and eliminate stock drives on Colorado Highway 149. This request for moving stock by rail has been made to Petitioner, through Petitioner’s counsel. The cars are currently located on the Subject property and are considered part of the seventeen (17) ‘offenders’ I was found guilty of storing within the City.”

As noted above, the record contains evidence that in 2011, four wooden boxcars, located on the Parcel, were to be used to store maintenance-of-way (“MOW”) track materials. Following the 2011 statement above, the wooden boxcars were, presently are, and will continue to be, used to store MOW equipment, tools and materials.

Petitioner’s Creede Branch is a line of railroad. As such, Petitioner has an obligation to maintain that line, in order to be able to provide freight rail service upon reasonable demand.

The maintenance of one’s rail line, is an “integral part of the railroad’s interstate

operations.

The maintenance of one's line of railroad, requires track tools, track equipment, and track materials, such as spikes, cross ties, rails, tie plates, joint bars, ballast and electrical wire. As noted above, "Petitioner asserts that it conducts these [MOW storage] activities on the Parcel because there is no space for them at any point on the Creede Branch." Op. at 5.

**Petitioner argues that:**

A. There is evidence in the record, which the Board overlooked, indicating that Petitioner used, and continues to use the Parcel has the Petitioner's MOW facility and that petitioner uses at least four of the box cars on the Parcel, in order to store some of Petitioner's MOW tools, equipment and track material;

B. It is common practice for railroads to use old, uninspected rail cars, to store the railroad's MOW equipment, tools and track materials.

C. The rehabilitation of a railcar for use as a non-moving storage shed for the railroad's MOW tools, equipment and materials, is an "integral part of the railroad's interstate operations."

D. Consequently, Petitioner's use of the Parcel constitutes "Transportation," for Petitioner's use of old railcars and the rehabilitation of railcars for that purpose of Petitioner's MOW tools, equipment and track materials on the Parcel, "includes ... a ... property, facility ... or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and (B) services related to that movement, including ... storage ... of ... property."

**LESS-THAN-CARLOAD INTRA-LINE FREIGHT**

On page 10 of the Decision, the Board made the following **inaccurate** statement:

"DRGHF claims that in recent years it has hauled 'less-than-carload ... intra-line freight for three local shippers' on the Creede Branch. According to the evidence of record, however, the only 'freight' movements on the Creede Branch have involved the transportation of river rafts and other gear for passengers as part of DRGHF's

excursion train operations.” Op. at 10.

The Board **incorrectly** assumed that the “less-than-carload” freight is part of the tourist excursion program, when in fact the “less-than-carload” freight is not directly tied into passenger transportation. The Foundation offers the movement of rafts, independent of the movement of people, for those raft companies that want to preposition their rafts up river for persons arriving via other means of transportation.

Petitioner also argued that Petitioner had sought and solicited the movement of freight (livestock) over the Creede Branch of which is ‘between a place in ... a State and a place in the same ... State as part of the interstate rail network.’”

Petitioner represents that Petitioner intends to continue to solicit the movement of livestock on its Line. Petitioner further argues that:

- (A) There is evidence in the record, (the second paragraph in paragraph 11 above, which appears in the record on page 3 of 4 pages filed on October 24, 2011), which the Board overlooked, indicating that Petitioner is storing livestock rail cars on the Parcel, which livestock rail cars are to be used to transport livestock on Petitioner’s Creede Branch;
- (B) The storage of rail cars, even rail cars out-of-service, particularly when those out-of-service rail cars are to be rehabilitated for revenue rail use, is an “integral part of the railroad’s interstate operations;”
- (C) Petitioner’s storage-of-livestock-rail-cars use of the Parcel constitutes “Transportation,” for Petitioner’s storage-of-livestock-rail-cars on the Parcel, “includes ... a ... property, facility ... **or equipment of any kind related to the movement of passengers or property, or both, by rail**, regardless of ownership or an agreement concerning use; and (B) services related to that movement, including ... **storage ... of ... property.**”

## INTERCHANGE AGREEMENT

The Board made the statement:

“DRGHF does not contend, nor does it present evidence to show, that it has entered into interchange agreements with any interstate carrier ... or plans to seek agreements with any other carrier.” Op. at 10.

