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December 21, 2018

Via electronic filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

Re: *Denver Rock Island Railroad Company – Complaint*, STB Docket No. NOR 42160

Via electronic filing

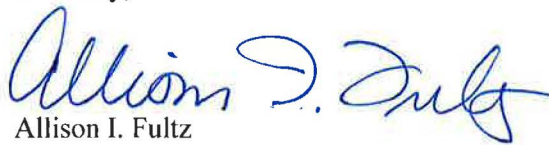
Dear Ms. Brown:

Please accept for filing the attached Answer of the City and County of Denver to the Complaint in the above-captioned proceeding.

This letter also responds to the Board's request in its Decision of December 6, 2018, in this matter that the City file a statement indicating whether the Reply the City filed on November 19, 2018, was intended as an Answer or as a Motion to Dismiss. If the latter, the Board directed the City to file an Answer no later than December 26, 2018. If recast in the context of a complaint proceeding pursuant to 49 C.F.R. part 1111, the City's Reply was intended as a Motion to Dismiss. However, in light of the reclassification of this proceeding as a complaint docket, the City is willing to supplement its Motion if this Board requires additional information.

Please do not hesitate to contact me with any questions.

Sincerely,



Allison I. Fultz
Counsel for City and County of Denver

Enclosure

DATE FILED: December 21, 2018

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DENVER ROCK ISLAND RAILROAD

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)

)

DOCKET NO. NOR 42160

Complainant,

)

v.

)

)

THE CITY AND COUNTY OF DENVER,)
COLORADO

)

)

Defendant.

)

**ANSWER OF THE CITY AND COUNTY OF DENVER, CO TO
COMPLAINT INCLUDING REQUEST FOR INJUNCTIVE RELIEF**

The City and County of Denver, CO ("CCD") hereby answers the Complaint of the Denver Rock Island Railroad Company, 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.*

ANSWER: CCD admits that DRIR is a class III common carrier by railroad. The remaining allegations stated in Paragraph I are a legal conclusion to which no answer is required. To the extent that the remaining allegations of Paragraph I are factual allegations, CCD denies each of them.

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.*

ANSWER: CCD denies that it is a Class III common carrier by rail. The remaining allegations stated in Paragraph II are a legal conclusion to which no answer is required. To the extent that the remaining allegations of Paragraph II are factual allegations, CCD denies each of them.

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.

ANSWER: The allegations stated in Paragraph III are a legal conclusion to which no answer is required. To the extent that the allegations of Paragraph III are factual allegations, CCD denies each of them.

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).

ANSWER: The allegations stated in Paragraph IV are a legal conclusion to which no answer is required. To the extent that the allegations of Paragraph IV are factual allegations, CCD denies each of them.

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).

ANSWER: CCD admits the allegations of Paragraph V.

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.

ANSWER: The allegations stated in Paragraph VI are a legal conclusion to which no answer is required. To the extent that the allegations of Paragraph VI are factual allegations, CCD admits each of them.

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.

ANSWER: The allegations stated in Paragraph VII are a legal conclusion to which no answer is required. To the extent that the allegations of Paragraph VII are factual allegations, CCD denies each of them.

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.

ANSWER: CCD admits that Track Nos. 420 and 421 are tracks that extend from the tracks that DRIR operates in the National Western Drive Corridor. CCD lacks sufficient information to confirm or deny the length of the tracks. The characterization of the Tracks 420 and 421 as "side tracks" is a legal conclusion to which no answer is required. To the extent characterization of Tracks 420 and 421 as "side tracks" is a factual allegation, CCD denies that allegation.

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.

ANSWER: CCD is without sufficient information to admit or deny the allegations in the first sentence of Paragraph IX and hereby denies such allegations. CCD admits the allegations of the second and third sentences of Paragraph IX, and that Track Nos. 420 and 421 were also being used to store railcars. CCD is without sufficient information to admit or deny the remaining allegations in Paragraph IX and they are hereby denied.

X

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

ANSWER: CCD admits the allegations of Paragraph X.

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.

ANSWER: CCD denies the allegations in the first and third sentences of Paragraph XI. CCD admits the allegations in the second sentence of Paragraph XI.

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.

ANSWER: CCD admits that WSSA conveyed an Easement Deed to DRIR dated July 10, 1997, for railroad purposes. CCD denies the remaining allegations of the first sentence of Paragraph XII. CCD denies the allegations of the second sentence of Paragraph XII. To the

extent that the allegations of the second sentence of Paragraph XII are factual allegations, CCD denies each of them.

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.

ANSWER: CCD denies the allegation in the first sentence of Paragraph XIII that it not provide notice to DRIR (see CCD's Reply in this proceeding at 6 and **Exhibit I**). CCD admits the remaining allegations of Paragraph XIII.

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).

ANSWER: The allegations stated in Paragraph XIV are legal conclusions to which no answer is required. To the extent that the allegations of Paragraph XIV are factual allegations, CCD denies each of them.

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.

ANSWER: The allegations stated in Paragraph XV are legal conclusions to which no answer is required. To the extent that the allegations of Paragraph XV are factual allegations, CCD denies each of them.

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).

ANSWER: The allegations stated in Paragraph XVI are legal conclusions to which no answer is required. To the extent that the allegations of Paragraph XVI are factual allegations, CCD denies each of them.

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).

ANSWER: The allegations stated in Paragraph XVII are legal conclusions to which no answer is required. To the extent that the allegations of Paragraph XVII are factual allegations, CCD denies each of them.

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.

ANSWER: The allegations stated in Paragraph XVIII are legal conclusions to which no answer is required. To the extent that the allegations of Paragraph XVIII are factual allegations, CCD denies each of them.

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.

ANSWER: CCD is without sufficient information to admit or deny the allegations in Paragraph XIX and they are hereby denied.

WHEREFORE, and in view of all of the foregoing, the Board should deny all of the relief requested by DRIR in this proceeding.

Respectfully submitted,



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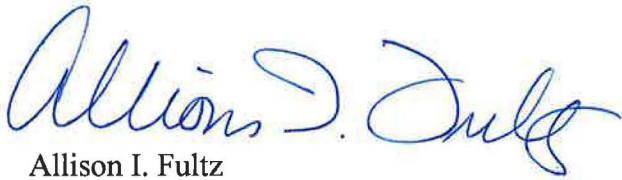
Counsel for City and County of Denver, CO

Dated: December 21, 2018

CERTIFICATE OF SERVICE

In accordance with 49 C.F.R. § 1111.4, I hereby certify that I have this 21st day of December, 2018, caused to be served a copy of the foregoing Answer of the City and County of Denver, Colorado, to the Complaint Including Request for Injunctive Relief, upon the following parties of record:

Thomas F. McFarland,
Thomas F. McFarland, P.C.
208 South LaSalle Street, Suite 1666
Chicago, IL 60604-1228


Allison I. Fultz