

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-515 (Sub-No. 2)

CENTRAL OREGON & PACIFIC RAILROAD, INC.—ABANDONMENT AND  
DISCONTINUANCE OF SERVICE—IN COOS, DOUGLAS, AND LANE COUNTIES, OR

Decided: August 15, 2008

On July 30, 2008, the Oregon International Port of Coos Bay (the Port) filed a motion for a Board order redesignating certain information currently designated as “Highly Confidential” in an abandonment and discontinuance of service application filed by Central Oregon & Pacific Railroad, Inc. (CORP) on July 14, 2008. In this decision, we are granting in part and denying in part the Port’s request.

BACKGROUND

CORP seeks authority under 49 U.S.C. 10903 to abandon certain portions of the Coos Bay Subdivision that it owns and to discontinue service over portions of the line that it leases.<sup>1</sup> Simultaneously with its application, CORP also filed a motion for an order to protect proprietary and commercially sensitive information in the application and accompanying verified statements. On July 15, 2008, the Board granted CORP’s protective order. To date, all of the protected documents submitted by CORP in this proceeding have been designated as “Highly Confidential,” which, pursuant to the protective order, can be viewed only by outside counsel or outside consultants of the parties who have signed the appropriate undertaking. No documents have been designated as “Confidential,” a designation that would entitle consultants, employees, agents, or counsel of a party who sign the appropriate undertaking to view the document.

On July 16, 2008, the Port filed a petition for reconsideration of the July 15, 2008 decision granting the protective order, and a motion to hold the procedural schedule for the abandonment and discontinuance proceeding in abeyance. The Board denied both of these requests in a decision served on August 1, 2008 (“August 1 Decision”).

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<sup>1</sup> A detailed description of the rail lines proposed for abandonment can be found in the Board’s notice in Central Oregon & Pacific Railroad, Inc.—Abandonment and Discontinuance of Service—in Coos, Douglas, and Lane Counties, OR, STB Docket No. AB-515 (Sub-No. 2) (STB served Aug. 1, 2008).

On July 30, 2008, the Port filed its motion to redesignate certain information currently designated as “Highly Confidential” under the protective order.<sup>2</sup> CORP filed a reply on August 4, 2008.<sup>3</sup>

## DISCUSSION AND CONCLUSIONS

Pursuant to Paragraph 10 of the protective order issued in this proceeding, the Port has asked for redesignation of certain information. The discussion that follows groups the disputed information into three categories based on the level of classification we find appropriate for each: public, confidential, and highly confidential.

Information to be Made Public. The Port argues that certain information designated as “Highly Confidential” should be made public. CORP does not oppose the Port’s request with regard to a large group of documents. Because the parties have agreed that such information can be made public, we will not discuss the documents that are no longer in dispute but we will order CORP to redesignate these documents as “Public.”<sup>4</sup>

As to the disputed portion of the Port’s request, the Port asserts that certain information has already been made public and should be redesignated as such. In response, CORP argues that redesignating documents already made public would be “pointless.” In the Board’s August 1, 2008 decision, we concluded that a similar argument by the Port – that some information already in the public domain had been classified as “Highly Confidential” – was not a basis for altering the Protective Order itself. We cautioned, however, that “the purpose of a

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<sup>2</sup> In a related proceeding in STB Finance Docket No. 35160, the Port, on August 8, 2008, filed a Supplement to its Feeder Line Application pursuant to the Board’s earlier request. The Port opined that the excessive use of the “Highly Confidential” designation by CORP is hindering its ability to negotiate with and evaluate potential operators for the line at issue. Additionally, the Port argues that its ability to make a sound business analysis is frustrated by its inability to have direct access to certain “Highly Confidential” information. Specifically, the Port notes that, while the Port’s counsel and consultants can view the “Highly Confidential” information, they cannot share that information with the Port. The relief granted in this decision should address the Port’s concerns about access to information it is seeking.

<sup>3</sup> CORP’s reply included a request to expand the protective order in this docket to the ongoing proceedings on the Port’s related feeder line application, a sentiment also expressed by the Port in footnote 1 of its July 30, 2008 motion to redesignate. The motion was granted in Oregon International Port of Coos Bay—Feeder Line Application—Coos Bay Line of the Central Oregon & Pacific Railroad, Inc., STB Finance Docket No. 35160 (STB served Aug. 8, 2008).

