

225738



Mack H. Shumate, Jr.
Senior General Attorney, Law Department

October 7, 2008

VIA E-FILE

The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423

**RE: Docket No. AB-33 (Sub-No. 230X) - Union Pacific Railroad Company -
Abandonment and Discontinuance - In Lassen County, CA and Washoe County, NV
(Flanigan-Wendel Line)**

Dear Ms. Quinlan:

This letter will serve as the reply of Union Pacific Railroad Company ("UP") to "Appeal" filed September 29, 2008 by Robert Kemp on behalf of "Nevada Central Railroad" ("NCR") The "Appeal", which includes both inflammatory rhetoric and unsubstantiated accusations (including a claim that the Director of the Board's Office of Proceedings has acted with "criminal intent") requests that the Board reverse the Director's decision of September 19, 2008¹

The September 19 decision rejected the Kemp/NCR Offer of Financial Assistance (OFA) to acquire a 220 foot segment (the "line segment") of the entire Flanigan to Wendel Line ("Line") on the grounds that (i) the record did not show that continued rail service was likely to result from the proposal, and (ii) Mr Kemp did not show that he would be able to finance the purchase of the line segment and operations over it for at least two years. To the extent any sense can be made from the diatribe contained in Mr. Kemp's appeal, he appears to be arguing that there really are traffic opportunities on the 220 foot line segment, and that the Banks family trust will furnish \$5,750 for the purchase of the line segment.

There is no merit to Mr Kemp's intemperate appeal, and the Director's decision should be affirmed:

1. The Director properly determined that Mr. Kemp's OFA was not likely to result in continued rail service.

¹ Mr. Kemp's repeated accusations of unlawful and criminal conduct by the Board's staff and UP in his OFA and in his recent appeal are flagrant violations of the Board's rules of practice, see 49 CFR 1103.12, 1103.14 and 1104.27. This goes far beyond the bounds of permissible conduct by persons participating in Board proceedings and warrants disciplinary action under 49 CFR 1103.5.

- (a) A 220 foot rail line segment (less than the length of five boxcars) is plainly insufficient to provide rail service, see Docket No. AB-409 (Sub-No. 5X) Los Angeles County Metropolitan Transp. Authority - Abandonment Exemption (served June 16, 2008) (Los Angeles). Mr. Kemp seems to be arguing that the length of the line segment isn't significant because it isn't "land locked". Neither UP nor the Director ever claimed the OFA line segment was "land locked" - there is, in fact, nothing (including potential customers) along it. The point is that the line segment is far too short to be "operated" as a "railroad". Mr. Kemp appears to acknowledge this by claiming he could add track parallel to the line segment and a "main line extension" (apparently by rebuilding the portion of the Flanigan to Wendel Line that, according to his OFA, he could not afford to purchase). How he could do all this with only the \$5,750 to \$13,000 in financial backing he claims to have (see no. 2 below) is not explained.
- (b) There are no rail shippers or any other businesses located on the 220-foot rail segment. In fact, there are no active rail shippers on the entire Flanigan to Wendel Line and the only shipments in the last four years have consisted entirely of salvaged materials from other abandoned UP rail lines in the area. Mr. Kemp did not identify any legitimate rail traffic prospects in his OFA, and does not do so in his appeal. There is nothing in his OFA or appeal showing that any of the traffic prospects he claims are real:
- (i) Mr. Kemp refers to a "38 megawatt power generating plant located less than a mile from the end of the Apprx[sic] 22 mile Rail Line (the Flanigan to Wendel Line) that is the subject of this proceeding. ." This apparently refers to a power plant located near Wendel, CA, which has never been rail served. Unlike Mr. Kemp's other traffic prospects, this facility really exists. But it is located at the wrong end of the Flanigan to Wendel Line. The 220 foot OFA line segment is located on the south end of the "apprx[sic] 22 mile Flanigan to Wendel Line", near Flanigan, NV. The power plant at Wendel is located near the north end of the Flanigan to Wendel Line over 22 miles away. To get anywhere near this plant, Mr. Kemp would have to acquire the entire Flanigan to Wendel Line, not just 220 feet near Flanigan, and then construct additional trackage to reach the plant.
- (ii) Mr. Kemp claims that, "...both UP and the Director already know that Petitioner already possesses a current binding contracts [sic] from a new Power Generating Customer, who will Co-locate with Petitioner adjacent to the end of the 220-Foot Rail Line (the line segment)" But Mr. Kemp does not identify this supposed customer or provide any information about it. UP knows of no such customer. Clearly, if this were a real rail traffic prospect, the customer would have contacted UP directly rather than

dealing only with Mr. Kemp, since UP would be the main provider of the rail transportation services it would use. Further, if there were any real prospect of such a facility requiring use of this short line segment of trackage, UP would never have sought to abandon it.

