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SERVICE DATE – AUGUST 12, 2010

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35380

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

AGENCY: Surface Transportation Board.

ACTION: Institution of declaratory order proceeding; request for comments.

SUMMARY: In response to a petition filed by the San Luis & Rio Grande Railroad (SLRG), the Board is instituting a declaratory order proceeding under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 to determine whether the Board's jurisdiction preempts the land use code of Conejos County, Colo. (County) that might otherwise apply to SLRG's proposed operation of a containerized truck-to-rail solid waste transload facility at Antonito, Colo. No responses to the petition have been filed. As discussed below, the Board will provide SLRG an opportunity to supplement its filing and invites public comments in response, with a particular focus on, but not limited to, issues related to the Clean Railroads Act of 2008, 49 U.S.C. §§ 10501(c)(2), 10908-10910 (CRA).

DATES: SLRG's opening statement is due August 27, 2010. Comments are due September 27, 2010. SLRG's reply to comments is due October 12, 2010.¹

ADDRESSES: Filings may be submitted either via the Board's e-filing format or in traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions at the E-FILING link on the Board's website at <http://www.stb.dot.gov>. Any person submitting a filing in the traditional paper format should send an original and 10 copies referring to Docket No. FD 35380 to: Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423-0001. In addition, one copy of each comment filed in this proceeding must be sent (and may be sent by e-mail only if service by e-mail is acceptable to the recipient) to SLRG's representative, John D. Heffner, 1750 K Street, N.W., Suite 200, Washington, D.C. 20006. When SLRG files its reply to comments, one copy of that filing must be sent (and may be sent by e-mail only if service by e-mail is acceptable to the recipient) to each commenter.

¹ SLRG's petition included a proposed expedited schedule for presentation of evidence and legal argument. Because of the novel issues raised in this proceeding, however, the Board has chosen to seek public comment. A decision in the matter will be issued after thorough consideration of all submissions.

Copies of written comments will be available for viewing and self-copying at the Board's Public Docket Room, Room 131, and will be posted to the Board's website.

FOR FURTHER INFORMATION, CONTACT: Joseph H. Dettmar, (202) 245-0395.
[Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at (800) 877-8339.]

SUPPLEMENTAL INFORMATION: SLRG's petition for declaratory order concerns its transload facility in the County. SLRG explains that it has hired a contractor, Alcon Construction, Inc. (Alcon), to operate the facility. According to SLRG, Alcon intends to transfer sealed containers or bags of contaminated dirt from trucks originating at Los Alamos National Laboratory in New Mexico to railcars. SLRG would then transport the dirt from Antonito to an interchange with Union Pacific Railroad at Walsenburg, Colo., for movement to its final destination at Clive, Utah. SLRG states that Alcon would function as its agent and that SLRG would be responsible for marketing, liabilities, expenses, safety, security, and compliance with applicable laws.

There has been citizen opposition to the facility, and SLRG's efforts to reach an agreement with the County have failed. According to SLRG, County officials have indicated that compliance with the local land use code could take an indefinite amount of time. The facility is ready, and SLRG had planned to begin operations there on May 25, 2010. The County, however, filed a complaint on May 24, 2010, in County Court, Conejos County, seeking to enjoin operations at the facility. That complaint has since been removed to federal court, where it remains pending. In the complaint, the County claims that SLRG has violated the County's land use code.

SLRG seeks an order from the Board declaring that, due to federal preemption under 49 U.S.C. § 10501(b), the facility is not subject to the County's land use code. According to SLRG, the facility meets the requirements for § 10501(b) preemption because the proposed activities are transportation and they would be performed under the auspices of a rail carrier. SLRG argues that transportation includes activities integrally related to transportation, such as its plans here to load, unload, and temporarily store materials. Further, SLRG asserts that it is a rail carrier, as the Board authorized it to acquire and operate a line of railroad in 2003.

In addition, petitioner argues that the proposed operations at its facility are not subject to the CRA, which, if applicable, would restrict the Board's jurisdiction over the facility. See 49 U.S.C. §§ 10501(c)(2)(B), 10908-10910. First, SLRG argues that the dirt would remain in its original shipping containers (sealed bags) and that the CRA only applies to activities outside of original shipping containers. 49 U.S.C. § 10908(e)(1)(H)(i). Second, SLRG claims that the dirt is not subject to the CRA because it is "government-generated dirt" as opposed to industrial waste.

Under 5 U.S.C. § 554(e), the Board has discretionary authority to issue a declaratory order to terminate a controversy or remove uncertainty. As there is a controversy here, a declaratory order proceeding is being instituted to obtain supplemental information from

petitioner and to invite public comment on the issues. Filings should focus particularly on whether SLRG's containers are original shipping containers under § 10908(e)(1)(H)(i) and whether the dirt SLRG plans to transload and transport is subject to the CRA, but evidence and argument are not limited to those issues.

Board decisions, notices, and filings in this and other Board proceedings are available on our website at WWW.STB.DOT.GOV.

Decided: August 6, 2010.

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