JONES MAYER
Krista MacNevin Jee, Esq., SBN 198650
kmj@jones-mayer.com
3777 North Harbor Boulevard
Fullerton, CA 92835
Telephone: (714) 446-1400
Facsimile: (714) 446-1448

Attorneys for Defendant,
CITY OF FORT BRAGG

EXEMPT FROM FILING FEES
PURSUANT TO GOVERNMENT CODE SECTION 6103

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MENDOCINO RAILWAY, Plaintiff, v. JACK AINSWORTH, et al., Defendants.	Case No. 4:22-CV-04597-JST *Assigned for all purposes to: Hon . Jon S. Tigar, Ctrm. 6* **REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF CITY OF FORT BRAGG'S REPLY TO OPPOSITION TO MOTION TO DISMISS** Action Filed: August 9, 2022 DATE: Dec. 22, 2022 TIME: 2:00 p.m.

TO THE HONORABLE COURT AND TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

Defendant City of Fort Bragg ("City") submits the following in support of its reply to the Opposition to Motion to Dismiss filed by Plaintiff Mendocino Railway ("MR"):

REQUEST FOR JUDICIAL NOTICE

Pursuant to Federal Rule of Evidence 201, Defendant City of Fort Bragg respectfully requests that the Court take judicial notice of the following materials submitted in support of its Reply to Plaintiff's Opposition to the Motion to Dismiss. The following matters are not subject to reasonable dispute because they can be accurately and readily determined

from sources whose accuracy cannot reasonably be questioned, and the contents of which is otherwise admissible.

- **Exhibit A:** City of Fort Bragg Municipal Code, Chapter 6.12 (Nuisances), Section 6.12.040 (Nuisance Conditions), a true and correct copy of which is attached hereto, and available at:

  https://www.codepublishing.com/CA/FortBragg/#!/FortBragg06/FortBragg0612.html#6.12.040

- **Exhibit B:** *Denver & Rio Grande Railway Historical Foundation*, Surface Transportation Board, Petition For Declaratory Order, Docket No. FD 35496, August 15, 2014, a true and copy of which is attached here, and available at:

  https://dcms-external.s3.amazonaws.com/MPD/62491/A3095D21D254D6A585257D38004B2823/43523.pdf

I. LEGAL STANDARD

Federal courts may grant judicial notice of facts that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. Rule 201(b)(2). A court may take judicial notice of such facts "at any stage of the proceeding," including in ruling on a motion for summary judgment or adjudication. Fed. R. Evid. 201(f); *see Hunt v. Check Recovery Sys.*, 478 F.Supp.2d 1157, 1160 (N.D. Cal. 2007) (taking judicial notice on a summary judgment motion).

Courts routinely take judicial notice of municipal ordinances and codes, as they constitute matters of public record that are not subject to reasonable dispute, and are official, codified legislative enactments of public entities. *See, e.g., Colony Cove Props., LLC v. City of Carson*, 640 F.3d 948, 954 n.3 (9th Cir. 2011) (taking judicial notice of municipal ordinances); *Solid Landings Behavioral Health, Inc. v. City of Costa Mesa*, 2015 U.S. Dist. LEXIS 52475, *1-2 (C.D. Cal. April 21, 2015) (same). *See also*, Cal. Evid. Code §§ 1280 (official writing), 1530 (official writing);

1119 Del. v. Cant'l Land Title Co., 16 Cal.App.4th 992, 996 n.2 (1993) (city municipal code provisions found to be "relevant matters which are properly the subject of judicial notice"); *Mack v. South Bay Beer Distributors*, 798 F.2d 1279, 1283 (9th Cir. 1986) (court may take judicial notice of and consider matters of public record of a City, including legislative actions); *Morgado v. City & County of San Fran.*, 13 Cal.App.5th 1, 13 n.8 (2017) (granting judicial notice as to Los Angeles City Charter provisions) As such, the Court should take judicial notice of the above-referenced Fort Bragg Municipal Code provisions, attached hereto as Exhibit A.

Exhibit B is an official decision of the Surface Transportation Board, a federal agency, which is a proper matter for judicial notice. *See, e.g., Union Pac. R.R. Co. v. Kan. City S. Ry. Co.*, 2009 U.S. Dist. LEXIS 70817, at *22 (S.D. Ill. 2009). In fact, it is proper for a court to take judicial notice of "public filings." *Golden Hill Paugussett Tribe of Indians v. Rell*, 463 F. Supp. 2d 192, 197 (D. Conn. 2006) (citing *Kavowras v. N.Y. Times Co.*, 328 F.3d 50, 57 (2d Cir. 2003) ("Among the matters of which courts may take judicial notice are decisions of an administrative agency."); *Reynolds v. Blumenthal*, 2006 U.S. Dist. LEXIS 68970, 2006 WL 2788380, at *3 n.7 (D. Conn. 2006); *Furnari v. Warden*, 218 F.3d 250, 255 (3d Cir. 2000) ("[I]t is proper for this Court to take judicial notice of decisions of an administrative agency.").

