

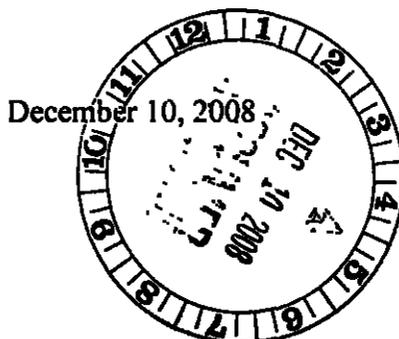
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## VIA HAND DELIVERY

The Honorable Anne K Quinlan  
Acting Secretary  
Surface Transportation Board  
395 E Street, SW  
Washington, D C 20423-0001



224170

**RE: STB 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 docket please find the original and sixteen (16) copies of the Petition for Reconsideration ("Petition") of the Oregon International Port of Coos Bay ("Port") The Petition contains certain information that was designated as Confidential by CORP and therefore is redacted from the Public Version Redacted material is shown in brackets [ ] The Port has also enclosed the original and sixteen (16) copies of the Confidential Version of the Petition The Port has included two sets of three compact disks with the Petition in PDF and MS Word format, one set for each version A check for \$200 is included for the filing fee

An additional copy of the Confidential and Public Versions is enclosed for date-stamping and return to the undersigned via our messenger

Please feel free to contact me if you have any questions

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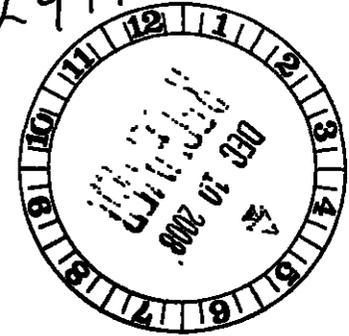
Very truly yours,

Sandra L Brown

Enclosure

cc Parties of Record

224170



**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB FINANCE DOCKET NO. 35160**

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

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**PETITION FOR RECONSIDERATION**

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*Counsel for the Oregon International  
Port of Coos Bay*

**December 10, 2008**

**INTRODUCTION**

The Oregon International Port of Coos Bay ("Port"), pursuant to 49 CFR § 1115.3, respectfully submits this Petition for Reconsideration of the decisions served on October 31, 2008 ("October Decision") and November 20, 2008 ("November Decision") (collectively, "Decisions") in this docket <sup>1</sup> As described below, the Decisions should be reconsidered on several issues due to material error

**PREFACE AND SUMMARY OF ARGUMENT**  
**Pursuant to 49 CFR § 1115.3(d)**

Under authority of 49 USC § 10907(b), and with the agreement of both the Central Oregon & Pacific Railroad ("CORP") and the Port, the Board found that the net liquidated value ("NLV") of the Coos Bay rail line ("Line") was the appropriate measure for the constitutional minimum value standard After receiving evidence from the parties, the Board calculated the NLV of the Line, but made several crucial errors, omissions or oversights in the process

First, the Board materially erred when it failed to include bridge removal and tunnel closure costs shown to be integral to the dismantling of the Line and, therefore, a necessary component of the NLV Calculation of a NLV of a rail line envisions that rail service ceases and the assets of the rail line are salvaged – meaning that things such as track assets are removed from the ground and sold The NLV represents the "net" proceeds of the salvaging process, with the costs inherent in salvaging subtracted from the asset values

In its evidentiary filings in this case, the Port provided ample evidence that any salvaging of the Line would require removal of the rail bridges over the Siuslaw River and Umpqua River CORP's own evidence confirmed that at least some part of the bridges over navigable water

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<sup>1</sup> In light of the Board's decision served November 7, 2008, this Petition for Reconsideration is timely under 49 CFR § 1115.3(e) for both the October 31<sup>st</sup> and the November 20<sup>th</sup> decision

would have to be removed if the Line was abandoned. Evidence also included letters from the U.S. Coast Guard and a federal statute. Further, the Port also provided extensive evidence regarding the cost to remove the bridges, costs that were tested and refined through several rounds of evidence as CORP provided its own view of the necessary bridge removal costs.

The Board inexplicably ignored all this evidence and deviated from precedent stating that calculation of a feeder line NLV includes bridge removal costs if sufficient evidence is offered. In rejecting the bridge removal costs, the Board relied upon 49 CFR § 1152.34(c)(1)(iii)(A)(2), a regulation from the offer of financial assistance (“OFA”) procedures under a different statutory scheme. Notably, the plain language of the regulation states that it applies only to OFA proceedings, and neither party raised or even mentioned this regulation at any time in the case because it was inconceivable that the Board would mis-apply a regulation in this way.

Board and Interstate Commerce Commission (“ICC”) precedent reveals that, contrary to the Board’s statement in the October Decision that assets with a negative net salvage value (“NSV”) should be valued at zero, feeder line decisions (including the Board’s own November Decision in this case) routinely include negative NSV assets in computing the NLV of the subject rail line. Agency precedent has also specifically stated that bridge removal costs should be considered in feeder line cases if certain evidentiary conditions are met – conditions which the Port did, in fact, meet in this case. In short, the Board committed material error by ignoring the bridge removal costs of \$7,758,400 and the tunnel closure costs of \$90,000.

The Board’s second material error concerns the arbitrary date of valuation used for certain of the track assets of the Line. The Board appropriately valued the reroil, scrap, and OTM steel track assets of the Line as of October 31, 2008, the date of the Board’s October Decision. Use of this valuation date was proper because it was the date the Port’s feeder line

application was approved and the Line was ordered to be sold to the Port. It also represented the most up-to-date valuation information available to the Board.

However, the Board materially erred when it valued the relay steel and tie assets as of a date in mid-August 2008, which resulted in some track assets being valued as of mid-August and some valued as of October 31. Court and agency precedent reveal a preference for more current and timely valuation data, and the Port provided relay steel and tie valuations as of October 31 to the Board in the Third Valuation Update.<sup>2</sup> The Board ignored this more up-to-date information, instead deciding to value the relay steel and tie assets as of an arbitrary date in August 2008. The Board should correct its error on this point and adopt the most up-to-date data submitted by the Port, thereby valuing all track assets as of the sale order decision – October 31, 2008.

