

TROUTMAN SANDERS LLP

ATTORNEYS AT LAW
A LIMITED LIABILITY PARTNERSHIP

401 9TH STREET, N W - SUITE 1000
WASHINGTON, D C 20004-2134
www.troutmansanders.com
TELEPHONE 202-274-2950

Sandra L. Brown
sandra.brown@troutmansanders.com



August 28, 2008

Via Hand Delivery
The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings

AUG 28 2008

Part of
Public Record

223455

**RE: Docket No. AB-515 (Sub-No. 2X), Central Oregon & Pacific Railroad, Inc. –
Abandonment and Discontinuance – in Coos, Douglas, and Lane Counties, OR
(Coquille to Vaughn)**

Dear Secretary Quinlan:

Enclosed for filing in the above captioned proceeding please find the original and ten (10) copies of both versions of the Comments of the Oregon International Port of Coos Bay ("Port"). The Port is filing a Public and Highly Confidential Version of its Comments. The Public version of the Comments indicate where material has been redacted by the insertion of brackets "[]" on either side of the Highly Confidential material that has been removed from the Public version.

Pursuant to Board regulations, enclosed are two sets of three CD-Roms, one set containing the Public version and one set containing the Highly Confidential version, of the Comments. One extra copy of each version of the foregoing Comments is enclosed for date-stamp and return to our offices by the waiting messenger.

Please feel free to contact me if you have any questions.

Very truly yours,

A handwritten signature in black ink that reads "Sandra L. Brown".

Sandra L. Brown

Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**

**COMMENTS OF THE OREGON
INTERNATIONAL PORT OF COOS BAY**

Sandra L. Brown
Michael H. Higgins
David E. Benz
TROUTMAN SANDERS LLP
401 Ninth Street, NW
Washington, DC 20004-2134
(202) 274-2959 Phone
(202) 654-5603 Fax
sandra.brown@troutmansanders.com
michael.higgins@troutmansanders.com
david.benz@troutmansanders.com

ENTERED
Office of Proceedings
AUG 28 2008
Part of
Public Record

*Counsel for the Oregon International
Port of Coos Bay*

August 28, 2008

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**

**COMMENTS OF THE OREGON
INTERNATIONAL PORT OF COOS BAY**

The Oregon International Port of Coos Bay ("Port"), by counsel and pursuant to 49 CFR § 1152.25(c)(1), hereby comments upon the abandonment and discontinuance of service application filed by the Central Oregon & Pacific Railroad, Inc. ("CORP") in the above-captioned proceeding.¹ In addition, the Port will use this opportunity to respond to a request of the Surface Transportation Board ("Board" or "STB") made at the public hearing on August 21, 2008 in Eugene, Oregon ("Hearing"), for further input regarding the current unserviceable condition of the Line caused by the unlawful actions of CORP and the need and support for the Board to establish an escrow fund to be used to restore service on the Line.

I. Background

CORP filed its abandonment and discontinuance of service application ("Abandonment Application") on July 14, 2008 regarding operations over most of the

¹ Due to the common issues involved, these Comments are also relevant to the Port's Feeder Line Application in Docket 35160, *Oregon International Port of Coos Bay – Feeder Line Application – Coos Bay Line of the Central Oregon & Pacific Railroad, Inc* and Docket 35130, *Central Oregon & Pacific Railroad, Inc. – Coos Bay Rail Line*

Coos Bay rail line (“Line”²). Due to CORP’s continuing embargo, no rail service has been provided on the Line for over eleven months, since September 20, 2007. The embargo was declared due to alleged unsafe tunnel conditions – but these conditions were not caused by any sudden catastrophic incident. Instead, the evidence shows that CORP’s own neglect caused the tunnel deterioration. After eight months of unsuccessfully and unrealistically seeking others to pay for the tunnel repairs, CORP finally decided to take its first steps to abandon the Line. Such action was surely driven by (1) the vast public outcry over CORP’s unlawful embargo and related actions, (2) the very public discussion regarding and support for the Port’s efforts to submit a feeder line application, and (3) CORP’s desire to take steps to limit the amount of and timeframe for damages resulting from its unlawful embargo. As the Board recognized in the Hearing, it is difficult to understand why CORP and RailAmerica took so long to recognize (or why they never recognized) that they had lost all credibility in Oregon. Draft Hearing Transcript at 110 (exchange between Commissioner Buttrey and Paul Lundberg); at 16 (Representative DeFazio mentions CORP’s “preposterous and ill faith proposal”), at 112-113 (Chairman Nottingham wonders if, without the Common Carrier Obligation hearing on April 24-25, 2008, CORP would have determined that Union Pacific would never give money to another railroad for repairs on that other railroad’s line).

Under this backdrop and in order to preserve rail service for the region, the Port filed a feeder line application covering the entire Coos Bay Subdivision on July 11, 2008

² The Port will generally refer to the abandonment segment of the Coos Bay rail line as the “Line” in these Comments even though the Abandonment Application does not include the Danebo to Vaughn segment of the Coos Bay Subdivision. Reference to the whole line is also appropriate because CORP has conceded that it will not oppose inclusion of this segment in the Port’s Feeder Line Application. Draft Hearing Transcript at 99-100.

Additional information and background can be found in the Port's Show Cause Reply (filed June 3, 2008 in Docket 35130) and the Port's Feeder Line Application (filed July 11, 2008 in Docket 35160).