Additionally, the Courts also routinely take judicial notice of websites maintained publicly on the internet, the contents of which are readily ascertainable and widely disseminated, especially with respect to "[p]ublic records and government documents available from reliable sources on the Internet, such as websites run by governmental agencies" *Gerristen v. Warner Bros. Ent. Inc.*, 112 F.Supp.3d 1011, 1033 (C.D. Cal. 2015) (taking judicial notice of business entity profiles from California Secretary of State's website) (internal quotes omitted); *Michery v. Ford Motor Co.*, 650 Fed. Appx 338, 342 n.2 (9th Cir. 2016) (taking judicial notice of National Highway Traffic Safety Administration's crash tests publicly available on its government website); *see also, Caldwell v. Caldwell*, 420 F. Supp. 2d. 1102, 1105 n.3 (N.D. Cal. 2006) (taking judicial notice of the UC Berkeley Museum of Paleontology website), aff'd, 545 F.3d 1126 (9th Cir. 2008); *Cairns v. Franklin Mint Co.*, 107 F. Supp. 2d 1212, 1216 (C.D. Cal. 2000) (taking judicial notice of pages on Warhol Museum's website), aff'd, 292 F.3d 1139 (9th Cir. 2000). Exhibit B is taken and

continuously maintained for access to the public from the City's public website, providing further grounds in favor of taking judicial notice.

II. CONCLUSION

For the foregoing reasons, the Court should take judicial notice of Exhibits A and B of this Request for Judicial Notice.

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Dated: November 4, 2022

JONES MAYER

By: _____
Krista MacNevin Jee
Attorneys for Defendant,
CITY OF FORT BRAGG

EXHIBIT A

RESPONSIBLE PARTY. Any person, trust(ee), entity, or parent or legal guardian of any person(s) under 18 years of age, whose acts or omissions have caused, permitted, or contributed to a nuisance and shall include any Owner(s) or occupant(s) of real property on which a nuisance exists

RESPONSIBLE PARTY. Any person, trust(ee), entity, or parent or legal guardian of any person(s) under 18 years of age, whose acts or omissions have caused, permitted, or contributed to a nuisance and shall include any Owner(s) or occupant(s) of real property on which a nuisance exists.

(Ord. 840, § 1, passed -- 2003; Am. Ord. 898 § 2 passed 11-14-2011)

6.12.020 PUBLIC NUISANCES INCLUDED.

The provisions of this chapter shall be applicable to any nuisance defined as a nuisance by any City ordinance, resolution, provision of the Municipal Code, or any of the conditions or activities set forth in § 6.12.040 of this chapter.

(Ord. 840, § 1, passed -- 2003; Am. Ord. 898 § 3 passed 11-14-2011)

6.12.030 OWNER'S RESPONSIBILITY.

An Owner remains liable to the City for violations of duties imposed upon him or her by this chapter even though:

A. An obligation is also imposed on another Responsible Party; or

B. The Owner has, by agreement, imposed upon another Responsible Party the duty of complying with this chapter.

(Ord. 840, § 1, passed -- 2003)

6.12.040 NUISANCE CONDITIONS.

It is declared a public nuisance for any Responsible Party owning, leasing, occupying, or having charge of any premises in this City to maintain the premises in the manner that any one (1) or more of the following conditions or activities are found to exist:

A. Land, the topography, geology or configuration of which, whether in natural state or as a result of grading operations, excavation or fill, causes erosion, subsidence, or surface water drainage problems of the magnitude as to be injurious or potentially injurious to the public health, safety, and welfare or to adjacent properties;

B. Buildings which are abandoned, partially destroyed, or permitted to remain unreasonably in a state of partial construction;

C. The failure to close by means acceptable to the City, all doorways, windows, and other openings into abandoned vacant structures;

D. Broken windows constituting hazardous conditions or inviting trespassers and malicious mischief;

E. Overgrown vegetation:

1. Likely to harbor rats, vermin, and other nuisances;

2. Causing detriment to neighboring properties; or

3. Causing fire hazard.

F. Dead, decayed, diseased, or hazardous trees, weeds, and other vegetation located in the curb, gutter, and sidewalk areas:

1. Constituting a danger to public safety and welfare; or

2. Detrimental to nearby property.

G. Attractive nuisance dangerous to children in the form of:

1. Abandoned and broken equipment;

2. Hazardous pools, ponds, and excavations; and

3. Neglected machinery.

H. Broken or discarded furniture and household equipment on the premises for periods in excess of 90 days, visible from the street or nearby property which constitutes visual blight or is detrimental to nearby property or property values;

I. Packing boxes, trash, dirt, and other debris deposited for periods in excess of 90 days either inside or outside buildings, visible from the street or nearby property which constitutes visual blight or is offensive to the senses or is detrimental to nearby property values;

J. The accumulation of dirt, litter, or debris in vestibules, doorways, or the adjoining sidewalks of commercial or industrial buildings;

K. Neglect of premises:

1. To influence zone changes; or

2. To cause detrimental effect upon nearby property or property values.

L. Maintenance of premises in the condition as to be detrimental to the public health, safety, or general welfare;

M. Property maintained in the condition as to create an unsafe condition;

N. Any automobile service station which is closed, vacant, or inoperative for a period exceeding 60 days is declared to be a public nuisance. Inoperative is defined as the failure to sell gas, either retail or wholesale, during the 60-day period;

