

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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

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**REPLY IN OPPOSITION TO  
MOTION TO STRIKE**

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DENVER & RIO GRANDE RAILWAY  
HISTORICAL FOUNDATION  
1474 Main Avenue, Suite 223  
Durango, CO 81301

Replicant

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DATE FILED: May 13, 2004

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SURFACE TRANSPORTATION BOARD

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Pursuant to 49 C.F.R. § 1104.13(a), DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION (the Foundation) hereby replies to a Motion to Strike (Motion) filed by the City of Creede, Colorado (the City) on April 23, 2004.

**PRELIMINARY STATEMENT**

The Motion is the latest in a series of increasingly frivolous pleadings filed by the City in this matter. Last October, the City filed a petition to reopen a decision issued over four years earlier that authorized acquisition of a rail line pursuant to the offer-of-financial-assistance (OFA) provisions of 49 U.S.C. § 10904. The acquisition had long since been consummated. The seller of the rail line, Union Pacific Railroad Company (UP) did not share the City's concern over the financial ability and integrity of the Foundation as purchaser of the line. UP opposed the City's petition.

After UP and the Foundation opposed the petition, the City this February filed a motion to file a limited rebuttal statement directed to the replies in opposition. Instead of limited rebuttal, the City filed seven pages of rebuttal on four different subjects.

Now the City wants the Board to strike all filings made by the Foundation on the ground that material submitted with the City's motion shows that certain statements made by the Foundation's Executive Director, Mr. Donald Shank, are intentionally and knowingly false (motion at 1). Mr. Shank had testified that an application in behalf of the Foundation to the Colorado Department of Transportation for a grant of track rehabilitation funds filed in June, 2002 actually was prepared by Mr. Terrence W. Whelan, who at that time was Town Manager of South Fork, Colorado, although the application was signed by Mr. Shank. The City's motion to strike contains an e-mail message from Mr. Whelan to counsel for the City in which Mr. Whelan appears to deny that he prepared the portion of the grant application relating to the Foundation's financial condition.

Contrary to the City's contention, Mr. Whelan's e-mail does not conclusively establish that Mr. Shank's testimony is intentionally and knowingly false. Mr. Whelan's e-mail establishes only that Mr. Shank's testimony as to identity of the preparer of the financial portion of the grant application has been contradicted by Mr. Whelan. It would be up to the trier of fact to resolve that conflict of testimony based on the entire record. In other words, the City's motion to strike based on Mr. Whelan's e-mail goes to the weight to be accorded to Mr. Shank's testimony as to the preparer of that part of the application, not to the admissibility of Mr. Shank's testimony. It follows that Mr. Shank's testimony in that respect should not be stricken.

The City's request that every pleading filed by the Foundation be stricken based on Mr. Whelan's e-mail is patently-frivolous. Mr. Whelan's e-mail relates to one portion of one document, not the record as a whole. The Foundation suspects that such wild accusations by the

City are getting as tiresome to the Board as they are to the Foundation. This is an appropriate case for an admonition to the City's counsel, if not formal sanctions.

It should also be stressed that the subject matter of the City's motion to strike has nothing to do with the merits of its petition to reopen the 1999 OFA decision. As the Foundation has pointed out, a consummated OFA acquisition cannot be set aside except for fraud or material misrepresentation to the Board at the time of authorization of the acquisition. The City's motion relates to activity before the Colorado Department of Transportation, not the Board. The action complained of took place over three years after the Board authorized the OFA acquisition. Quite obviously, even if the City had proven that the Foundation made a false representation to the Colorado DOT in 2002, that would not establish fraud or material misrepresentation before the Board in 1999. The City cannot prove fraud before the Board in conjunction with issuance of the OFA in 1999 by taking potshots at the Foundation's activities years later.

WHEREFORE, the City's motion to strike should be denied, and the City's counsel should be admonished to cease filing frivolous pleadings such as the motion to strike.<sup>1/</sup>

Respectfully submitted,

DENVER & RIO GRANDE RAILWAY  
HISTORICAL FOUNDATION  
1474 Main Avenue, Suite 223  
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<sup>1/</sup> Attached to the Reply is the signed rebuttal statement of Mr. Donald H. Shank, Executive Director of the Foundation, directed to Mr. Whelan's e-mail.

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DATE FILED: May 13, 2004

BEFORE THE SURFACE TRANSPORTATION BOARD  
OF THE UNITED STATES

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

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

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REBUTTAL TO PETITIONER'S MOTION TO STRIKE  
ALL FILINGS MADE BY THE  
DENVER & RIO GRANDE RAILWAY  
HISTORICAL FOUNDATION

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This Rebuttal is prepared by Donald H. Shank, Executive Director of the Denver & Rio Grande Railway Historical Foundation ("the Foundation") and shall serve as our response to the April 22, 2004 filing by the Petitioner entitled "MOTION TO STRIKE ALL FILINGS MADE IN THIS PROCEEDING BY RESPONDENT DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION.

For the record, once again, the CDOT Enhancement Program grant applications were prepared entirely by Terry Whelan, City Manager of and for the Town of South Fork, Colorado, and not by our Foundation or me. In Mr. Whelan's E-mail letter responding to Mr. Allen's questions surrounding these issues, he vividly, yet inaccurately recalls what transpired during his compilation and production of the documents that were ultimately submitted to CDOT.

In his letter Mr. Whelan answers the issues correctly in items 1 thru 4. However, at item 5, things get a bit interesting. Mr. Whelan is correct in that he and I did discuss the requirements for matching funds, BUT, I was not comfortable with representing that the Foundation had a \$2.2

Million Dollar savings account. Terry Whelan knew full well that we didn't had even remotely close to that amount in savings. I questioned him repeatedly regarding that very issue. Again, for the record, Mr. Whelan stated; "let's see if we can get just one of these grants and we'll find a source for the matching funds requirement."