II. Summary of Comments

While the Port does not dispute that the financial data CORP has submitted³ shows that rail operations on the Line are currently a money-losing endeavor, it is clear that CORP's actions over the past several years have violated its common carrier obligation and greatly harmed the prospects for future rail service on the Line. Moreover, CORP's Abandonment Application grossly understated the harmful impacts of abandonment on the community and shippers served by the Line. Prior to the embargo, the Line served in excess of 5,000 cars annually and traffic was growing the previous three years. Furthermore, the Line is a critical transportation link for a region that has no other rail lines and no Interstate highways. In fact, it is only via two-lane mountain roads that the towns along the Line can be reached from Interstate 5.

The Port implores the Board to continue its critical assessment of the calculated nature of CORP's actions throughout the past year or more. The abandonment delay caused by CORP's embargo, during which CORP said that service would eventually be restored, has only exacerbated the harm to shippers and communities along the Line

³ Until Tuesday, August 26, 2008, CORP had refused to provide systemwide financial data and any financial data prior to 2005. Late on Tuesday evening, CORP provided a spreadsheet of systemwide data. However, the spreadsheet was not provided in electronic format and no underlying foundation was provided for the data. Hence, the Port is still attempting to verify CORP's data. Systemwide data is particularly relevant here because CORP claims that it does not maintain data by individual branch lines, therefore, there is no way to verify CORP's financial claims for the Coos Bay Line unless CORP provides the systemwide data for independent verification of how CORP has generated its Coos Bay numbers.

while, at the same time, benefiting CORP as the price of steel has increased. The Board should find, as it has similarly in the past, that an embargo caused by deferred maintenance and neglect (and not a catastrophic event) cannot be appropriately used to support an abandonment application or relieve the railroad of the harm caused by its actions or inactions, especially when the railroad takes no steps to restart rail service during the embargo.

III. Regulatory framework

A railroad may not abandon a rail line without authorization from the Board. 49 USC § 10903(a)(1); *National Association of Reversionary Property Owners v Surface Transportation Board*, 158 F.3d 135, 137 (D.C. Cir. 1998). In this case, CORP has sought abandonment authority from the Board under 49 USC § 10903(d). Abandonment Application at 1-2. Therefore, the Board must find that the public convenience and necessity require or permit the proposed abandonment in order to approve CORP's application. 49 USC § 10903(d); *Consummation of Rail Line Abandonments that are Subject to Historic Preservation and other Environmental Conditions*, Ex Parte 678, slip op. at 2 (served April 23, 2008) ("*Consummation of Rail Line Abandonments*"). In the context of an abandonment, a finding of public convenience and necessity requires the Board to "balance the potential harm to affected shippers and communities against the present and future burden that continued operations could impose on the railroad and on interstate commerce." *South Orient Railroad Company, Ltd. – Abandonment and Discontinuance of Trackage Rights – Between San Angelo and Presidio, TX*, Docket AB-545, 3 STB 743, 757 (1998). Thus, the Board considers factors such as operating

profit/loss, other costs the railroad may experience from continued operations, and the effect on shippers and communities. *Id.*

Even when an abandonment application is approved, the Board's jurisdiction over the subject line does not cease until the abandonment is consummated. 49 CFR § 1152.29(e)(2); *Consummation of Rail Line Abandonments*, Ex Parte 678, slip op. at 2. If a railroad does not file a Notice of Consummation within one year after the Board decision authorizing the abandonment, then the authority terminates and a new application would have to be filed at the Board to abandon the line. 49 CFR § 1152.29(e)(2). When certain conditions, such as those dealing with environmental issues, are attached to an abandonment, the condition remains in place even after consummation of the abandonment. *Consummation of Rail Line Abandonments*, Ex Parte 678, slip op. at 4-5; *Baros v. Texas Mexican Railway Company*, 400 F.3d 228, 234-235 (5th Cir. 2005) ⁴

IV. Abandonment would have a severe impact on the communities involved

A. Traffic has been increasing

CORP has attempted to downplay the significance of the proposed abandonment by claiming that there is a "downward trend" in traffic on the Line. Abandonment Application at pages 2, 5, 6, 8, 9, and 19. CORP supports this characterization of Line traffic by stating that traffic on the abandonment section was 5,193 cars in 2005, 5,363 cars in 2006, and 4,018 cars in 2007. Application at 2. In actuality, though, traffic has been increasing on the Line. That is, traffic during 2007 averaged 15.22 cars per day before the embargo began on September 21st. If that same level of traffic had continued

⁴ A full and complete assessment of the environmental conditions that must be imposed on the potential abandonment is also crucial to the feeder line proceeding because, as CORP's counsel admits, the net liquidated value must assume that the Line is going to be scrapped even if in fact it is not scrapped. Draft Hearing Transcript at 121.

for the rest of 2007, traffic on the Line would have been 5,555 cars for the year. Therefore, traffic would be showing an “upward trend” over the last three years (5,193 to 5,363 to 5,555), not a downward trend. It is only the embargo, caused by CORP’s inadequate tunnel maintenance, which prevented any traffic from occurring during the least several months of 2007. Moreover, as discussed in the Port’s Show Cause Reply, at pages 26-27 and Exhibit 24, CORP has reported traffic numbers in numerous contexts that vary widely, thus further feeding the distrust and ill-faith feelings regarding CORP’s actions.

