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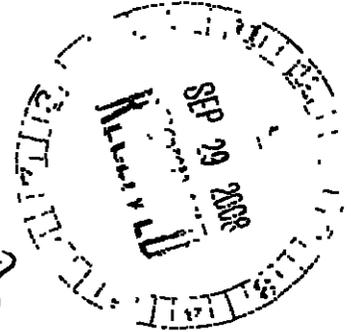
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FOUNDED 1866

September 29, 2008

The Honorable Anne K. Quinlan, Acting Secretary
Surface Transportation Board
395 F Street, S.W.
Washington, DC 20423

223687
223688



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

Dear Secretary Quinlan:

Enclosed for filing in the above-captioned proceeding are the following:

1. An original and 10 copies of the Central Oregon & Pacific Railroad, Inc.'s Motion for Leave to File Supplemental Response to Reply of Oregon International Port of Coos Bay;
2. An original and 15 copies of the Supplemental Response of Central Oregon & Pacific Railroad, Inc. ("CORP") to Reply of Oregon International Port of Coos Bay, a CD with the Supplemental Response in pdf format; and a disk containing an electronic version in Word format

Please acknowledge receipt of the enclosed documents for filing by date-stamping the extra copies and returning them to our messenger. If you have any questions, please contact the undersigned counsel.

Sincerely,

Terence M Hynes

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Enclosures

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Office of Proceedings
SEP 29 2008
Part of
Public Record

223687

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Oregon International Port of Coos Bay – Feeder Line)
Application – Coos Bay Line of the Central Oregon &)
Pacific Railroad, Inc.)
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Finance Docket No 35160

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**CENTRAL OREGON & PACIFIC RAILROAD, INC.'S
MOTION FOR LEAVE TO FILE SUPPLEMENTAL RESPONSE TO REPLY OF
OREGON INTERNATIONAL PORT OF COOS BAY**

Central Oregon & Pacific Railroad, Inc. ("CORP") respectfully requests that the Board grant CORP leave to file the attached Supplemental Response to the Reply of the Oregon International Port of Coos Bay (the "Port's Reply"). The Port's Reply raises for the first time new issues and evidence that were not -- but could have and should have been -- presented in the Port's July 11, 2008 Feeder Line Application and/or the Comments filed by the Port on August 28, 2008 in the proceeding involving CORP's Abandonment Application in *Docket AB-515 (Sub-No 2)*. Because the Port intentionally withheld those new issues and evidence from its prior filings for the obvious purpose of denying CORP any opportunity to address them -- CORP could properly pursue a motion to strike those portions of the Port's Reply. However, recognizing the desirability of developing a complete -- and accurate -- record, CORP instead requests leave to file this brief Supplemental Response.

Parties to Board proceedings are not allowed "to present new arguments and evidence on rebuttal." *Conrail Abandonment in Chicago, IL.—In Re Offer of Fin Assistance*, Docket No AB-167 (Sub-No 970N), 1987 WL 98398 at *4 (May 1, 1987) (refusing to permit offeror to reduce salvage value by sales commission where argument was first raised on rebuttal). See *CSX Transp - Discontinuance At Memphis, in Shelby Cty, TN*, STB Docket No. AB-55 (Sub-No. 618) (Oct. 28, 2002) (refusing to consider additional cost evidence submitted in rebuttal

evidence by applicant for discontinuance authority). The Board often allows supplemental filings when new evidence or information is presented by a party for the first time in a reply or rebuttal filing. *See, e.g., SF&I Ry. Inc —Acquisition & Operation Exemption—Toledo, Peoria & W Ry Corp Between La Harpe & Peoria, IL*, STB Fin. Docket No. 33995 (Feb. 1, 2002) (granting leave to file surrebuttal statement to respond to “new arguments” in reply statement), *Dakota, Minnesota & E R R Corp —Constr into the Powder River Basin*, STB Fin. Docket No. 33407, slip op. at 1 (Nov. 3, 1998) (supplemental evidence allowed in response to new evidence presented in reply filing) The Board has likewise indicated that, where a feeder line applicant includes new evidence in its rebuttal, the carrier has a right to respond. *See Keokuk Junction Ry Co.—Feeder Line Acquisition—Line of Toledo, Peoria & W. Ry Corp Between La Harpe & Hollis, IL*, STB Fin. Docket No 34335, slip op. at 5 (Feb. 7, 2005) (where feeder line applicant did not present new land title analyses “until its rebuttal,” holding that “we would have permitted [the incumbent railroad] to respond to them in a timely way”).

