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* ADMITTED TO PRACTICE IN
COLORADO, UTAH AND HAWAII

Telluride

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

210668

ENTERED
Office of Proceedings

APR 23 2004

Part of
Public Record

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

Dear Secretary Williams:

This transmits an original and ten copies of a Motion to Strike All Filings Made in this Proceeding by Respondent Denver & Rio Grande Railway Historical Foundation. This Motion is responsive to the filings made by the Respondent Foundation on March 1, 2004 and March 24, 2004.

Thank you for your attention to this matter.

Yours very truly,

A handwritten signature in cursive script, appearing to read "Geo M. Allen".

George M. Allen

cc: Thos. McFarland, Esq.
Robert T. Opal, Esq.
Raymond P. Micklewright, Esq.
Karl Morell, Esq.
Hon. B. J. Myers, Mayor of Creede

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BEFORE THE SURFACE TRANSPORTATION BOARD
OF THE UNITED STATES

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

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



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MOTION TO STRIKE ALL FILINGS MADE IN THIS PROCEEDING
BY RESPONDENT DENVER & RIO GRANDE RAILWAY
HISTORICAL FOUNDATION

ENTERED
Office of Proceedings

APR 23 2004

Part of
Public Record

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Petitioner, City of Creede, by its attorney, George M. Allen, hereby moves that there be struck from the record of this proceeding all filings made by the Respondent Denver & Rio Grande Railway Historical Foundation. This Motion is based on the Board's complete files and records in this proceedings, and is particularly based on the attachments to the Declaration of George M. Allen Under Penalty of Perjury filed herewith. The attachments to the Declaration consist of recent email correspondence in further material factual representations made under oath to this Board by the Foundation's President Donald Shank are conclusively established to be not only false, but intentionally and knowingly false.

Discussion

1. **The February 12, 2004 "Response to Opposition's Motion for Leave to File Limited Rebuttal Statement" (Filed with the Board on March 1, 2004 by the Foundation) Contains Further Falsifications of Material Facts, Demonstrating a Pattern and Practice on the Part of the Foundation and its President, Mr. Shank, to Attempt to Deliberately and Intentionally Create a False and Fraudulent Record in These Proceedings.**

At page 2 of the Donald Shank "Response to Opposition's Motion for Leave to File Limited Rebuttal Statement," Mr. Shank writes (or there has been written for Mr. Shank by another person):

1. The documents provided to CDOT [the Colorado Department of Transportation] were prepared by Mr. Terrance [sic] (Terry) Whelan, City Manager of and for the Town of South Fork, Colorado.
2. The figures reflected in those documents were derived by Mr. Whelan, not the Foundation.
3. Mr. Whelan had previously been successful in securing grant funding through this Enhancement Program for projects benefitting the Town of South Fork.
4. The Town of South Fork was acting as our sponsor.
5. I had only a few minutes to review what Mr. Whelan had prepared before I signed them in haste and rushed to the CDOT offices to meet the submission deadline. I also received a speeding ticket during that haste. The ticket is also a matter of record.
6. I questioned the dollar amount requested on those documents. Mr. Whelan replied, 'Let's see what we can get. Maybe they'll fund one of them.'
7. I questioned the matching funds requirement, reflected in the documents as a \$2.2 million savings account. Terry replied, 'if we get one of the grants, we'll find a donor for the matching funds. There are lots of private foundations that might help if we show we have this large grant.' For the record, the Foundation has never had a savings account with \$2.2 million in it.
8. I signed the forms. Do I regret doing so? Absolutely.
9. I withdrew from the Enhancement Program soon thereafter.
10. During 2002, Terry Whelan provided the Foundation with a letter [attached to this as Exhibit 1] written by him stating that he had prepared everything, including the compilation of figures and was responsible for any problems they created. Of course, once again, regrettably, I signed them.

