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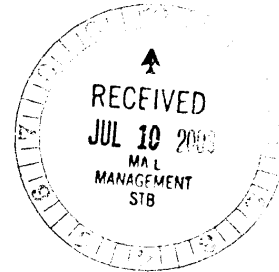
THOMAS F. MCFARLAND

July 9, 2003

By UPS overnight mail

Vernon A. Williams, Secretary
Surface Transportation Board
Case Control Unit, Suite 713
1925 K Street, N.W.
Washington, DC 20423-0001

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Office of Proceedings
JUL 10 2003
Part of
Public Record



Re: Finance Docket No. 34376, *City of Creede, Colorado - Petition for Declaratory Order*

Dear Mr. Williams:

The undersigned will represent the rail carrier, Denver & Rio Grande Railway Historical Foundation (the Foundation), in the above proceeding.

Statements made by the City of Creede, Colorado (the City) near the bottom of page 4 of its Petition for Declaratory Order (Petition) filed July 2, 2003 warrant a brief response. The City there alleged that in Paragraph 7 of his Order Referring Questions to the Surface Transportation Board filed May 9, 2003 ("Order") (copy of which is attached to the Petition), Judge Blackburn "deferred to the jurisdictional competence of the Board with regard to the issues arising from the Board's OFA proceedings." The City there stated that it will submit materials compiled in the District Court bearing upon both the issues identified by Judge Blackburn for referral to the Board and "the Board's jurisdictional competence referred in paragraph 7 of Judge Blackburn's May 9, 2003 referral orders."

On the basis of the foregoing, it is evident that the City intends to attempt to utilize this proceeding as a vehicle to assail the validity of the OFA by which the Foundation acquired the rail line, in addition to a forum for resolution of the issues referred to the Board by the Court. In adopting a procedural schedule for resolution of the latter issues, the Board should admonish the City in the strongest terms to refrain from addressing the alleged invalidity of the OFA in its evidence or argument in this proceeding. Any such evidence or argument would be highly inappropriate for the reasons identified below.

First, Judge Blackburn specifically denied the City's request to refer the issue of the validity of the Foundation's OFA to the Board (Order at 5). Secondly, Judge Blackburn

THOMAS F. MCFARLAND

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July 9, 2003

Page 2

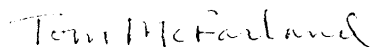
specifically denied the City's motion to amend its complaint against the Foundation to add an allegation that the Board's approval of the Foundation's OFA was invalid (Order at 3). As Judge Blackburn accurately concluded, only a United States Court of Appeals has jurisdiction to modify or set aside a decision of the Board. *See* 28 U.S.C. § 2321(a), 28 U.S.C. § 2342(5).

The Board's decision approving the Foundation's acquisition pursuant to its OFA was served on May 11, 1999. *See Union Pacific R. Co. -- Aband. Exempt. -- in Rio Grande and Mineral Counties, CO*, STB Docket No. AB-33 (Sub-No. 132X), decision served May 11, 1999. On May 24, 2000, the Board issued a decision in that proceeding that denied a petition filed by the City to reopen the proceeding in which the Foundation's acquisition of the line pursuant to the OFA was approved. The Board there addressed and rejected numerous arguments made by the City against the validity of the OFA, including an argument that the Foundation is not financially responsible. *Id.* at 4. Pursuant to 28 U.S.C. § 2344, the City had 60 days after issuance of that decision to file a petition for review of that decision in a United States Court of Appeals. The City failed to do so. The City's attempt now to obtain Board review of that determination through the back door of an unrelated declaratory order proceeding more than three years after issuance of the decision in which that determination was made is patently improper.

A fair reading of Paragraph 7 of Judge Blackburn's order, in light of the discussion preceding that Paragraph, is convincing that the Judge did not thereby intend to make the validity of the OFA open for review at the Board's discretion. As noted, the Judge specifically refused to refer that issue to the Board.

A strong Board admonition to the City to refrain from presenting extraneous matter in this proceeding involving the validity of the Foundation's OFA would circumvent needless motions to strike and replies. The Board is respectfully requested to issue such an admonition in the interest of judicial economy.

Very truly yours,



Thomas F. McFarland
*Attorney for Denver & Rio Grande
Railway Historical Foundation*

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cc: George M. Allen) by UPS
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