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SERVICE DATE – MARCH 4, 2009

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35175

ROSEBURG FOREST PRODUCTS CO., TIMBER PRODUCTS COMPANY, L.P.,  
SUBURBAN PROPANE, L.P., COWLEY D&L, INC., SOUSA AG SERVICE, AND YREKA  
WESTERN RAILROAD COMPANY—ALTERNATIVE RAIL SERVICE—CENTRAL  
OREGON & PACIFIC RAILROAD, INC.

Ex Parte No. 346 (Sub-No. 25-C)

RAIL GENERAL EXEMPTION AUTHORITY—PETITION FOR PARTIAL REVOCATION  
OF COMMODITY EXEMPTION—LUMBER OR WOOD PRODUCTS

Decided: March 3, 2009

Five shippers—Roseburg Forest Products Co. (RFP), Timber Products Company, L.P. (TPC), Suburban Propane, L.P. (Suburban), Cowley D&L, Inc. (Cowley), and Sousa AG Service (Sousa)—and a carrier, Yreka Western Railroad Company (YWR) (collectively, petitioners), have filed a petition under 49 U.S.C. 11123 and 49 CFR Part 1146<sup>1</sup> seeking an order authorizing interim alternative rail service for the petitioner-shippers' traffic over approximately 218 miles of rail line (the Line) operated by Central Oregon & Pacific Railroad, Inc. (CORP). The Line extends northward from CORP's connection with Union Pacific Railroad Company (UP) at Black Butte, CA (milepost 346.00), to Dillard, OR (milepost 562.00). Alleging a substantial, measurable deterioration and other inadequacy in CORP's rail service, petitioners request that the West Texas & Lubbock Railway Company, Inc. (WTL), and its agent, YWR, be authorized to provide alternative rail service over the Line.<sup>2</sup>

Because RFP and TPC ship lumber and wood products over the Line, and the rail transportation of these commodities has been exempted from Board regulation, petitioners also seek partial revocation of the class exemption for these products to permit the Board to entertain

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<sup>1</sup> These rules were adopted in Expedited Relief for Service Inadequacies, 3 S.T.B. 968 (1998) (Service Inadequacies).

<sup>2</sup> Under 49 U.S.C. 11123, the Board may authorize interim alternative rail service for an initial 30-day period and a total period not to exceed 270 days. There is a presumption under 49 CFR 1146.1(c) that alternative rail service will need to extend beyond the 30 days, but the incumbent carrier can rebut that presumption. A further Board order is needed for alternative rail service to continue beyond the initial 30-day period.

the portion of the petition that seeks alternative rail service for the transportation of these commodities. See 49 CFR 1039; Rail Exemption—Lumber or Wood Products, 7 I.C.C.2d 673 (1991) (Exemption-Lumber); and Service Inadequacies, 3 S.T.B. at 976.

UP filed a letter, which took no position on the merits of the petition but requested that, if the Board grants the petition, it require WTL to enter into an agreement with UP covering WTL's use of the segment between Bellview, OR (milepost 425.29), and Black Butte.

CORP, in a reply, maintains that its service is not inadequate and that petitioners are really complaining about its new rates. Nevertheless, CORP offered to enter into a voluntary agreement for WTL to lease and provide rail service over the approximately 96-mile portion of the Line between Black Butte and Medford, OR (milepost 441.80). For movements north of Medford, CORP said it would either provide haulage<sup>3</sup> for WTL or would interchange traffic with WTL for delivery to points between Medford and Dillard. CORP requested that the Board hold the proceedings in abeyance to give the parties an opportunity to negotiate an agreement.

Petitioners and WTL filed rebuttal statements agreeing to enter into negotiations with CORP for the lease of the portion of the Line between Medford and Black Butte. The Board, in a decision served on September 19, 2008, held the proceedings in abeyance for 30 days and ordered the parties to report back on the status of their negotiations by the end of the 30-day period. On October 6, 2008, CORP reported that the parties were unable to reach an agreement and requested that the Board return the proceedings to active status.