While Petitioner does not presently have a **formal** interchange agreement with its connecting railroad, **it does have an informal interchange agreement** with the San Luis & Rio Grande Railroad (“SLRG”). The Board even tacitly acknowledged the existence of such an informal interchange agreement, when the Board noted that:

“DRGHG claims that it leased both a concession car, which had been rehabilitated on the Parcel, and a locomotive to SLRG in 2006-2007, and that these actions constitute participation in interstate rail service, but that is not the case.” Op. at 10.

Ironically, the Board addressed a situation nearly identical to the facts in this case. In *Norfolk Southern – Petition of a Declaratory Order – Interchange with Reading, Blue Mountain & Northern Railroad* STB Docket# NOR 42078 decided April 29<sup>th</sup>, 2003 the agency found that the lack of interchange agreement is NOT an impediment to interstate commerce when the carriers are in fact interchanging cars with one another.

Prior to Petitioner leasing its concession car, and its locomotive, to the SLRG, the concession car and locomotive were stored on the Parcel. For the SLRG to use the concession car and the locomotive, they had to be “interchanged” with the SLRG. Likewise, when the SLRG returned the two cars after its lease expired, the two cars had to be “interchanged” with Petitioner’s railroad, in order to move the cars from the SLRG line of railroad to the Petitioner’s line of railroad.

As mentioned in Petitioner’s Petition for Stay, the Petitioner plans to seek a formal interchange agreement with the rail carrier that it connects to, namely, the San Luis & Rio

Grande Railroad. As noted above however, the lack of a formal interchange agreement does not preclude carriers from, in fact, interchange cars in interstate service.

### **PETITIONER'S LOCOMOTIVES AND RAILCARS**

The Board noted in footnote 46, on p. 10 of its Decision, that Petitioner's locomotive was being stored on the Parcel in 2006-2007, and that in 2006-2007, the Locomotive was leased to the SLRG. The record further indicates that the locomotive was returned to Petitioner when the lease expired.

The Board **incorrectly** held that the **leasing of rail cars by a carrier**, (as opposed to the storage of rail cars by a carrier) was not "Transportation," citing *Gen. Am. Tank Car Corp. V. El Dorado Terminal Co.*, 308 U.S. 422, 428-429 (1940).

In the Tank Car case, the tank cars were owned by a non-carrier. The Supreme Court held that the leasing of rail cars **owned by non-carriers**, would not cause the non-carrier tank car firm to become a common carrier by rail.

The leasing of rail cars that are owned **by a rail carrier**, is an "integral part of the railroad's interstate operations." It is so "integral," that there is an entire Part 1033 in 49 CFR devoted to "Car Service," which is in fact the leasing of rail cars to shippers, or to other railroads.

For example, 49 CFR 1033.1 (a) defines the words "car," "car hire," "owner" and "user" as follows:

- "(1) *Car*. A freight car bearing railroad reporting marks, other than an excluded boxcar as defined in §1039.14(c)(2) of this chapter whenever it is owned or leased by any class III carrier and bears a class III carrier's reporting marks.
- (2) *Car hire*. Compensation to be paid by a user to an owner for use of a car.
- (5) *Owner*. A rail carrier entitled to receive car hire on cars bearing its reporting marks.

(7) *User*. A rail carrier in possession of a car of which it is not the owner.

**Petitioner is a rail carrier.** It owns a locomotive and equipment which has its reporting marks stenciled on it, and thus is an “owner” as that word is defined in 49 CFR 1033.1(a)(5). That locomotive also meets the definition of a “car,” as defined in 49 CFR 1033.1(a)(1). That locomotive was in the possession of a “user,” as that word is defined in 49 CFR 1033.1(1)(7). Compensation was paid by a “user” to an “owner” for use of a “car.” That constitutes “car service.” That locomotive and the railcars at least one of the railcars in question was stored on the Parcel. “Car service,” is an “integral part of the railroad’s interstate operations.” “Transportation,” “includes ... a ... property, facility ... **or equipment of any kind related to the movement of passengers or property, or both, by rail,** regardless of ownership or an agreement concerning use; and (B) services related to that movement, including ... **storage** ... of ... property.”

