

April 18, 2012

JOHN D. HEFFNER

Direct Fax 202-742-8607
Direct Phone 202-742-8607**BY E-FILING**

Ms. Cynthia A. Brown
Chief Administration
Office of Proceedings
Surface Transportation Board
395 D Street, S.W.
Washington, D.C. 20423-0001

**RE: FD 35496, Denver & Rio Grande Railway Historical Foundation, Inc.
d/b/a Denver & Rio Grande Railroad, LLC**

Dear Ms. Brown:

On behalf of the City of Monte Vista, CO, and the San Luis & Rio Grande Railway, Respondents, I am submitting for the Board's consideration their Joint Motion to Compel Discovery by Denver & Rio Grande Railway Historical Foundation, Inc., d/b/a Denver & Rio Grande Railroad, LLC ("the Petitioner"). Petitioner acknowledges having received a copy of Respondents' Joint Discovery Request on March 6, 2012, and has yet to either object or respond. Accordingly, Respondents conclude that Petitioner will not produce the requested documents or answer the questions propounded to it absent Board action.

Under the procedural schedule issued by the Board in its most recent order served April 2, 2012, Petitioner was given until April 9 to file its opening evidence with Respondents' replies due May 10. Rather than respond in a timely manner, Petitioner dribbled in a series of nonsubstantive documents to the Board over a several day period between April 9 and 12. Finally, on the afternoon of April 12, Petitioner submitted its long awaited opening evidence, three days late.

Under these circumstances, Respondents either ask the Board to strike Petitioner's statement as late and discontinue this proceeding for lack of prosecution. Should the Board continue these proceedings, Respondents request

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Petitioner to comply with its document and interrogatory requests and further order that Respondents will have 15 days from the receipt of Petitioner's discovery responses to file their reply evidence.

Sincerely yours,



John D. Heffner

Enclosures

cc: Mr. Donald H. Shank
Eugene Farish, Esq.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35496

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

PETITION FOR A DECLARATORY ORDER

**JOINT MOTION TO COMPEL DISCOVERY FILED BY
THE CITY OF MONTE VISTA, CO,
AND THE SAN LUIS & RIO GRANDE RAILWAY**

John D. Heffner
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Suite 640
Washington, D.C. 20006
(202) 742-8607

Dated: April 18, 2012

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35496

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

PETITION FOR A DECLARATORY ORDER

**JOINT MOTION TO COMPEL DISCOVERY OF
THE CITY OF MONTE VISTA
AND THE SAN LUIS & RIO GRANDE RAILWAY**

INTRODUCTION

Pursuant to 49 CFR §1114.3(a), the City of Monte Vista, CO, and the San Luis & Rio Grande Railway (hereinafter “Respondents”) jointly request that the Surface Transportation Board (“the Board”) issue an order compelling Petitioner Denver & Rio Grande Railway Historical Foundation d/b/a Denver & Rio Grande Railroad, LLC (“DRGRF” or “Petitioner”) to respond completely and without evasion to Respondents’ Discovery Request served on them on March 6, 2012, a copy of which is attached as Exhibit A. As yet, Petitioner has not responded or indicated when or whether it intends to respond. A copy of an email sent to Petitioner seeking an answer as to when a response can be expected is attached hereto as Exhibit B. In addition, the undersigned counsel called Petitioner’s local

attorney Ronald Howard, Esq., on April 16 to ascertain that information and was advised that he would contact his client for an answer. As of today, no additional information is available.

BACKGROUND AND PROCEDURAL HISTORY

By Petition filed on July 12, 2011, DRGRF seeks a Board ruling that the I.C.C. Termination Act (“ICCTA”) preempts certain activities it conducts on a rail siding and parcel of land located in the City of Monte Vista (“Monte Vista”) and adjacent to a common carrier line of railroad owned and operated by the San Luis & Rio Grande Railway (“SLRG”) from Monte Vista’s enforcement of city zoning ordinances.¹ Those activities appear to include the storage and repair of railroad cars and other railroad-related equipment that DRGRF uses in providing an excursion rail service over another rail line located about 30 miles west of the subject siding.² While DRGRF or its affiliate own the property in Monte Vista on which it conducts these activities, SLRG owns the rail siding that serves that property. SLRG also owns and operates the 30 miles of railroad that separates DRGRF’s line from the Monte Vista property.

On February 23, 2012, the Board served an order instituting a declaratory order proceeding and setting the following deadlines for the submission of

¹ The ordinances prohibit the storage of rail cars on commercially zoned property.