Third, the Board committed material error when it rejected the Port's request to create an escrow account from part of the purchase price to remedy CORP's neglect of the Line. The Port produced extensive evidence in this case regarding CORP's knowledge of the repair needs of the Line, CORP's failure to meet those needs, and the current costs attributable to CORP's failure. As shown by the Port, CORP followed a milk-the-asset strategy with regard to the Line until it became inoperable. CORP's failure to adequately maintain its Line violated its duties as a common carrier and warrants the creation of an escrow account.

Fourth, the Board's failure to consider and account for the experience and data submitted by a state licensed and local appraiser in the real estate valuation is material error. The Board erred in its wholesale rejection of the real estate appraisal evidence submitted by the Port's local expert. Likewise, the Board erred in its uncritical wholesale acceptance of CORP's flawed appraisal.

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<sup>2</sup> The Port also provided updated relay steel and tie data in the Port's Supplemental Reply, which the Board accepted into the record. The Board later ignored the data.

## ARGUMENT

**I. The Board Erred By Failing To Include Bridge Removal And Tunnel Closure Costs****A. Precedent supports bridge removal and similar costs in feeder line cases**

Board and ICC precedent makes clear that bridge removal costs and other “assets” with negative NSV can and should be factored into a feeder line NLV calculation. Feeder line “precedent does not require the railroad to deduct the costs of bridge removal (and add the salvage or scrap value) unless it meets the following conditions: it must be specified by local or state regulations, or the bridges must cross navigable waterways that fall under U.S. regulations.” *Caddo Antoine and Little Missouri RR Co – Feeder Line Acq – Arkansas Midland RR Co Line between Gurdon and Birds Mill, AR*, Docket 32479, 1995 ICC Lexis 78 at \*26 (served April 18, 1995) (“*Caddo Antoine*”). Cf. *New Haven Inclusion Cases*, 399 U.S. 392, 437 (1970) (in dispute over NLV of New Haven Railroad, both sides deduct bridge removal costs despite negative impact). Recently, the Board was faced with a feeder line applicant who criticized the NLV calculation of the owning railroad for failing to include costs for bridge removal and environmentally-sound disposal of scrap ties. *Keokuk Junction Railway Co – Feeder Line Acq – Line of Toledo Peoria & Western Railway Corp between La Harpe and Hollis, IL*, Docket 34335, slip op. at 16 (served Oct. 28, 2004), revised Feb. 7, 2005, *aff’d Toledo Peoria & Western Railway v STB*, 462 F.3d 734 (7<sup>th</sup> Cir. 2006), *cert. denied*, 2007 U.S. Lexis 3030 (March 19, 2007) (“*KJRY-TPW*”). The Board rejected inclusion of such costs because “[t]here [was] no evidence any bridges would require removal and what the removal costs would be.” *Id.* at 16.

The Port has met the evidentiary standard set forth in *Caddo Antoine* and *KJRY-TPW*. In its filings in this case, the Port has shown that the Siuslaw and Umpqua River Bridges are over navigable waterways, subject to U.S. Coast Guard jurisdiction, and required to be removed in the

event that land transportation over the bridges ceases<sup>3</sup> Application at 130 (U S Coast Guard letter dated June 23, 2008, describing requirement of 33 USC § 502(a)), Supplemental Reply, S R V S Bishop at Attachment D (U S Coast Guard letter dated Sept 16, 2008)<sup>4</sup>; Supplemental Reply at 9-12 (describing environmental and other reasons bridges must be removed if Line is salvaged) CORP itself provided additional U.S Coast Guard evidence that such bridges must be removed Port Reply at 20-24 (describing e-mail from U S Coast Guard included by CORP in its Feeder Line Response) Moreover, the Port has documented the costs of removing the bridges with detailed cost estimates See workpapers named "Davis Spreadsheets.xls", submitted to the Board with the Application, Attachments J, K, L, and M to Exhibit 1 (R V S Davis), submitted with Reply, Attachments J and K to S R V S Davis, submitted with Supplemental Reply CORP, too, provided detailed estimates of bridge removal costs CORP Response at V S Pettigrew (Attachment 8) and V S Maloney. In short, the Port has met both the "conditions" of *Caddo Antoine* and also the standard of *KJRY-TPW* by providing "evidence" that the bridges "would require removal and what the removal costs would be "

The Board stated "restoration" costs "are not appropriate in an NLV calculation because they inherently have a negative NSV " October Decision at 14 The Board also asserted that "[u]nder our rules any asset with a negative NSV is assigned a value of zero " *Id* As shown above and in Section I B below, the Board's rationale is contradicted by years of precedent and by the Board's own November Decision in this case

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<sup>3</sup> The Board did not even address the other 105 bridges that cross waters impacting protected species and would also have to be removed Supplemental Reply at 9-12

<sup>4</sup> The U S Coast Guard filed another letter with the Board (dated Sept 26, 2008, and available on the Board's website with the environmental correspondence regarding the abandonment proceeding) The Board misconstrued this letter, which stated that jurisdiction to order removal of the two bridges at issue in this case rests with the Coast Guard, not the Board The Coast Guard did not state that the removal would not be required or that the Board should ignore the necessary costs of removal in its NLV calculation

**B. The Board's Decisions are internally inconsistent and contradict years of feeder line precedent**

In numerous other feeder line decisions, including the November Decision in this case, the Board has included "restoration costs" that have a negative value or has included "asset[s] with a negative NSV" in determining the NLV of a rail line. In the November Decision, the Board adopted the "Ties and Non-steel materials" value of \$1,203,400 asserted by the Port. Compare Board workpapers, sheet "NLV Reproduct – STB Restate" (at cell G-12) to the Port Reply Evidence, R.V.S. Gene Davis, Attachment B. The value of ties asserted by the Port, and accepted by the Board, includes the negative impact of salvaging scrap ties. See Port Reply, R.V.S. Gene Davis, Attachment C (page 2) (showing that scrap ties have a value of negative \$552,700). Clearly, scrap ties are "asset[s] with a negative NSV," and removal of them is "restoration" of the land, at considerable cost, to a pre-railroad condition.