The emailed communication to the undersigned from Mr. Whelan (dated April 17, 2004) and from South Fork, Colorado Town Attorney Frank Gallegos (dated April 19, 2004) demonstrate the falsity of the above claims by Donald Shank. We quote items 6 and 7 of Mr. Whelan's April 17, 2004 email to the undersigned (attached at page 1 of Exhibit A to the Allen Declaration filed

herewith):

6.) I do not know nor have I ever known what the financial condition of Mr. Shank's Foundation is. I do not have access to the financial reports of this Foundation. I do not know what funds are in the bank for this Foundation. I did not see then, nor have I seen to this date a copy of the submission that Mr. Shank made to CDOT. I sent him the completed grant request information and his organization put together the request itself. This would have included a copy of their financials since that was a requirement of the grant application.

7.) Since I did not know the Foundations financial situation I did not advise him on what to say or disclose in his application to CDOT as far as the Foundations financial position was concerned. I did not know until I received your e-mail that this was a cause of dispute.

We quote from Mr. Gallegos' April 19 email to the undersigned (Declaration Exhibit B), establishing that the Town of South Fork was not a sponsor of Mr. Shank's railroad undertaking:

*** [o]n Wednesday April 14, 2004, the South fork Board of Trustees met in a working session and I reviewed with them the situation respecting Mr. Whelan's CDOT application in June 2002. The Board concurs that any activity Mr. Whelan performed on the grant was without authority or direction of the Town and its Trustees. That at all times and all actions related thereto, he was not acting within the scope of his duties on behalf of the Town. I have further been instructed to draft a resolution memorializing the Board's position on this issue for approval at it next public meeting, which may not be accomplished until May.

The above point – that the Town of South Fork was not a sponsor (as claimed by Mr. Shank in item 4 of his March 1, 2004 submission to this Board) – is corroborated by Mr. Whelan himself:

1.) I did indeed prepare the grant requests for the Denver and Rio Grande Railway Association Historical Foundation. I did this on my home computer at night so as not to interfere with my duties as Town Manager.

2. The above Pattern of Lying and Deception Is a Continuation of a Pattern and Practice of Fraudulent Submissions to the Surface Transportation Board by the Foundation and Donald Shank.

The record of this proceeding is shot through with lie after lie after lie by the Foundation and

Donald Shank, going right back to the original financial representations submitted to obtain OFA rights. Mr. Shank lied then about assets claimed to be owned by the Foundation and himself. Gifts listed by the Foundation in its financial statements had not been received, were not obligated to be given by any documentation and were not in the possession of the Foundation. A half-million-dollar piece of California real estate claimed as an unencumbered personal asset of Mr. Shank was actually his ex-wife's house, as to which he had signed a sworn statement in his California divorce (commenced within 60 days of filing of his financials with this Board) that he *never* had any ownership or interest.

Mr. Shank submitted a fraudulent claim to this Board regarding a claimed \$250,000 cash contribution. Only after we tracked down his bookkeeper and obtained information from her did he admit that it was another person, and not he, who had made the \$250,000 contribution used for most of the purchase price from the Union Pacific.

The record of this matter before this Board is pathetic. The true facts are clear. Donald Shank was in financial distress when he obtained OFA rights, with suits and claims against him on his credit cards and with a history which he has admitted to the Board of non-payment of child support. He was not a multi-millionaire businessman able to guaranty the Foundation's responsibility to rehabilitate and restore rail service on a defunct and dilapidated 20 mile stretch of high mountain rail line which had been out of service for decades. He was at best a model railroad

buff¹ with delusions of grandeur, unable to discern the difference between model railroading and real railroading.

But while Mr. Shank's notions of railroading do not extend beyond HO gauge, the damage he has done is real and substantial. As Chief Judge Babcock of the federal court in Denver recognized, the Foundation's and Mr. Shank's activities in pretending to be railroaders had disrupted law enforcement and commerce in Creede and Mineral County. The record of these proceedings is replete with extensive evidence of the disruptions caused by Mr. Shank.

