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SEC

SERVICE DATE - LATE RELEASE NOVEMBER 3, 2003

SURFACE TRANSPORTATION BOARD

DECISION¹

STB Finance Docket No. 34376

CITY OF CREEDE, CO—PETITION FOR DECLARATORY ORDER

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

UNION PACIFIC RAILROAD COMPANY—ABANDONMENT EXEMPTION—
IN RIO GRANDE AND MINERAL COUNTIES, CO

Decided: November 3, 2003

In a decision served in STB Docket No. AB-33 (Sub-No. 132X) on May 11, 1999, the Board approved the sale of a 21.6-mile rail line known as the Creede Branch from Union Pacific Railroad Company (UP) to the Denver & Rio Grande Railway Historical Foundation (D&RGHF) in accordance with the offer of financial assistance (OFA) procedures under 49 U.S.C. 10904 and 49 CFR 1152.27. On November 26, 1999, the City of Creede, CO (City), which lies along the Creede Branch, filed a petition to reopen UP's abandonment exemption and the OFA line sale to D&RGHF. On May 24, 2000, the Board denied the City's petition to reopen, finding that the City had not satisfied the criteria necessary for reopening administratively final proceedings. The sale of the line was also consummated on May 24, 2000.

On July 2, 2003, the City filed a petition for declaratory order (STB Finance Docket No. 34376) pursuant to an order of the U.S. District Court for the District of Colorado (District Court)² referring to the Board three questions involving federal preemption of the City's zoning laws as applied to D&RGHF and ordering the parties to submit to the Board, within 80 days of the District Court's order, all portions of the court record relevant to the preemption issue. D&RGHF made its submission to the Board on July 21, 2003. After requesting two extensions from the District Court, the City submitted portions of the court record, totaling over 400 pages, on October 14, 2003. In addition to the documents themselves, the City tendered a 30-page pleading arguing that the Board should void the

¹ These proceedings are not consolidated. A single decision is being issued for administrative convenience.

² City of Creede v. Denver & Rio Grande Ry. Historical Found., No. 01-RB-318 (CBS) (D. Colo. May 9, 2003).

authorization in the abandonment exemption proceeding for sale of the line to D&RGHF under the OFA provisions. Although the City did not caption its pleading as a petition to reopen the proceeding in STB Docket No. AB-33 (Sub-No. 132X), it will be treated as such, as the City asks the Board to review its decision approving D&RGHF's OFA purchase based on new evidence.

The City's pleading was improperly filed in this declaratory order docket, which was established to receive the petition for declaratory order to consider the specific questions of federal preemption referred to the Board by the District Court and the portions of the court record relevant to this issue. The pleading tendered by the City appears to have no relevance to the questions referred to the Board by the District Court, but rather seeks revocation of the abandonment exemption and voiding of the OFA sale on the basis of alleged new evidence. Such a pleading should not have been submitted in the declaratory order proceeding, but should have been captioned as a petition to reopen and filed separately in STB Docket No. AB-33 (Sub-No. 132X).

Nevertheless, D&RGHF has not moved to strike this pleading, but instead, in a letter filed on October 22, 2003, requests an extension until December 3, 2003, to file its reply. D&RGHF also suggests that the declaratory order proceeding not go forward until there has been a disposition of the City's petition to reopen. By letter filed on October 24, 2003, UP notified the Board that it had not been served with a copy of the City's pleading seeking revocation of the abandonment exemption and subsequent OFA line sale. UP urges the Board to reject the pleading as improperly filed. By letter filed on October 27, 2003, the City states that its failure to serve UP was an oversight and that it has now served a copy on UP. In another letter filed on October 27, 2003, the City states that it has no objection to D&RGHF's request for an extension of time to file a reply.

Although the City has not followed the Board's rules for the filing of a petition to reopen and revoke an administratively final action—specifically, failing to caption its pleading properly, filing it in the wrong docket, and failing to promptly serve an essential party—these defects have been remedied by D&RGHF's willingness to reply on the merits, the City's agreement to an extension of time for the reply, and the City's service of a copy of its pleading on UP. The City's petition will be accepted for filing in STB Docket No. AB-33 (Sub-No. 132X) and the due date for replies from both D&RGHF and UP will be extended until December 3, 2003. So that the District Court will be apprised of the reason for the delay in the Board's response to the questions it referred to the Board, a copy of this decision will be served on the District Court.

It is ordered:

1. The City's October 14, 2003 pleading will be filed in STB Docket No. AB-33 (Sub-No. 132X) and treated as petition to reopen that proceeding.

2. The due date for replies to the City's petition to reopen the proceeding is extended to December 3, 2003. The parties should submit pleadings in STB Docket No. AB-33 (Sub-No. 132X) only.

3. The declaratory order proceeding in STB Finance Docket No. 34376 is held in abeyance pending the disposition of the City's petition to reopen STB Docket No. AB-33 (Sub-No. 132X).

4. This decision is effective on its service date.

5. A copy of this decision will be served on:

The Hon. Robert E. Blackburn
United States District Judge
United States Courthouse A741
909 19th Street
Denver, CO 80294

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary