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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING**

UNITED STATES OF AMERICA,

Plaintiff,

v.

**JOHN ELTON RIMMASCH and
WASATCH RAILROAD
CONTRACTORS,**

Defendants.

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Criminal No. 21-CR-13-J

NOTICE OF INTENT TO OFFER RULE 404(b) EVIDENCE

The United States hereby gives notice of its intent to offer evidence at trial that may be governed by Rule 404(b) of the Federal Rules of Evidence. The grand jury charged the Defendants with five counts of wire fraud in violation of 18 U.S.C. § 1343 and one count of knowing endangerment and aiding and abetting in violation of 42 U.S.C. § 7413(c)(5)(A) and 18 U.S.C. § 2 (Doc. 36).

At trial, the United States will offer evidence and testimony regarding the Defendants' Lions Park Locomotive 1242 project for the City of Cheyenne, Wyoming. This evidence may include evidence from the investigation, searches, and interviews.

By providing this notice, the United States does not concede the proposed evidence is governed by Rule 404(b). Rather, the United States expressly reserves the right to seek introduction of any evidence through other appropriate evidentiary rules or law. The United States also reserves the right to supplement this notice with additional evidence or argument.

I. FACTS

On September 29, 2014, Wasatch Railroad Contractors (WRC) submitted an invoice to the City of Cheyenne for approximately \$34,999 for the removal of asbestos that was deteriorating and falling off Locomotive 1242 in Lions Park, Cheyenne, Wyoming. *See* Exhibit 1.

A former employee of WRC was interviewed on November 3, 2021. *See* Exhibit 2. In the interview this employee stated Defendant Rimmasch made him remove asbestos from Locomotive 1242 in Lions Park. The employee stated he worked on the project for a week doing asbestos removal and painting the boiler. In regard to the asbestos removal, the employee stated Defendant Rimmasch told him to "just wet it and to wear a paper mask." *Id.* at 1. The employee stated tarps were put up and the asbestos was wet down, but it was still dusty, and the particles would fly up in the sky. *Id.* The employee stated he asked Defendant Rimmasch about permits, but Defendant Rimmasch told the employee he had it under control. *Id.* This employee stated he knew about asbestos, and he wore a paper suit and a dusk mask that Defendant Rimmasch provided. *Id.* The employee stated they got it [boiler] pretty clean for paint, but no testing was done. *Id.* The employee stated that everyone on the job knew it was asbestos. The employee stated Defendant Rimmasch told him he had the paperwork for the removal. *Id.* The employee told Defendant

Rimmasch how bad asbestos was, but Defendant Rimmasch didn't care and just wanted the job done. *Id.* This employee stated he was pretty sure Defendant Rimmasch knew that asbestos was bad. *Id.* The employee stated he recalled putting the asbestos in bags and throwing it away. *Id.* The employee thought there was three, six-foot long truckloads that were about 18 inches deep of asbestos. *Id.* at 2. The last load of the asbestos was taken to the last building on the left on Lincolnway, across from the Taco John Event Center where it was dumped in the garage bay. *Id.* This employee stated no one was wearing respirators. *Id.*

II. ARGUMENT

Rule 404 of the Federal Rules of Evidence governs character evidence, including crimes and other bad acts. The rule states “[e]vidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.” Fed. R. Evid. 404(b)(1). However, “[t]his evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” Fed. R. Evid. 404(b)(2); *see United States v. Tan*, 254 F.3d 1204, 1208 (10th Cir. 2001) (“The list of proper purposes is illustrative, not exhaustive . . .”). Although often misunderstood as a rule of exclusion that prohibits evidence of uncharged misconduct, Fed. R. Evid. 404(b) is actually “considered to be an inclusive rule, admitting all evidence of other crimes or acts except that which tends to prove only criminal disposition.” *Id.* (quotation marks omitted).

A four-part test under *Huddleston v. United States*, 485 U.S. 681, 691-92 (1988), establishes the requirements for admission of evidence under Rule 404(b) as follows:

(1) the evidence [is] offered for a proper purpose under Fed. R. Evid. 404(b); (2) the evidence [is] relevant under Fed. R. Evid. 401; (3) the probative value of the evidence [is] not substantially outweighed by its potential for unfair prejudice under Fed. R. Evid. 403; and (4) the district court, upon request, instruct[s] the jury

pursuant to Fed. R. Evid. 105 to consider the evidence only for the purpose for which it was admitted.