Similarly, the Board adopted road crossing remediation costs that had a negative NSV in its November Decision. Board workpapers, sheet "NLV Reproduct – STB Restate" (at cells G-26 and G-27). In fact, the road crossing costs are clearly labeled "Restoration Cost Adjustments" in the Board's own spreadsheet, thus refuting the Board's erroneous statement that "'restoration' costs asserted by the Port are not appropriate in an NLV calculation because, as costs, they inherently have a negative NSV." October Decision at 14.

These are not isolated examples. Prior Board and ICC decisions show that restoration costs and assets with a negative NSV have been included in calculating the NLV in earlier feeder line cases. In *Caddo Antoine*, the ICC included removal costs for scrap ties despite the fact that the ties had no market value. *Caddo Antoine*, Docket 32479, 1995 ICC Lexis 78 at \*33. Hence, the scrap tie cost of \$146,336 reduced the NLV of the rail line. *Id.* The ICC also included road crossing restoration at a cost of \$10,000. *Id.* In a more recent case, the Board again included

road crossing restoration costs of \$150,000 *Pyco Industries, Inc – Feeder Line Application – Lines of South Plans Switching, Ltd Co*, Docket 34890, slip op at 15, 19, and 30 (Board adopts Pyco’s road crossing remediation costs of \$150,000) Additionally, as described above in Section I A, the ICC and Board previously enunciated a standard for acceptance of bridge removal costs in feeder line cases, and the Port’s evidence in this case met that standard

Furthermore, precedent shows the Board does not even universally “zero out” all assets with a negative NSV in OFA cases *Railroad Ventures, Inc – Abandonment Exemption – between Youngstown, OH and Darlington, PA in Mahoning and Columbiana Counties, OH and Beaver County, PA*, Docket AB-556 (Sub-No 2X), slip op at 9 (served Jan 7, 2000) (“*Railroad Ventures*”) (deducting \$58,000 for “restoration of grade crossings” in OFA valuation)

An earlier abandonment case illuminates again that bridge removal costs should be deducted from the NLV *Chicago and North Western Transportation Co – Abandonment – between Norma and Cornell – in Chippewa County, WI*, Docket AB-1 (Sub-No 215), 1989 ICC Lexis 23 at \*11-15 (Feb 1, 1989) When a party to the abandonment proceeding included bridge removal costs in the NLV opportunity cost calculation because state law required removal, the abandoning railroad opposed this deduction based on ICC precedent that valued at \$0 any assets with a negative NSV *Id* at \*13-14. The ICC agreed with including the bridge removal costs because (1) the ICC recognized the costs as part of the NLV calculation and (2) the “zero-out” precedent only applied to OFA cases. *Id* at \*15

**C. The Board’s reliance on an OFA regulation is unlawful because it is contrary to the regulation’s plain language**

The Board based its denial of the bridge removal and tunnel closure costs primarily upon a regulation applicable by its plain language solely to OFA cases under 49 USC § 10904 October Decision at 14, 49 CFR § 1152.34(c)(1)(iii)(A)(2) The Board’s unprecedented

application of this OFA regulation to a completely different statutory scheme (the feeder line program, 49 USC § 10907) is reason enough for the Board's ruling on this issue to be reversed<sup>5</sup>

Ordinarily, the Board's interpretation of its own regulations would be entitled to "substantial deference" *Thomas Jefferson Univ v Shalala*, 512 U S 504, 512 (1994). However, deference is not appropriate if the "plain language" of the regulation compels an interpretation at odds with the Board's view *Id* (internal citations omitted). *See also Gardebring v Jenkins*, 485 U S 415, 428-430 (1988) (court relies on "plain language" of Health and Human Services regulation to support its decision, and notes that "we are properly hesitant to substitute an alternative reading for the Secretary's unless that alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation"), *Bowles v Seminole Rock & Sand Co*, 325 U S 410, 414 (1945) (administrative interpretation of a regulation is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation"), *Ashtabula County Medical Center v Thompson*, 352 F 3d 1090 (6<sup>th</sup> Cir 2003) (court overturns agency interpretation of regulation because the plain meaning of the regulation is contrary to agency's interpretation); *In re Old Fashioned Enterprises, Inc*, 236 F 3d 422, 425 (8<sup>th</sup> Cir 2001) ("no deference is due if the [agency's] interpretation is contrary to the regulation's plain meaning")

The Port did not file an OFA. For this reason alone, 49 CFR Part 1152 should not apply to the Board's consideration of the Port's feeder line application. The Port filed its application to acquire the Line under the feeder line program, 49 USC § 10907, which has its own set of

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<sup>5</sup> The Board may have even misapplied § 1152 34(c)(1)(iii)(A)(2). *Greenville County Economic Development Corporation – Abandonment and Discontinuance Exemption – in Greenville County, SC*, Docket AB-490 (Sub-No 1X), slip op at 4 (served March 16, 2006) (in OFA case, Board treats all track assets in a single group and values them at \$0 because bridge removal costs exceed market value of salvaged track assets)

regulations at 49 CFR Part 1151. In fact, 49 CFR § 1151.4(c) specifically discusses the Board's determination of the NLV of a rail line in a feeder line decision, but tellingly omits any reference to a standard akin to that in 49 CFR § 1152.34(c)(1)(iii)(A)(2).

The regulation at issue was promulgated in 1996 to implement revisions to "the law governing applications by rail carriers to abandon or discontinue service over lines of railroad and related offers of financial assistance." 61 FR 67876 (Dec. 24, 1996). There is no mention of applying the regulation to feeder line cases, therefore, "at the time of promulgation," the intent was clearly to use the regulation only for OFA cases. *Gardebring*, 485 U.S. at 430. Emphasizing this point, the Board described factors unique to the OFA process when it issued the new rule: the new 30-day OFA decision deadline and the use of the operating subsidy payment calculation as the basis for the OFA sale price calculation. 61 FR at 67881-67882.