Therefore, **Petitioner argues that the LEASING** of Petitioner’s locomotive and equipment to the SLRG, constituted “transportation” and “car service,” as those terms have been defined.

The Board **incorrectly** held that the **storage** (as opposed to the leasing) of Petitioner’s locomotive on the Parcel, did not constitute “transportation.”

A locomotive is a necessary piece of railroad equipment that a rail carrier needs to move rail cars. That makes a locomotive an “integral part of the railroad’s interstate operations;”

A locomotive is “**equipment of any kind related to the movement of passengers or property, or both, by rail.**” Consequently, the storage of a locomotive, constitutes “transportation.”

**Petitioner argues that** Petitioner’s **STORAGE** (as opposed to the leasing) of Petitioner’s locomotives or railcars on the Parcel, is a use of the Parcel which constitutes

“Transportation,” for Petitioner’s storage of Petitioner’s locomotive on the Parcel, “includes ... a ... property, facility ... **or equipment of any kind related to the movement of passengers or property, or both, by rail,** regardless of ownership or an agreement concerning use; and (B) services related to that movement, including ... **storage** ... of ... property.”

## **PETITIONER PLANS TO CONDUCT FREIGHT MOVEMENTS ON THE PARCEL**

In its decision, the Board **incorrectly** stated:

“DRGHF has provided no evidence to show that it conducts, **or has specific plans to conduct, any freight movements as part of the interstate rail network.**” Op. at 10. Bold added.

Petitioner’s new director of freight services has ascertained that there are a number of shippers who would like rail trans-loading service in the San Luis Valley and beyond.

As stated in Petitioner’s Petition for Stay, Petitioner is finalizing plans to file a Notice of Exemption / Individual Exemption, to acquire and operate the Parcel in Monte Vista, as a line of railroad, if such a petition is, in fact, required.

## **NEW EVIDENCE**

This is **new evidence**, which was not available at the time the Petition for Declaratory Order was filed, nor at the time Petitioner’s Opening Statement was filed (in 2012).

### ***Railroad Retirement Board***

In their reply, the respondents argued that the Foundation never sought a determination from the Railroad Retirement Board (RRB) regarding the status of the Foundation’s employees.

On March 20, 2013, the RRB determined that the Foundation is line haul rail carrier “operating in interstate commerce”. See: Exhibit 1- *RRB decision* at 2.

This Board's decision seems to be inconsistent with the findings of the RRB decision that found that the Foundation is "operating in interstate commerce."

#### Published Tariff

In 2013, the Foundation published its first Freight Tariff. Before this proceeding, the Foundation lacked certain institutional knowledge which the Respondent's seemed to pounce upon. Thanks to the generosity of our friends and allies, the Foundation was able to immediately remediate certain deficiencies in our organization.

Since the Board appears to be challenging whether the Foundation is in fact "holding out", the Foundation respectfully submits its Tariff as further evidence of its "holding out" to the general public. In *SMS Rail Services, Inc.– Petition for a Declaratory Order* STB Docket# 34483 decided January 19<sup>th</sup> 2005, the Board noted that the publishing of a Tariff and common carrier rates is consistent with a carrier "holding out".

In order to provide the Board with this new evidence, a copy of the Tariff is hereto attached as Exhibit #2.

#### New "Freight Service" Employees

The most substantial change that occurred in 2013 was the designating and hiring of employees dedicated solely to handling the Foundation's common carrier freight obligations. Mr. Eric S. Strohmeyer agreed to personally take on the role of the Foundation's Director of Freight Services. Mr. Strohmeyer is a person well known to this Board and will be directly in charge of overseeing and managing all Freight Services for the Foundation.

Mr. Strohmeyer will be filing a verified statement in this proceeding detailing the Foundation's past, present, and future plans and initiatives. The Foundation will allow him to articulate those efforts in his own words.