Id.; *United States v. Becker*, 230 F.3d 1224, 1232 (10th Cir. 2000). Although each requirement must be met, “[t]he standard for satisfying Rule 404(b) admissibility is permissive” *United States v. Parker*, 553 F.3d 1309, 1314 (10th Cir. 2009). “[I]f the other act evidence is relevant and tends to prove a material fact other than the defendant’s criminal disposition, it is offered for a proper purpose under Rule 404(b) and may be excluded only under Rule 403.” *Tan*, 254 F.3d at 1208.

a. Discussion

Under this standard, the evidence of the Defendants’ other acts summarized above are admissible. The grand jury charged the Defendants with crimes regarding their alleged false statements that they properly abated asbestos pursuant to their contract with the National Park Service. The grand jury also charged the Defendants with knowingly endangering others by releasing asbestos into the air. To convict the Defendants of these crimes, the United States must prove they *knowingly* engaged in the alleged conduct. Thus, the United States intends to offer evidence of the Defendants’ past experience and activities with asbestos to demonstrate their intent, knowledge, and the lack of accident or mistake.

The evidence of the Defendants’ participation in and consultation regarding the removal of asbestos from the Lions Park Locomotive 1242 project is both relevant and highly probative to the current charges to show the Defendants had knowledge of the danger of asbestos removal and that it needed to be properly abated. This evidence also makes it clear that Defendants were aware that asbestos abatement posed significant health risks and that precautions should have been taken to protect those removing the asbestos (and those people in the vicinity of the removal process) from the CNJ 1021. The introduction of this evidence is probative to show the Defendants are not new

to the world of asbestos abatement and disposal and they have had plenty of experience to know they are to provide the proper equipment to employees for their safety during asbestos removal as well as the proper procedures to dispose of the removed asbestos.

Moreover, the events described in the asbestos abatement of the Lions Park Locomotive 1242 project are strikingly similar to those alleged in this case. According to Wigmore's theory of improbability, "[s]imilar results do not usually occur through abnormal causes; and the recurrence of a similar result tends to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish the presence of the normal, i.e. criminal, intent accompanying such an act. . . ." Edward J. Imwinkelried, *Uncharged Misconduct Evid.* § 5:6 (updated Jan. 2020). Said another way, the similarity of each event lessens the likelihood that the charged conduct was undertaken by accident or mistake. McCormick on Evid. § 190.4 (8th ed.) (updated Jan. 2020); 1 *Uncharged Misconduct Evid.* § 5:6 (updated Jan. 2020). Thus, the similarity of Lions Park Locomotive 1242 project is relevant and highly probative to any possible claim that the charged conduct was undertaken unwittingly.

Because the evidence of the Lions Park Locomotive 1242 project is offered for proper purposes under Rule 404(b) and is relevant, it satisfies the first two parts of the *Huddleston* test. To be admissible, the probative value of evidence must also not be substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury. *Tan*, 254 F.3d at 1211 (quoting Fed. R. Evid. 403); *see also Huddleston*, 485 U.S. at 691-92. Here, unfair prejudice means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Tan*, 254 F.3d at 1211. The exclusion of otherwise admissible evidence under Rule 403 "is an extraordinary remedy to be used sparingly." *Id.* (quoting *United States v. Rodriguez*, 192 F.3d 946, 949 (10th Cir. 1999)). Presentation of the evidence described

herein does not call for the jury to convict the Defendants on an improper basis. And, as explained above, it is highly probative of the conduct at issue. Therefore, its probative value is not substantially outweighed by the danger of unfair prejudice.

Finally, the court may offer a limiting instruction to the jury, upon request, in satisfaction of the final *Huddleston* prong.

III. CONCLUSION

Having notified the Court and the Defendant of the proposed evidence, explained its proper purpose, relevance, and the absence of unfair prejudice, the United States requests the Court deny any further objection to these matters at trial under Fed. R. Evid. 403 or 404(b).

DATED this 31st day of January, 2022.

L. ROBERT MURRAY
United States Attorney

By: /s/ Stephanie I. Sprecher
STEPHANIE I. SPRECHER
Assistant United States Attorney

/s/ Richard H. Baird
RICHARD H. BAIRD
Special Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of January, 2022, the foregoing was electronically filed and consequently served on defense counsel.

/s/ Lisa Wait
For the United States Attorney's Office



OFFICE OF
INSPECTOR GENERAL
U.S. DEPARTMENT OF THE INTERIOR

INVESTIGATIVE ACTIVITY REPORT

Case Number OI-CO-19-0135-I	
Reporting Office Lakewood, CO	Report Date December 21, 2021
Report Subject Interview of [REDACTED] [REDACTED]	

On November 8, 2021, Special Agent (SA) Katharine Kovacek, U.S. Department of the Interior, Office of Inspector General, telephonically interviewed [REDACTED] former Assistant Director, City of Cheyenne Parks and Recreation (307-721-5304, [REDACTED]@cityoflaramie.org). [REDACTED] understood the interview was voluntary, he consented to be interviewed, and provided the following information:

[REDACTED] currently is the Assistant City Manager, City of Laramie Wyoming. [REDACTED] explained that people contacted the City of Cheyenne after they found white material underneath the Locomotive at Lions Park in Cheyenne, Wyoming.

