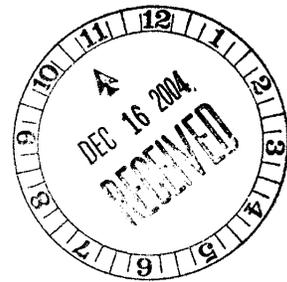


212770  
ORIGINAL

LAW OFFICE  
**THOMAS F. MCFARLAND, P.C.**  
208 SOUTH LASALLE STREET - SUITE 1890  
CHICAGO, ILLINOIS 60604-1112  
TELEPHONE (312) 236-0204  
FAX (312) 201-9695  
*mcfarland@aol.com*

THOMAS F. MCFARLAND

December 15, 2004



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

Re: Docket No. AB-33 (Sub-No. 132X), *Union Pacific Railroad Company --  
Abandonment Exemption -- in Rio Grande and Mineral Counties, CO*

Dear Mr. Williams:

Enclosed please find an original and 10 copies of Reply In Opposition To Petition Of  
"Concerned Citizens" To Reopen Decision Served May 11, 1999, for filing with the Board in the  
above referenced matter.

Very truly yours,

*Tom McFarland*

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

*TMcF:kl:enc:wp8.0\957-A\lstrstb1*

ENTERED  
Office of Proceedings

DEC 16 2004

Part of  
Public Record

BEFORE THE  
SURFACE TRANSPORTATION BOARD



UNION PACIFIC RAILROAD )  
COMPANY --ABANDONMENT ) DOCKET NO. AB-3  
EXEMPTION -- IN RIO GRANDE AND ) (SUB-NO. 132X)  
MINERAL COUNTIES, CO )

**REPLY IN OPPOSITION TO  
PETITION OF "CONCERNED CITIZENS"  
TO REOPEN DECISION SERVED MAY 11, 1999**

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

Replicant

THOMAS F. McFARLAND  
THOMAS F. McFARLAND, P.C.  
208 South LaSalle Street, Suite 1890  
Chicago, IL 60604-1112  
(312) 236-0204

Attorney for Replicant

DATE FILED: December 16, 2004

ENTERED  
Office of Proceedings

DEC 16 2004

Part of  
Public Record

**TABLE OF CONTENTS**

	<b><u>Page No.</u></b>
I. THE PETITION IS BARRED BY LACHES .....	1
II. THE PETITION IS BARRED BY THE LAW OF THE CASE .....	6
III. THE PETITION SHOULD BE REJECTED OR DENIED FOR LACK OF STANDING .....	8
IV. THE PETITION SHOULD BE DENIED BECAUSE THERE HAS BEEN NO SHOWING OF FRAUD, MISTAKE OR MINISTERIAL ERROR .....	10
V. EVEN IF NEW EVIDENCE AND MATERIAL ERROR WERE APPLICABLE STANDARDS OF REVIEW, THE PETITION SHOULD BE DENIED BECAUSE EVIDENCE IN THE PETITION IS NOT NEW AND MATERIAL ERROR WAS NOT SHOWN .....	13
VI. THE FOUNDATION'S AUTHORITY TO OPERATE THE RAIL LINE CANNOT BE LAWFULLY REVOKED BY VIRTUE OF REOPENING THE OFA ACQUISITION PROCEEDING .....	15
CONCLUSION AND REQUESTED RELIEF .....	17
CERTIFICATE OF SERVICE .....	18

**TABLE OF AUTHORITIES**

<b><u>Table of Cases</u></b>	<b><u>Page No.</u></b>
<i>Aban. and Discon. of R. Lines and Transp. under 49 U.S.C. 10903</i> , 1 S.T.B. 894 (1996) .....	12
<i>Buffalo Crushed Stone, Inc. v. STB</i> , 194 F.3d 125 (D.C. Cir. 1999) .....	3
<i>Canadian National Ry. Co. - Trackage Rights Exemption - Bangor and Aroostook R. Co.</i> , 2002 STB LEXIS 375 (F.D. No. 34014, decided June 25, 2002) .....	10,16
<i>Consolidated Rail Corp. - Aband. Exempt. - in Erie County, NY</i> , 1998 STB LEXIS 777 (STB Docket No. AB-167 [Sub-No. 1164X], decided Sept. 28, 1998) .....	3,9
<i>CSX Transp., Inc. -- Aband. -- between Bloomingdale and Montezuma</i> , <i>in Parke County, IN</i> , 2002 STB LEXIS 535 (ICC Docket No. AB-55 [Sub-No. 486], decision served September 13, 2002) .....	11
<i>Farmers Export Co. v. United States</i> , 758 F.2d 733 (D.C. Cir. 1985) .....	14
<i>Friends of Sierra Railroad, Inc. v. ICC</i> , 881 F.2d 663 (9 <sup>th</sup> Cir. 1989) .....	3
<i>Louisville &amp; Jefferson Co. &amp; CSX Const. &amp; Oper. Jeff., KY</i> , 4 I.C.C.2d 749 (1988) .....	5
<i>Midwestern Rail Prop., Inc. - Pur. - Rock Island</i> , 366 I.C.C. 915 (1983) .....	5
<i>Montezuma Grain Co. v. STB</i> , 339 F.3d 535 (7 <sup>th</sup> Cir. 2003) .....	11
<i>Mountain Laurel R. Co. - Acq. &amp; Oper. Exempt. - Consolidated Rail Corp.</i> , 1998 STB LEXIS 131 (F.D. No. 31974, decided May 13, 1998) .....	5
<i>Napa Valley Wine Train, Inc. - Petition for Declaratory Order</i> , 4 I.C.C.2d 720 (1988) .....	9,11,12
<i>Norfolk &amp; W. Ry. Co. and New York C. &amp; St. L. R. Co. Merger</i> , 5 I.C.C.2d 234 (1989) .....	5
<i>Omaha Public Power District v. BN R. Co.</i> , 3 I.C.C.2d 853 (1987) .....	14
<i>Platnick Brothers, Inc. v. N&amp;W Ry. Co.</i> , 367 I.C.C. 782 (1983) .....	14