<sup>4</sup> A list of the information requested to be redesignated as public by the Port and which CORP does not oppose is provided in Appendix A.

protective order is not to protect information that has previously been made public,” and we noted that under the Protective Order itself, the classification of information as “Confidential” or “Highly Confidential” could be challenged on a case-by-case basis. August 1 Decision at 2 n.1. Moreover, maintaining a “Highly Confidential” or “Confidential” designation as to materials that are not truly confidential because they are in the public domain, or are disclosed elsewhere in the pleadings, is not “hyper-technical” as alleged by CORP in its Response filed on August 4, 2008, at 6-7, but instead imposes unnecessary costs on all interested parties using that information. Therefore, information already lawfully within the public domain that has been labeled “Highly Confidential”<sup>5</sup> shall be redesignated as “Public.”<sup>6</sup>

Information to be Made Confidential. The Port requests that (1) the parcel-by-parcel appraisals of the value of real property be redesignated as “Confidential,”(2) the specific track asset values be made available to the public, and (3) detailed operating costs for the line be redesignated as “Confidential.” CORP opposes any redesignation of this information.

First, CORP argues that paragraph 6 of the protective order specifically allows CORP to classify appraisals of CORP-owned land as “Highly Confidential.” Further, CORP asserts that a lesser designation would put it at a competitive disadvantage in the ongoing feeder line proceeding and any future negotiations. Indeed CORP takes the position that even redesignating this information “Confidential” would place it at a competitive disadvantage in negotiations with the Port.

We fail to see how providing the Port access to the land appraisals subject to a “Confidential” designation would prejudice CORP. The Port’s attorneys and outside consultants, who could be part of any negotiating team along with internal Port staff, would have access to that information during negotiations with CORP in any event.

Further, we find that classifying the appraised land values as “Highly Confidential” is unnecessarily restrictive. Despite the inclusion in paragraph 6 of “confidential information regarding the appraised value of CORP-owned land” as a potential category of “Highly

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<sup>5</sup> This information includes, but is not limited to: (1) the names of shippers, carload totals and column headings for the years 2005, 2006, and 2007 on Attachment B to the verified statement of witness Williams; (2) the names of shippers, carload totals and column headings for the years 2005, 2006, and 2007 on Attachment D to the verified statement of witness Williams; and (3) operating income figures for the Coos Bay Subdivision for 2002 and 2003, which appear on page 5 of the abandonment application.

<sup>6</sup> Additionally, CORP argues that republishing a public version of Attachment B of the Verified Statement of witness Williams with the number of cars transported by specific shippers redacted, as the Port suggests, would create the misleading impression that all shippers used the line in 2005, 2006, 2007, and the Base Year. We find this argument unconvincing. CORP is now on record as indicating that some of these shippers did not move cars in each year.

Confidential” information, we see no reason why the parcel information should be restricted only to outside counsel or consultants. Reclassifying this information as “Confidential” will enable the parties themselves, as well as their agents, employees, in-house counsel, and consultants to view it while still maintaining an adequate level of protection. We will, however, protect parcel-by-parcel information from disclosure to the general public in this case as it could provide a competitive advantage to potential buyers (other than the Port) in land sale negotiations. Consequently, the land appraisal values will be redesignated as “Confidential.”

Second, the Port argues that the specific track asset values should be redesignated as “Public” because the document contains publicly available information and because the Board will have to discuss that information in any abandonment decision on the merits. However, the Port provides no reference as to where this information is publicly available. In support of its position, CORP argues that making this information public would prejudice two third-party salvage vendors by giving competitors insight into their bidding process. However, a “Confidential” rather than “Highly Confidential” designation would appear to protect against competitors having access to sensitive bidding information. No competitors of the third-party vendors have sought to participate in this proceeding. Their appearance would be conspicuous and any attempt by such an entity to sign the undertaking and gain access to the information could prompt an objection by CORP. In short, we find the threat to the third-party vendors to be attenuated and preventable, while the benefit to the Port of being able to discuss this information with its attorneys and consultants is very real. A “Confidential” designation would offer both access to the Port and protection to the vendors.

Neither party has fully supported its position, but we believe that redesignating this information as “Confidential” will strike the appropriate balance between legitimate access and legitimate protection here. A person cannot gain access to this information unless that person is a party to the proceeding who has signed the undertaking and thereby has agreed to abide by the Protective Order. Consequently, track asset information will be redesignated as “Confidential.”

Finally, the Port argues that the detailed operating costs for the line should be redesignated as “Confidential.” In reply, CORP asserts that disclosure of detailed information regarding operating costs on the Coos Bay Subdivision would provide significant insight into the costs that CORP incurs in operating its adjoining rail line. We disagree. First, redesignating information as “Confidential” is not disclosure to the public. That is, CORP will have adequate protection as this redesignation will only expand access to parties of record who sign the appropriate undertaking. Second, we are not persuaded that parties can gain insight into CORP’s adjoining lines through the operating costs on the Coos Bay Subdivision. No two lines are identical, and CORP’s adjoining line—the Siskiyou Line—has different shippers, a different make up of tunnels and bridges, and other inherent differences. Third, even if redesignating this information would provide insight into costs on the Siskiyou Line, CORP has not explained how this would put it at a competitive disadvantage. CORP has not identified any competitors who

are a party of record here,<sup>7</sup> or how this information could be used to create an unfair advantage in the market. CORP has not shown how it will be harmed competitively.