[REDACTED] conducted a site visit at Lions Park with Wasatch Railroad Contractors (Wasatch) owner, John Rimmasch, to review the material. During the site visit, Rimmasch identified there was asbestos and other materials under the locomotive, likely from the boiler.

As a result of this site visit, [REDACTED] requested the City of Cheyenne issue an Emergency Procurement to Wasatch for the asbestos abatement because they did not want the material to blow around (**Attachment 1**). Wasatch told [REDACTED] they could dispose of the material properly.

SA Kovacek read [REDACTED] the last paragraph of the emergency procurement memorandum he wrote to the Mayor of the City of Cheyenne:

Attached is a not to exceed proposal in the amount of \$34,999.00 from Wasatch Railroad Contractors, a local company, for the removal and storage of the boiler jacket for future renovation, removal of the asbestos, the removal/security of the lubricator box/ lines and to paint the boiler for both aesthetic and safety reasons. WRC is very skilled in both historic steam engine repair and renovation and has many restorations that included both asbestos and lubricator box/line removal.

[REDACTED] explained the wording in the memorandum was what Rimmasch had told him during the site visit at Lions Park. [REDACTED] was confident Wasatch had the knowledge to perform the work.

Reporting Official/Title
Katharine Kovacek/Special Agent

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EXHIBIT 1

OI-003 (09/20)

Case Number: OI-CO-19-0135-I

According to [REDACTED] Wasatch was skilled in both historic steam engine repair and renovation. Wasatch had worked with the City of Cheyenne before on a project related to a model train (no further information). [REDACTED] had visited the Wasatch shop in Cheyenne many times and had seen them perform restoration work. [REDACTED] had confidence Wasatch could perform the Lions Park abatement work.

Wasatch abated the asbestos from the locomotive at Lions Park and removed the boiler jacket from the locomotive. [REDACTED] said Wasatch would still have the boiler jacket, but at the time the abatement work was performed, the City of Cheyenne could not afford to replace the jacket. The contract with Wasatch to abate the asbestos at Lions Park did not require testing of the material to determine whether it was asbestos. [REDACTED] visited Lions Park during the performance of the contract, and saw Wasatch enclose the Locomotive with translucent, heavy plastic. During his visit, he did not see individuals working.

[REDACTED] did not tell Wasatch to keep the abatement a secret. He claimed that he wanted the public to know about the abatement, so they knew the City of Cheyenne was protecting citizens and ensuring the safety of the locomotive.

[REDACTED] did not recall discussions with Rimmasch about the dangers of asbestos. He said he thought Rimmasch knew asbestos was dangerous. [REDACTED] knew asbestos was dangerous because of dealing with asbestos abatement contracts for various City buildings.

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EXHIBIT 1



Wasatch Railroad Contractors

Invoice

Date	Invoice No.
09/29/2014	33949
Terms	Due Date
Net 10	10/09/2014

Bill To
City of Cheyenne 2101 O'Neil Ave. Cheyenne, WY 82001

Amount Due	Enclosed
\$34,999.00	

Please detach top portion and return with your payment

P.O. Number
Lions Park (242 Locomotive Ashe

Date	Service	Activity	Quantity	Rate	Amount
09/29/2014	Services	Safely remove boiler jacketing to preserve the jacket for reuse or patterns for new jacket. Safely and properly remove asbestos that is deteriorating and falling off of Lions Park locomotive. Remove lubricator and oil lines associated with lubricator. Paint boiler black while the jacketing is off and being stored by WRC.			34,999.00
001-21-2113-40-43701 Park Projects - re-appropriation per Lois R15-062016 DEPARTMENT APPROVAL: I certify under penalty of perjury that the items listed hereon for my department's budget have been received and the account is correct and approved for payment. PO Number 15-069546 Signature Rich Parrel 10-6-14 OCT 6 '14 PM 2:56					

Thank you for choosing Wasatch Railroad Contractors, we appreciate your business!

Total \$34,999.00

OK to pay:



2101 O'Neil Ave, Rm 302
Cheyenne, WY 82001
Phone: (307) 638-4356
Fax: (307) 638-4355
www.cheyennecity.org

MEMO

To: Rick Kaysen, Mayor
From: [REDACTED] Assistant Director, Parks & Recreation
Re: Emergency Procurement of Goods – Locomotive 1242
Date: September 11, 2014

This memo is intended to secure your approval to follow the Emergency Procurement procedure (copied below) outlined in the City's Purchasing Manual for the removal of hazardous material from the locomotive located in Lions Park.