O. Specialty structures which have been constructed for a highly specific single use only, and which are not enclosed or shielded, and which are unfeasible to convert to other uses, and which are abandoned, partially destroyed or are permitted to remain in a state of partial destruction or disrepair and constitute a hazardous condition including, but not limited to: tanks for gas or liquid, boat housing and storing facilities, boat hoisting and docking facilities, boat mooring pilings, lateral support structures and bulk-heads, utility high-voltage towers and poles, utility high-rise support structures, electronic transmitting antennas and tower, structures which support or house mechanical and utility equipment and are located above the roof lines of existing buildings, high-rise freestanding chimneys and smoke stacks, drive-in movie screens, recreational structures such as tennis courts and cabanas, and all other specialty structures not listed in this subsection but determined to be a specialty structure by the City;

P. Presence of abandoned, dismantled, wrecked, or inoperable motor vehicles, motorcycles, recreational vehicles, trailers, campers, boats, or parts thereof, except:

1. When completely enclosed within a building in a lawful manner where it is not visible from the street or other public or private property; or

2. When stored or parked in a lawful manner on private property in connection with the business of a licensed dismantler, licensed vehicle dealer, a junk dealer, or when the storage or parking is necessary to the operation of a lawfully conducted business or commercial enterprise.

Q. Obstruction or encroachment of any public property, including, but not limited to, any public street, highway, right-of-way, park, or building;

R. A violation of any provision of the Municipal Code;

S. Storage of hazardous materials in the manner as to be injurious or potentially injurious to the public health, safety and welfare or to adjacent properties; and/or

T. Any condition recognized in law or in equity as constituting a public nuisance, including without limitation, any condition described in Cal. Civil Code § 3479.

U. Continual complaints of violations of Local, State or Federal laws that require the Police Department to respond to the property resulting in the issuance of citations or the making of arrests.

V. Commercial buildings, which are closed, vacant, or inoperative for a period exceeding 90 days shall be declared a public nuisance, unless maintained to the following standards:

1. Windows must be kept clean, unobstructed by stored items or temporary coverings, and in a move-in ready condition equivalent to and consistent with occupied buildings in close proximity, except that temporary coverings are allowed during the period of time that an active building permit has been issued and tenant improvements are actually under construction;

2. Local contact information for the property owner or property manager must be posted and clearly displayed on the front door;

3. The interior and exterior of the structure must be maintained clear of trash, debris and stored items, except for those commercial fixtures directly associated with a prior or proposed legal use of the building;

4. The exterior surfaces and paint, millwork and trim shall be kept clean and maintained in good condition equivalent to and consistent with occupied buildings in close proximity, to achieve a uniform appearance with the surrounding area and present a move-in ready condition for future tenants or business operators; and

5. All nuisance conditions listed in this section are applicable to vacant buildings and in cases of immediate danger to health and safety or emergency may be caused to be abated prior to the 90-day period first stated above.

(Ord. 840, § 1, passed -- 2003; Am. Ord. 875, § 43, passed 08-25-2008; Am. Ord. 898 § 4, passed 11-14-2011; Am. Ord. 941 § 2, passed 09-24-2018)

6.12.050 ABATEMENT BY REPAIR, REHABILITATION, DEMOLITION, OR REMOVAL.

All or any part of premises found to constitute a public nuisance shall be abated by rehabilitation, removal, demolition, or repair pursuant to the procedures set forth in this chapter. The procedures set

EXHIBIT B

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EB

SERVICE DATE – AUGUST 18, 2014

SURFACE TRANSPORTATION BOARD

Docket No. FD 35496

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

Digest:[1] This decision finds that the activities on a parcel of land leased by Denver & Rio Grande Railway Historical Foundation in the City of Monte Vista, Colo., do not constitute transportation within the Board's jurisdiction and, as a consequence, that a local ordinance prohibiting storage of railcars on unconnected pieces of track is not preempted with respect to the parcel.

Decided: August 15, 2014

The Denver & Rio Grande Railway Historical Foundation (DRGHF or Petitioner), a Colorado not-for-profit corporation and Class III railroad, doing business as the Denver & Rio Grande Railway, L.L.C. (DRGR), has filed a petition asking the Board to declare whether a local zoning ordinance is preempted under 49 U.S.C. § 10501(b) with respect to a 1.84-acre parcel of land (Parcel) it leases in the City of Monte Vista, Colo. (the City). DRGHF filed the petition in response to the City's action to enforce a provision of the Monte Vista municipal code against Mr. Donald Shank, President and Executive Director of DRGHF. Specifically, the City charged Mr. Shank 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). That section provides that "[r]ailcars may not be stored in any residential, industrial or commercial zone of the City when not connected to a rail line."[2]

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[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

[2] The Municipal Court of the City of Monte Vista, in a decision issued April 1, 2011, in Case No. 2010-0936, ruled that Mr. Shank had violated § 12-17-110(3) with respect to a number of rail cars stored on the Parcel. See DRGHF Resp. to SLRG Reply, Ex. E. Mr. Shank appealed the ruling to the District Court of Rio Grande County, and that court is holding the proceeding in abeyance while Mr. Shank seeks declaratory order relief with the Board. See Joint Reply Statement of the City and SLRG at 6. In DRGHF's petition for declaratory relief at 3-4, Mr. Shank framed the matter as follows:

> "1. Is the land that is within the City Limits of Monte Vista, Colorado, currently served by and adjacent to a common carrier railroad, that had been the outer portions of the railroad's 400' wide right-of-way for 124 years, not platted nor reflecting any lot numbers, that is currently leased to a federally recognized railroad and being utilized

(continued . . .)

