

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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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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Finance Docket No. 35160

**REPLY OF CENTRAL OREGON & PACIFIC RAILROAD, INC. TO  
PETITION FOR RECONSIDERATION OF  
THE OREGON INTERNATIONAL PORT OF COOS BAY**

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Dated: December 29, 2008

Central Oregon & Pacific Railroad, Inc. (“CORP”) submits this Reply to the Petition for Reconsideration filed by The Oregon International Port of Coos Bay (the “Port”) in the above-captioned proceeding on December 10, 2008 (the “Reconsideration Petition”). For the reasons set forth below, the Port’s Reconsideration Petition should be denied in its entirety.

**PREFACE AND SUMMARY**  
**(Filed Pursuant to 49 C.F.R. § 1115.3(d))**

The Reconsideration Petition asks the Board to revisit almost every one of the Board’s findings with respect to the Net Liquidation Value (“NLV”) of the Coos Bay Line (the “Line”) set forth in the decisions served in the above-captioned proceeding on October 31, 2008 (the “*October 31 Decision*”) and November 20, 2008 (the “*November 20 Decision*”).<sup>1</sup> The Port does not suggest that any of the Board’s prior findings “will be affected materially because of new evidence or changed circumstances” (49 C.F.R. § 1115.3(b)(1)), nor does the Reconsideration Petition proffer any new or additional evidence. Rather, the Reconsideration Petition is premised on the Port’s claim that the Board committed numerous material errors in the *October 31 Decision* and the *November 20 Decision*.

First, the Port argues that “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.” Reconsideration Petition at 1. Specifically, the Port contends that, in rejecting its request for a deduction from the NLV to account for such costs, the Board “departed from precedent” (*id.* at 2, 6-7), and improperly “applied” a provision of its Offer of Financial Assistance (“OFA”) regulations to the Port’s feeder line application (*id.* at 2, 7-10.) Those assertions have no merit.

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<sup>1</sup> The only element of the Board’s NLV calculations that the Port does not challenge is the Board’s estimate of the value of scrap rail materials based upon AMM metals index prices as of October 31, 2008.

The Board's refusal to deduct alleged bridge removal and tunnel closure costs was fully consistent with Board precedent. The Port cites no case in which the Board deducted such costs from the NLV of a rail line in a feeder line proceeding — indeed, the Board rejected similar claims in the two cases principally relied upon by the Port. Moreover, the Board did not “apply” 49 C.F.R. § 1152.34(c)(1)(iii)(A)(2) to the Port's feeder line application. Rather, in denying the Port's request, the Board cited that regulation by way of analogy and (correctly) held that there was “no logical basis” to value assets with a negative NSV differently in forced sales under the OFA and feeder line procedures. *October 31 Decision* at 14. In any event, the Port did not meet its burden of proving that CORP would, in fact, be required to remove the subject bridges or that the cost of doing so would be \$7,758,400.

Second, the Port asserts that the Board committed material error by valuing relay quality rail and ties as of an “arbitrary, seemingly random date[ ].” Reconsideration Petition at 14. There was nothing “arbitrary” or “random” about the Board's reliance upon relay rail prices set forth in the Port's September 12 Reply filing (the “Port's Reply”). Indeed, the Board determined every element of the line's NLV (except for scrap rail) as of October 31, 2008 based on the evidence of record as of September 12, 2008. The Board's decision to use October 31 as the reference point for scrap rail prices only was appropriate in light of compelling evidence that AMM scrap steel prices declined sharply during September and October 2008. There was no indication in the record that relay rail prices experienced a similar decline. In any event, the record does not support the Port's proposed reduction in the value of relay rail.

Third, the Port contends that “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.” Reconsideration Petition at 3. *See id.* at 15-18. This argument ignores the

fact that the Board rejected the fundamental premise underlying the Port's various claims for "damages" – i.e., that CORP neglected the Line. Based upon the record, including undisputed evidence that CORP invested more than half of the gross freight revenues generated by the Line for ordinary maintenance and capital expenditures even as operating losses increased, the Board correctly concluded that CORP did not deliberately downgrade the Line, and that its decision not to engage in major tunnel rehabilitation was an appropriate effort to economize on a line with little positive earnings potential. The Board also correctly held that Section 10907 does not permit the Board to discount the NLV of a line to award "damages" or rehabilitation costs to a feeder line applicant. (In any event, the Port, which was not a shipper on the Line, lacks standing to seek such damages.)

