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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

**REPLY OF CENTRAL OREGON & PACIFIC RAILROAD, INC.
TO THE OREGON INTERNATIONAL PORT OF COOS BAY'S
MOTION TO STRIKE**

On October 7, 2008, the Oregon International Port of Coos Bay (the "Port") filed a Motion to Strike the Supplemental Response of Central Oregon & Pacific Railroad, Inc ("CORP"), which was filed to address new issues raised for the first time by the Port in its September 12, 2008 Reply in this feeder line proceeding (the "Port's Reply"). While the Port objected to CORP's alleged "impertinence" in calling the Board's attention to the new positions and blatant misstatements set forth in the Port's Reply, its Motion to Strike did not dispute the fact that the Port did, in fact, present such new material. Rather, the Port's Motion to Strike is, in essence, an improper "surrebuttal" to CORP's Supplemental Response.

As this Reply demonstrates, CORP's Supplemental Response was appropriate in light of the Port's late introduction of several new issues and arguments. For example, the Port's Reply raised significant questions regarding the Port's prior assurances that it was both able and willing to make the investment necessary to acquire, rehabilitate and operate the Coos Bay Subdivision. The Port's Reply also presented – for the first time – an absurd request that the Board require CORP to fund more than \$12 million in line rehabilitation and upgrade expenditures to improve the entire Coos Bay Subdivision to FRA class 2 track standards (a request that was increased to \$15.388 million in the Port's September 30 Supplemental Reply). See Port Supplemental Reply at 15. Furthermore, as CORP's Supplemental Response showed, the Port's Reply contained

blatant misstatements of fact with respect to several material issues CORP's Supplemental Response was filed to provide an accurate and complete record with respect to the new issues raised by the Port, and to ensure that the Board would not be misled by the Port's false statements. Because the Board held the evidentiary record open until September 30, 2008, CORP's Supplemental Response did not prolong this proceeding or otherwise prejudice the Port. The Port's Motion to Strike CORP's Supplemental Response is remarkable in light of the fact that the Port filed extensive new evidence – which went far beyond the subjects authorized by the Board in its *September 10 Decision* – on September 30, 2008. Indeed, the Port has continued to file new evidence and argument as recently as October 17, 2008. For the reasons set forth below, the Board should deny the Port's Motion to Strike, grant CORP's motion for leave to file its Supplemental Response, and deny the Port's most recent attempt to file even more evidence regarding issues beyond the scope of those to which the Board granted it leave to supplement the record on September 30.

ARGUMENT

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&L 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”)

The Board has denied a motion to strike evidence when both parties have had a chance to respond to the issues raised. *Pub Serv Co of Colo. v Burlington N & Santa Fe Ry Co*, STB Docket No. 42057, 2004 WL 1428724, at *4 (June 8, 2004); *Duke Energy Corp v CSX Transp, Inc*, STB Docket No. 42070, 2004 WL 250254, at *4 (Feb. 4, 2004). The Board will also deny a motion to strike evidence that helps ensure that the Board can fulfill its “duty to set a price for the line that is no lower than the constitutional minimum value.” *CSX Transp, Inc—Abandonment Exemption—in LaPorte, Porter, & Starke Counties, IN*, STB Docket No. AB-55 (Sub-No 643X), 2004 WL 933330, at *2 (April 30, 2004).¹

¹ The case principally relied upon by the Port in its Motion to Strike, *Burlington N & Santa Fe Ry Co—Abandonment Exemption—in Oklahoma City, OK*, STB Docket No. AB-6 (Sub-No 430X), slip op. at 2 (Jan. 26, 2007), is inapposite. In that case, the Board granted a motion to strike a filing that addressed only alleged mischaracterizations of cited cases, which the Board could easily address on its own. In the present case, CORP’s Supplemental Response addresses new factual issues and material misstatements of fact raised for the first time in the Port’s Reply.

I. CORP's Supplemental Response Was Appropriate In Light Of New Issues Raised For The First Time In The Port's Reply.

CORP's Supplemental Response was clearly warranted in light of the fact that the Port chose to present, for the first time, several new issues in its Reply.

For example, in its Feeder Line Application and Supplement, the Port asserted that it had access to \$31.5 million to fund the purchase, rehabilitation and operation of the Coos Bay Subdivision. The Port assured the Board that it "will be making continued efforts to obtain additional state funding to assist with the acquisition and rehabilitation of the Line." Port Supplement at 11. The Port asserted its willingness to invest in the line because "[t]he preservation of rail service along the entire Line is of vital importance to the future economic health of the communities of southwestern Oregon and the south coast region." *Id.* at 12. Indeed, the Port assured the Board that it was "willing to invest its last dime on saving rail service" (Supp. V.S. Bishop at 10) even though "from a business standpoint, very few people would invest in this line as an investment opportunity." August 21, 2008 Hrg. Tr. at 176 (Jeffrey Bishop).