Reply statements were filed by the City and San Luis & Rio Grande Railroad (SLRG).[3] SLRG is a Class III short line rail carrier that operates the Alamosa Subdivision, a 149-mile rail line extending east from its connection with DRGHF at Derrick, near South Fork, Colo., via Monte Vista, to its connection with the Union Pacific Railroad Company (UP) near Walsenburg, Colo.[4] DRGHF filed a response to SLRG's reply statement.

The Board thereafter instituted this declaratory order proceeding and stated that "DRGHF should submit evidence documenting with specificity the activities it claims are part of 'transportation' by a 'rail carrier' and should identify the specific 'transportation' of which these activities are allegedly a part."[5] The Board also stated that "wholly intrastate tourist excursion service and facilities used solely in providing such service are not transportation within the Board's jurisdiction."[6] DRGHF filed an opening statement on April 12, 2012; Respondents filed a joint reply statement on July 11, 2012; and DRGHF filed a verified statement by Mr. Shank in rebuttal on August 13, 2012.[7]

(. . . continued)
for rail-related purposes only and contains only railcars in varying stages of rehabilitation, subject to city zoning ordinances?

2. If the answer to question 1 is negative, is this parcel of land then subject to these municipal ordinances and zoning regimen, or is it: i) federally preempted by 49 U.S.C. Para. 10501(b); and/or ii) invalidated because these municipal ordinances and zoning regimen conflict with the Commerce Clause of the United States Constitution?"

[3] We refer to the City and SLRG collectively as "Respondents."

[4] See San Luis & Rio Grande R.R.—Acquis. & Operation Exemption—Union Pac. R.R., FD 34350 (STB served July 18, 2003). SLRG is a wholly owned subsidiary of Permian Basin Railways, Inc. (Permian Basin), which in turn is a subsidiary of holding company Iowa Pacific Holdings, LLC. See Permian Basin Rys.—Acquis. & Control Exemption—San Luis & Rio Grande R.R., FD 34799 (STB served Jan. 12, 2006).

[5] Denver & Rio Grande Ry. Historical Found.—Pet. for Declaratory Order, FD 35496, slip op. at 4 (STB served Feb. 23, 2012). The Board also, in the interest of a more complete record, denied a motion by SLRG to strike DRGHF's October 11, 2011 response to SLRG's reply statement.

[6] Id. (citing Fun Trains, Inc.—Operation Exemption—Lines of CSX Transp., Inc. & Fla. Dep't of Transp. (Fun Trains), FD 33472 (STB served Mar. 5, 1998)).

[7] In his verified statement at 11-12, Mr. Shank refers to a rebuttal statement in which DRGHF would address specific assertions made in Respondents' Reply Statement. However, no rebuttal statement was either attached or filed.

We now conclude that: (1) DRGHF's use of the Parcel is not part of transportation subject to the Board's jurisdiction; and (2) DRGHF does not appear to be in a position to institute such transportation in the reasonably foreseeable future. As a result, the City's zoning ordinances are not preempted with respect to the Parcel.

PRELIMINARY MATTERS

Respondents filed a letter from the Federal Railroad Administration (FRA) that refers to DRGHF as a "non-insular tourist railroad subject to FRA's safety jurisdiction." According to Respondents, FRA's description of DRGHF in the letter constitutes "substantial evidence that DRGR is not acting as a common carrier railroad."[8] DRGHF filed a reply requesting that the Board accept the FRA letter but disputing Respondents' interpretation of the letter. In DRGHF's view, the FRA letter provides evidence that DRGHF "is, at a minimum, 'subject to the FRA's safety jurisdiction.'"[9] This, DRGHF asserts, means that DRGHF is "able, and capable of providing rail service . . . holding out as providing said service to the public, [and] actually engaged in providing transportation and other railroad services to the public."[10] In the interest of a more complete record, we will accept the FRA letter, Respondents' accompanying letter, and DRGHF's reply.

DRGHF also moved to strike photographs appended to both the Respondents' reply statement and that reply's verified statement of Mr. Mathew Abbey, SLRG's General Manager. DRGHF contends that Respondents and Mr. Abbey failed to lay a foundation for the photographs—when, where, and by whom they were taken, what they depict, and how they relate to the proceeding—and that, as a result, DRGHF "cannot properly address and cross examine the photographs."[11] Respondents filed a reply opposing the motion to strike and responding to DRGHF's assertions concerning the FRA letter.

DRGHF's motion to strike will be denied. The Board's rules of practice are more informal than the Federal Rules of Evidence; they permit the Board to accept any evidence that is reliable and probative (49 C.F.R. § 1114.1) and are to be construed liberally (49 C.F.R. § 1100.3). The photographs immediately preceding the certificate of service in Respondents' reply statement are described as "[s]elected pictures of DRGHF's track and right of way,"[12] and are appended to a statement verified by Mr. Abbey. The photographs appended to Respondents' reply statement as Exhibit F are described as representative photos of DRGHF rolling stock

[8] Respondents' FRA letter at 1 (filed Aug. 2, 2012).