CORP also notes that the most recent full 12-month period (Sept. 1, 2006 to Aug 31, 2007) resulted in a transportation of 4,773 cars on the Line, which is a decline from 2006 and 2005. Abandonment Application at 5; V S. Williams at 3. Again, however, the level of traffic was artificially limited by tunnel problems caused by CORP’s inadequate maintenance. The Line was closed from November 2006 to early January 2007 due to problems with Tunnel 15. See CORP Show Cause Response (filed May 12, 2008 in Docket 35130) at page 7. It is not as if CORP did not have notice of this impending problem in Tunnel 15 – the Milbor Pita report from May 2004 found a “recipe for a major collapse” in Tunnel 15. See Exhibit 8, attached to Port’s Show Cause Reply. Obviously, traffic for the period from September 2006 through August 2007 would have been much higher had the Line not been closed due to problems with Tunnel 15.

B. Transportation alternatives are not adequate substitutes for rail service

The loss of rail service to the region served by the abandonment section of CORP would be significant. Compared to virtually all other rail lines that face abandonment proceedings at the Board, the abandonment segment of the Coos Bay Line is heavily used

by shippers, with over 5,000 cars per year being transported. As revealed by the level of interest in this proceeding, the Port's Feeder Line Application, and the Board's Public Hearing on August 21, 2008, the Line is a key part of the infrastructure serving the southwestern Oregon area. Of the 37 total parties represented at the Hearing, 30 supported the Port's Feeder Line Application and opposed CORP's abandonment. Five of the other speakers expressed general support or need for continued rail service while addressing environmental issues. Only one party spoke on behalf of CORP. The depth and strength of this bi-partisan support is unprecedented at the Board. Moreover, most of the shippers who used the Line in the past would like to see a resumption of rail service, with the Port as the railroad owner. See exhibits 11-22 of the Port's Feeder Line Application; Hearing testimony of individual shippers and shipper groups. The Port also provided evidence that an additional non-wood products shipper (in the mineral sands business) locating a new facility on the Line projected future rail shipments of 500 to 600 cars per year. See exhibit 23 of the Port's Feeder Line Application. Unfortunately, many other potential new businesses have been deterred from locating on the Line because of the current lack of rail service. These businesses quickly lose interest in locating in communities served by the Line when they realize that a rail embargo is in place. See page 2 of the Verified Statement of Martin Callery, attached to the Port's Show Cause Reply. The embargo and looming abandonment have also harmed (and would continue to harm) economic development efforts in the region. Draft Hearing Transcript at 60-61 (North Spit and Port area), 127-128 (mineral sands business), 131-132 (polysilicon manufacturing), 151 (generally, region-wide), and 170-171 (Georgia Pacific).

CORP has claimed that the lack of rail service during the embargo shows that shippers are able to use trucks and other transportation alternatives. Abandonment Application at 4 and 10. *See also* V.S. Williams at 2 and 5, attached to Abandonment Application. The Board should not allow CORP to use this sort of justification for the abandonment because it is CORP's own actions that caused the embargo, resulting in the shippers being without rail service. Under CORP's reasoning, every embargo could lawfully lead to an abandonment because shippers would undeniably be without rail service when the abandonment application is filed.

Moreover, it is not unusual that many shippers have tried to hold on during the embargo by continuing to keep their facilities operating, and maintaining customer relationships by continuing to ship product by truck when possible and temporarily absorbing the increased costs. The shippers had no prior notice of the embargo and thus had jobs in process that needed completion. Furthermore, CORP made statements such as "we plan to reopen" the Line during most of the embargo before changing to an abandonment strategy in May of this year. *See, e.g.*, the newspaper advertisement of CORP from December 22, 2007, attached as exhibit 29 to the Port's Show Cause Reply.

If rail service is absent over the long-term, it can be expected that shippers will reduce production or even close their rail-dependent facilities. Allyn Ford, President of Roseburg Forest Products, has suggested that Roseburg may have to pull investment out of the Coos Bay area if the loss of rail service becomes permanent. Port Show Cause Reply at 47-48 *See also* testimony of other shippers and speakers in Draft Hearing Transcript at 150, 158-159, 170-172, 177, 184-186, and 7 (2nd set). As described above, other prospective shippers will not locate in the area due to the lack of rail service. The

types of businesses that are rail-dependent in the southwestern Oregon region tend to be manufacturing or commodity-based businesses. The jobs created by these businesses usually have a multiplier effect, such that numerous service industry jobs (such as those in forest management, health care facilities, or retail businesses) result from each job in a rail-dependent industry. Draft Hearing Transcript at 43-44, 82, 86-89, 124-125, 151, 160, 164-167, 3 (2nd set), and 8 (2nd set).

Meanwhile, the option of water transportation is not very attractive or economically viable. The terminals mentioned at page 24 of CORP's Abandonment Application cannot provide an adequate substitute for rail transportation. The port terminal owned by Roseburg Forest Products is an outbound woodchip loading facility on the North Spit, and is about 25 miles from Roseburg's Coquille mill. Woodchips are the lowest-value commodity produced by a lumber mill. Meanwhile, Southport Forest Products has a barge slip at their North Spit sawmill, but this is configured for inbound logs only. Lastly, Georgia Pacific has a dock at their Bunker Hill mill site that is equipped for outbound woodchips. Ignoring, for a moment, the fact that the terminals mentioned above are extremely limited in the commodities they can handle, CORP displays specious reasoning in suggesting that water transportation can seamlessly substitute for rail transportation. Barge transportation is only economical for long distances and large quantities to water-accessible areas. Thus, even if proper loading facilities existed at the terminals mentioned above, it would be impossible to simply transfer 5 railcars of finished wood products to a barge, especially if the wood products are destined to San Francisco (too close) or Chicago (not feasibly water accessible).

