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October 7, 2008

Via E-filing

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

RE: STB Finance Docket No. 35160, Oregon International Port of Coos Bay—Feeder Line Application—Coos Bay Line of the Central Oregon & Pacific Railroad, Inc.

Dear Secretary Quinlan:

Enclosed for filing in the above-captioned docket please find the Motion to Strike the Supplemental Response of the Central Oregon & Pacific Railroad, being filed today by the Oregon International Port of Coos Bay ("Port"). This Motion to Strike is being filed at the Surface Transportation Board using electronic filing

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

Very truly yours,


Sandra L. Brown

Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 35160

**OREGON INTERNATIONAL PORT OF COOS BAY
—FEEDER LINE APPLICATION—
COOS BAY LINE
OF THE CENTRAL OREGON & PACIFIC RAILROAD, INC.**

**THE OREGON INTERNATIONAL PORT OF COOS BAY'S
MOTION TO STRIKE
THE SUPPLEMENTAL RESPONSE
OF THE CENTRAL OREGON & PACIFIC RAILROAD**

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I. INTRODUCTION

The Oregon International Port of Coos Bay ("Port") respectfully submits this Motion to Strike the Supplemental Response of the Central Oregon & Pacific Railroad, Inc. ("CORP"), which was filed with the Surface Transportation Board ("Board" or "STB") on September 29, 2008. CORP filed its 200+ page Supplemental Response despite there being no provision for such a filing in either the Procedural Schedule established by the Board on August 1, 2008 or the feeder line regulations found in 49 CFR Part 1151. Recognizing that its Supplemental Response was outside the procedural parameters of this case, CORP also filed a Motion for Leave to File its Supplemental Response. As explained below, the Board should deny the Motion for Leave and reject the Supplemental Response.

II. THE BOARD SHOULD STRIKE THE SUPPLEMENTAL RESPONSE

CORP's Supplemental Response does nothing more than make impertinent and inflammatory comments and rehash the same arguments and positions CORP has already presented in its Response (filed Aug. 29, 2008 in the feeder line case), its Opposition to Motion to Compel (filed September 2, 2008 in the feeder line case), its Abandonment Application (filed July 14, 2008 in the abandonment case), its Abandonment Rebuttal (filed Sept. 12, 2008), and its Response in the Show Cause proceeding (filed May 12, 2008). With all these pleadings on the record, the Port fails to see how CORP can claim the need to file a supplement on the familiar claims and assertions that have been made repeatedly over the last 5 months regarding: (1) CORP's neglect and poor maintenance of the Line; (2) the requirement that the Umpqua and Siuslaw River Bridges be removed if the Line is abandoned; (3) the real estate appraisal of the Port's witness Jay DeVoe; and (4) the establishment of an escrow account to be used to repair the deterioration of the Line. The Board is well-aware of CORP's positions on these issues, and any argument in the Supplemental Reply could have and should have been presented earlier. CORP's insistence in filing the Supplemental Reply appears to stem from a simple desire to "have the last word" in this feeder line case. Of course, the Board's feeder line procedures specifically state that the applicant is to file the final pleading. 49 CFR § 1151.2(f); *Pyco Industries, Inc. – Feeder Line Acquisition – Lines of South Plains Switching, Ltd. Co.*, Docket 34890, slip op. at 2 (served Oct. 17, 2006) ("*Pyco*") (Board notes that feeder line applicant has the "last word" under governing rules).

The Supplemental Reply also contains a number of attachments that should be stricken. These documents predate CORP's August 29th Response and concern issues that have been in dispute since the beginning of this case – the removal of the Umpqua and Siuslaw River Bridges

and the real estate appraisal of the Port's witness Jay DeVoe. Hence, CORP could have offered them earlier, and they should be stricken from the record. In short, CORP's Supplemental Response is nothing more than an impermissible reply to a reply, and it should be stricken. 49 CFR § 1104.13(c).

