

BEFORE THE SURFACE TRANSPORTATION BOARD
OF THE UNITED STATES

210049

UNION PACIFIC RAILROAD
COMPANY - ABANDONMENT
EXEMPTION - IN RIO GRANDE
AND MINERAL COUNTIES, CO

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DOCKET NO. AB-33
(SUB-NO. 132X)

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LIMITED REBUTTAL STATEMENT OF CITY OF CREEDE

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The City of Creede, by its counsel, George M. Allen, submits the following Limited Rebuttal Statement.

1. **There Is Persuasive Evidence That the Foundation Is and Has Been Financially Incapable of Operating Rail Service.**

At page 8 of the Foundation's January 20, 2004 Reply, the Foundation's legal counsel, Mr. McFarland, writes:

Where an offereor is found to be financially capable of paying the purchase price for the line, its capability to conduct operations for 2 years is presumed in the absence of persuasive evidence to the contrary.

The above sentence is a fairly dazzling display on the part of the Foundation of setting forth a statement law which is beyond challenge as a legal proposition, but absolutely, totally and completely inapplicable to the facts of this case.

In this case there is not only persuasive evidence, there is totally and completely irrefutable evidence that the Foundation is both incapable of paying the purchase price *and* incapable of conducting operations for two years.

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The Union Pacific has made a submission in which it has admitted that the purchase price has not been paid, even though nearly five years have gone by since the 1999 OFA Award and Union Pacific has further informed the Board that Union Pacific has extended the due date for receipt of payment out to a date in 2005, approximately six years after the original OFA Award. Other than wishful thinking on the part of Union Pacific, there is nothing in the record of this matter to give any indication the Foundation will *ever* be able to complete payment of the purchase price.

Furthermore, two years have long since passed after the date when the OFA Award was conclusively ordered (May 2000). In that time nothing remotely resembling operation of rail service has taken place. Furthermore, in the District Court litigation which led to referral of this matter to the Board, a voluminous record was compiled of newly discovered evidence, all of which established that the Foundation *never* had the capability to rehabilitate the line and operate rail service.

2. The Claim That Donald Shank Has Contributed Over \$506,000 To The Foundation Is Unfounded.

The Foundation's Reply, signed by its counsel, Mr. McFarland, claims Donald Shank, "has actually made contributions to the Foundation in an amount considerably greater than the amount of his pledge, i.e., contributions totaling \$506,028, compared to the pledge of \$400,000 (VS Shank at 2, Appdx. DHS-3)."

Mr. Shank's 4 page statement under oath, notarized on January 15, 2004, contains the following claim by Mr. Shank, *under oath*:

"Attached to my Statement as Appendix DHS-3 is a copy of a statement of contributions

made by me to the Foundation, as compiled by the Foundation's bookkeeper, Rosemary Beckwith & Associates, 359 Main Street, Suite 3, Grand Junction CO 81501, (970) 263-4118. The statement of contributions shows that I have contributed a total of \$506,028 to the Foundation as of the end of 2002."

The undersigned, as indicated by my attached Declaration, followed up on the invitation of Ms. Ransford, in Appendix DHS-3 to the Shank Verified Statement. Ms. Ransford had written, in her notarized December 11, 2003 To Whom It May Concern statement, attached by Mr. Shank to his January 15, 2004 Verified Statement (which was, in turn, attached by Mr. McFarland to the Foundation's January 20, 2004 STB Reply), "If you need further information, please call."

This writer took her up on that offer on February 4 and 5, 2004 and called. That call produced Ms. Ransford's statement to me that she had actually discussed the claimed \$506,028 figure with both Mr. Shank and Chicago attorney McFarland after she drafted the December 11, 2003 statement.

Ms. Ransford said she told Mr. McFarland by telephone that the \$506,028 figure was actually wrong by \$250,000, because she had mistakenly included in it a donation to the Foundation by an anonymous third party of \$260,000, made in 1999. Thus the figure credited to Mr. Shank for donations in 1999 of \$265,479 should have actually been \$15,479 and the total for the year ending 2002 should have been \$256,028, not \$506,028.

Ms. Ransford further explained, when I spoke to her on February 4, 2004, that *she faxed Mr. McFarland on December 11, 2003 [the same day as her two-page bookkeeping report attached by Messrs. Shank and McFarland to the January 20, 2004 STB Reply] and explained that the*

December 11, 2003 report was wrong by half – that, is, was wrong by a quarter of a million dollars.¹

Attachment DHS-3 is a two page statement from Mr. Shank's accountant, Denise Ransford of Mesa, Colorado.

3. Can You Believe Donald Shank Told The Colorado Department Of Transportation The Foundation Had A \$2,259,078 Savings Account?

Well, he did. Also attached to the Declaration of this writer is a copy of material obtained in a Colorado Open Records Law Request. Much of that material (in which Mr. Shank put the cost of rehabilitation of the Creede Branch at over \$10 million) (Record of District Court proceedings, STB filed on October 14, 2003, pages 404-414) has already been filed with the Board.