All this new evidence addresses, and contradicts the Board's **incorrect** assumption, that Petitioner has no "specific plans to conduct any freight movements as part of the interstate rail

network.”

Petitioner not only has “specific plans to conduct any freight movements as part of the interstate rail network,” but those “specific plans” are about to be implemented, and involve “freight movements as part of the interstate rail network,” on the very Parcel that is the subject of this proceeding.

### **NEW INTERSTATE TRAFFIC**

Petitioner is in the process of negotiating an agreement with an East Coast Shipper, which will entail the movement of rail cars between Petitioner’s Line and the East Coast.

Petitioner’s new director has ascertained that there is an unmet demand for public trans-loading facilities in Monte Vista, Colorado. Consequently, Petitioner is evaluating plans to file a Notice of Exemption / Individual Exemption, to acquire and operate Petitioner’s Monte Vista Parcel as a second line of railroad.

### **CONCLUSION**

Petitioner has directed the Board’s attention to sections of the record, which support Petitioner’s argument that the Parcel is / has been / will continue to be used for “transportation” purposes, to wit: to store and repair railcars, such as our livestock cars, Petitioner’s locomotive, and other cars used in “car service;” and to store out-of-service rail cars that are being used to store Petitioner’s MOW tools, equipment and material.

Petitioner has argued “material error” occurred, when the Board misperceived how certain commodities handled were being billed in less-than-car-loads, (river rafts) and misperceived who the “local shippers” were that were shipping goods in less-than-car-loads (raft owners, not excursion passengers).

Petitioner has argued that the Board misperceived that there was no interchange

agreement with the SLRG. There is, and has been, an informal (not written) interchange agreement between Petitioner and the SLRG, and that interchange of rail cars has in fact occurred.

Petitioner has introduced into the record new evidence, which was not readily available at the time the Petition for Declaratory Order was filed, to wit: That Petitioner plans to attempt to execute a formal interchange agreement with the SLRG; That Petitioner plans to file a Notice of Exemption / Individual Exemption to acquire and operate the Parcel as a second line of railroad; That Petitioner plans to provide public trans-load facilities on the Parcel; That Petitioner is negotiating an agreement with an East Coast shipper which will entail the movement of rail cars between Petitioner's Line and the East Coast.

WHEREFORE, Petitioner respectfully prays that the Board **reconsider** its August 18, 2014 decision in light of the evidence and arguments presented above, then conclude that (A) Petitioner's present / future use of the Parcel would constitute "Transportation," as that term in defined, and that (B) Monte Vista's Zoning Ordinance is preempted by 49 U.S.C. 10501(b); and (C) for such other and further relief as would be appropriate.

Respectfully,

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Donald H. Shank  
Executive Director

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(719) 873-5901  
Counsel for the  
Denver & Rio Grande Railway  
Historical Foundation, Inc.

## **CERTIFICATE OF SERVICE**

I hereby certify that on September 8, 2014, I served via first class mail, postage prepaid, a copy of this Petition for Reconsideration on the following:

Mr. Eugene L. Farish, Esq.  
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Counsel for the San Luis and  
Rio Grande Railway

Donald H. Shank

# **EXHIBIT # 1**

**B.C.D. 13-08**

**March 20, 2013**

**EMPLOYER STATUS DETERMINATION**

Denver & Rio Grande Railway Historical Foundation (D&RGHF) d/b/a Denver & Rio Grande Railroad, L.L.C.

This is a determination of the Railroad Retirement Board concerning the status of the Denver & Rio Grande Railway Historical Foundation (D&RGHF) d/b/a Denver & Rio Grande Railroad, L.L.C. as an employer under the Railroad Retirement Act (45 U.S.C. §231 et seq.) and the Railroad Unemployment Insurance Act (45 U.S.C. §351 et seq.).

In Surface Transportation Board (STB) Finance Docket No. AB-33 (Sub-No. 132X), decided May 6, 1999, Union Pacific Railroad Company (UP) (B.A. No. 1713) filed a verified notice of exemption to abandon and discontinue service over a 21.6-mile line of railroad known as the Creede Branch, extending from milepost 299.3 near Derrick to the end of the line at milepost 320.9 at Creede, in Rio Grande and Mineral Counties, Colorado. An offer of financial assistance was filed by D&RGHF. UP accepted the offer and advised the STB that UP and D&RGHF had reached an agreement for the purchase and sale of the rail line.