Here, the Port’s Reply constitutes an especially egregious instance of a party “sandbagging” its opponent by raising on rebuttal entirely new issues, and submitting a large volume of new evidence, that could have (and should have) been submitted earlier. To take a few examples, the Port’s Reply:

- Fundamentally alters the Port’s prior representations regarding the amount of money that it is able and willing to commit to acquire, rehabilitate and operate the Coos Bay Subdivision. *See* Port Reply at 6. Indeed, based upon the Port’s Reply, the record no longer supports a finding that the Port is a “financially responsible person” under 49 U.S.C. § 10907(a);
- Presents a brand-new claim seeking an additional “escrow” of nearly \$10 million to fund improvements to track and bridges that are not necessary to restore operations on the line (*id* at 71-72). This new claim is based, for the most part, on a Powerpoint presentation made by CORP to interested stakeholders in November 2007, and therefore clearly could have been raised earlier.

- Presents new legal arguments claiming that CORP should be punished for not designating the Coos Bay Subdivision as a candidate for abandonment on its System Diagram Map as early as 2004 (the first year in which the line experienced an operating loss) (*id* at 16-17);
- Presents a new estimate of bridge removal costs based upon a supposed “bid” by a construction company owned by the Port’s President – a blatant conflict of interest (*id* at 27);

CORP is entitled to address these new issues and evidence as a matter of fundamental fairness. The Port’s failure to address these issues as part of its case-in-chief in the Feeder Line proceeding, or in its August 28, 2008 Comments in the abandonment proceeding, cannot be explained as anything but intentional “sandbagging” designed to deny CORP any opportunity to respond. The Board should not countenance such sharp practice, and should grant CORP leave “to respond to them in a timely way” via the accompanying Supplemental Response. *Keokuk Junction*, STB Fin. Docket No. 34335, slip op. at 5.

Moreover, apparently emboldened by the belief that its sandbagging strategy would effectively shield its Reply from serious scrutiny, Port submitted a Reply that is replete with contradictions of its prior testimony, highly misleading statements and outright falsehoods. CORP should be permitted to respond in order to “correct[] misstatements of fact” and “clarif[y] mischaracterizations of [its] contentions.” *Norfolk So Ry Co —Pet for Decl Order— Interchange With Reading Blue Mtn & N R R Co.*, STB Docket No. 42078, slip op at 1 n 1 (Apr. 29, 2003) (“[i]n the interests of having a complete evidentiary record,” accepting surreply intended to “correct[] misstatements of fact” and “clarif[y] mischaracterizations of [party’s] contentions”); see *SMS Rail Serv. Inc —Pet for Declaratory Order*, STB Fin. Docket No. 34483, slip op at 3 (Jan. 24, 2005) (accepting surrebuttal “to correct allegedly incorrect statements” in rebuttal “[i]n the interest of compiling a complete record”). In the interest of fairness, such misrepresentations and misstatements should not be permitted to stand

unchallenged. Allowing CORP to respond briefly to the most egregious elements of the Port's Reply is necessary to remedy the Port's abuse of the Board's procedures and to "compile a full and complete record" in this proceeding *Union Pac R R Co—Abandonment Exemption—In Rio Grande & Mineral Crys , CO*, STB Docket No. AB-33 (Sub-No. 132X), slip op at 3 (June 22, 2004).

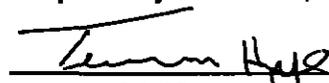
Finally, entertaining CORP's Supplemental Response will not prejudice any party, nor will it prolong this proceeding. The Board has already granted the Port "leave to supplement its rebuttal by September 30, 2008 with argument and evidence related to its September inspection...." Finance Docket No. 35160, Decision served September 10, 2008 at 3. Thus, the evidentiary record has not closed, and granting CORP similar leave to file the accompanying Supplemental Response will not result in any additional delay.

* * *

For the reasons set forth above, CORP respectfully requests that the Board grant CORP leave to file the accompanying Supplemental Response.

Scott G. Williams
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Respectfully submitted,


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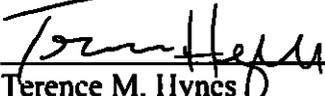
Dated. September 29, 2008

CERTIFICATE OF SERVICE

I hereby certify that I have caused the Central Oregon & Pacific Railroad, Inc 's Motion For Leave To File Supplemental Response To Reply Of Oregon International Port Of Coos Bay to be served by hand-delivery this 29th day of September 2008 on

Sandra Brown
Troutman Sanders
401 Ninth Street, N.W
Washington, D.C. 20004-2134

and by first-class mail, postage prepaid, and/or overnight delivery, to all parties of record.


Terence M. Hynes