

SURFACE TRANSPORTATION BOARD

DECISION

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

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

Decided: October 31, 2008

In this decision, we are granting the application of the Central Oregon & Pacific Railroad, Inc. (CORP) for authority to abandon and discontinue service over portions of its Coos Bay Subdivision. We find the financial loss in operating the line at issue warrants granting the application. We will condition our grant of authority on the carrier's compliance with labor and environmental conditions and ensuring that the abandonment will not create stranded segments. In addition, because we are granting today in a separate decision an application by the Oregon International Port of Coos Bay (the Port) to force CORP to sell the same trackage to the Port under the "feeder line" provision of our statute, we are prohibiting the carrier from consummating the abandonment unless and until the feeder line proceeding ends without a sale. Likewise, we will also toll the deadline for filing offers of financial assistance and will not consider any such offers, or any public use or trail use requests, unless the feeder line proceeding ends without a sale. While we are conditioning or delaying CORP's exercise of the abandonment authority, we are granting the lesser component—discontinuance authority. Therefore, CORP may immediately upon effectiveness of this decision discontinue service over the Line, the LPN Branch, and the Coquille Branch.

On July 14, 2008, CORP filed an application under 49 U.S.C. 10903 seeking authority to abandon and discontinue service over portions of a line of railroad known as the Coos Bay Subdivision (the Line). CORP seeks authority to abandon the portions of the Line that it owns, namely the line extending from milepost 669.0 near Vaughn to milepost 763.13 near Cordes, a distance of 94.13 miles in Coos, Douglas, and Lane Counties, OR. CORP also seeks authority to discontinue service over the portions of the Line that it leases: (1) the Coquille Branch¹ extending from milepost 763.13 near Cordes to milepost 785.5 near Coquille, a distance of 22.37 miles, in Coos County, OR, and (2) the LPN Branch extending between CORP milepost 738.8

¹ CORP leases this 22.37-mile segment from the Union Pacific Railroad Company (Union Pacific).

and LPN Branch² milepost 2.0, a distance of 2.0 miles, in Douglas County, OR.³ Notice of the filing was served and published in the Federal Register (73 FR 45098) on August 1, 2008. Protests were filed by the Port, the State of Oregon (the State), and the Coos-Siskiyou Shippers' Coalition.⁴ CORP replied to these protests.

On July 11, 2008, three days prior to CORP filing its application for abandonment and discontinuance authority, the Port filed an application under 49 U.S.C. 10907 to acquire, for continued rail service, the portion of the Line at issue in this abandonment, as well as an additional segment between milepost 669.0 and milepost 652.114 near Danebo, OR. This additional segment, which connects the Line to the national rail system, is still actively serving at least one shipper. We are granting the feeder line application in a separate decision served today in Oregon International Port of Coos Bay—Feeder Line Application—Coos Bay Line of the Central Oregon & Pacific Railroad, Inc., STB Finance Docket No. 35160.

BACKGROUND

CORP acquired the Line in 1994 from the Southern Pacific Transportation Company. At the same time, RailTex, Inc. (RailTex), the noncarrier parent of CORP, acquired authority to continue in control of CORP upon its becoming a Class III rail carrier. RailAmerica acquired RailTex in 2000. Fortress Investment Group LLC acquired RailAmerica in February 2007.⁵

² CORP leases this two-mile segment from Longview, Portland & Northern Railway Company (LPN).

³ CORP is also discontinuing service over the 3.5-mile Port of Coos Bay North Spit Rail Spur, which diverges from shipper Roseburg Forest Products' (Roseburg) North Spit Rail Spur at CORP milepost 763.20 at Cordes. CORP asserts, however, that the Board does not have jurisdiction over this discontinuance under 49 U.S.C. 10906. CORP's Aug. 19, 2008 Application for Abandonment and Discontinuance Authority, at 1 n.3. That assertion will be addressed later in this decision.

⁴ This coalition consists of local governments and shippers, the latter including Roseburg, Southport Lumber, American Bridge Manufacturing, Inc., and Georgia-Pacific West, Inc. (Georgia-Pacific).

⁵ Fortress Investment Group, LLC, et al.—Control Exemption—Rail America, Inc., et al., STB Finance Docket No. 34972 (STB served Dec. 22, 2006).

On September 21, 2007, CORP issued an embargo⁶ over most of the Line, citing unsafe conditions in three tunnels. On November 8, 2007, the Federal Railroad Administration issued a report based on its own investigation that validated CORP's safety concerns about the tunnels. For more than six months, CORP engaged in meetings, issued correspondence, and made statements to the media in an apparent effort to communicate with shippers on the Line, the State, and Union Pacific (the carrier that connects the Line to the national rail system) in an attempt to secure their participation in funding the repairs. The negotiations were unsuccessful. No repairs to the tunnels were made during that time.

On April 11, 2008, the Board issued a show cause order directing CORP to explain (1) why the Board should not consider CORP's ongoing failure to provide service on the Line an unlawful abandonment, and (2) why the Board should not require CORP to either (i) promptly repair the tunnels on the Line and resume rail service, or (ii) seek abandonment authority. In a May 12, 2008 response to the show cause order, CORP indicated that it would seek abandonment authority, which it did in this docket on July 14, 2008.

The Board conducted a public hearing in Eugene, OR, on August 21, 2008, to receive public comments in this proceeding as well as on the Port's related feeder line application. Speakers at the hearing included Oregon State Governor Ted Kulongoski, U.S. Representative Peter DeFazio, state senators and representatives, local government and other public officials, shippers and other businesses, the Port, CORP, a labor union representative, community groups, and concerned citizens. The agency also received written comments or testimony from most of the speakers as well as from U.S. Senator Ron Wyden and from other interested parties. As relevant, the testimony is discussed below.

