

**BEFORE THE UNITED STATES
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No.# 35496

**DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION INC.
d/b/a DENVER & RIO GRANDE RAILROAD, LLC**

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**PETITION FOR A DECLARATORY ORDER
OPENING STATEMENT**

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Public Record**

Submitted by

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Dated March 9th, 2012

**BEFORE THE
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INTRODUCTION

Pursuant to 5 U.S.C. 554(e) and 49 U.S.C. 721(a), the Denver and Rio Grande Railway Historical Foundation Inc. (DRGRHF or Foundation) filed a petition for a declaratory order with the United States Surface Transportation Board (STB or Board) asking the Board to resolve a conflict and remove uncertainty. On February 22nd, 2012, the Board commenced a proceeding to resolve the dispute. In accordance with the applicable regulations of the Board, the DRGRHF herein below submits its opening statement in this proceeding.

The DRGRHF is a Class III rail carrier subject to the Board's jurisdiction by virtue of its May 24th, 2000 acquisition of a 21.7 mile long rail line from the Union Pacific Railroad. See: *Union Pacific Railroad Company, Abandonment Exemption, in Rio Grande and Mineral Counties, Colorado STB Docket No.# AB-33 (Sub No. 132X)*. The Properties which are the subject of this proceeding were acquired in 2004, and 2005.

In late 2009 or early 2010 , or there about, the City of Monte Vista, Colorado amended their local zoning code. The section of the Monte Vista municipal code which was changed was Chapter 12 Article 17 Section 110. A copy of the relevant section of the municipal code is hereto attached as exhibit # 1. Chapter 12 of the code is the section that sets forth the Zoning regulations.

The legal question which has arisen is; does the provisions found at 49 U.S.C. 10501(b) preempt Chapter 12 Article 17 Section 110 of the Monte Vista municipal code ? A dispute has

emerged over the answer to that question which has led the Foundation to seek this declaratory order to resolve the controversy and remove uncertainty.

BACKGROUND

As was mentioned above, the DRGRHF is a Class III rail carrier subject to the Board's jurisdiction. In 2004, the Foundation acquired a legal leasehold interest in a Property owned by the Foundation's President, Mr. Donald Shank. A copy of the lease is hereto attached as Exhibit # 2. The facility contained an existing rail siding, and the site contained pre-existing buildings.

The site was, and continues to be used as, a restoration, storage, and maintenance of way facility for the Creede to Southfork Line. When the Creede branch was acquired, the line came without any buildings, or maintenance facilities of any kind, and a limited number of side tracks and storage locations. The society was left to have to develop brand new facilities.

It was determined that it would be easier, and more cost effective, to acquire an existing facility, either online, or nearby, that could be used as a restoration, storage and MOW facility. Since no suitable properties existed along the line, the Foundation, and its officers, looked off line to see if an appropriate facility could be found nearby.

A suitable facility was found nearby, in Monte Vista, CO. Given the Foundations significant investment in the Creede line, the facility in Monte Vista was purchased personally by Mr. Shank. He subsequently leased a large portion of the site to the foundation. He did keep a portion of the facility for his own personal use.

At about the same time, the Union Pacific Railroad spun off a series of branch lines radiating from Alamosa, Colorado to a new carrier called the San Luis and Rio Grande Railroad (SLRG). At the time, the SLRG was a subsidiary of Rail America.

In 2005, an entity called the Rio Grande Southern Railroad Company, LLC, (RGSR) a Colorado limited liability company acquired a parcel of land which sat adjacent to the property mentioned above from the SLRG. RGSR is owned and controlled by Mr. Donald H. Shank. It should be noted that the parcel purchased was a portion of the right of way through Monte Vista, CO. It was historically, and continues to be used to this day, as railroad property

Despite its name, the RGSR was formed to simply be the title holder to the property. The

RGSR has never held out to the public as providing rail transportation service. The parcel purchased from SLRG did contain an existing rail siding. The RGSR, upon closing, leased the parcel to the DRGRHF, a federally regulated carrier. A copy of the lease is hereto attached as exhibit # 3.

It should be noted, that the DRGRHF does not hold out as providing service at the Monte Vista facility. It simply uses that facility to support operations on the line the Foundation was authorized to acquire and operate. Since the Foundation uses the facility only as a support facility, its acquisition did not require prior Board approval. The Foundation's position is that the facility falls within the purview of 49 U.S.C. 10906; it is a facility subject to the Board's exclusive jurisdiction, but not subject to the Board's more detailed regulation such as is found in 49 U.S.C. 10901, 49 U.S.C. 10902, 49 U.S.C. 10903, 49 U.S.C. 10904, or 49 U.S.C. 10905, or 49 U.S.C. 10907.

From 2004, until 2010, the DRGRHF enjoyed unrestricted use of the facility and lived harmoniously with the City. There had been no problems between the City of Monte Vista and the Foundation until the City changed its zoning for the properties which are the subject of this proceeding.

In October of 2010, the City of Monte Vista surprisingly, and for reasons which are still not clear, notified Mr. Shank, instead of either the DRGRHF, or RGSR, that he was in violation of the City's zoning regulations. Despite the fact the city was told that the property was leased to a rail carrier, and that one of the parcels in question was not owned by him personally, in November of 2010, the City's code enforcement official cited Mr. Shank for violating the City's zoning regulations. See citations hereto attached as Exhibit # 4.

In February of 2011, Mr. Shank, by way of his retained counsel Mr. Ronald E. Howard, Esq., filed a motion to dismiss the complaints on the grounds that the railcars, and the use of the properties in question, was lawful under federal law, and that the municipal law in question was preempted by 49 U.S.C 10501(b). In the alternative, the motion requested that the matter be referred to the Board in order to address the scope of Federal preemption. See the Motion to Dismiss hereto attached at Exhibit 5.

The Municipal Court denied the motion, and a trial was held on March 16, 2011. After

hearing testimony on the matter, the trial court found that Mr. Shank was acquitted in part, and found guilty, in part, of violating the zoning regulations of the City of Monte Vista. A copy of the Court's order is hereto attached as Exhibit # 6.

The Court's order was subsequently appealed to the District Court of Rio Grande County. See: Case Number 2011 CV 29. Unlike the Municipal Court, which denied the Motion to Dismiss out of hand, and with out a hearing, the District Court permitted the parties to pursue this Declaratory Order proceeding in order to address the issue of Federal preemption. The appeal is currently being held in abeyance, pending the outcome of this proceeding.

THE FACTS

The property in question is Rio Grande County Parcel Number 3531307034 (subject property). The subject property is located within the city limits of the City of Monte Vista. The subject property's owner on the County tax rolls is listed as the Rio Grande Southern Railroad Company, LLC (RGSR). The RGSR is a Colorado limited liability company in good standing with the Colorado Secretary of State. The RGSR purchased the subject property in 2005 from the San Luis & Rio Grande Railroad, Inc. The subject property has been under railroad ownership and use for decades.

The subject property is under lease to the D&RGHF, a Colorado Nonprofit Corporation. The D&RGHF is also a federally authorized railroad owning and operating a railroad in Rio Grande and Mineral Counties. The railroad operated by the D&RGHF is part of the interstate rail network and is connected by direct rail interchange and rail spur to the subject property.

The D&RGHF utilizes the subject property for the storage of rail cars, rail car parts, and other railroad related equipment and materials. The D&RGHF also uses the subject property to restore, maintain, renovate and otherwise perform work on rail cars for use or anticipated use on the D&RGHF's rail line as well as for transportation related purposes by other federally authorized railroads.

The City enacted a zoning regimen that prohibits the storage of rail cars not attached to a live rail line. Thereafter, on or about October 18, 2010, the code enforcement official for the City did issue a warning notice to Don Shank, and individual, for violation of the City's zoning regimen with

regard to the storage of rail cars. The code enforcement official was informed by Mr. Shank that the rail cars were stored on railroad property and that he, individually, was not the owner of the subject property. The City's Chief of Police, Rick Needham, was also so advised by Mr. Shank. In a letter from Mr. Needham to Mr. Shank dated October 19, 2010, Mr. Needham acknowledged the title of the property was held by the RGSR but persisted in holding that the title of the property being held by a company notwithstanding, Mr. Shank was still "the owner of the railroad." (See Exhibit A attached hereto) Thereafter, on or about November 18, 2010, the code enforcement official for the City did issue a summons and complaint to Don Shank, an individual, for violation of the City's zoning regimen with regard to the storage of rail cars.

ARGUMENT

5 U.S.C. 554(e) and 49 U.S.C. 721, give the Board discretion to issue a declaratory order to terminate a controversy or remove uncertainty. The issue here is whether federal transportation law applicable to railroad operations preempts the City of Monte Vista's local zoning regulations. As was previously argued in the Monte Vista Municipal Court case, those same arguments apply, and are reproduced herein below: "

1. The D&RGHF is a rail carrier, and transportation by rail carrier is subject to the exclusive jurisdiction of the STB.

The D&RGHF purchased a 21.6 mile rail line known as the Creede Branch from the Union Pacific Railroad Company on May 24, 2000, under an offer of finance assistance approved pursuant to the procedures of 49 USC §10904 and 49 CFR §1152.27. "D&RGHF is a licensed railroad that holds itself out as a common carrier and that has not sought abandonment or discontinuance authority from the Board [STB]." STB Finance Docket Decision No. 34376, 8 (2005). The D&RGHF is considered a rail carrier and subject to the jurisdiction of the STB by both the U.S. District Court for the District of Colorado and the STB. *STB Finance Docket Decision No. 34376 (2005)*, *City of Creede v. Denver & Rio Grande Railway Historical Foundation*, 01-RB-318, (D. Colo., 2003).

In the Creede case the U.S. District Court recognized the doctrine of primary jurisdiction and referred railroad specific questions, including preemption of Creede's municipal zoning ordinances, to the STB for a decision. The decision of the STB in that case was relied upon by the Court in the issuance of its ruling, in favor of the D&RGHF.

As a rail carrier, the D&RGHF falls under the exclusive jurisdiction of the STB. The ICCTA 1995 at Section 10501 grants the STB "exclusive" jurisdiction over "transportation by rail carriers" and "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State." 49 U.S.C. §10501(b). "Transportation" has been broadly defined to include "a locomotive, car, vehicle, vessel, warehouse ... yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use" as well as "services related to that movement." 49 U.S.C. §10102(9). Thus, the subject property and the rail cars thereon are operated and/or owned by the D&RGHF; and, as such are encompassed under the definition of "transportation" in §10201(9); and, are therefore under the exclusive jurisdiction of the STB.

2. The City's zoning regimen is federally preempted with regard to the subject property.

In 49 U.S.C. §10501(a), Congress gives the STB jurisdiction over "transportation by rail carrier," which includes the carrier's rail facilities. Section 10501(b), as modified by the ICCTA 1995, expressly provides that, where the Board has such jurisdiction, that jurisdiction is "exclusive," and state and local laws, including local zoning and permitting laws and laws that have the effect of managing or governing rail transportation, are generally preempted.

State law is preempted by federal law when: (1) the preemptive intent is " 'explicitly stated in [a federal] statute's language or implicitly contained in its structure and purpose' "; (2) state law "actually conflicts with federal law"; or (3) "federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.' " *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112

S.Ct. 2608, 120 L.Ed.2d 407 (1992) (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977), and Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982)).

The basis of the preemptive authority of the STB with regard rail carriers and transportation by rail carriers, is based in Commerce Clause of the U. S. Constitution (Art. 1, sec. 8, cl. 3) that gives Congress plenary authority to legislate with regard to activities that affect interstate commerce. See *Gibbons v. Ogden, 9 Wheat 1, 196 (1824)*. With regard to railroads, this was done through the enactment of the Interstate Commerce Act, which has been deemed to be “among the most pervasive and comprehensive of federal regulatory schemes.” *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 318 (1981)*. The court has gone on to state that the Interstate Commerce Act so pervasively occupies the field of railroad governance that it completely preempts state law claims. *Deford v. Soo Line R.R., 867 F.2d 1080, 1088-91 (8th Cir. 1989)*.

The preemption of the Interstate Commerce Act was broadened through the ICCTA 1995 with the express preemption language in 49 USC §10501(b). The STB has gone so far as to state in its Creede decision that “section 10501(b) does not leave room for state and local regulation of activities related to rail transportation.” Additionally, the court has stated that the STB, “as the agency authorized by Congress to administer the Termination Act [ICCTA 1995], the Transportation Board [STB] is 'uniquely qualified to determine whether state law ... should be preempted' by the Termination Act.” *CSX Transportation, Inc. v. Georgia Public Service Commission, 944 F.Supp. 1573, 1584 (N.D.Ga.1996)*.

The purpose of this federal preemption is to prevent a patchwork of local and state regulation from unreasonably interfering with interstate commerce. *Green Mountain R.R. v. Vermont, 404 F.3d 638, 642 (2dCir. 2005)*. When the STB has jurisdiction under §10501(a), § 10501(b) preempts two broad categories of state regulation: (1) permitting or preclearance requirements (including environmental, zoning and other land use requirements) that by their nature could be used to deny a railroad the right to conduct rail operations or proceed with transportation activities the STB has authorized; and (2) attempts to address transportation matters that are regulated by the STB. *Id* at 642-43. The court has

also upheld the STB's position that "while state and local government entities ... retain certain police powers and may apply non-discriminatory regulation to protect public health and safety, their actions must not have the effect of foreclosing or restricting the railroad's ability to conduct its operations. *Village of Ridgefield Park v. New York, Susquehanna & W. Ry. Corp.*, 163 N.J. 446, 750 A.2d 57, 64 (2000).