In short, the regulation at issue is applicable only to OFA cases, and this interpretation is "compelled by the regulation's plain language." *Gardebring*, 485 U.S. at 430. Precedent shows that it has only been applied, if at all, in OFA cases. Research has revealed no prior application of this regulation to feeder line cases. The Board's attempt to apply it to a feeder line case conflicts with the regulation's plain language, conflicts with precedent, is entitled to no deference, and represents material error.

Lastly, the Board also noted that "[n]o party has offered any rationale for applying different methodologies to the valuation of rail properties subject to forced sales under section 10907 and section 10904." October Decision at 14. Of course, no party addressed this issue because it was inconceivable that the Board would apply an OFA regulation to this feeder line case. In any event, there are numerous differences between OFA and feeder line cases: (1) there are different governing statutes and different implementing regulations, (2) the OFA statutory

language in 49 USC § 10904(f)(1)(B) says the OFA price must be not less than the fair market value and must include facilities necessary to provide effective transport - hence, it envisions continued rail service; (3) the feeder line statutory price language in 49 USC § 10907(b)(2) says the feeder line price must be not less than the constitutional minimum value, which is "not less than the net liquidated value" or the GCV, whichever is greater - hence, it envisions liquidation, (4) the Board's OFA decision-making is on a strict 30-day deadline, while the feeder line process includes no such time limit, (5) OFA law and procedures include a continuing operation subsidy option, which has been said is the basis for the OFA valuation (61 FR 67882), (6) a feeder line case is much more difficult for the applicant because the PCN showing must be made, therefore it seems logical that the resulting price obtained might be lower than the price in an OFA case, which is much easier for an applicant to pursue, and (7) years of precedent show that OFA and feeder line valuations have been addressed differently *KJRY-TPW*, Docket 34335, slip op at 12 (served Feb 7, 2005), *Cisco Coop Grain Co v ICC*, 717 F 2d 401, 403-404 (7<sup>th</sup> Cir 1983) <sup>6</sup>

If the Board truly believes there is no legitimate reason to value rail lines differently in OFA and feeder line cases, then the Board should issue a Notice of Proposed Rulemaking regarding adoption of an analogue to § 1152 34(c)(1)(iii)(A)(2) in 49 CFR Part 1151. The Board should not overturn years of precedent by issuing an internally inconsistent opinion that selectively applies a regulation from a different statutory scheme.

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<sup>6</sup> The Board cited to an opinion from the 6<sup>th</sup> Circuit for the proposition that the rail line valuation standard under 49 USC § 10907 has been judicially equated with the standard under 49 USC § 10904. October Decision at 14 (note 35), *Railroad Ventures, Inc v Surface Transportation Board*, 299 F 3d 523 (6<sup>th</sup> Cir 2002). The relevance of this decision to the bridge removal issue now facing the Board is questionable. *Railroad Ventures* involved appeals from a Board OFA decision, and there was no dispute or contention in the case regarding differing valuation standards under the OFA and the feeder line procedures. *Railroad Ventures* did not involve a situation where the Board had tried to apply an OFA regulation to a feeder line case. The court's reference to 49 USC § 10907 merely provided background regarding the Board's authority, it was not related to the result in the case.

**D. The Board's Decisions are inequitable**

The Board's Decisions on the bridge removal and tunnel closure costs also represent an inequitable gain for CORP. If the Port has to abandon the Line at some point in the future, it will necessarily incur the bridge removal and tunnel closure costs – therefore, the Board's Decisions create a situation where the Port will have to pay twice for abandoning the Line once CORP would not have to pay them at all despite supposedly getting only the NLV for the Line. Cf. *Bauman v Ross*, 167 U.S. 548, 574 (1897) (to award more than just compensation in an eminent domain proceeding “would be unjust to the public”) The Board's Decisions have also violated the fair market value standard because the Decisions ignore necessary bridge removal and tunnel closure costs that would be incurred in the event that CORP actually did salvage and sell the Line in a “market” setting. *Kirby Forest Industries, Inc v United States*, 467 U.S. 1, 9-10 (1984), *United States v Miller*, 317 U.S. 369, 374-375 (1943)

Under just compensation precedent, “all factors” must be considered when valuing the subject property. *United States v 158 24 Acres of Land*, 696 F.2d 559, 564 (8<sup>th</sup> Cir. 1982). Eminent domain cases reveal that restoration costs such as environmental clean-up should be subtracted when valuing a property. *Oregon v Hughes*, 162 Ore. App. 414, 419-420 (Ore. Ct. App. 1999) (“evidence related to the contamination is relevant to determining the market value of the property”) See also *Northeast Ct. Economic Alliance, Inc v ATC Partnership*, 256 Conn. 813, 833 (2001) (“[e]xcluding contamination evidence is likely to result in a fictional property value – a result that is inconsistent with the principles by which just compensation is calculated”), *City of Olathe, Kansas v Stott*, 253 Kan. 687, 689 (1993) (“[u]nderground petroleum contamination necessarily affects the market value of real property”), *State ex rel Tennessee, Dept. of Transportation v Brandon*, 898 S.W.2d 224 (Tenn. Ct. App. 1994)

“It blinks at reality to say that a willing buyer would simply ignore the fact of contamination and its attendant economic consequences, including specifically the cost of remediation, in deciding how much to pay for property” *Northeast Ct Economic Alliance*, 256 Conn at 833-834 *See generally* Michael L Stokes, *Valuing Contaminated Property in Eminent Domain A Critical Look at Some Recent Developments*, 19 TUL ENVTL LJ 221, 224 (2006) (most courts find environmental contamination relevant to condemned property fair market value), Andra L Reed, Note, *Cleaning Up Contamination Proceedings Legislative and Judicial Solutions to the Dilemma of Admitting Contamination Evidence*, 93 IOWA L REV 1135, 1152-1153 (2008) (the majority of states consider contamination relevant to market value)

**II. The Board Erred By Valuing Some Of The Line’s Assets As Of August 2008**

The Board’s November Decision valued scrap, reroll, and OTM steel assets as of October 31, 2008, the date the sale of the Line was approved, but valued relay steel and tie assets using older, historical data from August 2008. The Board took this unusual step despite the fact that the record in this case included evidence on the relay steel and tie asset values as of October 31<sup>54</sup>. The Board’s reliance on certain historical price data was material error and should be reversed.