<i>Railroad Ventures, Inc. -- Aband. Exempt. -- between Youngstown, OH and Darlington, PA, in Mahoning and Columbiana Counties, OH and Beaver County, PA, 2004 STB LEXIS ____ (Docket No. AB-556 [Sub-No. 2X], decided Dec. 13, 2004)</i> .....	4
<i>Rio Grande Industries, et al. - Control - SPT Co., et al., 4 I.C.C.2d 834 (1988)</i> .....	8
<i>S.R. Investors, Ltd. - Aband. - in Tuolumne County, CA, 1987 ICC LEXIS 218 (ICC Docket No. 239X, decided July 14, 1987)</i> .....	2
<i>Sierra Club v. EPA, 292 F.3d 895 (D.C. Cir. 2002)</i> .....	9
<i>Southern Pacific Transp. Co. -- Exempt. -- Abandonment in Fort Bend County, TX, 1987 ICC LEXIS 189 (ICC Docket No. AB-12 [Sub-No. 110X], decided Aug. 4, 1987)</i> .....	11
<i>Tongue River RR Co. - Constr. &amp; Oper. - Ashland-Decker, MT, 2 S.T.B. 735 (1997)</i> .....	14
<i>Union Pacific R. Co. - Aband. Exempt. - in Rio Grande and Mineral Counties, CO, 2000 STB LEXIS 283 (STB Docket No. AB-33 [Sub-No. 132X], decided May 18, 2000)</i> .....	7,12
<i>Union Pacific R. Co. - Aband. Exempt. - in Rio Grande and Mineral Counties, CO, 2004 STB LEXIS 378 (STB Docket No. AB-33 [Sub-No. 132X], decided June 22, 2004)</i> .....	7,17
<i>United States v. Northern Pacific Ry. Co., 288 U.S. 490 (1933)</i> .....	4,14
<i>United States v. Tucker Truck Lines, Inc., 344 U.S. 33 (1952)</i> .....	2
<b><u>Statutes</u></b>	
49 U.S.C. § 722(c) .....	2,4
49 U.S.C. § 10505(d) .....	5
49 U.S.C. § 10903 .....	7,16
49 U.S.C. § 10903(d) .....	16
49 U.S.C. § 10904 .....	1,2,3,4,6,8,12,15

49 U.S.C. §§ 10904(c) .....	12
49 U.S.C. §§ 10904(d) .....	9
49 U.S.C. § 10904(d)(1) .....	12
49 U.S.C. § 10904(f)(1)(B) .....	9
49 U.S.C. § 10904(f)(3) .....	10,16
49 U.S.C. § 10904(f)(4) .....	12,15

**Other Authorities**

49 C.F.R. § 1152.25(e)(4) .....	10,12
<i>Federal Practice and Procedure: Jurisdiction</i> , § 4478 .....	8
H.R. Rep. 96-1430 at 125 (96 <sup>th</sup> Cong., 2d Sess., Comm. on Conf., S. 1946, Sept. 29, 1980) .....	9
Rule 60(b)(3) of the Federal Rules of Civil Procedure .....	5,6

BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

UNION PACIFIC RAILROAD	)	
COMPANY --ABANDONMENT	)	DOCKET NO. AB-33
EXEMPTION -- IN RIO GRANDE AND	)	(SUB-NO. 132X)
MINERAL COUNTIES, CO	)	

---

**REPLY IN OPPOSITION TO  
PETITION OF "CONCERNED CITIZENS"  
TO REOPEN DECISION SERVED MAY 11, 1999**

---

Pursuant to the Board's procedural decision served November 18, 2004, DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION ("the Foundation") hereby replies in opposition to a Petition to Reopen ("Petition") filed by Concerned Citizens of Creede and Mineral County, Colorado ("Concerned Citizens") on November 5, 2004.

