

232917

BEFORE THE SURFACE TRANSPORTATION BOARD

FD 35496

PETITION FOR DECLARATORY ORDER

ENTERED
Office of Proceedings
September 4, 2012
Part of
Public Record

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

**REPLY TO AUGUST 2nd, 2012 JOINT FILING OF
THE CITY OF MONTE VISTA, CO.
AND THE SAN LUIS & RIO GRANDE RAILROAD**

Comes now your petitioner, the Denver & Rio Grande Railway Historical Foundation. (DRGRHF or Foundation) which herein respectfully submits its reply to the August 2nd, 2012, letter of the City of Monte Vista, and the San Luis and Rio Grande Railroad (Respondents or Opposing Parties).

MINOR PROCEDURAL DEFECT

The Foundation does not oppose the efforts of the opposing parties to enter the FRA document into the record. However the Foundation does object to the fact that the opposing parties failed to seek leave from the Board to do so when they filed the document. Since the Letter from the FRA does not support the conclusions that the opposing parties are advocating, but does provide verification of statements previously made by the Foundation, the DRGRHF does not oppose the admission of the document into the record.

ARGUMENT

On August 2nd, 2012, the joint parties filed what appears to have been a supplement to their July 11th 2012 pleading. While docketed as a letter, it appears to have been a solicited response from the Federal

Railroad Administration.

1. The FRA Document does not support the conclusion reached by the joint parties.

In the letter, the opposing parties quote a small portion of a much larger sentence and then attempts to argue that the FRA has reached some sort of definitive conclusion that the DRGRHF is “non-insular tourist railroad subject to the FRA’s safety jurisdiction”. The omission of the rest of the sentence is clearly designed to mislead the Board.

First, it appears that the FRA was asked for certain information. The FRA statement is clearly qualified. The sentence from which the opposing parties quote appears to be in response to a specific question. It should be noted that the opposing parties didn’t include a copy of their letter to the FRA which might have shed some light on the context of the FRA’s response. However, FRA’s letter correctly states the position of the FRA. It clearly acknowledges that “Only the STB can determine whether an entity is a common carrier railroad.”

In short, the FRA letter clearly refers the question of the common carrier status of the Foundation to the Board. It certainly cannot be said to be substantial evidence that the Foundation is not a common carrier railroad. While the letter, on its face, does not support the conclusions reached by the opposing parties, it does provide some evidence to support the Foundation’s position.

2. Document does provide evidence that the FRA and the DRGRHF have a working relationship.

The Letter from the FRA does provide evidence that the Board could find useful. The letter does confirm what the Foundation has long stated. The FRA and the Foundation have a working relationship. On its face, the letter can be read to assume that the FRA is in fact, already asserting its safety jurisdiction over some (if not all) of the Foundations activities upon the property. The letter, on its face, appears to indicate that the FRA’s response was an informed decision. It clearly relies upon “The information that is available” and it clearly states a conclusion that the Foundation is, at a minimum, “subject to the FRA’s safety jurisdiction”.

It should be noted that the FRA has jurisdiction over many types of entities. The FRA has safety jurisdiction over both regulated freight and non-regulated passenger carriers. However, the FRA would not have anything to regulate, either by common carrier freight railroad, or a non insular tourist railroad, unless

either of those entities where in fact; 1st able, and capable of providing rail service; 2nd were holding out as providing said service to the public, and; 3rd were actually engaged in providing transportation and other railroad services to the public. **All three of those elements must be present in order for the FRA to assert jurisdiction.**

The fact that the FRA has indicated, in writing, that it has asserted its jurisdiction over the Foundations activities on the line is a powerful indicator that transportation by rail carrier may be in fact occurring on the line. In addition, the same safety regulations are applied equally to all those entities which come under the FRA's safety jurisdiction.

The Foundation would respectfully argue that, if an entity is capable of providing passenger services sufficient enough to trigger the FRA's safety jurisdiction, it is equally capable of providing freight services, over the same line. Providing an entity has the appropriate authority from the STB to conduct such common carrier operations on the line, it would come under the Board's exclusive jurisdiction and would be entitled to benefit of the preemptive reach of the ICCTA.

CONCLUSIONS

Wherefore, the DRGRHF respectfully requests that the Board accept into the record the FRA letter of July 24th 2012. In addition, the letter provides ample evidence that transportation by rail carrier may in fact be occurring by virtue of the evidence that the FRA has asserted its safety jurisdiction over the line. For all the reasons stated above, the DRGRHF respectfully requests that the Board grant its request for the declaratory relief.

Respectfully Submitted,



Donald H. Shank
President
Denver & Rio Grande Railway
Historical Foundation, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2012, I served via first class mail, postage prepaid, a copy of this Response on the following:

Mr. Eugene L. Farish, Esq.
Law Office of Eugene L. Farish, Esq. PC
739 1st Avenue
Monte Vista, CO 81144
Counsel for the City of Monte Vista

John D. Heffner, Esq.
Strasburger & Price LLP
1700 K Street NW
Suite 640
Washington, DC 20006
Counsel for the San Luis and
Rio Grande Railway



Donald H. Shank