

SURFACE TRANSPORTATION BOARD

Docket No. FD 35496

DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION—PETITION FOR
DECLARATORY ORDER

Digest:¹ This decision finds that the activities on a parcel of land leased by Denver & Rio Grande Railway Historical Foundation in the City of Monte Vista, Colo., do not constitute transportation within the Board’s jurisdiction and, as a consequence, that a local ordinance prohibiting storage of railcars on unconnected pieces of track is not preempted with respect to the parcel.

Decided: August 15, 2014

The Denver & Rio Grande Railway Historical Foundation (DRGHF or Petitioner), a Colorado not-for-profit corporation and Class III railroad, doing business as the Denver & Rio Grande Railway, L.L.C. (DRGR), has filed a petition asking the Board to declare whether a local zoning ordinance is preempted under 49 U.S.C. § 10501(b) with respect to a 1.84-acre parcel of land (Parcel) it leases in the City of Monte Vista, Colo. (the City). DRGHF filed the petition in response to the City’s action to enforce a provision of the Monte Vista municipal code against Mr. Donald Shank, President and Executive Director of DRGHF. Specifically, the City charged Mr. Shank with unlawfully storing railcars on the Parcel, a commercially zoned property in the City, in violation of Monte Vista Municipal Code § 12-17-110(3). That section provides that “[r]ailcars may not be stored in any residential, industrial or commercial zone of the City when not connected to a rail line.”²

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).

² The Municipal Court of the City of Monte Vista, in a decision issued April 1, 2011, in Case No. 2010-0936, ruled that Mr. Shank had violated § 12-17-110(3) with respect to a number of rail cars stored on the Parcel. See DRGHF Resp. to SLRG Reply, Ex. E. Mr. Shank appealed the ruling to the District Court of Rio Grande County, and that court is holding the proceeding in abeyance while Mr. Shank seeks declaratory order relief with the Board. See Joint Reply Statement of the City and SLRG at 6. In DRGHF’s petition for declaratory relief at 3-4, Mr. Shank framed the matter 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

(continued . . .)

Reply statements were filed by the City and San Luis & Rio Grande Railroad (SLRG).³ SLRG is a Class III short line rail carrier that operates the Alamosa Subdivision, a 149-mile rail line extending east from its connection with DRGHF at Derrick, near South Fork, Colo., via Monte Vista, to its connection with the Union Pacific Railroad Company (UP) near Walsenburg, Colo.⁴ DRGHF filed a response to SLRG's reply statement.

The Board thereafter instituted this declaratory order proceeding and stated that "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."⁵ The Board also stated that "wholly intrastate tourist excursion service and facilities used solely in providing such service are not transportation within the Board's jurisdiction."⁶ DRGHF filed an opening statement on April 12, 2012; Respondents filed a joint reply statement on July 11, 2012; and DRGHF filed a verified statement by Mr. Shank in rebuttal on August 13, 2012.⁷

(. . . continued)

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?"

³ We refer to the City and SLRG collectively as "Respondents."

⁴ See San Luis & Rio Grande R.R.—Acquis. & Operation Exemption—Union Pac. R.R., FD 34350 (STB served July 18, 2003). SLRG is a wholly owned subsidiary of Permian Basin Railways, Inc. (Permian Basin), which in turn is a subsidiary of holding company Iowa Pacific Holdings, LLC. See Permian Basin Rys.—Acquis. & Control Exemption—San Luis & Rio Grande R.R., FD 34799 (STB served Jan. 12, 2006).

⁵ Denver & Rio Grande Ry. Historical Found.—Pet. for Declaratory Order, FD 35496, slip op. at 4 (STB served Feb. 23, 2012). The Board also, in the interest of a more complete record, denied a motion by SLRG to strike DRGHF's October 11, 2011 response to SLRG's reply statement.

⁶ Id. (citing Fun Trains, Inc.—Operation Exemption—Lines of CSX Transp., Inc. & Fla. Dep't of Transp. (Fun Trains), FD 33472 (STB served Mar. 5, 1998)).

⁷ In his verified statement at 11-12, Mr. Shank refers to a rebuttal statement in which DRGHF would address specific assertions made in Respondents' Reply Statement. However, no rebuttal statement was either attached or filed.

