

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

232940

FD 35496

ENTERED
Office of Proceedings
September 7, 2012
Part of
Public Record

**DENVER & RIO GRANDE RAILWAY
HISTORICAL FOUNDATION, INC.
D/B/A DENVER & RIO GRANDE RAILROAD, LLC**

PETITION FOR DECLARATORY ORDER

**PETITION FOR LEAVE TO REPLY OF
THE CITY OF MONTE VISTA, CO,
AND THE SAN LUIS & RIO GRANDE RAILWAY**

Respectfully submitted,

John D. Heffner
Strasburger & Price, LLP
1700 K Street, N.W.
Suite 640
Washington, D.C. 20006
(202) 742-8607

Dated: September 7, 2012

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35496

**DENVER & RIO GRANDE RAILWAY
HISTORICAL FOUNDATION, INC.
D/B/A DENVER & RIO GRANDE RAILROAD, LLC**

PETITION FOR DECLARATORY ORDER

**PETITION FOR LEAVE TO REPLY OF
THE CITY OF MONTE VISTA
AND THE SAN LUIS & RIO GRANDE RAILWAY**

INTRODUCTION

On September 4, 2012, the Denver & Rio Grande Railway Historical Foundation d/b/a Denver & Rio Grande Railroad, LLC (hereafter “DRGRHF”) filed two documents with the Surface Transportation Board (“the Board”) in this seemingly never ending declaratory relief proceeding. DRGRHF seeks a Board ruling that its tourist railroad activities are entitled to preemption from the application of the zoning laws of the City of Monte Vista, CO (“the City”). First, DRGRHF moved to strike certain photographs submitted by the City and the San Luis & Rio Grande Railway, Respondents herein. Second, DRGRHF submitted a response to Respondents’ August 2, 2012, filing with the Board furnishing a letter

from the Federal Railroad Administration (“FRA”). The Board should deny the relief sought by DRGRHF in its September 4, 2012, submissions and, more importantly, deny its Petition for (sic) Declaratory Order.

ARGUMENT

I. DRGRHF’s Motion to Strike and Request for Enlargement of Time

The Board’s Rules of Practice at 49 CFR §1104.13(a) provide that “[a] party may file a reply or motion addressed to any pleading within 20 days after a pleading is filed with the Board, unless otherwise provided.” Regardless of the merits (or lack thereof) of DRGRHF’s assertions about these photographs, DRGRHF’s motion should have been submitted on or before August 1, 2012, to be timely and entitled to consideration. This is not the first time that DRGRHF has violated deadlines and other procedural requirements established by the Board. In its decision served on February 23, 2012, in this proceeding, the Board stated that “all parties are admonished to adhere to the Board’s rules and procedures, including those regarding filing, service, verification, and decorum.” Decision at 3.

DRGRHF’s objection to the acceptance into the record of these pictures on evidentiary grounds lacks merit. Unlike judicial proceedings, administrative agency proceedings are more informal. The strict rules of evidence governing the

submission of evidence do not apply in administrative agency proceedings. *See*, Jaffe and Nathanson Administrative Law, Cases and Materials at 432. (3d E. 1968)(“It is generally held that the rules of evidence do not *ipso facto* apply in administrative hearings”). The Board’s own rule on the admissibility of evidence states,

“Any evidence which is sufficiently reliable and probative to support a decision under the provisions of the Administrative Procedure Act, or which would be admissible under the general statutes of the United States, or under the rules of evidence governing proceedings in matters not involving trial by jury in the courts of the United States, will be admissible in hearings before the Board. The rules of evidence will be applied in any proceeding to the end that necessary and proper evidence will be conveniently, inexpensively, and speedily produced, while preserving the substantial rights of the parties.” 49 CFR §1114.1.

In any event, DRGRHF does not dispute that the pictures submitted are ones depicting its railroad and equipment.

II. DRGRHF Reply to August 2, 2012 Joint Filing

DRGRHF's "Reply" involves a letter that Respondents had filed with the Board on August 2, 2012, from the FRA concerning that agency's jurisdiction over the DRGRHF. In view of the fact that Respondents promptly emailed DRGRHF's Donald Shank a copy of its filing tendering the FRA letter,¹ there is no reason why DRGRHF could not have incorporated its response in its rebuttal filing due on August 11. But it waited until September 4, some 12 days after the August 22, deadline for responding, to submit a reply.

In any event Respondents had originally written the FRA on June 29, 2012, seeking that agency's opinion as to DRGRHF's status for FRA jurisdiction. Although Respondents had requested a prompt response in view of their July 11, 2012 filing deadline, it did not receive the FRA's response until after July 24, 2012, the date of the FRA's letter. In the interest of a complete record, Respondents request that the Board accept into the record their letter to the FRA² as well as their prior August 2, 2012, filing.

Substantively, DRGRHF fails to acknowledge that the FRA's jurisdiction is much broader than that of the Board. As pertinent here, 49 U.S.C. §20101 establishing the FRA's jurisdiction defines a railroad as

¹ Copy of email attached.

² Copy attached.

“(1)(A) ...any form of nonhighway ground transportation that runs on rails or electromagnetic guideways, including - (i) commuter or other short-haul railroad passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979; and (ii) high speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads; but (B) does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation. (2) ‘railroad carrier’ means a person providing railroad transportation.”

