



December 16, 2004

VIA E-Filing

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: AB-33 (Sub-No. 132X) - Union Pacific Railroad Company -
Abandonment Exemption - In Rio Grande and Mineral
Counties, Colorado -- Reply to Petition to Reopen

Dear Mr. Williams:

Accompanying this letter for filing in the above proceeding is UP's "Reply to
Petition to Reopen of Concerned Citizens of Creede and Mineral County Colorado" in both PDF
and Word formats.

Very truly yours,

A handwritten signature in black ink, appearing to read "Robert T. Opal", with a long, sweeping flourish extending to the right.

Robert T. Opal
General Commerce Counsel
Direct dial: 402/ 544-3072
Fax: 402/ 501-0132

cc: Persons listed in Certificate of Service

Robert T. Opal
General Commerce Counsel

UNION PACIFIC RAILROAD
1400 Douglas St., Stop 1580, Omaha, NE 68179-1580
ph. (402) 544-3072 fx. (402) 501-0132
rtopal@up.com

**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**

**REPLY TO
PETITION TO REOPEN OF
“CONCERNED CITIZENS OF CREEDE
AND MINERAL COUNTY, COLORADO”**

**UNION PACIFIC RAILROAD
COMPANY**

Robert T. Opal
General Commerce Counsel
1400 Douglas Street, Stop 1580
Omaha, Nebraska 68179
(402) 544-3072
(402) 501-0132 (FAX)

Dated and Filed: December 16, 2004

**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**

**REPLY TO
PETITION TO REOPEN OF
“CONCERNED CITIZENS OF CREEDE
AND MINERAL COUNTY, COLORADO”**

This Reply is filed on behalf of Union Pacific Railroad Company ("UP"). It is in response to a filing dated November 5, 2004 on behalf of 15 individuals calling themselves "Concerned Citizens of Creede and Mineral County, Colorado" ("Citizens").

Citizens are requesting that the Board "reopen the Board's prior determination that the offers of financial assistance ("OFA") of the Denver & Rio Grande Historical Foundation ("D&RGHF") to the Creede met the requirements of 49 U.S.C. § 10904." That "determination" was made in a Board decision served April 6, 1999 – over 5½ years ago. The Board subsequently approved the OFA sale to D&RGHF by decision served May 11, 1999, 5½ years ago, and

the sale was consummated in May, 2000, 4½ years ago. And, in the 5½ years that have passed since the Board made its "determination", the Board has considered, and denied, two previous requests to reopen and revoke the OFA, by decisions served May 24, 2000 and June 22, 2004.

Citizens' Petition is thus the third petition for reopening of the OFA proceeding that has been made in this abandonment, and the second such petition in the last two years.¹ It may not even be the last, as there could well be other groups of "concerned citizens" waiting to make their own filing if this one is unsuccessful. There is no reason that the Board should continue to entertain repeated petitions for reopening seeking reversal of Board determinations made over half a decade ago. The Board should summarily deny Citizens' Petition and make clear that it will reject any additional such petitions that may be filed.

I. Citizens' Petition Does Not Meet The Standards for Reopening.

A person seeking reopening of an administratively final decision must demonstrate "material error, new evidence, or substantially changed circumstances", 49 C.F.R. § 1115.4. Moreover, as the Board has recently explained:

¹ UP has no presence in the Creede area and does not know what connection there may be between the City of Creede and Concerned Citizens. However, it is apparent that the interests in the Creede area opposed to reactivation of the Creede Line are using litigation as a weapon to defeat it. D&RGHF has, in fact, been involved in almost constant litigation brought by interests opposing reactivation since it acquired the Line, and the instant petition appears to be the latest episode in this effort. It is hardly surprising that D&RGHF would have difficulties obtaining financing for rehabilitation and operation when its very right to hold and operate the property is under constant legal challenge.