The City will most likely argue, and it is true, that state or local governments may exercise their police powers, provided they do not unreasonably burden interstate commerce or interfere with railroad operations. *Id.* at 643. See also *N.Y. Susquehanna & W. Ry. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007). Where an activity, even though it is on rail property, is not considered "transportation by a rail carrier" under § 10501(a), no federal preemption applies, and states and localities are free to regulate the activity. *Florida East Coast Railway v. City of W. Palm Beach*, 266 F.3d 1324, 1336-37 (11th Cir. 2001). Such would be the case with a plant owned by an outside entity, a restaurant, or even a transloading facility serviced but not controlled by the railroad. However, the case at issue here is totally distinguishable from those where preemption does not apply.

In this case, we are dealing with rail cars, owned by a railroad, located on railroad property. Rail cars are a fundamental instrumentality of transportation by rail and rail operations in general. People and goods can not be transported by rail without the use of rail cars. Thus, the attempt by the City to regulate the storage or location of rail cars on railroad property creates a situation where the City's zoning regimen has the effect of foreclosing or restricting the railroad's ability to conduct its operations and proceed with transportation activities. This present case, without question, falls squarely within the bounds of the federal preemption under § 10501(b). "

One of the biggest obstacles that the City must overcome in this proceeding when it argues why its regulations are not preempted, is the Municipal Courts own ruling. Throughout the ruling, the court clearly indicates that it is analyzing the City's ability to use its police powers to regulate the **use** of property within its jurisdiction. The entirety of the proceeding, and the ruling which arose from it, dealt entirely with land use issues and what uses were permitted upon the subject land.

The City of Monte Vista is, without question, clearly attempting to regulate a rail carrier's operation by regulating the use of the land upon which a carrier's facilities exist. The City is attempting to regulate where railcars can be placed, maintained, repaired, serviced, stored, etc.

It should be noted that not a single public health or safety issue, such as either a building code (plumbing, electrical, etc.), or a fire or health code, was raised in the proceeding. The entirety of the proceeding was based solely on permitted uses. The court's decision was expressly limited to addressing permitted uses.

In addition, the court's ruling actually permits some of the railcars already on site to remain, finding their continued storage on the property to be a valid non-conforming use. No credible argument can now be made that those railcars which the court, upon hearing evidence and argument from all parties, found to be a valid non-conforming use, somehow now rise to a level of a serious public health and safety issue in this proceeding. In the event that the City even attempts to raise a public safety and health argument at this point, just a few simple questions can provide an adequate test to determine the real motives behind the municipal court proceeding:

1. Why did the City use a land use ordinance to prosecute a public health and safety issue?
2. Why did no one prosecuting the case for the city raise a public health or safety argument before the municipal court?
3. If there was a public health and safety issue, why would a municipal court permit a public health and safety issue to remain ?

It is in answering those questions that the Board can clearly see the controversy at issue is not a public health and safety issue, but rather clearly a land use issue which needs resolution in this proceeding. As Board precedent has clearly held, nearly all land use regulations are indeed preempted.

It should also be noted that any attempt by the City, or its misguided allies, to argue that the zoning regulation is somehow permissible because it is limited to only cars on tracks "disconnected" from the national rail network, is equally as flawed. In fact, if the Board were to accept that

argument, it would have a national impact far beyond the limited jurisdiction of one small municipality located in Colorado.

The DRGRHF finds it quite puzzling why the San Luis and Rio Grande Railroad (SLRG) appears to be so strongly in support of the City's ordinance. Should the Board hold that preemption doesn't apply in this case, the SLRG would also be subject to the same regulation. But more importantly, so too would other railroads like the Union Pacific, and BNSF Railways. It is against that backdrop that the Board should carefully consider what such a change in the regulatory scheme would mean.

Many Class I, II, and III railroads throughout the nation use older freight cars which have reached the end of time period in which those cars can be used in interchange service as storage enclosures. Many of the older cars are stored, on railroad property, and remain the property of the railroad they were used for. Many railroads, including all 7 Class I carriers, have some (but not all) of those retained storage cars stored on disconnected track panels in yards, and other facilities located all around the country.

If the Board were to find that one local municipality in Colorado can regulate railroad assets on "disconnected" tracks, what prevents every municipality in the nation from adopting the same ordinance? What if a railroad needs to remove a freight or passenger car from its trucks and places the car on the ground while it makes repairs to the cars trucks, does that mean the car is being stored on disconnected, or no tracks at all, and therefore subject to the local communities zoning regulations?

The DRGRHF fully expects the City of Monte Vista to argue its ordinance does not unreasonably interfere with interstate commerce because it only applies to the storage of railcars on tracks, (or not on tracks), which are not connected to the rest of the national network. Why the SLRG would also be advocating for such a conclusion appears to defy common sense. It is rare that a Class III carrier would actually support a zoning ordinance which would restrict its own operations as well.

Given the potential ramifications for the rest of the railroad industry should the Board find this zoning regulation, (which clearly restricts a rail carriers ability to conduct operations on its own

property) is not preempted, the DRGRHF is serving courtesy copies on both the Association of American Railroads, and the American Short Line and Regional Railroad Associations.

ADDITIONAL LEGAL ARGUMENTS

The DRGRHF recognizes that there are some additional legal arguments which are present in this proceeding which the Board may, or may not, be able to address. For example, the Court's decision to permit Mr. Shank to be prosecuted individually, as opposed to naming the proper defendants in the original complaint, raises serious issues as to whether or not Mr. Shank's constitutional rights were violated. Those legal arguments may best be left for the appropriate state or federal courts to address.

The fact that Mr. Shank was charged, despite the undisputed evidence that the property in question was owned by an LLC, and leased to a rail carrier subject to the agency's jurisdiction, should be disturbing to the Board. Not addressing this issue would mean a property owner who leases property to, for example, a Class 1 railroad could be charged with zoning violations despite the fact the property is being used for valid, authorized railroad purposes.

It should be noted, that to the best of the DRGRHF's current knowledge, the issue of whether or not a property owner who simply leases property to a railroad would be covered by the reach of federal preemption, has never been addressed by the Board. Most of the disputes that have arisen have dealt with a contractor, or some other business, operating on railroad property. The question of can a municipality continue to regulate property leased to a railroad, but owned by a non carrier third party, does not appear to have been raised before. It would appear that this case might be a case of first impression.

The Board may wish to address the extent that federal preemption may apply to underlying landowners who simply lease property to a railroad. In this case, Mr. Shank is not claiming to be holding out as a rail carrier, nor is there any evidence to show that he is in any way attempting to abuse the Board's processes. He was simply a member of an LLC which leased property to a rail carrier. The ramifications of failing to address the extent of federal preemption in this case could impact all railroads, and property owners, across the country.

However, notwithstanding the issue of whether or not Mr. Shank was appropriately charged and tried, the underlying controversy as to whether or not the zoning ordinance is preempted, remains. The DRGRHF respectfully asks that the Board address the issue in this proceeding.

CONCLUSION

_____ For all the reasons set forth above, the DRGRHF respectfully asks that the Board address and issue a declaratory order in this matter to resolve the uncertainty that currently exists. In addition, because the Foundation believes this matter raises a question of first impression, the Board may want to address the issue of whether or not a property owner, who simply leases property to a railroad, would in fact, be entitled to invoke federal preemption while the owner's property remains leased to, and in dominion and control, or a rail carrier.

On Behalf of the Denver & Rio Grande Railway Historical Foundation Inc.,

Respectfully submitted,

Donald H. Shank /s/

Donald H. Shank

President and Executive Director

Dated : April 11th, 2012

VERIFICATION

I, Donald H. Shank, due solemnly swear, under penalty of perjury that I am authorized to prepare and file the above “*DRGRHF’s Opening Statement*”. I also certify that all the facts and representations contained herein are true and accurate to the best of my knowledge and belief.

Respectfully submitted,

Donald H. Shank /s/

Donald H. Shank

President

Dated : April 11th, 2012

CERTIFICATE OF SERVICE

I, Donald H. Shank, do hereby certify, under penalty of perjury, that a copy of the foregoing "Opening Statement", was served, via 1st Class United States Mail, on this, the 11th day of April, 2012, upon the following parties:

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Respectfully Submitted,

Donald H. Shank /s/
Donald H. Shank

EXHIBIT No. # 1

(2) In development of single vacant sites within a developed area, the unit shall be compatible with structures on adjacent properties. Development of manufactured housing shall comply with the site plan, development standards or other design criteria as required for the underlying zone required by City subdivision regulations and zoning regulations.

(3) Units shall not be less than twenty-four (24) feet in width or thirty-six (36) feet in length.

(4) The main roof shall be pitched rather than flat.

(5) Each unit shall be faced in wood siding, brick, a combination thereof or other cosmetically equivalent exterior siding.

(6) The engineered permanent foundation shall be the same as required for "site built"/ "stick built" housing within the City, as required by the Building Code.

(7) Landscaping of the lots shall be consistent with the provisions of this Chapter.

(8) All units shall include a garage unless such a requirement is inconsistent with the surrounding neighborhood.

(9) Architectural compatibility with adjacent development shall be provided through the use of similar colors, building materials, design details, massing, scale or architectural style, including such structural features as porches, alcoves, bay windows, broken-roof pitch lines, wood trim, shutters and other exterior decorative features. (Ord. 789 §18-389, 2006)

Sec. 12-17-110. Storage and parking of commercial vehicles, railcars, camping units, manufactured homes single-wide, recreational equipment, buses, trailers and similar units.

Commercial vehicles, railcars, camping units, manufactured homes single-wide, recreational equipment, boats, buses, trailers and other similar units shall not be parked or stored on any lot or upon any public right-of-way in any zoning district contrary to this Section, except in accordance with the following provisions:

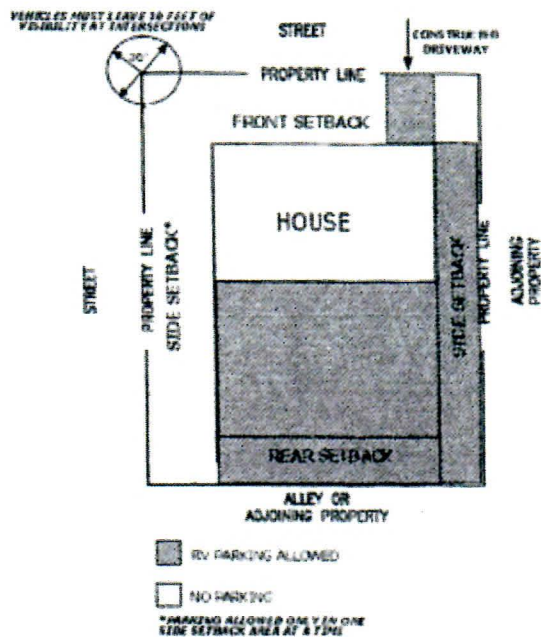
(1) Not more than one (1) commercial vehicle (not to exceed one and one-half [1½] tons rated capacity) on a residential lot, or combination of lots under single ownership, shall be permitted, and in no case shall a commercial vehicle used for hauling explosives, gasoline or liquefied petroleum products be permitted.

(2) Buses, trailers and commercial vehicles not to exceed one and one-half (1½) tons rated capacity, camping units, recreational equipment (which includes, but is not limited to, ATVs and snowmobiles), boats and similar units may be parked or stored on a residential lot, or combination of lots under single ownership, subject to the following conditions:

a. If such units or vehicles are parked in any required front setback, they shall be parked on a constructed driveway. A *constructed driveway* is an off-street parking area built of asphalt, concrete, rock or gravel that occupies no more than forty percent (40%) of the front setback area.

e. A camping unit or recreational vehicle shall not be occupied for more than thirty (30) days in any one (1) year while it is parked or stored in any area within the City, except in a mobile home park or campground authorized under Article 5 of this Chapter.

RV PARKING AREAS CORNER LOT DIAGRAM



(3) Railcars may not be stored in any residential, industrial or commercial zone of the City when not connected to a rail line.

(4) A manufactured home single-wide shall not be stored within the City limits except in a licensed mobile home park.

(5) Commercial vehicles, railcars, camping units, manufactured homes single-wide, recreational equipment, boats, buses, trailers and similar units shall be considered stored if not moved for seven (7) consecutive days.

(6) Parking and operation restrictions of commercial and other specified vehicles upon public rights-of-way:

a. *Commercial vehicle*, for the purpose of this Paragraph, is defined as any tandem or single-axle vehicle having a gross vehicle weight rating (GVWR) of thirty-six thousand (36,000) pounds or more;

b. Commercial vehicles, railcars and similar units, designed primarily for conveying products and services, shall only be allowed in commercial and industrial zone districts of the City, upon public rights-of-way. However commercial vehicles and similar units shall be allowed to enter residential areas for the purpose of delivery or retrieval of products and services to specific residences in said areas, as well as commercial vehicles necessarily utilizing the City streets for the purpose of construction or contracting in residentially zoned districts.

c. Parking restrictions in residential, commercial and industrial zone districts: No person shall park any commercial vehicle or similar unit, designed primarily for conveying products and

services, for more than one (1) hour upon any public right-of-way or place ordinarily used for vehicular parking which is zoned residential. No person shall park any such commercial vehicle or railcar for more than forty-eight (48) hours in any area which is zoned commercial or industrial. Movement of said vehicle from one (1) location to another within the City shall be no defense to this Section.