C. Shippers have experienced much higher costs

In evaluating a proposed abandonment, the Board must consider the increased cost of transportation to shippers. *Bushoom Grain Company, Inc. v. Interstate Commerce Commission*, 856 F.2d 790, 795-796 (7th Cir. 1988).

Testimony provided by numerous shippers and affected businesses at the Hearing reveals significantly increased transportation costs are being incurred due to CORP's current embargo. *See, e.g.*, Draft Hearing Transcript at 91 (American Bridge), 152 (shippers generally), 155 (Roseburg Forest Products), 158-159 (Southport Forest Products), 161 (McNasha), 166 (Plum Creek), 171-172 (Georgia Pacific), 176-177 (American Bridge), and 179 (Danish Dairy).

Relying on its witness John Williams, CORP claims that the switch from rail service to trucking will only increase the average shipper's transportation rate 11%. Application at 4; V.S. Williams at 2. However, the calculations used by Williams to reach the 11% figure are highly suspect for a number of reasons. First, Williams' projection of the transportation costs incurred by shippers in the absence of CORP rail service is puzzling because it shows []

|| In

short, Williams' calculations appear unreliable and should not be given credence by the Board.

V. CORP has overstated its financial hardship

CORP claims that it is financially constrained by its Cooperative Marketing Agreement ("CMA") with Union Pacific. Abandonment Application at 7-8. However, CORP admits that the CMA does not apply to almost a quarter of the cars on the Line. Verified Statement of Paul Lundberg at 3 (note 1), attached to CORP's Show Cause Response; Port Show Cause Reply at 42. Moreover, UP itself noted that CORP can apply surcharges to Line traffic. Exhibit 20 to Port Show Cause Reply.

Despite CORP's claims of being constrained by the CMA, ||

]]

VI. The Board must consider the impact of the abandonment on rural and community development

As mandated by Congress, the Board must give consideration to the impact on rural and community development in evaluating the abandonment proposed by CORP 49 USC § 10903(d). These impacts are significant for the region served by CORP. As noted by both CORP and the Port in earlier filings, the region served by the Line is largely rural with a few small towns. See CORP Environmental Report at 6, 9, 10; Port Show Cause Reply at 46-48. The area is geographically isolated – most of it is bounded by the Coast Range of mountains on one side and the Pacific Ocean on the other, while the eastern end of the abandonment section is nestled within the rugged Coast Range. This geographic isolation means that effective transportation is crucial to the future economic health and survival of the region. Port Show Cause Reply at 46-48. Unfortunately, though, the area is not served by an Interstate highway, and Interstate 5 can only be accessed by travel on winding two-lane mountain roads for 60 to 100 miles or more. Cf. Abandonment Application at 24 (describing the 135-mile distance from Coquille to the UP transload facility in Eugene). Strangely, though, CORP claimed in its

abandonment application that the area served by the Line has “ready access” to the Interstate highway network. Abandonment Application at 23.

As policy-makers in Washington have embraced free trade and the global economy, transportation is an even more critical aspect of any region’s economic health. It would be devastating for the southwestern Oregon region to lose all rail service while trying to compete in a global economy. More importantly, the very existence of the Port may depend on the continued provision of rail service. Supplemental Verified Statement of Jeffrey Bishop at page 9, attached to the Port’s Supplement to Feeder Line Application. *See also* Draft Hearing Transcript at 13, 135, and 137.

CORP’s witness John Williams argues that the ability of shippers to shift production to other facilities shows they are not harmed. V.S. Williams at 14, attached to abandonment application. However, it is communities that the Board must consider under 49 USC § 10903(d), not businesses. *Georgia Public Service Commission v. Interstate Commerce Commission*, 704 F.2d 538, 546 (11th Cir. 1983). The impact to the affected communities would be insurmountable as testified at the Board’s Hearing Draft Hearing Transcript at 8, 11-12, 32, 35, 40, 42-43, 45-46, 48-49, 51, 57, 81, 83, 85-90, 92, 124-126, 171-172, 174, 180-181, 183, 8 (2nd set), 10-12 (2nd set), 27 (2nd set), and 36 (2nd set).

VII. CORP failed to include all required mitigation

A. The Board must consider the bridge removal cost

The Abandonment Application is faulty because CORP failed to include the cost of removing the swing span bridges over the Umpqua and Siuslaw Rivers Verified Statement of Marc Bader at 3 (note 1), attached to Abandonment Application. These two

rivers are navigable waterways under the jurisdiction of the United States Coast Guard (“USCG”). As shown by Attachment 6 of Exhibit 6 of the Port’s Fccdr Line Application, the USCG would require removal of these two bridges in the event rail line operations cease.⁵ *See also Wisconsin Central Ltd. – Abandonment Exemption – in Manitowoc County, WI*, Docket AB-303 (Sub-No. 30X), slip op. at 2 (served March 17, 2008) The Board should require CORP to consult with the USCG regarding the removal of these two bridges. Additionally, the Board must consider the cost of removing these two bridges when the Board balances the burden to CORP of continued operations (such as the lost opportunity cost) with the harm to shippers and the community from a loss of rail service. *Chicago and North Western Transportation Company – Abandonment – Between Norma and Cornell – In Chippewa County, WI*, Docket AB-1 (Sub-No. 215), 1989 ICC Lexis 23 at *15 (February 1, 1989).