III. EACH PART OF CORP'S SUPPLEMENTAL RESPONSE MUST BE STRICKEN

A. The Port is financially responsible

In the Supplemental Response, CORP claimed that there is now "serious doubt" that the Port is financially responsible. In particular, CORP incorrectly claimed that the Port stated in the Reply that the Port would not use the \$12.5 million loan commitment from Umpqua Bank. Supplemental Response at 3-4. CORP is simply wrong in its reading of the Reply. First, the Port never stated that it would not use the Umpqua Bank loan commitment – the Port simply stated that it "would not be wise" to incur long-term debt due to the financial needs of the Line. Reply at 6. In fact, the Port stated that "[c]onsideration of the Port's cash reserves and the Umpqua Bank loan commitment reveals that the Port has the ability to pay the Line's NLV." Reply at 7. Clearly, there was no statement that the Port was rejecting the Umpqua Bank loan commitment. The Port's reluctance to use debt to purchase the Line was mentioned as background explanation for the Port's efforts to get \$8 million in SAFETEA-LU funds (which were originally slated for repairs for the Coos Bay railroad bridge) reallocated to the purchase and repair of the Line.

CORP's Supplemental Response argument on this point should also be rejected because the Board itself can assess the Port's financial responsibility. *Cf. BNSF Railway Company – Abandonment Exemption – in Oklahoma City, OK, Docket AB-6 (Sub-No. 430X), slip op. at 2 (served Jan. 26, 2007) (motion to strike granted because, among other things, Board itself can*

interpret decisions cited by the parties; hence, no additional argument about the meaning of such decisions is necessary).

Secondly, CORP is wrong in its assertion that the Port “radically alter[ed]” its position regarding the Umpqua Bank loan commitment in the Reply. The Port’s Supplement expressed exactly the same sentiment as the Reply – that the Port was reluctant to use debt to fund the acquisition of the Line and hoped to get the \$8 million in SAFETEA-LU funds re-allocated. Supplement at 11; Supplement Verified Statement of Jeffrey Bishop at 10. Crucially, the Supplement was filed August 8, 2008 – a full three weeks before CORP’s feeder line comments (a.k.a., “Response”). Hence, CORP’s argument on this point could have been offered earlier and, therefore, should be stricken now.

B. CORP’s redundant argument about neglect of the Line should be stricken

In its Supplemental Response, CORP claims, again, that it did not neglect the Line’s maintenance needs (Supplemental Response at 14-21) despite the fact that CORP has already presented its claims on this issue on numerous occasions. Virtually the entire CORP Show Cause Response was used to present CORP’s view that the Line was not neglected. *See, e.g.*, Show Cause Response at 11 (“CORP invested substantial sums”), 12 (“CORP has been anything but negligent in its approach to maintaining the Coos Bay Line”), 16 (“consistent level of expenditures by CORP to maintain the line”), 17-19 (explaining that it was reasonable to delay repairs to tunnels 13, 15, and 18 during the fall, winter, and spring of 2007-2008), and V.S. Lundberg at 5 (stating that, compared to other RailAmerica railroads, CORP spent a much greater percentage of its gross freight revenues on maintenance). Similarly, CORP used its Abandonment Application to justify its repairs (or lack thereof) to the Line. Abandonment Application at 8 (note 6) and 18 (“during .prior years CORP invested considerable time and

money in maintaining the Coos Bay Subdivision"). CORP's Response in the feeder line case also claimed that the maintenance of the Line was not neglected. Response at 60-68. In its Abandonment Rebuttal, CORP again spent many pages defending its care of and maintenance choices for the Line. Abandonment Rebuttal at 27-40. CORP's Supplemental Response merely presents redundant argument on this point, and should be stricken as a violation of 49 CFR § 1104.8. *See BNSF Railway Company – Abandonment Exemption – in Oklahoma City, OK, Docket AB-6 (Sub-No. 430X), slip op. at 2 (served Jan. 26, 2007) (motion to strike granted where party's allegations have been previously made).*

C. The Board should strike CORP's repeated argument about the escrow account as redundant and a violation of Board procedures

CORP argues that the Board should not use an escrow account to fund Line repairs Supplemental Response at 9-14. CORP has already presented the Board with extensive claims and arguments regarding (1) the use of an escrow account to fund repairs for the Line; (2) CORP payment of damages; and (3) CORP otherwise having to fund rehabilitation of the Line. CORP Response at 55-60; CORP Abandonment Rebuttal at 27-32 and 45-47. Again, CORP's argument is redundant and should be stricken. 49 CFR § 1104.8. *BNSF Railway Company – Abandonment Exemption – in Oklahoma City, OK, Docket AB-6 (Sub-No. 430X), slip op. at 2 (served Jan. 26, 2007)*