This provision shall not apply to any commercial vehicle, railcar or similar unit which is leased or owned by any permittee granted a permit for construction or repair work or by a public utility engaged in work for which no such permit is required or a vehicle leased or owned by any contractor hired by such permittee or public utility, provided that the commercial vehicle or similar unit is used in such construction or repair site or within one hundred fifty (150) feet thereof as measured from the limits of the work area as specified in the permit and only during the period of actual construction; or to any such trailer, semi-trailer, tractor trailer or commercial vehicle or railcar which is leased or owned by a City department or contractor or vendor hired by such City department for construction or repair work or by a subcontractor thereof.

(7) Commercial vehicles carrying flammable gases or liquids. No commercial vehicle used for transportation of flammable gases or liquids shall be parked in the City in excess of one (1) hour. No driver, operator or attendant shall leave a commercial vehicle unattended during the loading or unloading of flammable gases or liquids. No commercial vehicle used for transportation of flammable gases or liquids shall be parked nearer than twenty-five (25) feet to any building except when loading or unloading such flammable gases or liquids.

(8) Towing authorized. The Police Department is authorized to remove and tow away by a commercial towing service any commercial vehicles, camping units, recreational equipment, buses, trailers and similar units parked in violation of this Section. Such items so towed for illegal parking shall be stored in a safe place and shall be returned to the owner or operator of such vehicle upon payment of the towing and storage fees.

(9) Every person convicted of a violation of this Section may be punished in accordance with the provisions of Section 1-4-20 of this Code. (Ord. 796 §B, 2008; Ord. 811 §1, 2009)

Sec. 12-17-120. Home occupations.

The purposes of this Section are to encourage major business activities to be conducted in appropriate commercial zones, to allow for home occupations that are compatible with the neighborhoods in which they are located as an accessory use, to safeguard peace, quiet and domestic tranquility within certain residential neighborhoods within the City, to protect residents from excessive noise, excessive traffic, nuisance, fire hazard and other possible adverse effects of commercial uses being conducted in residential areas, to provide a means to terminate home occupations if disruption of a residential neighborhood occurs and to preserve the residential character of residentially zoned areas of the City while allowing limited home occupations.

(1) Home occupation license. A home occupation shall be conducted within the City only in residentially zoned areas, and in compliance with the following provisions:

a. No home occupation may be conducted by any person in the City without having first procured a valid and current license to conduct the same.

EXHIBIT No. # 2

COMMERCIAL RIGHT-OF-WAY LEASE

THIS COMMERCIAL RIGHT-OF-WAY LEASE ("Lease") is entered into this 22nd day of April 2004 between DONALD H. SHANK, an unmarried man, as OWNER ("Lessor") and the DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION, a Colorado not-for-profit corporation ("Lessee").

Lease No. 200401

PART 1 BASIC LEASE TERMS

A. PREMISES

The term "Premises" shall refer to the land at or near Monte Vista, County of Rio Grande, State of Colorado, as shown on Drawing No. CL-104, dated April 25th, 2004, containing site description and location, attached hereto as Exhibit "A" and made a part hereof.

B. EFFECTIVE DATE

This Lease shall take effect on April 30, 2004, ("Effective Date").

C. TERM

This Lease shall be for a term of Ten (10) years ("Lease Term") from Effective Date hereon and shall continue after the Lease Term on a year-to-year tenancy basis, unless earlier terminated in accordance with the terms stated herein.

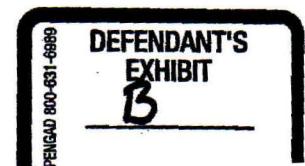
D. TERMINATION

This Lease shall be terminable by Lessee at any time without cause upon twelve (12) months advance written notice to Lessor. Lessor's termination rights shall be limited to "cause" as defined in paragraph 21(Default) in Part 2, General Lease Terms, attached hereto and made a part hereof. Upon termination of the Lease under either of these circumstances, Lessee shall have the right, but not the obligation, to remove all improvements located on the Premises so long as the improvements are removed to the satisfaction of Lessor by the date of termination.

E. USE

Lessee may use the Premises as a railcar restoration and/or rehabilitation facility and the storage of operational, non-operational and historic railcars, parts and assemblies.

CROW Lease #: 200401
Page 1 of 11



F. RENT

Commencing as of the Effective Date hereof, Lessee shall pay to Lessor, its successors and assigns, as rent for the Premises ("Rent") the sum of ONE DOLLAR (\$1.00) per annum payable annually, with the first year's rent to be paid concurrently upon execution hereof.

G. RENT ADJUSTMENT

Base Rent shall be adjusted on an annual basis based upon the CPI factor (defined in Section 5 of the General Lease Terms) as indicated on the Consumer Price Index, not to exceed a 5.0% adjustment from the previous year, but only upon mutual agreement of the parties.

H. SECURITY DEPOSIT

N/A, none required.

I. PROOF OF INSURANCE

On or before execution of this Lease, Lessee shall furnish to Lessor proof of insurance as required under Section 14 of the General Lease Terms, and the effective date of insurance coverage shall be no later than the Effective Date of this Lease.

J. ADDRESSES FOR NOTICES

All notices to either Lessor or Lessee shall be addressed as follows:

To Lessor: Donald H. Shank
107 N. Prospect Ave.
Monte Vista, CO 81144

To Lessee: Denver & Rio Grande Railway Historical Foundation
20 N. Broadway St.
Monte Vista, CO 81144

K. PAYMENTS TO LESSOR

Cash or check shall be made payable to Lessor as follows:

Via U. S. Mail: as above in Section J.

CROW Lease #: 200401
Page 2 of 11

The foregoing Basic Lease Terms and the General Lease Terms set forth in attached Part 2 are incorporated into and made parts of this Lease.

IN WITNESS WHEREOF, the parties hereto have executed, or have caused to be executed, this Lease in duplicate the day and year first above written.

DONALD H. SHANK, an unmarried man and OWNER, as LESSOR

By: Donald H. Shank

Title: OWNER

THE DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION,
as LESSEE

By: Robert W. Shank APR 30, 2004

Title: EXEC VICE PRESIDENT D & RGHF

By: _____

Title: _____

CROW Lease #: 200401
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PART 2
GENERAL LEASE TERMS

1. PREMISES AND TERM

Lessor hereby leases to Lessee the Premises for the tenancy shown in the Basic Lease Terms, subject to the terms and conditions as set forth in this Lease.

2. USE

Lessee shall not use, nor allow to be used, the Premises for any use other than that stated in the Basic Lease Terms.

Lessee shall not permit to be placed on the Premises or improvements any signs or notices not solely related to the business of Lessee conducted on the Premises.

Lessee shall not permit any damage, nuisance or waste on the Premises; nor permit to be stored on the Premises any gasoline, diesel fuel, oil, and other petroleum products, or any flammable, hazardous or explosive material, waste or substance, the storage of which would be subject to state or federal regulation, or impede the safe and efficient rail operations of Lessor.

Lessee, at Lessee's expense, and only with respect to a condition of the Premises that is caused by Lessee, shall arrange for the filing of any map, drawing, diagram or environmental impact report as may be required by any governmental agency having jurisdiction in the matter.

3. CONDITION OF PREMISES and WARRANTIES

Lessee warrants that it has examined the Premises and accepts the Premises in an "AS-IS, WHERE-IS" condition, with all faults and with full knowledge of the physical condition of the Premises.

Lessor covenants and warrants to Lessee that Lessor holds title to the Premises (referred to herein as "ROW") that encompasses the Premises and that the ROW was authorized and provided for by the General Railroad Right-of-Way Act of March 3, 1875, a98 Stat. 482, 43 U.S.C. paragraph 934 *et seq.* Lessor further covenants and warrants that it has good right, full power and lawful authority to make this Lease and charge Rent for the full term and any extensions thereof, subject the potential circumstances referred to in Part 1, Basic Lease Terms, section D, paragraph(s) 1 and 2 ("Automatic Termination").

CROW Lease #: 200401
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Lessor covenants that so long as Lessee fulfills the terms, conditions and covenants required of it to be performed, it will have peaceful and quiet possession of the Premises.

4. PAYMENT / REFUND OF RENT

Lessee shall pay to Lessor as Rent for the Premises the amount set forth in Section F of the Basic Lease Terms, payable at the times set forth therein, without deduction, setoff, prior notice or demand. Upon termination of this Lease, unless Lessee is then in default, any unearned portion of any Rent paid in advance shall be refunded to Lessee upon Lessee's written demand therefore if made within thirty (30) days after termination.

5. RENTAL REVISION

The Rent shall automatically and without notice to Lessee be adjusted, upwards only, on each anniversary of the effective date, by the CPI Factor. The "CPI Factor" is the percentage of adjustment stated in the Consumer Price Index established during the last twelve-month period immediately preceding each anniversary of the Effective Date, adjusted to the nearest one-tenth of one percent. Lessor hereby agrees that it shall not increase the Rent more than five percent (5.0%) on an annual basis.

6. SECURITY DEPOSIT

N/A, none required

7. TAXES AND ASSESSMENTS

Lessee shall pay, before they become delinquent, all taxes, charges, and assessments, which are levied upon, or which may be locally assessed against, any improvement or personal property placed upon the Premises by the Lessee.

8. UTILITIES

Lessee shall arrange and pay all utilities, including without limitation, water, power, heat, garbage, communication and sewer services, to be used by Lessee for the Premises.

9. MAINTENANCE AND REPAIR

Lessee, at Lessee's expense, shall keep and maintain the Premises and all improvements thereon in good repair and in a neat and safe condition.

CROW Lease #: 200401

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10. ALTERATIONS

During the term of this Lease, Lessee shall have the right to construct a building and other improvements on the Premises and to make such alterations, improvements, and changes to any building and improvements that may from time to time be on the Premises as Lessee may deem necessary, or to replace any building or improvement with a new one of substantial value. Subject to the Lessee's right to remove that portion of a building and improvements located, or hereinafter placed, on the Premises as stated in the Basic Lease Terms, all repairs, alterations and improvements to or on the Premises shall become the property of Lessor, without payment by Lessor of any compensation therefore, after termination of the Lease. The Premises and all improvements located or placed thereon, shall be deemed the unencumbered property of the Lessor, without payment by Lessor of any compensation to Lessee.

11. LIENS AND CLAIMS

Lessor may post and maintain upon the Premises notices of non-responsibility as provided by law.

12. INDEMNIFICATION

Lessee shall furnish, defend (with counsel satisfactory to Lessor) and indemnify Lessor from and against all liability, cost and expense for loss of or damage to property and for injuries to or death of any person (including, but not limited to, the property and employees of each party hereto) when arising or resulting from use of the Premises by Lessee, its agents, employees, or invitees, or from breach of this Lease by Lessee.

The term "Lessor," as used in this Section 12 and Sections 13, 14 and 15, shall include the successors, assigns and affiliated companies of Lessor, and, if applicable, any other railroad company that may be lawfully operating on Lessor's tracks.

13. LESSEE'S LEASEHOLD INTEREST

Lessee may encumber, by mortgage, deed of trust, or other appropriate instrument, (hereinafter "encumbrance instrument") its leasehold interest and estate on the Premises, together with all buildings and improvements placed by Lessee on the Premises, as security for any indebtedness or obligation of Lessee. The execution of any such encumbrance instrument or the foreclosure thereof or the exercising of any right, power or privilege reserved in such encumbrance instrument shall not be deemed a violation of any terms or conditions of this Lease or an assumption of this Lease by the holder of such encumbrance instrument. The Lessee shall not be released from its liability under this Lease by such encumbrance instrument or the foreclosure, conveyance, or exercise of any rights there under.

If Lessor receives notice from the holder of an encumbrance instrument or from Lessee that the leasehold interest has been encumbered, Lessor shall mail or deliver to the holder, at the address specified in the notice of the encumbrance, duplicate copies of all notices in writing which Lessor may give to Lessee under the provisions of this Lease Agreement. The holder of the encumbrance instrument may cure any default under the Lease by making payments on behalf of Lessee at any time before the rights of Lessee are terminated hereunder. All such payments made or acts performed by such holder shall be as effective as if done and performed by Lessee.

14. COMPLIANCE WITH LAW

Lessee, at Lessee's expense, shall comply with all applicable laws, regulations, rules and orders with respect to the use of the Premises, without limitation, those relating to construction, grading, signage, health, safety, noise, environmental protection, waste disposal, and water and air quality, and shall furnish satisfactory evidence of such compliance upon request of Lessor.

Should any discharge, leakage, spillage, emission, or pollution of any type occur upon or from the Premises due to Lessee's use and occupancy thereof, Lessee, at Lessee's expense, shall clean all property affected thereby, to the satisfaction of any governmental body having jurisdiction there over.

Lessee shall indemnify, hold harmless, and defend Lessor from and against all liability, claim, cost or expense (including, without limitation, any fines, penalties, judgments, litigation costs, attorney's fees, and consulting, engineering and construction costs) incurred by Lessor as a result of Lessee's breach of this section, or as a result of any such discharge, leakage, spillage, emission or pollution on or from the Premises caused by Lessee or Lessee's agent, employees or those acting on Lessee's behalf and which occurs during the Lease Term.

15. INSURANCE

While this Lease is in effect, Lessee, at Lessee's expense, shall maintain and furnish Lessor evidence of insurance set forth in Lessor's "General Insurance Requirements" attached hereto as Exhibit "B" and made a part hereof.

16. NOISE AND VIBRATION

Lessee hereby recognizes and acknowledges that railroad tracks are, or shall be, located on, near, behind, or adjacent to the Premises.

Lessee recognizes that the operation of trains over the tracks does and shall produce noise levels, which may be considered objectionable by the employees, agents, tenants, customers, or invitees of Lessee. Therefore, Lessee agrees that no legal action or complaint of any kind whatsoever shall be instituted against Lessor on Lessee's behalf as a result of such noise levels.