In this decision, we explain that petitioners have failed to make all of the showings required for the relief they seek. We will hold the record open to give the parties an opportunity to submit supplemental information.

## BACKGROUND

The Line extends over the Siskiyou Mountain Pass, which peaks at milepost 412.00 just north of the Oregon-California border. CORP acquired the 138-mile segment of the Line between Dillard and Bellview and leased the remaining 79.29-mile segment between Bellview and Black Butte from UP's predecessor, Southern Pacific Transportation Company. See Central Oregon & Pacific Railroad, Inc.—Lease, Operation, and Acquisition Exemption—Southern Pacific Transportation Company, Finance Docket No. 32567 (ICC served Jan. 19, 1995).

According to CORP, the Line is subject to "extreme winter weather," and in each direction "the grade over the Siskiyou Pass is one of the most severe grades, if not the most severe grade, in the United States." See Reply at 13. CORP says the Line's altitude makes it subject to heavy snow storms that cause service disruptions. To handle the grade, CORP says it

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<sup>3</sup> "Haulage" would be an agreement between CORP and WTL whereby CORP would provide motive power to WTL at an agreed-upon charge, and WTL would tender service to the public as though the train were its own.

ordinarily operates with a 5-locomotive consist capable of moving about 4,000 tons (37 loaded cars depending on per-car weight). CORP notes that the haulage capacity decreases when locomotives develop mechanical problems or require maintenance. CORP says that, while it would be possible to keep extra unused locomotives available, the added expense of any such action would need to be passed on to shippers.

Petitioners RFP and TPC, the Line's two largest shippers, are significant manufacturers of lumber and wood products. RFP operates a raw veneer mill in Weed, CA (milepost 348.40), plywood, particleboard, and stud mills at Dillard, and plywood and engineered wood mills at Riddle, OR (milepost 344.20). CORP is the only rail carrier that serves these mills. From Weed, RFP ships raw logs and raw veneer north over the Siskiyou Pass to Dillard and Riddle to be made into finished products. RFP also ships woodchips from Weed south a short distance to Black Butte for interchange with UP.

TPC operates a raw veneer mill at Yreka, CA, that is served only by YWR, and both a manufacturing complex at Medford, OR (milepost 441.80), and a hardwood mill at Grant's Pass, OR (milepost 473.90), that are served only by CORP. TPC ships raw veneer produced at Yreka via YWR to Montague, CA (milepost 375.50), for interchange with CORP and movement north over the Siskiyou Pass to TPC's finishing mills in Medford and Grant's Pass and a plywood mill in White City, OR. CORP interchanges with WCTU Railway at Tolo, OR (milepost 455.90), for a short haul to TPC's White City mill. TPC also ships woodchips from Yreka over the Siskiyou Pass to pulp mills as far north as St. Helens, OR.

Petitioners Suburban, Cowley, and Sousa make only limited use of rail service. Suburban receives about 15 or 20 tank car shipments of propane annually at its facility in Yreka via YWR's interchange with CORP at Montague. Cowley receives a similar number of shipments of fertilizer at its facility in Grenada, CA (milepost 369.10), and Sousa receives an unspecified number of shipments of fertilizer at its facility in Montague.

Petitioner YWR, a Class III rail carrier, operates approximately 8 miles of rail line from Yreka to its interchange with CORP at Montague—YWR's only connection to the national rail system. In prior years, YWR moved between 1,500 and 1,900 carloads annually for TPC and Suburban. YWR also operates a tourist excursion train, the Blue Goose, between Montague and Yreka.

WTL, the proposed alternative service operator, also is a Class III rail carrier. It is one of a number of subsidiaries of Permian Basin Railways, Inc. (Permian), which in turn is a subsidiary of Iowa Pacific Holding, LLC, a railroad holding company. WTL operates 107 miles of railroad on two lines extending from Lubbock to Seagraves and Whiteface, TX. It provided alternative rail service over a portion of a 25.3-mile line of South Plains Switching, Ltd. Co. in Lubbock for a 20-month period commencing in January 2006. See PYCO Industries, Inc.—Alternative Rail Service—South Plains Switching, Ltd. Co., STB Finance Docket No. 34802 (PYCO) (STB served Jan. 26, 2006, and Jan. 11, 2008); South Plains Switching, Ltd. Co.—Compensation For Use of Facilities in Alternative Rail Service—West Texas and Lubbock Railway Company, STB Finance Docket No. 35111, slip op. at 5 (STB served Dec. 15, 2008).