¹ Receipt of this information from Ms. Ransford created in inevitable sense of *deja vu* for this lawyer. I had exactly the same reaction as the one I had when the file of Mr. Shank's divorce was produced to me in the records room of the Los Angeles, California Superior Court Clerk's Office, in downtown Los Angeles, and it turned out that in his California divorce documents, Mr. Shank had signed a statement under oath that he had never had any interest in the \$495,000 Agoura Hills, California house, owned by his former wife as separate pre-marital property, but nevertheless listed by Mr. Shank as a personal asset on the Financial Statement he gave to the STB to support his claim the Foundation had the means to purchase, rehabilitate and operate the Creede Branch right of way at issue in this proceeding. Whether the misrepresentation is a half million dollars, as it was to the STB in 1999 in his Financial Statement regarding the California house, or a quarter of a million dollars, as with his most recent claim of contributions to his Foundation, Mr. Shank (and his lawyer) seem utterly unconcerned by the magnitude and scale of attempted deception and quite oblivious to the inevitability of being discovered.

The Board will recall that Mr. McFarland took umbrage and reacted with outrage when this lawyer cautioned him against submission of fraudulent or perjured factual materials on behalf of Mr. Shank. Now we have in front of us a \$250,000 misrepresentation which was corrected the day it was made by the bookkeeper, on December 11, 2003, but felicitously left uncorrected in the filing with the Board, apparently in the hope no one would ever call the bookkeeper, notwithstanding her invitation to do just that. Then it was used as the platform from which to mount a claim, by both Mr. Shank and Mr. McFarland that Shank had discharged his personal guaranty to the Foundation, when in fact, no such thing has happened.

In making the October 14, 2003 filing, we missed inclusion of the remarkable claim that the Foundation had a \$2.25 million + savings account circa November, 2001 through June, 2002.

Did the Foundation have such an account? Did it have that account notwithstanding having been in default with Union Pacific on its purchase obligation? Did it have that account notwithstanding its repeated claims that it was financially harmed by this litigation and that constituted a reason for not resuming rail service.

We frankly do not know the answer to any of those questions.

What we do know is that Mr. Shank, grandiose claims to the contrary notwithstanding, had a long record of not making payments on credit card bills, of not discharging personal obligations, such as child support, and of litigation disputes with those with whom he had business dealings.

He made submissions to the STB to get the Creede Branch which, when we were able to invoke the discovery processes of the federal court we found to be utterly and completely false. The pattern of submission of false information, whether to this Board, to his own accountants, to the federal court or to others appears not to have stopped, *viz.*, the \$250,000 misrepresentation made by both Mr. Shank and his lawyer, Mr. McFarland, regarding Mr. Shank's contributions to the Foundation.

4. There Is No Shipper Driven Potential Revenue Stream To Operate The Line.

The most recent submission by the Foundation claims there may be several carloads per year of freight shipments. The submission to CDOT (October 14, 2003 Record, pages 405-414) details a rehabilitation cost of at least \$10 million. Research by Creede Mayor Myers indicates that the magnesium chloride shipper itself ships in the mag chlor for Mineral County's roads and itself

applies the mag-chor to the roads and would have no means of storage for that material other than to park rail cars in the middle of Creede. No facility presently exists to do any of that. No facility will exist unless multi millions of dollars are spent to replace or rehabilitate the six century old bridges over the Rio Grande River and restore the 21 miles of right of way with all new roadbed, ballast, track and ties. In over three years of litigation the Foundation has come up with only a few thousand dollars worth of dubious claimed shipper demand. That is far short of anything remotely resembling a revenue stream sufficient to operate the Branch.

Conclusion

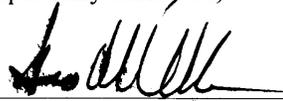
We understand the adjacent landowners will move to strike much of the most recent Foundation filing due to lack of verification. As demonstrated above, it makes little difference to Mr. Shank whether he is under oath or not. His most recent submission contains a quarter million dollar misrepresentation which *is* under oath and went uncorrected by either him or his lawyer, both of whom were happy to repeat it even though his bookkeeper herself had corrected it in writing to Mr. McFarland.

We respectfully submit that the Board has no choice, given the flagrant and repeated fraudulent financial misrepresentations, other than to revoke the award of OFA rights to the Foundation.

When that comes to pass, Creede has never had an unwillingness to have rail service if there is a need and a responsible ability to provide that service. Creede has objected to a tourist train, but that is not what the Board awarded to the Foundation.

[Signature Block on Following Page]

Respectfully submitted,

A handwritten signature in black ink, appearing to read "G. M. Allen", written over a horizontal line.