17. RESERVATIONS

Lessor hereby excepts and reserves the right, to be exercised by Lessor and by any other who has obtained or may obtain permission or authority from Lessor so to do, to

- (A) operate, maintain, review and, reinstall any and all existing pipe, track (if any), power and communication (including without limitation fiber optic) lines and appurtenances and other facilities of like character upon, over or under the surface of the Premises; and
- (B) construct, operate, maintain, review and relocate such additional facilities of the same character as shall not unreasonably interfere with the Lessee's use of the Premises as specified in section E of the Basic Lease Terms.

Any such construction, operation, reinstallation, relocation or maintenance shall not be done at Lessee's expense unless such work is requested by Lessee or done solely for the benefit of Lessee.

18. MINERAL RIGHTS

None exist in Lessor.

19. SURRENDER OF PREMISES

Upon termination of this Lease, and subject to the terms of Paragraph D of the Basic Lease Terms, Lessee shall leave the Premises in a neat and clean condition satisfactory to Lessor and free of all personal property of Lessee.

20. TERMINATION OF LEASE

Except as otherwise stated herein, termination of this Lease for any reason whatsoever shall not release either party from any liability or obligation hereunder resulting from an event that occurred before termination.

21. DEFAULT

The following events constitute an event of default by Lessee under the terms of this Lease, and establish "cause" sufficient for Lessor to terminate this Lease:

- A. If the Lessee shall fail to pay any installment of the Rent set forth in the Lease when the same shall become due and payable, and such failure shall continue for thirty (30) days after mailing notice thereof by the Lessor to the Lessee; or

- B. If Lessee fails to perform any other term or condition of this Lease on the part of Lessee to be performed, and such failure shall continue for forty-five (45) days after mailing written notice thereof by Lessor; provided, however if any such default is of such nature that it cannot, with due diligence, be cured within a period of forty-five (45) days, the Lessor shall not be entitled to declare the Lease in default, as provided herein, if the Lessee shall have commenced the curing of such default within the period of forty-five (45) days, and so long as the Lessee shall thereafter proceed with all due diligence to complete the curing of such default; or
- C. If Lessee abandons or removes all of its improvements from the Premises. Lessor's right to terminate the Lease may, in addition to other remedies Lessor may have at law or equity.

22. ASSIGNMENT AND SUBLETTING

Lessee shall have the right to assign or encumber Lessee's interest in this Lease or in the Premises, or sublease all or any part of the Premises, under the following terms and conditions;

- A. Lessee may sublet part or all of the Premises. Lessee shall remain liable to Lessor for all payments due hereunder if a sublet shall occur, and
- B. Lessee shall not assign or transfer this Lease or any interest in this Lease without the prior written consent of Lessor and an assignment shall not be deemed consent to any subsequent assignment. Any assignment without consent shall be void and shall, at the option of Lessor, constitute an event of default by Lessee. Lessor's consent to an assignment shall not be unreasonably withheld provided the new lessee provides sufficient financial information and such other information as Lessor may request to demonstrate sufficient financial stability and reliability to perform all Lessee's obligations under the Lease.

23. DISPOSSESSION

If Lessee is lawfully deprived of the possession of all or any part of the Premises by a party other than Lessor, Lessor shall, upon receipt of notice from Lessee setting forth the circumstances, either install Lessee in possession of the Premises or terminate this Lease and refund to Lessee the pro rata amount of any prepaid but unearned rent after receipt of such notice. In addition, Lessor shall be liable to Lessee for any loss, damage or claim resulting from such deprivation of possession.

24. NOTICES

All notices shall be in writing and, shall be deemed to have been given when delivered personally or deposited in the United States Mail, registered and certified, postage prepaid, and

CROW Lease #: 200401

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addressed to the party to whom notice is directed at the address set forth in the Basic Lease Terms. Payments to Lessor shall be made at the address for payments or by electronic transfer to the coordinated provided in the Basic Lease Terms. Either party may change the address for notices or Lessor may change the address or routing instructions for payments by giving the other party notice to that effect.

25. ATTORNEY'S FEES

If either party brings any action against the other to enforce or collect any sum due under this Lease or if Lessor brings an action for unlawful detainer of the Premises, the losing party shall pay the reasonable attorney's fees of the prevailing party in addition to the judgment and court costs.

26. LESSOR'S RIGHT-OF-ENTRY

Lessor shall have the right-of-entry to the Premises at any time it deems appropriate and/or necessary. Lessor shall reserve the right to inspect and identify the Premises.

27. NON-WAIVER

Lessor's failure to enforce or exercise its rights with respect to any provision hereof shall not be construed as a waiver of such rights or of such provision. Acceptance of Rent or any other sum shall not be a waiver of any preceding breach by Lessee of any provision hereof, regardless of Lessor's knowledge of such preceding breach at the time of acceptance of such Rent; nor shall such acceptance be a waiver in any way of Lessor's right to terminate this Lease in accordance with Section 19 herein.

28. JOINT AND SEVERAL LIABILITY

If Lessee is more than one person or entity, each such person or entity shall be jointly and severally liable for the obligations or Lessee hereunder. If Lessee is a husband and wife, the obligations hereunder shall extend to their sole and separate property as well as their community property.

29. TIME OF ESSENCE

Time is of the essence of each provision of this Lease.

30. ENTIRE AGREEMENT

This Lease sets forth the entire agreement between the parties with respect to the leasing of the Premises and supersedes all prior agreements, communications, and representations, oral and written, express or implied, since the parties intend that this be an integrated agreement. This agreement shall not be modified except by written agreement of the parties. Nothing contained within the text, parts, sections or exhibits of this Lease shall be construed to provide Lessee with any form of right, interest, or title to or in the Premises other than a leasehold interest.

EXHIBIT B

GENERAL INSURANCE REQUIREMENTS ("GIR")

Company shall be furnished evidence of insurance in connection with the foregoing Agreement. Such insurance shall be written by an insurance company having a Best's rating of B+13 or better and licensed to do business in the state where the Premises are located, meeting the requirements stated below in a form satisfactory to Company, for each of the following types of insurance in amounts not less than the amounts herein specified.

The terms "Agreement" as herein used shall refer to the Lease, License, or permit, including supplemental agreements thereto, to which this Exhibit "B" is attached and made a part of; "Company" shall refer to the Lessor, Licensor, or Permitter named in the Agreement; "Lessee," "Licensee," or "Permittee" shall refer to the Lessee, Licensee, or Permittee, (whichever is applicable), named in the Agreement; and "Premises" shall refer to the property described in the Agreement and as shown on the attached print.

Liability Insurance Requirements

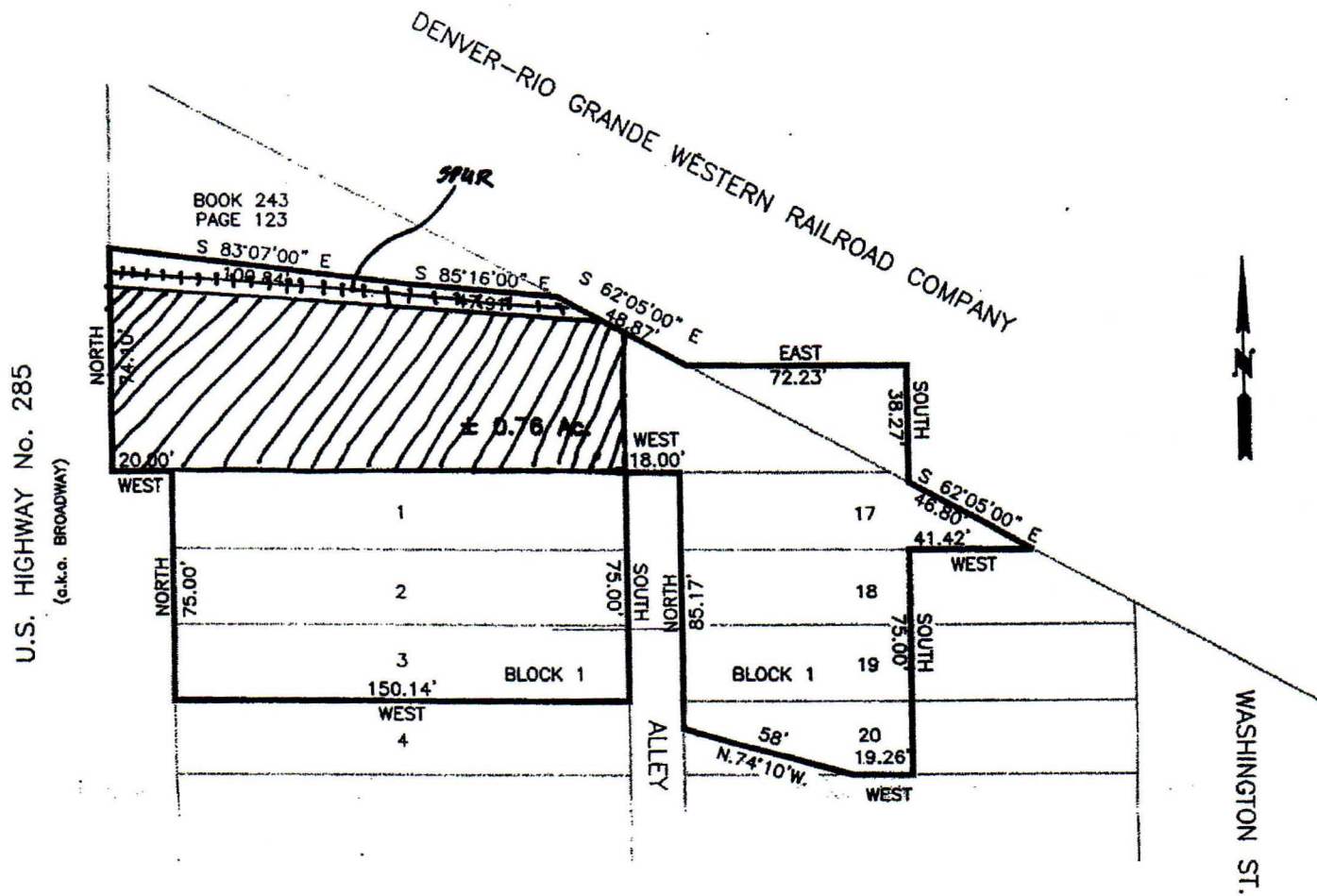
1. Comprehensive General Liability Insurance or General Liability Insurance on an occurrence basis shall have a combined single limit of not less than \$1,000,000 per occurrence and shall provide for the following:
 - (a) Such insurance is primary, without right of contribution from other insurance, which may be in effect.
 - (b) Such insurance shall not be invalidated by the acts or omissions of other insureds.
 - (c) Such insurance shall not be materially modifiable or cancelable without thirty (30) days' prior written notice to Company (except in the case of cancellation for nonpayment of premium in which case cancellation shall not take effect until at least ten (10) days' notice has been given to Company). This provision is referred to below as "Notice of Modification or Cancellation."
 - (d) Company shall be named as additional insured.
 - (e) Contractual liability with the deletion of the exclusion for operations within fifty (50) feet of railroad track and deletion of the exclusion of explosion, collapse, or underground hazard, if applicable. (NOTE: For any license or permit involving property within fifty (50) feet of track, the exclusion for operations within fifty (50) feet of track will apply unless eliminated by endorsement).
 - (f) Premises, products/completed operations, and personal injury coverage.
 - (g) Severability-of-interest clause.
 - (h) In the case of commercial general liability insurance, the policy must also provide for aggregate coverage at each location and for the reinstatement of the aggregate in the event the limits of the policy are exhausted.
 - (i) If the proposed use of the Premises involves a hazard, which poses particular risk to the environment, the policy must cover sudden and accidental pollution on a named-peril basis to address the hazard.

2. Workers Compensation Insurance shall have limits not less than those required by statute, shall cover all persons employed by Lessee, Licensee, or Permittee, as the case may be, in the conduct of its operations on the Premises and shall provide for the following:
 - (a) Waiver of subrogation against Company
 - (b) Notice of Modification or cancellation
 - (c) All states endorsements
 - (d) Coverage for Longshore and Harbor Workers Act, if applicable
3. Employers Liability Insurance shall have a limit of not less than \$1,000,000 and shall be endorsed to provide for (a) Notice of Modification or Cancellation, and (b) waiver of subrogation against Company.
4. Umbrella or Excess Liability Insurance shall provide that if the underlying aggregate is exhausted, the excess coverage shall drop down as primary insurance, and shall provide for Notice of Modification or Cancellation.

A properly completed certificate of insurance shall be furnished to Company for approval.

DON SHANK PROPERTY

LOC. IN THE NW1/4 OF THE SW1/4 AND
THE SW1/4 OF THE NW1/4
SECTION 31, T. 39 N., R. 8 E., N.M.P.M.
CITY OF MONTE VISTA
RIO GRANDE COUNTY, COLORADO



DONALD H. SHANK
COMMERCIAL RIGHT-OF-WAY
LEASE # 200401 DRAWING # CL401
DATE DRAWN: APRIL 25, 2004

LOCATED IN S/W ¼ N/W ¼ AND
THE S/W ¼ OF THE N/W ¼
SEC. 31, T. 39 N., R. 8 E., N.M.P.M.
CITY OF MONTE VISTA
RIO GRANDE COUNTY, COLORADO

NOT LEASED-

EXHIBIT No. # 3

COMMERCIAL RIGHT-OF-WAY LEASE

THIS COMMERCIAL RIGHT-OF-WAY LEASE ("Lease") is entered into this 14th day of April 2005 between the RIO GRANDE SOUTHERN RAILROAD COMPANY, L.L.C., a Colorado Limited Liability Company ("Lessor") and the DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION, a Colorado not-for-profit corporation d.b.a. the DENVER & RIO GRANDE RAILROAD COMPANY, L.L.C. ("Lessee").