Before 2006, petitioners were generally satisfied with CORP's service. In April 2006, TPC says it began having problems arranging for woodchip cars because CORP's contact personnel and car ordering procedures would change without notice. After being told off and on for more than a year that woodchip cars were no longer available, TPC claims that its personnel observed empty woodchip cars stored on CORP's lines. In spring 2007, TPC says that when contacts with UP, the car supplier, revealed that woodchip cars were available, CORP moved more than 60 empty cars into the Montague rail head at one time in "apparent retaliation" for TPC's contacts with UP, "completely congesting the trackage and in essence shutting down local access to the YWR-CORP interchange at Montague." See Petition at 14.

In early 2007, CORP's parent company, RailAmerica, Inc., was acquired by Fortress Investment Group, LLC (Fortress).<sup>4</sup> That summer, according to TPC, CORP sporadically and without notice began reducing service from 5 to 4 days per week and there was a period when service was reduced by this amount for 6 weeks in a row.

In a letter dated December 13, 2007, CORP notified shippers that it was losing money operating the Line and that it would change its service offerings, effective January 15, 2008, and seek higher rates and/or additional traffic to make rail operations economically viable. CORP's first change rerouted, without additional charge, the finished product traffic moving from TPC's and RFP's Oregon mills. Instead of moving south over the Siskiyou Pass, CORP rerouted the traffic north for interchange with UP at Eugene, OR, and then south to the shippers' customers or interchange back to CORP at Black Butte. CORP's second change reduced rail service from 5-days-a-week to 2-days-a-week (Tuesdays and Thursdays) in each direction for loaded and empty cars that originated or terminated south of the Siskiyou Pass. CORP stated that it would, and says that it did, modify the new schedule "as necessary to accommodate traffic when more was tendered than [it] could handle in two day per week service." See Reply at 10.

CORP published new, increased rates on April 15, 2008, that became effective on May 6, 2008. RFP and TPC had ceased tendering shipments to CORP and turned to truck transportation on April 8 and May 2, 2008, respectively, after concluding that they would not be able to reach agreements on new transportation contracts before CORP's increased rates became effective. On May 27, 2008, CORP published new rates effective May 28, 2008, that scaled back by half the tariff rates that had become effective on May 6, 2008.<sup>5</sup> Petitioners claim that CORP never notified them of the reduction in rates and that they did not learn of it until CORP filed its reply.

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<sup>4</sup> See Fortress Investment Group LLC, et al.—Control Exemption—RailAmerica, Inc., et al., STB Finance Docket No. 34972 (STB served Dec. 22, 2006). CORP was formed by RailTex, Inc., a noncarrier holding company, see RailTex, Inc.—Continuance in Control Exemption—Central Oregon & Pacific Railroad, Inc., Finance Docket No. 32568 (ICC served Jan. 19, 1995), which was acquired by RailAmerica, also a noncarrier holding company, see Rail America, Inc.—Control Exemption—RailTex, Inc., STB Finance Docket No. 33813 (STB served Jan. 10, 2000).

<sup>5</sup> In a letter filed on September 4, 2008, CORP pointed out that the actual rates in effect at that time were the scaled back rates that had taken effect on May 28, 2008, and were included  
(continued . . . )

Petitioners say they searched for, and interviewed, potential alternative service providers for several weeks after the May 6, 2008 rate increase. Ultimately, they selected WTL and on August 26, 2008, filed their petition for alternative rail service. The petition applies to shipments of loaded cars that originate, or empty cars that terminate, at petitioner-shippers' facilities in California or are handled in interchange with CORP at Montague and move over the Siskiyou Pass. The petition does not apply to the traffic of any other shippers located between Black Butte and Dillard. As to RFP and TPC, the alternative service request applies to shipments of raw material and empty cars that move from their facilities in Yreka (via Montague) and Weed over the Siskiyou Pass to or from their finishing mills in Oregon or that move south for interchange with UP at Black Butte. The petition does not apply to their shipments of finished product that formerly moved south over the Siskiyou Pass from their Oregon mills for interchange with UP at Black Butte.