In calculating the NLV of the Line’s track assets in its Reply Evidence, the Port used a valuation date of August 15, 2008 because that date coincided with the most recent on-site inspection by the Port’s expert Gene A. Davis. As shown on Attachment H of the R.V S. Davis (Exhibit 1) of the Port’s Reply, the Port valued all track assets on dates within a 7-day period in mid-August: scrap, reroll, and OTM steel assets were valued as of August 15 using the American Metals Market (“AMM”) prices, other steel assets and ties were valued using mid-August price quotes that were submitted in the CORP Response (filed August 29).

As the case continued over the next two months, more current asset valuation data became available. For example, the Port provided updated valuation figures for all track assets on September 30. See Attachment H of S.R V S Davis (Exhibit 2) to Supplemental Reply. In its October Decision, the Board properly recognized the need to use more current data and value the Line's track assets as of the date of decision approving the feeder line application. October Decision at 10 and 12. At that time, the Board did not specifically mention that relay steel assets and ties might be valued as of some other date. Thus, the Port provided valuation data for all track assets as of October 31<sup>st</sup> in its November 5<sup>th</sup> Third Valuation Update. Unfortunately, the Board took the unusual step of ignoring the updated relay steel and tie assets values in its November Decision and split the asset valuation date.

Precedent shows a strong preference for using the most current and up-to-date valuation information available. *Caddo Antoine*, Docket 32479, slip op. at 15-16 (served Aug. 12, 1999) (Board suggests that more recent NLV data would have been preferred). In another recent feeder line case, the Board plainly stated a preference for "recent price quotes" instead of "older data." *KJRY-TPW*, Docket 34335, slip op. at 14 (served Oct. 28, 2004). The Board also accepted scrap steel valuation data submitted by the parties after the procedural record had closed in this case, thereby using the most recently "available data" in the NLV calculation. *Id.* at 13-15.

Under the 5<sup>th</sup> Amendment to the Constitution, private property shall not be taken for public use "without just compensation." Courts have interpreted this standard to mean the fair market value of the property on the date it was appropriated. *Kirby*, 467 U.S. at 9-10; *Miller*, 317 U.S. at 374. In the feeder environment, the property is "taken" when the Board issues its decision approving the sale and setting the price, because it is at this point that the Board has given control over the rail line's future to the feeder line applicant. *Cf. United States*

*v Dow*, 357 U S 17, 21-22 (1958) (court finds valuation date should be when possession is taken from landowner even if title passes later), *Kirby Forest*, 467 U S at 5 (landowner has right to bring inverse condemnation action to recover value of land “on the date of the intrusion by the government”) See also *United States v Ledford*, No 98-6444, 1999 U S App Lexis 33400 (10<sup>th</sup> Cir , Dec 21, 1999)

Thus, in the case of the Coos Bay rail line, the Board should value all track assets as of October 31, 2008, the date of the Board’s October Decision approving the Port’s application. The Board correctly took this path with regard to reroil, scrap, and OTM steel track assets. However, the Board’s decision to continue using a mid-August valuation date for relay steel assets and ties is arbitrary. *Kirby Forest* and similar cases do not support valuation as of several “dates” of taking, one date is envisioned 26 AM JUR 2d *Eminent Domain* § 271 (“arbitrary or otherwise improper methods used by commissioners in computing awards will be disapproved by reviewing courts”) While prior Board decisions may have used multiple dates of valuation, these decisions did so due to necessity – information regarding valuations as of a single date did not exist *KJRY-TPW*, Docket 34335, slip op at 13-15 (served Oct 28, 2004) In the current case, however, the Port provided valuations for all track assets as of October 31, 2008. If left unchanged, the Board’s Decisions set a troublesome precedent where NLV valuations are based on arbitrary, seemingly random dates when later, more up-to-date valuation information exists but is ignored. *Cf In re Blakely*, 76 B R 465, 468 (Bankr E D Pa 1987) (in valuing debtor’s property, court notes that it could have “arbitrarily select[ed] an earlier date. as the date to render our valuation,” but instead chose the date of confirmation for valuation because “at that date, it must be resolved precisely what payments the Debtor must make to each interested party under the Plan and hence it is the last possible date on which such a valuation determination

could be made”), *vacated on other grounds*, 78 B R 435 (Bankr. E D. Pa 1987) The Board should reconsider its Decisions, value all track assets as of October 31, 2008, and reduce the track assets valuation to the amount set forth in the Port’s Third Valuation Update,<sup>7</sup> where the Port showed the relay rail materials and ties should be valued at \$7,915,500 and \$1,398,900, respectively, rather than the \$9,907,300 and \$1,203,400 used by the Board<sup>8</sup>

### **III. The Board Erred In Failing To Create An Escrow Account**

The Board also materially erred when it failed to order that part of the proceeds of the feeder line sale should be placed in escrow to cover necessary Line repairs caused by CORP neglect of the Line October Decision at 16-17 In rejecting the escrow request, the Board stated that CORP did not engage in “deliberate downgrading” of the Line<sup>9</sup> The Port had never argued the deliberate downgrading doctrine because it does not represent the Port’s position in this case Deliberate downgrading “occurs when a carrier actively discourages existing or potential traffic on a viable line simply to facilitate abandonment” and to “drive shippers from the line” *Georgia*