Lease No. 200501

PART 1 BASIC LEASE TERMS

A. PREMISES

The term "Premises" shall refer to the land at or near Monte Vista, County of Rio Grande, State of Colorado, as shown on Drawing No. CL-105, dated April 5th, 2005, containing site description and location, attached hereto as Exhibit "A" and made a part hereof.

B. EFFECTIVE DATE

This Lease shall take effect on January 1, 2005, ("Effective Date").

C. TERM

This Lease shall be for a term of Ten (10) years ("Lease Term") from Effective Date hereon and shall continue after the Lease Term on a year-to-year tenancy basis, unless earlier terminated in accordance with the terms stated herein.

D. TERMINATION

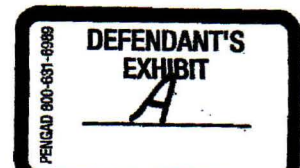
This Lease shall be terminable by Lessee at any time without cause upon twelve (12) months advance written notice to Lessor. Lessor's termination rights shall be limited to "cause" as defined in paragraph 21(Default) in Part 2, General Lease Terms, attached hereto and made a part hereof. Upon termination of the Lease under either of these circumstances, Lessee shall have the right, but not the obligation, to remove all improvements located on the Premises so long as the improvements are removed to the satisfaction of Lessor by the date of termination.

E. USE

Lessee may use the Premises as a railcar restoration and/or rehabilitation facility and the storage of operational, non-operational and historic railcars, parts and assemblies.

CROW Lease #: 200501

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F. RENT

Commencing as of the Effective Date hereof, Lessee shall pay to Lessor, its successors and assigns, as rent for the Premises ("Rent") the sum of ONE DOLLAR (\$1.00) per annum payable annually, with the first year's rent to be paid concurrently upon execution hereof.

G. RENT ADJUSTMENT

Base Rent shall be adjusted on an annual basis based upon the CPI factor (defined in Section 5 of the General Lease Terms) as indicated on the Consumer Price Index, not to exceed a 5.0% adjustment from the previous year, but only upon mutual agreement of the parties.

H. SECURITY DEPOSIT

N/A, none required.

I. PROOF OF INSURANCE

On or before execution of this Lease, Lessee shall furnish to Lessor proof of insurance as required under Section 14 of the General Lease Terms, and the effective date of insurance coverage shall be no later than the Effective Date of this Lease.

J. ADDRESSES FOR NOTICES

All notices to either Lessor or Lessee shall be addressed as follows:

To Lessor: Rio Grande Southern Railroad Company, L.L.C.
20 N. Broadway St.
Monte Vista, CO 81144

To Lessee: Denver & Rio Grande Railway Historical Foundation
d.b.a. Denver & Rio Grande Railroad Company
20 N. Broadway St.
Monte Vista, CO 81144

K. PAYMENTS TO LESSOR

Cash or check shall be made payable to Lessor as follows:

Via U. S. Mail: as above in Section J.

CROW Lease #: 200501
Page 2 of 11

The foregoing Basic Lease Terms and the General Lease Terms set forth in attached Part 2 are incorporated into and made parts of this Lease.

IN WITNESS WHEREOF, the parties hereto have executed, or have caused to be executed, this Lease in duplicate the day and year first above written.

THE RIO GRANDE SOUTHERN RAILROAD COMPANY, L.L.C., as LESSOR

By: *David A. Shank* *4/15/05*

Title: *REGISTERED AGENT + PRESIDENT*

THE DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION,
d.b.a. DENVER & RIO GRANDE RAILROAD COMPANY, L.L.C., as LESSEE

By: *Robert W. Shank* *MAY 2, 2005*

Title: *EXEC VICE PRESIDENT D&RGHF*

By: *Robert W. Shank* *MAY 2, 2005*

Title: *GEN SUPERINTENDANT D&RG RR*

CROW Lease #: 200501
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PART 2
GENERAL LEASE TERMS

1. PREMISES AND TERM

Lessor hereby leases to Lessee the Premises for the tenancy shown in the Basic Lease Terms, subject to the terms and conditions as set forth in this Lease.

2. USE

Lessee shall not use, nor allow to be used, the Premises for any use other than that stated in the Basic Lease Terms.

Lessee shall not permit to be placed on the Premises or improvements any signs or notices not solely related to the business of Lessee conducted on the Premises.

Lessee shall not permit any damage, nuisance or waste on the Premises; nor permit to be stored on the Premises any gasoline, diesel fuel, oil, and other petroleum products, or any flammable, hazardous or explosive material, waste or substance, the storage of which would be subject to state or federal regulation, or impede the safe and efficient rail operations of Lessor.

Lessee, at Lessee's expense, and only with respect to a condition of the Premises that is caused by Lessee, shall arrange for the filing of any map, drawing, diagram or environmental impact report as may be required by any governmental agency having jurisdiction in the matter.

3. CONDITION OF PREMISES and WARRANTIES

Lessee warrants that it has examined the Premises and accepts the Premises in an "AS-IS, WHERE-IS" condition, with all faults and with full knowledge of the physical condition of the Premises.

Lessor covenants and warrants to Lessee that Lessor holds title to the Premises (referred to herein as "ROW") that encompasses the Premises and that the ROW was authorized and provided for by the General Railroad Right-of-Way Act of March 3, 1875, a98 Stat. 482, 43 U.S.C. paragraph 934 *et seq.* Lessor further covenants and warrants that it has good right, full power and lawful authority to make this Lease and charge Rent for the full term and any extensions thereof, subject the potential circumstances referred to in Part 1, Basic Lease Terms, section D, paragraph(s) 1 and 2 ("Automatic Termination").

CROW Lease #: 200501
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Lessor covenants that so long as Lessee fulfills the terms, conditions and covenants required of it to be performed, it will have peaceful and quiet possession of the Premises.

4. PAYMENT / REFUND OF RENT

Lessee shall pay to Lessor as Rent for the Premises the amount set forth in Section F of the Basic Lease Terms, payable at the times set forth therein, without deduction, setoff, prior notice or demand. Upon termination of this Lease, unless Lessee is then in default, any unearned portion of any Rent paid in advance shall be refunded to Lessee upon Lessee's written demand therefore if made within thirty (30) days after termination.

5. RENTAL REVISION

The Rent shall automatically and without notice to Lessee be adjusted, upwards only, on each anniversary of the effective date, by the CPI Factor. The "CPI Factor" is the percentage of adjustment stated in the Consumer Price Index established during the last twelve-month period immediately preceding each anniversary of the Effective Date, adjusted to the nearest one-tenth of one percent. Lessor hereby agrees that it shall not increase the Rent more than five percent (5.0%) on an annual basis.

6. SECURITY DEPOSIT

N/A, none required

7. TAXES AND ASSESSMENTS

Lessee shall pay, before they become delinquent, all taxes, charges, and assessments, which are levied upon, or which may be locally assessed against, any improvement or personal property placed upon the Premises by the Lessee.

8. UTILITIES

Lessee shall arrange and pay all utilities, including without limitation, water, power, heat, garbage, communication and sewer services, to be used by Lessee for the Premises.

9. MAINTENANCE AND REPAIR

Lessee, at Lessee's expense, shall keep and maintain the Premises and all improvements thereon in good repair and in a neat and safe condition.

10. ALTERATIONS

During the term of this Lease, Lessee shall have the right to construct a building and other improvements on the Premises and to make such alterations, improvements, and changes to any building and improvements that may from time to time be on the Premises as Lessee may deem necessary, or to replace any building or improvement with a new one of substantial value. Subject to the Lessee's right to remove that portion of a building and improvements located, or hereinafter placed, on the Premises as stated in the Basic Lease Terms, all repairs, alterations and improvements to or on the Premises shall become the property of Lessor, without payment by Lessor of any compensation therefore, after termination of the Lease. The Premises and all improvements located or placed thereon, shall be deemed the unencumbered property of the Lessor, without payment by Lessor of any compensation to Lessee.

11. LIENS AND CLAIMS

Lessor may post and maintain upon the Premises notices of non-responsibility as provided by law.

12. INDEMNIFICATION

Lessee shall furnish, defend (with counsel satisfactory to Lessor) and indemnify Lessor from and against all liability, cost and expense for loss of or damage to property and for injuries to or death of any person (including, but not limited to, the property and employees of each party hereto) when arising or resulting from use of the Premises by Lessee, its agents, employees, or invitees, or from breach of this Lease by Lessee.

The term "Lessor," as used in this Section 12 and Sections 13, 14 and 15, shall include the successors, assigns and affiliated companies of Lessor, and, if applicable, any other railroad company that may be lawfully operating on Lessor's tracks.

13. LESSEE'S LEASEHOLD INTEREST

Lessee may encumber, by mortgage, deed of trust, or other appropriate instrument, (hereinafter "encumbrance instrument") its leasehold interest and estate on the Premises, together with all buildings and improvements placed by Lessee on the Premises, as security for any indebtedness or obligation of Lessee. The execution of any such encumbrance instrument or the foreclosure thereof or the exercising of any right, power or privilege reserved in such encumbrance instrument shall not be deemed a violation of any terms or conditions of this Lease or an assumption of this Lease by the holder of such encumbrance instrument. The Lessee shall not be released from its liability under this Lease by such encumbrance instrument or the foreclosure, conveyance, or exercise of any rights there under.

If Lessor receives notice from the holder of an encumbrance instrument or from Lessee that the leasehold interest has been encumbered, Lessor shall mail or deliver to the holder, at the address specified in the notice of the encumbrance, duplicate copies of all notices in writing which Lessor may give to Lessee under the provisions of this Lease Agreement. The holder of the encumbrance instrument may cure any default under the Lease by making payments on behalf of Lessee at any time before the rights of Lessee are terminated hereunder. All such payments made or acts performed by such holder shall be as effective as if done and performed by Lessee.

14. COMPLIANCE WITH LAW

Lessee, at Lessee's expense, shall comply with all applicable laws, regulations, rules and orders with respect to the use of the Premises, without limitation, those relating to construction, grading, signage, health, safety, noise, environmental protection, waste disposal, and water and air quality, and shall furnish satisfactory evidence of such compliance upon request of Lessor.

Should any discharge, leakage, spillage, emission, or pollution of any type occur upon or from the Premises due to Lessee's use and occupancy thereof, Lessee, at Lessee's expense, shall clean all property affected thereby, to the satisfaction of any governmental body having jurisdiction there over.

Lessee shall indemnify, hold harmless, and defend Lessor from and against all liability, claim, cost or expense (including, without limitation, any fines, penalties, judgments, litigation costs, attorney's fees, and consulting, engineering and construction costs) incurred by Lessor as a result of Lessee's breach of this section, or as a result of any such discharge, leakage, spillage, emission or pollution on or from the Premises caused by Lessee or Lessee's agent, employees or those acting on Lessee's behalf and which occurs during the Lease Term.

15. INSURANCE

While this Lease is in effect, Lessee, at Lessee's expense, shall maintain and furnish Lessor evidence of insurance set forth in Lessor's "General Insurance Requirements" attached hereto as Exhibit "B" and made a part hereof.

16. NOISE AND VIBRATION

Lessee hereby recognizes and acknowledges that railroad tracks are, or shall be, located on, near, behind, or adjacent to the Premises.

Lessee recognizes that the operation of trains over the tracks does and shall produce noise levels, which may be considered objectionable by the employees, agents, tenants, customers, or invitees of Lessee. Therefore, Lessee agrees that no legal action or complaint of any kind whatsoever shall be instituted against Lessor on Lessee's behalf as a result of such noise levels.

17. RESERVATIONS

Lessor hereby excepts and reserves the right, to be exercised by Lessor and by any other who has obtained or may obtain permission or authority from Lessor so to do, to

- (A) operate, maintain, review and, reinstall any and all existing pipe, track (if any), power and communication (including without limitation fiber optic) lines and appurtenances and other facilities of like character upon, over or under the surface of the Premises; and
- (B) construct, operate, maintain, review and relocate such additional facilities of the same character as shall not unreasonably interfere with the Lessee's use of the Premises as specified in section E of the Basic Lease Terms.

Any such construction, operation, reinstallation, relocation or maintenance shall not be done at Lessee's expense unless such work is requested by Lessee or done solely for the benefit of Lessee.

18. MINERAL RIGHTS

None exist in Lessor.

19. SURRENDER OF PREMISES

Upon termination of this Lease, and subject to the terms of Paragraph D of the Basic Lease Terms, Lessee shall leave the Premises in a neat and clean condition satisfactory to Lessor and free of all personal property of Lessee.

20. TERMINATION OF LEASE

Except as otherwise stated herein, termination of this Lease for any reason whatsoever shall not release either party from any liability or obligation hereunder resulting from an event that occurred before termination.