It was reported to the City of Cheyenne, Parks & Recreation Department that two substances of concern were leaking from locomotive 1242. On review by staff and Wasatch Railroad Contractors personnel it was observed that the asbestos bricks surrounding the boiler of this locomotive had become saturated with water and degrading to the degree that a mixture of material including long strand asbestos fibers is dripping to the ground near the locomotive. It was also observed that the lubricator box was leaking heavy oil sludge onto the ground.

I am asking for your permission to utilize the Emergency Procurement process as asbestos remediation is a very serious issue where asbestos is able to vacate its present medium and enter into a public park is a serious concern for the welfare and safety of the public. I also believe the emergency is present as the material, both asbestos and heavy oil sludge, is easily viewable and present in this area. I also believe this issue must be taken care of quickly.

Attached is a **not to exceed proposal in the amount of \$34,999.00** from Wasatch Railroad Contractors, a local company, for the removal and storage of the boiler jacket for future renovation, removal of the asbestos, the removal/security of the lubricator box/ lines and to paint the boiler for both aesthetic and safety reasons. WRC is very skilled in both historic steam engine repair and renovation and has many restorations that included both asbestos and lubricator box/line removal.

I appreciate your quick response to this request.

Approved
Rick Kaysen
9/12/14

**United States Environmental Protection Agency
Criminal Investigation Division
Investigative Activity Report**

Investigation Number:
00891-0800

Reporting Office:
Denver, CO, Area Office

Investigation Name:
Wasatch Railroad Contractors

Activity Date:
11/03/2021

Subject of Report:
Employee Former Wasatch Employee

Reporting Official and Date:
James Mercier
Special Agent
30 Nov 2021, Signed by: James Mercier

Approving Official and Date:
James Ehrig
Special Agent in Charge
03 Dec 2021, Approved by: James Ehrig
Special Agent in Charge

DETAILS:

On November 3, 2021, US Environmental Protection Agency Criminal Investigation Division Special Agent James Mercier and SA Katherine Kovacek from the Department of Interior Office of Inspector General telephonically interviewed Employee a former employee from Wasatch Railroad Contractors, regarding his work experiences at Wasatch. Employee stated he was expecting our call as he spoke with another former employee, Joel Cannon, the night before. According to Employee he worked at Wasatch for about three to three and a half years while he was on probation. Employee explained during that time he only worked on one project that contained asbestos and it was the 1242 Engine in Lyons Park, Cheyenne, Wyoming.

Employee explained that John Rimmasch, the owner of Wasatch, made him remove the asbestos from the 1242. He worked on the 1242 for a week doing the asbestos removal and painting the broiler. Employee stated the whole broiler was covered with asbestos. Rimmasch had told him to just wet it and to wear a paper mask. They put up tarps and wet it down, but it was still dusty, and it would fly up in the sky. He asked Rimmasch about permits, but Rimmasch told him he had it under control and to just do it.

Employee stated he knew about asbestos and wore the paper suit and dust mask that Rimmasch had provided. They, JJ LNU and him, got it pretty clean for paint, but it was never tested. Everyone knew it was asbestos, Rimmasch, JJ LNU, and him all knew. Rimmasch had told them he had all the paperwork for the removal. Employee told Rimmasch about how bad asbestos was, but Rimmasch didn't care and wanted it done. Employee was sure that Rimmasch knew that asbestos was bad.

Employee recalled putting the asbestos in bags and throwing it away. He thought it was done kind of fly by night. Employee thought they disposed of three, six-foot-long truckloads that were about 18 inches deep of asbestos. Employee added there were illegals, who couldn't speak English, at

**United States Environmental Protection Agency
Criminal Investigation Division
Investigative Activity Report**

the place they took the three truckloads of asbestos to be disposed of. They took the asbestos to the last building on the left on Lincoln way, across from the Taco Johns event center. It was just dumped in the garage bay and no one was wearing respirators.

Rimmasch had kept quiet about doing the work and was very secretive about it. Rimmasch was working at the shop in Cheyenne along with JJ LNU who drove to dispose of the asbestos. Rimmasch built steam engines in the shop and traveled to other sites to make repairs. Employee recalled hauling some stuff to the Shoshoni location, but he never worked there.

Employee stated Rimmasch was a Bishop for church but lied about everything. Rimmasch lied every day. Employee thought the asbestos job was bullshit and not done right. He had to work on it because he was on probation. Rimmasch had him under his thumb and took advantage of him while he worked at Wasatch.

ATTACHMENT(S):