[9] DRGHF Reply at 2 (filed Sept. 4, 2012).

[10] Id. at 3.

[11] DRGHF Mot. to Strike Photographs at 1 (filed Sept. 4, 2012).

[12] Respondents' Reply Statement at 5 n.7.

stored on the Parcel.[13] Respondents' reply statement, which includes Mr. Abbey's verified statement, was filed by an attorney-practitioner and, under 49 C.F.R. § 1104.4, does not require verification. Moreover, DRGHF does not dispute that the challenged photographs accurately depict DRGHF's rail line or equipment.

BACKGROUND

In 2000, DRGHF acquired a 21.6-mile rail line (the Creede Branch or the Line) between milepost 299.3 near Derrick (at South Fork, Colo.), and the end of the line near milepost 320.9 in Creede, Colo., from UP pursuant to an offer of financial assistance (OFA) under 49 U.S.C. § 10904.[14] At South Fork, the Creede Branch connects to SLRG's Alamosa Subdivision. According to DRGHF, the switch connecting the Creede Branch to SLRG's Alamosa Subdivision at South Fork was locked in 2008 at the order of FRA.

The 1.84-acre Parcel at issue in this case is located not on DRGHF's Creede Branch, but approximately 30 miles to the east in Monte Vista, adjacent to SLRG's Alamosa Subdivision. In 2005, SLRG sold the Parcel to DRGHF's noncarrier affiliate, Rio Grande Southern Railroad Company, LLC, which then leased it to DRGHF. A spur, known as Track 15, off of SLRG's line crosses the Parcel. SLRG asserts that when it sold the Parcel in 2005, SLRG retained ownership of the portion of the spur on the Parcel and an easement underlying it.[15] According to DRGHF, SLRG removed the switch connecting the spur to the Alamosa Subdivision in 2008 when DRGHF declined to pay switch fees.

The Creede Branch was built to serve the mining industry in and around Creede in the latter half of the 1800s. However, as mining activity in the area declined, so did freight rail operations over the Creede Branch. Freight rail service into Creede ceased in 1969 and on the

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[13] Id. at 11-12 & n.15.

[14] See Union Pac. R.R.—Aban. Exemption—in Rio Grande & Mineral Cntys., Colo., AB 33 (Sub-No. 132X) (STB served May 11, 1999). In 2008, the Board granted the City of Creede's application for adverse abandonment of a 1-mile portion of the Creede Branch, from near milepost 320.9 to near milepost 319.9, within the City of Creede. See Denver & Rio Grande Ry. Historical Found.—Adverse Aban.—in Mineral Cnty., Colo. (DRGHF Aban.), AB 1014 (STB served May 23, 2008).

[15] Mr. Shank in his individual capacity owns an adjacent parcel on which, according to Respondents, there is a commercial/industrial building that serves as Mr. Shank's residence and on which four rail cars are being stored. See Respondents' Reply Statement at 4, 6, & Ex. C (map). The use of that property is not at issue in this case. According to DRGHF, Track 15, the spur that runs from the SLRG line onto the Parcel, extends further onto Mr. Shank's individually owned property as well, and he owns that portion of it and leases it to DRGHF. See DRGHF Resp. to SLRG Reply at 5-6; DRGHF Opening Statement, map attached to Ex. 2.

remainder of the Creede Branch by the mid-1980s.[16] DRGHF states that, upon acquiring the Line in 2000, it "immediately began rehabilitation of the track and roadbed that had been dormant and maintenance deferred since 1985," and that, to date, "more than two thousand ties, thousands of spikes and track bolts and dozens of rails have been replaced."[17] In 2009, DRGHF began operating a tourist-based passenger excursion service on the Creede Branch, using a self-propelled rail-bus called the "Silver Streak," which DRGHF claims has carried more than 4,500 passengers as well as "less-than-carload . . . intra-line freight for three local shippers."[18] DRGHF asserts that it "continues to upgrade the quality and utility of the Line in preparation for requested freight movement" on the Creede Branch, and that the potential for movements of ore over the Creede Branch "is looking better and better" as the price of silver rises.[19]

As for the Parcel in Monte Vista, DRGHF states that it 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 [DRGHF's] rail line as well as for transportation related purposes by other federally authorized railroads."[20] Further, DRGHF states that "several rail cars have been rebuilt on this property and have been utilized in general commerce on both SLRG and DRGHF/DRGR," and that "[s]everal more are currently under rehabilitation for use on DRGHF/DRGR."[21] DRGHF asserts that "[s]ome cars reside on Track 15, some on panel track built to accommodate railcars and some temporarily on blocks awaiting trucks and rehabilitation."[22] DRGHF asserts that it conducts these activities on the Parcel because there is no space for them at any point on the Creede Branch. When acquired, according to DRGHF, the Creede Branch "came without any buildings, or maintenance facilities of any kind, and a limited number of side tracks and storage locations."[23]

DRGHF claims that it modified a former UP Railway Post Office car on the Parcel and leased it to SLRG for use as a concession car on SLRG's passenger excursion train during 2006 through the end of the 2007 summer season.[24] Also, DRGHF claims that it leased a locomotive to Permian Basin for use by SLRG in 2006-2007.[25] These leased pieces of equipment, DRGHF

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[16] See DRGHF Aban., slip op. at 1.