"...the Board generally does not consider new issues raised for the first time on reconsideration when those issues could have and should have been presented in the earlier stages of the proceeding. Moreover, the term 'new evidence' refers to evidence that was not reasonably available to the party when the record was developed, and not simply newly raised. Nothing in the statute or the Board's regulations obligates the agency to rethink its decisions whenever a party wishes to try out a new theory or finds new information at a late stage in the process. And, if a party were free to reshape its case, so long as it did so within 20 days after a decision, the administrative process might never end. The agency is not expected to 'behave like Penelope, unraveling each day's work to start the web again the next day'". Docket No. 42056, Texas Municipal Power Agency v. The Burlington Northern and Santa Fe R. Co., served September 27, 2004, p. 3 (internal citations omitted).²

Citizens' Petition does not meet the standards for "reopening" a Board determination made over half a decade ago.

First – Citizens have sat on their hands for over 5 years. They have not participated in the proceedings which resulted from the City of Creede's two prior reopening requests. Significantly, they do not claim to have been unaware of the City's prior reopening requests – how could they have been unaware of them in a town which has only 350 inhabitants (Citizens, p. 14)? And they offer no explanation as to why they didn't previously participate in the proceeding. They claim only that "Their interests are not limited to what happens within the City of Creede" (*Id.*, p. 3) -- a page after they showed that all of their specific concerns are limited to what happens within the City of Creede (*Id.*, p. 2). Further, while Citizens' Petition is directed at "errors" the Board supposedly made in its June 22 decision, Citizens do not explain why they failed to file their petition within the

² The language quoted above is discussing the criteria for petitions for reconsideration under 49 C.F.R. § 1115.3. However, the criteria for petitions to reopen under 49 C.F.R. § 1115.4 are the same.

20 day time limit provided by 49 C.F.R. § 1115.3(e) and do not even acknowledge that they failed to meet this deadline.

The Board is not required to reopen its proceedings every time some new player decides to come out of the woodwork to try its hand. That is particularly true here, where the "Citizens" obviously could have participated in the prior challenges to the OFA, and failed to do so. At some point, an administrative proceeding must end, and that point is past in this case.

Second – There really isn't anything new in the Citizens' Petition. The Board has previously considered – and rejected – arguments by others that D&RGHF wasn't "financially responsible, that D&RGHF didn't acquire the Line to perform rail service, that there is insufficient demand for rail freight service in the area and that the Line requires rehabilitation. The arguments being made by Citizens are simply variants of arguments which have been made before.³ There is no reason for the Board to consider them again just because they are being made by someone else.

³ A comparison of Citizens' arguments to the arguments made in prior filings will demonstrate their similarity:

<u>Issue</u>	<u>Filing</u>
Financial Responsibility	City of Creede, 11-17-99 (p. 2), 10-10-03 (passim) and 2-7-04 (passim); Landowners, 12-19-03 (pp. 5-14) and 2-9-04 (passim)
Continued Rail Service/ Shipper Demand	City of Creede, 10-10-03 (p. 24) and 2-7-04 (p. 5); Landowners, 12-19-03 (pp. 14-17)
Rehabilitation	City of Creede, 11-17-99 (p. 2), 10-10-03 (pp. 21-24); Landowners, 12-19-03, pp. 11-12.

Similarly, most of the “new evidence” accompanying the Citizens’ Petition isn’t new. Most of it, in fact, predates the City of Creede’s 2003 reopening proceeding, in which Citizens could have participated, but did not. Moreover, even the more recently dated materials are not “evidence that was not reasonably available to the party when the records was developed”, Texas Municipal Power, supra, p. 3. It is evidence that could – and should -- have been produced earlier. For example, the photographs on which Citizens so heavily rely may have been taken recently, but they depict conditions which could have been photographed long ago. In fact, Citizens admits, at p. vii of its filing, that the photos depict conditions that have existed for years.

Since Citizens’ Petition does not meet the standards for reopening, the Board should deny the Petition without addressing the merits of Citizens’ arguments. Citizens’ obvious strategy is to obtain a decision on the merits so that they can seek judicial review, and further prolong this proceeding. The Board should not reward this legal gamesmanship.

II. Citizens Cannot Obtain A Forced Abandonment of the Creede Line In this Proceeding.

Citizens want the Board to force the abandonment of the Creede Line. To accomplish this, they want the Board to “reopen its June 22 Decision, find that D&RGHF did not satisfy the statutory requirements of Section 10904, grant UP’s abandonment and exempt that abandonment from the OFA provisions of Section 10904” (Citizens, p. 34). Presumably, Citizens contemplates that revoking D&RGHF’s regulatory authority to acquire and operate the Line would

also require unwinding of the OFA sale (as City of Creede recognized in its earlier filings), although Citizens never comes out and says so.