As petitioners envision it, WTL would administer the alternative rail service pursuant to an agency agreement between it and YWR. Under the agreement, WTL would, among other things, issue the bills of lading and collect freight charges on shipments not involving YWR. YWR, as WTL's agent, would handle all traffic moving over the Line. YWR would use its Alpha and Numeric codes for freight car identification and maintain interchange agreements and relationships with connecting rail.

#### DISCUSSION AND CONCLUSIONS

The Board's authority under 49 U.S.C. 11123 and regulations at 49 CFR Part 1146 provide an accelerated process to address serious ongoing service disruptions and inadequacies of a temporary nature such as equipment shortages, traffic congestion, and unauthorized cessations of operations. The relief available is not permanent, is to be granted without assessing fault, and is not intended to be used as a punitive or preventive measure. See Service Inadequacies, 3 S.T.B. at 970, 973.

A petition seeking alternative rail authority must: (1) show substantial, measurable service deterioration or other service inadequacy; (2) summarize discussions with the incumbent carrier and show why the incumbent is unlikely to restore adequate rail service within a reasonable time; and (3) contain a commitment from an alternative carrier to meet current transportation needs and show that this service can be performed safely without degrading service to its existing customers and without unreasonably interfering with the incumbent's overall ability to provide service. See 49 CFR 1146.1. We discuss these criteria below.

#### Substantial, Measurable Deterioration or Other Service Inadequacy

While it is undisputed that CORP effected a substantial reduction in rail service, petitioners have not yet established that CORP's service was inadequate under 49 U.S.C. 11123.

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( . . . continued)

in its reply as Exhibit 2 of the verified statement of Patrick Kerr. CORP requested leave to late-file the letter, and petitioners did not object. We will grant CORP's request.

Petitioners contend that CORP began a “slow-motion” abandonment of the Line in early 2007, just after CORP’s corporate parent, RailAmerica, was acquired by Fortress. They say they experienced car supply problems, poor communications, and reduced service levels as early as spring 2006, but that rail service became wholly inadequate when CORP adopted the 2-day-a-week schedule in January 2008, and further worsened when CORP failed to provide adequate rail service even at the reduced service level.

Car supply and retaliation. Failure to deliver adequate empty cars can form the basis for finding a “substantial, measurable deterioration” of rail service, see, e.g., PYCO, slip op. at 5 (STB served Jan. 26, 2006). TPC’s chip car problem evidently ended about a year and a half before petitioners sought relief from us. This contrasts with the situation in PYCO, where the failure to deliver sufficient boxcars was ongoing. Id. And the record here shows, at most, one incident that could qualify as retaliation. Significantly, TPC’s witness, Susan Hart, does not claim retaliation and petitioners themselves seem hesitant to describe it as retaliatory, referring to it as “apparent retaliation.” Petition at 14.

Summer 2007 service. Petitioners contend that CORP failed to provide full scheduled service in the summer of 2007, frequently running trains only 4 times a week rather than the scheduled 5 times a week. They do not show, however, that this level of service had any significant effect on the shipper-petitioners. We do not find this to constitute a substantial, measurable deterioration in service.