Fourth, the Port asserts that the Board erred in rejecting the Port's land valuation evidence. Reconsideration Petition at 3, 18-23. Specifically, the Port complains of "the Board's apparent failure to credit Mr. DeVoe's particularly relevant experience." *Id.* at 19. The Port also claims that the Board failed to justify its rejection of witness DeVoe's nonsensical "base homesite theory" (*id.* at 19-20), and that the Board supposedly accepted CORP's land valuation evidence without analysis. *Id.* at 20. None of these claims warrants reconsideration of the Board's findings.

Mr. DeVoe's Oregon experience was not "particularly relevant" as it was devoid of any significant experience with railroad corridor valuation. The Board reject Mr. DeVoe's appraisal not for lack of railroad experience but rather because the methodologies he employed and the conclusions he reached were not credible. Mr. DeVoe's appraisal relied on a premise that excess land was undesirable and "applie[d] the ATF method incorrectly or not at all," resulting in an estimate that 78% of the right-of-way had no resale value. The Board was not convinced.

## ARGUMENT

Petitions for reconsideration are not an invitation for parties to reargue points that were raised and decided earlier. Rather, a petition for reconsideration will be granted only if it identifies “new evidence,” “changed circumstances” or a “material error” in the Board’s prior decision. 49 C.F.R. § 1115.3(b); *see, e.g., Union Pac. Corp.—Control & Merger—Southern Pac. Rail Corp.*, STB Fin. Docket No. 32760 (Sub-No. 42) (Aug. 14, 2006). The Port does not even attempt to demonstrate new evidence or changed circumstances. While it asserts in conclusory fashion that the Board “materially erred” in determining almost every element of the Line’s NLV, the Port offers no persuasive reason why the Board’s evaluation of the evidence was unreasonable, nor does the Port demonstrate that the *October 31 Decision* or the *November 20 Decision* is in any respect inconsistent with governing law or prior agency precedent. It is not enough for a party seeking reconsideration simply to assert that the Board was wrong – if the standard of § 1115.3(b) is to have any meaning, a party must meet the heightened standard of proving a material error. The Port’s failure to articulate with particularity any material error in the *October 31 Decision* or the *November 20 Decision* warrants rejection of its Reconsideration Petition. *See Kansas City So. Ry. Co.—Trackage Rights Exemption—Gateway W. R.R. Co.*, STB Fin. Docket No. 33780 (June 5, 2000) (denying petition for reconsideration that “for the most part merely repeat[s] arguments addressed in the prior decision”); *Victoria Terminal Enters., Inc.—Transportation of Fertilizer Within Texas—Pet. for Declaratory Order*, ICC No. MC-C-30002 (Apr. 19, 1988) (rejecting petitions to reopen that “largely repeat arguments previously made and fully considered and discussed in our prior decision”).

**I. THE BOARD'S REFUSAL TO DEDUCT ALLEGED BRIDGE REMOVAL AND TUNNEL CLOSURE COSTS FROM THE NLV OF THE LINE WAS FULLY CONSISTENT WITH GOVERNING LAW AND BOARD PRECEDENT.**

The Port contends that the Board committed material error by failing to deduct from the NLV of the Line the alleged cost of removing the Siuslaw and Umpqua River bridges, as well as the cost of closing tunnels on the Line. According to the Port, those costs are “integral to the dismantling of the Line and, therefore, a necessary component of the NLV.” Reconsideration Petition at 1. According to the Port, the Board’s decision in this regard “departed from precedent” (*id.* at 2, 6-7) and was “based . . . primarily upon a regulation applicable by its plain language solely to OFA cases under 49 USC § 10904” (*id.* at 7). Those assertions have no merit.