Citizens cannot obtain a forced abandonment through a revocation of the OFA at this late date. We addressed this issue in our January 19, 2004 Reply to the City of Creede. Briefly, the Board considered a virtually identical issue in Finance Docket No. 34014, Canadian National R. Co. – Trackage Rights Exemption – Bangor & A.R. Co., served June 25, 2002. In that case, the bankruptcy trustee of BAR sought to terminate CN trackage rights over BAR (which CN had not yet used) by obtaining a “revocation” of the regulatory exemption which had authorized these rights. However, the Board held that a “revocation” would not terminate CN’s trackage rights because the rights, once authorized, could not be terminated over CN’s opposition without an adverse discontinuance proceeding.

The same principle applies here. D&RGHF’s OFA purchase was authorized by the Board and the purchase was consummated on May 24, 2000. As a result, regardless of whether D&RGHF has actually operated the Line, it has been the incumbent railroad for 4½ years. If the City wants Board action removing D&RGHF from the Line, it must file a formal application for adverse abandonment, see Canadian National, supra, pp. 8-10; Finance Docket No. 34090, Union Pacific R. Co. – Declaratory Order, served November 9, 2001.

Citizens tries to create the appearance that there is precedent for the relief it is seeking by taking selected quotes out of context from several STB, ICC and court decisions. But none of these cases support the notion that the Board can

force the abandonment of a line by revoking OFA authority after a line has been sold, and none of them even involve a post-sale revocation. The OFA rejection decisions cited by Citizens all involve pre sale rejections made when the OFA's were filed.⁴ Abandonment of R. Line and Discontinuance of Service, 365 I.C.C. 249 (1981) does not address OFA rejection. Modern Handcraft Inc. – Abandonment, 363 I.C.C. 969 (1981) is an adverse abandonment case, not an OFA case. The only references to OFA's in the decision are statements that the abandonment authority being granted was subject to financial offer procedures, 363 I.C.C. 973 and 974. Napa Wine Train – Declaratory Order, 7 I.C.C.2d 954 (1991) involved a line previously purchased under OFA procedures, but the issue in the case was whether the OFA authority allowed the purchaser to institute intrastate passenger service without state regulatory approval. This case has nothing to do with rejection of OFA's, whether pre or post sale, and is no longer good law due to changes made in the ICC Termination Act.⁵

III. Terminating D&RGHF's OFA Authority At This Late Date Would Be Contrary To 49 U.S.C. § 10904.

Unwinding an OFA sale years after it occurred to force abandonment of a line is contrary to 49 U.S.C. § 10904. First, the statute is intended to provide an

⁴ Docket No. AB-167 (Sub-No. 493N), Conrail Abandonment – 30th Street Secondary Track, decided June 11, 1987; Docket No. AB-6 (Sub-No. 380X), The Burlington Northern S.F. R.Co. – Abandonment Exemption – In King County, WA, served August 5, 1998; Redmond Co. v. S.T.B., 223 F.3d 1057 (9th Cir., 2000); Docket No. AB-547X, Roaring Fork RHA – Abandonment Exemption, served May 21, 1999.

⁵ The Napa decision is based on provisions of the Interstate Commerce Act, chiefly 49 U.S.C. §§ 10908, 10909 and 11501 (1991 ed.), which were subsequently either repealed or substantially amended in the ICCTA. In particular, the 1991 version of § 11501, as it had been interpreted by the courts, permitted states to regulate various aspects of rail transportation. The current version of § 11501 does not.

opportunity to preserve rail service on lines that would otherwise be abandoned. Citizens' attempt to use the statute to force an abandonment of the Creede line stands the statute on its head. Second, under the statute, a railroad making an OFA sale is made is supposed to be placed in the same economic position it would have been had it abandoned and liquidated the line, rather than sold it intact, see Chicago & North Western T. Co. v. United States, 678 F.2d 665 (7th Cir., 1982). As the Board recognized in the June 22 Decision, revoking an OFA and unwinding an OFA sale years after it closed effectively prolongs the abandonment process for this period. Further, it exposes the selling carrier to significant risks that the carrier would not have faced had the line been abandoned rather than sold in an OFA. For example, in the intervening years, the property could deteriorate or otherwise lose value, be encumbered with liabilities or environmentally contaminated. The abandoning railroad cannot, consistent with the statute, be required to accept these post sale risks.