Reduced service schedule. The evidence suggests that the 2-day a-week schedule CORP implemented in January 2008 was adequate for the number of cars RFP and TPC tendered for movement to their Oregon mills. As far as we can tell from petitioners’ submissions, RFP and TPC together tendered approximately 68 carloads of logs and raw veneer a week (50 carloads from RFP and 18 carloads from TPC). Petitioners do not dispute, however, that if all five of CORP’s locomotives were in service, CORP could move as many as 37 carloads a train (74 carloads a week) north over the Siskiyou Pass on its 2-day-a-week service schedule.<sup>6</sup>

The Train Chart<sup>7</sup> CORP submitted shows that: (1) between January 15 and May 6, 2008, CORP left carloads behind a total of nine Tuesdays and four Thursdays; (2) CORP moved out on Thursdays carloads left behind on Tuesdays; (3) CORP ran extra trains to clear up backlogs when physical limitations prevented it from moving all of the carloads tendered to it; and

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<sup>6</sup> The record is silent on the number of combined carloads RFP and TPC tendered for movement to their Oregon mills. There is evidence indicating that TPC tendered more than 18 cars a week, see Petition at 16; Petitioners’ Rebuttal, V.S. of Susan Hart at 2, but not enough to change our finding that CORP’s 2-day-a-week schedule was adequate to handle RFP’s and TPC’s weekly traffic.

<sup>7</sup> The Train Chart shows the day and date of rail movements, the number of locomotives used, the number of loaded and/or empty cars in the train, whether the movement was northbound or southbound, the number of loaded cars left behind, and any comments. See Reply, V.S. of Patrick Kerr, Exhibit 5.

(4) only in two instances (January 24 and March 13, 2008) did carloads wait up to 5 days to move to TPC's and RFP's Oregon mills.

Petitioners point to three consecutive Tuesdays and Thursdays between January 31 and February 12, 2008, when CORP failed to move tendered traffic. But the record indicates that four storms dumped in excess of 4 feet of snow on the Siskiyou Pass during this period, closing both the Line and Interstate 5—the parallel north-south artery that serves the same points served by the Line. CORP asserts that it operated snow plows on four of these days but ran out of space to push the snow. The Train Chart confirms these clearing operations and that CORP ran extra trains on Saturday, February 2, and Friday, February 8, 2008, to clear out the backlog of carloads and deliver empty cars.

Petitioners maintain that a 5-day service week is necessary for a consistent and orderly supply of raw materials to move to TPC's and RFP's Oregon mills. They refer to a "tightly maintained production schedule" at TPC's White City mill, which requires Friday deliveries of specific volumes of substrate that "due to production parameters and product tolerances" can only be produced at TPC's Yreka mill on Mondays and Tuesdays. See Petition at 22-23.

Petitioners claim that the reduced service frequency, the bunching of more rail cars per train that resulted, and the otherwise poor service made it extremely difficult for TPC's and RFP's personnel to coordinate the unloading of inbound raw material and the loading of outbound finished product. According to petitioners, severe plant congestion and measurably increased cycle time per car resulted. These difficulties, petitioners say, led to unavoidable delays in supplying finished goods to RFP's and TPC's customers and were likely to result in RFP and TPC losing business share to competitors with more reliable transportation service, particularly as to customers that require just-in-time deliveries.

The evidence, however, suggests that the problems at RFP's and TPC's Oregon mills were not solely attributable to CORP's 2-day a-week schedule. CORP attributes the problems at these mills to internal difficulties, noting that TPC's Medford mill has room to place only two cars, and says these problems could be resolved by blocking cars or adding more track at the mills. TPC responds that its Medford mill accommodates more than two cars but requires box car loading of commodity and off-loading of veneer at the same location.

The record on this matter would benefit from further development. We will therefore direct the parties to supplement the record to clarify: (1) the frequency and severity of the delays RFP and TPC have endured in supplying finished goods to their customers and the consequences, if any, to them of those delays; (2) the extent to which internal difficulties at their Oregon mills contribute to the various problems about which RFP and TPC complain; and (3) the feasibility of addressing these problems through means other than a return to a 5-day-a-week service schedule (i.e., building more track at the mills for loading and unloading cargo or storing raw materials at the mills).