Information regarding D&RGHF was furnished by Mr. Donald H. Shank, President and CEO of D&RGHF. In a letter dated September 7, 2012, Mr. Shank stated that D&RGHF is an IRS 501(c) (3) public charity, incorporated in the State of Colorado, which is governed by a Board of Directors. According to Mr. Shank, on May 24, 2000, D&RGHF purchased a rail line from the UP and limited operations, using solely volunteer labor, began on May 26, 2009. Mr. Shank stated that D&RGHF's track extends 20 miles from South Fork, Colorado (Derrick) milepost 299.30 to Willow Creek, Colorado (Creede) at milepost 319.92. D&RGHF currently employs two part-time employees who were first compensated on July 1, 2012. Mr. Shank stated that D&RGHF's track connects with the San Luis & Rio Grande Railroad (SLRG) (B.A. No. 3796), a wholly owned subsidiary of Iowa Pacific Holdings, at Derrick, Colorado (South Fork, Colorado) at milepost 319.30. According to Mr. Shank, D&RGHF currently operates the entire 20 miles of track from South Fork to Willow Creek, Colorado for carload and less-than-carload freight, and for summer passenger excursions. Mr. Shank stated that from the start of the line's acquisition in 2000, to the date of his letter (September 7, 2012), D&RGHF has held itself out to the public as the sole provider of rail freight services along the line and that no customer of Denver & Rio Grande Railway Historical Foundation (D&RGHF) d/b/a Denver & Rio Grande Railroad, L.L.C., had requested full carload service. Mr. Shank stated that

starting in 2011 D&RGHF began providing less-than-carload rail freight service. The service encompassed the movement of recreational vessels between South Fork and Wagon Wheel Gap, Colorado. Mr. Shank stated that total freight revenue for calendar year 2011 was approximately \$850.00. Mr. Shank stated that the D&RGHF has reached a tentative agreement with another entity to permit that entity to act as the “designated freight carrier” for the line. Mr. Shank further stated that the proposed transaction is not anticipated to be an exclusive operating agreement and that D&RGHF will retain the ability to provide limited rail freight services and will also retain a residual common carrier obligation for those services that the designated freight carrier may be permitted to provide. Mr. Shank stated that D&RGHF is retaining certain responsibilities including dispatching of the line and track maintenance and that employees performing those tasks will be supporting not only D&RGHF’s passenger operations, but also the operations of the designated freight carrier as well. D&RGHF will also be retaining the exclusive right to provide all LCL service over the line.

Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. §231(a)(1)), insofar as relevant here, defines a covered employer as:

(i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under part A of subtitle IV of Title 49, United States Code.

Section 1 of the RUIA contains essentially the same definition. (45 U.S.C. § 351.

The evidence of record establishes that D&RGHF is a line haul rail carrier operating in interstate commerce. Accordingly, it is determined that the Denver & Rio Grande Railway Historical Foundation (D&RGHF) d/b/a Denver & Rio Grande Railroad, L.L.C., became an employer within the meaning of section 1(a)(1)(i) of the Railroad Retirement Act (45 U.S.C. §231(a)(1)(i)) and the corresponding provision of the Railroad Unemployment Insurance Act effective May 26, 2009, the date as of which it commenced operations.