CORP also complains about what is to be included in the escrow repair fund proposed by the Port in its Reply (Supplemental Response at 6-9), but CORP's criticism is without merit. Throughout the past several months, the Port has frequently expressed its concern regarding the condition of all the Line's infrastructure. *See, e.g.,* Port Show Cause Reply at 27-28 and 41; Application at 30-31, 36, 50, 54, and 144; Supplement at 5-8; Port Abandonment Comments at 19-28; Port Motion to Compel (Aug. 29, 2008), especially Exhibits 1, 4, and 11; Reply at 69-74.

However, the Port was not able to confirm its fears about the actual condition of the Line until it had the opportunity to conduct on-site inspections of the Line – which occurred after the Application was filed – on August 13-15, 2008 and Sept. 12-18, 2008. CORP itself refused to give the Port access to the Line before the Port filed the Application. Confirmation also came in the form of CORP’s discovery responses, which again were not received until after the Application was filed. The simple regulatory structure put in place by the Board in feeder line proceedings, where the applicant does not have access to discovery until after the application is filed, means that there was no possibility that the Port could know what full amount should be in the escrow account at the time of the Application. *Caddo Antoine and Little Missouri Railroad Company – Feeder Line Acquisition – Arkansas Midland Railroad Company Line between Gurdon and Birds Mill, AR, Docket 32479, 4 STB 610, 616 (May 3, 2000) (note 17, but slip op. version of decision uses “note 16”) (Board accepts feeder line applicant’s reply evidence on railroad revenues because it was based on information received from the railroad in discovery).*

Despite not having access to discovery prior to filing the Application, the Port did express its concern about the condition of the bridges on the Line before filing its Reply. Application at 30-31 and 144; Supplement at 7; Port Motion to Compel at 2 and 11-12. However, the Port did not know the severity of the condition of the bridges until after receiving discovery documents from CORP, which were not received until well after the Port filed its Application and which included thousands of pages of bridge inspection records. Reply Exhibit 30 at CORP01194-02370 and CORP02439-03888. Once these documents were in hand and the Port was able to review them, it became clear that there were serious problems with the Line’s bridges. As described by the Port in its Reply, the discovery documents showed that CORP did not engage in a bridge repair program in the summer of 2007 despite the presence of numerous

bridge conditions found to be "unsafe" by CORP's bridge contractor. Reply at 71-74 (highlighting discovery documents CORP01194-02363 and CORP03643-03660). Although the Port always wanted to inspect the Line's tunnels and bridges, the information revealed by CORP's discovery documents made inspection of the bridges even more important. Port Motion to Compel at 11-12 (stating that bridge condition is crucial because it determines the financial needs of the Line for rehabilitation and maintenance, as well as the overall current "utility" of the Line).

As explained above, CORP's argument on the items to be included in the escrow account should be stricken because it is an impermissible reply to an reply, and also because it is irrelevant, immaterial, and redundant. 49 CFR §§ 1104.13(c) and 1104.8 Moreover, it ignores the simple fact that the Port did not have access to discovery until after filing its Application *Pyco*, Docket 34890, slip op. at 7 (served July 3, 2006) (Board allows feeder line applicant to amend valuation evidence after receipt of railroad's discovery responses), *Pyco*, Docket 34890, slip op. at 5 (served Aug. 16, 2006) (Board recognizes that feeder line applicant's valuation evidence relies on discovery received from railroad); *St. Louis Southwestern Railway Company – Abandonment Exemption – in Hunt and Collin Counties, TX, in the Matter of a Request to Set Terms and Conditions*, Docket AB-39 (Sub-No. 17X), 1994 ICC Lexis 223 at *5-6 (served Nov. 15, 1994) (Board denies motion to strike OFA applicant's new rebuttal evidence because applicant did not receive the information in discovery until after the opening offer was filed).