We now conclude that: (1) DRGHF's use of the Parcel is not part of transportation subject to the Board's jurisdiction; and (2) DRGHF does not appear to be in a position to institute such transportation in the reasonably foreseeable future. As a result, the City's zoning ordinances are not preempted with respect to the Parcel.

PRELIMINARY MATTERS

Respondents filed a letter from the Federal Railroad Administration (FRA) that refers to DRGHF as a "non-insular tourist railroad subject to FRA's safety jurisdiction." According to Respondents, FRA's description of DRGHF in the letter constitutes "substantial evidence that DRGR is not acting as a common carrier railroad."⁸ DRGHF filed a reply requesting that the Board accept the FRA letter but disputing Respondents' interpretation of the letter. In DRGHF's view, the FRA letter provides evidence that DRGHF "is, at a minimum, 'subject to the FRA's safety jurisdiction.'"⁹ This, DRGHF asserts, means that DRGHF is "able, and capable of providing rail service . . . holding out as providing said service to the public, [and] actually engaged in providing transportation and other railroad services to the public."¹⁰ In the interest of a more complete record, we will accept the FRA letter, Respondents' accompanying letter, and DRGHF's reply.

DRGHF also moved to strike photographs appended to both the Respondents' reply statement and that reply's verified statement of Mr. Mathew Abbey, SLRG's General Manager. DRGHF contends that Respondents and Mr. Abbey failed to lay a foundation for the photographs—when, where, and by whom they were taken, what they depict, and how they relate to the proceeding—and that, as a result, DRGHF "cannot properly address and cross examine the photographs."¹¹ Respondents filed a reply opposing the motion to strike and responding to DRGHF's assertions concerning the FRA letter.

DRGHF's motion to strike will be denied. The Board's rules of practice are more informal than the Federal Rules of Evidence; they permit the Board to accept any evidence that is reliable and probative (49 C.F.R. § 1114.1) and are to be construed liberally (49 C.F.R. § 1100.3). The photographs immediately preceding the certificate of service in Respondents' reply statement are described as "[s]elected pictures of DRGHF's track and right of way,"¹² and are appended to a statement verified by Mr. Abbey. The photographs appended to Respondents' reply statement as Exhibit F are described as representative photos of DRGHF rolling stock

⁸ Respondents' FRA letter at 1 (filed Aug. 2, 2012).

⁹ DRGHF Reply at 2 (filed Sept. 4, 2012).

¹⁰ Id. at 3.

¹¹ DRGHF Mot. to Strike Photographs at 1 (filed Sept. 4, 2012).

¹² Respondents' Reply Statement at 5 n.7.

stored on the Parcel.¹³ Respondents' reply statement, which includes Mr. Abbey's verified statement, was filed by an attorney-practitioner and, under 49 C.F.R. § 1104.4, does not require verification. Moreover, DRGHF does not dispute that the challenged photographs accurately depict DRGHF's rail line or equipment.

BACKGROUND

In 2000, DRGHF acquired a 21.6-mile rail line (the Creede Branch or the Line) between milepost 299.3 near Derrick (at South Fork, Colo.), and the end of the line near milepost 320.9 in Creede, Colo., from UP pursuant to an offer of financial assistance (OFA) under 49 U.S.C. § 10904.¹⁴ At South Fork, the Creede Branch connects to SLRG's Alamosa Subdivision. According to DRGHF, the switch connecting the Creede Branch to SLRG's Alamosa Subdivision at South Fork was locked in 2008 at the order of FRA.

The 1.84-acre Parcel at issue in this case is located not on DRGHF's Creede Branch, but approximately 30 miles to the east in Monte Vista, adjacent to SLRG's Alamosa Subdivision. In 2005, SLRG sold the Parcel to DRGHF's noncarrier affiliate, Rio Grande Southern Railroad Company, LLC, which then leased it to DRGHF. A spur, known as Track 15, off of SLRG's line crosses the Parcel. SLRG asserts that when it sold the Parcel in 2005, SLRG retained ownership of the portion of the spur on the Parcel and an easement underlying it.¹⁵ According to DRGHF, SLRG removed the switch connecting the spur to the Alamosa Subdivision in 2008 when DRGHF declined to pay switch fees.

