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October 27, 2011

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BY E-FILING

Cynthia A. Brown
Chief of Administration
Office of Proceedings
Surface Transportation Board
395 E. Street, S.W.
Washington, D.C. 20423

ENTERED
Office of Proceedings

OCT 27 2011

Part of
Public Record

**RE: FD 35496, Denver & Rio Grande Railway Historical Foundation's
Petition for a Declaratory Order**

Dear Ms. Brown:

On behalf of the San Luis & Rio Grande Railroad, I am e-filing its Motion to Strike the "Response to San Luis & Rio Grande's Reply in Opposition" originally filed with the Board on October 11 and supplemented on October 24, 2011.

Sincerely yours

John Heffner

JDH:jg

Enclosure

cc: All parties
Mr. Ed Ellis

Strasburger & Price, LLP

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FD 35496

**DENVER & RIO GRANDE RAILWAY
HISTORICAL FOUNDATION'S
PETITION FOR A DECLARATORY ORDER**

**MOTION TO STRIKE OF
SAN LUIS & RIO GRANDE RAILROAD**

Submitted by
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Dated: October 27, 2011

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On October 11, 2011, the Denver & Rio Grande Railway Historical Foundation (“DRGHF”) filed with the Surface Transportation Board (“the Board”) a document dated September 9, 2011, entitled a “Response to San Luis & Rio Grande’s Reply in Opposition.”¹ This filing is apparently a supplement to DRGHF’s previous submission seeking permission or “Leave” to file a Response to the Opposition Statements previously tendered by both San Luis & Rio Grande Railroad and the City of Monte Vista, CO.² There DRGHF had represented that its “Responses” would be “forthcoming in the very near future.” The Board should strike DRGHF’s “Response” as late,” a prohibited reply to a reply, and as

¹ Hereafter “the Response.”

² Hereafter SLRG and the City, respectively.

unverified as well as for containing material that is irrelevant, immaterial, impertinent, and scandalous.

BACKGROUND

This proceeding dates back to July 12, 2011, when the Board docketed a Petition for Declaratory Order that DRGHF had apparently originally submitted on April 28, 2011. DRGHF sought a ruling whether certain land owned by its affiliate [Rio Grande Southern Railroad Company]³ and leased to it is subject to the zoning ordinances of the City of Monte Vista. Additionally, Petitioner sought a ruling that the City's ordinances are preempted under 49 U.S.C. 10501(b) and/or invalidated by the Commerce Clause of the United States Constitution. Both SLRG and the City filed timely replies to that Petition. DRGHF then filed a Request for Leave to file a Response without tendering any substantive material. SLRG responded to that pleading on September 19 seeking denial of DRGHF's Request. Petitioner then filed its most recent pleading, this Response, dated September 9 but actually docketed on October 11.⁴

A short description of the pertinent geography will be helpful to the Board's understanding of this dispute. DRGHF is a Board regulated class III common carrier short line railroad having acquired a 21.6 mile segment of railroad between

³ Hereafter "Rio Grande"

⁴ Earlier this week DRGHF submitted several additional pages of the filing that it had inadvertently omitted from the document at the time of its original submission.

MP 299.3 at Derrick and MP 320.9 at Creede, CO, from the Union Pacific Railroad (“UP”) in an offer of financial assistance proceeding.⁵ DRGHF is the very same railroad that was the subject of an adverse abandonment application filed by the City of Creede and approved by the Board in 2008.⁶ SLRG is a Board regulated class III short line railroad which acquired the balance of UP’s line from Derrick to an interchange with UP and BNSF Railway at MP 180.0 near Walsenburg, CO.⁷ SLRG is a wholly-owned subsidiary of Permian Basin Railways and its holding company owner, Iowa Pacific Holdings, LLC. Permian Basin acquired SLRG from its previous owner, RailAmerica, Inc., in 2006.⁸ A map depicting the subject rail lines is attached to this pleading as Exhibit A.

This proceeding concerns a dispute between the City and DRGHF over the latter’s use of a rail siding located within the City’s limits. That siding is located on land owned by DRGHF’s affiliate, Rio Grande, and leased to it. The land is burdened by a railroad easement and track owned by SLRG and reserved by SLRG at the time it (under previous ownership) sold that parcel to Rio Grande in 2005.

⁵ Union Pacific Railroad Company—Abandonment Exemption—in Rio Grande and Mineral Counties, CO, Docket No. AB-33 (Sub-No. 132X), STB served May 11, 1999.

