

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35160

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

Decided: September 10, 2008

By decision served August 1, 2008, the Board accepted for consideration a feeder line application under 49 U.S.C. 10907 filed by the Oregon International Port of Coos Bay (the Port) on July 11, 2008, to acquire 111.016 miles of rail line owned by the Central Oregon & Pacific Railroad, Inc. (CORP), between milepost 763.130 near Cordes, OR, and milepost 652.114 near Danebo, OR (the Line). In that decision, the Board also adopted a procedural schedule for the proceeding.

On August 29, 2008, the Port filed a motion to compel CORP to grant the Port's consultants a right of access to enter upon the Line to allow them to inspect the Line's bridges and tunnels in an effort to evaluate the level of rehabilitation and maintenance that would be needed for service to be reinstated. Specifically, the Port requests access to the Line beginning September 11, 2008, and agrees to limit the inspection to no more than 5 business days. An onsite inspection was previously performed by the Port between August 13-15, 2008,¹ but the Port argues that a second inspection is needed to afford its bridge and tunnel consultants a chance to personally inspect the Line. The Port explains that its consultant at the first inspection used the opportunity to refine the Port's net liquidation value (NLV) estimate of the Line, but had neither the time nor the ability to inspect the bridges and tunnels. The Port argues that this second inspection would further aid it in estimating the NLV of the Line, and determining whether it should acquire the Line if the Board grants its feeder line application. Further, the Port states that the second inspection is needed because the Port and its consultant were previously denied access to tunnels 13, 15 and 18, the tunnels cited by CORP when it embargoed the Line on September 21, 2007. Because its rebuttal is due on September 12, 2008, the Port also requests leave to supplement its rebuttal by October 10, 2008, with the evidence it collects during the second inspection.

In its reply filed September 3, 2008, CORP argues that an additional inspection would be unnecessarily duplicative and unduly burdensome. CORP asserts that the Port has not sufficiently explained why its bridge and tunnel consultants did not attend the August inspection

¹ In attendance were the Port's consultant, Gene A. Davis, its Executive Director, Jeffrey Bishop, and its Director of Communications & Freight Mobility, Martin Callery.

or why it did not request additional inspection time, if more was needed. According to CORP, the Port approached the August inspection as “nothing more than a tourist expedition.” CORP’s September 3, 2008 Reply, at 11. CORP denies that it forbade entry to tunnels 13, 15 and 18, and claims that all attendees agreed not to enter the tunnels for safety reasons. CORP also claims that the attendees had access to other tunnels during the inspection.

CORP argues that any information gained from a second inspection would be irrelevant because the Port has already submitted its case-in-chief, and its rebuttal evidence must be limited to responding to CORP’s reply, which CORP asserts does not discuss the condition of the bridges and tunnels. CORP also argues that the Port can access the information it seeks by turning to the four inspection reports in its possession, which examine the condition of the tunnels on the Line extensively.² CORP contends that its staff is small, that it is busy operating and maintaining more than 300 miles of line that are not subject to the embargo and preparing rebuttal evidence that is due September 12, 2008, in the abandonment proceeding,³ and that it would be burdensome for CORP to escort the Port’s consultants on another multi-day inspection. Noting that the Port has already stated that it has no choice but to purchase the Line, CORP further asserts that a second inspection will not assist the Port in deciding whether to purchase the Line. Finally, CORP opposes the Port’s request for leave to file a supplement by October 10, 2008, arguing that the request for an additional inspection is merely an attempt by the Port to extend the filing date for its rebuttal evidence.