D. CORP's additional trail arguments are inflammatory and could have been provided earlier and, therefore, should be stricken now

CORP has impermissibly offered additional evidence and documentation in the Supplemental Response in support of its claimed "trail theory" for future use of the Line's swing bridges. Supplemental Response at 22-25. The Board should strike CORP's newly-offered

evidence on this point because all of it could have been offered earlier – in CORP’s Response. CORP’s trail argument in the Supplemental Response consists simply of e-mails and a draft agreement dating from mid-August 2008. See Verified Statement of Todd Cecil, attachments 1-6. If CORP wanted to offer these as evidence, it should have done so in its August 29th Response. Because the Port included the removal costs for the entire Umpqua and Siuslaw River Bridges in its July 11th Application, CORP knew that bridge removal (and the trail issue) was a contested point. See also Port’s Abandonment Comments (filed Aug. 28, 2008) at 15-16 (finding it highly unlikely that a trail would use the swing bridges in the future).

Furthermore, CORP’s claim of “outright falsehoods” is impertinent, inflammatory, and untrue. In fact, if the Board were to review the late material provided by CORP it does not negate the Port’s assertion that CORP was pushing this “time-sensitive matter” and that the Trust merely sent a typical form option agreement.¹ As this evidence could have been provided earlier and is inflammatory, it should be stricken now as an impermissible reply to a reply. 49 CFR §§ 1104.8 and 1104.13(c).

E. The Board should strike CORP’s repetitive and redundant ongoing arguments about bridge removal costs and CORP’s inflammatory conflict of interest claim

The Board should also strike CORP’s continuing argument regarding removal costs for the Umpqua and Siuslaw River Bridges. Supplemental Response at 25-30. CORP appears to

¹ Ironically, CORP argues that the Board must accept this non-definitive agreement into consideration as to why the Board cannot consider bridge removal costs in the NLV. Then, CORP argues that the lack of a definitive or specific ruling from the Coast Guard or the Army Corps of Engineers on bridge removal, notwithstanding the regulations and precedent on the issues or that no application to rule on has been filed with these entities, means the Board cannot consider the bridge removal evidence in the NLV. CORP’s righteous indignation that everyone is wrong or lying and they are the true-tellers further supports why CORP/RailAmerica has not figured out why everyone is so mad at them. See August 21 Hearing Tr. at 142 Further, CORP seems to think that it is the only party entitled to zealous representation, but it is the Board that will determine the weight of the evidence, not CORP.

simply want the last word on bridge removal costs, despite the fact that the Board's regulations clearly allow the feeder line applicant to file the final pleading. *Pyco Industries, Inc. – Feeder Line Acquisition – Lines of South Plains Switching, Ltd. Co.*, Docket 34890, slip op at 2 (served Oct. 17, 2006) (Board notes that feeder line applicant has the "last word" under governing rules).

CORP also expresses alarmist rhetoric over the bridge removal estimate received by the Port from West Coast Contractors ("WCC"), a Coos Bay – based firm whose president, David Kronsteiner, is the Port's President. If there is any place for CORP's arguments about the WCC's estimate they simply go to the weight of the evidence, something that the Board can assess on its own without assistance from either party *Cf. BNSF Railway Company – Abandonment Exemption – in Oklahoma City, OK*, Docket AB-6 (Sub-No. 430X), slip op. at 2 (served Jan. 26, 2007) (motion to strike granted because, among other things, Board itself can interpret decisions cited by the parties; hence, no additional argument about the meaning of such decisions is necessary). Moreover, the Port did not even rely on WCC's estimate for its calculation of the Line's NLV. Reply Verified Statement of Gene Davis, Attachments J and K.

More troubling are CORP's claims of conflict of interest and violation of Oregon law which are inflammatory and should be stricken. Of course, Mr. Kronsteiner is the President of the Port and his name is clearly shown on the WCC estimate as the President of WCC.² In fact as CORP points out, Mr. Kronsteiner discussed his company at the Board's August 21st hearing. Contrary to CORP's assertion, WCC does have experience in all kinds of marine demolition as is

² Counsel for the Port had meant to include a footnote in the legal text of the Port's Reply regarding the WCC estimate but the footnote was inadvertently left off in the rush of compiling the Reply in the extremely short two week timeframe, especially given CORP's delayed service to the Port of CORP's Response on a holiday weekend. The oversight to include a footnote in the Port's Reply section starting at page 27 (titled local contractors experience in marine bridge removals) and to specifically point out the WCC estimate and Mr. Kronsteiner's position at the Port does not excuse CORP's inflammatory comments especially since the record clearly reflects these facts.

