

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: April 30, 2012

The Denver & Rio Grande Railway Historical Foundation, Inc. (DRGHF), a Class III railroad, filed a petition on July 12, 2011, asking the Board to declare whether 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. By decision served on February 23, 2012, the Board: (1) instituted a declaratory order proceeding to address this issue; (2) admonished the parties to adhere to the Board's rules and procedures, including those regarding filing, service, verification, and decorum; and (3) directed the parties to comply with the procedural schedule provided in the decision. The procedural schedule, among other requirements, directed DRGHF to file its opening evidence by March 26, 2012. In a decision served on April 2, 2012, the Board granted a request by DRGHF to extend for 20 days, until April 9, 2012, the due date for its opening evidence and extended the due dates for filing reply and rebuttal statements to May 10 and May 25, 2012, respectively.

On April 11, 2012, DRGHF filed a motion for leave to late file its opening evidence, and it filed its opening evidence the next day. Respondents, the City of Monte Vista and San Luis & Rio Grande Railway, filed a joint pleading on April 18, 2012, asking the Board to strike DRGHF's opening statement as late-filed and discontinue the proceeding. Alternatively, Respondents jointly request that the Board order DRGHF to comply with Respondents' joint discovery requests, and that Respondents be given 15 days from the receipt of discovery responses to file their reply statement. Respondents state that the joint discovery requests along with a transmittal letter were served on DRGHF on March 6, 2012, and requested the production of documents and answers to interrogatories within 20 days (by March 26, 2012). According to Respondents, DRGHF acknowledged receiving a copy of the discovery requests but has not yet objected or otherwise responded to any of the requests.<sup>1</sup>

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<sup>1</sup> In the April 2, 2012 decision, Respondents, in replying to DRGHF's claim that it was not aware of the Board's February 23, 2012 decision, stated that they sent DRGHF discovery requests with a transmittal letter stating that the Board had set April 26, 2012, as the deadline for their reply, and they attached a certified mail receipt for this letter, signed by DRGHF's President on March 6, 2012.

The Board's rules specifically provide that parties may obtain discovery—in the form of depositions, interrogatories, requests for documents, and requests for admissions—for any matter, not privileged, which is relevant to the subject matter involved in a formal proceeding. See 49 C.F.R. § 1114.21. A motion to compel discovery may be filed if a party that has been served with proper notice of discovery fails to respond in a timely matter, and that party generally has 20 days to file a reply. See 49 C.F.R. § 1114.31(a).

DRGHF was served with proper notice of discovery on March 6, 2012, and was given a reasonable time period, 20 days, to respond. In view of its apparent failure to respond in any way to any of Respondents' joint discovery requests, there is no need to wait for DRGHF to file a reply to Respondents' motion to compel. DRGHF is ordered to respond, as appropriate, to Respondents' joint discovery requests—whether by providing the requested documents and interrogatory answers, raising objections, or otherwise<sup>2</sup>—within 7 days from the service date of this decision and simultaneously file with the Board a certification that it has done so.<sup>3</sup> Under the Board's regulations at 49 C.F.R. § 1114.31(b) and (d), a failure to respond timely may result in sanctions such as the Board: (1) restricting DRGHF's ability to introduce evidence; (2) declining to accept as true certain facts as claimed; (3) striking out all or any part of any of DRGHF's pleading; (4) staying further proceedings until the order is obeyed; or (5) dismissing the proceeding. In lieu of, or in addition to, such actions, the Board may also require the payment of reasonable expenses, including attorney's fees, by the party that failed to respond to discovery, unless the Board finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Id.

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

It is ordered:

1. Respondents' joint motion to compel discovery is granted as discussed above. DRGHF is directed to serve upon Respondents DRGHF's responses to Respondents' joint discovery requests by May 7, 2012 and file a certification with the Board that it has done so.
2. Respondents' reply statement is due May 22, 2012, and DRGHF's rebuttal statement is due June 6, 2012.
3. This decision is effective on its service date.

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

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<sup>2</sup> In this decision, the Board is not ruling on the validity of Respondents' discovery requests as those requests have not been challenged; nor is the Board requiring that DRGHF necessarily provide the requested information or documents in response to each of the requests. DRGHF's response may include well-founded objections to any request, if warranted.

<sup>3</sup> DRGHF shall serve its discovery responses on Respondents, as directed above, but shall not file those responses with the Board. See 49 C.F.R. § 1114.21(f).