DISCUSSION AND CONCLUSIONS

The statutory standard governing an abandonment or discontinuance of service is whether the present or future public convenience and necessity permit the proposed action. 49 U.S.C. 10903(d). In implementing this standard, we 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. Colorado v. United States, 271 U.S. 153, 168-70 (1926). In weighing the burden on the carrier and on interstate commerce, we consider any drain on resources that keeping the line open would cause on the remainder of the rail system, due to operating losses on the line and/or lost "opportunity costs." See Farmland Indus., Inc. v. United States, 642 F.2d 208 (7th Cir. 1981).

⁶ An embargo is a notification to the railroad industry and affected shippers that, in the carrier's opinion, a disability exists that temporarily prevents it from providing service. The carrier issues an embargo through the Association of American Railroads pursuant to Circular TD-1. An embargo does not require prior Board approval. See, e.g., Bar Ale, Inc. v. California Northern Railroad Co. and Southern Pacific Transportation Company, STB Finance Docket No. 32821, slip op. at 5 (STB served July 20, 2001). If justified, the embargo will temporarily relieve the carrier of its common carrier obligation. Id. slip op. at 6.

Public Convenience and Necessity

We will now discuss the factors relevant to our public convenience and necessity inquiry. After that discussion, we will present our application of those factors to the facts of this case.

Traffic, operations, and revenues. The Line has lost traffic over the past 5 years. CORP's witnesses state that the Line carried 7,574 carloads in 2003; 5,408 carloads in 2004; 5,193 carloads in 2005; 5,363 carloads in 2006; and 4,018 carloads in 2007 until the September 21, 2007 embargo. According to these witnesses, the decline began in 2004 when Weyerhaeuser Corporation's (Weyerhaeuser) paper manufacturing facility at Cordes closed, causing a loss of approximately 3,000 carloads.⁷

The record does not support the Port's contrary assertion that traffic on the Line actually shows an upward trend. The Port's calculations are based on the average cars per day over the Line in 2007 until the September embargo—15.22 carloads per day. Extrapolating this daily carload average past the embargo date to the end of 2007 produces an estimate of 5,555 cars for the year. The Port's approach, however, assumes an even distribution of traffic throughout the year, an assumption contravened by the actual experience on the Line.⁸ As a result, we find CORP's forecast year projection of 5,363 carloads to be reasonable here, because CORP based its projection on more realistic traffic distribution over the year. In any event, even if the Port's unsupported assumption were credible, the traffic volume on the Line still falls far short of the carloads in 2003, the last year in which the Line was profitable.

Here, CORP could not offset the loss of carloads by increasing rates on the remaining traffic that uses the Line. According to CORP, the majority of traffic moving over the Line is handled by CORP for the account of Union Pacific. Thus, CORP states, it does not have the right to set rates for, or to impose surcharges on, that traffic; rather, it receives a flat "Handling Carrier Charge" for each car that it handles on Union Pacific's behalf. CORP asserts that this handling charge has not kept up with increases in its costs in recent years.

Avoidable costs. Avoidable costs are costs that the applicant will cease to incur if it abandons and discontinues service over the Line. CORP says that it will incur on-branch avoidable costs totaling \$4,748,339 for the forecast year and off-branch avoidable costs totaling

⁷ CORP acknowledges a small increase in traffic from 2005-2006 attributable to new business from Roseburg; in fact, the increase tempered the loss from Weyerhaeuser so the net loss on the Line compared to the prior year was only 2,166 carloads. CORP further notes, however, that traffic declined in the Base Year and asserts that the remaining traffic on the Line has never been enough to offset the loss of Weyerhaeuser traffic.

⁸ Traffic data from 2006, the last full calendar year of operations before the embargo, show that traffic volumes declined in the last four months of the calendar year. In 2006, traffic over the Line was 4,608 carloads during the first 8 months, an average of 19.0 cars per day, but only 755 carloads during the last 4 months, an average of only 6.2 cars per day. By relying on only the first 8 months of 2007 to extrapolate its total carload figure for that year, the Port failed to account for this seasonal decline, and thus overstated volumes.

\$1,090,554 for the forecast year. Total avoidable costs thus would be \$5,838,893 for the forecast year. Because protestants have not presented any evidence to contradict CORP's avoidable cost estimates, we will accept CORP's estimates.

Line condition and rehabilitation. As indicated, the Line is currently embargoed due to the poor condition of several timber-lined tunnels that are nearly a century old. CORP estimates that the cost to immediately restore the Line's tunnels to operating condition would be \$2,860,785.⁹ Although CORP asserts that an additional \$3,818,961 in tunnel repairs will be necessary within 4 years,¹⁰ CORP did not include the additional repairs over the next four years in its rehabilitation cost estimate. We accept CORP's unchallenged \$2,860,785 rehabilitation cost estimate.

Opportunity costs. Opportunity costs (or total return on value of road property) reflect the economic loss experienced by a carrier from forgoing a more profitable alternative use of its assets. Under Abandonment Regulations—Costing, 3 I.C.C.2d 340 (1987), the opportunity cost of road property is computed on an investment base equal to the sum of: (1) allowable working capital; (2) the net liquidation value (NLV) of the line; and (3) current income tax benefits (if any) resulting from abandonment. The investment base (or valuation of the road properties) is multiplied by the current nominal rate of return to yield the nominal return on value. Under 49 CFR 1152.34(d), the rate of return used to calculate return on value represents the individual railroad's current pre-tax nominal cost of capital. Our most recent after-tax cost of capital finding for the railroad industry is used as a basis for developing the appropriate nominal rate of return. The nominal return is then adjusted by applying a holding gain (or loss) to reflect the increase (or decrease) in value a carrier will expect to realize by holding assets for one additional year.

CORP estimates that continued operation of the Line would cause it to incur an opportunity cost on the value of its property of \$2,879,734. Although protestants do not challenge this figure, we will make two adjustments.

First, CORP computed its opportunity costs by multiplying its total valuation of road property¹¹ by a rate of return of 14.6%. But CORP erred in determining the rate of return

⁹ CORP's Aug. 19, 2008 Application for Abandonment and Discontinuance Authority, vol. 1, at 15-16. In Exhibit 1 of CORP's application for abandonment and discontinuance, this figure is rounded to \$2,861,000—which is also the figure used in Appendix A of this decision.