listed in the WCC experience attached to the estimate. Likewise, WCC has experience in rail bridge rehabilitation, and WCC was one of the subcontractors to perform rehabilitation on the Coos Bay rail bridge³. Of course the Port does not intend to demolish these rail bridges and if in fact the Port was ever required to do so, WCC would bid on that work, make the appropriate disclosures and Mr. Kronsteiner would abstain from voting or discussing the bid at the Port Commission meeting on the matter just as he did when WCC bid on the other work for the Port. However, the fact remains that WCC is a local, experienced marine contractor with expertise in demolition and working with rail infrastructure in the Oregon coastal environment.

Moreover, even if the WCC estimate is ignored by the Board, it will have no effect on the Port's evidence, and CORP's concerns are, therefore, irrelevant. 49 CFR § 1104.8. Lastly, CORP itself has received extensive NLV evidence from its own employees. If the Board were to throw out the WCC estimate, then it should also reject the voluminous CORP NLV evidence from CORP or RailAmerica employees. See, e.g., Verified Statement of Marc Bader in CORP's Abandonment Application, Verified Statement of Alan Pettigrew in CORP's Response; Verified Statement of Alan Pettigrew in CORP's Abandonment Rebuttal.

F. The Board should strike CORP's redundant arguments about the requirement to remove the Umpqua and Siuslaw bridges

Once again in a continuing effort to argue the same points repeatedly, with the apparent goal of getting the "last word," CORP claims again that the Umpqua and Siuslaw River Bridges do not need to be removed or, if they do, the entirety of the bridges do not need to be removed.

³ WCC has bid on and been awarded various Port projects. The Oregon statutes exist to protect the public from unethical activities by public officials, but also to protect the rights of individuals who serve in a public official role providing service to the community. In many areas it is often civic and business leaders who are willing to serve in a public official role and the statutes provide protection for all parties, while still allowing a person to pursue normal business activities.

Supplemental Response at 30-33. The required removal of these two bridges has been asserted by the Port since its Application; hence, CORP should have included all its argument in its Response. Application at 17-19, 104-106, and 130. The Board should reject CORP's additional argument because it unnecessarily duplicative, it should have been provided earlier, and it violates the Board's regulatory goal of giving the feeder line applicant the last word. 49 CFR §§ 1104.8 and 1151.2(f).

G. The Board should strike CORP's "sandbagging" argument as irrelevant, inflammatory, and simply incorrect

In its Supplemental Response, CORP again makes the bizarre argument that the Port's August 28th Comments in the abandonment case, Docket AB-515 (Sub-No. 2), were somehow improper because they did not include certain specific arguments in opposition that CORP apparently wanted to see. Supplemental Response at 2. This assertion is irrelevant, immaterial, inflammatory, and downright weird. There is no legal requirement of any kind that requires the Port or any entity or person to comment in any particular way in an abandonment case. Indeed, the governing regulations state that any party "may" comment on an abandonment application 49 CFR § 1152.25(a). The Port even considered filing no comments whatsoever in the abandonment case, which would have been perfectly lawful and above reproach. CORP's suggestion that the Port "abused" the Board's procedures in the content of its entirely optional abandonment Comments is impertinent and should be stricken. 49 CFR § 1104.8

H. The Board should strike CORP's additional real estate argument because it could have been offered earlier

The final part of CORP's Supplemental Response consists of extensive real estate appraisal argument that, again, is repetitive and consists of old documents that could have been offered earlier. Supplemental Response at 33-39. The liquidation value of the Line's real estate

has been an issue in this case from the beginning, and CORP could have previously submitted the deeds, the excerpt from *The Appraisal of Real Estate*, and the Tax Court case included in the Supplemental Response. The Board should reject these additional evidentiary sources, and the CORP argument that is based on them, because they could have been provided earlier and they simply represent CORP's desire to have the last word in this case. *BNSF Railway Company – Abandonment Exemption – in Oklahoma City, OK*, Docket AB-6 (Sub-No. 430X), slip op. at 2 (scrved Jan. 26, 2007) (motion to strike granted because, among other things, Board's rules do not permit a reply to a reply). Furthermore, as shown below, CORP's real estate argument is simply wrong.