In the unlikely event that a trail sponsor requests that the Board impose a condition of rail banking and interim trail use for this Line, the Board should ensure that such trail sponsor is willing to “assume full responsibility” for all bridges, tunnels, trestles, culverts, and other structures on the Line. 16 USC § 1247(d). It seems likely that the tunnels would require significant repair work before being safe for a trail. Moreover, the tunnels, bridges, and trestles would likely require considerable ongoing maintenance and operational attention on a regular basis. The trail sponsor would have to ensure that the tunnels, bridges, and other structures comply with local public health and safety laws, and would not create a public nuisance under Oregon law.

⁵ *See, e.g.*, 49 CFR § 116.01(a) (“All bridges are obstructions to navigation and are tolerated only as long as they serve the needs of land transportation while allowing for the reasonable needs of navigation”).

Moreover, even if interim trail use is requested and/or completed, the Board must still impose environmental conditions to the abandonment authority, stating that CORP would need to remove the two swing span bridges and meet any other conditions imposed by the Board on the abandonment since trail use is voluntary and can be discontinued at any time. *A & R Line, Inc – Abandonment Exemption – in Cass and Pulaski Counties, IN*, Docket AB-855 (Sub-No. 1X), slip op. at 4 (served August 13, 2004). Furthermore, the cost of these mitigation measures must be considered by the Board in evaluating the net liquidation value of the Line.

B. The Board should impose environmental mitigation conditions

CORP has not planned or provided for any environmental mitigation costs in its salvage activities. Abandonment Application at 25; Environmental and Historic Report at 15. For this reason, the Board should disregard the salvage bids included by CORP in the Abandonment Application because such bids have not included any evaluation of the environmental and bridge removal costs associated with salvage of the Line.

The Environmental Assessment of the Board's Section of Environmental Analysis ("SEA") shows that any abandonment authority will include environmental conditions. For example, the SEA has recommended that CORP revegetate disturbed areas with native species. Environmental Assessment at 12. The Board should impose the conditions recommended by the SEA, and the Board should also consider the costs of these environmental mitigation efforts in balancing the burden to CORP of continued operations with the harm to shippers and the community of a loss of rail service. *Chicago and North Western Transportation Company – Abandonment – Between Norma and Cornell – In Chippewa County, WI*, Docket AB-1 (Sub-No. 215), 1989 ICC Lexis 23

at *15 (February 1, 1989). The Board should also impose any other environmental conditions recommended by local, state, and federal agencies as they begin to submit their comments on the Environmental Assessment to the Board.

VIII. CORP owes damages

The Board has the authority to require modifications or conditions in conjunction with an abandonment approval. 49 USC § 10903(e)(1)(B). In this case, if the Board grants CORP's abandonment application, the Board should also order CORP to pay damages to the Port and any other entity, such as the State of Oregon or the shippers, that made good faith investments in the Line based on CORP's assurances of future rail service. Port Show Cause Reply at 48-49. With the encouragement of CORP, many millions of dollars were spent on upgrading the Line, building new track, attracting and expanding new and current business, and repairing the Coos Bay Bridge in the last several years. Port Show Cause Reply at 18-22. As CORP admits, 96% of the Line's traffic originates or terminates in Coos Bay or Coquille, both of which are located south of the Coos Bay Bridge. Abandonment Application at 6-7. CORP's service over the Coos Bay Bridge to connect to this traffic, from August 2000 until the embargo in September 2007, was made possible by the Port's accepting the donation of this bridge and the Port obtaining significant funding for bridge rehabilitation. Port Show Cause Reply at 18-22.

In addition, contemporaneous statements of CORP management show that CORP invited these investments, and represented that rail service would be provided indefinitely. The CORP General Manager noted that:

[M]any of our customers have made capital investments in their facilities recently....We are also excited about the American Bridge

Company ..We.. expect a substantial amount of rail traffic in future years once the [American Bridge] plant goes on stream....[T]he Coos Bay Bridge is also scheduled for a \$6.8 million rehabilitation project of its own, and CORP's proposed line improvement [half of which was paid for with state funds] is essential to insure the bridge money is a worthwhile endeavor....We only see great potential for growth in rail in the years ahead.

Letter from Dan Lovelady to Ed Immel of Oregon DOT, as part of application for state funding, April 4, 2002, attached as exhibit 9 to Port's Show Cause Reply. A year later, he made similar comments

[T]his track rehabilitation compliments the \$6.8 million rehabilitation of the Coos Bay Bridge and capital improvements made by many of the rail shippers on the Coos Bay Line....This project will continue our track rehabilitation plans on the Coos Bay Branch that will insure rail service that is so critical to the economy of the Bay Area and the many rural communities along the line remains for many years to come.

Letter from Dan Lovelady to Ed Immel of Oregon DOT, as part of application for state funding, February 7, 2003, attached as exhibit 10 to Port's Show Cause Reply After another year-and-a-half, a similar sentiment was again expressed:

With the Port of Coos Bay getting grant money to build a new rail spur to the North Spit at Cordes and the new sawmill being built there, we want to have the track rehabilitated to handle this new business We believe the new rail spur and natural gas to the North Spit will generate many new industrial rail opportunities for the CORP

E-mail from Dan Lovelady to Robert Melbo of Oregon DOT, September 16, 2004, attached as exhibit 39 to Port's Show Cause Reply.