The Creede Branch was built to serve the mining industry in and around Creede in the latter half of the 1800s. However, as mining activity in the area declined, so did freight rail operations over the Creede Branch. Freight rail service into Creede ceased in 1969 and on the

¹³ Id. at 11-12 & n.15.

¹⁴ See 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 of a 1-mile portion of the Creede Branch, from near milepost 320.9 to near milepost 319.9, within the City of Creede. See Denver & Rio Grande Ry. Historical Found.—Adverse Aban.—in Mineral Cnty., Colo. (DRGHF Aban.), AB 1014 (STB served May 23, 2008).

¹⁵ Mr. Shank in his individual capacity owns an adjacent parcel on which, according to Respondents, there is a commercial/industrial building that serves as Mr. Shank's residence and on which four rail cars are being stored. See Respondents' Reply Statement at 4, 6, & Ex. C (map). The use of that property is not at issue in this case. According to DRGHF, Track 15, the spur that runs from the SLRG line onto the Parcel, extends further onto Mr. Shank's individually owned property as well, and he owns that portion of it and leases it to DRGHF. See DRGHF Resp. to SLRG Reply at 5-6; DRGHF Opening Statement, map attached to Ex. 2.

remainder of the Creede Branch by the mid-1980s.¹⁶ DRGHF states that, upon acquiring the Line in 2000, it “immediately began rehabilitation of the track and roadbed that had been dormant and maintenance deferred since 1985,” and that, to date, “more than two thousand ties, thousands of spikes and track bolts and dozens of rails have been replaced.”¹⁷ In 2009, DRGHF began operating a tourist-based passenger excursion service on the Creede Branch, using a self-propelled rail-bus called the “Silver Streak,” which DRGHF claims has carried more than 4,500 passengers as well as “less-than-carload . . . intra-line freight for three local shippers.”¹⁸ DRGHF asserts that it “continues to upgrade the quality and utility of the Line in preparation for requested freight movement” on the Creede Branch, and that the potential for movements of ore over the Creede Branch “is looking better and better” as the price of silver rises.¹⁹

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” and “to restore, maintain, renovate and otherwise perform work on rail cars for use or anticipated use on the [DRGHF’s] rail line as well as for transportation related purposes by other federally authorized railroads.”²⁰ Further, DRGHF states that “several rail cars have been rebuilt on this property and have been utilized in general commerce on both SLRG and DRGHF/DRGR,” and that “[s]everal more are currently under rehabilitation for use on DRGHF/DRGR.”²¹ DRGHF asserts that “[s]ome cars reside on Track 15, some on panel track built to accommodate railcars and some temporarily on blocks awaiting trucks and rehabilitation.”²² DRGHF asserts that it conducts these activities on the Parcel because there is no space for them at any point on the Creede Branch. When acquired, according to DRGHF, the Creede Branch “came without any buildings, or maintenance facilities of any kind, and a limited number of side tracks and storage locations.”²³

DRGHF claims that it modified a former UP Railway Post Office car on the Parcel and leased it to SLRG for use as a concession car on SLRG’s passenger excursion train during 2006 through the end of the 2007 summer season.²⁴ Also, DRGHF claims that it leased a locomotive to Permian Basin for use by SLRG in 2006-2007.²⁵ These leased pieces of equipment, DRGHF

¹⁶ See DRGHF Aban., slip op. at 1.

¹⁷ DRGHF Pet. for Declaratory Order at 1-2.

¹⁸ DRGHF Resp. to SLRG Reply at 4.

¹⁹ DRGHF Pet. for Declaratory Order at 2.

²⁰ DRGHF Opening Statement at 4.

²¹ DRGHF Pet. for Declaratory Order at 3.

²² Id.

²³ DRGHF Opening Statement at 2.

²⁴ DRGHF Rebuttal Statement at 10.