The regulations governing these proceedings provide clearly that it is unlawful to obstruct Board investigations. 49 C.F.R. 1103.25(b). While the §25(b) prohibition against obstruction of investigation by the Board is couched in terms of conduct of practitioners, the underlying purpose of §25(b) of the Board's procedural rules is manifest: it is to insure that the Board's factual records are accurate and that reliance can be placed upon those records.

The conduct of Donald Shank and the Foundation throughout the dealings of Mr. Shank and his Foundation have been consistent, going right back to the 1999. That is a pattern of willfully submitting false information to the Board. The longer the proceedings go on, the more false information is forthcoming from Mr. Shank. The falsifications cannot be characterized as incidental or minimal. They have involved claims of nonexistent assets and donations running into hundreds of thousands of dollars. The false representation of a claimed savings account to the Colorado

¹ *The Board will recall that claimed donations to the Foundation running into six figures — donations which had never been received as Mr. Shank admitted in his August 1, 2001 deposition — were Lionel model trains.*

Department of Transportation was a lie of a magnitude of over \$2 million. Mr. Shank's recent attempt to lay off responsibility for that lie is refuted by Mr. Shank's own source, former South Fork Town Manager Whelan.

Because the misrepresentations of facts to this Board are substantial, material and ongoing, there is no way that any further submissions by Donald Shank and the Foundation can be relied on any more than his original submissions associated with obtaining OFA rights can be relief upon.

Conclusion

Donald Shank has a relationship to the truth analogous to the relationship between dogs and lampposts. Nothing he says or writes can be relied upon. This writer cannot comprehend why his distinguished Chicago attorney, Mr. McFarland, files his falsifications with the Board. Surely the obligations of the Rules of Procedure of the Board must require some inquiry by counsel into the veracity of factual representations, particularly after there is a record of repeated falsification of finances. But be that as it may, if Mr. McFarland is unwilling to filter out the lies, there is no way to insure the integrity of the record other than to strike the falsifications. The entirety of the factual record submitted to the Board by the Respondent Foundation and its President, Mr. Shank, is so unreliable, and so demonstrably fabricated, that the only appropriate action is to strike it from the record and to determine this matter based solely on the submissions of the Petitioner City of Creede, the adjoining landowners and the Union Pacific.

[signature block on following page]

Respectfully submitted,

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

GEORGE M. ALLEN

Counsel for City of Creede

**BEFORE THE SURFACE TRANSPORTATION BOARD
OF THE UNITED STATES**

**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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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 are true copies, reprinted from archival storage on the Yahoo Mail website, of an exchange of email correspondence between the undersigned and former South Fork, Colorado Town Manager Terrence Whelan dated April 14, 2004 (Exhibit A, pages 2-4, Allen to Whelan) and April 17, 2004 (Exhibit A, page 1, Whelan to Allen).
2. Attached as Exhibit B is a true copy, reprinted from archival storage on the Yahoo Mail website, of an email sent to the undersigned on April 19, 2004 by A. Frank Gallegos, the Town Attorney of South Fork, Colorado.
3. The above statements are true and are affirmed by the undersigned under penalties prescribed by 18 U.S.C. §1001.



George M. Allen



Print - Close Window

Date: Sat, 17 Apr 2004 08:03:42 -0700 (PDT)**From:** "Terry Whelan" <twwhelan9854@yahoo.com>**Subject:** Re: November 15, 2002 Whelan to Micklewright letter**To:** "George Allen" <alnoma@yahoo.com>

April 17, 2004

Mr. George M. Allen, Esq.

Telluride, Colorado

Dear Mr. Allen;

I am in receipt of your e-mail regarding a letter I sent to Mr. Micklewright in regard to my authorship of the grant requests made to the Colorado Department of Transportation for the Denver & Rio Grande Railway Historical Foundation. I do apologize for the difficulty you have had in contacting me, I was very unexpectedly dismissed from my job as Town Manager in South Fork, and as I had to quickly find employment I left the area, and have been traveling around the country looking for work. As such I do not have a phone or a permanent address, I do check on my e-mail by stopping off at local libraries around the country and using their facilities to make contact with others. I just returned to this area from Chicago on Thursday. So far my efforts have not produced any employment so I would anticipate I will be continuing to travel until I secure employment. I no longer have a phone, but I do have e-mail and have gotten into the habit of checking on that source of communication at regular intervals. I have also setup a temporary P.O. Box in Woodbridge to accommodate receipt of mail until I am more settled. My temporary address is P.O. Box 2578, Woodbridge, VA 22193.