[17] DRGHF Pet. for Declaratory Order at 1-2.

[18] DRGHF Resp. to SLRG Reply at 4.

[19] DRGHF Pet. for Declaratory Order at 2.

[20] DRGHF Opening Statement at 4.

[21] DRGHF Pet. for Declaratory Order at 3.

[22] Id.

[23] DRGHF Opening Statement at 2.

[24] DRGHF Rebuttal Statement at 10.

[25] Id.

states, were interchanged to and from DRGHF and SLRG locations without a formal interchange agreement. The Post Office car and two other railcars are locked in place on the portion of the spur that crosses the Parcel, and a steam locomotive under restoration, a boxcar, a caboose, and other equipment are locked in place on the portion of the spur owned by Mr. Shank on his individually owned property.[26]

The City and SLRG contend that DRGHF is not a rail common carrier. They claim that DRGHF has handled only passengers riding in a maintenance-of-way vehicle modified for excursion passenger service on the Creede Branch in summer months and freight consisting of rafts traveling with passengers rafting on the Upper Rio Grande River.[27] Respondents also claim that DRGHF's tariff and marketing literature relate only to the solicitation of passenger excursion traffic, and that these documents, along with DRGHF's Articles of Incorporation (which state that its corporate purpose "shall be to function as a restoration facility and museum of vintage and historic railroad equipment"), indicate "that DRGHF's business purpose is to operate a museum of historic railroad equipment."[28] Further, Respondents claim that DRGHF is not recognized as a rail common carrier by FRA or as a rail common carrier and "covered entity" under the Railroad Retirement Act, 45 U.S.C. § 231 et seq., and the Railroad Unemployment Insurance Act, 45 U.S.C. § 351 et seq.[29]

Respondents contend that DRGHF does not have, and has never sought, operating rights over the 30 miles of SLRG track between South Fork and the Parcel in Monte Vista.[30] They also assert that DRGHF: (1) has no interchange or haulage agreements with SLRG, UP, or other railroads;[31] (2) has never received railcars from UP or any other rail carrier for use in interline or interstate service;[32] (3) is incapable of handling the type of freight or rolling stock typically handled by short line railroads in interstate commerce;[33] (4) does not conduct itself as a common carrier on the Creede Branch;[34] and (5) does not hold out to provide common carrier railroad service of any type that is part of the national railroad network.[35]

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[26] DRGHF Resp. to SLRG Reply at 6-7.

[27] Respondents' Reply Statement at 14. Respondents assert that DRGHF's passenger and raft service is sold as a package so there are no freight rates for the transport of rafts.

[28] Id.

[29] Id. at 16-17.

[30] Id. at 12.

[31] Id. at 14.

[32] Id. at 21.

[33] Respondents' Reply Statement at 18.

[34] Id. at 13.

[35] See Respondents' Pet. for Leave to Reply at 7 (filed Sept 7, 2012).

Moreover, Respondents contend that DRGHF's tracks, facilities, and equipment are not suitable for handling freight or passenger traffic in either interline rail service or interstate commerce.[36] Referring to the roster of equipment DRGHF furnished in discovery, Respondents assert that: (1) only one of the four listed locomotives, a road switcher, is shown as operable; (2) only two of eight railcars identified on the roster as "passenger and non-revenue," including two cabooses, are less than 80 years old; and (3) none of the eight assorted freight cars depicted on the roster appear to be the types employed today in revenue freight service. According to Respondents, "the majority of [DRGHF's] equipment is unfit for use, is far out of inspection date, and is in many cases disassembled. That equipment which has wheels is unlikely to be moved on its own wheels safely or for any distance."[37] Respondents assert that the Line's rail, generally consisting of 65 lb. rail with 90 lb. sections, is unsuitable for handling freight or passenger railcars in interline service, and they describe the track structures and right-of-way as "weedy, eroded, in need of surfacing, major tie replacement, and heavy bridge repair."[38] Respondents claim that "approximately $5 million would have to be spent on track, bridges, and right of way maintenance to put the [Creede Branch] in a minimally acceptable class I condition for handling interstate freight,"[39] and that a review of DRGHF's financial statements and tax returns shows that its revenues would barely cover typically accepted maintenance costs for FRA class I track and are insufficient to permit the level of rehabilitation that would be required for interline service.

According to Respondents, DRGHF uses the Parcel in Monte Vista (as well as adjoining land owned by Mr. Shank in his individual capacity) to store numerous pieces of mostly vintage railroad or railroad-related equipment, some on short, disconnected track segments, in various states of disrepair and possibly to do some repair and maintenance work.[40]

Finally, citing Joint Petition for Declaratory Order—Boston & Maine Corp. & Town of Ayer (Ayer), 5 S.T.B. 500 (2001), reconsideration denied (STB served Oct. 5, 2001) and New York Susquehanna & Western Railway v. Jackson (N.Y. Susquehanna), 500 F.3d 238 (3d Cir. 2007), Respondents argue that, even if DRGHF could be seen as a rail carrier conducting activities related to rail transportation, the City's zoning ordinances would not be preempted under § 10501(b). They assert that under longstanding Board and court precedent, certain types of state and local regulation involving public health and safety are not preempted so long as they

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[36] See Respondents' Reply Statement at 17-18.