I. CORP's real estate assertions are incorrect

1. CORP wrongly asserts that the Port has mischaracterized *The Appraisal of Real Estate*.

In its effort to discredit the Port's real estate analysis, CORP accuses the Port of mischaracterizing parts of *The Appraisal of Real Estate*, 12th Edition, which provide support for Mr. Jay DeVoe's method of estimating the value of the land comprising the right-of-way. Seizing a distinction between the terms "raw land" and "site," CORP argues that the real property along the right-of-way is "raw land" and that the concept of "surplus land" is inapposite because "surplus land" applies to "sites." Supplemental Response at 33-35. CORP's critique is unavailing.

First, CORP mistakenly asserts that the parcels within the rail corridor would be considered "raw land." Supplemental Response at 34. CORP is incorrect because "raw land" refers to land "on which no improvements have been made; land in its natural state before grading, construction, subdivision, or the installation of utilities." *The Appraisal of Real Estate*, 12th Edition at 198 (emphasis added). CORP's assertion ignores roughly 100 years of continuous

use of the corridor for rail operations. Given this history, the parcels comprising the right-of-way are not "land in its natural state." On the contrary, the corridor has been cleared of its natural foliage, and graded and contoured for rail operations. Ballast, ties, tracks, switches, and other track materials have been installed, removed, repaired, and relayed. Bridges, culverts, and other improvements have been constructed. Because of its development for rail purposes and its use as a rail line, the real property along the line does not meet the definition of "raw land." Even if the rail infrastructure were removed, the corridor still could not be regarded as "land in its natural state" because of clearing, grading and contouring. Thus, the parcels fall within the definition of "site"—"land that is improved so that it is ready for a specific purpose." In this respect, CORP's critique fails.

Second, it is worth noting that CORP's expert, Mr. Charles W. "Sandy" Rex did not use the term "raw land" to characterize the right of way in either his abandonment appraisal or his feeder line appraisal. On the contrary, Mr. Rex noted improvements to the land that would purportedly make it attractive to buyers: "The subject land is particularly well-suited for conversion to a road, since the land has already been cleared and has ballast." R.V.S. Rex at 22. The idea that the right of way is comprised of "raw land" appears to be newly-minted for purposes of CORP's Supplemental Response. Moreover, to the extent that CORP's "raw land" vs. "site" distinction has any validity—which it does not—it would not apply where abutting lands are improved.

Third, assuming for the sake of argument that the corridor is comprised of "raw land," CORP still fails to show that the concept of "surplus land" does not support Mr. DeVoe's approach. The ATF methodology, in part, assigns a land use for each parcel within the right of way based on the land use(s) of abutting properties. It is assumed that the parcels will be sold to

adjacent property owners. Mr. DeVoe contends that adjacent property owners would view the small, irregularly-shaped parcels as contributing little to existing land uses, and would buy the parcels only at a substantial discount, if at all. Application, Verified Statement of Jay DeVoe at 70-71. Put differently, purchasers would demand a discount in order to buy land that would generally be considered to be "surplus land" if it were already part of the existing site. "Surplus land is not needed to support the existing improvement and typically cannot be separated from the property and sold off. Surplus land does not have an independent highest and best use and may contribute minimal value." *The Appraisal of Real Estate*, 12th Edition at 198. Purchasers simply would not pay full ATF prices for heavily-encumbered land that could not be subsequently "separated from the property and sold off" and that would "contribute minimal value." Thus, the concept of "surplus land" supports Mr. DeVoe's base homsitic methodology, regardless of whether the corridor is initially deemed to be "raw land" (which it is not).