As set forth below, the Petition should be rejected or denied on one or more of the following legal grounds.

**I. THE PETITION IS BARRED BY LACHES**

The Petition does not identify the Board decision that is sought to be reopened. Instead, the Petition states (at 1) that it is directed at the Board's determination that the Foundation's offer of financial assistance (OFA) met the requirements of 49 U.S.C. § 10904.

That determination was made in a Board decision served May 11, 1999. That year is not a misprint. The Petition is directed at a Board decision that was issued more than 5½ years ago! Moreover, the rail line acquisition that followed from that decision was closed on May 24, 2000. The Petition thus seeks to undo a transaction that was consummated more than 4½ years ago!

The Petition is thus untimely in the extreme. Under 49 U.S.C. § 722(c), petitions to reopen may be filed “at any time,” but that means a time within reason. Were that not so, there would be no legal principle of laches. The principle of laches is that a legal right will not be enforced if a long delay in asserting the right has prejudiced an adverse party.

Here, the Concerned Citizens slept on their rights for much too long. Consideration of their Petition at this late date would derogate 49 U.S.C. § 10904 inasmuch as rail line owners and potential purchasers would be likely to forego § 10904 acquisitions if they were subject to being undone years after consummation. Laches bars consideration of the Petition in that circumstance.

There is compelling precedent for applying laches to preclude reopening in view of denial of reopening as to delayed filings not nearly as radical as the 5½-year hiatus in the case at hand. Thus, in *S.R. Investors, Ltd. - Aband. - in Tuolumne County, CA*, 1987 ICC LEXIS 218 (ICC Docket No. 239X, decided July 14, 1987), the Board’s predecessor denied a petition to reopen that was filed 16 months after the effective date of the decision sought to be reopened. In doing so, the Interstate Commerce Commission (ICC) said (at \*27-28):

There are also strong equitable reasons for not reopening this proceeding. These include the substantial amount of time that has passed from the time Sierra’s abandonment was exempted (February, 1985) to the time that Friends’ petition to reopen was filed (June, 1986), and in addition, the good faith reliance by Sierra and LPC on the exemption authority in abandoning and purchasing, respectively, the right-of-way. We also emphasize that both the California SHPO and Friends had actual notice of Sierra’s exemption, but that Friends, the SHPO and other California agencies all slept on their rights.

Objections to agency proceeding(s) should be made while the agency has the opportunity for correction. *United States v. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). As the Supreme Court there concluded (*Id.*):

(s)imple fairness to those who are engaged in the tasks of administration and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate in practice.

A petition for judicial review of the ICC's decision in that proceeding was dismissed for want of jurisdiction in *Friends of Sierra Railroad, Inc. v. ICC*, 881 F.2d 663 (9<sup>th</sup> Cir. 1989).

Similarly, in *Consolidated Rail Corp. - Aband. Exempt. - in Erie County, NY*, 1998 STB LEXIS 777 (STB Docket No. AB-167 [Sub-No. 1164X], decided Sept. 28, 1998), the Board denied a petition to revoke an abandonment exemption and OFA acquisition that was filed 18 months after the OFA acquisition was consummated. In doing so, the Board emphasized that revocation of the OFA acquisition at such a late date would undermine the OFA statute, viz. (at \*5-6, emphasis added):

... Were we to revoke the exemption as requested by BCS, our action not only would adversely affect Conrail, but it would also negate a purchase by an innocent third party, RJCN, which invoked section 10904 in the good faith belief that, if it complied with the statutory standards and procedures, it would acquire the line. To hold otherwise would not only work unjustifiable injury to bona fide purchasers such as RJCN, but also would undermine section 10904. Purchasers acquiring lines under that provision would have to worry that their rights to the lines they acquire might be abrogated months and perhaps years later because of some defect in the underlying abandonment.

Our practice of revoking abandonments authorized pursuant to the class exemption is predicated on the need to maintain the integrity of the applicable regulations. But that purpose is not served when upholding the class exemption can only be achieved at the expense of derogating section 10904 of the statute (footnote omitted).

The Board's decision in that proceeding was upheld on judicial review in *Buffalo Crushed Stone, Inc. v. STB*, 194 F.3d 125 (D.C. Cir. 1999). In doing so, the Court said (at 130):

... (T)he Board's action preserved the integrity of section 10904's OFA procedures, protected a bona fide purchaser, and promoted the goals of the statute ...

