

BEFORE THE  
SURFACE TRANSPORTATION BOARD

Docket No. AB-33 (Sub-No. 132X)

Union Pacific Railroad Company  
--Abandonment Exemption--  
In Rio Grande and Mineral Counties, CO

MOTION AND REPLY OF CONCERNED CITIZENS  
OF CREEDE AND MINERAL COUNTY, COLORADO



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The Concerned Citizens of Creede and Mineral County, Colorado submit this motion to file a reply and limited reply to the replies of the Denver and Rio Grande Railway Historical Foundation ("Foundation") and Union Pacific Railroad Company ("UP").

MOTION FOR LEAVE TO FILE REPLY

Under the Board's rules of practice, replies to replies are not automatically allowed. That said, the Board liberally construes its rules and often accepts replies to replies for good cause and for a more complete record for decision. The Concerned Citizens believe good cause exists in this case for a limited reply to the replies of the Foundation and UP and respectfully ask that their reply be accepted.

The Foundation and UP had ample opportunity to review the positions and evidence of the Concerned Citizens before submitting their replies. Indeed, the Concerned Citizens consented to a generous extension of time for them to file those replies. The Concerned Citizens, however, are seeing for the first time in those replies the arguments of the Foundation and UP against their Petition to Reopen. Significantly, the Foundation and UP do not address the merits

of the contentions and evidence submitted by the Concerned Citizens. Instead, they raise various legal arguments and misapprehend the position of the Concerned Citizens in an effort to persuade the Board not to reach those merits. Fairness requires that Concerned Citizens be permitted to respond to these arguments.

#### REPLY

Either the Foundation or UP or both variously argue that the Concerned Citizens' Petition should be denied, because it comes too late; the evidence and argument contained therein allegedly are not really new; the Concerned Citizens' Petition is defective, because it did not identify the Board decision sought to be reopened; the Concerned Citizens lack standing; and the doctrines of laches and law of the case bar the Petition. We briefly address each of these arguments.

The Foundation's argument that the Concerned Citizens' "Petition does not identify the Board decision that is sought to be reopened" (Reply at 1) is untrue. The Concerned Citizens' Petition is clearly seeking to reopen the Board's decision served June 22, 2004. See, e.g., Petition at 34 ("The Board should reopen its June 22 Decision . . .").

The Foundation's contention (Reply at 8) that the Concerned Citizens lack standing is frivolous. The Board and its predecessor agency, the ICC, have long held that concerned and affected citizens have standing to file a petition to reopen.

The Foundation's arguments (Reply at 6-7) that the Petition is barred by "the law of the case" is contrary to the scope of the Board's authority to modify its decisions and the Board regulations allowing petitions to reopen.

The argument that the Concerned Citizens' Petition should not be considered, because it has been more than five years since the Foundation's offer of financial assistance ("OFA") was

originally approved and there must be administrative finality are also without merit in the unique circumstances of this case. These OFA proceedings have unfolded in a highly irregular manner, with a continuing disregard for the requirements of Section 10904 and Board precedent. In addition, it remains undisputed that, even though shipper interest is a “critical factor” in the Board’s analysis of an offer under 49 U.S.C. § 10904, the Foundation made no attempt to demonstrate any shipper interest in restoration of freight service on the Creede Branch until the Foundation’s January 20, 2004 Reply, nearly five years after the Board’s Director of the Office of Proceedings originally approved the Foundation’s offer. The Board addressed this “critical factor” for the first time ever in its June 22, 2004 decision, the very decision the Concerned Citizens are seeking to reopen. The Foundation did not assert that it needed the Creede Depot until even later, in its September 13, 2004 Reply Statement in Finance Docket No. 34376. Thus, there was no opportunity to comment on these important matters until recently.<sup>1</sup>

The Foundation’s “laches” argument is also unavailing. Reply at 1-5. Laches is an equitable doctrine. The Foundation cannot benefit from this doctrine, even if applicable, because it has unclean hands. The Foundation has submitted to the Board false, misleading and incomplete information supporting its OFA. And, as explained above, the Foundation only recently came forth with alleged shipper support for its OFA. The Foundation is correct that the integrity of the OFA process is important. As the Board stated in Finance Docket No. AB-6 (Sub-No. 380X), The Burlington Northern and Santa Fe Ry. Co. -- Abandonment Exemption, 1998 STB LEXIS 200, \*14, “it would be an abuse of our process to permit the section 10904 process to go forward” when there is little likelihood that continued freight service will result

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<sup>1</sup> It is also not reasonable to expect that an ad hoc group of citizens can organize themselves and petition the government as quickly as an existing corporation or foundation can respond to events.

from the offer. It remains undisputed that that is the case here. Thus, the integrity issue points to granting, not rejecting, the Petition to Reopen. Even though the Foundation's OFA was accepted, it is not too late for the Board to take corrective action and preserve the integrity of the OFA process by granting the Concerned Citizens' Petition.