In regard to your questions: 1.) I did indeed prepare the grant requests for the Denver and Rio Grande Railway Association Historical Foundation. I did this on my home computer at night so as not to interfere with my duties as Town Manager. However, I did it to assist the Town businesses, because I believed that the prospect of a railway tourist attraction would help the Town businesses much as it helped Durango. I did not believe that Mr. Shank had the same expertise I had in the preparation of CDOT grant requests, that is why I agreed to assist him with this task. 2.) I should explain that Mr. Shank contacted me and requested I resend the letter I had sent to his law firm in May, so I complied with his request and resent this to them in November. That is why the document you have has the separate dates. 3.) I do not now have, nor did I ever have any financial interest in Mr. Shank's venture, nor did I have any interest in becoming financially involved in his venture. My motive was to assist him so that his enterprise would enhance the business activity in South Fork and thereby help the Town. 4.) The grant requests to CDOT were broken out into a number of separate requests, perhaps 5 or 6, to be applied for in successive years as the CDOT Enhancement Funds became available. It was known that CDOT did not have funding to accomplish all of these tasks in a single grant request. I do not have the data with me here so I can't say specifically, but it was I believe, separated into 5 or 6 separate identifiable projects with the hope the funding would follow in successive years. It was however presented to CDOT as a total package so they would know what would be happening over that period of time. 5.) Mr. Shank and I did discuss the requirements for matching funds, naturally, we would have to do this to be able to apply. He talked about the possibility of generating matching funds from investors. He felt that there were persons in the San Luis Valley who might be interested in investing in the enterprise if they knew that funding would be provided by CDOT. I do not remember him talking about any specific investor, just types of investors in general. I did understand from these conversations that the Foundation did not have the matching funds for all of the requests at that time. I did not know how much they could afford in matching funds. But remember, the plan was to fund these projects as we were able to get funding from CDOT, not to fund them all at once. 6.) I do not know nor have I ever known what the financial condition of Mr. Shank's Foundation is. I do not have access to the financial reports of this Foundation. I do not know what funds are in the bank for this Foundation. I did not see then, nor have I seen to this date a copy of the submission that Mr. Shank made to CDOT. I sent him the completed grant request information and his organization put together the request itself. This would have included a copy of their financials since that was a requirement of the grant application. 7.) Since I did not know the Foundations financial situation I did not advise

http://us.f408.mail.yahoo.com/ym/ShowLetter?box=Inbox&MsgId=8041_31689990_5607... 4/22/2004

Exh. A

him on what to say or disclose in his application to CDOT as far as the Foundations financial position was concerned. I did not know until I received your e-mail that this was a cause of dispute.

I believe this addresses your questions; I am certainly willing to answer any other questions you may have about this grant request preparation. I cannot say when I might be back in Colorado, but I can be contacted via mail or e-mail if you want to contact me.

Sincerely,

Terrence W. Whelan

George Allen <alnoma@yahoo.com> wrote:

Telluride, Colorado
April 14, 2004

Terrance Whelan

Re: November 2002 Whelan to Micklewright letter

Dear Mr. Whelan:

Your email address and cell phone number were provided to me by the offices of the Town of South Fork, Colorado, where you previously served as Town Manager. You have not returned calls I placed to your cell phone number.