In *United States v. Northern Pacific Ry. Co.*, 288 U.S. 490 (1933), the Supreme Court upheld the ICC's denial of a petition for rehearing that was filed 22 months after the ICC's decision became final. In doing so, the Court said (at 494):

Though the order substantially reduced the carriers' revenue, we do not consider the merits of the application for rehearing, as we think the carriers' lack of diligence in bringing this matter to the Commission's attention deprived them of any equity to complain of the refusal of their petition. They sat silent and took the chance of a favorable decision on the record as made. They should not be permitted to reopen the case for the introduction of evidence long available and susceptible of production months before the Commission acted. The denial of a rehearing, in view of this delay, was not such an abuse of discretion as would warrant setting aside the order.

Most recently, in *Railroad Ventures, Inc. -- Aband. Exempt. -- between Youngstown, OH and Darlington, PA, in Mahoning and Columbiana Counties, OH and Beaver County, PA*, 2004 STB LEXIS \_\_\_\_ (Docket No. AB-556 [Sub-No. 2X], decided Dec. 13, 2004), the Board denied a petition to reopen and request to file "new" evidence that was submitted more than 3 years after the Board's original determination. The Board there said (slip opinion at \*5):

RVI's attempt to renew its challenge to the underlying valuation methodology is repetitive and without merit and should not be considered further, as concerns for administrative finality, repose, and detrimental reliance counsel against a reopening here. More than 3 years elapsed after the Board's original assessment of the line before RVI tendered its purportedly "new" evidence. CCPA/CCPR reasonably relied on the Board's determination of the purchase price when they chose to proceed to acquire and operate the line, and they invested substantial resources to restore rail service. Were we to alter the purchase price at this time, CCPA could not simply walk away from the deal, as it could have when we originally set the price.

The ICC stated on a number of additional occasions that it would apply the equitable doctrine of laches in appropriate circumstances, notwithstanding that a statute allowed the filing of petitions at any time. *Louisville & Jefferson Co. & CSX Const. & Oper. Jeff., KY*, 4 I.C.C.2d 749, 756, n.8 (1988); *see, also, Midwestern Rail Prop., Inc. - Pur. - Rock Island*, 366 I.C.C. 915, 922 (1983); *Norfolk & W. Ry. Co. and New York C. & St. L. R. Co. Merger*, 5 I.C.C.2d 234, 237 (1989); and *Mountain Laurel R. Co. - Acq. & Oper. Exempt. - Consolidated Rail Corp.*, 1998 STB LEXIS 131 (F.D. No. 31974, decided May 13, 1998) at \*17 (“While specific time limits are not applicable to the filing of petitions to reopen and revoke under 49 U.S.C. 10505(d), the time elapsed is relevant and, depending on the facts of the case, concerns for administrative finality, repose and detrimental reliance must be balanced with those factors that support reopening and revocation, particularly when the challenged exemption pertains to a transaction that cannot readily be undone, as MLRR alleges here.”); c.f. Rule 60(b)(3) of the Federal Rules of Civil Procedure, which precludes relief from a United States District Court judgment based on fraud or misrepresentation if the request for relief is not filed within one year after entry of the judgment.

Here, both Union Pacific Railroad Company (UP), as seller of the rail line, and the Foundation, as purchaser of the line, reasonably relied on the Board’s decision in the OFA proceeding in consummating purchase and sale of the line. In continued reliance on that decision, the Foundation has expended substantial sums for repair and rehabilitation of the rail line. UP continues to express its commitment to the transaction. Now, 5½ years later, a third party, the Concerned Citizens, seeks to undo the acquisition. Were the Board to accede to that request, the salutary purpose of 49 U.S.C. § 10904, to provide for continuation of needed rail service, unquestionably would be undermined, as prospective sellers and buyers would hesitate to

act under § 10904 for fear that their transaction would be negated years later. The case for application of laches to the Petition of the Concerned Citizens is compelling in view of both the lengthy delay in filing that Petition and the reasonable reliance by the Foundation and UP on the decision sought to be reopened in consummating acquisition of the rail line. The Petition should be rejected or denied on that legal basis.

**II. THE PETITION IS BARRED BY THE LAW OF THE CASE**

This is the fourth petition that has been filed seeking to reopen the Board's decision served May 11, 2004, i.e.:

<u>Petition Filed By:</u>	<u>Date of Filing</u>
City of Creede	November 26, 1999
City of Creede (second petition)	October 14, 2003
Adjacent Land Owners	December 19, 2003
Concerned Citizens of Creede and Mineral County	November 5, 2004

It is now evident that residents in and around Creede are acting as a "tag-team" by filing one petition after another in an effort to exhaust the Foundation's will and financial ability to file effective replies, while at the same time it works to restore rail service on the line. Each of the Concerned Citizens is a resident of Creede. (Petition, Ex. 1). In practical effect, the City of Creede is the municipal alter ego of the citizens of Creede who make up the Concerned Citizens. The Adjacent Land Owners, who reside near Creede, are closely allied with the City of Creede and the Concerned Citizens.

