

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

ORIGINAL

209532

THOMAS F. MCFARLAND

December 3, 2003

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

ENTERED  
Office of Proceedings

4 2 03

Part of  
Public Record

RECEIVED  
DEC 4 2003  
MAIL  
MANAGEMENT  
STB

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

Dear Mr. Williams:

Hereby transmitted for filing with the Board in the above proceeding are the original and 10 copies of a letter dated December 1, 2003 from George M. Allen, Esq., Attorney for the City of Creede, Colorado (the City) in the above proceeding, to the undersigned and another attorney for Denver & Rio Grande Railway Historical Foundation (the Foundation), and to Robert T. Opal, Esq., attorney for Union Pacific Railroad Company (UP).

I am bringing Mr. Allen's letter to the attention of the Board because in my view it constitutes an attempt by Mr. Allen to obstruct the Board's investigation into the City's Petition to Reopen the Board's decision in this proceeding served May 11, 1999,<sup>1</sup> and to corruptly influence UP and its attorney during that investigation, all in violation of 49 C.F.R. § 1103.25(b).

Mr. Allen's letter is outrageous and manifestly improper. It is openly designed to intimidate UP and its attorney from filing evidence and argument bearing on the issues involved in the Board's investigation of the City's Petition to Reopen. It contains the following blatant threat against UP and its counsel (Letter dated Dec. 1, 2003 at 4):

Could Union Pacific find itself defending a RICO case or a COCCA case if it is found to have acted in concert with Mr. Shank and the Foundation in trafficking in OFA rights based on fraudulent financial submissions going through

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<sup>1</sup> The City's pleading that is being treated as a Petition to Reopen was filed on October 14, 2003. Replies to the Petition are due on December 19, 2003.

THOMAS F. MCFARLAND

Vernon A. Williams  
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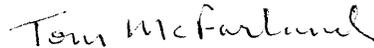
the mails, by facsimile, by email or by interstate telephone? Yes. Could attorneys involved in such schemes find themselves defending such litigation brought against them in their personal capacities? Yes.

The threat extends to the attorneys for the Foundation as well, viz. (*id.*):

. . . And we want every lawyer to be on notice that he and his client may have their further submissions subject to scrutiny in other proceedings, including in potential civil litigation involving the damages which have been caused by the factual misrepresentations already made and still subject to civil suit . . .

There is no place in Board proceedings for threats and attempted coercion of that nature. The Board is requested to admonish Mr. Allen in the strongest terms to refrain from such practices in any future appearances before the Board.

Very truly yours,



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

*TMcF:kl:wp11\957\trstb5*

cc: George M. Allen, Esq.  
Robert T. Opal, Esq.  
Raymond Micklewright, Esq.  
Mr. Donald H. Shank

LAW OFFICES  
**GEORGE M. ALLEN \***

*For*  
*957*

206 SOCIETY DRIVE, SUITE A  
TELLURIDE, COLORADO 81435  
TELEPHONE: 970-369-1000  
FACSIMILE: 970-369-1009  
CELLULAR: 970-260-3895  
EMAIL: [alnoma@yahoo.com](mailto:alnoma@yahoo.com)

2202 S. MOUNTAIN VISTA LANE  
PROVO, UTAH 84606  
TELEPHONE: 801-375-7486  
FACSIMILE: 801-375-8399

\* ADMITTED TO PRACTICE IN  
COLORADO, UTAH AND HAWAII

Telluride  
December 1, 2003

Raymond P. Micklewright, Esq.  
WOLF & SLATKIN  
44 Cook Street,  
Suite 1000  
Denver CO 80206-5827  
Telephone: 303-355-2999  
Facsimile: 303-329-6826

Thomas F. McFarland, Esq.  
208 South LaSalle Street, Ste. 1890  
Chicago IL 60604  
Telephone: 312-236-0204  
Facsimile: 312-201-9695  
Email: [mcfarland@aol.com](mailto:mcfarland@aol.com)

Robert T. Opal, Esq.  
Law Department  
Union Pacific Railroad  
1416 Dodge Street, Room 830  
Omaha NE 68179-0001

Re: STB Docket No. AB 33 (SUB-NO. 132X)

Gentlemen:

This transmits a copy of the filing and transmittal correspondence being made today in the Surface Transportation Board by the City of Creede.

Messrs. Micklewright, McFarland and Opal  
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The tone of the correspondence I have received from Robert Opal and the tone of the filing Mr. Opal has already made in the Surface Transportation Board, as well as the tone and tenor of filings which have been made by Messrs. Micklewright and McFarland on behalf of Donald Shank and the Foundation which is Mr. Shank's alter-ego have raised substantial concern on my part and on the part of the officers of the City of Creede as to the nature of what will soon be filed with the STB by attorneys for Mr. Shank, the Foundation and/or the Union Pacific with regard to the issue of misrepresentations of fact made by Mr. Shank and the Foundation in obtaining OFA rights to the Creede Branch.

Mr. Opal's November 26, 2003 letter to me stated his position that Creede would not be able to file additional materials with the STB beyond its October 14, 2003 filing. Doubtless Messrs. McFarland and Micklewright have the same view. That view apparently flows from your shared belief that the only issues which may arise (and the only proceeding which may lie ahead) involve what may or may not be done by the STB regarding the OFA rights obtained by the Foundation in 1999 and 2000.

The purpose of this letter (apart from transmitting courtesy copies of our filing made today) is to give each of you the clearest possible warning against steps you may be about to take to somehow spin the facts to avoid the inevitable conclusions to be drawn from Mr. Shank's past blatant factual misrepresentations to the Board, to the citizens and public officials and law enforcement personnel of Rio Grande and Mineral Counties and throughout Southern Colorado, to the media, to the Colorado Department of Transportation, on the Internet and elsewhere.