21. DEFAULT

The following events constitute an event of default by Lessee under the terms of this Lease, and establish "cause" sufficient for Lessor to terminate this Lease:

- A. If the Lessee shall fail to pay any installment of the Rent set forth in the Lease when the same shall become due and payable, and such failure shall continue for thirty (30) days after mailing notice thereof by the Lessor to the Lessee; or

- B. If Lessee fails to perform any other term or condition of this Lease on the part of Lessee to be performed, and such failure shall continue for forty-five (45) days after mailing written notice thereof by Lessor; provided, however if any such default is of such nature that it cannot, with due diligence, be cured within a period of forty-five (45) days, the Lessor shall not be entitled to declare the Lease in default, as provided herein, if the Lessee shall have commenced the curing of such default within the period of forty-five (45) days, and so long as the Lessee shall thereafter proceed with all due diligence to complete the curing of such default; or
- C. If Lessee abandons or removes all of its improvements from the Premises. Lessor's right to terminate the Lease may, in addition to other remedies Lessor may have at law or equity.

22. ASSIGNMENT AND SUBLETTING

Lessee shall have the right to assign or encumber Lessee's interest in this Lease or in the Premises, or sublease all or any part of the Premises, under the following terms and conditions;

- A. Lessee may sublet part or all of the Premises. Lessee shall remain liable to Lessor for all payments due hereunder if a sublet shall occur, and
- B. Lessee shall not assign or transfer this Lease or any interest in this Lease without the prior written consent of Lessor and an assignment shall not be deemed consent to any subsequent assignment. Any assignment without consent shall be void and shall, at the option of Lessor, constitute an event of default by Lessee. Lessor's consent to an assignment shall not be unreasonably withheld provided the new lessee provides sufficient financial information and such other information as Lessor may request to demonstrate sufficient financial stability and reliability to perform all Lessee's obligations under the Lease.

23. DISPOSSESSION

If Lessee is lawfully deprived of the possession of all or any part of the Premises by a party other than Lessor, Lessor shall, upon receipt of notice from Lessee setting forth the circumstances, either install Lessee in possession of the Premises or terminate this Lease and refund to Lessee the pro rata amount of any prepaid but unearned rent after receipt of such notice. In addition, Lessor shall be liable to Lessee for any loss, damage or claim resulting from such deprivation of possession.

24. NOTICES

All notices shall be in writing and, shall be deemed to have been given when delivered personally or deposited in the United States Mail, registered and certified, postage prepaid, and

CROW Lease #: 200501

Page 9 of 11

addressed to the party to whom notice is directed at the address set forth in the Basic Lease Terms. Payments to Lessor shall be made at the address for payments or by electronic transfer to the coordinated provided in the Basic Lease Terms. Either party may change the address for notices or Lessor may change the address or routing instructions for payments by giving the other party notice to that effect.

25. ATTORNEY'S FEES

If either party brings any action against the other to enforce or collect any sum due under this Lease or if Lessor brings an action for unlawful detainer of the Premises, the losing party shall pay the reasonable attorney's fees of the prevailing party in addition to the judgment and court costs.

26. LESSOR'S RIGHT-OF-ENTRY

Lessor shall have the right-of-entry to the Premises at any time it deems appropriate and/or necessary. Lessor shall reserve the right to inspect and identify the Premises.

27. NON-WAIVER

Lessor's failure to enforce or exercise its rights with respect to any provision hereof shall not be construed as a waiver of such rights or of such provision. Acceptance of Rent or any other sum shall not be a waiver of any preceding breach by Lessee of any provision hereof, regardless of Lessor's knowledge of such preceding breach at the time of acceptance of such Rent; nor shall such acceptance be a waiver in any way of Lessor's right to terminate this Lease in accordance with Section 19 herein.

28. JOINT AND SEVERAL LIABILITY

If Lessee is more than one person or entity, each such person or entity shall be jointly and severally liable for the obligations or Lessee hereunder. If Lessee is a husband and wife, the obligations hereunder shall extend to their sole and separate property as well as their community property.

29. TIME OF ESSENCE

Time is of the essence of each provision of this Lease.

30. ENTIRE AGREEMENT

This Lease sets forth the entire agreement between the parties with respect to the leasing of the Premises and supersedes all prior agreements, communications, and representations, oral and written, express or implied, since the parties intend that this be an integrated agreement. This agreement shall not be modified except by written agreement of the parties. Nothing contained within the text, parts, sections or exhibits of this Lease shall be construed to provide Lessee with any form of right, interest, or title to or in the Premises other than a leasehold interest.

EXHIBIT B

GENERAL INSURANCE REQUIREMENTS ("GIR")

Company shall be furnished evidence of insurance in connection with the foregoing Agreement. Such insurance shall be written by an insurance company having a Best's rating of B+13 or better and licensed to do business in the state where the Premises are located, meeting the requirements stated below in a form satisfactory to Company, for each of the following types of insurance in amounts not less than the amounts herein specified.

The terms "Agreement" as herein used shall refer to the Lease, License, or permit, including supplemental agreements thereto, to which this Exhibit "B" is attached and made a part of; "Company" shall refer to the Lessor, Licensor, or Permitter named in the Agreement; "Lessee," "Licensee," or "Permittee" shall refer to the Lessee, Licensee, or Permittee, (whichever is applicable), named in the Agreement; and "Premises" shall refer to the property described in the Agreement and as shown on the attached print.

Liability Insurance Requirements

1. Comprehensive General Liability Insurance or General Liability Insurance on an occurrence basis shall have a combined single limit of not less than \$1,000,000 per occurrence and shall provide for the following:
 - (a) Such insurance is primary, without right of contribution from other insurance, which may be in effect.
 - (b) Such insurance shall not be invalidated by the acts or omissions of other insureds.
 - (c) Such insurance shall not be materially modifiable or cancelable without thirty (30) days' prior written notice to Company (except in the case of cancellation for nonpayment of premium in which case cancellation shall not take effect until at least ten (10) days' notice has been given to Company). This provision is referred to below as "Notice of Modification or Cancellation."
 - (d) Company shall be named as additional insured.
 - (e) Contractual liability with the deletion of the exclusion for operations within fifty (50) feet of railroad track and deletion of the exclusion of explosion, collapse, or underground hazard, if applicable. (NOTE: For any license or permit involving property within fifty (50) feet of track, the exclusion for operations within fifty (50) feet of track will apply unless eliminated by endorsement).
 - (f) Premises, products/completed operations, and personal injury coverage.
 - (g) Severability-of-interest clause.
 - (h) In the case of commercial general liability insurance, the policy must also provide for aggregate coverage at each location and for the reinstatement of the aggregate in the event the limits of the policy are exhausted.
 - (i) If the proposed use of the Premises involves a hazard, which poses particular risk to the environment, the policy must cover sudden and accidental pollution on a named-peril basis to address the hazard.

2. Workers Compensation Insurance shall have limits not less than those required by statute, shall cover all persons employed by Lessee, Licensee, or Permittee, as the case may be, in the conduct of its operations on the Premises and shall provide for the following:
 - (a) Waiver of subrogation against Company
 - (b) Notice of Modification or cancellation
 - (c) All states endorsements
 - (d) Coverage for Longshore and Harbor Workers Act, if applicable
3. Employers Liability Insurance shall have a limit of not less than \$1,000,000 and shall be endorsed to provide for (a) Notice of Modification or Cancellation, and (b) waiver of subrogation against Company.
4. Umbrella or Excess Liability Insurance shall provide that if the underlying aggregate is exhausted, the excess coverage shall drop down as primary insurance, and shall provide for Notice of Modification or Cancellation.

A properly completed certificate of insurance shall be furnished to Company for approval.

EXHIBIT A

-Centerline existing main line of
San Luis and Rio Grande Railroad



± 1.84 ACRES
± 80,192 SQ. FT.

BOOK 243
PAGE 123

N 62°05'00" W

BOOK 518, PAGES 1921-1922

WEST

72.23'

NO

51

WEST

75.06'

WEST

WASHINGTON ST.

L=100.00'
R=2149.50'
Chd.=N 88°48'06" W
100.00'

L=93.07'
R=363.73'
Chd.=N 80°08'16" W
92.82'

**RIO GRANDE SOUTHERN RR Co.
COMMERCIAL RIGHT-OF-WAY
LEASE # 200501 DRAWING# CL501
DATE DRAWN: APRIL 5, 2005**

LOCATED IN THE S/W ¼ NW ¼
SEC. 31, T.39 N., R.8 E., N.M.P.M.
CITY OF MONTE VISTA
RIO GRANDE COUNTY, COLORADO

EXHIBIT No. # 4

EFILED Document

CO Rio Grande County District Court 12th JD

Filing Date: Jun 8 2011 3:25PM MDT

Filing ID: 38034345

Review Clerk: Jennifer Martinez

2010-04-17

Case Report No. 10-1135 City of Monte Vista
Summons & Complaint or Penalty Assessment

MVOV NO. M 0317

Date of Violation (mm/dd/yyyy)	Time of Violation	Approximate Location of Violation	
11/19/10	1306 am	20 N Broadway, South Side Bar	
Defendant (Last Name)		(First)	(Middle)
Shank		Donald	
Defendant's Address		City	State
20 N Broadway		Monte Vista	CO
Vehicle License Number/Type	State	Vehicle Year	Make
VIOLATIONS ☐ Traffic Offense ☒ Code Violation ☐ Criminal Offense			
Section	Violation	Section	Violation
☐ 6.2.10	Dangerous dog prohibited	☐ 5-1-170	Accum. rubbish weeds
☐ 6.2.20	Running at-large prohibited-animal	☐ 5-1-30	Accum. nuisance
☐ 6.2.30A	License required (dog tag)	☐ 5-1-210	Snow & tree removal
	☐ First ☐ Second ☐ Third	☐ 5-1-260	Junk
	☐ First ☐ Second ☐ Third	☐ 5-1-270	Parking vehicles/lawns
☐ 5-1-90	Uncollected garbage	☐ 5-1-280	Abandon wrecked junk vehicle
☐ 8-7-100	Loud obnoxious noise	☐ 5-1-40	Violation building zone reg.
☐ 12-20-30	Sign permit		
Section	Violation	C-Code	Fine
☒ 12-17-110(3)(5)	Storage of Rec/Vehs	X	4
☐ Warning - The violation must be corrected within ____ days. Failure to do so will result in a summons into Municipal Court.			
Appear or pay at: Monte Vista Municipal Court, 4 Chico Camino, Monte Vista, Co. 81144.			
☒ My signature is a promise to pay this prior to the court date. If I do not submit payment, my signature is a promise to appear in court at the date, time and place indicated herein.			
_____ at 8:00 AM. Failure to pay or appear will result in a Warrant for your arrest.			
Fine	Surcharge	TOTAL	
☒ Mandatory Appearance - You must appear in Court. You are summoned and ordered to appear to answer charges stated above in:			
Monte Vista Municipal Court 4 Chico Camino Monte Vista, Colorado 81144			
On <u>12-10-10</u> at 8:00 AM 719-852-5926			
Warning - If you fail to appear, a Warrant will be issued for your arrest and additional costs will be assessed.			
RRV (Rev 4/10) Court		THIS IS A LEGAL DOCUMENT	

Summons - Without admitting guilt, I promise to appear at the time and place indicated.

Defendant name (print)

Date

Defendant Signature

The undersigned has probable cause to believe that the defendant committed the offense(s) against the peace and dignity of the People of the City of Monte Vista, State of Colorado and affirms that a copy of this summons and complaint or penalty assessment was served upon the defendant.

Officer/Complainant (print)

Date Issued

Badge #

Witness

Address

EFILED Document

CO Rio Grande County District Court 12th JD

Filing Date: Jun 8 2011 3:25PM MDT

Filing ID: 38034345

Review Clerk: Jennifer Martinez

2010-0936

Case Report No. 10-1136

City of Monte Vista

MVOV NO. M 0318

Summons & Complaint or Penalty Assessment

Date of Violation (mm/dd/yyyy)		Time of Violation		Approximate Location of Violation	
11/19/10		1306 am		N Broadway Rio Grande Southern RR	
Defendant (Last Name)		(First)		(Middle)	
Shank		DON			
Defendant's Address		City		State	
20 N Broadway		Monte Vista		CO	
Vehicle License Number/Type		State		Vehicle Year	
Make		Body Style/Model		Color	
VIN					
☐ Traffic Offense ☒ Code Violation ☐ Criminal Offense					
Section	Violation	Section	Violation	Section	Violation
☐ 6.2.10	Dangerous dog prohibited	☐ 5-1-170	Accum. rubbish weeds	☐ 5-1-90	Uncollected garbage
☐ 6.2.20	Running at-large prohibited-animal ☐ First ☐ Second ☐ Third	☐ 5-1-30	Accum. nuisance	☐ 5-1-280	Abandon wrecked junk vehicle
☐ 6.2.30A	License required (dog tag) ☐ First ☐ Second ☐ Third	☐ 5-1-210	Snow & tree removal	☐ 8-7-100	Loud obnoxious noise
		☐ 5-1-260	Junk	☐ 5-1-40	Violation building zone reg.
		☐ 5-1-270	Parking vehicles/lawns	☐ 12-20-30	Sign permit
Section	Violation	C-Code	Fine	Sur	Points
☒ 12-17-110(3)(5)	Storage of mtl/cr/s	X	280		
☐					
☐					
☐ Warning - The violation must be corrected within _____ days. Failure to do so will result in a summons into Municipal Court.					
Appear or pay at: Monte Vista Municipal Court, 4 Chico Camino, Monte Vista, Co. 81144. ☐ My signature is a promise to pay this prior to the court date. If I do not submit payment, my signature is a promise to appear in court at the date, time and place indicated herein. _____ at 8:00 AM. Failure to pay or appear will result in a Warrant for your arrest.					
Fine		Surcharge		TOTAL	
☒ Mandatory Appearance - You must appear in Court You are summoned and ordered to appear to answer charges stated above in:					
Monte Vista Municipal Court 4 Chico Camino Monte Vista, Colorado 81144					
On 12/01/10 at 8:00 AM 719-852-5926 Warning - If you fail to appear, a Warrant will be issued for your arrest and additional costs will be assessed.					
RRV (Rev 4/10) Court					

THIS IS A LEGAL DOCUMENT

Summons - Without admitting guilt, I promise to appear at the time and place indicated.