The Board issued a comprehensive decision in this proceeding served June 22, 2004, in which petitions to reopen filed by the City of Creede (second petition) and by the Adjacent Land Owners were denied. *Union Pacific R. Co. - Aband. Exempt. - in Rio Grande and Mineral*

*Counties, CO*, 2004 STB LEXIS 378 (STB Docket No. AB-33 [Sub-No. 132X], decided June 22, 2004). (“2004 OFA Decision”). After thorough analysis in that decision, the Board found that (1) it was previously determined correctly that the Foundation is financially responsible (*id.* at \*11-16); (2) the OFA was legitimately filed for continuation of rail freight service (*id.* at \*16-20); and (3) the appropriate remedy to determine whether restoration of rail service in and near Creede is in the public interest is an application for adverse abandonment under 49 U.S.C. § 10903 (*id.* at \*20-22).

The Board issued an earlier decision in this proceeding served May 24, 2000, in which the City of Creede’s first petition to reopen was denied. *Union Pacific R. Co. - Aband. Exempt. - in Rio Grande and Mineral Counties, CO*, 2000 STB LEXIS 283 (STB Docket No. AB-33 [Sub-No. 132X], decided May 18, 2000). (“2000 OFA Decision”). The Board there found that (1) it was previously determined correctly that the Foundation is financially responsible (*id.* at \*7-8); (2) the rail line has not been abandoned under State law (*id.* at \*8-11); and (3) that the City’s alleged use of the rail line right-of-way as a recreational trail does not defeat the Foundation’s right to operate the line pursuant to its OFA (*id.* at \*11-13).

The Petition filed by the Concerned Citizens essentially plows over the same ground that was resolved in the Board’s prior decisions in this proceeding. Thus, the Petition attacks the Board’s prior determinations that the Foundation is financially responsible and that the OFA is for continued rail freight service (at 3-26). As such, the Petition is barred by the rule of the law of the case.

The principle of the law of the case is a rule of practice, based on sound policy that when an issue is once litigated and decided, that should be the end of the matter. *Rio Grande*

*Industries, et al. - Control - SPT Co., et al.*, 4 I.C.C.2d 834, 913 (1988). It is a doctrine that rests on good sense and the desire to protect both the court and parties against the burdens of “repeated reargument by indefatigable diehards.” *Id.* at 914, quoting from *Federal Practice and Procedure: Jurisdiction*, § 4478, at 790.

“Repeated reargument by indefatigable diehards” describes the successive petitions filed by the closely-allied Creede interests to a tee. The Foundation has been determined to be financially responsible initially by the Board’s Director of Office of Proceedings, then by the Board on review, then by the Board a second time on review. It is outrageous for the Concerned Citizens to reargue that issue for a third time. Under the doctrine of the law of the case, the Board need not consider and respond to that highly repetitive matter. The Petition should be rejected or denied on that basis.

### **III. THE PETITION SHOULD BE REJECTED OR DENIED FOR LACK OF STANDING**

The decision sought to be reopened and reversed approved the Foundation’s acquisition of the subject rail line from UP under the OFA provisions of 49 U.S.C. § 10904 (“the OFA statute”). Both parties to the acquisition -- the Foundation and UP -- support the Board’s determination that the acquisition met the requirements of the OFA statute. The Petition to Reopen filed by the Concerned Citizens should be rejected or denied because the Concerned Citizens is a third party who lacks standing to complain that the OFA acquisition is unlawful.

The OFA statute is designed to preserve rail service for the benefit of the shipping public on rail lines that otherwise would be abandoned, while ensuring that rail carriers who own such lines receive at least fair market value as compensation for their acquisition. 49 U.S.C.

§§ 10904(d), (f)(1)(B); H.R. Rep. 96-1430 at 125 (96<sup>th</sup> Cong., 2d Sess., Comm. on Conf., S. 1946, Sept. 29, 1980). The statute is not to be used by parties other than the offeror and offeree who attempt to use it to prevent rail service contrary to its intended purpose. *Consolidated Rail Corp. -- Aband. Exempt. -- in Erie County, NY, supra*, 1998 STB LEXIS 777 at 5-6.