² DRGRF acquired that line of railroad extending between Derrick and Creede about 13 years ago in an offer of financial assistance proceeding. Union Pac. R.R.—Aban. Exemption— in Rio Grande & Mineral Cnty., Colo., AB 33 (Sub-No. 132X, STB served May 11, 1999.

evidence and argument: March 26, 2012, for DRGRF's opening evidence; April 26, 2012, for replies; and May 11, 2012, for DRGRF's rebuttal. On March 26, Petitioner sought an extension until April 9 to file its opening evidence claiming that it was unaware of the Board's February 23, order. Although the Board granted that request, Petitioner still failed to submit its opening evidence until April 12, three days after the Board's new deadline.

Concurrently with this motion, Respondents are submitting a letter requesting that the Board extend the current reply deadline of May 10. Respondents request that the Board set the deadline for submission of their replies for 15 days after Petitioner furnishes all of the evidence and information sought through Respondents' Joint Discovery Request.

ARGUMENT

The Board's rules of practice provide that "[p]arties may obtain discovery under this subpart regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding other than an informal proceeding." Furthermore those rules add, "[i]t is not grounds for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." 49 CFR §1114.21(a).

As the Board properly noted in its order served February 23, the central issue in this proceeding is whether the activities that DRGRF is conducting at Monte Vista or elsewhere constitute “transportation by a rail carrier.” If those activities are, as Respondents contend, the performance of a wholly intrastate tourist excursion service, Petitioner’s operations and facilities used in providing such service are not “transportation” within the Board’s jurisdiction and are not entitled to preemption. See, e.g., Fun Trains, Inc.—Operation Exemption—Lines of CSX Transp., Inc. & Fla. Dep’t of Transp., FD 33472, STB served Mar. 5, 1998. In order to assist the Board in its determination, Respondents have propounded a series of interrogatories and document requests for DRGRF to answer or provide.

The information that Respondents seek falls into the following broad categories: 1) DRGRF’s financial condition; 2) the physical condition of its railroad; 3) the nature and condition of DRGRF’s rolling stock and motive power; 4) DRGRF’s efforts to solicit and provide common carrier railroad service; and 5) DRGRF’s status as a “covered carrier” under the Railroad Retirement Act and the Railroad Unemployment Insurance Act. Respondents will briefly explain why each of the materials sought is relevant to this proceeding.

DRGRF’s financial condition. Respondents believe that production of Petitioner’s financial statements and tax returns will demonstrate that it lacks the financial resources to upgrade its line of railroad and bridges between Derrick and

the outskirts of Creede to handle the type of railroad equipment commonly used today to provide common carrier railroad service. Similarly, any liens, encumbrances, and judgments imposed on or rendered against DRGRF will be indicative of DRGRF's financial condition and ability to provide common carrier railroad service.

Physical condition of its railroad. Likewise, Respondents believe that the requested information will show that the present physical condition of DRGRF's line and bridges do not meet Federal Railroad Administration (FRA) standards for handling the types of locomotive power commonly used by short line railroads as well as the types of railroad cars currently used in common carrier freight service.

Nature and condition of motive power and rolling stock. Again Respondents believe that the requested information about Petitioner's locomotives and rolling stock will demonstrate that its equipment does not meet FRA standards and is not suitable for hauling freight or performing any service other than an excursion passenger service.

DRGRF's efforts to solicit and provide common carrier railroad service. Under Board precedent the essence of "common carriage" is the holding out to the public to provide rail service.³ Respondents contend that production of the

³ The fundamental test for determining whether an entity is a common carrier is whether there has been a holding out to serve the public as a common carrier. See, e.g., Santa Clara

requested information will show that DRGRF's sole intent is to market the line as an excursion passenger service, an amusement, not a common carrier rail service for moving freight or passengers. In particular, any evidence (or lack thereof) in the form of rate circulars, tariffs, transportation contracts, interchange agreements, and similar documents as well as car loadings and related revenues will be indicative of whether DRGRF is holding out its services as a rail common carrier.

DRGRF's status before the Railroad Retirement Board. Any carrier licensed by the Board and conducting operations in interstate or foreign commerce is a "rail carrier" for the purpose of coverage under the RRA and RUIA. Respondents have reason to believe that the Railroad Retirement Board has no record of DRGRF's existence, either because DRGRF has never registered with that agency or the Railroad Retirement Board does not regard it as a common carrier railroad. Accordingly, any evidence of DRGRF's status at that Railroad Retirement Board will bear heavily on the issue of whether it is a common carrier railroad eligible to claim preemption under the I.C.C.T.A. from Monte Vista's ordinances or simply an intrastate excursion passenger service outside the coverage of the RRA and RUIA and ineligible to claim preemption here.

CONCLUSION

Valley Transportation Authority – Acquisition – Union Pacific Railroad Company, STB Finance Docket No. 34094, slip op. at 3, STB served Nov. 16, 2001.

Accordingly, Respondents request that the Board issue a decision compelling DRGRF to respond to their Joint Discovery Request on or before May 3, 2012.