¹⁰ Id. at 16.

¹¹ The Port argues that the Board should reduce the NLV, which is a large component of the valuation of property, based on the cost of bridge removal and environmental costs in any salvage activity. We have addressed the Port's arguments in the related feeder line decision in STB Finance Docket No. 35160.

CORP's expert witnesses also provided a second NLV figure in its September 12, 2008 Rebuttal to Protests. This later figure, however, was presented on rebuttal; therefore, interested parties did not have a chance to comment. Additionally, at least one other CORP expert witness
(continued . . .)

because it relied on the Board's procedures used in the Uniform Rail Costing System, where the rate of return is calculated based on a 35% tax rate. In contrast, for abandonments and feeder line proceedings, the tax rate should be 37%, which accounts for federal and state taxes. See 49 CFR 1152.34(d). In addition, CORP did not use the most recent pre-tax cost of capital figure. As a result, CORP's opportunity cost calculation produces a figure slightly lower than it should be. When we apply the correct pre-tax cost of capital, the rate of return becomes 17.24%.

Second, we are reducing CORP's opportunity cost to \$957,397 because, as discussed below, we are excluding any value for salvage. Our reduction in opportunity cost will not change the result, however, because the Line still incurs significant opportunity costs.

In the feeder line proceeding, the Port has submitted evidence of a significant reduction in the price of steel since July, when both the feeder line and abandonment applications were filed. That evidence undercuts the net salvage value submitted by CORP in this proceeding, and we will not overlook such data simply because it was submitted in a different docket concerning substantially the same assets. However, we will not transfer any updated feeder line steel prices into this case because the feeder line figures reflect the 111 miles that are the subject of that proceeding, not the 94 miles at issue here. Because we cannot compute a realistic net salvage value for the Line to be abandoned based on the evidence in the record, we will compute an NLV based solely on the price of real estate. Applying the 17.24% cost of capital to the \$5,553,345 valuation of property excluding salvage, we compute an opportunity cost of \$957,397 per year.

We understand that CORP is incurring a much larger opportunity cost, because based on the recent evidence the Port has submitted in the feeder line case, the rail on the Line still has substantial value, and CORP is forgoing that value by not selling it. Here, because we can conclude that the Line is incurring, at the very minimum, a \$957,397 opportunity cost, it is unnecessary for us to determine with greater specificity what the additional forgone opportunity cost would be if the net salvage value were included. We therefore take notice of the additional opportunity cost, which we know exists but which the record does not permit us to measure. See Grand Trunk Western Railroad Incorporated—Abandonment—In Macomb and Oakland Counties, MI, STB Docket No. AB-31 (Sub-No. 33) (STB served Dec. 24, 1998).

Summary of cost and revenue evidence. The base year is the last full 12-month period during which CORP conducted operations over the line, i.e., September 1, 2006, through August 31, 2007. The forecast year is from July 1, 2008, through June 30, 2009. Although the shipper coalition seeks to challenge CORP's argument that it has suffered losses, that challenge is unsupported. In fact, the Port (a protestant to the abandonment) submitted testimony in the related feeder line application indicating that its expert witness had "no reason to dispute or challenge the operating losses" of CORP on the Line.¹²

(. . . continued)

has not adopted the higher NLV figure. See id., vol. 2, V.S. Baranowski, Attachment 1. For these reasons, the Board will not rely on CORP's second NLV figure.

¹² The Port's July 11, 2008 Feeder Line Application, vol. I, Exhibit 5, at 84.

For the entire Line, in the forecast year, CORP will realize revenues of \$3,718,631 and incur avoidable costs of \$5,838,893, resulting in a forecast year operating loss of \$2,120,262. When the total return on value is considered, the estimated forecast year loss from operations is \$2,276,489. When the costs to rehabilitate the Line are considered, the estimated subsidy payment is \$5,137,489. See Appendix A to this decision.

Alternative transportation. CORP presents evidence of alternatives for transportation on the Line. Its expert witness indicates that the shippers can readily divert virtually all the traffic CORP previously handled over the Line to truck or to truck-rail transload service. CORP's witness asserts that truck-rail transload service is viable and that some shippers on the Line have used this as an alternative since the embargo.

CORP's witness maintains that there is an adequate supply of trucks in CORP's service territory to absorb the prior rail traffic over the Line. He adds that approximately 96% of all carloads that moved over the Line during 2007 originated or terminated at either Coos Bay or Coquille.¹³ He also states that truck traffic can move between Eugene (where the Line interchanges with Union Pacific's rail system) and Coos Bay or Coquille via the US-101 Coast route and Oregon State Highway 126 to reach US I-5 for direct truck shipments to or from points in California or Arizona.¹⁴ The witness adds that Oregon State Highway 126 and US-101 are "reasonably good two-lane highways," that Roseburg, the second largest shipper on the line, can use Oregon State Highway 42, and that the route on Oregon State Highway 42 between Coos Bay, Coquille, Dillard, and Roseburg is "an excellent highway, with wide lanes, good super-elevation and reasonably flat terrain through a series of river valleys."¹⁵

CORP's expert witness states that he has spoken with the owner of A&M Reload, the primary reload facility used by former CORP shippers. According to CORP's witness, Roseburg, Georgia-Pacific, and Durawood Treating Co. are all customers of A&M Reload, and A&M Reload has substantial excess capacity available to handle additional truck-rail transload traffic.¹⁶ CORP calculates that the average increase in transportation costs to shippers resulting from the proposed abandonment will be 11%.¹⁷

Protestants maintain that these transportation alternatives are inadequate substitutes for rail service. They state that trucking is a short-term solution that is too expensive to rely on in the long term and that shippers have already incurred significant increases in costs due to the embargo. For example, protestants note that Georgia-Pacific—the largest shipper on the Line

¹³ CORP's Aug. 19, 2008 Application for Abandonment and Discontinuance Authority, vol. 2, V.S. Williams, at 4.

