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October 29, 2018

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By UPS overnight mail

Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20024

ENTERED
Office of Proceedings
October 30, 2018
Part of
Public Record

Re: Finance Docket No. 36240, *Denver Rock Island Railroad Company v. The City and County of Denver, Colorado*

Dear Ms. Brown:

Hereby transmitted is the original and 10 copies of a Complaint Including Request For Injunctive Relief for filing with the Board in the above referenced matter.

Also enclosed is a check in the amount of \$350 for the filing fee.

Very truly yours,

Thomas F. McFarland
One of the Attorneys for Complainant

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BEFORE THE
SURFACE TRANSPORTATION BOARD

DENVER ROCK ISLAND RAILROAD	)	
COMPANY,	)	FINANCE DOCKET
	)	NO. 36240
<u>Complainant,</u>	)	
v.	)	
	)	
THE CITY AND COUNTY OF DENVER,	)	
COLORADO,	)	
	)	
<u>Defendant.</u>	)	

COMPLAINT INCLUDING REQUEST FOR INJUNCTIVE RELIEF

DENVER ROCK ISLAND RAILROAD
COMPANY
3400 East 56th Avenue
Commerce City, CO 80022

Complainant

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Attorneys for Complainant

DATE FILED: October 30, 2018

BEFORE THE
SURFACE TRANSPORTATION BOARD

DENVER ROCK ISLAND RAILROAD	)	
COMPANY,	)	FINANCE DOCKET
	)	NO. 36240
<u>Complainant,</u>	)	
v.	)	
	)	
THE CITY AND COUNTY OF DENVER,	)	
COLORADO,	)	
	)	
<u>Defendant.</u>	)	

COMPLAINT INCLUDING REQUEST FOR INJUNCTIVE RELIEF

Pursuant to 49 U.S.C. § 10501(b)(2); 49 U.S.C. § 1321(b)(4); 49 U.S.C. § 10903(d); 49 C.F.R. § 1111.1, *et seq.*, and 49 C.F.R. § 1117.1, DENVER ROCK ISLAND RAILROAD COMPANY (DRIR), hereby complains against the CITY AND COUNTY OF DENVER, COLORADO (CCD), including a request for injunctive relief, as follows:

I

DRIR is a Class III common carrier by rail subject to the jurisdiction of the Surface Transportation Board (the Board) under the Interstate Commerce Act, as amended, 49 U.S.C. § 10101, *et seq.*

II

CCD is a Class III common carrier by rail subject to the jurisdiction of the Board under the Interstate Commerce Act, as amended, 49 U.S.C. § 10101, *et seq.*

III

The Board has jurisdiction of the subject matter of the Complaint under 49 U.S.C. § 10501(b)(2) because at issue is CCD's removal of side tracks authorized to be operated by DRIR without authority from the Board for abandonment or discontinuance of rail service over those tracks.

IV

Since 1993, DRIR or its predecessor, Denver Terminal Railroad Company, has been authorized by the Board or its predecessor, the Interstate Commerce Commission, to provide common carrier rail transportation over tracks in the Denver, Colorado Stockyards Area, commonly known as the National Western Drive Corridor and the River Corridor, collectively referred to as the Stockyards Corridors. *See Denver Terminal RR -- Acquisition and Operation Exemption -- Denver Ry.*, 1993 WL 381588 (Finance Docket No. 32356, decision served September 29, 1993).

V

In 1996, the Board denied an application by the Western Stock Show Association (WSSA), who at that time owned the land under the Stockyards Corridors, for adverse discontinuance of DRIR's Board authority to operate over the Stockyards Corridors. *See Western Stock Show Assn. -- Aban. Exemption -- in Denver, CO*, 1 STB 113 (1996).

VI

In City and County of Denver -- Acq. Exemption -- Western Stock Show Assn., 2018 WL 3799869 (Finance Docket No. 36157, decision served August 9, 2018), the Board found that

WSSA had residual authority to operate over the Stockyards Corridors, which it transferred to CCD in recently conveying the land under those Corridors to CCD.

VII

DRIR's authority to operate over the Stockyards Corridors is current and primary. CCD's authority to operate over those Corridors is residual and secondary. CCD's residual authority cannot take effect unless and until DRIR's primary authority is formally discontinued by a decision of the Board.

VIII

Track Nos. 420 and 421 are side tracks that extend from the main tracks that DRIR operates in the National Western Drive Corridor. Track No. 420 is approximately 1,671 feet long. Track No. 421 is approximately 412 feet long.