[37] Id. at 20.

[38] Id. at 18.

[39] Id.

[40] Id. at 11.

do not restrict rail carriers from conducting their common carrier operations, unreasonably burden interstate commerce, or discriminate against rail carriage.[41]

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. The Board has broad discretion in determining whether to issue a declaratory order. See Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C. 2d 675 (1989). For the reasons discussed below, we find that a controversy exists between these parties and that a declaratory order should be issued. We further find that DRGHF has not shown that its activities on the Parcel in Monte Vista constitute rail transportation under the Board's jurisdiction and, as a consequence, we conclude on the record before us that the City's ordinance prohibiting the storage of rail cars in a residential, industrial, or commercial zone of the City when not connected to a rail line is not preempted with respect to the Parcel.

As noted in the February 23, 2012 decision instituting this declaratory order proceeding, to be within the Board's jurisdiction and thus covered by preemption under § 10501(b),[42] an activity: (1) must be performed by, or under the auspices of, a "rail carrier;" and (2) must constitute "transportation." A "rail carrier" is "a person providing common carrier railroad transportation for compensation," 49 U.S.C. § 10102(5), and "transportation" includes property, facilities, and equipment "related to the movement of passengers or property, or both, by rail . . . and services related to that movement," including the receipt, delivery, storage, transfer, and handling of property, 49 U.S.C. § 10102(9). However, the Board's jurisdiction over transportation by rail carrier (and thus transportation within the reach of § 10501(b) preemption) only extends to transportation between, among other things, "a place in . . . a State and a place in the same or another State as part of the interstate rail network." 49 U.S.C. § 10501(a)(2)(A). This is a fact-specific determination. See All Aboard Fla.–Operations LLC—Constr. & Operation Exemption—in Miami, Fla. & Orlando, Fla. (All Aboard), FD 35680, slip op. at 3 (STB served Dec. 21, 2012).

In interpreting the reach of preemption under § 10501(b), the Board and the courts have found that it categorically prevents states or localities from intruding into matters that are directly regulated by the Board (e.g., rail carrier rates, services, construction, and abandonment). See, e.g., Franks Inv. Co. v. Union Pac. R.R., 593 F.3d 404, 414 (5th Cir. 2010) (en banc); Borough of Riverdale—Pet. for Declaratory Order, FD 35299, slip op. at 2 (STB served Aug. 5, 2010); E. Ala. Ry.—Pet. for Declaratory Order, FD 35583, slip op. at 4 (STB served Mar. 9,

[41] See Monte Vista Resp. and Protest at 15-17; SLRG Reply at 10-11.

[42] The Board's jurisdiction over "transportation by rail carriers" is "exclusive." 49 U.S.C. § 10501(b). Moreover, § 10501(b) expressly provides that "the remedies provided under [49 U.S.C. §§ 10101-11908] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law."

2012). It also prevents states and localities from imposing requirements that, by their nature, could be used to deny a rail carrier's ability to conduct rail operations. See, e.g., Norfolk S. Ry. v. City of Alexandria, 608 F.3d 150, 158 (4th Cir. 2010). Thus, state or local permitting or preclearance requirements, including building permits, zoning ordinances, and environmental and land use permitting requirements, are categorically preempted as to any facilities that are an integral part of rail transportation. See Green Mountain R.R. v. Vermont (Green Mountain), 404 F.3d 638, 643 (2d Cir. 2005).

Other state actions may be preempted as applied—that is, only if they would have the effect of unreasonably burdening, interfering with, or discriminating against rail transportation, which is a fact-specific determination based on the circumstances of each case. See N.Y. Susquehanna, 500 F.3d at 252-54; Ayer, 5 S.T.B. at 510-12; Borough of Riverdale—Pet. for Declaratory Order—N.Y. Susquehanna & W. Ry., FD 33466, slip op. at 2 (STB served Feb. 27, 2001) and 4 S.T.B. 380, 387 (1999). Localities retain their reserved police powers to protect the public health and safety so long as their actions do not unreasonably burden interstate commerce. See Green Mountain, 404 F.3d at 643. For example, electrical, plumbing, and fire codes generally may be applied. Id. State and local action, however, must not have the effect of foreclosing or unduly restricting the rail carrier's ability to conduct its operations or otherwise unreasonably burden interstate commerce. See CSX Transp. Inc.—Pet. for Declaratory Order, FD 34662, slip op. at 5 (STB served May 3, 2005).

Thus, if DRGHF is using the Parcel to support transportation subject to the Board's jurisdiction, a City ordinance prohibiting or unreasonably interfering with that use would be preempted as applied to the Parcel. On the other hand, if DRGHF's use of the Parcel is not in furtherance of transportation over which the Board has jurisdiction, then the City's ordinance would not be preempted with respect to the Parcel. See Ayer, 5 S.T.B.at 507 ("zoning ordinances and local land use permit requirements are preempted where the facilities are an integral part of the railroad's interstate operations").