GEORGE M. ALLEN
Counsel for City of Creede

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DECLARATION OF GEORGE M. ALLEN UNDER PENALTY OF PERJURY

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George M. Allen hereby declares, under penalty of perjury:

1. Attached hereto as Exhibit A is a true copy of material sent to me by facsimile by Denise Ransford, bookkeeper for Donald Shank, on February 5, 2004.
2. Ms. Ransford stated to me on both February 4, 2004 and February 5, 2004, in my telephone conversations with her, that she told Thomas McFarland by telephone that her initial statement of Mr. Shank's contributions was wrong by \$250,000 because she had mistakenly included a \$250,000 contribution to the Foundation by an anonymous third party contributor other than Mr. Shank.
3. Attached as Exhibit B are two pages from materials submitted to the Colorado Department of Transportation by Mr. Shank and the Foundation. Those were part of the same submission contained in the District Court Record filed by Creede on October 14, 2003 at pages 404-414.
4. Mayor B.J. Myers of Creede has informed me that she has contacted the prospective magnesium chloride shipper identified by Mr. Shank and the Foundation. That shipper now trucks mag chor to Mineral County and itself applies the material to the roads. There would be no consequential saving from use of rail shipping into Creede and if that were done the rail cars would have to remain in Creede on an indefinite basis. Creede at present has no rail car storage facility and never has had such a facility.

[Signature Block on Following Page]

The above statements are true and are affirmed by the undersigned under penalties prescribed by 18 U.S.C. §1001.

A handwritten signature in black ink, appearing to read "George M. Allen", written over a horizontal line.

George M. Allen

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**ROSEMARY
BECKWITH
& ASSOCIATES, P. C.**
Certified Public Accountants

359 Main Street, Suite 3
Grand Junction, CO 81501
PHONE: 263-4118
FAX: 263-4117

Fax

To: Tom McFarland From: Denise

Fax: _____ Pages: 2 includes cover

Phone: _____ Date: 11/15/03 3/20/03 12/11/03

Re: _____ CC: _____

- Urgent For Review Please Comment Please Reply Please Recycle

• Comments:

Tom -

This is what Don requested
I send to you. IF you need
further info call 970-261-0274

Denise

let me know if you need further changes.
Denise

Exhibit A, P. 1

**DJ's Bookkeeping Service
P.O. Box 342
Mesa, CO 81643
(970) 261-0274**

December 16, 2003

Tom:

I received a phone call from Don Shank - there are some errors in the wording that need to be addressed.

1) I am a privately owed company and the company name is:

DJ's Bookkeeping Service, PO Box 342, Mesa, Colorado 81643

Phone # (970) 261 0274

Owner & operator is : Denise L. Ransford

I work for Rosemary Beckwith & Associates, however Don Shank is not their client.

2) Regarding the \$350,000 donation - included in this figure is a private donation of \$250,000 from another source. Don reminded me of this and that he has a deposition that addresses this source of funds.

Let me know if you need anything else.


Denise Ransford

Exhibit A,
P. 2

ATTACHMENT F
Budget and Implementation Schedule

See attached Project budget breakout. The estimates of funding come from the Denver & Rio Grande Historic Foundation Master Plan developed by Foundation Board in Durango, Colorado. The D&RG matching funds have been set-aside in a savings account and are available now to complete these projects. The contracted consulting to construct these projects is included in the estimates from the above-mentioned plan. The completed project will "stand on its own" once all the sections of the project are completed. It is expected to be an economically viable enterprise without the need for additional assistance, once the infrastructure is restored.

Exhibit B,
Page 1

ATTACHMENT F

Denver & Rio Grande Railway Historical Foundation
Master Plan Projects
Budget

<u>Project Description</u>	<u>Total Project Costs</u>	<u>CDOT Funds Requested</u>	<u>D&RG Matching Funds</u>	<u>Estimated Implementation Schedule (in Weeks)*</u>
Project # 1 Restore the Track between South Fork and Creede	\$8,094,240.00	\$6,475,392.00	\$1,618,848.00	58
Project # 2 Restore the bridges between South Fork and Creede	\$2,025,600.00	\$1,000,000.00	\$415,100.00	76
Project # 3 Construct a Railway Maintenance Facility	\$125,650.00	\$100,520.00	\$25,130.00	36
Project # 4 Acquire right-of-way between South Fork and Monte Vista	\$1,000,000.00	\$800,000.00	\$200,000.00	24
Totals	\$11,295,390.00	\$9,036,312.00	\$2,259,078.00	

Exhibit B
P. 2

CERTIFICATE OF SERVICE

I hereby certify that I have, at Telluride, Colorado this 7th day of February, 2004, served a true copy of the documents denominated below on the parties and/or counsel listed below by the means of service shown below:

Documents Served

**MOTION FOR LEAVE TO FILE LIMITED REBUTTAL STATEMENT;
LIMITED REBUTTAL STATEMENT OF CITY OF CREEDE**

Means of Service

- U.S. Mail, Postage Prepaid
- Overnight Courier
- Hand Delivery
- Facsimile
- Email

Agencies, Persons and/or Counsel Served

Hon. Vernon Williams, Secretary
Surface Transportation Board
1925 K Street, N.W.
Suite 700
Washington DC 20423-0001

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

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Ball Janik, LLP
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Washington DC 20005
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Facsimile: 202-783-6947
Counsel for Adjacent Landowners

Hon. B. J. Myers
Mayor
City of Creede
P.O. Box 457
Creede CO 81130
Telephone: 719-658-2276
Facsimile: 719-658-2017
cityofcreede@amigo.net



George M. Allen

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