Original signed by:

FOR THE BOARD  
Martha P. Rico  
Secretary to the Board

## **EXHIBIT # 2**

**FT DRGR 8000-C (NEW)**

**DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION INC.**

**D/B/A**

# **DENVER & RIO GRANDE RAILROAD**

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## **FREIGHT TARIFF DRGR 8000-C (NEW)**

**NAMING**

**MISCELLANEOUS RULES AND CHARGES,**

**SWITCHING AND DEMURRAGE RULES AND CHARGES,**

**AND**

**LOCAL AND PROPORTIONAL RATES**

**APPLYING**

**FROM, TO, AND AT STATIONS ON THE**

**DENVER & RIO GRANDE RAILROAD (DRGR) IN COLORADO**

## **TARIFF**

**This tariff is applicable on all interstate and intrastate traffic, except where expressly provided to the contrary in connection with particular rates and provisions contained herein.**

**ISSUED: Dec. 10, 2012**

**EFFECTIVE: Jan. 1, 2013**

**ISSUED BY**

**Donald H Shank, President**

**Denver & Rio Grande Railway Historical Foundation, Inc.**

**20 N. Broadway St**

**Monte Vista, CO 81144**

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**FT DRGR 8000**

**RULES AND OTHER GOVERNING PROVISIONS  
GENERAL RULES AND REGULATIONS**

**ITEM 10**

**REFERENCE TO TARIFFS, ITEMS, NOTES, RULES, ETC.**

Where reference is made in this tariff to tariffs, items, notes, rules, etc., such references are continuous and include supplements to and successive issues of such tariffs and reissues of such items, notes, rules, etc.

**ITEM 15**

**HAZARDOUS MATERIALS**

DRGR will only accept hazardous material shipments for shipment with advance notice only.

**ITEM 20**

**METHOD OF CANCELING ITEMS**

As this tariff is supplemented, numbered items with letter suffixes cancel corresponding numbered items in the original tariff or in a prior supplement. Letter suffixes will be used in alphabetical sequence starting with A.

Example: Item 445-A cancels Item 445 and Item 365-B cancels Item 365-A in a prior supplement which in turn canceled Item 365.

**ITEM 30**

**SUPPLEMENTS AND REISSUES**

When reference is made in this tariff, or supplements, to other publications for rates or other information, it includes "Supplements thereto or successive issues thereof." Where reference is made in this tariff to items, it includes "reissues" of such items.

**ITEM 50**

**MILEAGE CHARGES ON PRIVATELY OWNED CARS**

DRGR will not pay mileage charges on privately owned cars when moving from, to or via stations on DRGR.

**RULES AND OTHER GOVERNING PROVISIONS  
GENERAL RULES AND REGULATIONS  
(continued)**

**ITEM 60**

**LIABILITY AND CLAIMS**

Carrier's liability for any alleged loss, damage or delay to any commodity shall be in accordance with standards imposed in 49 USC 11707 and 49 CFR Part 1005.

Securement of lading shall be in accordance with the rules and/or recommendations of the Association of American Railroads, or as modified to meet the needs of customer.

**ITEM 70**

**PAYMENT TERMS**

All payments for service covered herein are due and payable within fifteen (15) calendar days following presentation of the Freight Bill. Payments received after the expiration of the credit period shall be subject to a service charge of two percent (2%) per month (or fraction thereof) of the outstanding balance.

**ITEM 90**

**PAYMENT OF CHARGES**

Customer shall be liable for the payment of any and all transportation, demurrage and other charges accruing on traffic from, to and at stations on DRGR. Nothing herein shall limit the right of DRGR to require at time of movement, shipment or delivery the prepayment or guarantee of such charges.

DRGR reserves the right to refuse shipment from customer, make delivery of shipment to customer, deliver loaded cars to interchange, or accept request for any other movement of car without payment or guarantee of all outstanding and current charges.

DRGR reserves the right, at its sole discretion, to cancel the credit of any customer at any time.

Cars held for payment of charges will be subject to demurrage rules and charges in Item 120. The exception for private cars in paragraph 4, Item 120, will not apply and private cars held for payment of charges will be subject to demurrage.

## **SECTION 1**

### **MISCELLANEOUS RULES AND CHARGES**

#### **ITEM 100**

##### **RE-SPOT (SET-BACK) CHARGES**

A charge of \$150.00 per car will be assessed on cars that have been placed for loading or unloading and subsequently removed and re-spotted (set-back) in order to place or move other cars.

#### **ITEM 110**

##### **TURNING OF CARS TO PERMIT LOADING OR UNLOADING, ETC.**

If cars are turned at request of customer to facilitate loading or unloading, or for any other purpose, a charge of \$150.00 per car per occurrence will be assessed and will be in addition to all other applicable charges. (See Note, this item.)