Regarding the integrity of the Board's OFA procedures, we note that no attempt has been made to rebut the merits of the contentions and evidence set forth in the Petition of the Concerned Citizens and accompanying exhibits that:

- (1) there is no demonstrated shipper need to reestablish freight service on the long dormant Creede Branch;
- (2) the cost of rehabilitating the Creede Branch is substantial;
- (3) the Foundation does not have and has never had the financial wherewithal to rehabilitate and provide freight service on the Creede Branch, even if there were a demonstrated shipper need; and
- (4) the Foundation's purpose in acquiring the Creede Branch was to try and establish an historic tourist railroad, not to restore freight service.

Contrary to the Foundation's argument, the concerns raised by Concerned Citizens cannot be dismissed as "post-acquisition shortcomings." Reply at 15. The statute and Board precedent require that a person making an offer of financial assistance show the need for continued rail freight service and that it has the financial ability to rehabilitate and operate the line at the time it makes the OFA, not at some later date. The lack of any shipper support is not some "post-acquisition event." It was, and is, a fatal flaw in the Foundation's OFA. The Foundation's Reply effectively concedes that it did not make such statutorily required showings and cannot still.

Arguments that none of the evidence submitted by the Concerned Citizens is new are also without merit. First, as explained, the Foundation itself did not come forward with any alleged

support for a need for the re-establishment of freight service until its January 20, 2004 filing with the Board. See Concerned Citizens' Pet. at 9-11. The Foundation attempted to bolster its claimed shipper interest at an even later date, in its Reply Statement (p. 6) filed September 13, 2004 in Docket No. 34376. Thus, the Concerned Citizens' evidence rebutting the alleged shipper support is new and relevant. Second, the Foundation did not make any representations about its claimed need for and rights to the Creede Depot until September 13, 2004, also in Finance Docket No. 34376. Again, the evidence and information submitted by the Concerned Citizens showing that the Foundation has no right to use the Depot is responsive to new assertions by the Foundation regarding its intended use of the Depot.

It is also argued that the photos submitted by the Concerned Citizens, taken in October of 2004, are not new evidence, because they merely show that the Creede Branch is in dilapidated condition and has been for several decades. These current photos are directly relevant to these proceedings for several reasons. They show that the Foundation has misinformed the Board as to the level of rehabilitation necessary to restore freight service over the Branch. As explained in the Concerned Citizens' Petition, under Board precedent, the amount and cost of rehabilitation needed for an out-of-service line go to whether the offeror can demonstrate a sufficient need for freight service.<sup>2</sup> These photos also show that the Foundation has misrepresented to the Board the progress it alleges to have made since approval of its OFA.

The tax returns of the Foundation clearly were not available at the time its OFA was originally approved in 1999 or at the time of earlier petitions to reopen. These returns, spanning the period 1999-2002, show that the Foundation has consistently misinformed the Board as to its

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<sup>2</sup> See Petition at 13-15 and, e.g., The Burlington Northern and Santa Fe Ry. Co. -- Abandonment Exemption, 1998 STB LEXIS 200, \*20-22; Conrail Abandonment of a Portion of the West 30th St. Secondary Track in New York, NY, 1987 ICC LEXIS 477, \*20.

financial ability to rehabilitate and operate the Creede Branch. They also show that the Board's concerns about the finances of the Foundation's founder and executive director, Mr. Shank, were well founded, and deserved closer scrutiny.<sup>3</sup>

In addition, the website for the Foundation was not posted until after approval of the OFA. See Concerned Citizens Exh. No. 14. This website, as updated in 2003, confirms again that the purpose of the Foundation was always to establish a tourist railroad, substantial rehabilitation is necessary, and that the Foundation does not have and has never had the financial resources necessary to rehabilitate and operate the Creede Branch.

The UP and Foundation argue that Concerned Citizens are seeking a forced abandonment of the Creede Branch. UP at 6-7; Foundation at 16. This is not so. All the Concerned Citizens are asking is for the Board to reopen these proceedings, follow the requirements of Section 10904 and its own precedents, and rescind the Foundation's OFA. That does not force the abandonment of the Branch (we are speaking in a technical, legal sense, of course, since the line was de facto abandoned several decades ago by predecessors to UP). Presumably, UP could withdraw its abandonment notice. But, even if it did not, and rescission of the OFA resulted in