Third parties attempting to misuse the OFA statute to prevent rail service lack standing to seek review of agency action approving OFA acquisitions because they are not injured by the agency's action. See *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002). That is so because the new rail operator under the OFA statute is merely a successor-in-interest to the license held by the previous rail carrier. The OFA acquirer thus stands in the shoes of the selling rail carrier. The OFA acquisition does not have an adverse effect on third parties because the new rail carrier has the same rights and obligations as the prior rail carrier. *Napa Valley Wine Train, Inc. - Petition for Declaratory Order*, 4 I.C.C.2d 720, 727-728 (1988) (“ . . . [the previous carrier] could have added passenger operations without seeking regulatory approval . . . (I)n any instance where the previous carrier could have performed a particular service without seeking additional authority, the new operator . . . should be able to also . . .”). Such a third party also lacks standing under the requirement of redressability where more than one offeror had properly invoked the OFA statute because even if the OFA acquisition of one such offeror were to be revoked, the OFA of the other offeror would then be entitled to consideration. See 49 U.S.C. § 10904(f)(3); c.f. *Canadian National Ry. Co. -- Trackage Rts. Exempt. -- Bangor and A.R. Co.*, 2002 STB LEXIS 375 at \*12-13 (STB Finance Docket No. 34014, decision served June 25, 2002). Here, a second OFA was filed, requiring that UP negotiate with that offeror if the Foundation's acquisition were to be revoked. Thus, the Concerned Citizens have not been

injured by the Foundation's acquisition of the rail line, but even if they were, such injury would not be redressed by revocation.

It is beyond dispute that prior to the Foundation's acquisition of the rail line, UP could have lawfully rebuilt the rail trackage in and near Creede, established passenger rail service to and from Creede, and reestablished rail freight service at Creede. As made clear in the cases cited above, the Foundation is able to lawfully do any of those things as successor-in-interest of UP under the OFA statute. It follows that the Concerned Citizens were not legally injured as a result of the Foundation's acquisition of the Branch from UP under the OFA statute. In the absence of such legal injury, the Concerned Citizens lack standing to seek review of that acquisition. Their Petition should be rejected or denied on that basis.

**IV. THE PETITION SHOULD BE DENIED BECAUSE THERE HAS BEEN NO SHOWING OF FRAUD, MISTAKE OR MINISTERIAL ERROR**

The Petition is assertedly filed pursuant to 49 C.F.R. § 1152.25(e)(4). (Petition at 1). That regulation governs petitions to reopen administratively final Board actions. The standards of review applicable to such a petition are material error, new evidence or substantially changed circumstances.

Contrary to that assertion, those standards of review do not apply where, as here, review is sought of a Board decision that has resulted in a consummated rail line acquisition. Such a Board decision is reviewable only for fraud, mistake or ministerial error. Thus, in *Napa Valley Wine Train, Inc. - Petition for Declaratory Order, supra*, the ICC referred to the predecessor of 49 U.S.C. § 722(c), which provides for reopening of a proceeding at any time because of material error, new evidence or substantially changed circumstances, and said (4 I.C.C.2d at 729):

. . . However, the Commission has never viewed that authority as limitless. Rather, the need for administrative finality weighs heavily where, as here, a party has acted in reliance on a Commission decision, making a substantial investment. Hence, the circumstances in which jurisdiction reasonably can be reasserted are considerably more circumscribed. Fraud, mistake and ministerial error are the only grounds traditionally asserted by the Commission as a basis for revoking authority already exercised . . . (footnote omitted; emphasis added).

*Accord: CSX Transp., Inc. -- Aband. -- between Bloomingdale and Montezuma, in Parke County, IN, 2002 STB LEXIS 535 at \*9-11 (ICC Docket No. AB-55 [Sub-No. 486], decision served September 13, 2002), aff'd sub nom. Montezuma Grain Co. v. STB, 339 F.3d 535 (7<sup>th</sup> Cir. 2003).* There has never been a contention that the Foundation and UP were mutually mistaken in regard to the subject OFA acquisition, nor that the Board committed a ministerial error in approving the acquisition. That leaves fraud as the only potential ground for relief.

In order to grant a petition to reopen on the basis of fraud where the proceeding has resulted in a consummated transaction, the Board would have to find not only that the request for approval of the transaction contained information that was materially false or misleading, but also that the Board relied on that information in approving the transaction. *Southern Pacific Transp. Co. -- Exempt. -- Abandonment in Fort Bend County, TX, 1987 ICC LEXIS 189 at \*6 (ICC Docket No. AB-12 [Sub-No. 110X], decided Aug. 4, 1987).*

The scope of review here is even more circumscribed in light of the Board's narrow role in processing OFAs under 49 U.S.C. § 10904. The Board decides only whether the OFA statute has been properly invoked, i.e., whether one or more financially responsible persons has offered financial assistance on a timely basis. 49 U.S.C. §§ 10904(c), (d)(1). The current OFA statute does not continue a requirement of the prior statute that the Board find that an OFA is "bona fide", i.e. for continued rail service. *Aban. and Discon. of R. Lines and Transp. under 49 U.S.C.*

10903, 1 S.T.B. 894, 911 (1996). The Board does not have discretion to deny an acquisition once it is found that the OFA statute has been properly invoked; the Board must authorize an OFA acquisition whenever the parties agree on the financial terms of the acquisition or the offeror is willing to meet the financial terms set by the Board. *Napa Valley Wine Train, Inc. - Petition for Declaratory Order, supra*, 4 I.C.C.2d at 727.