⁶ Denver & Rio Grande Railway Historical Foundation-Adverse Abandonment-In Mineral County, CO, Docket No. AB-1014, STB served May 23, 2008.

⁷ SLRG operates into Walsenburg on trackage rights over UP for interchange purposes.

⁸ Permian Basin Railways, Inc.—Acquisition of Control Exemption—San Luis & Rio Grande Railroad Company, Inc., FD 34799, STB served January 12, 2006.

The land and track that are the subjects of this proceeding are located approximately 30 miles from Derrick where DRGHF's ownership of the railroad begins and SLRG's ends. In other words, the parcel and track in dispute at Monte Vista are physically disconnected from the rest of DRGHF's "rail system" by some 30 miles of track and right of way owned and actively operated by SLRG.

ARGUMENT

1. Rejection of the Response as late-filed and a prohibited reply

The Board's Rules of Practice provide that "a reply or motion addressed to any pleading [be filed] within 20 days after the pleading is filed with the Board unless otherwise provided." 49 CFR 1104.13. Regardless of whether DRGHF's most recent pleading was filed on September 9 or October 11, it was submitted substantially after the end of the 20 day period allowed for replies under the Board's Rules of Practice. Moreover, DRGHF's representative Donald Shank has provided no explanation or justification for this late filing.

Second, DRGHF's request to submit its "Response" flies in the face of longstanding Board policy that normally forbids the acceptance of a reply to a reply. 49 CFR 1104.13(c). DRGHF's request does not offer any reason justifying a waiver of the Board's policy. The Springfield Terminal Railway Company-Petition for a Declaratory Order-Reasonableness of Demurrage Charges, Docket No. 40128, STB served June 11, 2010 (reply to a reply rejected). However, in the

unlikely event the Board should accept DRGHF's "Response," SLRG requests leave to submit a short substantive response to ensure a complete record.

2. The "Response" should be rejected as unverified.

Section 1104.4 of the Board's rules requires that the original of each document not signed by a practitioner or attorney must be: (1) signed in ink; (2) accompanied by the signer's address; and (3) *verified* if it contains allegations of fact, under oath, by the person, in whose behalf it is filed, or by a duly authorized officer of the corporation in whose behalf it is filed. This is particularly important where, as here, numerous factual allegations are made against another party to the proceeding.

DRGHF's representative Donald Shank admits that he is not an attorney ("I am not an attorney, nor do I profess to be one"). Response at 3. Moreover, there is no indication that he is a practitioner authorized to practice before the Board. Accordingly, the requirement of section 1104.4 requiring verification of documents is implicated. Mr. Shank states that he will do his best to (1) rebut what he calls the "inaccuracies" of SLRG's counsel and to (2), in his words, "set the record straight." In view of his efforts to present factual information rebutting evidence presented by SLRG it is essential that his filing be verified or be rejected for failure to comply with the Board's requirement.

3. Rejection of DRGHF's pleading as irrelevant, immaterial, impertinent, and scandalous

The Board's Rules of Practice also provide for the rejection of material that is redundant, irrelevant, immaterial, impertinent, and scandalous. 49 CFR 1104.8. DRGHF devotes its Response to a lengthy, rambling dissertation about its collection of "historic" railroad equipment stored at either South Fork or Monte Vista. But this dissertation has absolutely nothing to do with the only matter at issue: whether federal law preempts the application of Monte Vista's zoning laws to DRGHF's car storage activities.

As a threshold matter, the Board has no jurisdiction over a wholly intrastate excursion passenger service. Magner-O'Hara Scenic Railway v. Interstate Commerce Commission, 692 F.2d 441 (6th Cir. 1982). Accordingly, an intrastate passenger operator is not entitled to federal preemption. Furthermore, as SLRG has previously argued, two elements must exist for an activity to enjoy federal preemption from state or local laws: (1) it must be transportation and (2) by a rail carrier. James Riffin-Petition for Declaratory Order, FD 34997, STB slip op. at 5, served May 2, 2008 and cases cited therein. While DRGHF is a Board-licensed rail carrier by reason of the authority granted through its offer of financial assistance, the activities it is conducting here – storage and/or operation of "historic" rail cars and parts - cannot be considered "rail transportation" or "common carrier rail service" by any stretch of the imagination. In fact, agency precedent defines the term "rail carrier" as a "person providing common carrier

railroad transportation for compensation...offering service to the general public.”
DesertXpress Enterprises, LLC-Petition for Declaratory Order, FD 34914, STB
served June 27, 2007. Moreover, under that precedent a rail carrier’s activities are
not entitled to preemption when that carrier is conducting activities or providing
services that do not involve rail service. New England Transrail, LLC, d/b/a
Wilmington & Woburn Terminal Railway-Construction, Acquisition And
Operation Exemption-In Wilmington and Woburn, MA, FD 34797, STB slip op. at
7, served July 10, 2007.