Defendant name (print)

Date

Defendant Signature

The undersigned has probable cause to believe that the defendant committed the offense(s) against the peace and dignity of the People of the City of Monte Vista, State of Colorado and affirms that a copy of this summons and complaint or penalty assessment was served upon the defendant.

Officer/Complainant (print)

Date Issued 11-19-10

Badge # 216

Witness

Address

EXHIBIT No. # 5

MONTE VISTA MUNICIPAL COURT MONTE VISTA, COLORADO 81144	
Plaintiff(s): THE PEOPLE OF THE STATE OF COLORADO THE TOWN OF MONTE VISTA vs. Defendant(s): DONALD H. SHANK	▲ COURT USE ONLY ▲
Attorney for Defendant Ronald E. Howard, #34424 26357 W. Hwy. 160, Ste. B South Fork, CO 81154 Phone Number: (719) 873-5901 ron@rehowardlaw.com	Case Number: 2010 – 0936 Division Courtroom
MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF	

COMES NOW Ronald E. Howard, Attorney at Law, on behalf of the Defendant, Donald H. Shank, and hereby requests that this Court dismiss Plaintiff's Complaint with prejudice for, among other reasons, want of jurisdiction pursuant to 49 U.S.C. §10501(b), or, in the alternative, stay the proceeding in this case and refer the matter to the U. S. Surface Transportation Board for a Decision. As grounds therefore, the Defendant states as follows:

INTRODUCTION

The Defendant in this proceeding is an individual, Donald H. Shank, who was issued a summons and complaint by the Code Enforcement Official for the City of Monte Vista (City) for the storage of rail cars within the city limits. The Defendant is not, personally, the owner of the property whereon the rail cars are stored, nor is he the owner of the rail cars themselves.

This is, in fact, a matter of Federal preemption of the City's zoning regimen under the authority and jurisdiction of the Surface Transportation Board (STB). The STB is generally

granted exclusive jurisdiction over the regulation railroads. Such is the present case because the property in question is a railroad facility owned by the Rio Grande Southern Railroad Company, LLC, under lease to the Denver & Rio Grande Railway Historical Foundation (D&RGHF), a federally authorized railroad. The rail cars in question are owned by the D&RGHF.

FACTS

The property in question is Rio Grande County Parcel Number 3531307034 (subject property). The subject property is located within the city limits of the City of Monte Vista. The subject property's owner on the County tax rolls is listed as the Rio Grande Southern Railroad Company, LLC (RGSR). The RGSR is a Colorado limited liability company in good standing with the Colorado Secretary of State. The RGSR purchased the subject property in 2005 from the San Luis & Rio Grande Railroad, Inc. The subject property has been under railroad ownership and use for decades.

The subject property is under lease to the D&RGHF, a Colorado Nonprofit Corporation. The D&RGH is also a federally authorized railroad owning and operating a railroad in Rio Grande and Mineral Counties. The railroad operated by the D&RGHF is part of the interstate rail network and is connected by direct rail interchange and rail spur to the subject property.

The D&RGHF utilizes the subject property for the storage of rail cars, rail car parts, and other railroad related equipment and materials. The D&RGHF also uses the subject property to restore, maintain, renovate and otherwise perform work on rail cars for use or anticipated use on the D&RGHF's rail line as well as for transportation related purposes by other federally authorized railroads.

The City enacted a zoning regimen that prohibits the storage of rail cars not attached to a live rail line. Thereafter, on or about October 18, 2010, the code enforcement official for the City

did issue a warning notice to Don Shank, and individual, for violation of the City's zoning regimen with regard to the storage of rail cars. The code enforcement official was informed by Mr. Shank that the rail cars were stored on railroad property and that he, individually, was not the owner of the subject property. The City's Chief of Police, Rick Needham, was also so advised by Mr. Shank. In a letter from Mr. Needham to Mr. Shank dated October 19, 2010, Mr. Needham acknowledged the title of the property was held by the RGSR but persisted in holding that the title of the property being held by a company notwithstanding, Mr. Shank was still "the owner of the railroad." (See Exhibit A attached hereto) Thereafter, on or about November 18, 2010, the code enforcement official for the City did issue a summons and complaint to Don Shank, and individual, for violation of the City's zoning regimen with regard to the storage of rail cars.

FORMATION AND JURISDICTION OF THE SURFACE TRANSPORTATION BOARD

The Surface Transportation Board was formed by act of Congress through the Interstate Commerce Commission Termination Act of 1995 (ICCTA 1995). The ICCTA 1995 was codified in Title 49 of the U.S. Code.

The ICCTA 1995 grants the STB with *exclusive* jurisdiction over "transportation by rail carriers" and "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State." 49 U.S.C. § 10501(b). (emphasis added)

ARGUMENT

- 1. The D&RGHF is a rail carrier and transportation by rail carrier is subject to the exclusive jurisdiction of the STB.**

The D&RGHF purchased a 21.6 mile rail line known as the Creede Branch from the Union Pacific Railroad Company on May 24, 2000, under and offer of federal assistance approved pursuant to the procedures of 49 USC §10904 and 49 CFR §1152.27. "D&RGHF is a licensed railroad that holds itself out as a common carrier and that has not sought abandonment or discontinuance authority from the Board [STB]." *STB Finance Docket Decision* No. 34376, 8 (2005). The D&RGHF is considered a rail carrier and subject to the jurisdiction of the STB by both the U.S. District Court for the District of Colorado and the STB. *STB Finance Docket Decision* No. 34376 (2005), *City of Creede v. Denver & Rio Grande Railway Historical Foundation*, 01-RB-318, (D. Colo., 2003).

In the *Creede* case the U.S. District Court recognized the doctrine of primary jurisdiction and referred railroad specific questions, including preemption of Creede's municipal zoning ordinances, to the STB for a decision. The decision of the STB in that case was relied upon by the Court in the issuance of its ruling, in favor of the D&RGHF.

As a rail carrier, the D&RGHF falls under the exclusive jurisdiction of the STB. The ICCTA 1995 at Section 10501 grants the STB "exclusive" jurisdiction over "transportation by rail carriers" and "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State." 49 U.S.C. §10501(b). "Transportation" has been broadly defined to include "a locomotive, car, vehicle, vessel, warehouse ... yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use" as well as "services related to that movement." 49 U.S.C. §10102(9). Thus, the subject property and the rail cars thereon are operated and/or owned by the D&RGHF; and, as such are encompassed under

the definition of "transportation" in §10201(9); and, are therefore under the exclusive jurisdiction of the STB.

2. The City's zoning regimen is federally preempted with regard to the subject property.

In 49 U.S.C. §10501(a), Congress gives the STB jurisdiction over "transportation by rail carrier," which includes the carrier's rail facilities. Section 10501(b), as modified by the ICCTA 1995, expressly provides that, where the Board has such jurisdiction, that jurisdiction is "exclusive," and state and local laws, including local zoning and permitting laws and laws that have the effect of managing or governing rail transportation, are generally preempted.

State law is preempted by federal law when: (1) the preemptive intent is " 'explicitly stated in [a federal] statute's language or implicitly contained in its structure and purpose' "; (2) state law "actually conflicts with federal law"; or (3) "federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.' " *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977), and *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982)).

The basis of the preemptive authority of the STB with regard rail carriers and transportation by rail carriers, is based in Commerce Clause of the U. S. Constitution (Art. 1, sec. 8, cl. 3) that gives Congress plenary authority to legislate with regard to activities that affect interstate commerce. *See Gibbons v. Ogden*, 9 Wheat 1, 196 (1824). With regard to railroads, this was done through the enactment of the Interstate Commerce Act, which has been deemed to be "among the most pervasive and comprehensive of federal regulatory schemes." *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981). The court has gone on to

state that the Interstate Commerce Act so pervasively occupies the field of railroad governance that it completely preempts state law claims. *Deford v. Soo Line R.R.*, 867 F.2d 1080, 1088-91 (8th Cir. 1989).

The preemption of the Interstate Commerce Act was broadened through the ICCTA 1995 with the express preemption language in 49 USC §10501(b). The STB has gone so far as to state in its *Creede* decision that "section 10501(b) does not leave room for state and local regulation of activities related to rail transportation." Additionally, the court has stated that the STB, "as the agency authorized by Congress to administer the Termination Act [ICCTA 1995], the Transportation Board [STB] is 'uniquely qualified to determine whether state law ... should be preempted' by the Termination Act." *CSX Transportation, Inc. v. Georgia Public Service Commission*, 944 F.Supp. 1573, 1584 (N.D.Ga.1996).

The purpose of this federal preemption is to prevent a patchwork of local and state regulation from unreasonably interfering with interstate commerce. *Green Mountain R.R. v. Vermont*, 404 F.3d 638, 642 (2dCir. 2005). When the STB has jurisdiction under §10501(a), § 10501(b) preempts two broad categories of state regulation: (1) permitting or preclearance requirements (including environmental, zoning and other land use requirements) that by their nature could be used to deny a railroad the right to conduct rail operations or proceed with transportation activities the STB has authorized; and (2) attempts to address transportation matters that are regulated by the STB. *Id* at 642-43. The court has also upheld the STB's position that "while state and local government entities ... retain certain police powers and may apply non-discriminatory regulation to protect public health and safety, their actions must not have the effect of foreclosing or restricting the railroad's ability to conduct its operations. *Village of*

Ridgefield Park v. New York, Susquehanna & W. Ry. Corp., 163 N.J. 446, 750 A.2d 57, 64 (2000).

The City will most likely argue, and it is true, that state or local governments may exercise their police powers, provided they do not unreasonably burden interstate commerce or interfere with railroad operations. *Id* at 643. *See also N.Y. Susquehanna & W. Ry. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007). Where an activity, even though it is on rail property, is not considered “transportation by a rail carrier” under § 10501(a), no federal preemption applies, and states and localities are free to regulate the activity. *Florida East Coast Railway v. City of W. Palm Beach*, 266 F.3d 1324, 1336-37 (11th Cir. 2001). Such would be the case with a plant owned by an outside entity, a restaurant, or even a transloading facility serviced but not controlled by the railroad. However, the case at issue here is totally distinguishable from those where preemption does not apply.

In this case, we are dealing with rail cars, owned by a railroad, located on railroad property. Rail cars are a fundamental instrumentality of transportation by rail and rail operations in general. People and goods cannot be transported by rail without the use of rail cars. Thus, the attempt by the City to regulate the storage or location of rail cars on railroad property creates a situation where the City’s zoning regimen has the effect of foreclosing or restricting the railroad’s ability to conduct its operations and proceed with transportation activities. This present case, without question, falls squarely within the bounds of the federal preemption under §10501(b).

3. The Court can refer the matter to the STB for a Decision on the issue of preemption.

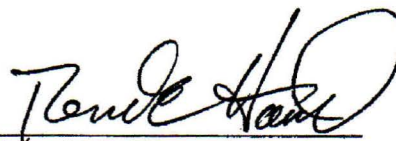
Should the Court decide that outright dismissal is not warranted under the facts as provide in this Motion to Dismiss, the Court can issue a stay in the present proceeding and refer

the matter to the STB for a decision. Pursuant to 49 USC §721 (The Administrative Procedure Act) and 5 USC§554(e) the STB has the authority to issue a declaratory order to “terminate a controversy or remove uncertainty.” Obviously, this case arises from a controversy with the City as well as uncertainty arising from the ownership, control, and use of the subject property as relates to preemption of the City’s zoning regimen. The foregoing makes this present case one where a declaratory order from the STB would remove any uncertainty and settle the controversy.

CONCLUSION

Based on the foregoing argument and the preemption of the City’s zoning regimen in this particular case under 49 USC §10501(b), the Defendant requests this case be dismissed in its entirety, with prejudice. In the alternative, the Defendants requests that the Court stay this proceeding and, pursuant to the Administrative Procedure Act, refer the matter to the STB for a declaratory order.

Respectfully submitted this 04th day of February 2011.

A handwritten signature in black ink, appearing to read "Ronald E. Howard", written over a horizontal line.

Ronald E. Howard, #34424
Attorney for Defendant
26357 W. Hwy. 160, Ste. B
South Fork, CO 81154
(719) 873-5901

CERTIFICATE OF SERVICE

This is to certify that on the 04th day of February 2011, a true and correct copy of the above and foregoing was delivered, to the following:

Via E-mail and First-Class U.S. Mail, Postage prepaid
Law Office of Eugene L. Farish, P.C.
Eugene L. Farish, Esq.
739 1st Ave.
Monte Vista, CO 81144

A handwritten signature in black ink, appearing to read "Eugene L. Farish", is written over a horizontal line.

EXHIBIT No. # 6

IN THE MUNICIPAL COURT
CITY OF MONTE VISTA, CO

CASE NO. 2010-0936

CASE NO. 2010-0937

EFILED Document

CO Rio Grande County District Court 12th JD

Filing Date: Jun 8 2011 6:12PM MDT

Filing ID: 38039406

Review Clerk: Jennifer Martinez

The People of the City of Monte Vista,)
Plaintiff)

DECISION AND ORDER

v.)

Donald H. Shank,)
Defendant)

FACTS AND HISTORY

The Defendant in both of these cases is Donald Shank, one and the same person as Donald H. Shank. The word "Defendant" refers to him as an individual. Two related parties, the Rio Grande Southern Railroad company, LLC, a Colorado limited liability company and the Denver & Rio Grande Railway Historical Foundation, a Colorado not-for-profit corporation, are not named defendants.