It follows that if review of a decision that has resulted in a consummated OFA acquisition is not precluded by laches, or by the law of the case, or by lack of standing, the decision is reviewable only for fraud, mistake or ministerial error and only in regard to either the financial responsibility of the offeror or the timeliness of the offer. The financial responsibility of the offeror refers to the ability of the offeror to fund the acquisition and operate the line for two years as required by 49 U.S.C. § 10904(f)(4). *2000 OFA Decision* at 4. However, where an offeror is found to be capable of paying the purchase price for the line, its capability to conduct operations is presumed in the absence of persuasive evidence to the contrary. (*Id.*).

There is no showing in the Concerned Citizens' Petition (nor any attempt to show) that the Foundation fraudulently misrepresented to the Board that its offer was filed on a timely basis, nor that the Foundation misrepresented that it was capable of paying the purchase price for the rail line. Much of the argument in the Petition centers on the Foundation's alleged incapability of rehabilitating the trackage in the rail line so as to restore rail freight service, but that allegation, even if true (which the Foundation denies), cannot form the basis for a claim of fraudulent misrepresentation to the Board. That is so because the Foundation was not legally required to make such a representation and did not do so. If there was doubt about the Foundation's capability in that respect, it was incumbent on UP or a third party with standing to

provide persuasive evidence to that effect at that time. No such evidence was presented to the Board.

To the extent that the Petition can be interpreted to have alleged that the Board's finding of financial responsibility is based on fraud, the Foundation hereby adopts, as its reply to such allegation, the argument at pages 12 through 15 of its prior Reply filed January 20, 2004, and the verified statement of Mr. Donald H. Shank, which is attached to that Reply.

**V. EVEN IF NEW EVIDENCE AND MATERIAL ERROR WERE APPLICABLE STANDARDS OF REVIEW, THE PETITION SHOULD BE DENIED BECAUSE EVIDENCE IN THE PETITION IS NOT NEW AND MATERIAL ERROR WAS NOT SHOWN**

As shown in the previous section of reply, new evidence and material error are not applicable standards for review of a Board decision that has resulted in a consummated rail line acquisition. Even if those standards were applicable here, the Petition should be denied because evidence in the Petition is not "new" as that term is used in the standard of review, and because no material error was shown.

The evidence claimed to be new is summarized at pages v. and vi. of the Petition. It is clear that for the most part, that evidence was available for filing at the initial stage of the OFA proceeding, but was not submitted at that time. Thus, the Foundation's then-current Federal income tax return could have been filed at that time. Similarly, pictures showing the physical condition of the rail line and information showing the age and weight of the rail in the line could have been filed at the time that the Foundation's OFA was first submitted. The Petition fails to provide an explanation or justification for failure to have filed that evidence on a timely basis.

Such evidence thus should not be accepted for filing because it is not “new evidence” as that term is used in the standard of review.

Evidence that was reasonably available during the original proceeding is not “new evidence” as that term is used in the standard of review. *Omaha Public Power District v. BN R. Co.*, 3 I.C.C.2d 853, 862 (1987), citing *Platnick Brothers, Inc. v. N&W Ry. Co.*, 367 I.C.C. 782, 785 (1983), and *Farmers Export Co. v. United States*, 758 F.2d 733, 738 (D.C. Cir. 1985). The Board will not accept evidence for filing as “new” if either the concerns that it addresses have already been extensively considered and disposed of, or it could have and should have been developed and presented earlier. *Tongue River RR Co. - Constr. & Oper. - Ashland-Decker, MT*, 2 S.T.B. 735, 742 (1997) (“This evidence, although newly introduced, is not new because it also could have been presented earlier, but was not.”); *see, also, United States v. Northern Pacific Ry. Co.*, *supra*, 288 U.S. at 494 (“They should not be permitted to reopen the case for the introduction of evidence long available and susceptible of production months before the Commission acted”).

Other elements of the claimed new evidence do not bear on any issue that was before the Board for decision when it accepted the Foundation’s OFA for filing in 1999. Thus, the traffic volume of a potential shipper later identified by the Foundation and the ownership of the railroad depot in Creede have no bearing on the lawfulness of the Board’s finding that the Foundation’s OFA met the requirements of the OFA statute. That is not the kind of new evidence that should be admitted in conjunction with a petition to reopen the decision in which the Board made that finding.