¹⁴ CORP's Sept. 12, 2008 Rebuttal to Protests, vol. 2, V.S. Williams, at 8-9.

¹⁵ Id.

¹⁶ CORP's Sept. 12, 2008 Rebuttal to Protests, vol. 2, V.S. Williams, at 8.

¹⁷ CORP's Aug. 19, 2008 Application for Abandonment and Discontinuance Authority, vol. 2, V.S. Williams, at 5.

before the embargo—testified that since the embargo has been in place, the cost of shipping its lumber has increased by 17-21%.¹⁸ Another shipper, a manufacturer of bridge components, testified that trucking is not a sufficient alternative because some of its products are so large and heavy the shipper can only transport them by rail. And, according to the Port, transportation costs for shippers in general have increased 10-15% since CORP issued the embargo.¹⁹ Finally, protestants claim that water transportation is not feasible because it is only economical for shippers transporting large quantities long distances to water-accessible areas.

Shipper and community interests. At the August 21, 2008 hearing, shippers, federal and state representatives, public officials, community groups, businesses, and individual citizens expressed concerns that the proposed abandonment would harm economic development and increase truck traffic. In addition, the Board received written evidence raising similar concerns from speakers and non-participants at the hearing.

Many speakers raised concerns about the economic impact of losing rail service permanently. Some shippers were skeptical about the prospect of continuing their own business operations if rail service on the Line were not restored. Many of the shippers and businesses that use rail transportation pointed to the hardships suffered from the embargo. For example, a local dairy farm that received grain shipments by rail said it had to purchase two trucks after the embargo because it had to drive an additional 80 miles to pick up feed, and several wood product shippers testified that the cessation of rail service has caused a cutback in production and a reduction of jobs.

Numerous speakers raised concerns that many “family wage” jobs would disappear if rail service were not restored, and they maintained that closing the line permanently would have a far-reaching ripple effect on the regional economy. Educators at both the primary and secondary levels expressed concerns that, if jobs were lost, enrollment and educational opportunities would suffer. Many speakers also expressed concerns that the lack of rail service would put the Oregon coastal community at a competitive disadvantage. We will address these interests in our discussion of the public convenience and necessity.

Public convenience and necessity analysis. In applying the broad “public convenience and necessity” standard of 49 U.S.C. 10903, the Board must determine whether the burden on the railroad from continued operation outweighs the burden on the shippers and public parties from the loss of rail service. In doing so we consider a number of factors, including operating profit or loss, other costs the carrier may experience (including rehabilitation and economic costs), and the effects on shippers and communities. No one factor is conclusive. See Cartersville Elevator, Inc. v. ICC, 724 F.2d 668, aff’d on reh’g, en banc, 735 F.2d 1059 (8th Cir. 1984). Protestants must show that the harm to shippers and communities outweighs the

¹⁸ Draft transcript of Aug. 21, 2008 hearing, at 219.

¹⁹ The Port also argues that CORP’s calculations of increased transportation costs are “highly suspect.” See Port’s Aug. 28, 2008 Comments, at 11. But as we will discuss, even if we disregard CORP’s calculations and rely on the Port’s assertions, the increase in transportation costs does not warrant a denial of the abandonment application.

demonstrated harm to the railroad and interstate commerce resulting from continued operation. See Chicago and North Western Transp. Co.—Abandonment, 354 I.C.C. 1, 7 (1977).

Here, the record shows that continued operation of the Line would impose a substantial economic burden on CORP. Avoidable loss from operations in the forecast year is \$2,120,262; the estimated forecast year loss on operations is \$2,276,489.

Traffic declined in the years preceding the embargo, and there have not been enough carloads, for several years, to sustain the Line. Rehabilitation costs are significant, particularly the \$2.9 million necessary to return the tunnels to service in the short term. Opportunity costs on the value of CORP's real estate total \$957,397. Thus, the record here demonstrates that there would be substantial harm to the railroad and interstate commerce if CORP were required to continue operations.

We have weighed that evidence against the evidence of shipper and community need for the Line. Shippers, federal and state representatives, public officials, and other community interests, in both written submissions and in testimony at the August 21, 2008 public hearing, have raised concerns about the lack of service on the Line and the harm that will result if rail service is not restored. Existing shippers also have shown that they will incur higher transportation costs if they must use alternative transloading or truck service. The Board, however, has long held that railroads are not required to operate an unprofitable line simply to prevent existing shippers from incurring higher transportation costs by truck. CSX Transportation, Inc.—Abandonment Exemption—in Harrison County, WV, STB Docket No. AB-55 (Sub-No. 563X) (STB served Sept. 25, 1998). Departing from this longstanding policy in a case like this one—where the Line is not even close to profitability—would seriously discourage needed private investment in smaller railroads. Thus, any harm to the shippers and the community caused by higher transportation costs is outweighed by the burden of requiring CORP to continue service on this uneconomic Line. The abandonment, therefore, will be granted.

Although the applicant has justified a grant of its application under the statutory standards, the circumstances surrounding this case warrant comment beyond the findings of fact and law that are customary in an abandonment case.

Shortly after CORP's sudden closure of the Line in September 2007, the railroad announced that seasonal weather conditions would delay any re-opening of the Line until the Spring of 2008. CORP also began, in the Fall of 2007, to communicate to stakeholders and the media that CORP would require financial assistance from a variety of sources, including the State, the Port, CORP's customers, and a connecting railroad, the Union Pacific, in order for CORP to re-open the Line. CORP's statements on the amount needed to repair the Line ranged from \$2.9 million to \$24 million. In one proposal, CORP suggested that the State, the Port, shippers, and Union Pacific each individually contribute \$4.6 million to rehabilitate the Line. While all of the stakeholders indicated a desire to see service restored on the Line, all rejected at some point in the process the specific terms and conditions requested by CORP.

