

**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, LLC**

**JOINT REPLY OF  
THE CITY OF MONTE VISTA, CO,  
AND THE SAN LUIS & RIO GRANDE RAILROAD  
TO PETITION FOR STAY**

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Submitted by

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Dated: September 2, 2014

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**I.  
INTRODUCTION**

Respondents the City of Monte Vista (“the City”) and the San Luis & Rio Grande Railroad (“SLRG”),<sup>1</sup> a Class III short line railroad subject to the jurisdiction of the Surface Transportation Board (“the Board”) respond to a request filed on August 27, 2014, by the Denver & Rio Grande Railway Historical Foundation d/b/a Denver & Rio Grande Railroad, LLC (“hereafter DRGRHF”) seeking to stay a decision of the Board issued on August 18, 2014. The Board ruled that DRGRHF’s activities consisting of the storage of railroad cars,

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<sup>1</sup> Collectively “Respondents.”

equipment, and parts on leased land inside the City's limits do not constitute transportation within the Board's jurisdiction. Respondents assert that the Board reached the correct decision and urge that the stay request be denied.

## II. BACKGROUND

The facts of this dispute are well known and need only be repeated for the sake of clarity. DRGRHF owns a line of railroad that it acquired about 15 years ago from the Union Pacific Railroad in an offer of financial assistance proceeding. That line extends between MP 299.3 at Derrick (near South Fork) and MP 320.9 in the City of Creede, CO. SLRG is a railroad established in 2003 which acquired the balance of this line (over 100 miles of track) between Derrick and Walsenburg, CO, where it connects with the Union Pacific Railroad and BNSF Railway.

Some years ago, DRGRHF leased a parcel of land inside Monte Vista's city limits from a corporate affiliate<sup>2</sup> and stored railroad equipment and parts on that property in violation of a City ordinance that forbade the storage of railcars on property not connected to a rail line. The subject parcel is adjacent but not connected to SLRG's line and is some 30 miles *east* of DRGRHF's own track. The City found that DRGRHF's owner Donald Shank had violated its ordinance. DRGRHF petitioned the Board to find that its activities "as a rail carrier" on the parcel preempted the City's ordinance. The Board ruled that DRGRHF's service

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<sup>2</sup> The affiliate purchased the property from a prior corporate owner of SLRG.

did not constitute transportation under the ICC Termination Act and denied preemption. This stay requested followed.

### III. ARGUMENT

The Board's rules at 49 CFR §1115.5 govern the granting of stays. In deciding whether or not to grant a stay, the Board follows the four-part *Virginia Jobbers*' test<sup>3</sup> applied by courts in the District of Columbia. Simply stated, the movant must show 1) a substantial likelihood of success, 2) that the movant will suffer irreparable injury absent a stay, 3) that the other party will not be harmed absent a stay, and 4) that the public interest will be harmed absent a stay. DRGRHF's request must be denied for failure to satisfy one or more of these four tests.

1. Likelihood of success. Simply stated, DRGRHF has failed to satisfy this initial test for the requested relief. DRGRHF concedes at page 3 that it is running a tourist operation between South Fork and a point in Mineral Springs. As the Board's August 18 decision noted, wholly intrastate tourist excursion service and the facilities used solely for such service are not transportation within its jurisdiction. Decision at 2.

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<sup>3</sup> *Virginia Jobbers Petroleum Association v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958).

The gist of DRGRHF's argument is that there is (and was) ample evidence of undisputed, regulated transportation on the subject property before the Board rendered its decision. Presumably, this "evidence" is the fact that DRGRHF owns a regulated line of railroad, some 30 miles *west* of its Monte Vista facility. As the owner of a common carrier railroad line, DRGRHF is entitled to argue that preemption applies to any activities associated with providing common carrier railroad service in interstate commerce on that line. Nevertheless, preemption does not cover noncommon carrier activities such as an intrastate tourist excursion service and it certainly does not cover a disconnected piece of property 30 miles to the *east*.

DRGRHF then goes on to state that during the 18 months it was awaiting the Board's decision, it made a number of undescribed organizational changes and is now "unquestionably capable of providing the transportation" the Board hypothesized would not be possible. DRGRHF then identifies a series of measures that it is undertaking including executing an interchange agreement with SLRG at some future unspecified date, developing a transload facility at Monte Vista, and negotiating an unidentified agreement for the movement of rail cars between Monte Vista and the East Coast. DRGRHF provides no specifics and does not indicate why it could not have undertaken the alleged activities at a prior date. In

short, DRGRHF has not shown why it has any more of a chance of success today than it had when it filed its Petition several years ago.

2. Irreparable injury to movant. Presumably, the injury that movant would suffer would be the penalty for violating the City's ordinance. The appropriate remedy would be for DRGRHF to seek a remedy from a Colorado court rather than the Board. Alternatively, DRGRHF should consider moving its facility to a point on its own rail line.

3. Irreparable injury to Respondents. The irreparable damage to SLRG is the damage to its reputation from having an unsightly mess next to its tracks. The City will continue to suffer injury from the violation of its ordinance. As the City stated in its Response and Protest submitted on August 1, 2011, "The zoning regulations were designed to address the health, safety and welfare of the citizens of the city and to prevent the type of blight which [DRGRHF] has created and promoted by the institution and continuation of a wrecking yard in the middle of the City. It is indistinguishable from any other salvage yard except that it is limited to rail cars and parts thereof." *See* City of Monte Vista Response and Protest at 10 and Exhibits 8a, 8i, 8m and 8n attached thereto.

4. Respondents have submitted pictures of the subject facility that show it to be an ugly blight as well as an "attractive nuisance" that could pose a danger to people entering on the property. *See* paragraph above and the numerous pictures

submitted as exhibits by the Respondents in their replies filed on July 11 and August 1, 2011, and July 12, 2012.

5. The public interest. The public interest is best represented by the City. Zoning ordinances such as that violated here are intended to insure the health, safety, and welfare of the citizens of Monte Vista. Allowing DRGRHF to continue to maintain this facility will perpetuate a visual nuisance and a physical danger.

#### IV. CONCLUSION

The Board's August 18, 2014, decision was the correct one. DRGRHF's stay request should be denied.

Respectfully submitted,



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September 2, 2014

CERTIFICATE OF SERVICE

I, John D. Heffner, hereby certify that I have sent a copy of the foregoing Joint Reply of the San Luis & Rio Grande Railroad and the City of Monte Vista, CO, to the Petition for Stay filed by the Denver & Rio Grande Railway Historical Foundation d/b/a Denver & Rio Grande Railroad, LLC, to the following parties by US Mail and electronic mail, this 2nd day of September 2014:

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/s/ John D. Heffner  
John D. Heffner

Dated: September 2, 2014