Diversification to trucks. The parties dispute whether truck transportation is a logistically or economically feasible alternative for shipper petitioners, assuming that if it is, then we may not find a substantial, measurable deterioration in rail service. But we have made such a finding at

least once before when shippers diverted all of their traffic to trucks. See Arkansas Midland Railroad Company, Inc.—Alternative Rail Service—Line of Delta Southern Railroad, Inc., STB Finance Docket No. 34479, slip op. at 6 (STB served Mar. 11, 2004). We see no reason to depart from this precedent, especially because it is part of the rail transportation policy to ensure the continuation of a sound rail transportation system with effective competition between rail and other modes of transportation. See 49 U.S.C. 10101(4). Thus, we conclude that a shipper’s ability to divert its traffic to trucks does not preclude a finding under section 11123 that rail service has deteriorated sufficiently to justify an alternative service order.

Rail options. The evidence suggests that RFP and TPC may have two other rail options whose viability would undercut petitioners’ claim that they lack access to adequate rail service. Cf. Granite State Concrete Co., Inc. and Milford-Bennington Railroad Company, Inc. v. Boston and Maine Corporation and Springfield Terminal Railway Company, STB Docket No. 42083, slip op. at 6 (STB served Sept. 15, 2003) (noting that incumbent carrier’s offer to serve shipper itself, where service by trackage rights tenant was allegedly inadequate, precluded finding that alternative rail service was appropriate). Unfortunately, the parties’ submissions regarding these options are unclear.

As to the first option, CORP says that “[i]n addition to the current service that CORP offers over Siskiyou Pass at current rates, CORP is willing to reroute traffic from Montague, Grenada, and Weed south to Black Butte for interchange to the UP” and movement north to Eugene, OR, for interchange back to CORP and movement south to TPC’s and RFP’s Oregon mills. See Reply at 7. This is the reverse of the routing CORP began using in January 2008 to move finished product from TPC’s and RFP’s Oregon mills. It is unclear whether CORP is offering this alternative route in addition to, or in lieu of, its scheduled twice-a-week operations over the Siskiyou Pass and how often the rerouted trains would run. Nor is it clear how, if at all, the alternative route would affect TPC’s and RFP’s operations. Because of the time lost at two interchanges and because it would be 150 miles longer, RFP claims that this “would not be a viable rail alternative.” See Rebuttal V.S. of Andrew Jeffers at 7. RFP also says that it had discussed this routing with UP but that UP was not comfortable about taking on the additional traffic and the rates it proposed, while less than those of CORP, were not truck competitive.

The second rail option, according to CORP, would involve UP operating over the Siskiyou Pass, which apparently UP retained the right to do when it leased the Black Butte-to-Bellview segment of the Line to CORP. However, the current record does not reveal whether UP would be willing to provide this service much less at what level and frequency. Therefore, it is not clear whether these operations would constitute a meaningful alternative to CORP’s current 2-day-a-week schedule.

Rail rates and new traffic. Petitioners argue that CORP’s rate increases, combined with its failure to quote a rate for proposed new traffic in December 2007, show that CORP deliberately intended to downgrade service on the Line. We disagree. Rate disputes do not constitute service disruptions or inadequacies within the meaning of 49 U.S.C. 11123. See Albemarle Corporation—Alternative Rail Service—Line of the Louisiana and North West Railroad Company, STB Finance Docket No. 34931, slip op. at 4 (STB served Oct. 6, 2006); Keokuk Junction Railway Company—Alternative Rail Service—Line of Toledo, Peoria and

Western Railway Corporation, STB Finance Docket No. 34397, slip op. at 6 (STB served Oct. 31, 2003) (Keokuk). These disputes require permanent, not temporary, relief, which can be obtained only on fully developed records based on rate complaints filed under 49 U.S.C. 10701(d)(1). See, e.g., Keokuk, slip op. at 6. The opportunity for new traffic to which petitioners refer involved only 4-5 cars per month, to be shipped by RFP from Weed to Saginaw, OR. At the time, CORP and RFP were parties to a service contract, which CORP says governed the adequacy of CORP's service. If the contract applied to the proposed new traffic, then it is unclear why RFP would have had to ask CORP to quote a rate since, presumably, the contract would set one. But RFP does not argue that the contract did not apply to the new traffic. Thus, on this record, we conclude that CORP's failure to quote a rate does not establish grounds for an alternative service order. We agree with petitioners, however, that the Board has jurisdiction to consider RFP's claims that CORP's continuation of a 2-day-a-week service schedule after the lapse of the contract in May 2008 presents a rail service emergency under 49 U.S.C. 11123.