After receiving informal complaints that no progress towards re-opening the Line was accomplished in the first three months of the Line's closure, the Board's Office of Compliance and Consumer Assistance in January 2008 convened informal settlement meetings attended by senior officials from CORP, its parent corporation, RailAmerica, the major shippers on the Line and the State of Oregon. These discussions did not produce a settlement. At this point, the most prudent and effective course for CORP would have been to either (1) commit the resources necessary to repair and re-open the Line as soon as weather permitted in the Spring of 2008; or (2) initiate discontinuance or abandonment proceedings.

Instead of pursuing these options, CORP continued to send letters to stakeholders reiterating its request for contributions, which were rejected. CORP's actions conveyed a tacit message that the status quo—leaving the Line and those who depend upon it in limbo indefinitely—was acceptable to CORP. By delaying the important decisions it needed to make, CORP failed to consider the effect of the Line's closure, and the subsequent uncertainty regarding whether it would reopen, on the businesses, workers and communities along the Line.

Concerned that CORP had not resolved the Line's issues in an expeditious manner, the Board issued a Show Cause Order in early April 2008 asking CORP to explain why it should not be required to either reopen the Line or seek abandonment authority. During a Board hearing held on April 24 and 25, 2008, Board members questioned CORP, its stakeholders and the Union Pacific on their respective positions and intentions related to the Line. At the hearing, CORP's customers reiterated their opposition to subsidizing CORP's operations on the Line. Union Pacific also delivered a clear rejection of CORP's proposals.

Only after the Board's April 2008 hearing did CORP finally indicate that it would seek to abandon the Line and take the first procedural step towards filing an abandonment application by updating its system diagram map. It submitted an abandonment application in July 2008, some ten months after embargoing the Line.

Despite CORP's slow progress toward a resolution, the Board has handled this application and the related feeder line application in an expeditious and proactive manner. The Coos Bay Subdivision controversy has been the subject of Board hearings in Washington, DC, and Eugene, Oregon, in addition to the informal settlement meetings in January 2008. A voluminous record has been developed. Nevertheless, shippers along the Line are faced with continued delays in service while a new potential ownership and operating team is assembled and assesses the repairs needed on the Line.

No railroad should be required by the government to keep operating indefinitely a money-losing line. That, in sum, is why we are approving this abandonment application. CORP's conduct in this matter, however, should not be viewed as an appropriate model of corporate citizenship and responsibility or an appropriate model for how to respond when circumstances require the closure of an active rail line.

Other Issues

Deliberate downgrading. Several protestants argue that CORP deferred maintenance in an unlawful manner. They request that the Board deny the abandonment application and order CORP to repair the Line and resume service. Whether a carrier has engaged in deliberate downgrading depends on the carrier's intent. Our predecessor, the Interstate Commerce Commission, focused on the following criteria for evaluating allegations of deliberate downgrading: (1) the nature of the service and the public need shown in the past for the service; (2) the effect of the carrier's act; (3) the need demonstrated by a carrier to economize; and (4) any evidence of specific intent to turn what could be a profitable operation into a deficit operation in perfecting a case for abandonment.²⁰

Application of the four-part test is highly fact-dependent. We must evaluate the behavior of a railroad on a particular line in light of the kind of service historically provided on that line, the nature of the market for that service, the characteristics of the line, and the manifested intent of the carrier. Protestants did not refer to the four criteria much less make any attempt to offer evidence or argument to satisfy those criteria.

Historically, the Line carried approximately 7,500 cars per year. Weyerhaeuser's sudden departure in 2004 meant that the Line lost 3,000 cars per year, and CORP found fewer than 900 cars annually from other sources to replace them. CORP attempted to operate the Line without that traffic for 3 years, even though it lost money in each of those years. From 2002 to 2007, the record indicates that CORP spent an average of 24% of the Line's annual gross freight revenue on ordinary track, bridge, and crossing maintenance.²¹ For the same period, when extraordinary capital expenditures are included, CORP's spending for the Line rose to 49.4% of gross freight revenues.²² Starting in 2004 the Line operated at a loss, yet CORP's combined ordinary maintenance and capital investment spending on the Line rose to 66.2% of gross freight revenue in 2005 and 80.6% of gross freight revenue in 2006.²³ Lastly, we note that CORP authorized and made repairs to a bridge on the Line in October 2007, a month after issuing the embargo.²⁴

Based on this record, and assessing the ICC's four downgrading criteria, we are not able to conclude that CORP deliberately attempted to degrade a profitable service. While there is no question that CORP failed to make investments in the Line's tunnels, which, if made, would likely have slowed their deterioration, this fact alone does not show that deliberate downgrading

²⁰ See, e.g., Burlington Northern Railroad Company—Abandonment—in Fergus, Judith Basin, and Chouteau Counties, MT, Docket No. AB-6 (Sub-No. 175) (ICC served July 26, 1984) (citing Missouri-Kansas-Texas R. Co.—Abandonment, 338 I.C.C. 728, 746-47 (1971)).

²¹ CORP's Sept. 12, 2008 Rebuttal to Protests, at 35-37.

²² Id.

²³ Id.

²⁴ Id. at 37.

occurred. Rather, an analysis of the traffic on the Line and CORP's maintenance costs shows that CORP attempted to "economize" by declining to invest substantial sums into a line with limited earnings potential. Given the losses on the Line, and CORP's continued spending on ordinary maintenance and extraordinary capital expenditures, we find no basis to conclude that CORP engaged in deliberate downgrading here.

Improper segmentation. Protestants argue that the proposed abandonment will result in the improper segmentation of the Line because the 16.886-mile segment between Vaughn and Danebo was not included in the abandonment. For this claim, protestants rely on Caddo Antoine and Little Missouri R. Co. v. STB, 95 F.3d 740 (8th Cir. 1996). There the court held that the Board cannot authorize "a segmentation of lines that would foreclose the viability of contiguous segments, making their eventual abandonment a foregone conclusion." Id. at 748. But protestants do not explain how the loss of service over the western segment of the Line would threaten the viability of the eastern segment. Nor does the record otherwise support that conclusion as the eastern segment is unaffected by the embargo and actively serves at least one shipper. Thus, Caddo Antoine does not control under the facts in this case.

