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Telluride
October 2, 2004

Hon. Vernon Williams, Secretary
Surface Transportation Board
1925 K Street, N.W.
Suite 700
Washington DC 20423-0001

Office of Proceedings
OCT - 4 2004

Re: Finance Docket No. 34376

Dear Secretary Williams:

This transmits the City of Creede's Reply in the referenced matter.

Yours very truly,

George M. Allen

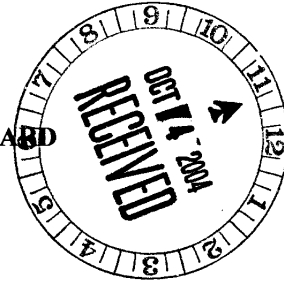
Enclosure

cc: Thos. McFarland, Esq.
Robert T. Opal, Esq.
Raymond P. Micklewright, Esq.
Karl Morell, Esq.
Robert M. Jenkins, III, Esq.
City of Creede

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BEFORE THE SURFACE TRANSPORTATION BOARD
OF THE UNITED STATES



CITY OF CREEDE, CO
PETITION FOR
DECLARATORY ORDER

FINANCE DOCKET NO.
34376

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REPLY OF PETITIONER, CITY OF CREEDE, CO

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ENTERED
Office of Proceedings

OCT - 4 2004

Petitioner, City of Creede, by its attorney, George M. Allen, hereby submits its Reply in Support of its Petition For Declaratory Order.

Restatement of Facts

At the risk of the boredom which inevitably comes from repetition, we restate the facts presented to the Board in the City of Creede's Opening Statement. Nothing in the submissions of either the Respondent Denver & Rio Grande Railway Historical Foundation or the submission of the *amicus curiae* Association of American Railroads has controverted the facts which we stated in our Opening Statement and which we reiterate below. Those fact are as follows:

1. Rail service on the Creede Branch of the former Denver & Rio Grande Western Railroad ceased in 1985.
2. Rail service within the City of Creede (where the land at issue in this matter is situated) last took place in 1972.
3. The Denver & Rio Grande Railway Historical Foundation – the owner of the Creede

Branch through the Offer of Financial Assistance process – has neither capability nor plans for resumption of rail service by actual operation of trains within the City of Creede.

Discussion

To the extent there is anything in the submissions of either the Foundation or the AAR which bears remotely on the above uncontested factual submission, it is the wholly unsupported claim of the Foundation, at page 6 of its Reply Statement, that the Foundation has a claimed “intent” to “rehabilitate and to use all four of . . . [the] . . . tracks . . .” for rail purposes.

This writer is a 62 year old country lawyer with no technical training in the operation of space ships. I might have an “intent” to fly to the moon as an American astronaut. If I were to claim to have such an intent, that would not make my claim of that intent judicially or administratively cognizable for any legitimate purpose. The Foundation’s claim of an “intent” to use long-since abandoned trackage and structures in the City of Creede for some rail purpose is ludicrous on the face of the record in this proceeding. The Foundation has no capacity to rehabilitate or operate interstate rail service on the Creede Branch. If and when the Foundation acquires any such capacity, Creede has already conceded that Creede’s residential zoning would not apply to the Foundation’s interstate rail operations.

The Foundation must continue to hope, notwithstanding an uncontroverted record in both the District Court and this proceeding that rehabilitation and restoration to service of the defunct Creede Branch would require millions of dollars which the Foundation does not have and cannot get, and the passage of more than four years in which the Foundation has utterly failed to restore or

rehabilitate any part of the Creede Branch, that somehow this Board and, ultimately, the federal court system, is going to recognize the Foundation as an operating railroad.

The Foundation is not a railroad carrying out any operations which relate even remotely to this Board's function of regulating interstate rail transportation. The Foundation is a *de facto* bankrupt entity, as the complete record of this proceeding establishes, which has no ability or prospect whatever of being able to carry on rail service within the City of Creede. The Foundation is no more capable of carrying out the daunting multi-million dollar task of engaging in interstate rail operations in Creede, Colorado than this attorney is capable of flying to the moon.

Creede has a interest in the regular administration of its laws and ordinances which must be weighed against the Foundation's claim that it has an "intent" to carry out rail service.

The entire record of this proceeding establishes the facts necessary for the Board to conclude that Creede's interest in orderly administration of land use within the City of Creede, including land use on the defunct right of way, far outweighs any possible interest of the Foundation relating to interstate rail service.