Such unequivocal expressions of commitment were conspicuously absent from the Port's Reply. To the contrary, the Port took the position that "the Port now believes that it would not be wise to incur long-term debt in the acquisition of the Line." Port Reply at 6. This statement represented a clear departure from the Port's prior assurances that it was "willing to take all necessary steps to save the Line." Port Supplement at 12. The Port's Motion to Strike suggests that CORP misunderstood these statements regarding the Port's "reluctance to use debt to purchase the Line." Port Motion at 3. Yet, such equivocation continued in the Port's September 30 Supplemental Reply. *See* Supp. Reply, V.S. Bishop at 10, n.3. Given the stark contrast between the Port's prior statements and those set forth in its Reply – which go to the

heart of the issue of whether the Port is a “financially responsible person” – it was clearly appropriate for CORP to address this issue in its Supplemental Response.

The Port’s Reply also introduced a breathtaking new demand that CORP be required to fund a major rehabilitation of the entire Coos Bay Subdivision, totaling nearly \$12.7 million. The Port claimed that such work was required to enable it to reinstitute service over the line ² CORP’s Supplemental Response demonstrated that the Port’s assertions were incorrect. Specifically, CORP showed that the vast majority of the work for which the Port would have CORP pay would be necessary only to improve those segments of the Coos Bay Subdivision that are not currently at FRA class 2 standards to that level. Indeed, only the repair of the three tunnels whose condition led to the embargo of the line is required to restore operations at FRA class 1 standards (as contemplated by the feeder line statute).

CORP’s Supplemental Response was clearly appropriate to address the Port’s new demands, which went far beyond its prior requests that the Board require CORP to fund the cost of making tunnel repairs necessary to lift the embargo. Indeed, as noted in CORP’s Supplemental Response, the Port’s new demands, which are based entirely upon estimates that were available to it long before September 12, 2008, are improper rebuttal and should not be considered by the Board at all. CORP Supplemental Response at 8

II. CORP’s Supplemental Response Was Appropriate To Correct The Port’s Blatant Misstatements.

The Board has held that it is appropriate for a party to submit additional evidence and argument in order to “correct[] misstatements of fact” and “clarif[y] mischaracterizations of [its]

² The Port’s claim that extensive track repairs would be needed to permit the commencement of service on the line is belied by the Port’s statements to the media that the overall condition of the line has not deteriorated since the embargo was imposed. See CORP Supplemental Response at 11, 16.

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 this case, allowing CORP to respond briefly to the most egregious misstatements of fact in 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 Ctys, CO*, STB Docket No. AB-33 (Sub-No. 132X), slip op. at 3 (June 22, 2004).

CORP’s submission of supplemental evidence relating to communications between CORP and the Trust for Public Lands (the “Trust”) was both necessary and appropriate to show the misleading nature of the unsworn “testimony” on that subject offered by Port counsel. As CORP’s Supplemental Response showed, the Port’s characterization of the nature and status of negotiations regarding possible sale of the Coos Bay Subdivision right-of-way for trail use was both inaccurate and misleading. CORP Supplemental Response at 22-25

CORP’s Supplemental Response was likewise appropriate to address the Port’s submission of a purported “bid” by West Coast Contractors (“WCC”) to remove the Siuslaw and Umpqua River bridges. The Port’s Reply failed to disclose that WCC is a company owned and operated by the Port’s President, Mr Kronsteiner. CORP was clearly justified in bringing this blatant conflict of interest to the Board’s attention. In its Motion to Strike, the Port lamely asserts that it “meant to include a footnote” in its Reply drawing the Board’s attention to the fact

that this bid was not arms-length, but that “the footnote was inadvertently left off in the rush of compiling the Reply ” Port Motion to Strike at 9, n.2. This self-serving assertion is belied by the fact that the Port could have corrected the record in its subsequent filing on September 30, but did not do so The Port now says that it did not rely on the WCC “bid,” accordingly, the Board should not rely on it either.

Finally, CORP’s Supplemental Response was an appropriate response to the Port’s blatant miscitation to the *The Appraisal of Real Estate* in attempting to resuscitate witness DeVoe’s nonsensical “base homesite theory.” CORP demonstrated that the Port’s reliance upon *The Appraisal of Real Estate* was unavailing – indeed, that authority contradicts witness DeVoe’s analysis. Moreover, the Port misrepresented an example of the proper valuation of “surplus land” set forth in *The Appraisal of Real Estate* (at 199) Viewed in its full context, the example upon which the Port relies provides no support for witness DeVoe’s appraisal of residential parcels CORP also showed that witness DeVoe’s objectivity in appraising real estate for litigation purposes has previously been called into question in *In re Estate of William Busch (Deceased)*, T C M 2000-3, Docket No 16441-97 (2000) In its Motion to Strike, the Port claims that witness DeVoe “does not recall” that case and “”has no records that might confirm that he worked on the assignment.” Port Motion to Strike at 16 As Attachment 1 to this Reply shows, the appraisal that was determined by the United States Tax Court to be biased in *Busch* was, in fact, signed by witness DeVoe. CORP’s Supplemental Response with respect to this issue was both necessary and appropriate to provide an accurate record in this proceeding.