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<sup>7</sup> CORP’s rebuttal attempt to submit relay and tie asset values as of October 31, 2008 should be rejected for numerous reasons as previously ruled by the Board See CORP filing (Nov 7, 2008). First, the L B Foster bid submitted by CORP still is not an unconditional bid because it is only valid for 90 days V S Pettigrew, Attachments A and B Second, the L B Foster bid continues to rely upon incorrect track quantities that were rejected when the Board adopted the Port’s track asset types and quantities The Board adopted the Port’s track quantities (October Decision at 12), yet L B Foster deviated from those quantities in its latest estimate Compare V S Pettigrew, Attachments A and B to Port Reply, R.V S Davis, Attachment C (page 1) Third, the L B Foster bid deviated from the November Decision (pages 3-4) by failing to use the October 31<sup>st</sup> AMM prices for scrap, rroll, and OTM steel assets. Compare V.S Pettigrew, Attachments A and B to Port Third Valuation Update, T.U V S. Davis at Attachment H

<sup>8</sup> Adjustment of the relay rail and ties values necessarily involves a resulting change in the profit and cost of money expenses The Port described how to calculate the profit and cost of money in its Petition for Technical Correction (filed Nov 25, 2008) With the changes to relay rail and tie assets as shown above, profit decreases from [ ], and cost of money decreases from [ ] Including the reduction in asset valuations described above, the net change to the NLV is a decrease of \$1,517,461.

<sup>9</sup> The Board described the four-part deliberate downgrading test in the abandonment decision, Docket AB-515 (Sub-No 2), slip op at 11-12 (served Oct 31, 2008)

*Great Southern Division, South Carolina Railroad Co , Inc – Abandonment and Discontinuance Exemption – between Albany and Dawson, in Terrell, Lee, and Dougherty Counties, GA, Docket AB-389 (Sub-1X), 1996 STB Lexis 226 at \*12-13 (served Aug. 16, 1996)* This has never been the position of the Port or any other party in the proceedings regarding this Line. Instead, the Port has consistently argued that railroads have an obligation to maintain their tracks in adequate condition for continued rail service, especially in situations where the relevant rail line has not been placed on the System Diagram Map as a candidate for abandonment. The Port provided voluminous evidence of CORP's knowledge of the maintenance needs of the tunnels, bridges, and track on the Line. CORP obviously ignored those maintenance needs because the tunnels deteriorated to an unusable condition. Bridge repair needs were also neglected. CORP's failure to properly maintain the Line, all the while encouraging private investment in rail-related facilities, was a violation of its common carrier obligation under 49 USC § 11101, resulted in an improper use of the embargo procedure (which is meant for catastrophic events, not deterioration caused by neglect), and precluded effective use of the feeder line process (which was devised to give affected communities and shippers the opportunity to purchase rail lines before deterioration). *See, e g* , Port's Show Cause Reply at 11-18, Application at 48-54, Reply at 69-74, and Supplemental Reply at 6-17.

In an attempt to justify its decision, the Board notes that there was no evidence that "CORP planned to seek abandonment authority before the Board's April 11 show cause order." October Decision at 17. However, this is exactly the Port's point. Abandonment was the appropriate step if CORP did not want to engage in the necessary upkeep required to prevent deterioration of the Line to the point of inoperability. CORP's failure to engage in ongoing maintenance was improper and not representative of a common carrier obligation. If the Board

fails to create an escrow account in this case, then CORP's failure to initiate abandonment or otherwise put the affected community and shippers on notice before the deterioration, which has resulted in the need for \$15 388 million of rebuilding before the Line can even safely be reopened, will result in the feeder line statute and Congressional intent to protect communities and shippers becoming meaningless<sup>10</sup> Thus, the fact that CORP did not plan or give any notice to others that this Line was heading for abandonment until after the Board's April 11 show cause order supports a finding that CORP violated its common carrier obligation and hampered the feeder line process, which was devised to give affected communities and shippers the opportunity to purchase rail lines before deterioration

CORP's behavior warrants creation of an escrow account "to make serviceable any segment of the line that [was] allowed to become unserviceable during [CORP's] ownership" *Railroad Ventures* (served Nov 9, 2001), slip op at 5 The escrow should cover "passive" misconduct by CORP, including the failure to "keep the line serviceable notwithstanding weather-related damage" *Id* at 6 (n 11) The Port's request for an escrow account is reasonable because CORP allowed the Line to deteriorate to a condition of inoperability and has made no effort to repair the Line to restart service.<sup>11</sup> thereby violating "the requirement that carriers keep their railroad lines in sufficiently good condition to comply with

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<sup>10</sup> The escrow figure consists of \$3 099 million to conduct immediate repairs to tunnels 13, 15, and 18, \$9 2 million to conduct critical bridge repairs for conditions that are "unsafe" or "could cause failure at any time", \$2.42 million to engage in "require[d] tie replacement, and \$0 699 million to conduct surfacing of ties Supplemental Reply at 15-17

<sup>11</sup> At page 11 of the Abandonment Decision, the Board noted that CORP made repairs to one bridge on the Line after the embargo This was the only bridge repair by CORP during the entirety of 2007 This minor repair to one bridge was apparently due to fire damage (see CORP001197 and 002168-2169, found in Port Reply Vol III), represented less than one-half of one percent of the total bridge repairs that CORP said were necessary due to "unsafe" conditions on the Line (compare CORPHC000014 to Port Show Cause Reply, Ex 23 at page 5), and meant that CORP ignored 15 other bridges which Osmose stated were "unsafe and could fail at any time" as a result of the February 2007 inspection CORP00195-00197, Port Reply Vol III

their common carrier obligation under 49 U.S.C. 11101 to provide service on reasonable request.” *Railroad Ventures* (served April 28, 2008), slip op. at 11. An escrow account would ensure that the Board adequately “enforc[es] consistent federal policy requiring common carrier railroads to maintain their rail lines properly unless and until they are lawfully abandoned.” *Id.*

The Board also erred in its assertion that an escrow account was inappropriate because it encompassed “rehabilitation costs,” which cannot be considered in an NLV calculation. October Decision at 16.<sup>12</sup> Yet, the *Railroad Ventures* case was also based on an NLV valuation, and it did include both an escrow account and an NLV deduction to restore road crossings. *Railroad Ventures* (served Jan. 7, 2000), slip op. at 8-9 and (served Oct. 4, 2000), slip op. at 19.