According to Webster’s New World Law Dictionary. “irrelevant matter” is
“evidence or testimony, not pertinent to the claims or defenses in the case.”
www.yourdictionary.com. Black’s Law Dictionary defines “irrelevant” as “not
relevant; immaterial; not relating or applicable to the matter at issue.” At page 744
(5th Ed). Similarly, “immaterial” is defined alternatively as “not consisting of
matter; incorporeal; spiritual” or “that does not matter; not pertinent; unimportant.”
www.thefreedictionary.com. Black’s Law Dictionary adds that “immaterial” is
“not material, essential, or necessary; not important or pertinent; not decisive; of
no substantial consequence; without weight; of no material significance.” Black’s
Law Dictionary. *supra* at page 675. Clearly any discussion of DRGHF’s efforts to
store, maintain, repair, or operate “historic” equipment is neither relevant nor

material to the basic issue of preemption here and its Response should be stricken on that basis alone.

Finally, the Board should strike the Response to the extent it contains what might loosely be described as impertinent or scandalous matter which has no place in agency proceedings. Black's Law Dictionary defines "impertinent" as "that which does not belong to a pleading, interrogatory, or other proceeding; out of place; superfluous; and irrelevant." Black's Law Dictionary, *supra* at 679. An internet dictionary defines "impertinent" "as exceeding the limits of propriety or good manners." www.thefreedictionary.com. This web dictionary source defines "scandalous" as "causing scandal; shocking; scandalous behavior" or "containing material damaging to reputation; defamatory; a scandalous expose." *Id.* Black's Law Dictionary does not define "scandalous" but does define the word "scandal" as "defamatory reports or rumors; aspersion or slanderous talk, uttered recklessly or maliciously." Black's Law Dictionary. *supra* at page 1206.

DRGHF makes disparaging remarks irrelevant to the facts and law of this proceeding about both the undersigned counsel and Ed Ellis, SLRG's chief executive. See Response at pages 9-10. Among the most egregious are the following:

- "When you take into account that Ellis savors every opportunity to create problems for DRGHF and has even tried several times to "backdoor" our

Foundation in hopes of taking our railroad from us in his typical underhanded, unethical manner, nothing surprises us” and

- “I suspect that at this point Mr. Heffner has his panties in an uproar as I may have insulted Mr. Ellis’ character (or lack thereof).”

Comments such as those have no place in a Board proceeding. They do not shed light on the facts, the law, or the issue before the Board. Those remarks and others on page 10 regarding the dumping of raw sewage on the right of way by and efforts by Mr. Ellis to “weasel his way out of this” should be stricken.

CONCLUSION

The Board should promptly issue a decision striking DRGHF’s request to file its “Response” as well as denying its Petition for a Declaratory Order.

Respectfully submitted,


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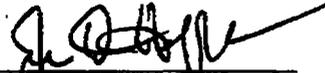
Dated: October 27, 2011

CERTIFICATE OF SERVICE

I, John D. Heffner, hereby certify that I have mailed a copy of the "Motion to Strike Reply of San Luis & Rio Grande Railroad" to the following parties by first class U.S. mail this 27th day of October 2011:

Mr. Donald H. Shank
Rio Grande Southern Railroad Company, L.L.C.
20 N. Broadway St.
Monte Vista, CO 81144

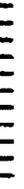
Eugene L. Farish, Esq.
City Attorney
739 First Avenue
P.O. Box 430
Monte Vista, CO 81144



John D. Heffner

EXHIBIT A

San Luis & Rio Grande Railroad

-  SLRG / San Luis & Rio Grande Railroad / Rio Grande Scenic Railroad
-  SLRG San Luis & Rio Grande Railroad Trackage Rights
-  BNSF Railway
-  SLC San Luis Central
-  UP Union Pacific



Central Car Repair Facilities

Connections: SLRG with UP at Walsenburg, CO
 SLRG with SLC at Monte Vista,
 CO (Sugar Jct.)



San Luis & Rio Grande



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