²⁵ Id.

states, were interchanged to and from DRGHF and SLRG locations without a formal interchange agreement. The Post Office car and two other railcars are locked in place on the portion of the spur that crosses the Parcel, and a steam locomotive under restoration, a boxcar, a caboose, and other equipment are locked in place on the portion of the spur owned by Mr. Shank on his individually owned property.²⁶

The City and SLRG contend that DRGHF is not a rail common carrier. They claim that DRGHF has handled only passengers riding in a maintenance-of-way vehicle modified for excursion passenger service on the Creede Branch in summer months and freight consisting of rafts traveling with passengers rafting on the Upper Rio Grande River.²⁷ Respondents also claim that DRGHF's tariff and marketing literature relate only to the solicitation of passenger excursion traffic, and that these documents, along with DRGHF's Articles of Incorporation (which state that its corporate purpose "shall be to function as a restoration facility and museum of vintage and historic railroad equipment"), indicate "that DRGHF's business purpose is to operate a museum of historic railroad equipment."²⁸ Further, Respondents claim that DRGHF is not recognized as a rail common carrier by FRA or as a rail common carrier and "covered entity" 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.²⁹

Respondents contend that DRGHF does not have, and has never sought, operating rights over the 30 miles of SLRG track between South Fork and the Parcel in Monte Vista.³⁰ They also assert that DRGHF: (1) has no interchange or haulage agreements with SLRG, UP, or other railroads;³¹ (2) has never received railcars from UP or any other rail carrier for use in interline or interstate service;³² (3) is incapable of handling the type of freight or rolling stock typically handled by short line railroads in interstate commerce;³³ (4) does not conduct itself as a common carrier on the Creede Branch;³⁴ and (5) does not hold out to provide common carrier railroad service of any type that is part of the national railroad network.³⁵

²⁶ DRGHF Resp. to SLRG Reply at 6-7.

²⁷ Respondents' Reply Statement at 14. Respondents assert that DRGHF's passenger and raft service is sold as a package so there are no freight rates for the transport of rafts.

²⁸ Id.

²⁹ Id. at 16-17.

³⁰ Id. at 12.

³¹ Id. at 14.

³² Id. at 21.

³³ Respondents' Reply Statement at 18.

³⁴ Id. at 13.

³⁵ See Respondents' Pet. for Leave to Reply at 7 (filed Sept 7, 2012).

Moreover, Respondents contend that DRGHF's tracks, facilities, and equipment are not suitable for handling freight or passenger traffic in either interline rail service or interstate commerce.³⁶ Referring to the roster of equipment DRGHF furnished in discovery, Respondents assert that: (1) only one of the four listed locomotives, a road switcher, is shown as operable; (2) only two of eight railcars identified on the roster as "passenger and non-revenue," including two cabooses, are less than 80 years old; and (3) none of the eight assorted freight cars depicted on the roster appear to be the types employed today in revenue freight service. According to Respondents, "the majority of [DRGHF's] equipment is unfit for use, is far out of inspection date, and is in many cases disassembled. That equipment which has wheels is unlikely to be moved on its own wheels safely or for any distance."³⁷ Respondents assert that the Line's rail, generally consisting of 65 lb. rail with 90 lb. sections, is unsuitable for handling freight or passenger railcars in interline service, and they describe the track structures and right-of-way as "weedy, eroded, in need of surfacing, major tie replacement, and heavy bridge repair."³⁸ Respondents claim that "approximately \$5 million would have to be spent on track, bridges, and right of way maintenance to put the [Creede Branch] in a minimally acceptable class I condition for handling interstate freight,"³⁹ and that a review of DRGHF's financial statements and tax returns shows that its revenues would barely cover typically accepted maintenance costs for FRA class I track and are insufficient to permit the level of rehabilitation that would be required for interline service.

According to Respondents, DRGHF uses the Parcel in Monte Vista (as well as adjoining land owned by Mr. Shank in his individual capacity) to store numerous pieces of mostly vintage railroad or railroad-related equipment, some on short, disconnected track segments, in various states of disrepair and possibly to do some repair and maintenance work.⁴⁰

Finally, citing Joint Petition for Declaratory Order—Boston & Maine Corp. & Town of Ayer (Ayer), 5 S.T.B. 500 (2001), reconsideration denied (STB served Oct. 5, 2001) and New York Susquehanna & Western Railway v. Jackson (N.Y. Susquehanna), 500 F.3d 238 (3d Cir. 2007), Respondents argue that, even if DRGHF could be seen as a rail carrier conducting activities related to rail transportation, the City's zoning ordinances would not be preempted under § 10501(b). They assert that under longstanding Board and court precedent, certain types of state and local regulation involving public health and safety are not preempted so long as they

³⁶ See Respondents' Reply Statement at 17-18.