III. CORP’s Supplemental Response Did Not Unduly Delay This Proceeding Or Otherwise Prejudice The Port.

Entertaining CORP’s Supplemental Response will not prolong this proceeding or otherwise prejudice any party. CORP filed its Supplemental Response on September 29, 2008

The Board had already granted the Port “leave to supplement its rebuttal by September 30, 2008 with argument and evidence related to its September inspection ” See Finance Docket No. 35160, Decision served September 10, 2008 at 3. Thus, the evidentiary record was still open when CORP’s Supplemental Response was filed, and accepting that submission will not result in any additional delay Moreover, the Port has already responded to the evidence set forth in CORP’s Supplemental Response in its Motion to Strike

It is the Port, not CORP, that has continued to file voluminous evidence that goes far beyond the scope of that authorized by the Board’s *September 10 Decision* In that decision, the Board granted the Port “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.”

September 10 Decision at 3. The Port apparently did not feel constrained to comply with the limitations on the scope of supplemental evidence prescribed by the Board. The Port’s September 30, 2008 Supplemental Reply was a massive filing that introduced new arguments and issues that were neither “related to its September inspection” of the Coos Bay Subdivision nor “responsive to CORP’s [August 29, 2008] reply ”

For example, the Port’s Supplemental Reply argued for the first time that impacts on endangered or threatened species might determine whether bridges should be removed as part of the abandonment process Port Supplemental Reply at 9-12 As part of this discussion, the Port indicated that it had contacted the Army Corps of Engineers to determine “the regulatory requirements that would apply to abandonment of the Line.” Port Supplemental Reply at 10 (emphasis added); see also Supp. Reply V.S. Bishop at 6 (testifying that Senator Wyden contacted the Coast Guard to determine abandonment requirements) This evidence, which

should have been presented (if at all) in the abandonment proceeding, has nothing whatsoever to do with the Port's September inspection of the line

The Port's Supplemental Reply also presented a drastically revised NLV estimate based not on facts gleaned from its inspection of the line, but on changes in the market price of scrap steel Port Supplemental Reply at 17-19. The Port went so far as to solicit new bids for the salvage of the line from two vendors, A&K Railroad Materials & Menard's Railroad Materials. Supp Reply V.S Davis at 3. Indeed, the supplemental verified statement of Port witness Davis is devoted entirely to revising the Port's NLV estimate based on more current steel prices, not on any new information gleaned from the Port's second inspection of the line Such evidence goes far beyond the scope of that authorized by the Board's *September 10 Decision*, and it should be disregarded for that reason.

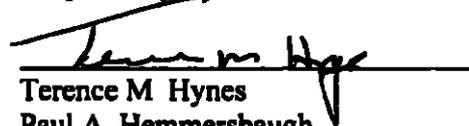
Indeed, the Port was not content to rest on the new NLV evidence that it (improperly) submitted in its September 30 Supplemental Reply. On October 17, 2008, the Port filed a Petition for Leave to Supplement the Record, in which it presented yet another NLV estimate based upon further changes in scrap steel prices since September. Pet Supp. V.S Davis Attachment B. Such evidence clearly is not related to, or based in any way upon, the supplemental line inspection authorized by the Board's *September 10 Decision*, and is therefore improper The Board should not grant the Port's petition to reopen the record at this late date for the sole purpose of presenting self-serving adjustments to its NLV estimate (CORP would be entirely within its rights to file a formal motion to strike the Port's October 17 submission in its entirety. However, in the interest of avoiding further unnecessary procedural skirmishing, the Board should simply consider the evidentiary record in this case closed as of September 30, as contemplated by the *September 10 Decision*)

Moreover, it is ironic that, having accused CORP (as well as RailAmerica and Fortress) of seeking a "windfall" by abandoning the Coos Bay Subdivision at a time when steel scrap prices were high, the Port has filed multiple revisions to its NLV estimate in a transparent attempt to take advantage of the precipitous drop in steel scrap prices that has accompanied the recent overall decline in financial markets. In order to avoid an NLV determination that is unduly influenced by the current volatile market conditions, if the Board chooses to rely upon AMM steel scrap prices in calculating the NLV of the Coos Bay Subdivision, it should use an average of AMM prices prevailing over the period in which this proceeding has been pending.