The same goes for the standard of material error. There is nothing new in the Petition on that issue. The Petition merely rehashes issues adequately resolved by the Board on two previous occasions. The Board should decline to reopen on that basis.

**VI. THE FOUNDATION'S AUTHORITY TO OPERATE THE RAIL LINE CANNOT BE LAWFULLY REVOKED BY VIRTUE OF REOPENING THE OFA ACQUISITION PROCEEDING**

---

The substance of the Petition is not that the Board erred in finding that the Foundation's OFA met the requirements of 49 U.S.C. § 10904. Instead, the focus of the Petition is alleged post-acquisition shortcomings: i.e., (1) the Foundation's failure to have instituted rail freight service over the line within a reasonable time after the acquisition; and (2) the absence of support for rail freight service by prospective freight shippers having traffic volumes likely to result in profitable operation of the rail line. In essence, the Concerned Citizens seek revocation of the Foundation's authority to operate the line because post-acquisition events allegedly show that the Foundation is not financially responsible, and that there is no reasonable prospect for profitable operation of the rail line. The overriding goal of the Concerned Citizens is to preclude railroad operation in and around the City of Creede.

That goal is not achievable in this proceeding. Even if the Foundation's OFA acquisition of the rail line were to be reopened and set aside, a railroad operation in and around Creede would not necessarily be precluded. The authority to operate the rail line would revert to UP in that circumstance. In that event, UP would be legally required by virtue of 49 U.S.C. § 10904(f)(3) to sell the line to Rio Grande & San Juan Railroad Co., which also timely filed an OFA for acquisition of the rail line in this proceeding. Even apart from that obligation, UP could elect to sell the rail line to another entity who could then reestablish rail freight operations at

Creede, or UP could elect to do so itself. Reopening and setting aside the OFA acquisition in this proceeding thus may well fail to achieve the Concerned Citizens' goal.

The Concerned Citizens would have an opportunity to attempt to rid Creede of the prospect for rail service by filing an application for adverse abandonment of the rail line under 49 U.S.C. § 10903. If the Concerned Citizens were to prove that the present or future public convenience and necessity require or permit abandonment of the line, the Board would authorize abandonment under 49 U.S.C. § 10903(d). That would have the effect of terminating the Foundation's federal authority to operate the rail line.

The Board recognized the appropriateness of a § 10903 proceeding in similar circumstances in *Canadian National Ry. Co. - Trackage Rights Exemption - Bangor and Aroostook R. Co.*, 2002 STB LEXIS 375 (F.D. No. 34014, decided June 25, 2002). There, the petition sought to revoke the decision by which a rail carrier acquired trackage rights over a rail line, instead of filing an application under 49 U.S.C. § 10903 for adverse discontinuance of those rights. In refusing to revoke the acquisition decision, the Board said (at \*12-13):

. . . Here, of course, the Trustee does not want us to conduct a full scale regulatory licensing proceeding; rather, he wants us to terminate the trackage rights authority. But mere revocation will not do that here because, as detailed below, trackage rights, once authorized, may not be discontinued without a specific ruling that discontinuance is in the public interest. And the proper regulatory procedure for obtaining that ruling, where discontinuance is not consensual on the part of both parties, is an adverse discontinuance proceeding.

*See, also*, the 2004 Decision in this proceeding at \*20-22.

The Concerned Citizens' inappropriate use of reopening of an OFA acquisition proceeding to obtain adverse abandonment of the Foundation's federal rail operating authority constitutes an additional ground for rejection or denial of their Petition.

**CONCLUSION AND REQUESTED RELIEF**

WHEREFORE, for the reasons stated, the Petition should be rejected or denied.

Respectfully submitted,

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

*Replicant*

*Thomas F. McFarland*

THOMAS F. McFARLAND  
THOMAS F. McFARLAND, P.C.  
208 South LaSalle Street, Suite 1890  
Chicago, IL 60604-1112  
(312) 236-0204

*Attorney for Replicant*

DATE FILED: December 16, 2004

**CERTIFICATE OF SERVICE**

I hereby certify that on December 15, 2004, I served the foregoing document, Reply In Opposition To Petition Of "Concerned Citizens" To Reopen Decision Served May 11, 1999, on the following:

*by UPS overnight mail:*

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

*by first-class U.S. mail:*

George M. Allen  
206 Society Drive  
Suite A  
Telluride, CO 81435

Karl Morell  
Ball, Janik, LLP  
1455 F Street, N.W., Suite 225  
Washington, DC 20005

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

John D. Heffner, PLLC  
1920 N Street, N.W.  
Suite 800  
Washington, DC 20036

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

Martin O'Grady  
Colorado Dept. of Public  
Health & Environment  
4300 Cherry Drive South  
Denver, CO 80222-1530

*Thomas F. McFarland*

\_\_\_\_\_  
Thomas F. McFarland