- (iii) Mr. Kemp also alludes to the possibility of serving other customers, none of which are identified. However, what he appears to be saying is that he could obtain additional customers from "acquisition of the subject 220-Foot Line (the line segment) with its planned future Reconstruction and Rehabilitation back to its original length of Apprx[sic]: 22 miles." How he could do this when there were no on-line rail shippers using any portion of the Flanigan to Wendel Line including the line segment in the last years it was active is not explained. But, even if his claim is taken at face value, he would have to rebuild the entire Flanigan to Wendel Line before he could get this business. If he really believed these prospects existed, he would have submitted an OFA for the entire Flanigan to Wendel Line, not just the 220-foot line segment at the far south end of the Line. Regardless of what Mr. Kemp may think about the price UP quoted (\$3,187,065 for the entire Flanigan to Wendel Line), that works out to only \$147,397 per route mile - a small fraction of what it would cost to reconstruct the 22 mile Flanigan to Wendel Line at a later date.
- (c) Mr. Kemp's claim that this 220-foot rail line segment is "critical" to a "458-Mile Heavy High Speed Mainline Railroad System located within the state of Nevada" he proposes to construct is absurd on its face and a complete fantasy. We simply point out that Mr. Kemp indicated in his OFA that he was capable of acquiring only the 220 foot line segment because of the price UP had quoted to him for the entire Flanigan to Wendel Line (\$3,187,065). In other words, he could not afford to purchase an existing 21.7 mile rail line for its net liquidation value, yet the Board is supposed to believe that he is going to be able to fund the construction of a 458 mile high speed mainline rail system in the Nevada desert.
2. The Director properly determined that Mr. Kemp had failed to demonstrate that he would be able to finance the purchase of the line segment and operations over it for two years:
- (a) Mr. Kemp has not proposed (either in his OFA or in his appeal) to put any of his own resources into the line segment. Rather, he asserted in his OFA that an entity called the "Banks Family Trust" would provide \$13,000, but provided no information about this entity or its resources, or whether this amount of funding would be sufficient to both acquire and operate the line segment for two years. In his appeal, Mr. Kemp claims that the Trust is a legitimate entity (he calls it a "financial investment partnership"). But he provides nothing but his own assertions to support this and again provides NO information about its financial

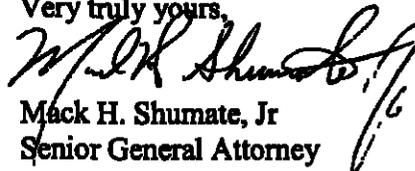
resources, which he or the Trust should have easily been able to do the second time around. That alone should serve as a major warning flag. Further, while he claims in his appeal that \$13,000 will be sufficient to purchase and operate the line segment for two years, he makes no attempt to demonstrate that he would be able to do so. In fact, the claim is absurd on its face. A \$5,750 purchase price would leave him with \$7,250 to operate the line segment for two years - only \$3,625 a year. He cannot even lease an operable locomotive for this amount, let alone purchase fuel for it or conduct any operations.

- (b) Mr. Kemp points to an STB decision in AB-1081 X, San Pedro Railroad Operating Company - Abandonment Exemption (served February 17, 2006) which, he says, shows that the Board accepted an OFA with a financial showing by the offerer which was "just as financially Binding and .. factually viable" [sic] as the showing he has made. Even a cursory review of the OFA filed in the San Pedro proceeding will show that this is not the case. While the public version of the OFA in that proceeding is redacted, there is enough available in the public version to show the offeror provided extensive information as to its financial resources, including a \$120,000,000 letter of credit from established financial institutions, see Sonora-Arizona International OFA filed February 13, 2006 (available on STB website). That is a far cry from the showing Mr. Kemp has made.

Finally, Mr. Kemp argues that UP's Reply to his OFA was somehow improper and "unlawful". UP's reply was entirely proper. The Board's rules of practice provide that a party may file a reply to any pleading (except a "reply to a reply") unless otherwise provided, 49 CFR 1104.13. The Board's Financial Assistance Rules do not prohibit the filing of replies to Offers of Financial Assistance, therefore replies are permitted. In fact, the Board has accepted and considered replies to OFA's in other proceedings, see for example Docket No. AB-33 (Sub-No. 265X) Union Pacific R. Co. - Abandonment & Discontinuance of Trackage Rights, (served May 7, 2008) Mr. Kemp's further argument that he should have been permitted an opportunity to reply to UP's reply is contrary to 49 CFR 1104.13(c), which expressly prohibits the filing of a "reply to a reply"

For the reasons stated above, UP respectfully requests that the Director's decision served September 19, 2008 be affirmed.

Very truly yours,



Mack H. Shumate, Jr.
Senior General Attorney

cc: Robert Allen Kemp (NCR)

O:\ABANDONMENTS\33-230X\STB-UPReply-NCRAppeal.doc

CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing document upon Robert Alan Kemp by

First Class United States Mail at the addresses shown below:

Robert Alan Kemp
Nevada Central Railroad
4959 Talbot Lane, Unit #69
Reno, NV 89509 ²

Robert Alan Kemp
c/o Joseph McNulty
45 Lakeview Avenue
Bay Shore, NY 11706 ³

Robert Alan Kemp
c/o General Delivery
Phoenix, AZ 85034-9999 ⁴

Dated at Chicago, Illinois this 7th day of October, 2008.