The only activities shown by the record of this action to have been carried out by the Foundation on the right of way within Creede are the attempted collection of rents from adjacent landowners and the filing of since-dismissed trespass charges against citizens making recreational use of the right of way. Neither the Foundation's activities in trying to collect rents from adjacent landowners (who are claimed to encroach on the right of way) nor the Foundation's assertions that trespasses or other misdemeanors have occurred on the right of way sound even remotely like operating interstate rail service.

The Foundation and the AAR have submitted a body of material with which Creede does not have any particular disagreement. They have provided the authority to support a proposition which is not relevant to this case. The proposition they support is that where interstate rail transportation is involved, there is near total preemption of local police power. Creede does not contest that point. Creede's point is that the Foundation has made no factual showing, and cannot make a factual showing, that it is now or ever will be involved in any activity which any reasonable person could construe as relating, even remotely, to interstate rail transportation.

The Foundation has an inchoate right to operate rail interstate rail service on the Creede Branch. But it has demonstrated no factual ability to do so. It has made submissions to the Colorado Department of Transportation (CDOT) in which the Foundation recognized the need for many millions of dollars to rehabilitate and restore the Creede Branch. (See Creede's October 14, 2003 submission in this proceeding, pages 391-415, which include the June, 2001 Foundation application for over \$10 million in grant money to CDOT)

This Board does not need to reach the fine distinctions advocated by the AAR and the Foundation having to do with whether entire rights of way are exempt from local police power or only parts of rights of way are exempt from such police power because in this case, on these facts, the entire right of way is defunct and has been so for more than 30 years. The Foundation is not now doing anything resembling participation in interstate rail transportation. That being the case, there is no factual issue before the Board on which to ground a determination such as that sought by the AAR and having to do with the fine questions of whether entire rights of way or only parts of rights

of way are subject to STB regulation.

Here the facts are uncontroverted that no part of the Creede Branch right of way in the City of Creede is being used for interstate rail transportation and that the Foundation has no capacity to use any part of the right of way for interstate rail transportation.

Conclusion

We submit that the Board should make a determination that the application of a balancing test requires that the Board conclude that on the facts of this case, there is no showing that the Foundation is engaged in any activity relating to regulation of interstate rail transportation and therefore the Board has no basis to appropriately exercise its jurisdiction to make any determination relating to the questions referred to the Board by the District Court.

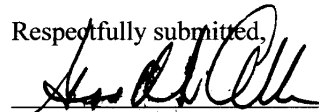
That result would leave Creede's residential zoning intact and applicable to the defunct right of way on the ground that right of way is not now used for any purpose related to the Board's regulatory competence and does not, on the facts of this case, have any apparent factually supported future likelihood, however remote, of ever being used for interstate rail transportation.

The Board could properly find, as did the I.C.C. in *Napa Valley Wine Train, Inc. Petition for Declaratory Order*, Finance Docket No. 31156, 7 ICC 2d 954, 1991 WL 166559 (I.C.C.) that, at best, the involvement of the Foundation's activities *vis-a-vis* interstate rail transportation and regulation are *de minimus*. The *Napa Valley Wine Train* case provides precedent for the Board taking that posture in this proceeding, and in so doing the Board would follow the path of the Commerce Commission, which, after first making a ruling, declined to exercise regulatory authority because the activities of the rail carrier in that case (which were much more nearly cognizable than

those of the Foundation in this matter) were so *de minimus* as to warrant a finding of no federal regulatory competence.

Since Creede concedes that if and when interstate rail service resumes (an event likely never to take place), the rail operator would not be subject to Creede's zoning on as to its rail-related activity, there is no need to sort out the issues raised by the AAR. That result would be entirely consistent with the Eleventh Circuit's decision in *Florida East Coast Ry. v. City of West Palm Beach*, 266 F.3d 1324 (11th Cir. 2001) and with the Board's history of handling issues related to police powers of local governments as such police powers relate to activities which do not bear on interstate rail regulation.

Respectfully submitted,



GEORGE M. ALLEN
Counsel for City of Creede

CERTIFICATE OF SERVICE

I hereby certify that I have, at Telluride, Colorado, this 2d day of October, 2004, served a true copy of the documents denominated below on the parties and/or counsel listed below by the means of service shown below:

Documents Served

REPLY OF PETITIONER, CITY OF CREEDE, CO

Means of Service

- ☐ U.S. Mail, Postage Prepaid
- ☐ Overnight Courier
- ☐ Hand Delivery
- ☒ Facsimile or
- ☒ Email

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