Again, I didn't produce this information on these grant requests, nor did I prepare the financial info that reflected that absurd savings account balance. Terry Whelan did. But, I placed my signature on them, and again, quite regrettably. Terry had a successful track record with the CDOT Enhancement Program. He had already been awarded a few grants for various civic projects. He felt our Foundation might be successful with the Town of South Fork as our sponsor. He emphatically stated, "since your Foundation is a non-profit entity, you can partner with our town as your sponsor. You need a municipality as a sponsor." I took him at his word.

Mr. Whelan's recollection of sending me completed grant request information for our Foundation to then put together the package including our financial and budgetary information is incorrect. For the record, a breakdown of the CDOT submission package is as follows (reference is to the grant application already in the record):

1. Cover letter to Laurie Blanz - written by Terry Whelan - I have never used this type of format with our letterhead boxed, nor do I sign letters as President and CEO, I use either President and Executive Director, or just Executive Director. This letter was written entirely by Mr. Whelan.
2. Grant Applications - the next four pages - prepared entirely by Terry Whelan - note lines 14, 15 and 17 on the first two grant apps. These figures were derived by Terry and are ridiculously absurd. Also note line 23 (Required Attachments) all attachments were prepared by Terry Whelan, I added only the Foundation's Articles of Incorporation and the IRS determination letter. Note Attachment "F" (Budget) - again, totally prepared by Terry Whelan - note Attachment "H" refers to a Foundation Master Plan - there wasn't one, but note that Mr. Whelan states that; "there is no controversy regarding its implementation."
3. Please read the letter following Attachment "H" also prepared by Terry Whelan. Does this sound like a community that didn't support the railroad?
4. Following Attachment I (prepared by T. Whelan) you will find letters of support from the Mayor of South Fork as well as civic leaders. I added these to the package in a rush to make the deadline at CDOT.
5. However, as I have stated again and again, I signed everything in front of Terry Whelan in his Town Manager's Office in South Fork, drove 100 miles to Durango over an 11,000' mountain pass with terrible road construction, received a speeding ticket (71 in a 55) while leaving South Fork, added the few things itemized above from the Foundation's Durango office and then took the package directly to CDOT. I changed nothing that Terry Whelan prepared. It was submitted to CDOT as written. Perhaps the inference by George Allen at the request and direction of Creede Mayor B.J. Myers to provide materials regarding the CDOT application to law enforcement authorities in La Plata County, Colorado, (Durango), has seriously intimidated Mr. Whelan's and

skewed his recall of the events surrounding the packages preparation which included the budget reflecting a \$2.2 Million savings account.

Had the Foundation enjoyed a \$2.2 Million savings account, the Union Pacific Railroad would have been paid off and our historic railroad rehabilitated without considering or needing grant funding. I followed Terry Whelan's lead and now I'm paying the price. It should be noted that the documents were prepared in a format that was not available to our Foundation on our outdated computer. ***ALL*** the documents were prepared by Mr. Whelan, but I did sign them and only included some additional supporting materials. I raced to Durango to the CDOT Regional Office to make the 4:00 p.m. submission cutoff. I received a speeding ticket from a South Fork Police Officer. I showed him the paperwork and even told the officer I had just picked up from Terry only moments earlier and informed him that I was rushing to Durango to make a deadline for submission. I still got the ticket and appeared in Municipal Court in South Fork. It's all a matter of record.

Contrary to Mr. Allen's assertion that I have attempted to "lay off responsibility for a lie of a magnitude of over \$2 million", I haven't tried to "lay off" anything. I'm certain Terry is intimidated by the threat inferred in the forwarding of documents to the La Plata County authorities. The man is looking for a new job. He desperately wants his backside covered.

On page 3 of Mr. Allen's motion he restates items 6 and 7 of Terry Whelan's statement surrounding the development of the grant requests. Terry knew full well that the Foundation was not in the best shape financially. The Creede lawsuit had wreaked havoc on our fundraising abilities. Mr. Whelan prepared the Budget and all other accompanying documentation.

Further down on page 3, Mr. Allen reflects on an April 19<sup>th</sup> Email letter from Frank Gallegos, the *current* City Attorney for South Fork and thinks that because now, two years after the fact, a different group of Trustees that recently fired Terry Whelan as Town Manager, who, by the way, has placed South Fork in financial chaos, are going to say anything to place their posteriors in jeopardy. I'm certain that the conversation I had with one of the Town Trustees this very day (May 5, 2004) might surprise even George Allen. The Trustee stated that he knows Terry Whelan prepared the CDOT Enhancement Package in his Town Manager's Office, used the Town's computer, printer and paper, and represented to the Foundation that this was done by the Town Manager on behalf of the Town of South Fork. The pattern of lying that Mr. Allen refers to at the bottom of page 3 begs for a finger to be pointed at Terry Whelan, not at me. But when it comes to twisting the facts to fit George Allen's needs, he is obviously quite accomplished!



**CERTIFICATE OF SERVICE**

I hereby certify that on May 13, 2004, I served the foregoing document, Reply In Opposition To Motion To Strike, on George M. Allen, [alnoma@yahoo.com](mailto:alnoma@yahoo.com), 206-A Society Drive, Telluride, CO 81435 and Robert T. Opal, [robertopal@up.com](mailto:robertopal@up.com), Union Pacific Railroad Company, 1416 Dodge Street, #830, Omaha, NE 68179 by electronic mail.

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Thomas F. McFarland