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<sup>3</sup> UP argues that, if OFAs can be reopened, the Board should require "that any entity filing an OFA submit audited financial statements, firm financial commitments, and detailed operating and marketing plans." Reply at 9-10. The Board has, in fact, required that entities making OFAs for out-of-service lines make these kinds of showings. See, e.g., Roaring Fork Railroad Holding Authority -- Abandonment Exemption, 1999 STB LEXIS 299, \*8-11 (requiring firm and adequate shipper commitments); The Burlington Northern and Santa Fe Ry. Co. -- Abandonment Exemption, 1998 STB LEXIS 200, \*9-10 and 16-22 (Board should "carefully review" whether there are firm shipper commitments); Conrail Abandonment, 1987 ICC LEXIS 477, \*21-24 (inquiring whether offeror had committed financial resources, insurance, assets, etc.). The instant case stands out, because, even though the Branch has been out of service for decades, and the entity making the OFA had no experience operating railroads, the Board did not "carefully review" whether the Foundation had firm financing commitments adequate to rehabilitate and operate the line or for shippers or a realistic operating plan. If the Board had done so, in all likelihood the Creede Branch would have been approved for abandonment in 1999, as UP wanted.

the abandonment of the Branch, that is the very outcome the UP itself was seeking when it set these events in motion with its notice of exemption to abandon the Branch. The Concerned Citizens do not understand how the UP can complain about an outcome it sought.

The Concerned Citizens also do not understand how reopening this proceeding exposes UP to new risks. Reply at 9. The Creede Branch already has deteriorated to the point of scrap; it can hardly deteriorate much more. Moreover, there have been no rail new operations over the Branch that could give rise to new liabilities for UP.

The Foundation and UP paint several hypothetical, allegedly adverse outcomes if the Board were to rescind the Foundation's OFA at this time. None of their postulations are likely outcomes from granting the relief sought by the Concerned Citizens. None excuse abuse of the OFA process. Contrary to the contentions of the Foundation (Reply at 15), rescission of its OFA would not compel the UP to re-sell the Creede Branch to a prior unsuccessful offeror, the Rio Grande & San Juan Railroad Company. Even if still in existence, and interested, that offeror could not show a need for continued rail service on the Branch any more than the Foundation could. Moreover, granting the Concerned Citizens' Petition would not necessarily result in another round of offers of financial assistance. Given the record, as supplemented by Concerned Citizens, that there is no need to re-establish freight service, the Board has the authority to exempt UP from the OFA procedures and allow its proposed abandonment of the Creede Branch to take effect immediately. See, e.g., Roaring Fork Railroad Holding Authority -- Abandonment Exemption, STB Docket No. AB-547X, 1999 STB LEXIS 299, \*11-12.

The Foundation's further contention (Reply at 15-16) that rescission of its OFA will not necessarily achieve the formal abandonment sought by Concerned Citizens, because the UP or some other entity may come forward and re-establish freight operations, is silly. If there were a

basis to re-establish freight operations on the long dormant Branch, the UP, or perhaps the San Luis & Rio Grande Railroad, Inc., which purchased the adjacent line segment from UP,<sup>4</sup> would have done so some time ago, and the UP would not have sought abandonment authorization.

Rescission of the OFA, and abandonment of the Branch, would also not necessarily require that the sale of UP's interest in the Branch to the Foundation be undone. The UP and Foundation could renegotiate the purchase based on the new circumstances. The Foundation could continue to try and establish a historic tourist railroad. However, the Foundation could no longer masquerade as a carrier subject to STB jurisdiction and the land that the UP did not own in fee, including a significant piece of the Creede downtown, would revert to the landowners.

These outcomes do not result in any unfair burden on the Foundation. As the evidence submitted by the Concerned Citizens shows, neither Mr. Shank nor the Foundation have put much in the way of hard dollars into the Creede Branch. Almost all of the actual monies raised by the Foundation have apparently been used to pay the UP. The Foundation may either be able to keep the real estate it acquired from UP in fee simple or obtain a refund from UP. The equipment and labor appears to have largely been donated to the Foundation. Even then, according to the Foundation's web site, much of the donated equipment is only on loan to the Foundation. In any event, unlike the bona fide buyer in Consolidated Rail Corp. -- Abandonment Exemption, 1998 STB LEXIS 777, the Foundation is not some innocent purchaser of the line. The Foundation's problems are of its own making, because it chose to gamble it could get away with abuse of the OFA procedure and to submit false, misleading, and incomplete information to the Board.

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<sup>4</sup> See Petition to Reopen at 9, n.10.

The Foundation's apparent legal argument that, because of an amendment to Section 10904 made by the ICC Termination Act, the Board's authority under Section 10904 has been narrowed simply to assure "whether the OFA statute has been properly invoked. . . ." is clear error. Reply at 11. The Board precedent cited by the Concerned Citizens, which the Foundation does not discuss, holds that, under Section 10904, as amended, OFAs must still demonstrate financial responsibility and a need for restoration of freight service. See, e.g., The Burlington Northern and Santa Fe Ry. Co. -- Abandonment Exemption, 1998 STB LEXIS 200, \*10-15.