Note - Charge will not apply to properly placarded boxcars.

#### **ITEM 120**

##### **SPECIAL FREIGHT TRAIN SERVICE**

Special Freight Train Service is the movement of a train in other than normal freight train service at the specific request of the shipper or consignee, or as may be required due to other conditions outside normal train operations.

The charge for special freight train service will be \$200.00 per hour, minimum \$1000.00 per occurrence, and will be in addition to all other charges associated with the movement.

Charges to be calculated from the time the crew and locomotive report for special service until the return of crew and locomotive to starting point.

(This railroad reserves the right to restrict or modify any request for special freight train service.)

#### **ITEM 130**

##### **CARS INTERCHANGED IN ERROR**

A charge of \$150.00 per car will be assessed delivering carrier on all cars interchanged to the DRGR in error.

**SECTION 1**  
**MISCELLANEOUS RULES AND CHARGES**  
**(continued)**

**ITEM 140**

**EMPTY CARS ORDERED BUT NOT LOADED**

On empty cars that are ordered for loading and order is canceled and car is in route, or the service of switching or placing of car has been performed and the car is not loaded but returned to this railroad empty, a charge of \$150.00 per car will be assessed and collected from the person, firm or corporation ordering such cars. (See Note, this item.)

Note - Charge will not apply on cars unfit for loading, see Item 150, this tariff.)

**ITEM 150**

**IMPROPER CARS FURNISHED FOR LOADING BY CONNECTING LINES**

When cars ordered by industries for loading are refused on account of not being in proper condition to load, a charge of \$150.00 per car will be assessed against the railroad furnishing the car.

## **SECTION 2**

### **SWITCHING**

#### **ITEM 200**

##### **DEFINITION OF INTRA-PLANT SWITCHING**

A switching movement from one track to another within the same plant or industry, or from one location to another location on the same track within the same plant or industry.

#### **ITEM 210**

##### **ADDITIONAL SWITCHING**

Additional switching is a switch movement after car has been initially placed on public, private or assigned sidings, or on storage or interchange tracks.

#### **ITEM 220**

##### **INTRA-PLANT SWITCHING CHARGE**

DRGR will perform intra-plant switching at a charge of \$75.00 per car.

#### **ITEM 230**

##### **ADDITIONAL SWITCHING CHARGE**

DRGR will perform additional switching at a charge of \$75.00 per car.

## **SECTION 3**

### **CAR DEMURRAGE RULES AND CHARGES**

#### **ITEM 300**

##### **APPLICATION**

Except where provided to the contrary, Demurrage Rules and Charges contained herein apply to all railroad and privately-owned cars held for or by consignors and consignees for any purpose.

#### **ITEM 310**

##### **HOLIDAYS**

Wherever reference is made to "holidays," it shall mean only the days listed below:

New Year's Day - January 1 (See Note 1)  
Washington's Birthday - Third Monday of February  
Memorial Day - Last Monday of May  
Independence Day - July 4 (See Note 1)  
Labor Day - First Monday of September  
Thanksgiving Day - Fourth Thursday of November  
Christmas Day - December 25 (See Note 1)

Note 1 - When this date occurs on a Sunday, the following Monday will be observed as the holiday.

#### **ITEM 320**

##### **ACTUAL PLACEMENT**

Actual Placement is made when a car is placed in an accessible position for loading or unloading or at a point previously designated by the consignor or consignee.

#### **ITEM 330**

##### **CONSTRUCTIVE PLACEMENT**

When a car consigned or ordered to a private track, industrial interchange track or other-than-public-delivery track cannot be actually placed because of a condition attributable to the consignor or consignee, such car will be held at available hold point and notice shall be sent or given the consignor or consignee that the car is being held and that this railroad is unable to effect placement; however, if car is placed on private track, industrial interchange track or other-than-public delivery track serving the consignor or consignee, the car will be considered constructively placed without notice.