Stranded segments. It is well settled that so long as there is a common carrier obligation attached to a particular segment of track, the Board will not allow that segment to become isolated from the rail system as a result of the abandonment of the adjoining segment. See Buffalo & Pittsburgh Railroad, Inc.—Abandonment Exemption—in Erie and Cattaraugus Counties, NY, STB Docket No. AB-369 (Sub-No. 3X) (STB served Sept. 18, 1998). Here, CORP's proposed abandonment would result in two and possibly three stranded segments. The Coquille Branch and the LPN Branch are both stub-ended and they rely solely on the Line to connect to the national rail system. While CORP seeks authority to discontinue service over the LPN and Coquille branches, that action would not relieve LPN (owner of the LPN Branch) and Union Pacific (owner of the Coquille Branch) of their respective underlying common carrier obligations.

Likewise, the North Spit Rail Spur at milepost 763.20 at Cordes is stub-ended, connecting to the rail system only via the Line. As indicated, CORP has stated that it will discontinue service over the North Spit Rail Spur, but that the Board does not have jurisdiction over the discontinuance. It is unclear, however, if there is an underlying owner of the North Spit Rail Spur that has a common carrier obligation, or if that obligation could not be met if the Line were abandoned. We cannot and will not risk stranding a rail line on the strength of CORP's statement that a section of track exists that CORP has the right to operate over, a right it can terminate without Board authority. The record does not reveal who owns the underlying track, whether that track is subject to Board authority, and if not, why not. CORP's reference to "discontinuing service" suggests that the North Spit Rail Spur has been used to provide for-hire service.

As a result, we will condition abandonment authority²⁵ on LPN and Union Pacific filing for and obtaining abandonment authority for their respective segments. We will also condition CORP's abandonment authority on either (1) the owner of the North Spit Rail Spur filing for and obtaining abandonment authority for that segment, or (2) CORP submitting an explanation of and evidence on why such action is unnecessary. Also, if the owner of the North Spit Rail Spur needs authority to abandon that segment, CORP needs authority to discontinue service over it.

Although we are delaying CORP's exercise of abandonment authority, we are allowing for the immediate exercise of the lesser component of that authority—discontinuance authority. CORP has met its burden to obtain discontinuance authority, and protestants have not presented any persuasive argument as to why CORP should not be allowed to discontinue service. Therefore, CORP may discontinue service over the entire Line, as well as over the LPN and Coquille branches, and the North Spit Rail Spur.

Equitable relief. The Port and the State request that, if we grant abandonment authority, we should order CORP to reimburse the Port, the State, shippers, and any other entity that made investments based on an expectation of continued rail service. Because the Port and the State lack standing to request reimbursement on behalf of entities other than themselves, we will limit our discussion to the claims for equitable relief advanced by the Port and the State, rather than discussing possible relief for the shippers or any other entity.

The Port and the State rely on Central Michigan Railway Company—Abandonment Exemption—in Saginaw County, MI, STB Docket No. AB-308 (Sub-No. 3X) (STB served Oct. 31, 2003) (Central Michigan) to support their request. There, acting under very unusual circumstances, the Board conditioned its grant of abandonment authority on the payment of compensation by a railroad to a shipper that had invested in facilities to receive direct rail service.

Here, reliance on Central Michigan is misplaced for two reasons. First, the Board imposed the condition because the railroad in Central Michigan volunteered to compensate the shipper for those expenditures and made that offer a part of the railroad's argument in support of its request for authority to abandon the line. Indeed, the Board has imposed requirements based on voluntary offers by petitioners or applicants that we may not have had authority to impose otherwise. Township of Woodbridge v. Consolidated Rail Corp., STB Docket No. 42053 (STB served Dec. 1, 2003).

Second, the circumstances in Central Michigan were so unique that equity justified this unusual and unprecedented condition. In Central Michigan, the line earned a profit from operations and continued to do so during the pendency of the abandonment application. The State of Michigan decided it needed the land on which the rail line was located in order to construct a much-needed highway. To obtain the land, the state offered the railroad a very large sum of money. Thus, as a result of the offer, the railroad immediately incurred a substantial

²⁵ This condition on CORP's abandonment authority will not affect the discontinuance authority sought by CORP over the LPN and Coquille branches.

opportunity cost in providing service on the line. This cost justified the abandonment, which the railroad did nothing to incur, and which neither the carrier, its users, or anyone else could have foretold. Because the rationale to abandon the line arose suddenly and unexpectedly from an external source, the railroad felt obligated to offer some of the payment it received to a user of the rail service, and the Board imposed a payment based on that offer as a condition of the authority to abandon the line.

The facts here are very different from those in Central Michigan. CORP has not made a settlement offer to any party. Moreover, unlike in Central Michigan, where the line authorized for abandonment was operating at a profit, CORP has demonstrated financial losses from operating the Line. For these reasons, Central Michigan does not support any reimbursement by the railroad to other parties.

Additional relief. Protestants request a reduction in the purchase price in the feeder line application or an adjustment to the NLV of the Line that reflects the cost of rehabilitating the Line. As an alternative, the Port requests that the Board place a portion of the purchase price in an escrow account to pay for repairs if it successfully acquires the Line. This is not the proper forum to consider such relief. These requests are more appropriately discussed in the related feeder line docket (STB Finance Docket No. 35160), and the decision served today in that proceeding does so.

Protestants further argue that CORP violated its common carrier obligation by failing to provide service and that damages are warranted. Those issues, however, are also not relevant to our consideration of this abandonment application. Rather, such relief may be sought by complying with the Board's formal complaint procedures set forth at 49 CFR Part 1111. See Ohio Valley Railroad Company—Petition to Restore Switch Connection and Other Relief, STB Finance Docket No. 34608 (STB served July 13, 2007).