Respectfully submitted,



John D. Heffner
Strasburger & Price, LLP
1700 K Street, N.W.
Suite 640
Washington, D.C. 20006
(202) 742-8607

Dated: April 18, 2012

CERTIFICATE OF SERVICE

I, John D. Heffner, hereby certifies that I transmitted a copy of the foregoing Joint Motion to Compel Discovery of the City of Monte Vista, CO, and the San Luis & Rio Grande Railway to the following party by first class United States Mail and electronic mail this 18th day of April 2012:

Donald H. Shank



John D. Heffner

EXHIBIT A

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35496

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

PETITION FOR A DECLARATORY ORDER

**JOINT DISCOVERY REQUEST OF
THE CITY OF MONTE VISTA
AND THE SAN LUIS & RIO GRANDE RAILWAY**

John D. Heffner
Strasburger & Price, LLP
1700 K Street, N.W.
Suite 640
Washington, D.C. 20006
(202) 742-8607

Dated: March 1, 2012

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35496

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

PETITION FOR A DECLARATORY ORDER

**JOINT DISCOVERY REQUEST OF
THE CITY OF MONTE VISTA
AND THE SAN LUIS & RIO GRANDE RAILWAY**

Pursuant to 49 CFR Subpart B §1114 *et al* Respondents the City of Monte Vista, CO, and the San Luis & Rio Grande Railway (hereinafter “Respondents”) jointly request that Petitioner Denver & Rio Grande Railway Historical Foundation (“DRGRHF” or “Petitioner”) answer the following document requests and interrogatories. Each request should be answered separately and fully in writing and subscribed by an appropriate verification by a representative having personal knowledge of the requested information. Petitioner is requested to serve its responses within twenty days’ time.

DEFINITIONS

1. The names “Denver & Rio Grande Railway Historical Foundation” or any abbreviation thereof and “Petitioner” includes the DRGRHF and also any other corporation, company, or business founded or

controlled by Donald H. Shank including, but not limited to, Rio Grande Southern Railroad Co., LLC, Denver & Rio Grande Railroad, LLC, Colorado & Southern Railroad, Donald H. Shank Construction, or any predecessor or successor thereof and Donald H. Shank in his individual capacity.

2. “Railroad Retirement Board” means that agency that is in charge of administering the Railroad Retirement Act, 45 U.S.C. §231, and the Railroad Unemployment Insurance Act, 45 U.S.C. §351.
3. “Federal Railroad Administration” means that agency in charge of administering the Federal Railroad Safety Act, 49 U.S.C. §20101 and regulations thereunder.
4. “Colorado Department of Transportation” refers to that agency established under Colorado law for administering all transportation functions not assumed or possessed by the federal government.
5. “Communications” means all written documents exchanged between DRGRHF and another party whether in the form of a letter, memorandum, telegram, notice, decision, order, report, or email and whether transmitted by hand, United States Mail, overnight mail service, messenger or courier, or electronic transmission.

6. “Correspondence” means any sort of written document or other communication as defined above and regardless of the form of transmission.
7. “Promotional materials” means any sort of circular, advertisement, printed material, billboard, audio message, or electronic image intended to attract or persuade present or potential customers to ship freight by rail utilizing DRGRHF’s services.

INSTRUCTIONS

1. Use of the conjunctive includes the disjunctive and vice versa.
2. The construction of 49 CFR §1101.3 shall apply, including that a word in the singular includes the plural and vice versa.
3. If the person answering cannot supply the exact data in answering any request that calls for a numerical response, he or she should provide the best estimate of the data called for, indicate that he or she has provided the best estimate by making the notation “(est.)” in the response and describe the basis upon which the estimate was derived.
4. If the answering person claims any requested document is privileged from disclosure, he or she should state the basis for the claim or privilege, state the nature of the information or document withheld, state the facts upon which the claim of privilege is based, provide the

number of such documents which are being withheld from production on a claim of privilege along with an identification of each such document (author, addressee, date, length in pages and subject(s)) and answer any remaining part of the discovery request for which such claim is not made.

5. These document production requests and interrogatories are continuing in nature and responses should be supplemented promptly as more information or documents responsive to a request becomes available.

FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

1. Please furnish a copy of the financial (profit and loss) statements and balance sheets for the Denver & Rio Grande Railway Historical Foundation (“DRGRHF”) for the calendar years 2009, 2010, and 2011.
2. Please furnish a copy of the federal and state income tax returns filed by DRGRHF for the 2009, 2010, and 2011 tax years.
3. Please furnish an inventory or roster of all railroad equipment owned, leased, or operated by DRGRHF including, but not limited to, locomotives, passenger or freight cars, and work equipment. This inventory should include the numbers of cars or engines, the road numbers or other identifying information, the manufacturer and approximate date of manufacture, the model number or type, and, in the case of a locomotive, the horsepower. Please indicate whether the specific equipment is owned, leased, or used, and the name of any lessor or, in the case of equipment encumbered by any security agreement, lien, or encumbrance, the name of the creditor.
4. Please furnish copies of any citations, liens, levies, judgments, sanctions, penalties, notices, rulings, or administrative orders issued against DRGRHF during 2009, 2010, and 2011 by any state, local, or federal agency including any

environmental agency, tax collecting agency, city department, and transportation agency.

