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SERVICE DATE – DECEMBER 20, 2010

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35380

SAN LUIS & RIO GRANDE RAILROAD—PETITION FOR A DECLARATORY ORDER

Decided: December 17, 2010

Digest:¹ This decision denies the railroad's motions to strike certain filings as late-filed and grants a request for a public meeting in Conejos County, Colorado, which will be conducted by Board staff.

BACKGROUND

In response to a petition filed by San Luis & Rio Grande Railroad (SLRG), the Board instituted a declaratory order proceeding under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 on August 12, 2010, to determine whether the Board's jurisdiction preempts the land-use code of Conejos County, Colorado that may otherwise apply to SLRG's proposed operation of a truck-to-rail transload facility in Antonito, Colorado. San Luis & Rio Grande R.R.—Petition for a Declaratory Order, FD 35380 (STB served Aug. 12, 2010) (August decision). Specifically, the facility will be used to transfer containers and/or bags of contaminated soil and debris from trucks originating at Los Alamos National Laboratory (LANL) in New Mexico to railcars.

In the August decision instituting a proceeding, the Board opened the matter for public comment given the novel issues raised and gave SLRG the opportunity to supplement its filing. The Board requested that the filings focus on issues related to the Clean Railroads Act of 2008, 49 U.S.C. §§ 10501(c)(2), 10908-10910 (CRA), including whether SLRG's containers are original shipping containers under 49 U.S.C. § 10908(e)(1)(H)(i), and whether the soil SLRG plans to transload and transport is subject to the CRA. The August decision also established an initial procedural schedule.

In response to the Board's request for public comments, the Board of County Commissioners of Conejos County, Colorado (County Commissioners) and Conejos County Clean Water, Inc. (CCCW), along with several individuals and community organizations, filed timely comments on October 12, 2010. In its extensive comments, CCCW included a request for a public hearing proceeding in Conejos County. In support of this request, CCCW attached a letter from its Chair explaining that Conejos County is the poorest county in Colorado with a

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

median income of \$24,744, making it almost impossible for its residents to travel to Washington, DC to participate in this proceeding if the Board were to hold a hearing at its headquarters. The letter was accompanied by a petition with approximately 145 signatures in support of the request. Several commenters, both individuals and organizations, timely filed in support of CCCW, including its request for a public hearing proceeding in Conejos County.

On October 27, 2010, SLRG filed its reply to the comments and, among other things, argued that the Board should not hold a field hearing given the Board's limited resources and the fact that substantial written comments were already submitted. SLRG also notified the Board it would file its own petition of over 1,000 signatures in support of its project, which it has done.

On November 5, 2010, CCCW filed additional signatures to the petition it included in its October 12 comments (November 5 filing). Also, CCCW filed with the Board on November 8, 2010, a copy of a complaint it and others filed in the United States District Court for the District of Colorado against the Department of Energy and others, regarding the underlying decision by those entities to approve and fund the transportation, transfer, and storage of waste materials from LANL (complaint). On November 23, 2010, CCCW filed a second group of additional signatures to the petition it had filed with its October 12 comments (November 23 filing).

In response to the November 5 filing and the filing of the copy of the complaint, SLRG filed a letter requesting that the Board deny the request for a field hearing in the November 5 filing, and strike both the November 5 filing and the complaint. SLRG argues, citing 49 C.F.R. § 1112.10, that the request for a field hearing does not explain why written submissions are inadequate to resolve the dispute. Additionally, SLRG claims the complaint is beyond the Board's jurisdiction and irrelevant because neither SLRG nor the Board are parties to the Federal case. SLRG also argues that both filings should be struck because they were late-filed. On November 24, 2010, in response to the November 23 filing, SLRG filed another letter, which the Board reads as a second motion to strike that reiterates its arguments in opposition to the request for field hearing.

For the reasons stated below the Board will deny the motions to strike and grant CCCW's request for an opportunity to provide oral public comments in Conejos County, to the extent discussed below.

DISCUSSION AND CONCLUSIONS

As the Board explained in the August decision, this matter involves novel issues for which it chose to seek public comment. As the pleadings falling on both sides of the preemption issue make clear, this matter also involves important issues for the residents of Conejos County. Given these circumstances, the Board will grant CCCW's request for the opportunity to provide oral public comments in Conejos County. The Board's staff will hold a public meeting to allow the public to comment on the proceeding. The exact time, location, and other details will be announced in a separate notice.

As to the motions to strike, the Board reads the November 5 and the November 23 filings as supplements to CCCW's request for an opportunity to provide oral public comments, and not

as separate late-filed requests for a field hearing, as SLRG claims. Indeed, SLRG was aware of the request for the opportunity to provide oral public comments in Conejos County and responded to that request in its reply. The fact that CCCW filed additional signatures on November 5 and 23, 2010, to supplement its request did not change the substance of the request or arguments in support thereof. Therefore, the Board will accept the November 5 and November 23 filings and deny the motions to strike them.

Regarding the complaint, it is a publicly available document that, although not directly involving the Board or SLRG, does relate to the underlying project to dispose of the LANL waste. Furthermore, the complaint was filed in Federal district court on November 1, 2010, and, therefore, was not available for filing with CCCW's October 12 comments. The Board will deny the motion to strike the copy of the complaint.

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

It is ordered:

1. The request for an opportunity to provide oral public comments will be granted as discussed above and Board staff will conduct a public meeting in Conejos County at a time and place to be determined in a separate notice.
2. The motions to strike will be denied as discussed above.
3. This decision is effective on its date of service.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Nottingham.