Expenditures by the Port and others were made in good faith and reliance on CORP's representation that rail service on the Line would continue. As such, any revenue earned by CORP over the last six or more years was made possible by the funding of others It is only fair and equitable for the Board to attach a condition to the abandonment that these investment funds be re-paid by CORP. *Central Michigan*

Railway Company – Abandonment Exemption – In Saginaw County, MI, Docket AB-308 (Sub-No. 3X), slip op. at 6-7 (served Oct. 31, 2003) (where shipper made a “good faith investment” and “had no basis for thinking that its investment would be lost shortly after it was made,” Board orders abandoning railroad to reimburse shipper \$100,710 (less salvage value) for cost of installing rail trackage and unloading facilities built in 1996-1998).

IX. The Board should order part of the feeder line purchase price to be paid into escrow and used to repair the tunnels

At the Hearing, the Board heard testimony from shippers, CORP, the Port, elected officials, and members of the public regarding CORP’s Abandonment Application and the Port’s Feeder Line Application. During the hearing, the Board invited the witnesses to supplement their testimony before the record closed in the two proceedings. Draft Hearing Transcript at page 149, lines 15-22. During the hearing, Chairman Nottingham and Commissioner Buttrey asked the Port’s representatives whether and, if so, how the Board could order CORP to repair the tunnels in conjunction with the feeder line proceeding. *See, e.g.*, Draft Hearing Transcript at page 137 (line 23) to page 138 (line 6), page 141 (line 19) to page 142 (line 2), and page 144 (line 21) to page 145 (line 20). With the remainder of these Comments, the Port would like to respond to the Board’s questions from the Hearing.

A. CORP’s actions require a Board response

The situation facing the shippers and communities of southwestern Oregon requires a firm response from the Board in order to rectify the harmful situation created by CORP’s actions. CORP had repeated notice of the tunnel problems on the Line over the last several years, including reports from tunnel experts, yet took no action to

properly maintain the tunnels. Port Show Cause Reply at 11-18. As the Port addressed in the Show Cause Proceeding and as discussed at the Hearing, CORP had the Milbor Pita tunnel report in May 2004⁶, and therefore knew of the dire conditions in several of the tunnels. Port Show Cause Reply, Exhibit 8. Information from the Oregon DOT and other sources confirms the lack of tunnel work by CORP. Port Show Cause Reply at 13-14. At the same time the tunnels were being neglected, CORP was encouraging repeated investments by shippers, the state of Oregon, and the Port in track, bridges, and rail-related facilities. Port Show Cause Reply at 18-22. Never once during this time did CORP or RailAmerica raise the issue of tunnel problems that might shut down the entire Line. In fact, it was the Port that broached the subject of tunnel conditions with CORP, but the Port was told that there were no problems with the tunnels. Port Show Cause Reply at 20-21.

In encouraging this public investment, CORP represented that rail service would be provided indefinitely. Port Show Cause Reply Exhibits 9, 10, and 39. Nevertheless, the tunnels continued to deteriorate and CORP continued to ignore the consultants' recommendations of repair. During this time, the price of steel began rising.

By September 2007, the tunnels had deteriorated so much that rail operations had to cease. CORP declared an embargo; yet, as is now clear, made no efforts to begin repairing the tunnels. Port Show Cause Reply at 37; Draft Hearing Transcript at 20-21. Instead, CORP sought nearly \$20 million from public sources and UP in order to undertake the repairs that should have been done over the previous 13 years of CORP

⁶ The report was sent to RailAmerica's chief engineer Marc Badier, who is now providing testimony for CORP on the windfall NLV salvage value that CORP seeks for the Line in the feeder line proceeding.

ownership. Port Show Cause Reply at 37-38. CORP purchased an advertisement in a local newspaper, saying that rail service would be restored. Port Show Cause Reply Exhibit 29. During the embargo, the price of steel continued rising.

As the summer of 2008 approached, it became clear to the Port and others that CORP was not serious about reopening the Line. Shippers and communities of the geographically isolated and largely rural region served by the Line had been without service for almost a year, and action was needed. The Port prepared a Feeder Line Application to preserve rail service for the area and filed it at the Board on July 11, 2008. A few days later, CORP filed its application for abandonment and discontinuance authority for most of the Line, yet planned to retain control of access to the Line by not abandoning the eastern 20 miles. By the summer of 2008, the price of steel has risen dramatically compared to four years earlier.

The Board must find that CORP failed “to maintain the line during the period of its ownership in disregard of...[its] common carrier obligation.” *Railroad Ventures, Inc. – Abandonment Exemption – Between Youngstown, OH and Darlington, PA, in Mahoning and Columbiana Counties, OH, and Beaver County, PA*, Docket AB-556 (Sub-No. 2X), slip op. at 10 (served April 28, 2008) (“*Railroad Ventures*”). “A railroad has a duty under both the Interstate Commerce Act and under its state franchises to maintain and repair its lines and provide service thereon.” *Interstate Commerce Commission v. Maine Central Railroad Company*, 505 F.2d 590, 593 (2nd Cir. 1974). In neglecting tunnel maintenance while nonetheless operating the Line until it had deteriorated to inoperability, with extensive rehabilitation needed, CORP “shirked” its maintenance responsibility. *Railroad Ventures*, Docket AB-556 (Sub-No. 2X), slip op. at