³⁷ Id. at 20.

³⁸ Id. at 18.

³⁹ Id.

⁴⁰ Id. at 11.

do not restrict rail carriers from conducting their common carrier operations, unreasonably burden interstate commerce, or discriminate against rail carriage.⁴¹

DISCUSSION AND CONCLUSIONS

Under 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. The Board has broad discretion in determining whether to issue a declaratory order. See 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). For the reasons discussed below, we find that a controversy exists between these parties and that a declaratory order should be issued. 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 and, as a consequence, we 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.

As noted in the February 23, 2012 decision instituting this declaratory order proceeding, to be within the Board’s jurisdiction and thus covered by preemption under § 10501(b),⁴² an activity: (1) must be performed by, or under the auspices of, a “rail carrier;” and (2) must constitute “transportation.” A “rail carrier” is “a person providing common carrier railroad transportation for compensation,” 49 U.S.C. § 10102(5), and “transportation” 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). However, the Board’s jurisdiction over transportation by rail carrier (and thus transportation within the reach of § 10501(b) preemption) 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.” 49 U.S.C. § 10501(a)(2)(A). This is a fact-specific determination. See All Aboard Fla.—Operations LLC—Constr. & Operation Exemption—in Miami, Fla. & Orlando, Fla. (All Aboard), FD 35680, slip op. at 3 (STB served Dec. 21, 2012).

In interpreting the reach of preemption under § 10501(b), the 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., rail carrier rates, services, construction, and abandonment). See, e.g., Franks Inv. Co. v. Union Pac. R.R., 593 F.3d 404, 414 (5th Cir. 2010) (en banc); Borough of Riverdale—Pet. for Declaratory Order, FD 35299, slip op. at 2 (STB served Aug. 5, 2010); E. Ala. Ry.—Pet. for Declaratory Order, FD 35583, slip op. at 4 (STB served Mar. 9,

⁴¹ See Monte Vista Resp. and Protest at 15-17; SLRG Reply at 10-11.

⁴² The Board’s jurisdiction over “transportation by rail carriers” is “exclusive.” 49 U.S.C. § 10501(b). Moreover, § 10501(b) expressly provides that “the remedies provided under [49 U.S.C. §§ 10101-11908] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.”

2012). 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. See, e.g., Norfolk S. Ry. v. City of Alexandria, 608 F.3d 150, 158 (4th Cir. 2010). 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. See Green Mountain R.R. v. Vermont (Green Mountain), 404 F.3d 638, 643 (2d Cir. 2005).

Other state actions may be preempted as applied—that is, only if they would have the effect of unreasonably burdening, interfering with, or discriminating against rail transportation, which is a fact-specific determination based on the circumstances of each case. See N.Y. Susquehanna, 500 F.3d at 252-54; Ayer, 5 S.T.B. at 510-12; Borough of Riverdale—Pet. for Declaratory Order—N.Y. Susquehanna & W. Ry., FD 33466, slip op. at 2 (STB served Feb. 27, 2001) and 4 S.T.B. 380, 387 (1999). Localities retain their reserved police powers to protect the public health and safety so long as their actions do not unreasonably burden interstate commerce. See Green Mountain, 404 F.3d at 643. For example, electrical, plumbing, and fire codes generally may be applied. Id. State and local action, however, must not have the effect of foreclosing or unduly restricting the rail carrier's ability to conduct its operations or otherwise unreasonably burden interstate commerce. See CSX Transp. Inc.—Pet. for Declaratory Order, FD 34662, slip op. at 5 (STB served May 3, 2005).

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. On the other hand, if DRGHF's use of the Parcel is not in furtherance of transportation over which the Board has jurisdiction, then the City's ordinance would not be preempted with respect to the Parcel. See Ayer, 5 S.T.B. at 507 (“zoning ordinances and local land use permit requirements are preempted where the facilities are an integral part of the railroad's interstate operations”).