Finally, UP sold the Creede line in good faith, in reliance on the Board's decisions accepting D&RGHF's OFA and approving the sale. If the Board were to order the Creede OFA sale to be unwound at this late date, then no selling railroad would ever be able to rely on the finality of an OFA sale. If this sale can be undone because of alleged defects in the OFA 4½ years after the sale, then why not 10, 20 or 30 years later? And, if the Board is going to expose the selling railroad to such a risk, then it must, consistent with due process, require that any entity filing an OFA submit audited financial statements, firm financial

commitments, and detailed operating and marketing plans.⁶ It also must give the selling railroad, and any other interested parties, an opportunity to contest the offeror's showing before requiring the railroad to negotiate with the offeror or setting the terms of an OFA sale.

IV. Adverse Abandonment

Citizens argue that the "potential to file an adverse abandonment does not cure the material errors in the Board's June 22 Decision" (Citizens, p. 33). However, as we have shown (pp. 6-8, supra) an adverse abandonment is the only way to force the abandonment of a rail line after it has been sold through OFA procedures. It is no different than if the selling railroad never filed for abandonment and were still the incumbent. Citizens may prefer to focus on the OFA and events which occurred half a decade ago in order to avoid the standards for adverse abandonment, which Citizens probably fears it cannot meet. But the past is essentially irrelevant to the standard for granting an adverse abandonment application, which requires a finding that the present and future public convenience and necessity require or permit abandonment, 49 U.S.C. § 10903(d).

V. Citizens' Oral Hearing Request Should Be Denied

Citizens requests an "oral hearing before the Board", but offers no explanation of why such a hearing would be necessary or even useful (Citizens, p ix). UP believes that an oral hearing to address arguments the Board already

⁶ As noted in the Board's June 22 Decision, there were actually two entities which submitted offers for the Creede Line, D&RGHF and Rio Grande & San Juan Railroad ("RGSJ"). UP did not even have an opportunity to see RGSJ's "financial responsibility" information before the Board accepted the RGSJ OFA, since RGSJ submitted all of this information under seal, and did not provide it to UP.

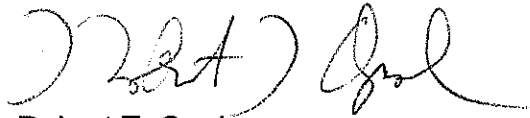
addressed in depth in its June 22 decision would be particularly pointless. For that matter, there is no reason the Board should even consider these arguments again.

CONCLUSION

For the reasons stated above, the Board should summarily deny Citizens' Petition to Reopen.

Respectfully submitted,

UNION PACIFIC RAILROAD COMPANY

A handwritten signature in black ink, appearing to read "R. T. Opal", is written over the company name.

Robert T. Opal
General Commerce Counsel
1400 Douglas Street, Stop 1580
Omaha, Nebraska 68179
(402) 544-3072
(402) 501-0132 (FAX)

CERTIFICATE OF SERVICE

I certify that I have this date served a copy of the foregoing document
upon the persons shown below. Service was made U.S. mail, postage prepaid.

Ronald M Johnson
Heidi Ginst
Akin, Gumo, Strauss, Hauer & Feld, L.L.P.
1333 New Hampshire Avenue, N.W.
Washington D.C. 20036

Thomas McFarland
208 South LaSalle
Suite 1890
Chicago, IL 60604-1112

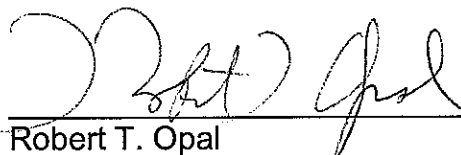
Karl Morrell
Ball Janik, L.L.P.
1455 F Street, N.W.
Suite 225
Washington, D.C. 20005

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

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

Martin O'Grady
Colorado Dept. of Public Health & Environment
4300 Cherry Drive South
Denver, CO 8022-1530

Dated at Omaha, Nebraska this 16th day of December, 2004.


Robert T. Opal