2. CORP has not demonstrated that the reserved rights were factored into recent purchases

Mr. DeVoe has testified that certain reserved rights held by the Union Pacific Railroad Company ("UPRR"), as successor to the Southern Pacific Transportation Company ("SPT") would substantially reduce the value of the real estate comprising the corridor. Reply Verified Statement of Jay DeVoe at 7-8; V.S. DeVoe 70-71, 169, 174 and 224. Contrary to common sense and STB precedent, CORP advocates a token discount (if any), citing recent sales of rail corridor property purportedly "at or above ATF value" Supplemental Response at 37. Attempting to bolster its argument that recent sale prices reflected each purchaser's full knowledge of the SPT reservations, CORP attached several deeds to its Supplemental Response, which supposedly "explicitly" identify the reservations. Supplemental Response, Exhibit 5. For example, a quitclaim deed from CORP to Gary and Karn Waggoner states, "AND FURTHER

SUBJECT TO those specific reservations, conditions and/or exceptions made by and in favor of Southern Pacific Transportation Company, its successors and assigns, in the Prior Deed, which may affect the hereinbefore described portion of the properties conveyed therein and thereby.”

Plainly, the deeds’ bare references do not “explicitly” identify SPT’s extensive reservations: timber, mineral, and water rights, and a communications and pipeline easement. While the references put each purchaser on notice, they shed no light on whether any purchaser actually investigated the extent of rights, and bargained with full knowledge. CORP urges the Board to infer due diligence. But, CORP’s inference is dubious since CORP’s own land title expert, Patricia L. Chapman, Esq., and its land value expert, Mr. Rex failed to locate, investigate, and/or analyze the SPT reservations in preparing CORP’s own Abandonment Application. Also, as Mr. DeVoe noted, the appraisal relied upon by Swanson Brothers Lumber Company (prepared by Charles P. Thompson & Assoc., Inc) does not mention SPT’s reserved rights. R.V.S DeVoe at 8-9 (discussing Attachment 2 of R.V.S. Cecil). CORP’s witness Cecil testified that “[t]he SPT reservations were never discussed by the parties during the course of [the Swanson Brothers] negotiations[.]” R.V.S Cecil at 6. Thus, it is hardly “ludicrous on its face” (Supplemental Response at 37) for the Port to question whether recent sales reflect the SPT reservations. Mr. DeVoe makes a persuasive case that recent purchasers lacked relevant knowledge R.V.S DeVoe at 8-9, 11-12.

Finally, CORP’s selection of deeds for its Exhibit 5 is puzzling. First, CORP includes a number of deeds pertaining to land in Jackson and Josephine counties. These deeds are not for “purchasers of right of way land” as alleged by CORP, unless CORP is referring to a right of way other than the Line. Supplemental Response at 38. Second, CORP is wrong in asserting that the deeds “explicitly identified the rights retained by SPT.” Supplemental Response at 38.

The quit claim deed from CORP to G & I Investments does not contain any reference to the SPT reservations. Similarly, the quit claim deed from CORP to Rodger S Whipple lacks any such reference. The easement for roadway purposes granted by CORP to Copeland Sand and Gravel has no reference to the SPT reservations. And, the property line adjustment deed from CORP to Kay and Larry Larson does not "explicitly" refer to the SPT reserved rights.

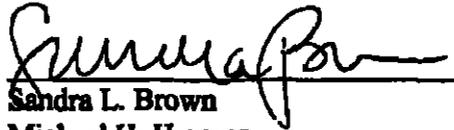
3. The Board is fully competent to assess the significance, if any, of *In re Estate of William Busch (Deceased)*

CORP contends that a decision from U.S. Tax Court, dated January 5, 2000, impugns Mr. DeVoe's credibility. The decision, in part, considers an appraisal prepared by DeVoe & Associates in 1993 or 1994. During this time period, Mr. DeVoe was a junior appraiser in his father's firm. He does not recall the assignment in question, and has no records that might confirm that he worked on the assignment. Mr. DeVoe's father, David M. DeVoe, MAI, SRA (now retired), may have handled the project by himself. In any event, the Port submits that if the Board accepts CORP's impermissible reply to reply, the Board can review the tax court's decision and assess the validity of CORP's assertion that the court questioned the integrity of the DeVoe appraisal.

IV. CONCLUSION

For all the reasons explained above, the Board should strike the Supplemental Response filed by CORP on September 29, 2008.

Respectfully submitted,



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*Counsel for the Oregon International
Port of Coos Bay*

October 7, 2008

CERTIFICATE OF SERVICE

This is to certify that on this 7th day of October 2008, I caused the foregoing Motion to Strike in STB Finance Docket No. 35160 to be served upon all parties of record in this proceeding.



David E. Benz