In that context, we draw your attention to Mr. Shank's 2002 grant application to the Colorado Department of Transportation, in which he represented to that body that the Foundation has \$2 million in matching funds in a savings account to match the more than \$8 million he requested from CDOT for rehabilitation of the Creede Branch right of way (Record, pages 404-412). We view that particular bit of hyperbole as evidence that Mr. Shank's proclivity for submission of flagrantly false financial information did not come to an end with his submissions to the STB in 1999 and 2000 and more than sufficient to establish that he has been engaged in a pattern and practice of racketeering activity within the meaning of the RICO statute.

We realize that Messrs. McFarland and Micklewright want to somehow save Mr. Shank's Foundation's OFA rights, past financial misrepresentations notwithstanding, and to somehow spin the facts so as to explain away the true financial circumstances of both Mr. Shank and his Foundation. We realize that Mr. Opal wants to avoid the embarrassment and complications of Union Pacific having to cope with rescission of the OFA rights. We realize that the three addressees of this letter therefore have a community of interest in somehow coming up with an alternative factual presentation to explain away Mr. Shank having claimed to have assets he did not own (and never owned, and stated under oath in California that he did not own) and of Mr. Shank having

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claimed financial capability on the part of the Foundation which it never had and never will have.

Before any of you takes any step to be involved in a submission in the Surface Transportation the Board (or any other forum or to any other tribunal) of purported factual claims which constitute further factual misrepresentations, or, for that matter, republication of prior factual misrepresentations, you should be aware with all possible clarity regarding the potential for any such submission leading to adverse proceedings for any lawyer or party involved in such an undertaking. Toward that end, you should know the following:

On March 26, 2002, while in Los Angeles, Creede Mayor B.J. Myers and I inspected for the first time the public record in Los Angeles Superior Court Case BD-332896, the Shank divorce. That date is therefore the discovery date, within the meaning of the applicable three year Colorado statute of limitations, C.R.S. §13-80-108(3), as to our knowledge that Mr. Shank falsified his personal financial statement to the STB to gain the OFA rights.

I advised Mayor Myers, after our discovery of the court file in the Shank divorce case (in which Mr. Shank stated under oath that he *never* owned any interest in the Agoura Hills, California property claimed by him as a personal asset of \$495,000 equity value in his 1999 financial representations to the STB), that claims probably existed against Mr. Shank and the Foundation for damages for fraud and that civil rights to maintain actions to seek such damages exist under both federal law (specifically, the federal wire fraud and mail fraud statutes, 18 U.S.C. §§1341 and 1343, the Hobbs Act, 18 U.S.C. §1951 and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§1961, *et seq.*), as well as under comparable Colorado state statutes, including the state extortion statute, C.R.S. §18-3-207, and the Colorado Organized Crime Control Act (COCCA), 18 C.R.S. §§ 18-17-101, *et seq.*

Since that time we have had discussions regarding the very substantial financial damage done to the businesses and citizens of Creede by the Foundation having obtained and exercised OFA prerogatives (including the outrageous attempts to collect rents). The reason that no civil action has been brought to date for the very substantial damages arising from Mr. Shank's misconduct probably has as much to do with the lack of a judgment-capable potential defendant as anything else. The investigation conducted before I was retained indicated Mr. Shank had a long history of failure to meet financial obligations, including collection suits by credit card issuers. Our communications with his former wife's legal counsel indicated that he had not made child support payments. In short, he was someone against whom a RICO or COCCA judgment would probably be unable to be collected.

If, however, any other party, whether that be an attorney or a corporation, is found to be complicit with, or in conspiracy with, Mr. Shank in his undertakings to maintain OFA rights notwithstanding his past financial misrepresentations, each of you should be aware that there are numerous persons who have suffered very great financial damage arising from the cloud placed on

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their businesses' real estate marketability and business opportunity in Creede and Mineral County arising from the undertakings by Mr. Shank and those acting in concert with him.

To put it as bluntly as I can: Could Union Pacific find itself defending a RICO case or a COCCA case if it is found to have acted in concert with Mr. Shank and the Foundation in trafficking in OFA rights based on fraudulent financial submissions going through the mails, by facsimile, by email or by interstate telephone? Yes. Could attorneys involved in such schemes find themselves defending such litigation brought against them in their personal capacities? Yes. Could any such party assume that any such communications would be found to be privileged and not actionable? Possibly. But this writer's experience in having been winning counsel both in the District Court and in appellate proceedings in Colorado's leading case on such claims of privilege, *MacLarty v. Whiteford*, 30 Colo. App. 378; 496 P.2d 1071 (Colo. App. 1972), leaves me reluctant to say that one can assume that all filings made in all circumstances are absolutely privileged.

✓ We do not, by the sending of this letter, mean to inhibit or intimidate any lawyer from making good faith arguments, if such arguments can be made, regarding the OFA rights of the Foundation. But we want every lawyer involved in this litigation to be on notice that the City of Creede and this attorney, as its counsel, views with the utmost gravity the submissions which have been made to date by Mr. Shank and will scrutinize all future submissions. And we also want every lawyer to be on notice that he and his client may have their further submissions subject to scrutiny in other proceedings, including in potential civil litigation involving the damages which have been caused by the factual misrepresentations already made and still subject to civil suit. The fact the STB saw fit to convert the present case into a proceeding to consider rescission of the Foundation's OFA rights, notwithstanding acknowledged procedural flaws in our October 14, 2003 filing, speaks volumes as to the seriousness with which the Board and its staff view this matter.

Yours very truly,



George M. Allen

Enclosure

cc: Hon. B. J. Myers,  
Mayor, City of Creede

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