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.[43]

DRGHF contends that the Parcel is used to support its rail operations on the Creede Branch. Even assuming this to be the case, however, the evidence of record shows that since acquiring the Line in 2000, DRGHF has used the Creede Branch only to provide seasonal, intrastate passenger excursion service. The record before us does not demonstrate that DRGHF has provided any interstate passenger service on the Creede Branch, or any passenger service

[43] Because the record fails to show that the Parcel is being used in connection with jurisdictional common carrier transportation, we need not decide whether, if it were being used for such a purpose, the ordinance would unduly interfere with that use.

that connects, or even could connect, to interstate passenger carriers. DRGHF does not contend, nor does it present evidence to show, that it has entered into interchange agreements with any interstate carrier, offered through ticketing for passengers on any other carrier, or plans to seek agreements with any other carrier that would make its passenger movements on the Line part of the interstate rail network. Under established Board precedent, such wholly intrastate passenger excursion operations do not constitute rail operations as "part of the interstate rail network," and as a result the operations are outside the Board's jurisdiction. Fun Trains, slip op. at 2-3; see also All Aboard, slip op. at 3-4 (wholly intrastate passenger rail operations with no connection to, and no through ticketing planned with, Amtrak or any other interstate carrier are not within the Board's jurisdiction, even though the operations would be physically conducted on part of the interstate rail network).

DRGHF claims that in recent years it has hauled "less-than-carload . . . intra-line freight for three local shippers" on the Creede Branch.[44] According to the evidence of record, however, the only "freight" movements on the Creede Branch have involved the transportation of river rafts and other gear for passengers as part of DRGHF's excursion train operations. However, these river rafts and other gear apparently move with the passengers as a package; there are no separate freight rates for them or for any other items. Moreover, by DRGHF's own admission, these movements are entirely "intra-line" as they are conducted only on the Creede Branch, which is entirely intrastate. And notwithstanding its statement concerning the possibility of ore movements resulting from higher silver prices,[45] DRGHF has provided no evidence to show that it conducts, or has specific plans to conduct, any freight movements as part of the interstate rail network. Moreover, DRGHF has not provided evidence to show that it has, or plans to seek, any interchange, haulage, or other commercial arrangements or agreements with any other rail carrier.[46]

The very limited, wholly intrastate excursion passenger and related raft operations that DRGHF has conducted over the Line to date are not transportation that is conducted under the Board's jurisdiction "as part of the interstate rail network." See Napa Valley Wine Train, Inc.—Pet. for Declaratory Order (Wine Train), 7 I.C.C. 2d 954, 965-68 (1991). Thus, the activities taking place on the Parcel provide no basis for finding the City's ordinance is preempted under § 10501(b).

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[44] DRGHF Pet. for Declaratory Order at 2.

[45] DRGHF Resp. to SLRG Reply at 4.

[46] DRGHF claims that it leased both a concession car, which had been rehabilitated on the Parcel, and a locomotive to SLRG in 2006-2007, and that these actions constitute participation in interstate rail service, but that is not the case. DRGHF's activities merely establish that DRGHF is or has been a lessor of equipment, which does not constitute for-hire rail service. See Gen. Am. Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422, 428-29 (1940) (tank car lessor is not a carrier under the Interstate Commerce Act).

Finally, the FRA letter referring to DRGHF as a "non-insular tourist railroad subject to the FRA's safety jurisdiction" does not mean that DRGHF's activities on the Parcel are in support of transportation subject to the Board's jurisdiction, as the jurisdictions of the Board and FRA are not coextensive. See Wine Train, 7 I.C.C. 2d at 966 n.33 (noting that FRA's safety jurisdiction "extends to all railroads—even those not engaged in interstate commerce").

In sum, the evidence of record fails to show that DRGHF's present or foreseeable future use of the Parcel is in support of activities that constitute transportation conducted under the Board's jurisdiction—that is, transportation "between a place in . . . a State and a place in the same or another State as part of the interstate rail network." 49 U.S.C. § 10501(a)(2)(B). DRGHF has not demonstrated that it provides interstate passenger service or that it has or plans to seek agreements with any other carriers that would make its passenger movements part of the interstate rail network. The wholly intrastate operations DRGHF runs on the Creede Branch are outside the Board's jurisdiction. Because DRGHF's use of the Parcel to store and rehabilitate rail cars is unrelated to rail common carrier service under the Board's jurisdiction, we conclude that enforcement of Municipal Code § 12-17-110(3) is not preempted under § 10501(b).

Because we find that Municipal Code § 12-17-110(3) is not preempted due to the absence of jurisdictional transportation-related use of the Parcel now or in the foreseeable future, we need not address Respondents' alternative argument that the ordinance would not be preempted even if DRGHF were undertaking jurisdictional activities there.[47]

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

It is ordered:

1. Respondents' letter of August 2, 2012, and DRGHF's reply of September 4, 2012, are accepted into the record.

2. DRGHF's September 4, 2012 request for an extension to file a motion to strike and Respondents' petition for leave to file a reply are granted, and their motion to strike and reply are accepted into the record.

3. DRGHF's motion to strike is denied.

4. The petition for declaratory order is granted as discussed above.

5. This decision is effective on the date of service.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.

[47] See supra n.41 and accompanying text.