CONCLUSION

For the reasons set forth in this Reply, CORP respectfully requests that the Board deny the Motion to Strike filed by the Oregon International Port of Coos Bay

Respectfully submitted,



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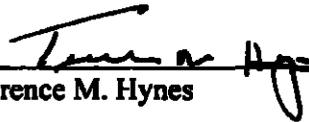
Dated: October 21, 2008

CERTIFICATE OF SERVICE

I hereby certify that I have caused the Reply of Central Oregon & Pacific Railroad, Inc. to the Oregon International Port of Coos Bay's Motion to Strike to be served by hand-delivery this 21st day of October 2008 on:

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

and by first-class mail, postage prepaid, to all parties of record.


Terence M. Hynes

Attachment 1

ONLY COPY

Do NOT MARK

APPRAISAL REPORT

**ESTIMATED MARKET VALUE
OF UNDIVIDED 50% INTEREST**

90.74± Acre Property

**3300 to 3450 Mohr Avenue
Unincorporated Area
Pleasanton, California
(Busch)**

AS OF

February 26, 1993

FOR

**Law Offices of
Hallgrimson, McNichols, McCann & Inderbitzen**

**By
DeVoe & Associates
Real Estate Appraisers and Consultants
1386 "B" Street
Hayward, CA 94541**

eVoe & Associates

DeVoe & Associates

REAL ESTATE APPRAISERS AND CONSULTANTS

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1386 "B" Street
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Telephone (510) 582 7 60
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February 1, 1994

Nickolas P. Tooliatos II
Hallgrimson, McNichols, McCann & Inderbitzen
P.O. Box 10189
Pleasanton, CA 94588-0189

Re: Estate of William Busch

Dear Tooliatos:

Pursuant to your request, an appraisal has been completed of the market value of an undivided 50% interest in the 90.74± acre William and Velma Busch (Trust) property located at 3300 to 3450 Mohr Avenue, Pleasanton, California. This property is located between Mohr Avenue and Busch Road, opposite Martin Avenue, in the unincorporated area of Alameda County.

Within this report we describe the method of arriving at our valuation estimates and provide relevant portions of the data gathered in the investigation upon which value estimates are based.

We hereby certify that we have made a personal inspection of the subject property, assembled information, data and facts pertinent to its valuation, and have investigated and analyzed the available comparable sales and other market information.

In this appraisal William Busch's date of death, February 26, 1993, is considered the date of valuation. In our opinion, the market value of an undivided 50% interest in the subject property, as described in the following report, is:

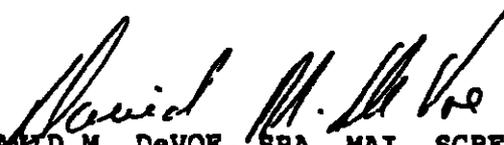
THREE MILLION EIGHT HUNDRED TEN THOUSAND DOLLARS
(\$3,810,000)

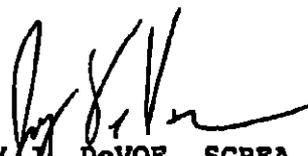
We hereby certify that to the best of our knowledge and belief the statements and data used herein are true and correct and that no important facts have been intentionally withheld or overlooked; that neither the employment in nor the compensation for preparing this report is contingent upon the reported values; that we have no interest present or prospective therein, and that this appraisal has been prepared in conformance with and subject to the rules of the code of Professional Ethics and Standards of Professional Practice of the Ap-

Nickolas P. Tooliatos II
February 1, 1994
Page 2

praisal Institute, of which David DeVoe is a member and Jay
DeVoe is a MAI candidate.

Respectfully Submitted,
DeVOE & ASSOCIATES


DAVID M. DeVOE, SRA, MAI, SCREA
(CA Cert. No. AG005345)


JAY J. DeVOE, SCREA
(CA Cert. No. AG004713)

SUMMARY OF PERTINENT FACTS AND IMPORTANT CONCLUSIONS

Purpose and Function of Appraisal: To estimate the market value of the subject property as of February 26, 1993 for estate purposes.

OWNERSHIP: William & Velma Busch Trust

LOCATION: 3300 to 3450 Mohr Avenue
Pleasanton, California

This property is located between Busch Road and Mohr Avenue, opposite Martin Avenue. This property is in the unincorporated area of the County of Alameda.

SHAPE AND SIZE: A fairly regular shaped parcel containing 90.74± acres (per Assessor's Records).

ZONING: A, Agricultural (Alameda County)

PLANNING: Residential - Medium Density (City of Pleasanton)

IMPROVEMENTS: Older single-family residences, agricultural and miscellaneous yard improvements.

DATE OF VALUATION: February 26, 1993 (date of death of William Busch)

INTEREST APPRAISED: Fee Simple, Undivided 50% Interest.

FINAL VALUE ESTIMATE: \$3,810,000