Mack H. Shumate

² This is the address shown on the Board's service list. However, when UP sent a report on the condition of the line to this address on August 15, 2008, it was returned as undeliverable (see UP letter to STB dated August 19, 2008). On August 29, 2008 Mr. Kemp made a filing with the Board indicating that he was in the process of moving to Tempe, AZ. While his recent appeal indicates he is now in Tempe, he has never provided the Board or UP with his Tempe mailing address.

³ This is the address to which Mr. Kemp requested UP to send the August 15 report when UP contacted him after seeing his August 29 filing, as described in the previous footnote.

⁴ This is the new address which Mr. Kemp provided to the U.S. District Court for Nevada on August 1, 2008 in Case No. 3:2007c00567, Robert Alan Kemp v. City of Ely.

<input checked="" type="checkbox"/> FILED	<input type="checkbox"/> RECEIVED
<input type="checkbox"/> ENTERED	<input type="checkbox"/> SERVED ON
COUNSEL/PARTIES OF RECORD	
AUG - 1 2008	
CLERK US DISTRICT COURT DISTRICT OF NEVADA	
BY _____	DEPUTY

1 Robert Alan Kemp, Plaintiff Pro-Se
 2 C/O: General Delivery
 3 Phoenix, Arizona 85034
 4 775-287-3681

5 **In the United States District Court**
 6 **for the District of Nevada**

7 **ROBERT ALAN KEMP**)
 8 **D/B/A:**)

9 **NEVADA CENTRAL**)
 10 **RAILROAD**)

11 **Plaintiff**)
 12)

13 **vs.**)

Case No.: 3.07 - CV - 00567-BES-VSP

14 **CITY OF ELY; WHITE PINE COUNTY;**
 15 **WHITE PINE HISTORICAL RAILROAD**
 16 **FOUNDATION; EASTERN NEVADA ECONOMIC**
 17 **DEVELOPMENT AUTHORITY, INC; CITY OF**
 18 **LOS ANGELES; LOS ANGELES DEPARTMENT**
 19 **OF WATER AND POWER; WHITE PINE**
 20 **ENERGY ASSOCIATES, LLC; SIERRA**
 21 **PACIFIC RESOURCES; SIERRA PACIFIC**
 22 **POWER COMPANY; V & S RAILWAY;**
 23 **RICHARD SEARS and JANE DOE SEARS,**
 24 **husband and wife; GARY D. FAIRMAN**
 25 **and JANE DOE FAIRMAN, husband and**
 26 **wife; and DOES 1 through 50; and**
ROE Corporations 1 through 30.

Defendants,

Notice of Change of
Plaintiff's
Address and Telephone
Number of Legal Record

24 Comes now, Plaintiff, Robert Alan Kemp, D/B/A Nevada Central Railroad, appearing in person
 25 pro-se, hereby submits his change of address and telephone number contact of legal record

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Plaintiff's Previous Address and Phone was

4959 Talbot Lane
Unit # 69
Reno, Nevada 89509
775-827-3258

Plaintiff's Current Address and Phone is Now:

C/O: General Delivery
Phoenix, Arizona 85034-9999
775-287-3681

Please change necessary documents and forward all pleadings and correspondence to the foregoing

Submitted this 30th day of July, 2008.



Robert Alan Kemp, D/B/A
Nevada Central Railroad,
Plaintiff, Pro-Se

CERTIFICATE OF SERVICE

Pursuant to FRCP, I Daria Lynne Kemp, Certify that I caused to be served a true and correct copy of Plaintiffs [Change of Address and Telephone Number of Legal Record] to the United States District Court, Nevada and all name Defendants in the instant action by placing same in a sealed envelope with postage prepaid in the United States Mail at Reno, Nevada and addressed as set forth below.

Jones Vargas
3773 Howard Hughes Pky
Third Floor South
Las Vegas, NV 89169
Attorney for Defendant V&S Railway

C David Russell, Esq.
100 West Liberty Street
Suite 800
Reno, NV 89501
Attorney For Defendants, City
Of Los Angeles and Los
Angeles Department of Water
and Power

Brent Kolvet, Esq
Thorndall, Armstrong, et al
6590 S. McCarran
Suite B
Reno, NV 89509
Attorney for Defendants City of Ely,
White Pine County, White Pine Historical
Railroad Foundation, Richard and Jane Doe
Sears, Gary D, and Jane Doe Fairman

Gregg P. Barnard, Esq
6100 Neil Road
Suite 500
Reno, NV 89511
Attorney For Defendants,
Sierra Pacific Resources and
Sierra Pacific Power Company

Kathleen Drakulich, Esq
Kummer, Kacmpfer, Bonner,
Renshaw & Ferrario
5585 Ketzke Lane
Reno, Nevada 89511
Attorney for Defendant
White Pine Energy Associates, LLC.

Gary D. Fairman, Esq.
PO Box 151105
Ely, NV 89301
Attorney for Defendant,
Eastern Nevada Economic
Development Authority

Dated this 30th day of July, 2008



Daria Lynne Kemp