

Voting Conference, May 3, 2005

Joint Statement of Timothy Strafford and Brian O'Boyle
Staff Attorneys, STB Office of Proceedings

Union Pacific Railroad Company
– Abandonment Exemption –
In Rio Grande and Mineral Counties, CO.

STB Docket No. AB-33 (Sub-No. 132X)

City of Creede, CO—Petition for Declaratory Order

STB Finance Docket No. 34376

Good morning Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey.

The draft decision before you in the abandonment proceeding would deny a petition to reopen prior decisions in this proceeding served in 1999, 2000, and 2004. The 1999 decision approved the sale of a 21.6-mile rail line in Rio Grande and Mineral Counties, CO, known as the Creede Branch, by Union Pacific Railroad Company (UP) to the Denver & Rio Grande Railway Historical Foundation (Foundation) pursuant to the offer of financial assistance (OFA) procedures. The 2000 and 2004 decisions declined to reopen the 1999 decision.

In December 1998, UP filed a notice of exemption to abandon the line. The Foundation was authorized to acquire the line under the OFA procedures, through which interested persons may seek to acquire a rail line for continued rail service before it is abandoned. The City of Creede asked the Board to reopen the decision authorizing the transfer 6 months later because the City opposed the sale. In its 2000 decision, the Board declined to grant reopening and the sale of the line was consummated in May 2000.

In November 2000, the City filed suit against the Foundation in Colorado state court to resolve certain zoning issues related to the railroad right-of-way. The matter was subsequently removed to a Federal district court, which, in turn, referred issues of Federal preemption to the Board. My colleague Brian O'Boyle will present the staff's recommendations in that declaratory order proceeding in a moment.

In 2003, the City again sought to void the OFA sale authorization. This pleading was treated as a second petition to reopen and was denied.

On November 5, 2004, a group calling itself the Concerned Citizens of Creede and Mineral County, CO (Concerned Citizens), filed another petition to reopen the prior decisions. Petitioners ask that the Board: (1) find that the Foundation did not satisfy the requirements of the OFA provisions; (2) authorize abandonment of the line; and (3) exempt this line from the OFA provisions.

The draft decision would deny the petition to reopen. A petition to reopen an administratively final action will be granted only upon a showing that material error, new evidence, or substantially changed circumstances would materially affect the challenged action. Concerned Citizens argue that new evidence demonstrates that the previous decisions constituted material error, insofar as the Board found that the Foundation was financially responsible under 49 U.S.C. 10904 and that its OFA was for continued rail service.

The draft decision finds that petitioners have not presented any new evidence that materially affects the agency's earlier decisions in this proceeding, and that they have not shown material error. Further, the decision notes that concerns for administrative finality, repose, and detrimental reliance preclude reopening an OFA sale that was consummated 5 years ago.

This concludes my statement. Mr. O'Boyle will now present the staff's recommendation in the declaratory order proceeding.

Thank you.

Good morning, Board Members.

As mentioned by my colleague, the Federal District Court of Colorado has referred to the Board questions of federal preemption regarding this line in a related finance proceeding. By way of background, the City is seeking a declaratory judgment from the Federal district court that its zoning ordinances are applicable to the portion of the Foundation's right-of-way that runs through the City that it claims is not required for rail purposes. The Foundation argues that the City's zoning ordinances are Federally preempted.

The Federal district court referred to the Board the following questions: whether the Foundation needs the outer portions on the sides of its right-of-way to safely and efficiently provide rail service, and if so, whether the City's zoning ordinances are applicable to these outer portions of the right-of-way, or instead, if the ordinances are preempted.

As the Board recently noted in the City of Lincoln case, the burden of showing that a railroad does not need its entire right-of-way is on the party trying to curtail the railroad's full use of the right-of-way; in this case, the burden is on the City. The draft decision before you finds that the City has not met this burden.

The draft decision then answers the second part of the Federal district court's inquiry by finding that the City's zoning ordinance is Federally preempted by 49 U.S.C. 10501(b). Federal preemption under this statute applies only if the rail carrier is using its right-of-way for rail transportation purposes. Because the Foundation has shown that it intends to use all of its right-of-way for rail transportation purposes, the draft decision concludes that Federal preemption applies. The draft decision notes, however, that if the Foundation were to use the right-of-way for purposes that are not considered to be transportation within the Interstate Commerce Act, such as commercial enterprises, the City's zoning ordinance would not be preempted.

We would be happy to address any questions you may have.