10 (served April 28, 2008). *See also Interstate Commerce Commission v. Chicago and North Western Transportation Company*, 407 F.Supp. 827, 831 (S D. Iowa 1975). CORP then made improper use of the embargo authority – which is generally meant for catastrophic events such as washouts. CORP’s milk-the-asset strategy created extreme economic hardship for the shippers and communities along the Line by suddenly leaving them without rail service. *Cf.* 141 Congressional Record H12248, 12258 (Nov. 14, 1995) (while debating Interstate Commerce Commission Termination Act of 1995, Rep. Nadler notes that feeder line program is needed to protect “shippers and residents of such areas from decisions by a railroad...that enjoys the local monopoly status to eliminate service to an area”). CORP’s actions also frustrated the proper use of the Board’s Feeder Line procedure – which is designed “to provide shipper groups and government agencies an alternative to inadequate rail service and to preserve feeder lines prior to the total downgrading of such lines” House Conference Report No. 96-1430 at page 124, reprinted in 1980 U.S.C.C.A.N. 4110, 4156 (emphasis added). *See also* Draft Hearing Transcript at 143 and 148.

CORP should have begun the abandonment process for the Line years ago when it was operational, and maybe as late as 2004, when CORP decided not to undertake the urgent tunnel repairs recommended by Milbor-Pita. Port Show Cause Reply at 14 and 44-45. If CORP had provided notice to shippers and the communities that the Line was potentially subject to abandonment (such as by appropriately designating the Line on the CORP system diagram map) while the Line was still operational and before many years of deferred maintenance, the shippers and communities would not have suffered such severe economic dislocation. The Line could have been purchased via the feeder line or

OFA process with no break in rail operations and before it was inoperable. Instead, however, CORP followed a policy of neglect, then embargo, and finally abandonment. CORP's actions have frustrated the purposes of the Board's feeder line process. *Railroad Ventures*, Docket AB-556 (Sub-No. 2X), slip op. at 12 (served October 4, 2000) ("It is well settled that administrative agencies have inherent authority to protect the integrity of the regulatory processes that they are charged with administering, and to prevent or remedy a misuse of those processes.") (citations omitted). *See also* Port Feeder Line Application at 52-53. The years of neglect and delay mean that CORP is now on the verge of a financial windfall – after years of operating the Line without paying for adequate maintenance, CORP now stands to benefit even further due to the recent rapid increase in the price of steel – whether the Line is salvaged or sold via the feeder line process.

CORP contends it is not responsible for the deterioration of the tunnels because they were neglected in the years prior to CORP's acquisition of the Line in 1994. Abandonment Application at 8. The Port has already rebutted this contention with evidence from the purchase agreement with Southern Pacific, ||

|| Port's Show Cause Reply at 12-13. *See also* Draft Hearing Transcript at 28-29 (2nd set). Moreover, Board precedent shows that a railroad cannot disclaim responsibility for the condition of its rail line when it has owned the line for several years and assumed the

common carrier obligation for the line at the time of acquisition⁷ *Railroad Ventures*, Docket AB-556 (Sub-No. 2X), slip op. at 7 (served April 28, 2008) CORP's failure to conduct any regular maintenance on the Line during the embargo is an additional reason that Board corrective action is needed. *Cf. Railroad Ventures*, Docket AB-556 (Sub-No. 2X), slip op. at 7-8 (served April 28, 2008); *Kansas City Southern Railway Company – Abandonment Exemption – Line in Warren County, MS*, Docket AB-103 (Sub-No. 21X), slip op. at 4-5 (served May 20, 2008) (“*Kansas City Southern*”).

B. The Board should establish an escrow fund

Given CORP's violation of its common carrier obligation, the frustration of the Board's feeder line process, and the harm caused by CORP's actions, the Board should grant the Port's feeder line application at a reasonable price and order CORP to repair the tunnels to a serviceable condition, or compensate the Port for their repair. Board action is necessary to preserve rail service on the Line because, otherwise, the financial burden of purchasing the Line from CORP and rehabilitating the tunnels will likely prove prohibitively expensive for the Port. *Cf. Consolidated Rail Corporation v. Interstate Commerce Commission*, 29 F.3d 706, 712 (D.C. Cir. 1994) (court notes that the goal of the forced-sale provision is continuance of rail service, not just maintaining the existence of rail lines).

⁷ As the Board noted at the Hearing, a rail purchaser must undertake efforts to know the condition of the line when acquired and while it is being operated. Draft Hearing Transcript at 139. This was seconded by a former Oregon DOT employee Draft Hearing Transcript at 29 (2nd set) and 41(2nd set). The Port could not agree more, and has been attempting to gain additional access to the Line in order to independently evaluate the true condition of the Line's tunnels and bridges. Unfortunately, the Port is being forced to file a Motion to Compel the inspection pursuant to 49 CFR §§ 1114.30 and 1114.31.

The Board can ensure repair of the tunnels by ordering sufficient funds from the Feeder Line purchase price for the Line to be placed in an escrow account. The escrow funds would be for the purpose of “pay[ing] for repairs that are needed to make serviceable” the tunnels on the Line that CORP “allowed to become unserviceable during its ownership.” *Railroad Ventures*, Docket AB-556 (Sub-No. 2x), slip op. at 5 (served November 8, 2001).

These funds could be accessed by the Port for Board-approved tunnel repairs. *Railroad Ventures*, Docket AB-556 (Sub-No. 2X) slip op. at 19 (served October 4, 2000) (Board orders creation of escrow account so that selling railroad pays for crossing and signal repairs after OFA sale); *Railroad Ventures, Inc. v. Surface Transportation Board*, 299 F.3d 523, 559-560 (6th Cir. 2002) (“*Railroad Ventures v. STB*”) (court approves Board action). *See also Kansas City Southern*, Docket AB-103 (Sub-No. 21X), slip op. at 4-5 (served May 20, 2008) (Board orders selling railroad to pay for bridge damage caused by neglect during OFA process); Port Feeder Line Application at 48-54.