Moreover 49 U.S.C. §20103(f) specifically vests in the Secretary of Transportation and the FRA as its designee jurisdiction over tourist railroads. 49 CFR §213.3 establishing federal track safety standards grants the FRA jurisdiction over all “standard gage track in the general railroad system of transportation” excluding intraplant trackage and trackage used exclusively for rapid transit operations in an urban area that are not connected with the general railroad system of transportation. *See, B. Willis, C.P.A., Inc-Petition for Declaratory Order*, FD 34013, slip op. at 5-6, STB served July 26, 2002 (cited as B. Willis), for a discussion of FRA jurisdiction versus Board jurisdiction.

By contrast, the Board’s jurisdiction is limited in 49 U.S.C. §10501(a) to transportation by a rail carrier in interstate commerce meaning between a place in a State and a place in the same or another State as part of the *interstate rail network* [emphasis supplied]. Furthermore, the I.C.C. Termination Act defines a “rail carrier” as a “person providing common carrier railroad transportation for compensation.” 49 U.S.C. 10102(5). And, as Respondents have noted several times before, the term “common carrier” means an entity that “holds itself out to the public to perform transportation for compensation.” In the Board’s own words, the fundamental test for determining whether an entity is a common carrier is whether there has been a holding out to serve the public as a common carrier. See, e.g., Santa Clara Valley Transportation Authority – Acquisition – Union Pacific Railroad Company, FD 34094, slip op. at 3, STB served Nov. 16, 2001, cited in SMS Rail Service, Inc.- Petition for Declaratory Order, FD 34483, STB served Jan. 24, 2005; B. Willis, supra. The record shows that DRGRHF has not been holding itself out to provide common carrier railroad service of any type as part of the national railroad network. Accordingly, an entity such as a tourist railroad could be subject to the FRA’s safety jurisdiction but not subject to the Board’s economic regulatory jurisdiction. DRGRHF is not entitled to the federal preemption accorded common carrier railroads.

CONCLUSION

The Board should deny the relief sought by DRGRHF through its September 4, 2012, submissions and, more importantly, deny its Petition for [a] Declaratory Order.

Respectfully submitted,



John D. Heffner
Strasburger & Price, LLP
1700 K Street, N.W.
Suite 640
Washington, D.C. 20006
(202) 742-8607

Dated: September 7, 2012

Heffner, John D.

From: Heffner, John D.
Sent: Thursday, August 02, 2012 3:54 PM
To: 'Donald Shank'
Subject: FRA letter

Attachments: SP-#4162870-v1-SLRG_FRA_letter_August_2_2012.PDF

Mr. Shank I am emailing (and US mailing as well) a letter from the FRA that I received a few days ago.
John Heffner

Strasburger
ATTORNEYS AT LAW

John Heffner • Strasburger & Price, LLP
1700 K Street, N.W., Suite 640, Washington, D.C. 20006
202.742.8607 • Fax 202.742.8697 • Strasburger.com

9/6/2012

June 29, 2012

JOHN D. HEFFNER

Direct Fax 202-742-8607
Direct Phone 202-742-8697
Email: john.heffner@strasburger.com

Regional Administrator
Federal Railroad Administration
901 Locust Street
Suite 464
Kansas City, MO 64106

RE: Denver & Rio Grande Railway Historical Foundation

Dear Sir or Madam:

I am writing on behalf of the San Luis & Rio Grande Railway, a class III short line railroad common carrier subject to the jurisdiction of your agency and the federal Surface Transportation Board. My purpose in contacting you is to ascertain the status in the eyes of the FRA of an entity known as the Denver & Rio Grand Railway Historical Foundation d/b/a Denver & Rio Grande Railroad, L.L.C. DRGRHF is owned by an individual named Donald Shank and has offices in South Fork and Monte Vista, CO. The company acquired the Creede Branch of the Union Pacific Railroad between Derrick and Creede, CO, about 13 years ago after UP had obtained abandonment authority from the STB. Because the DRGRHF is asserting that it is a common carrier railroad subject to the STB's jurisdiction and eligible to claim federal preemption from state and local laws, I want to determine if the FRA is treating the DRGRHF or any other "carrier" owned by Mr. Shank as a common carrier railroad.

My client is currently involved in an administrative proceeding at the STB that has been docketed as FD 35496 on the issue of whether Shank's company is entitled to claim preemption. Inasmuch as our reply statement is due July 11, your prompt attention to this matter is appreciated.

Regional Administrator

June 29, 2012

Page 2

Respectfully yours,

A handwritten signature in black ink, appearing to read 'J. D. Heffner', with a long horizontal flourish extending to the right.

John D. Heffner

cc: Mr. Edwin E. Ellis (by email)

CERTIFICATE OF SERVICE

I, John D. Heffner, hereby certify that a copy of the foregoing Petition For Leave To Reply of The City Of Monte Vista, CO, And The San Luis & Rio Railway dated September 7, 2012, was sent by first-class and electronic mail to the following:

Mr. Donald Shank
Denver & Rio Grande Railway
Historical Foundation
20 North Broadway Street
Monte Vista, CO 81144



John D. Heffner

Dated: September 7, 2012