The Denver & Rio Grande Railway Historical Foundation and Donald Shank have filed your November 15, 2002 letter to Denver attorney Ray Micklewright with the Surface Transportation Board in the Board's Docket No. AB-33 (Sub-No. 132X), a proceeding in which the Board is considering revocation of rights previously awarded to the Foundation for operation of the former D&RGW right of way between Derrick, Colorado and Creede, Colorado. The Board reopened the Year 2000 award to the Foundation on the basis of submission by my client, the City of Creede, of evidence developed in federal court litigation that prior financial submissions to the Board by the Foundation and Mr. Shank contained substantial misrepresentations as to financial capability of the Foundation and Mr. Shank.

As you will recall, in your November 15, 2002 letter you take responsibility for preparation of a subsequently withdrawn grant application by the Foundation and Mr. Shank to the Colorado Department of Transportation for nearly \$10 million in state funds for the Foundation's railway "Master Plan."

The grant application, submitted to CDOT in June, 2002, contains a document which represents that the Foundation had a "savings account" with a balance of

more than \$2.2 million which was available for matching funds.

Mr. Shank has stated to the STB that you suggested to him that he make the representation regarding the savings account, with an expectation that if CDOT awarded the requested grant to the Foundation, that you and he would be able to find the matching funds from another source and thus, in effect, make good, the claim of having matching funds for the requested funding from CDOT.

I have been directed by Creede mayor B.J. Myers to provide materials regarding the CDOT application to law enforcement authorities in LaPlata County, Colorado, which is the venue where the CDOT application was submitted.

While your November 15, 2002 letter (which curiously bears fax transmission codes dated May 16, 2002) letter contains your statement of authorship of the CDOT grant request, it contains no corroborating statement as to whether you did nor did not advise Mr. Shank to represent to CDOT that the Foundation had more than \$2 million in a savings account. Mr. Shank has subsequently admitted to the STB that there was no such savings account.

I am now in the process of preparation of both a filing with the STB to address the issues arising from your November 15, 2002 letter and materials to go to LaPlata County authorities. In that regard, it would be most helpful to have your input as to whether you advised or participated with Mr. Shank in claiming in the CDOT grant application that the Foundation had a savings account with a \$2.2 million-plus positive balance as of the November, 2001-June, 2002 time period.

I would very much appreciate your reply as to what role, if any, you played with respect to the claim to CDOT that the Foundation and Mr. Shank had a \$2.2 million savings account in the referenced time frame.

Yours very truly,

George M. Allen

cc: Hon. B.J. Myers
Frank Gallegos, Esq.
Ray Micklewright, Esq.

=====

George M. Allen
206-A Society Drive, Telluride CO 81435
2202 Mountain Vista Lane, Provo UT 84606
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Date: Mon, 19 Apr 2004 15:52:00 -0600

From: "A. Frank Gallegos" <alfrk@fone.net>

Subject: Re: whelan email and my transmittal memo

To: "George Allen" <alnoma@yahoo.com>

Dear George,

In response to our several recent phone calls and email messages, this is to confirm, that on Wednesday April 14, 2004, the South fork Board of Trustees meet in a working session and I reviewed with them the situation respecting Mr. Whelan's CDOT application in June 2002. The Board concurs that any activity Mr. Whelan performed on the grant was without authority or direction of the Town and its Trustees. That at all times and all actions related thereto, he was not acting within the scope of his duties on behalf of the Town. I have further been instructed to draft a resolution memorializing the Board's position on this issue for approval at it next public meeting, which may not be accomplished until May. Should you have any oother questions or concerns, please contact me.

A. Frank Gallegos
Attorney for the Town of South Fork, Colorado

Exh. B

CERTIFICATE OF SERVICE

I hereby certify that I have, at Telluride, Colorado this 22d day of April, 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 TO STRIKE ALL FILINGS MADE IN THIS PROCEEDING BY RESPONDENT
DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION**

Means of Service

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

Agencies, Persons and/or Counsel Served

Hon. Vernon Williams, Secretary
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Counsel for Adjacent Landowners

City of Creede

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Creede CO 81130

Telephone: 719-658-2276

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cityofcreede@amigo.net

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

George M. Allen

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