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SERVICE DATE – FEBRUARY 23, 2012

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35496

DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION D/B/A DENVER &
RIO GRANDE RAILROAD, L.L.C.—PETITION FOR DECLARATORY ORDER

Decided: February 22, 2012

The Denver & Rio Grande Railway Historical Foundation, Inc. (DRGHF),¹ a Class III railroad, filed a petition on July 12, 2011, asking the Board to declare that 49 U.S.C. § 10501(b) preempts municipal zoning law with respect to DRGHF's activities on a parcel of land leased by DRGHF in Monte Vista, Colo. As discussed below, a declaratory order proceeding will be instituted to resolve the controversy presented here.

BACKGROUND

In 1999, DRGHF obtained a 21.6-mile rail line extending between a point near Derrick, Colo., and Creede, Colo., known as the Creede Branch (the Line), from Union Pacific Railroad Company pursuant to an offer of financial assistance (OFA).² In its petition for declaratory order in this case, DRGHF states that it is upgrading the quality and utility of the track on the Creede Branch in preparation for requested freight movement. It asserts that the increasing price of silver is improving the potential for ore shipments on the Creede Branch. Currently, DRGHF operates a tourist excursion service on the Line.

DRGHF also leases a parcel of land in Monte Vista. The parcel, which is the subject of the present petition for declaratory order, is approximately 30 miles away from the Creede Branch but is connected to it by the San Luis & Rio Grande Railroad (SLRG). DRGHF states that it uses this parcel as a railcar rehabilitation and restoration facility, claiming that several railcars have been rebuilt on this property and used on the SLRG and on DRGHF's Line.

¹ DRGHF states that it is a Colorado not-for-profit corporation, d/b/a Denver & Rio Grande Railroad, L.L.C.

² Union Pac. R.R.—Aban. Exemption—in Rio Grande & Mineral Cntys., Colo., AB 33 (Sub-No. 132X) (STB served May 11, 1999). In 2008, the Board granted the City of Creede's application for adverse abandonment for a 1-mile portion of the Creede Branch within the Creede city limits. See Denver & Rio Grande Ry. Historical Found.—Adverse Aban.—in Mineral Cnty., Colo., AB 1014 (STB served May 21, 2008). The abandoned portion is not a subject of dispute in this proceeding.

DRGHF also claims that several more railcars are currently being rehabilitated on the Monte Vista parcel for use on DRGHF's Line.

In this proceeding, DRGHF seeks a declaratory order as to whether its use of the parcel of land it leases in Monte Vista is encompassed in the definition of "transportation by rail carrier" so that local zoning ordinances are preempted.³

On August 1, 2011, the City of Monte Vista and SLRG both filed responses opposing the petition. Monte Vista states that it has sought enforcement of Monte Vista municipal code section 12-17-110 (3) and (5) against DRGHF, for the unlawful storage of railcars upon commercially zoned property in the City. Monte Vista and SLRG argue that DRGHF is not a rail carrier and that the activities conducted at the parcel in Monte Vista do not constitute transportation. Monte Vista asserts that DRGHF would not be able to operate "full size" locomotives, passenger or freight cars on the Creede Branch without extensive bridge and track renovations, which it has no apparent ability to undertake.

With respect to the parcel at issue, Monte Vista and SLRG question whether DRGHF actually rehabilitates any railcars, contending that there appears to be no evidence of any rehabilitated cars being used on the Creede Branch. Instead, Monte Vista and SLRG claim that DRGHF uses the property to store various pieces of railroad or railroad-related equipment in various states of disrepair. Some of the railcars, according to Monte Vista and SLRG, are stored on track within the parcel, even though the deed assertedly reserves exclusive use of this track to SLRG. SLRG states that it has asked DRGHF to vacate the track, but DRGHF has not complied. Monte Vista claims that DRGHF transports the cars to the property by flatbed vehicle and crane and removes them in the same manner.

Alternatively, Monte Vista and SLRG argue that, even if DRGHF is a rail carrier conducting transportation-related activities, the allegedly preempted zoning ordinances fall within the city's historic police powers, and accordingly are not preempted.

³ Specifically, DRGHF frames the issue as follows:

"1. Is the land that is within the City Limits of Monte Vista, Colorado, currently served by and adjacent to a common carrier railroad, that had been the outer portions of the railroad's 400' wide right-of-way for 124 years, not platted nor reflecting any lot numbers, that is currently leased to a federally recognized railroad and being utilized for rail-related purposes only and contains only railcars in varying stages of rehabilitation, subject to city zoning ordinances?

2. If the answer to question 1 is negative, is this parcel of land then subject to these municipal ordinances and zoning regimen, or is it: i) federally preempted by 49 U.S.C. Para. 10501(b); and/or ii) invalidated because these municipal ordinances and zoning regimen conflict with the Commerce Clause of the United States Constitution?"

Pet. at 3-4. To the extent that DRGHF's question 2.(ii) raises an issue under the "dormant commerce clause" of the United States Constitution, its claim must be brought before an appropriate court rather than the Board. See Hi Tech Trans, LLC—Pet. for Declaratory Order—Hudson Cnty., N.J., FD 34192, slip op. at 4-5 n.8 (STB served Nov. 20, 2002).