Summary. The record does not establish the existence of a rail transportation emergency having a substantial adverse effect on rail shippers. Although petitioners have experienced a reduction in service frequency and have documented some service inadequacy, they have not established that a substantial, measurable service deterioration exists that would justify an alternative service order. Normally, in such a case, we would not address the remaining criteria for authorizing alternative rail service. But because we are affording the parties an opportunity to submit supplemental evidence on this issue, we proceed to address the other criteria.

#### Discussions with the Incumbent and Reasons Why Restoration of Adequate Service Is Unlikely

Under 49 CFR 1146.1(b)(ii), petitioners seeking a prescription of alternative rail service must summarize their discussions of the service problems with the incumbent carrier. The purpose of this requirement is to ensure that the petitioners and the carrier have done all that they could do to resolve the service issues before seeking relief from the Board. See American Plant Food Corporation—Alternative Rail Service—Line of Texas Northeastern Railroad, STB Finance Docket No. 33795, slip op. at 2-3 (STB served Dec. 7, 1999) (denying an alternative service request where the shipper had not contacted the incumbent carrier in the 9-month period before filing its petition). We find that petitioners have made the requisite showing here.

The record before us indicates that RFP and TPC repeatedly brought to CORP's attention their dissatisfaction with its 2-day-a-week service schedule. While CORP ran extra, unscheduled trains as it deemed necessary to clear up backlogs, there is no evidence to suggest that it sought to engage RFP and TPC in discussions aimed at resolving or ameliorating their problems with the reduced service schedule. Rather, petitioners complain about CORP's unresponsiveness and "utter lack of communication." See Rebuttal at 8.

We find unpersuasive CORP's argument that the repeated efforts RFP and TPC made to bring their problems to CORP's attention were not the type of discussions mandated by the Board because they occurred in the context of negotiations over new contracts or a lease assignment. Nor do we find merit to CORP's contention that an undue amount of time elapsed between the time RFP and TPC diverted their traffic to truck and the time petitioners filed this

request for alternative rail service. The record shows that during this time, WTL's parent company attempted to negotiate with CORP for the assignment and sale of the Line. And petitioners and WTL, at CORP's suggestion, entered into negotiations for the lease of the Medford-Black Butte portion of the Line in September 2008. These efforts afforded additional opportunities for the parties to enter into discussions aimed at resolving or ameliorating petitioner-shippers' problems with CORP's reduced service schedule.

The second part of this criterion requires a showing that the incumbent carrier is unlikely to restore adequate rail service within a reasonable time. As noted above, we are unable to find on this record that CORP is failing to provide adequate rail service. We are therefore unable to make the corollary finding that CORP is unlikely to restore adequate rail service. Of course, if petitioners make a showing of inadequate service in their supplemental filings, we will revisit this matter.

#### Commitment from Alternative Service Provider

Petitioners claim that the proposed alternative rail service would meet their needs and free CORP from what it claims is a money losing operation while compensating it for the use of the Line. They contend that WTL is committed to providing 5-day-a-week service; is an experienced and reliable alternative rail service provider; and is ready, willing and able to provide the proposed alternative rail service. Additionally, they claim that YWR knows local rail transportation conditions, having provided rail service for two of the petitioner-shippers, and that WTL would defer to YWR on all transportation matters.