There are two parcels involved in these two cases, described as follows:

The North Parcel – This parcel, a portion of the original railroad right-of-way, was purchased by the Defendant in early 2005 and it is the Parcel involved in Case No. 2010-0936. The Parcel is approximately described as follows: Bounded on the north by a line parallel to and 20' south of the centerline of the main line of the railroad, on the west by U.S. Hwy. 285, on the south by the south boundary of the original railroad right-of-way and on the east by a point approximately 60 feet west of the switch that serves Spur Track ICC No. 15.

The South Parcel – This is the Parcel involved in Case No. 2010-0937 and was evidently never a portion of the original railroad right-of-way. It was also purchased by the Defendant in 2005. It is approximately described as follows: Lots 1, 2, 3 and 20, the west half of Lot 19, 18 and 17, all in Block 1, and a tract north of these Lots, in the Town (now City) of Monte Vista.

As of 2005 and thereafter, both of these Parcels were zoned CB (Commercial Business).

The Defendant individually placed 11 railcars on the North Parcel in 2005, two on blocks and 9 on panel track (track that is not connected to a main line). He placed another 17 railcars on this Parcel in 2010, either on blocks or panel track.

The Defendant individually placed 4 railcars on the South Parcel in 2005, either on blocks or panel track. No additional railcars have been placed on the South Parcel.

In 2008 or 2009, the City of Monte Vista (the "City" herein) adopted amendments to its zoning Ordinances (the Amendments" herein). Both Parcels remained in the Commercial Business district but the City added provisions directed specifically at railcars. No complaints were filed against the Defendant (or any entities) until November 19, 2010. On that date, the Defendant was served with 2 Complaints directing his individual appearance. The Defendant appeared, was advised of his rights and was granted a continuance. The Defendant retained Ronald E. Howard, Attorney at Law, on both cases (hereafter, "Defendant's Attorney") and the Defendant's Attorney filed an Entry of Appearance and Plea of Not Guilty in both Cases.

Complaint No. 2010-0936 charges that the Defendant, on November 19, 2010, violated the amended Section 12-17-110 (3) and (5) of the City Code. Specifically, he was charged with the unlawful storage of 28 railcars on the North Parcel in a Commercial Business district other than on a railroad spur connected to the mainline of the railroad. Complaint No. 2010-0937 is almost identical except that it involves the 4 railcars located on the South Parcel.

Thereafter, the Defendant's Attorney filed a Motion to Dismiss both Complaints based entirely on Federal pre-emption. The Motion included a Supporting Brief. The City Attorney filed a Response shortly thereafter. The Court denied dismissal and the alternative request that the Court stay these proceedings and refer the matter to the U.S. Surface Transportation Board for a possible declaratory judgment.

The Defendant waived his Right to a Speedy Trial and filed a Witness and Exhibit list. The City Attorney immediately filed a Motion in Limine requesting that the Court disallow the testimony of one defense witness. The Court substantially granted this Motion. The City Attorney then filed an Amended Motion in Limine on March 15, 2011 to exclude testimony by telephone. The Court never had an opportunity to rule on this Motion but at trial (the next day), no ruling proved necessary.

The trial began and ended on Wednesday, March 16, 2011. The trial consisted of a substantial number of verbal stipulations including all essential factual elements of the charges. The only oral testimony relied upon by the Court was the testimony of the Defendant regarding how many railcars were placed on which Parcels and on what approximate dates. All of the City's Exhibits were admitted into evidence. The Court appreciates the professionalism shown by both counsel in entering into the stipulations.

DISCUSSION

The Court reviewed all of Chapter 12 of the City Code (Zoning) with the exception of the Sections dealing with signs. Article 1 is entitled "General Provisions" and Section 12-1-10 is entitled "Definitions". The following definitions were considered significant.

The definition of "Permitted Use" reads as follows: "Permitted use means a use specifically allowed in one (1) or more of the various zone districts without the necessity of obtaining a use permit." A permitted use is a vested property right.

Table 12-3 in Section 12-5-20 is a "Use Chart" that contains 58 "Use Groups". Use Groups define all of the possible uses of land in the City. The Chart shows all of the various zone districts, all permitted uses, special review uses and, by omission of either of those uses, all prohibited uses, in every district. To this Court, the word "specifically" compels a narrow interpretation of the various uses.

The definition of "Nonconforming use" (not including irrelevant language) reads as follows: "Nonconforming . . . use means a lawful existing . . . use at the time this Chapter or any amendments thereto become effective which does not conform to the requirements and provisions of this Chapter." The Court considers a nonconforming use to be a significant vested property right. As a result, this Court must give far more than lip service to that right.

The definition of "Special review use" reads as follows: "Special review use means any use which, although not permitted outright in a particular district, may be permitted by the City Council upon recommendation by the Planning and Zoning Commission in accordance with the standards and procedures of this Chapter". The Court believes that a Special Review Use does not create a vested property right.

The following Sections of the City Code were considered pertinent. Some of these may only be identified by number and title.

Sections 1-4-20 and 12-1-90: Noted only to show the seriousness of the possible penalties.

Section 12-4-50: Zoning Map Amendment. Paragraph (6)(a), Grounds for Request, reads as follows: "Evidence that the property was not properly zoned when existing zoning was imposed".

Sections 12-3-230, 250, 260, 290 and 300: All of these Sections deal with nonconforming uses. Several of these Sections are significant factors in this decision.

Section 12 -2 -30: Article 2 deals with the Board of Adjustment. That Section reads in part as follows: (b) The Board of Adjustment shall have the following duties: (2) To hear and decide whether a specific use is expressly permitted in a use group as specified in Article 5 of this Chapter." The underlined words very clearly require a very narrow interpretation of the definition of "permitted use".

Section 12-3-200: Time Limitation of Use Permit: This Section is cited because it further illustrates that the concept of "Special Use Review" does not establish a vested right.

Sections 12-13-10, 20 and 30. These Sections and those immediately following create the Commercial Business (CB) District and provide some of the limitations that apply in that District. However, the vast majority of the limitations, as with all of the districts, appear in

Table 12-3, the Use Chart. The Court also notes that while Sections 12-13-10 and 50 and Table 12-11 are perfectly compatible with Monte Vista's central business district, their applicability to the North Parcel is a bit of a challenge.

Section 12-17-110: Both of the Complaints are based entirely on this Section. Because of the Amendments, the Court had to analyze both the pre and post Amendment versions.

ANALYSIS AND CONCLUSIONS OF LAW

These cases represent the latest collision between the police powers of the City and the private property rights of its citizens. The Court is tasked with legally resolving the conflict. To a degree, part of the process involves trying to determine the intent of the City with respect to the zoning Ordinances.

The Court cannot treat the North Parcel and the South Parcel in the same way. The North Parcel has always been a part of the railroad right of way and most of the South Parcel has not. The Court will address the North Parcel first.

The railroad existed before the City and has always occupied a significant amount of acreage within the City. So, the railroad represents a substantial business in this City. By law, some property rights must exist with respect to the railroad. Prior to the Amendments, what were those property rights?

The answer appears to be - none. Only permitted uses and nonconforming uses can constitute vested property rights. Special review uses are not vested. Very surprisingly, the City zoning Ordinances, both before and after the Amendments, do not even acknowledge the existence of the railroad. There are no Permitted uses and no districts that allow a railroad. As a result, there are no vested property rights associated with the railroad except any "after the fact" nonconforming uses. Table 12-3, with all of its detailed uses, does not list or imply a railroad use. This omission denies the existence of any vested property rights associated with that use.

Nonetheless, it would be unfair for the Court to conclude that it was the intent of the City to deprive such a substantial business of any vested property rights. It is legally more appropriate for the Court to conclude that the omission was an oversight or an "error".

The Court cannot speculate on the intent of the City in the face of an error. So, to give any meaning to the whole subject, the Court concludes that the City's intent was to treat the conduct of the railroad business as a Permitted Use and that any activities engaged in by the railroad that would normally be associated with the operation of a railroad are permitted uses. For purposes of these cases (but not necessarily the subject of pre-emption), the Court concludes that the storage and rehabilitation of railcars is not an abnormal use of railroad property.

The failure of current or prior owners of the railroad to request an amendment to the error in Table 12-3 is no more fatal to the Defendant's rights than the City's failure to correct the error is fatal to its police powers. Consequently, the Defendant did not violate the City Zoning Ordinances on the North Parcel during the period preceding the Amendments.

Subsequent to the Amendments, the fundamental question is the power of the City to regulate and prohibit certain current uses of the North Parcel. The only answer to that question is hidden somewhere in the subjects of property rights, police powers and Federal pre-emption. The Court therefore finds that the Amendments do not violate established property rights and that the Amendments represent a valid exercise of the City's police power. Federal pre-emption will be left to some other tribunal.

The end result with respect to the North Parcel is that, of the 28 railcars placed on that Parcel, 11 of them were placed there lawfully, before the Amendments, and their continuing presence on that Parcel is now protected as a valid nonconforming use. The other 17 railcars were placed on that Parcel after the adoption of the Amendments and are therefore not protected as a nonconforming use. The Court finds the Defendant Not Guilty with respect to the 11 railcars placed on the North Parcel before the Amendments. The Court finds the Defendant Guilty in Case No. 2010-0936, with respect to the 17 railcars placed on the North Parcel after the Amendments.

As noted earlier, the South Parcel is legally different. The difference is that this Parcel has been historically used for commercial and not railroad purposes. The fact that it was zoned Commercial Business does not represent an error. The fact that it was not zoned in error provides the owner with at least some vested property rights. So, where the South Parcel is concerned, the only important question is whether are not the placement of the 4 railcars prior to the Amendments was a violation of the City zoning Ordinances. If the placement of the railcars was a violation and unlawful before the Amendments, their continuing presence could not now be a nonconforming use. If the placement was not a violation and was lawful before the Amendments were adopted, their continuing presence constitutes a valid non-conforming use.

The Court's review of the zoning Ordinances as they existed prior to the Amendments did not identify a specific prohibition against placement of the railcars on the South Parcel. The permitted uses in the Commercial Business District prior to the Amendments could be construed to validate the placement of the railcars, particularly 18-302(9) and (14). The Amendments deal specifically with railcars, endeavor to avoid Federal pre-emption and create the prohibitions that gave rise to these Cases. Finally, while the nearly 6 year delay in prosecuting these alleged violations does not necessarily constitute a defense, that delay leads the Court to believe that before the Amendments, even the City did not believe that it could convict the Defendant for the placement of the original 11 railcars on the North Parcel and the 4 railcars on the South Parcel.

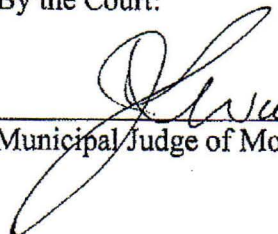
As a result of all of the above, the Court cannot conclude beyond a reasonable doubt that the original placement of the 4 railcars on the South Parcel was unlawful. Therefore, the Court must find that, after the Amendments, the four railcars on the South Parcel remained lawful as a nonconforming use. Accordingly, the Court finds the Defendant Not Guilty in Case No. 2010-0937.

To dispel any suspicion that this decision represents some sort of compromise verdict, the parties are advised that, no matter how many railcars were placed before and after the Amendments, it would not change the Court's legal conclusions in the slightest.

The Clerk of the Court is instructed to consult with the attorneys and schedule a date and time for sentencing in Case No. 2010-0936. That date should be at least 31 days from the date of this Order. In the interim, the Defendant may perfect an appeal in the state courts, in the Federal courts or with the U.S. Surface Transportation Board.

Done and signed this 1st day of April, 2011.

By the Court:



Municipal Judge of Monte Vista, Colorado

Exhibit : A



**POLICE DEPARTMENT
CITY OF MONTE VISTA**

720 1ST AVENUE
MONTE VISTA, CO 81144
(719)852-5111
FAX(719)852-6162

**Rick Needham
Chief of Police**

19 October 2010

Donald H. Shank
20 North Broadway
Monte Vista, CO 81144

Dear Mr. Shank,

Per our conversation this morning I am enclosing the relevant ordinance, 12-17-110, concerning the railcars you have on property that I have been advised belongs to the Rio Grande Southern Railroad Company, L.L.C. According to the Colorado Secretary of State, you are the owner of the railroad.

I highlighted the sections that pertain to your particular situation to assist your understanding of the ordinance. It is the Departments hope that you will choose to voluntarily comply with the ordinance within 7 days as this will avoid your being summonsed into court. As I read the ordinance, the assertion that the railcars are on "railroad" property is not a defense against the storage as this lies in an area zoned commercial business.

The area where the railcars are stored is within the City of Monte Vista in an area zoned commercial. The ordinance specifically proscribes storage in such a location.

To answer your question of how this matter came to my attention, many matters are related to me via several methods. I do not feel it is appropriate to disclose the source of the complaint and I will keep that confidential. I will advise you that this was brought to my attention yesterday so I directed the Ordinance Enforcement Officer to contact you about this and begin the process to have the violation resolved. You stated in our conversation that you had moved the railcars to that location only one day prior to the complaint having been filed. It would seem there are members within the community that object to the storage of antiquated railcars in the City. As such, I feel obliged to enforce the ordinances and obligate you to remove the offending objects to comply with the ordinance.

If I can be of further service, please call.

Respectfully,


Rick Needham
Chief of Police

To Serve and Protect
montevistapolice@ci.monte-vista.co.us