On September 8, 2011, DRGHF submitted a request for leave to respond to the replies of SLRG and Monte Vista. Monte Vista and SLRG submitted responses requesting that the Board deny DRGHF's request and reject its reply, arguing that DRGHF's promised reply would be late and its request did not include any explanation or justification for the late filing.

On October 11, 2011, DRGHF submitted its response to SLRG's reply. DRGHF claims that, in addition to its tourist excursion service, it also carries less-than-carload freight for three local shippers. According to DRGHF, its Monte Vista parcel is not physically disconnected from the Creede Branch because the SLRG connects them. DRGHF asserts that the switch into the Monte Vista parcel has been disabled since 2008, when DRGHF declined to pay switch fees to SLRG. DRGHF contends that it modified one of the cars on the Monte Vista parcel for use by SLRG, which SLRG used as a concession car in its passenger operation during 2006 and 2007, and DRGHF attached pictures of this car as an exhibit to its pleading. In response to SLRG's statement that DRGHF is storing cars on the track in contravention of the terms of its deed, DRGHF claims that SLRG placed these cars on the track and has refused to return them to DRGHF as requested.

PRELIMINARY MATTERS

On October 27, 2011, SLRG filed a motion to strike DRGHF's response. SLRG argues that DRGHF's response is late, a prohibited reply to a reply, unverified, and contains material that is irrelevant, immaterial, impertinent, and scandalous. Because of the fact-intensive nature of this particular declaratory order proceeding, the Board will deny SLRG's motion to strike in order to allow the development of a more complete record. However, going forward, all parties are admonished to adhere to the Board's rules and procedures, including those regarding filing, service, verification, and decorum.

DISCUSSION AND CONCLUSIONS

Under the Administrative Procedure Act, 5 U.S.C. § 554(e) and 49 U.S.C. § 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. We have broad discretion to determine whether to issue a declaratory order. See Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C.2d 675 (1989). It is appropriate here to institute a declaratory order proceeding to provide clarification on the question presented: whether federal law preempts municipal zoning law as applied to DRGHF's activities on the parcel of land in Monte Vista.

In 49 U.S.C. § 10501(a), Congress has given the Board jurisdiction over "transportation by rail carrier." As modified by the ICC Termination Act of 1995,⁴ 49 U.S.C. § 10501(b) expressly provides that, where the Board has such jurisdiction, that jurisdiction is "exclusive," and therefore certain state and local laws—including local zoning and permitting laws and laws

⁴ Pub. L. No. 104-88, 109 Stat. 803 (1995).

that have the effect of managing or governing rail transportation—are generally preempted.⁵ To be within the Board’s jurisdiction and thus covered by § 10501(b) preemption, an activity (1) must constitute “transportation,” and (2) must be performed by, or under the auspices of, a “rail carrier.”⁶

With certain exceptions not relevant here,⁷ a “rail carrier” is “a person providing common carrier railroad transportation for compensation.” 49 U.S.C. § 10102(5). The term “transportation” is defined broadly to include property and facilities related to the movement of passengers or property by rail. See 49 U.S.C. § 10102(9)(A); Green Mountain R.R., 404 F.3d at 642. That term also includes all of the services related to that movement, including receipt, delivery, transfer and handling of property. See 49 U.S.C. § 10102(9)(B). However, a wholly intrastate tourist excursion service and facilities used solely in providing such service are not transportation within the Board’s jurisdiction. 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).

The record does not contain sufficient evidence to determine whether the activities currently taking place on the Monte Vista parcel are part of “transportation” by a “rail carrier.” Therefore, the Board will institute a declaratory order proceeding in this case to ensure that the record related to whether DRGHF’s activities at Monte Vista fall within the Board’s jurisdiction is complete.

The parties shall comply with the procedural schedule set forth in Ordering Paragraph 3 below. In presenting its case, DRGHF should submit evidence documenting with specificity the activities it claims are part of “transportation” by a “rail carrier” and should identify the specific “transportation” of which these activities are allegedly a part. However, DRGHF is not limited to providing these categories of information; it should also provide any other information and evidence necessary to present a complete prima facie case that its activities on the Monte Vista parcel fall within the statutory definition of “transportation” by “rail carrier.”

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

⁵ For an explanation of the scope of federal preemption under 49 U.S.C. § 10501(b), see, e.g., New York Susquehanna & Western Railway v. Jackson, 500 F.3d 238, 252-55 (3d Cir. 2007); Green Mountain Railroad v. Vermont, 404 F.3d 638, 642 (2d Cir. 2005); City of Lincoln—Petition for Declaratory Order, FD 34425 (STB served Aug. 12, 2004), affirmed, City of Lincoln v. STB, 414 F.3d 858 (8th Cir. 2005).

⁶ 49 U.S.C. § 10501(a)(1), (b)(1); see N.Y. & Atl. Ry. v. STB, 635 F.3d 66, 71-72 (2d Cir. 2011); Hi Tech Trans, LLC v. New Jersey, 382 F.3d 295, 308 (3d Cir. 2004); Fla. E. Coast Ry. v. City of W. Palm Beach, 266 F.3d 1324 (11th Cir. 2001).

⁷ The term “rail carrier” does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation. 49 U.S.C. § 10102(5).

It is ordered:

1. SLRG's motion to strike is denied.
2. A declaratory order proceeding is instituted.
3. DRGHF's opening evidence is due by March 26, 2012. Replies are due by April 26, 2012. DRGHF's rebuttal is due by May 11, 2012.
4. This decision is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.