IX

DRIR and its predecessors have operated over Track Nos. 420 and 421 continuously for more than 35 years. Those Tracks were used recently to provide rail service to Rocky Mountain Colby Pipe Co., among other shippers. That shipper recently relocated away from the Stockyards Corridors in anticipation of a track relocation project being negotiated by CCD and DRIR. Track Nos. 420 and 421 were also being used to store railcars, which generated revenue for DRIR.

X

CCD has never operated over Track Nos. 420 and 421, nor has CCD operated over any other part of the Stockyards Corridors.

XI

DRIR owns the rail and other track materials in Track Nos. 420 and 421. DRIR has a Bill

of Sale from Union Pacific Railroad Company, dated April 28, 1995 that conveys Track Nos. 727 and 754 to DRIR. Those Tracks are now known as Track Nos. 420 and 421.

XII

By virtue of an Easement Deed dated July 10, 1997, WSSA conveyed an easement to DRIR to operate over the Stockyards Corridors, including Track Nos. 420 and 421, for railroad purposes. Even if that Deed did not convey an easement by deed, DRIR has a prescriptive easement to operate over Track Nos. 420 and 421 under Colorado law.

XIII

On or about October 23, 2018, without prior notice to DRIR, CCD began to remove rail and track materials from Track Nos. 420 and 421. As of the filing of this Complaint, approximately 125 feet of rail and track materials have been removed from Track No. 420 and from Track No. 421. Prior to removal of rail and track materials, CCD required that railcars being stored by DRIR for revenue on Track No. 420 be moved off that Track. In addition, CCD has effectively barricaded Track Nos. 420 and 421 such that access to those Tracks by DRIR has been prevented.

XIV

Removal of rail and track materials from Track Nos. 420 and 421 and other activities undertaken by CCD to prevent use of those Tracks by DRIR constitute abandonment of those Tracks without Board approval in violation of 49 U.S.C. § 10903(d).

XV

CCD cannot rely on 49 U.S.C. § 10906 to authorize its abandonment and removal of

Track Nos. 420 and 421 without Board authority because CCD has only residual, secondary authority over those tracks, such that it cannot abandon and remove those Tracks over the objection of DRIR, which has primary and current authority over those Tracks.

XVI

The Board has injunctive power under 49 U.S.C. § 1321(b)(4) and 49 U.S.C. § 10903(d) to require a rail carrier to cease and desist from removing rail and other track materials from an STB-regulated rail line without Board approval. *See Colorado Wheat Administrative Committee v. V&S Railway, LLC*, 2015 WL 2151430 (Docket No. NOR 42140, decision served May 7, 2015).

XVII

The Board has injunctive power under 49 U.S.C. § 1321(b)(4) and 49 U.S.C. § 10903(d) to require a rail carrier to replace rail and other track materials that have been removed in violation of law. *See Busboom Grain, Inc. v. ICC*, 830 F.2d 74 (7th Cir, 1987).

XVIII

The Board should issue an injunction to require CCD to cease and desist from removing rail and track materials from Track Nos. 420 and 421, and to replace such materials so removed, because (1) it is likely that DRIR will prevail on the merits of this Complaint; (2) without an injunction, DRIR would suffer immediate irreparable injury; (3) CCD would not be seriously harmed if an injunction were to be issued; and (4) the public interest warrants issuance of an injunction.

XIX

CCD's unauthorized removal of tracks and other activities preventing DRIR's access to Track Nos. 420 and 421 have resulted in loss of revenue from storage of cars on those Tracks, and inability to locate shipper facilities to be served by those Tracks.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, the Board should institute an investigation into the matters complained of, after which the Board should issue an injunction that requires CCD to cease and desist from removing rail and track materials from Track Nos. 420 and 421, and to replace such rail and other track materials as have been removed from those Tracks. The Board should also award damages to DRIR for loss of revenue from storage of cars, and for inability to locate shippers adjacent to Track Nos. 420 and 421.

Respectfully submitted,

DENVER ROCK ISLAND RAILROAD
COMPANY
3400 East 56th Avenue
Commerce City, CO 80022

Complainant

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DATE FILED: October 30, 2018

CERTIFICATE OF SERVICE

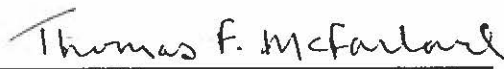
In accordance with 49 C.F.R. § 1111.3, I hereby certify that on October 29, 2018, I served a copy of the foregoing Complaint Including Request For Injunctive Relief by UPS overnight mail on representatives of the City and County of Denver, Colorado, i.e.:

Matthew J. Mulbarger, Esq.
Assistant Director, Litigation
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I also certify that the front of the overnight express courier envelopes includes the legend
"Service of STB Complaint."



Thomas F. McFarland