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SERVICE DATE – SEPTEMBER 12, 2014

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35496

DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION—PETITION FOR
DECLARATORY ORDER

Decided: September 11, 2014

The Denver & Rio Grande Railway Historical Foundation (DRGHF), a Colorado not-for-profit corporation and Class III railroad doing business as the Denver & Rio Grande Railway, L.L.C., has asked the Board to stay the decision served on August 18, 2014, addressing DRGHF’s petition for declaratory order.¹ The request will be denied.

DRGHF filed a petition asking the Board to declare whether a zoning ordinance of the City of Monte Vista, Colo. (the City) is preempted under 49 U.S.C. § 10501(b) with respect to a 1.84-acre parcel of land it leases in the City (Parcel). DRGHF filed the petition in response to the City’s action against Mr. Donald Shank, President and Executive Director of DRGHF, charging him with unlawfully storing railcars on the Parcel, a commercially zoned property in the City, in violation of Monte Vista Municipal Code § 12-17-110(3).

The Parcel is located approximately 30 miles east of the Creede Branch, a 21.6-mile rail line between South Fork (near Derrick) and Creede, Colo., that DRGHF acquired from Union Pacific Railroad Company (UP) in 1999.² According to DRGHF, the Parcel, which it leases from its noncarrier affiliate, Rio Grande Southern Railroad Company, LLC (RGSRR), is used “for the storage of rail cars, rail car parts, and other railroad related equipment and materials” and “to restore, maintain, renovate and otherwise perform work on rail cars for use or anticipated use on the [Creede Branch] as well as for transportation related purposes by other federally authorized railroads.”³ DRGHF has operated a tourist-based passenger excursion service over the Creede Branch in summer months since 2009, using a maintenance-of-way vehicle that has been modified to carry passengers and rafts for passengers rafting on the Upper Rio Grande River.

¹ Denver & Rio Grande Ry. Hist. Found.—Pet. for Declaratory Order, FD 35496 (STB served Aug. 18, 2014) (August 18 Decision).

² See Union Pac. R.R.—Aban. Exemption—in Rio Grande & Mineral Cntys., Colo., AB 33 (Sub-No. 132X) (STB served May 11, 1999).

³ DRGHF’s Opening Statement 4.

In the August 18 Decision, the Board concluded that the very limited, wholly intrastate excursion passenger and related raft operations that DRGHF has conducted over the Creede Branch to date are not transportation conducted under the Board's jurisdiction "as part of the interstate rail network." August 18 Decision, slip op. at 10. Thus, the Board ruled that the activities on the Parcel provide no basis for finding that the City's ordinance is preempted under § 10501(b).

On August 27, 2014, DRGHF filed a petition asking the Board to stay the effective date of the August 18 Decision pending the Board's consideration of a petition to reconsider that decision, which DRGHF says it plans to file shortly. The City and San Luis & Rio Grande Railroad (SLRG)⁴ filed a joint reply on September 2, 2014.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 721(b)(4), the Board may issue an appropriate order, such as a stay, when necessary to prevent irreparable harm. A party seeking a stay must establish that (1) there is a likelihood that it will prevail on the merits of any challenge to the action sought to be stayed, (2) it will suffer irreparable harm in the absence of a stay, (3) other interested parties will not be substantially harmed, and (4) the public interest supports the granting of the stay. See, e.g., Eighteen Thirty Group, LLC—Acquis. Exemption—in Allegany Cnty., Md., FD 35438, et al. (STB served Nov. 17, 2010); Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958). The Board typically does not grant a stay under the traditional stay criteria unless it is necessary to prevent irreparable harm. Ballard Terminal R.R.—Lease Exemption—Line of Eastside Community Rail, FD 35730, slip op. at 2 (May 1, 2013).

Here, DRGHF did not even cite the four stay criteria, much less demonstrate that its stay request satisfies this standard. Significantly, DRGHF has failed to show that it will suffer irreparable harm if a stay is not granted. In earlier pleadings, DRGHF has claimed that the Parcel "reflects a single purpose use, that being as a railcar rehabilitation and restoration facility[,] and has only been used for that purpose since RGSRR purchased it and leased it to DRGHF."⁵ In its stay request, however, DRGHF asserts that "it is actively developing plans to offer trans-load service to shippers at [its] Monte Vista location."⁶ Specifically, DRGHF claims that it "is currently negotiating an agreement which will involve the movement of railcars between [its] Monte Vista location and the East Coast."⁷ DRGHF, however, does not

⁴ SLRG, a Class III rail carrier, operates the Alamosa Subdivision, a 149-mile rail line extending from its connection with the Creede Branch at Derrick east to Monte Vista and then beyond to its connection with UP near Walsenberg, Colo. A spur off of SLRG's line extends onto the Parcel at Monte Vista.

⁵ DRGHF's Pet. for Declaratory Order 3.

⁶ DRGHF's Pet. for Stay 5.

⁷ Id.

demonstrate or even claim that allowing the August 18 Decision to remain in effect while the Board considers DRGHF's anticipated reconsideration petition would adversely affect any efforts on DRGHF's part to reach an agreement that would allow the Parcel to be used in support of rail service in interstate commerce (and thus qualify for preemption), much less irreparably harm DRGHF in any way. Moreover, it is difficult to see how it could, since the August 18 Decision itself contemplates that the preemption analysis could change if the use of the Parcel changes.⁸

Because DRGHF has failed to show irreparable harm in the absence of a stay, the petition for stay will be denied.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. DRGHF's petition for a stay is denied.
2. This decision is effective on its service date.

By the Board, Daniel R. Elliott III, Chairman.

⁸ "The record before us does not demonstrate that the DRGHF's present or foreseeable future use of the Parcel furthers the provision of transportation subject to the Board's jurisdiction. Accordingly, *as long as that remains the case*, the City's rail car storage ordinance is not preempted." August 18 Decision, slip op. at 9 (emphasis added).