

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35496

PETITION FOR DECLARATORY ORDER

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

236540
ENTERED
Office of Proceedings
August 27, 2014
Part of
Public Record

PETITION FOR STAY

Respectfully submitted,

On Behalf of the D.& R.G. R.H.F.

Donald H. Shank/s/

Donald H. Shank
Executive Director
P.O. Box 1280
South Fork, CO 81154
Phone: (719) 873 - 2003

PETITIONER'S PETITION FOR STAY

Comes now your Petitioner, the Denver & Rio Grande Railway Historical Foundation, Inc. (DRGHF), which petitions the Surface Transportation Board ("Board") to **stay** the decision rendered by the Board on **August 18, 2014**, and in support hereof states:

GROUND FOR A STAY

49 CFR 1115.3 (a) permits a discretionary appeal of an entire Board action.

49 CFR 1115.3 (f) permits a petitioner to request a stay of an entire Board action, when a party plans on filing a petition for reconsideration.

Petitions for stay are due within 10 days of the service date of a decision.

Petitions for reconsideration are due within 20 days of the service date of a decision.

A petition for reconsideration will only be granted upon a showing of one or more of the following points:

“(1) The prior action will be affected materially because of new evidence or changed circumstances.

(2) The prior action involves material error.” 49 CFR 1115.3(b).

Petitioner plans to file a Petition for Reconsideration within 20 days of the service date (**August 18, 2014**) of the “entire Board decision” in the above entitled proceeding.

In the Board's decision, the Board made the following 2 findings :

“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.” (Emphasis added.)

The Foundation respectfully submits that there was more than ample evidence of undisputed, regulated transportation which is subject to the Board’s jurisdiction having occurred, and continuing to occur on the subject property in this record well before the Board rendered its decision. Nevertheless, Foundation will carefully reiterate the existing evidence in a manner which makes that evidence crystal clear for both the Board’s reconsideration of its decision, and if necessary, for the 10th Circuit Court of Appeals judicial review of the Board’s decisions in this proceeding.

The Board’s decision appears to have focused on, and relied upon the Foundation’s current tourist operations along its line which runs from South Fork, CO to a terminus in Mineral County, CO. While the Foundation does not intend to dispute that it runs a tourist train over its tracks, the Foundation is still a Class III railroad, and will remain a Class III railroad until the South Fork line is removed from the national rail network. The common carrier obligation to maintain its tracks for freight service remains.

The Board’s decision attempts to leave open the possibility that certain activities at the Monte Vista site may be subject to the Board’s exclusive jurisdiction and that the disputed zoning regulation may indeed be pre-empted. The Foundation will be seeking clarification of that issue in its Petition for Reconsideration.

In the intervening 18 months while the DRGRHF awaited the Board’s decision, the Foundation in fact has made a number of changes in the organization and is now unquestionably capable of providing the transportation this Board hypothesized would not be possible “in the reasonably foreseeable future”. In short, the “future” the Board speculated about had indeed already changed even before the Board reached its conclusions.

It should be noted that at no time did the Foundation ever believe the Board would depart

from its long standing precedent that “zoning ordinances are categorically pre-empted” which, it appears, the Board is attempting to do in this proceeding. Thankfully for the Foundation, the Board’s decision over-reached by speculating about what the Foundation is likely to do in the future. Thus the changes made in the last 18 months are now both “changed circumstances” and, in support of which, “substantial new evidence” has come to light which directly relates to the heart of the Board’s speculative decision about what may occur in the future.

In addition, your Petitioner will demonstrate in its Petition for Reconsideration, that the Board’s August 18, 2014 decision is laced with “material error.” Indeed, the entire decision is full of inconsistencies with regards to not only the facts, but also fails to even remotely follow the Board’s long standing precedent.

ARGUMENTS

Petitioner’s Petition for Reconsideration will provide the Board with “substantial new evidence” that was not available when the Petition for Declaratory Order was filed, and that only recently has become available, including, but not limited to, the following:

1. Rulings by other Federal Agencies which directly contradict some of the conclusions reach in this Board’s decision.

2. Petitioner shortly will make a demand upon the San Luis & Rio Grande Railway, demanding that the San Luis & Rio Grande Railway:
 - A. Re-install the turnout that connected Petitioner’s Monte Vista track with the San Luis & Rio Grande Railway’s track;

 - B. Enter into an interchange agreement with Petitioner, at Petitioner’s at Petitioner’s South Fork connection with the San Luis & Rio Grande Railway. In the event that the SLRG does not enter into a formal interchange agreement with the Foundation, your petitioner will file a

formal complaint with the Board and ask the Board to prescribe one.

Until recently, your petitioner did not anticipate holding out to the public at the Monte Vista site. Petitioner is now actively developing plans to offer trans-load rail service to shippers at Petitioner's Monte Vista location. Petitioner is currently negotiating an agreement which will involve the movement of railcars between Petitioner's Monte Vista location and the East Coast of the United States.

In furtherance of the proposed services mentioned above, your Petitioner is currently determining which regulatory authorities, if any, are needed in order to hold out at, and subsequently operate a public trans-loading operation at the Monte Vista site that is the subject of this Declaratory Order Petition, as a part of the Foundation's regulated rail system.

In order for the Board to properly evaluate both the changed circumstances, as well as the new evidence, a short housekeeping stay of the effective date of the decision until either the Board issues a decision on the Petition for Reconsideration, or if necessary, a Petition for Review is filed with the 10th Circuit Court of Appeals, would minimize the potential disruption of the various judicial processes surrounding this proceeding.

ADDITIONAL INFORMATION

It should be noted that until recently, the San Luis & Rio Grande Railway **was incapable of providing, and did not provide, rail service** between Monte Vista, CO and South Fork, Colorado, a distance of about 34 miles, due to a combination of poor track conditions and the use of the line to store derelict, out of service equipment for various rail car owners. The SLRG only recently began providing rail service to a coal load-out located about 7 miles West of Del Norte. An additional 10 miles of SLRG track would need to be restored to service in order to reach the connection to the Foundation's line in South Fork, CO (Derrick).

CONCLUSION

Wherefore, your Petitioner respectfully requests that Board issue a Stay of its decision pending the Board's evaluation of your Petitioner's Request for Reconsideration.

Respectfully submitted,

Donald H. Shank /s/

Donald H. Shank
P.O. Box 1280
South Fork, CO 81154
(719) 873-5901

Executive Director
Denver & Rio Grande Railway
Historical Foundation, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2014, I served via first class mail, postage prepaid, a copy of this Petition for Stay 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, CO

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/s/
Donald H. Shank