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BEFORE THE
SURFACE TRANSPORTATION BOARD

CITY OF CREEDE, CO -- PETITION FOR) FINANCE DOCKET
DECLARATORY ORDER) NO. 34376



MOTION TO REJECT CITY OF CREEDE'S
OPENING STATEMENT AND FOR MODIFICATION
OF THE PROCEDURAL SCHEDULE

ENTERED
Office of Proceedings

AUG 17 2004

Part of
Public Record

DENVER & RIO GRANDE RAILWAY
HISTORICAL FOUNDATION
20 North Broadway
Monte Vista, CO 81144

Respondent

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DATE FILED: August 17, 2004

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SURFACE TRANSPORTATION BOARD

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**MOTION TO REJECT CITY OF CREEDE'S
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Pursuant to 49 C.F.R. § 1117.1, Respondent DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION (the Foundation) hereby moves the Board (1) to reject Petitioner City of Creede's (the City) Opening Statement filed August 11, 2004, because of its late filing; and (2) for modification of the procedural schedule in this proceeding as explained below.

I. MOTION TO REJECT OPENING STATEMENT

Pursuant to the Board's procedural decision in this matter served June 22, 2004, the City's Opening Statement was required to be filed on July 22, 2004.

The City's Opening Statement was not filed until August 11, 2004, 20 days after that filing deadline. The Opening Statement was not accompanied by a motion or petition asking the Board to accept its filing out of time. There was no explanation of any purported justification for the late filing. The Opening Statement makes no reference at all to its late filing.

It is provided in 49 C.F.R. § 1104.6 that documents must be received by the Board within the time limits set for filing. It is provided in 49 C.F.R. § 1104.10(a) that the Board may reject a document submitted for filing if the Board finds that the document does not comply with the rules.

In accordance with the regulations cited above, the Board should reject the City's Opening Statement because of its untimely filing. The Opening Statement should be returned to the City unfiled in accordance with 49 C.F.R. § 1104.10(b). While the Board has been liberal in accepting documents filed only a few days late when accompanied by an explanation in justification for such late filing and a request for acceptance, here the City's filing is nowhere close to the filing deadline, and there has been no explanation in purported justification for the late filing, nor any motion or petition that the Board accept the Opening Statement out of time. The degree of lateness and the absence of any purported justification for the late filing combine to dictate that the late-filed Opening Statement be rejected and returned to the City in accordance with the applicable regulations.

Upon rejection of the City's Opening Statement, the proceeding should go forward in accordance with the remainder of the procedural schedule, modified as requested below. This is a declaratory order proceeding in which the issues were referred to the Board by a United States District Court. It would not be appropriate merely to dismiss the petition because of the City's untimely filing. The Foundation and the Intervenor(s) identified hereafter should be permitted to file evidence and argument, and the City should be permitted to reply to that filing. In that manner, the Board would have an adequate record on which to report its findings on the issues that were referred by the Court.

II. MOTION FOR MODIFICATION OF THE PROCEDURAL SCHEDULE

Regardless of whether or not the City's Opening Statement is rejected, the procedural schedule in this proceeding should be modified to provide for additional time for the Foundation to file its evidence and argument, and for entities that have notified the Foundation of their intent

to intervene (i.e., the Association of American Railroads, the Small Railroad Business Owners of America, and perhaps the American Short Line and Regional Railroad Association) to file evidence and argument in support of the Foundation's position in this matter. Pursuant to the modified procedural schedule here sought, the City would be provided with ample time to file rebuttal evidence and argument.

The modified procedural schedule here sought is as follows:

Filing of:

The Foundation's evidence and argument	-	September 13, 2004
Intervenor's evidence and argument	-	September 27, 2004
The City's rebuttal evidence and argument	-	October 18, 2004

The Foundation submits the following in support of its motion for modification of the procedural schedule.

If the City's Opening Statement is not rejected, the Foundation should be provided with 32 days for filing its Reply Statement, as was provided in the procedural decision served June 22, 2004 (i.e., opening statement due July 22, 2004; reply statement due August 23, 2004). The City's Opening Statement was filed on August 11, 2004. The 32nd day thereafter is September 13, 2004,^{1/} which is the filing date sought for the Foundation's Reply Statement.

The Foundation's filing date should be extended to September 13, 2004 even if the City's Opening Statement is rejected. Until the City's recent extremely late filing, the Foundation did not have reason to begin preparation of a filing. As a result, key personnel of the Foundation went on summer vacation. The City should not be permitted to benefit from its unauthorized late filing. Adequate time should be provided for the Foundation to prepare and file evidence and

^{1/} September 12 is a Sunday.

argument following the completion of vacation schedules. The filing date of September 13, 2004 here sought is necessary for that purpose.

The filings of the Intervenor identified above will be in the nature of "amicus" filings. It is customary to provide for a reasonable period of time after the filing of the parties' evidence and argument for "amicus" parties to file their evidence and argument. The filing date of September 27, 2004 for Intervenor's evidence and argument is sought for that purpose.

Under the modified procedural schedule sought herein, the City would be provided with the same 21 days after the most recent prior filing for its rebuttal filing, as was provided for in the procedural decision served June 22, 2004.

III. CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated, the Board should (1) reject and return the City's late-filed Opening Statement and (2) modify the procedural schedule in the manner sought herein.

Respectfully submitted,

DENVER & RIO GRANDE RAILWAY
HISTORICAL FOUNDATION
20 North Broadway
Monte Vista, CO 81144

Respondent

Thomas F. McFarland

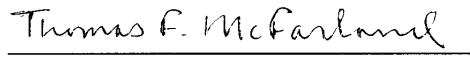
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Attorney for Respondent

DATE FILED: August 17, 2004

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2004, I served the foregoing document, Motion To Reject City Of Creede's Opening Statement And Modification Of The Procedural Schedule, on George M. Allen, 206-A Society Drive, Telluride, CO 81435, by UPS overnight mail.



Thomas F. McFarland