#### **IV. The Board Erred In Its Rejection Of The Port’s Real Estate Evidence**

The Port submits that the Board committed material error in its wholesale rejection of the real estate appraisal evidence submitted by the Port’s expert witness, Mr. Jay J. DeVoe.

As an initial matter, the October Decision gives no indication that the Board adequately considered Mr. DeVoe’s nearly twenty years of experience as a real estate appraiser in Oregon, and his familiarity with Oregon’s real estate market. Mr. DeVoe is licensed by Oregon and holds the highest professional designations from the Appraisal Institute and the International Right-of-Way Association. As explained in his opening testimony, Mr. DeVoe’s approach and his conclusions were informed by his expertise in the Oregon real estate market and the psychology

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<sup>12</sup> Interestingly, the Board notes that “the NLV calculation assumes that the subject line will be dismantled and taken out of service” (October Decision at 16) to justify rejecting the escrow request but, earlier, states, if bridge removal is required, “any cost that exceeds the salvage value of those bridges is not to be considered in our calculation of the NLV” (October Decision at 14) and rejects the bridge removal costs. That is, the Board argues “dismantling” to reject the escrow, but ignores “dismantling” in rejecting the bridge removal costs.

of potential purchasers of the subject property<sup>13</sup> CORP's expert, by contrast, has no comparable experience with the Oregon real estate market and obtained a temporary license in order to conduct his appraisal. The Board's apparent failure to credit Mr DeVoe's particularly relevant experience represents a critical oversight. See *CSX Transportation, Inc—Abandonment Exemption—Fayette and Nichols Counties, WV*, Docket No. AB-55 (Sub-No. 250X), 1989 ICC Lexis 2 at \*4 (served Jan. 4, 1989) (noting use of an appraiser "familiar with the local area")<sup>14</sup>

Along this line, the October Decision fails to indicate that the Board adequately considered Mr DeVoe's appraisal on its own terms. While it is true that Mr DeVoe used a modification to the across-the-fence ("ATF") methodology that the Board may not have seen before—a modification that was informed by Mr DeVoe's local experience, fully explained,<sup>15</sup> and supported by a professional treatise and relevant articles<sup>16</sup>—the October Decision does not sufficiently evaluate Mr DeVoe's approach and conclusions. Instead, it appears that once the Board detected Mr DeVoe's modification, it applied only cursory analysis. See *Jost v STB*, 194 F.3d 79, 85 (D.C. Cir. 1999) (citation omitted) ("The arbitrary and capricious standard of the APA mandates that an agency take whatever steps it needs to provide an explanation that will enable the court to evaluate the agency's rationale at the time of decision.") For example, the Board declares, "[w]e are not convinced of the theory's premise" but provides no explanation as

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<sup>13</sup> Mr DeVoe's analysis was supported by a V.S. from a local real estate attorney experienced in the south coast Oregonian view of property. Coffey Reply V.S., at 6 and 11-12.

<sup>14</sup> The Board and its predecessor traditionally deferred from questions of State law, which were recognized as beyond the unique expertise held by the agency. See *CSX Transportation, Inc—Abandonment Exemption—In Allegany County, MD*, Docket No. AB-55 (Sub-No. 659X), 2008 STB Lexis 216, at \*5 (served April 24, 2008), *B Willis, C P A*, Docket No. 34013, 2001 STB Lexis 767, at \*10 (served Oct. 3, 2001). The Port submits that similar deference should be observed with respect to a real estate valuation, fundamentally a State property question, performed by an appraiser with local experience. The reliance on a local appraiser's valuation would be particularly vital to the Board if it does not have a professional appraiser on staff.

<sup>15</sup> DeVoe Opening V.S., at 69-72 and 146-147.

<sup>16</sup> DeVoe Reply V.S., Ex. 27, 28, and 29.

to why the theory is unsound or unreliable October Decision at 12. Indeed, the Port introduced a leading treatise and articles that strongly support that the premise is sound Moreover, the Board is simply wrong in asserting that in any event “the Port’s witness applied [the theory] incorrectly because he performed no pricing calculations to reflect the higher-valued base homesite portions in valuation units specified as residential properties ” October Decision at 12 In fact, as explained on pages 146-147 and 157 of Mr DeVoe’s opening testimony, this was consistent with the base homesite approach. And, the October Decision is also wrong in asserting that Mr DeVoe “did not provide any evidence on the minimum requirements for residential lots ” October Decision at 12 In fact, he did.

- Valuation Unit 7, Zoning “Development standard include minimum lot sizes of two and five acres for RR2 and RR5, respectively setbacks of twenty feet, fifteen feet and twenty feet for front, side and rear setbacks, respectively. 35-foot height limit and one parking space. DeVoc Opening V S , at 144
- Valuation Unit 10, Zoning: “Development standards include five-acre minimum lot size, 40 percent coverage, 45 foot height restriction, setbacks include 30 foot from public right-of-way and ten foot from private right-of-ways ” DeVoc Opening V S , at 169
- Valuation Unit 11, Zoning “Development standards include two-acre minimum lot size, setbacks of 35 feet from right-of-way centerline or five feet from right-of-way, there is [sic] no coverage or height restrictions ” DeVoc Opening V S , at 172

Simply, the October Decision does not suggest a careful, reasoned analysis of Mr DeVoe’s testimony on its own terms, but a sweeping rejection based on cursory inspection <sup>17</sup>

The direct consequence of the STB’s sweeping rejection of Mr DeVoe’s testimony was its uncritical acceptance of CORP’s evidence, despite several flaws For example, it is