Feeder line application. As discussed, we are granting both this application for abandonment and discontinuance authority and the related feeder line application filed by the Port in STB Finance Docket No. 35160. Our decision in the feeder line proceeding *requires* CORP to transfer the Line to the Port (assuming that the Port accepts the terms we have set and the purchase price we will establish in a subsequent decision), whereas the findings we make here merely *permit* CORP to abandon the Line, subject to the conditions we have imposed. Because of the importance of allowing the development and continuation of rail transportation, when possible, we will give primary effect to a grant of authority that permits continued rail service. Accordingly, we will impose a condition here delaying CORP's ability to exercise this abandonment authority pending final resolution of the feeder line proceeding.²⁶ If the feeder line

²⁶ This condition delaying CORP's ability to exercise abandonment authority will not affect CORP's discontinuance authority over the Line, or over the LPN and the Coquille branches and the North Spit Rail Spur. CORP may immediately upon effectiveness of this decision discontinue service over the Line, the LPN and the Coquille branches, and the North Spit Rail Spur.

sale is consummated, we will dismiss the abandonment application. If it is not, we will establish an effective date for the abandonment authority.

CORP will not be unduly harmed by the new due dates or delays we are imposing. The Board has made every effort to expedite the feeder line proceeding. The delay in this case will be reasonable and as short as possible.

Tolling the filing deadline for OFAs. Normally, OFAs must be filed no later than 120 days after an abandonment application is filed. 49 U.S.C. 10904(c). Accepting OFAs at this time, however, would be inconsistent with the feeder line application we are granting in the related proceeding. A feeder line sale would moot any subsequent sale of the Line by OFA or otherwise. Additionally, a feeder line sale, if consummated, would promote the same public interest that underlies the OFA process: preserving rail service. Indeed, the feeder line sale here will provide for a more prudent ownership of the Line than any subsequent OFA sale would, as the related feeder line proceeding encompasses more trackage and a sale there would maintain the Line as a single unit. CORP agrees that operationally it makes the best sense to have any purchase of the Line include the additional 16.886 miles of track between Vaughn and Danebo pursued in the feeder line application.²⁷ We will therefore toll the applicable statutory deadline for OFAs pending resolution of the feeder line process and further Board action. We will reinstate the OFA deadlines in the event a feeder line sale does not occur.

Public use and trail use. As public use and trail use of the Line would also be inconsistent with a feeder line sale, we will defer action on any public use request under 49 U.S.C. 10905 and any trail use request filed pursuant to 49 CFR 1152.29 pending resolution of the feeder line process and further Board action.

LABOR PROTECTION

In approving this abandonment application, we must ensure that affected rail employees will be adequately protected. 49 U.S.C. 10903(b)(2). We have found that the conditions imposed in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979), satisfy the statutory requirements, and we will impose them here.

ENVIRONMENTAL ISSUES

Under the National Environmental Policy Act of 1969, 42 U.S.C. 4321-4343 (NEPA), the Board is required to consider the environmental impacts of the proposed abandonment. In accordance with the Board's environmental rules, CORP submitted an environmental report with its application and notified the appropriate Federal, state and local agencies of the opportunity to submit information concerning the environmental impacts of the proposed abandonment. See 49 CFR 1105.11. The Board's Section of Environmental Analysis (SEA) issued, for public review and comment, an Environmental Assessment (EA) on August 15, 2008, assessing the potential environmental impacts of the proposed abandonment and the recommended

²⁷ Draft transcript of Aug. 21, 2008 hearing, at 128-29.

environmental mitigation. A number of written comments on the EA were submitted. Speakers also provided oral comments at the August 21, 2008 public hearing. After reviewing the environmental comments, SEA issued a post EA responding to the comments and making final recommendations for environmental mitigation on September 25, 2008.²⁸

We have considered the EA, post EA, and environmental comments. We agree with the conclusions reached in the EA and post EA, and the environmental conditions recommended in the post EA. Based on SEA's recommendations, we conclude that while the proposed abandonment could result in some adverse environmental impacts, the abandonment will not significantly affect the quality of the human environment if SEA's recommended environmental conditions are imposed.

We find:

1. The present or future public convenience and necessity permit the abandonment of the portions of the above-mentioned line that CORP owns and discontinuance of service over the above-mentioned portions of the Line that CORP leases, subject to the employee protective conditions in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979), and the conditions that CORP shall: (1) notify the National Geodetic Survey (NGS) at least 90 days prior to beginning any salvage activities that will disturb or destroy any geodetic station marker in order to plan for the possible relocation of the marker by NGS; (2) prior to beginning any salvage activities, consult with Oregon's Coastal Management Program staff members Dave Perry at (541) 270-3279 and John Ritz at (541) 601-9659 to determine whether state coastal management consistency certification is required. If consistency certification is required, CORP shall be prohibited from performing any salvage activities until it obtains consistency certification and shall then notify the Board's Section of Environmental Analysis (SEA) in writing, pursuant to the Coastal Zone Management Act, 16 U.S.C. 1451 *et seq.*, and the Board's environmental regulations at 49 CFR 1105.9; (3) prior to commencement of any salvage activities, consult with the U.S. Army Corps of Engineers' Portland District (Corps) and the U.S. Coast Guard regarding their requirements and, if applicable, comply with the reasonable requirements of the Corps and the U.S. Coast Guard. The railroad shall report the results of these consultations in writing to SEA prior to the onset of salvage operations; (4) to ensure appropriate consideration of the National Pollution Discharge Elimination System (NPDES) and Clean Water Act (CWA) requirements, consult with the Oregon Department of Environmental Quality (DEQ) prior to commencement of any salvage activities and comply with the reasonable NPDES requirements. CORP shall report the results of these consultations in writing to SEA

²⁸ SEA's final recommended conditions address concerns that were raised regarding the bridges and tunnels on the Line; increased truck traffic and resulting impacts to air quality and road infrastructure; and pesticides. In a letter dated September 26, 2008, the U.S. Coast Guard—which has jurisdiction over bridges that cross navigable waters—agreed with SEA's conclusion that a condition regarding bridge removal or responsibility for maintenance would not be appropriate here. Our conditions require that before commencement of any salvage activities, (including the potential removal of any bridges over navigable waters) CORP must consult with the Coast Guard regarding its requirements.