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. Accordingly, as long as that remains the case, the City's rail car storage ordinance is not preempted.⁴³

DRGHF contends that the Parcel is used to support its rail operations on the Creede Branch. Even assuming this to be the case, however, the 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. The record before us does not demonstrate that DRGHF has provided any interstate passenger service on the Creede Branch, or any passenger service

⁴³ Because the record fails to show that the Parcel is being used in connection with jurisdictional common carrier transportation, we need not decide whether, if it were being used for such a purpose, the ordinance would unduly interfere with that use.

that connects, or even could connect, to interstate passenger carriers. DRGHF does not contend, nor does it present evidence to show, that it has entered into interchange agreements with any interstate carrier, offered through ticketing for passengers on any other carrier, or plans to seek agreements with any other carrier that would make its passenger movements on the Line part of the interstate rail network. Under established Board precedent, such wholly intrastate passenger excursion operations do not constitute rail operations as “part of the interstate rail network,” and as a result the operations are outside the Board’s jurisdiction. Fun Trains, slip op. at 2-3; see also All Aboard, slip op. at 3-4 (wholly intrastate passenger rail operations with no connection to, and no through ticketing planned with, Amtrak or any other interstate carrier are not within the Board’s jurisdiction, even though the operations would be physically conducted on part of the interstate rail network).

DRGHF claims that in recent years it has hauled “less-than-carload . . . intra-line freight for three local shippers” on the Creede Branch.⁴⁴ 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. However, these river rafts and other gear apparently move with the passengers as a package; there are no separate freight rates for them or for any other items. Moreover, by DRGHF’s own admission, these movements are entirely “intra-line” as they are conducted only on the Creede Branch, which is entirely intrastate. And notwithstanding its statement concerning the possibility of ore movements resulting from higher silver prices,⁴⁵ 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. 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.⁴⁶

The very limited, wholly intrastate excursion passenger and related raft operations that DRGHF has conducted over the Line to date are not transportation that is conducted under the Board’s jurisdiction “as part of the interstate rail network.” See Napa Valley Wine Train, Inc.—Pet. for Declaratory Order (Wine Train), 7 I.C.C. 2d 954, 965-68 (1991). Thus, the activities taking place on the Parcel provide no basis for finding the City’s ordinance is preempted under § 10501(b).

⁴⁴ DRGHF Pet. for Declaratory Order at 2.

⁴⁵ DRGHF Resp. to SLRG Reply at 4.

⁴⁶ DRGHF 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. DRGHF’s activities merely establish that DRGHF is or has been a lessor of equipment, which does not constitute for-hire rail service. See Gen. Am. Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422, 428-29 (1940) (tank car lessor is not a carrier under the Interstate Commerce Act).

Finally, the FRA letter referring to DRGHF as a “non-insular tourist railroad subject to the FRA’s safety jurisdiction” does not mean that DRGHF’s activities on the Parcel are in support of transportation subject to the Board’s jurisdiction, as the jurisdictions of the Board and FRA are not coextensive. See Wine Train, 7 I.C.C. 2d at 966 n.33 (noting that FRA’s safety jurisdiction “extends to all railroads—even those not engaged in interstate commerce”).

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.” 49 U.S.C. § 10501(a)(2)(B). DRGHF has not demonstrated that it provides interstate passenger service or that it has or plans to seek agreements with any other carriers that would make its passenger movements part of the interstate rail network. The wholly intrastate operations DRGHF runs on the Creede Branch are outside the Board’s jurisdiction. 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).

Because we find that Municipal Code § 12-17-110(3) is not preempted due to the absence of jurisdictional transportation-related use of the Parcel now or in the foreseeable future, we need not address Respondents’ alternative argument that the ordinance would not be preempted even if DRGHF were undertaking jurisdictional activities there.⁴⁷

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

It is ordered:

1. Respondents’ letter of August 2, 2012, and DRGHF’s reply of September 4, 2012, are accepted into the record.
2. DRGHF’s September 4, 2012 request for an extension to file a motion to strike and Respondents’ petition for leave to file a reply are granted, and their motion to strike and reply are accepted into the record.
3. DRGHF’s motion to strike is denied.
4. The petition for declaratory order is granted as discussed above.
5. This decision is effective on the date of service.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.

⁴⁷ See supra n.41 and accompanying text.