The various Board precedents cited in the Foundation's reply are inapposite. Only two even involved OFAs. In one, the false information had been submitted by the carrier which had sought to abandon the line.<sup>5</sup> The Board found that the innocent purchaser of the line should not be penalized. Here, as explained, it was the person making the OFA, the Foundation, which presented false and misleading information to the Board. In the other case, the issue sought to be revisited was the valuation of the line. Again, there was no allegation that the OFA was not legitimate or did not meet the requirements of Section 10904.<sup>6</sup>

It is ironic that the Foundation cites Napa Valley Wine Train, Inc. -- Petition for Declaratory Order, 188 ICC LEXIS 216. Reply at 9. In that decision, the ICC initially found that the Wine Train was a jurisdictional carrier. Analogous to the actions of the Concerned Citizens here, a group of interested persons, which had not previously participated in the proceedings, subsequently came forward with evidence showing that the Wine Train was not

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<sup>5</sup> Consolidated Rail Corp. -- Abandonment Exemption, 1998 STB LEXIS 777.

<sup>6</sup> Railroad Ventures, Inc. -- Abandonment Exemption, 2004 STB LEXIS 788. This decision also does not support the Foundation, because the Board reached the merits of the petition. Id. at \*12-13.

really engaged in interstate transportation. Based on this new evidence, new in the sense it had not been previously submitted, the ICC reversed itself, when it realized the Wine Train had mischaracterized the true nature of its operations. Napa Valley Wine Train, Inc. -- Petition for Declaratory Order, 1991 ICC LEXIS 195.<sup>7</sup>

Finally, the suggestion that the Concerned Citizens have an adequate remedy by filing a petition for adverse abandonment does not make sense. On the one hand, the Concerned Citizens are criticized for allegedly running up the legal expenses of the Foundation and prolonging uncertainty over the status of the Branch. But, initiating an entire new proceeding will result in even more legal expense, more use of Board resources, and more uncertainty. Moreover, much of the same record that would be put forward in such a proceeding has already been put forward in the Concerned Citizens' Petition to Reopen. And, no explanation is given of how a new proceeding will cure the fact that the Foundation's OFA did not meet the criteria of Section 10904.

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<sup>7</sup> Contrary to UP's argument (Reply at 8), Napa Valley is still good law for the proposition that the Board does not exercise jurisdiction over intrastate tourist railroad operations, which do not actually provide freight service. See, e.g., Fun Trains, Inc. -- Operation Exemptions, 1998 STB LEXIS 75 (citing, 1998 STB LEXIS 75 (citing Napa Valley). Ironically, if the Foundation's OFA is not rescinded, based on the record evidence that the Foundation has no freight customers or viable prospects, there would be no basis for the Board to have jurisdiction over its other operations (if it had any).

For the reasons set forth in the Concerned Citizens' Petition and this Reply, the Board should reopen its June 22 Decision, rescind the Foundation's OFA, and authorize the abandonment of the Creede Branch. Failure to do so, we respectfully submit, would be arbitrary and an abuse of discretion.

Respectfully submitted,



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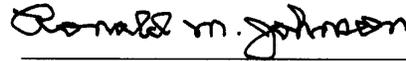
Ronald M. Johnson  
Heidi Gunst  
Akin, Gump, Strauss, Hauer & Feld, LLP  
1333 New Hampshire Avenue, N.W.  
Washington, DC 20036  
202-887-4114

Counsel for Concerned Citizens of  
Creede and Mineral County, Colorado

Dated: January 12, 2005

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing document and related exhibits to be served upon the following parties by first-class mail, prepaid, this 12th day of January, 2005.



Ronald M. Johnson

George M. Allen  
206 Society Drive  
Suite A  
Telluride, CO 81435  
For the City of Creede

Karl Morell  
Ball Janik, LLP  
1455 F Street, N.W.  
Suite 225  
Washington, DC 20005  
For the South Fork-Creede  
Railway Corridor Preservation  
Group, Inc.

John D. Heffner, PLLC  
1920 N Street, N.W.  
Suite 800  
Washington, DC 20036  
For the Rio Grande & San Juan  
Railroad Company

Thomas McFarland  
208 South LaSalle Street  
Suite 1890  
Chicago, IL 60604-1112  
For the Denver & Rio Grande  
Railway Historical Foundation

Martin O'Grady  
Colorado Department of  
Public Health & Environment  
4300 Cherry Drive South  
Denver, CO 80222-1530  
For the State of Colorado

Robert T. Opal  
Union Pacific Railroad Co.  
1400 Douglas Street  
Stop 1580  
Omaha, NE 68179-0001  
For the Union Pacific Railroad  
Company

Donald Shank  
Denver & Rio Grande  
Historical Foundation  
20 North Broadway  
Monte Vista, CO 81144