CORP argues that the Port has not articulated any compelling reason why redesignation is necessary, and points out that the Port has not shown that review and analysis of CORP's detailed cost calculations by R.L Banks and the Port's counsel is not sufficient to enable the Port to participate meaningfully in this case. That may be true. But the Port is the principal, and its counsel and consultants are merely its agents and the information may be useful to the Port as it directs the litigation of its case here and in the feeder line proceeding. Therefore, as the Port requests, the detailed operating costs for the line will be redesignated as "Confidential."

Information to Remain Highly Confidential. The Port requests that CORP be required to redesignate as "Confidential" the Commercial Marketing Agreement (CMA) between CORP and Union Pacific Railroad Company (UP). CORP asserts that this "Highly Confidential" designation should remain in place.

The Port argues that the CMA should be designated "Confidential" because paragraph 1(b) of the protective order provides that "the confidential terms of contracts with shippers or carriers" are to be designated as "Confidential Information." In reply, CORP points out that paragraph 6 of the protective order allows confidential information regarding the "division of rates" and "compensation between carriers" to be designated as "Highly Confidential." Further, CORP maintains that the CMA prohibits disclosure of its terms without UP's consent, and that UP's consent is contingent on the CMA being designated as "Highly Confidential."

UP is a third party that has entered into a contract with CORP subject to the proviso that the terms would not be disclosed without UP's consent and with the understanding that UP's consent is contingent upon the provisions of the CMA being designated as "Highly Confidential." We will respect the interest of UP, a nonparty, in maintaining the confidentiality of the CMA. In addition, no evidence has been offered to dispute CORP's claim that its agreement with UP would disclose commercially sensitive information about the Siskiyou Line, which CORP will continue to operate.

To ensure that all interested parties will have access to the redesignated information as appropriate prior to the hearing scheduled to be held in this matter on August 21, 2008, CORP is required to refile full and complete redesignated versions of its application and verified statements in compliance with the instructions in this decision by August 19, 2008.

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<sup>7</sup> We note that if CORP believes a competitor has become a party of record and wishes to sign the appropriate undertaking, CORP would be able to raise, with the Board, any concerns that it might have about how release of this information could harm it.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The Port's request to designate certain information in CORP's application and accompanying verified statements is granted in part and denied in part. CORP is directed to re-file full and complete redesignated versions of its application and verified statements in compliance with the instructions in this decision no later than August 19, 2008.
2. The Information listed in Appendix A is redesignated as "Public."
3. Information that has been made available to the public in this proceeding and in the proceedings in STB Finance Docket No. 35160 is designated/redesignated as "Public."
4. Parcel-by-parcel appraisals concerning CORP real estate, specific track asset values, and detailed operating costs are redesignated as "Confidential."
5. The Port's remaining request to redesignate certain "Highly Confidential" information is denied.
6. This decision is effective on its service date.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Anne K. Quinlan  
Acting Secretary

APPENDIX A:  
UNOPPOSED REDESIGNATION OF INFORMATION AS “PUBLIC”

- The Application: redactions on pages 2, 8, 11 (references to total avoidable loss from Exhibit 1, line 7); page 8 (percent increase in operating expenses from Base Year to Forecast Year); page 20 (reference to estimated subsidy payment from Exhibit 1, line 19).
- Exhibit 1: lines 1-4 (aggregated revenue data); line 5 (total on-branch costs); line 6 (total off-branch costs); 7 (total avoidable costs and total avoidable loss); and lines 8-19 (subsidy and aggregated NLV information).
- Verified Statement of witness Baranowski: redactions on page 3 (aggregated carloads and revenues); page 9 (references to total off-branch costs and working capital from Exhibit 1); page 10 (references to aggregate land and track asset NLV data from Verified Statements of witnesses Rex and Bader); pages 13-14 (total Forecast Year revenues, avoidable on-branch costs, avoidable off-branch costs, and total avoidable loss); page 14 (estimated percent increase in operating expenses between Base Year and Forecast Year); and Attachment 4 (opportunity cost).
- Verified Statement of witness Williams: Attachments C and E.
- Verified Statements of witness Rex: page 3 (aggregate NLV of land); Attachment 1; and pages 1-7 (explanation of methodology).
- Verified Statement of Marc Bader: page 4 (aggregate NLV of track assets).