**SECTION 3  
CAR DEMURRAGE RULES AND CHARGES  
(continued)**

**ITEM 340**

**FREE TIME**

Free time as follows will be allowed for each car:

Twenty-Four (24) hours to complete loading.  
Twenty-Four (24) hours to complete unloading.

Free time will be computed from the first 7:00 AM after placement, or after notification has been sent or given where required. For the purpose of computing free time, Saturdays, Sundays and holidays will be excluded.

**ITEM 350**

**DEMURRAGE CHARGES**

After expiration of free time allowed the following charges per car per day, or fraction of a day, will be made until car is released.

\$20.00 for each of the first four chargeable days,  
\$30.00 for each of the next two days,  
\$60.00 for each subsequent day.

The applicable charge will accrue on all Saturdays, Sundays and holidays subsequent to the first chargeable day, including a Saturday, Sunday or holiday immediately following the day on which the first chargeable day begins to run.

Note 1: Not applicable on privately-owned cars on private tracks.

Note 2 : Privately-owned cars which are first held on railroad tracks under constructive placement will be subject to demurrage charges provided for herein after expiration of free time (See Item 340) until such time car is placed on private tracks.

## **SECTION 4**

### **LOCAL AND PROPORTIONAL RATES**

(Rates in US dollars and cents, per car, except as noted)

#### **ITEM 400**

#### **LOCAL RATES**

**COMMODITY:** Freight, all Kinds (unless otherwise excluded)

Origin	Destination	Rate	Route
All DRGR Stations	All DRGR Stations	\$300*	1

Explanation of Route:

1. DRGR (local - direct)

Exclusions:

Excludes movement of hazardous material or explosives shipments.

Excludes less-than-carload (LCL) shipments

Excludes the movement of livestock

Hazardous materials or explosives shipments will be accepted by prior arrangement with DRGR only and are not governed by this Tariff.

Notes

\* - This rate covers all *intra*-line movements, regardless of origin and destination pairings

**SECTION 4  
LOCAL AND PROPORTIONAL RATES  
(continued)**

**ITEM 410**

**PROPORTIONAL RATES**

**COMMODITY:** Freight, all Kinds (unless otherwise excluded)

Origin or Destination	To / From Junction	Rate	Routes
Baxterville, CO	Derrick, CO	\$300.00*	2,3,4,5
Riverside, CO	Derrick, CO	\$400.00*	2,3,4,5
Wagon Wheel Gap, CO	Derrick, CO	\$500.00*	2,3,4,5
Wasson, CO	Derrick, CO	\$600.00*	2,3,4,5
Willow Creek, CO	Derrick, CO	\$700.00*	2,3,4,5

Explanation of Routes:

1. DRGR (local - direct)
2. DRGR - Derrick - SLRG
3. DRGR - Derrick - SLRG - Monte Vista - SLC
4. DRGR - Derrick - SLRG - Walsenberg - UP
5. DRGR - Derrick - SLRG - Walsenberg - UP - (beyond)

Exclusions

Excludes any type of hazardous material or explosives shipments.

Hazardous materials or explosives shipments will be accepted by prior arrangement with DRGR only and are not governed by this Tariff.

Notes

\* - this rate only applies to carloads moving between the junction at Derrick, CO and the corresponding DRGR origin/destination pair. Shippers may only use this tariff for any shipment tendered which is moving under a appropriate bill of lading pursuant to AAR Rule 11.

**SECTION 4  
LOCAL AND PROPORTIONAL RATES  
(continued)**

**ITEM 420**

**JOINT THROUGH RATES**

The DRGR currently has no published through rates. Any shipper or consignee seeking a published through rate may contact the DRGR to request a rate. Rates will be published as soon as possible after a request is received.

## **SECTION 5**

### **INDEX, ABBREVIATIONS, ENDNOTES**

#### **ITEM 500**

#### **EXPLANATION OF ABBREVIATIONS AND REFERENCE MARKS**

FT - Freight Tariff

DRGR – Denver & Rio Grande Railway Historical Foundation.

[A] - Addition

[I] - Increase

[NC] - Brought forward without change

[R] - Reduction

(Underscored portion denotes change)