prior to the onset of salvage operations; (5) consult with DEQ prior to commencement of any salvage activities to discuss DEQ's concerns regarding proper disposal of waste and demolition material. CORP shall report the results of these consultations in writing to SEA prior to the onset of salvage operations; (6) based on the comments and concerns of the Oregon Department of State Lands (DSL): (i) revegetate disturbed areas with native species and (ii) consult with DSL's Wetlands and Waterways Conservation Division prior to commencement of any salvage activities, in order to discuss DSL's concerns regarding the abandonment (erosion and sedimentation control plan; bridge and culvert maintenance; and the safety and condition of land and structures on any state-owned land). CORP shall report the results of these consultations in writing to SEA prior to the onset of salvage operations; (7) prior to commencement of any salvage activities, consult with the U.S. Fish and Wildlife Service and Director Kim Kratz at the National Marine Fisheries Service regarding potential impacts from salvaging activities to Federally listed threatened and endangered species that may occur in the vicinity of the Line. CORP shall report the results of these consultations in writing to SEA prior to the commencement of salvage operations; (8) in the event that any structure removal is planned during the salvage activities, immediately cease all work and notify SEA and the Oregon Parks and Recreation Department's State Historic Preservation Office (SHPO). SEA would then consult with the SHPO, the railroad, and any other consulting parties, if any, to determine what documentation is necessary; (9) prior to commencement of salvage activities, contact the DSL, the Port of Siuslaw, the City of North Bend, the City of Coos Bay, the Lane County Board of Commissioners, and the DEQ in order to discuss their concerns regarding the bridges and culverts on the Line, as well as their concerns regarding salvage activities (erosion control plan; plan for waste and demolition material disposal, specifically the removal of tracks in the vicinity of water crossings; and habitat and estuary protection). The railroad shall report the results of these consultations in writing to SEA prior to the commencement of salvage operations; and (10) during any salvage activities, utilize alternatives to herbicides and pesticides or consult with the Oregon Department of Agriculture's Pesticide Division at (503) 986-4635 prior to using herbicides and pesticides.

2. CORP is authorized to discontinue service over the entire Line, but it may not consummate abandonment of the Line until the owners of the Coquille Branch, LPN Branch, and North Spit Rail Spur (if necessary) file for and obtain abandonment authority or CORP submits an explanation of and evidence on why such actions are unnecessary; and pending further Board action in response to any of those submissions.

3. CORP may not exercise the abandonment authority granted here if the Port consummates the feeder line sale pursuant to 49 U.S.C. 10907 authorized today in STB Finance Docket No. 35160.

4. The statutory timeframes for the filing of OFAs will be tolled until final resolution of the related feeder line process. Should the feeder line purchase occur, we will not entertain any subsequent OFA. Conversely, should no feeder line sale occur, we will reinstate appropriate filing deadlines.

5. We will not address any public use or trail use requests until the feeder line process has ended without a sale under that process and the OFA process has similarly ended without a sale.

It is ordered:

1. The application is granted subject to the conditions specified above.
2. The Port's requests for relief are denied.
3. The due date for OFAs under 49 U.S.C. 10904, is tolled pending further Board action.
4. This decision is effective on November 30, 2008. Petitions to stay must be filed by November 10, 2008. Petitions to reopen must be filed by November 20, 2008.
5. The abandonment authority granted in this decision will not become effective unless and until the feeder line process in STB Finance Docket No. 35160 has been concluded without a sale and the Board establishes that effective date by order. The discontinuance authority granted here may be exercised immediately upon the effective date of this decision.

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

Anne K. Quinlan
Acting Secretary

APPENDIX A
REVENUES AND COSTS
COOS BAY SUBDIVISION

	Base Year operations (09/06-08/07)	Forecast year operations (07/08-06/09)
Revenues attributable for:		
1. Freight originated and/or terminated on branch	2,730,889	3,306,341
2. Bridge Traffic		
3. All other revenue and income	340,533	412,290
4. Total revenues attributable (lines 1 through 3)	3,071,422	3,718,631
Avoidable costs for:		
5. On-branch costs (lines 5a through 5k)	3,550,896	4,748,339
a. Maintenance of way and structures	738,541	987,594
b. Maintenance of equipment	171,695	229,594
c. Transportation	1,373,172	1,836,237
d. General administrative	607,726	812,665
e. Deadheading, taxi, and hotel		
f. Overhead Movement		
g. Freight car costs (other than return on freight cars)	659,762	882,249
h. Return on value-locomotives		
i. Return on value-freight cars		
j. Revenue taxes		
k. Property taxes		
6. Off-branch costs (lines 6a through 6c)	815,536	1,090,554
a. Off-branch costs (other than return on freight cars)	633,836	847,580
b. Return on value-freight cars	21,240	28,403
c. Make Whole adjustment off branch	160,460	214,571
7. Total avoidable costs(line 5 plus line 6)	4,366,432	5,838,893
Subsidization costs for:		
8. Rehabilitation	0	2,861,000
9. Administration costs (subsidy year only)		
10. Casualty reserve account		
11. Total subsidization costs (lines 8 through 10)	0	2,861,000
Return on value:		
12. Valuation of property (lines 12a through 12c)	19,677,937	5,553,345
a. Working capital	137,208	183,477
b. Income tax consequences		
c. Net liquidation value	19,540,729	5,369,868
13. Nominal rate of return	0.1724	0.1724
14. Nominal return on value (line 12 times line 13)	3,392,476	957,397
15. Holding gain (loss)		801,170
16. Total return on value (line 14 minus line 15)	3,392,476	156,227
17. Avoidable loss from operations (line 4 minus line 7)	(1,295,010)	(2,120,262)
18. Estimated forecast year loss from operations (line 4 minus lines 7 and 16)		(2,276,489)
19. Estimated subsidy (line 4 minus lines 7,11, and 16)		(5,137,489)