DISCUSSION AND CONCLUSIONS

Under 49 CFR 1114.30(a)(2), any party may seek permission to enter upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspecting and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon. Moreover, under 49 CFR 1114.21(a)(1), parties may seek discovery regarding any matter, not privileged, if the matter is relevant to the subject matter involved in a proceeding. It is not grounds for objection that the information sought would be inadmissible, so long as it appears reasonably calculated to lead to the discovery of admissible evidence. See 49 CFR 1114.21(a)(2). The requirement of relevance means that the information might be able to affect the outcome of a proceeding. Waterloo Railway Company—Adverse Abandonment—Lines of Bangor and Aroostook Railroad Company and

² These four reports are: the 1994 Shannon & Wilson report, the 2004 Milborn Pita report, the 2007 Shannon & Wilson report, and the 2007 Federal Railroad Administration report.

³ On July 14, 2008, in Central Oregon & Pacific Railroad, Inc.—Abandonment and Discontinuance of Service—in Coos, Douglas, and Lane Counties, OR, STB Docket No. AB-515 (Sub-No. 2), CORP applied for authority, under 49 U.S.C. 10903, to abandon the Coos Bay Line between milepost 669.0 near Vaughn, OR, and milepost 763.13 near Cordes, OR, and to discontinue service over the segments of the Coos Bay Subdivision that are leased by it, including: (1) the Coquille Branch between milepost 763.13 near Cordes, and milepost 785.5 near Coquille, OR; and (2) the LPN Branch between CORP milepost 738.8 and LPN Branch milepost 2.0. The Board is concurrently processing CORP’s abandonment and discontinuance application and the Port’s feeder line application.

Van Buren Bridge Company In Aroostook County, Maine, STB Docket No. AB-124 (Sub-No. 2) et al., slip op. at 2 (STB served Nov. 14, 2003). However, discovery may be denied if it would be unduly burdensome in relation to the likely value of the information sought. See 49 CFR 1114.21(c). In determining whether to permit inspections, we balance the need for the information to be gained from the inspection against the burdens the inspection would impose. Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company, STB Docket No. 42056, slip op. at 3 (STB served Feb. 9, 2001).

The Port's motion to compel will be granted. The Port seeks to inspect the Line's bridges and tunnels so that it may better evaluate the level of rehabilitation and maintenance that would be needed if operations resume. The condition of the Line's bridges and tunnels is clearly relevant to the proceeding, as the Port will have to decide whether to purchase the Line and resume service if the Board grants its feeder line application. See 49 CFR 1151.2(h).⁴

While the parties have different explanations for why the tunnels were not inspected during the August inspection, we believe that the Port should be granted access because, if the feeder line sale is approved and consummated, the Port would be financially and operationally responsible for rehabilitating and maintaining the Line's tunnels and bridges. Given the importance of the information to the Port, the burden on CORP related to granting access to the Port's consultants is not unreasonable. With most of the Line out of service, the inspection should have little effect on the Line's operation and we would not expect CORP to need to utilize a large number of employees to escort the Port's consultants.

We find no merit to CORP's contention that the Port approached the August inspection as a tourist expedition. The August inspection gave the Port and its consultant an opportunity to personally observe the Line, for which they may become responsible, and to refine the Port's NLV estimate. It is not unreasonable for the Port not to have been able to complete the entire examination on its initial visit, or to have been unable to arrange all of the necessary consultants given the parties' last-minute negotiations on access dates.

CORP's argument that the information the Port seeks by inspection can be obtained from the four existing inspection reports is also unconvincing. While the existing reports may be helpful tools, the Port should be able to perform its own independent inspection before purchasing the Line.

The inspection may continue for up to 5 consecutive business days, and should be concluded no later than September 18, 2008. The Port will be granted leave to supplement its rebuttal by September 30, 2008, with argument and evidence related to its September inspection that are responsive to CORP's reply and the other comments filed in response to the Port's application.

⁴ Regardless of the Port's prior statement that it intends to purchase the Line, the rules provide that feeder line applicants have 10 days from the date the Board authorizes a sale and establishes the constitutional minimum value to decide whether to proceed with the transaction.

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

It is ordered:

1. The Port's motion to compel discovery is granted.
2. The Port's request for permission to supplement its rebuttal is granted as described above.

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

Anne K. Quinlan
Acting Secretary