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<sup>17</sup> The examples of Mr DeVoe’s purported errors (listed on page 13 of the October Decision) are wrongly described as errors, since they simply flow from the Board’s wholesale rejection of Mr DeVoc’s base homesite approach, and/or its rejection of his opinion as an expert Mr DeVoc presented opinions based on his experience, which were explained and supported throughout his testimony For example, with regard to valuation unit 3, Mr DeVoe’s conclusions were explained in detail at pages 87-110 of his opening V S Based on his analysis and experience, Mr DeVoc concluded that timber lands lacking timber rights would have no value to adjoining landowners

abundantly clear that neither CORP's title expert nor its real estate appraiser were aware of the substantial reservations held by Southern Pacific Transportation Company ("SPT") in the original sale of the Line to CORP. These reservations were brought to light by Mr. DeVoe. This oversight compromises CORP's appraisal, which was originally prepared for the abandonment proceeding and then resubmitted in this proceeding with a "fix-it" to account for the error. Rex Resp. V S. at 29-33 (the "[ ] correction")<sup>18</sup>. But the reservations are a "game-changer" that cannot be corrected after the fact,<sup>19</sup> rather, CORP's mistake fundamentally calls into question its ATF analysis because the SPT reservations should have been considered in selecting sales deemed "comparable" to subject parcels.<sup>20</sup> They render incomparable CORP's supposedly comparable sales because those sales do not have similar reservations. CORP's appraisal was an "apples to oranges" exercise. Mr. DeVoe, by contrast, made no such error, and accounted for the reservations in his base homesite approach.

Moreover, the October Decision shows no consideration of the key point that CORP did not re-acquire the reserved timber rights in Douglas County, which Mr. Rex excludes from his [ ] correction at pages 29-31 of his Verified Statement. RailTex Logistics, Inc. ("RailTex") rather than CORP owns those rights, having acquired them from UPRR. See Rex Resp. V S. at 29. In a feeder proceeding, the land component of the NLV considers property owned by the incumbent carrier. Because CORP does not own the timber rights in Douglas

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<sup>18</sup> The correction was allegedly to account for the Coos and Lane County timber rights reservation that CORP had ignored in its appraisal submitted in the abandonment proceeding.

<sup>19</sup> See *The Appraisal of Real Estate*, 12<sup>th</sup> Ed. at 425-426 and 430-431 (2001). The treatise notes, "Easements themselves are not usually valued. In most appraisal assignments involving easements, the value of the easement is reflected in how a property subject to an easement is affected by its presence or absence." Of course, this is precisely what CORP's witness purported to do in his correction: he supposedly derived a value for the SPT timber reservation and then deducted this value from his original conclusion for affected parcels.

<sup>20</sup> See *The Appraisal of Real Estate*, 12<sup>th</sup> Ed. at 425-426 and 430-431.

County—RailTex does—the value of such rights should be subtracted from Line’s NLV. When the Port purchases the Line from CORP, the Port will take the property subject to RailTex’s timber rights, unless the Board orders RailTex to convey its rights to the Port. However, RailTex, a “sister-company of CORP,” is not before the Board and may not even be within the Board’s jurisdiction. It was plainly a mistake on Mr. Rex’s part to exclude Douglas County timber rights from his [ ] correction. By extension, the October Decision validates this erroneous analysis and will result in the Port paying for timber rights it does not receive unless the Board orders that RailTex convey its Douglas County timber rights to the Port. Following Mr. Rex’s approach – which the Port does not endorse – the Board should deduct a minimum of approximately \$100,000 from the purchase price to reflect timber in Douglas County (

) See Rex Resp V S at 29-30

Furthermore, there is no indication whatsoever that the Board investigated other errors in Mr. Rex’s testimony. The Port submits that rejection of its evidence, even if it were warranted—which it was not—does not allow the Board to uncritically accept CORP’s evidence. For example, the Board erred when it uncritically accepted CORP’s evidence on land values in the City of Veneta and on waterfront residential parcels.

City of Veneta - The October Decision does not address the existence of the City of Veneta’s Greenway Zoning overlay that virtually precludes development and impairs the value of subject line parcels. Mr. Rex’s value conclusions are supported by his conjecture—without any support—that the City of Veneta would repeal the overlay if rail operations were halted. See Rex Resp V S at 25. By accepting CORP’s erroneous unit values of [

] per acre, the October Decision markedly increases the value of the underlying parcels. Indeed, the last unit value is by far the highest value assigned to the Line. Overall,

30 15 acres of the subject line are valued at improperly inflated unit prices See Rex Rrsp V S at 37-38, Segments 217-225

Waterfront Residential - The October Decision does not address parcels wrongly categorized as "Waterfront Residential " None of the segments are waterfront properties because each is separated from the Siuslaw River by a state highway Under Mr Rex's own ATF theory, the segments at issue should be associated with the abutting properties to the west, rather than the other side of the highway As such, Mr Rex created a land use that should not exist and wrongly applied his fourth-highest unit price ( [ ] per acre), which significantly increased the value of the property A total of 8 87 acres of the subject line are affected by this inflated unit price See Rex Rrsp V.S at 35, Segments 64, 66-67

### **CONCLUSION**

For the reasons described above and in the Port's prior pleadings, the Board should reconsider its Decisions, and (1) deduct \$7,758,400 for bridge removal and \$90,000 for tunnel closure from the purchase price for the Line. (2) value the relay steel assets and tie assets as of October 31, 2008, as described in the Third Valuation Update, which would result in a deduction of \$1,517,461 from the purchase price, (3) order the creation of an escrow account so that part of the purchase price for the Line can be used to rectify CORP's neglect, and (4) accept the Port's land appraisal evidence in total or at least discount CORP's appraisals for serious flaws which result in a substantial overstatement in the land value for the Line

Respectfully submitted,



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December 10, 2008

**CERTIFICATE OF SERVICE**

This is to certify that on this 10th day of December 2008, I caused the foregoing to be served upon all parties of record in this proceeding, STB Docket No 35160.

  
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David E Benz