C. The Board has the authority to order the establishment of the requested escrow fund

At the Hearing, the Board suggested that it may provide an equitable remedy in the feeder line case that involves creation of an escrow account to pay for tunnel repairs. The unique facts of this case warrant the application of equitable principles to arrive at a fair and just result in this manner, for the “historic purpose of equity [is] to secure[e] complete justice.” *Alhemarle Paper Company v Moody*, 422 U.S. 405, 418 (1975) (internal quotation omitted). Issues concerning rail carriers involve the public interest, and in such cases the application of equity is even more appropriate. *Virginian Railway Company v. System Federation No. 40*, 300 U.S. 515, 552 (1937).

The Board itself has broad powers to fashion appropriate remedies and equitable principles if necessary. In the Feeder Line Application, the Port noted that “regulatory agencies are afforded some discretion in determining which sanctions or remedies would best effectuate statutory objectives.” *Zola v Interstate Commerce Commission*, 889 F.2d 508, 515 (3rd Cir. 1989). Thus, an agency like the Board “has discretion to take actions that are legitimate, reasonable, and [directly] adjunct to” its explicit statutory power. *Interstate Commerce Commission v. American Trucking Association, Inc.*, 467 U.S. 354, 365 (1984) (internal citations omitted). The Board has previously fashioned unique remedies in specific cases. *See, e.g., Central Michigan*, Docket AB-308 (Sub-No. 3X), slip op. at 6-7 (served Oct. 31, 2003) (Board orders reimbursement by abandoning railroad to shipper who made good-faith rail investment in its facility); *Kansas City Southern*, Docket AB-103 (Sub-No. 21X), slip op. at 4-5 (served May 20, 2008) (Board orders selling railroad to pay for rehabilitation of bridge damaged during OFA proceeding), *Railroad Ventures v STB*, 299 F.3d 523, 560-563 (6th Cir. 2002) (court approves Board voiding contract between selling railroad and local government as an improper precondition to the re-start of rail service by the OFA purchaser); *Arizona Public Service Corporation & PacifiCorp v. The Burlington Northern & Santa Fe Railway Company*, Docket 41185 (served May 12, 2003) (Board removes prescriptive effect of transportation rate but keeps it in place during reopening of rate reasonableness proceeding) The facts of this case directly implicate the Board’s statutory duty to protect the public interest and enforce the common carrier obligation. Feeder Line Application at 49-50 and 53-54. The Port has previously presented extensive argument regarding the authority of the Board to order CORP to repair the tunnels or reimburse the Port for their

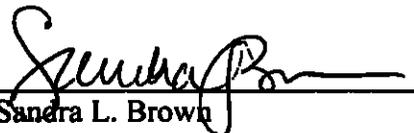
repair. Feeder Line Application at 48-54. Moreover, the ICC was also willing to order railroad repairs when appropriate *Winnebago Farmers Elevator Company v. Chicago and North Western Transportation Company*, Docket 28412, 354 ICC 859, 878 (1978).

As mentioned above, it would be unjust to allow CORP to neglect the obvious tunnel maintenance needs of the Line for years, thereby violating its common carrier obligation (Draft Hearing Transcript at 141), and then use a sudden embargo and, finally, abandonment to reap the benefits of the current high price of steel. This case presents a classic scenario where the Board should apply equitable principles and/or order that part of the feeder line purchase price be paid into an escrow account for use in repairing the tunnels. The Board used an escrow account in a similar situation in the *Railroad Ventures* case, which was affirmed on appeal. Docket AB-556 (Sub-No. 2X) slip op. at 19 (served October 4, 2000), *affirmed Railroad Ventures v. STB*, 299 F 3d 523, 559-560 (6th Cir. 2002). In *Railroad Ventures*, the selling railroad in an OFA case had allowed or encouraged parts of the rail line, including the crossings and signals, to “become unserviceable during its ownership.” Docket AB-556 (Sub-No. 2X) slip op at 5 (served November 9, 2001). The circumstances created by CORP with respect to the Line warrant similar action by the Board.

X. Conclusion

For all the reasons set forth hereinabove, the Board should deny the abandonment as proposed, find that an unlawful abandonment has already occurred, grant the Port's Feeder Line Application, order CORP to pay damages, and establish an escrow account so that CORP funds the rehabilitation of the Line.

Respectfully submitted,



Sandra L. Brown
Michael H. Higgins
David E. Bcnz
Troutman Sanders LLP
401 9th Street, NW
Suite 1000
Washington, DC 20004
(202) 274-2959
(202) 654-5603 (fax)

*Attorneys for the Oregon International
Port of Coos Bay*

August 28, 2008

VERIFICATION

I, Jeffrey Bishop, verify under penalty of perjury that the foregoing factual submissions contained in the Public Version of the Comments of the Oregon International Port of Coos Bay are true and correct based on my knowledge, information and belief.



Jeffrey Bishop
Executive Director
Oregon International Port of Coos Bay

Dated: 8/27/08

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of August 2008, I served a Public Version copy of the foregoing by e-mail and/or first class mail, postage prepaid, to all parties of record in this proceeding. Appropriate persons who have signed the Undertaking pursuant to the Board's Protective Order received a Highly Confidential Version.



David E. Benz