CORP questions, among other things, WTL's experience and ability to provide alternative rail service over a mountainous line many times larger than the line at issue in PYCO, supra, and whether WTL would be able to obtain the experienced engineers necessary to operate the Line. WTL points out that Permian, its parent company and owner of San Luis and Rio Grande Railroad (SLRG), is familiar with mountain operations. SLRG, according to WTL, operates daily freight and seasonal passenger service over a mountainous line with grades and curves very similar to those on the Line. WTL also claims that it has adequate management to devote to alternative service and is familiar with RailAmerica's operating practices, having bought four RailAmerica railroads. Additionally, WTL states that Permian: (1) has arranged to lease locomotives similar to those being used by CORP for the mountainous terrain; (2) will send mountain-qualified operating crews to provide alternative service and an on-site, mountain-qualified manager to ensure safety, rules compliance, and service adequacy; and (3) will provide those personnel with proper training and territorial qualification prior to startup.

Petitioners maintain that the proposed alternative rail service would not result in degrading rail service to WTL's and YWR's existing customers. As to WTL, they claim that there would be no operational conflict because: (1) its line and existing customers are located in Texas whereas the alternative service Line is located more than a thousand miles away in California and Oregon; and (2) the two lines have little in common in terms of traffic or other needs. As to YWR, petitioners assert that all of its existing customers are petitioner shippers and would not experience any rail service degradation.

Noting that CORP would continue serving the non-petitioner shippers on the portion of the Line between Ashland, OR (milepost 429.10), and Dillard,<sup>8</sup> WTL asserts that the two carriers' operating supervisors would be able to work together to develop train service windows that would prevent delays or disruptions. Nevertheless, to ensure that the dual operations would be performed safely and without unreasonably interfering with CORP's ability to serve the non-petitioner shippers, WTL acknowledges that an operating protocol would have to be negotiated or imposed by the Board. WTL claims that it is familiar with such protocols, having provided alternative rail service pursuant to Board-imposed protocols in PYCO (STB served Feb. 16, 2006).

Except as noted below, we find that petitioners have satisfied the commitment requirement of 49 CFR 1146.1(b)(iii). Before we would authorize alternative rail service, petitioners would have to provide assurances that Permian/WTL's plans to operate the Line with mountain-qualified operating crews and a mountain-qualified manager would not result in degrading service to the existing customers of SLRG. And if we were to authorize alternative rail service, we would order WTL and CORP to promptly enter into operating protocols and report back to the Board that the protocols are in place. If the parties were unsuccessful in negotiating protocols, we would impose them. Id.

#### Request for Partial Revocation of Class Exemption

Because petitioners have not satisfied the criteria of 49 CFR 1146.1 based on their filings to date, it would be premature to consider their request for a partial revocation of the class exemption for lumber and wood products. See Exemption-Lumber, supra.

#### Supplemental Evidence

We will hold these proceedings open to give petitioners an opportunity to respond to the concerns raised above. In particular, petitioners should supplement the record as to their commercial needs and why CORP's 2-day-a-week service schedule is inadequate to satisfy them. Petitioners should also provide assurances that WTL's plans to operate the Line will not result in degrading service to SLRG's customers.

CORP should clarify why it is opposed to alternative rail service given that petitioners have diverted their traffic to truck transportation and that CORP would be compensated for WTL's operation of the Line, as CORP insisted in its proposal to voluntarily lease the Black Butte-Medford portion of the Line to WTL. CORP should also respond to the contentions that it failed to give notice of the scaled-back rate increases or make copies of its tariff available from customary sources. Finally, CORP should clarify the ambiguities noted above regarding petitioner-shippers' other rail options. After we have received the parties' supplemental

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<sup>8</sup> Between Ashland and Black Butte, WTL believes that petitioning shippers are CORP's only rail customers, and as such, says "there would be no need for CORP to operate between these two points if [alternative rail service] is granted and therefore no impact on its operations." See WTL Rebuttal at 6-7.

information, we will issue a final decision on the merits of petitioners' request for an order authorizing interim alternative rail service.

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

It is ordered:

1. CORP's letter filed on September 4, 2008, is accepted into the record.
2. The parties are directed to submit supplemental statements responsive to the questions raised above by March 24, 2009, and replies by April 3, 2009.
3. This decision is effective on its date of service.

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

Anne K. Quinlan  
Acting Secretary