5. Please furnish copies of any ruling(s) by the United States Railroad Retirement Board (“RRB”) on the issue of whether DRGRHF is or is not a “covered employer” under the Railroad Retirement and Railroad Unemployment Insurance Acts.

6. Please furnish copies of all communications between DRGRHF and the RRB for the years 2009 through 2012.

7. Please furnish copies of all communications between DRGRHF and the Federal Railroad Administration (“FRA”) and between DRGRHF and the Colorado Department of Transportation for the years 2009 through 2012.

8. Please furnish copies of all tariffs, exempt circulars, and summaries of confidential shipping contracts published by, entered into, or to which DRGRHF is a party for the years 2009 through 2012.

9. Please furnish copies of all correspondence, promotional materials and website listings that DRGRHF has sent or received, published, or used to attract rail freight customers during the years 2009 through 2012.

10. Please provide a map or diagram of the entire railroad owned and operated by DRGRHF or any affiliate thereof indicating the rail weight, tie condition, and FRA track standard, and maximum operating speed per segment.

11. Please furnish a copy of all reports or estimates of the work required to enable DRGRHF to handle the types of railroad equipment commonly used today to transport freight in interchange service. If none exists, so state.

12. Please furnish a copy of the promissory note between DRGRHF and the Union Pacific Railroad Company (“UP”) which UP took back at the time it sold DRGRHF the line of railroad between Derrick and the end of the line at Creede, CO. If the note has been paid, please so state.

FIRST REQUEST FOR INTERROGATORIES

13. Has DRGRHF been a party to any litigation initiated or pending against it during the years 2009 through 2012, inclusive? If so, please identify that litigation

by (1) court or agency where pending, (2) case name and number, (3) parties to the proceeding, (4) the nature of the proceeding, and (5) a statement as to outcome or current status.

14. Does DRGRHF owe any real estate taxes for the years 2009 through 2012 that are currently unpaid? If so, please identify (1) the name of the taxing authority, (2) the amount of the tax, and (3) any penalties or interest imposed.

15. Please list all fines or levies imposed during the years 2009 through 2012, inclusive, identifying (1) the name of the agency imposing the fine or levy, (2) the nature of the fine or levy, and (3) the current status (whether paid, contested, dropped, etc.).

16. Please identify all current employees of DRGRHF and their current position.

17. Does DRGRHF own or operate any equipment on which there is a lien or security interest? If so, please identify the (1) the piece of equipment as per the information sought in document production request number 3, (2) provide the name and address of the creditor or other party that imposed the lien or security interest, (3) state where the lien or interest was recorded, and (4) provide all details about the lien or security interest.

18. Has any equipment owned or operated by DRGRHF been the subject of any repossession? If so, please identify the equipment and the circumstances of that repossession.

19. Please identify all freight traffic movements handled by DRGRHF for the years 2009 through 2012 indicating (1) the commodity involved, (2) the number of carloads or tonnage handled, (3) the origin and destination points, (4) the names of the consignees and consignors, (5) whether the traffic was interchanged with other carriers and the names of those carriers, and (6) DRGRHF's portion of the freight rates.

20. Please describe the businesses that you conduct under the name "Donald Shank Construction" at 20 N. Broadway Street, Monte Vista, CO 81144, and any business that you conduct at 0097 Ponderosa Drive, South Fork, CO 81154 under the name "Donald H. Shank." If you do not currently conduct any business under either of these names, please indicate accordingly.

21. Is any segment of the railroad line owned and operated by DRGRHF or any affiliate “excepted track” as that term is used in the FRA track standards?
22. Is any segment of the railroad line owned and operated by DRGRHF or any affiliate subject to a “slow order.” If so, please identify such slow order by milepost indicating the maximum operating speed at that location.
23. Please provide the current balance, if any, on the promissory note with UP referenced in document production request 12, and indicate the number of payments still required to be made before the loan represented by that note is paid in full. Please indicate whether DRGRHF is current or in default in its payments.

John D. Heffner
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(202) 742-8607

Dated: March 1, 2012

EXHIBIT B

Heffner, John D.

From: Heffner, John D.
Sent: Friday, April 13, 2012 10:05 AM
To: 'Donald Shank'
Cc: 'ron@rehowardlaw.com'
Subject: my discovery request

Mr. Shank, please advise as to when I can expect a response to my discovery request that I sent you a few weeks ago.

Strasburger
ATTORNEYS AT LAW

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4/18/2012