The Board’s refusal to assign a “negative value” to bridges on the Line was fully consistent with precedent. The Reconsideration Petition cites no case in which such costs were deducted from the NLV of a rail line in a feeder line proceeding. Indeed, in the two cases principally relied upon by the Port, the Board rejected similar claims. In *Caddo*, the ICC rejected a feeder line applicant’s proposal to deduct bridge removal costs from the NLV, modifying the proffered NSV to eliminate “any costs associated with bridge removal.” *Caddo Antoine and Little Missouri RR Co. – Feeder Line Acquisition – Arkansas Midland RR. Co. Line between Gurdon and Birds Mill, AR*, ICC Docket No. 32479 (1995). 1995 WL 226042 at \*9. In the other case relied upon by the Port, *Keokuk Junction Railway Co. – Feeder Line Acq. – Line of TP&W between La Harpe and Hollis, Ill.*, STB Dkt. No. 34335 (served Oct. 28, 2004), *aff’d TP&W v. STB*, 462 F.3d 734 (7<sup>th</sup> Cir. 2006) (“*Keokuk*”), the Board likewise declined to deduct bridge removal costs from its NLV calculation because the applicant failed to present evidence addressing whether any bridges would require removal or the cost of doing so. *See Keokuk* at 12. The Board did not even address the issue whether a negative asset value might properly be assigned to a bridge in calculating NLV for feeder line purposes. Rather, *Keokuk* stands for the

unremarkable proposition that if a party fails to present evidence regarding an issue it raises, the Board will not entertain its argument on that issue.<sup>2</sup> In short, the Board's refusal to deduct from the NLV of the Line the purported cost of removing the Siuslaw and Umpqua River bridges was fully consistent with precedent in prior feeder line cases.

Moreover, contrary to the Port's assertions, the Board did not "apply" 49 C.F.R. § 1152.34(c)(1)(iii)(A)(2) to the Port's feeder line application, nor did the Board base its decision not to assign a negative value to the subject bridges "primarily" on that regulation. Rather, in holding that it would be inappropriate to assign a negative value to bridges in this feeder line proceeding, the Board cited its OFA regulations by way of analogy and (correctly) held that there was "no logical basis" to value assets with a negative NSV differently in forced sales under the OFA and feeder line procedures. *October 31 Decision* at 14.

The Board's reasoning is amply supported by prior agency precedent. In adopting the regulations governing feeder line proceedings in *Feeder Railroad Development Program*, 367 I.C.C. 261, 264 (1983), the ICC explicitly held that the same standards applied in determining the forced sale price in both contexts. In response to commenters' concerns that a feeder line application and a parallel OFA proceeding might produce different valuations for the same line,

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<sup>2</sup> The other cases cited by the Port are inapposite, as they do not involve either OFA or feeder line applications. See *New Haven Inclusion Cases*, 399 U.S. 392, 437 (1970) (bankruptcy law decision rendered 10 years before Congress enacted feeder line statute and having nothing to do with either OFA or feeder line statutes or regulations); *Chicago and Northwestern Transp. Co – Abandonment – Between Norma and Cornell, WI*, ICC Dkt. AB-1 (Sub-No. 215) (Feb. 1, 1989) (abandonment case that Commission expressly distinguished from OFA context – and, by implication from feeder line context – finding "we are not concerned with how much a party should pay for a line of railroad or how much a party should pay a carrier to keep a particular line operating. Our task is to assess the benefits flowing to a carrier from the abandonment of a line."). Also distinguishing *CN&W* from the present case is the fact that the parties were in agreement that state law definitely "w[ould] require the bridges to be removed." *Id.* at \*14. In the present case, there is a strong dispute as to whether the removal of any bridges might be required if the line were abandoned.

the Board responded that there was “no likelihood” of such divergent determinations “since the criteria used to set the price are the same” in both contexts. *See id.* at 363 (emphasis added).

Subsequent feeder line cases uniformly confirm that the same valuation standards apply in OFA and feeder line proceedings. *See, e.g., Railroad Ventures, Inc. v. STB*, 299 F.3d 523, 556 (6<sup>th</sup> Cir. 2002) (affirming STB OFA decision under Section 10904 decision by applying standards of Section 10907, and equating the “constitutional minimum value” requirements of the two analyses); *Sandusky County – Feeder Line Application – Consol. Rail Corp.*, 6 I.C.C.2d 568, 573 (1990) (in valuing a line for a feeder line application, the agency “appl[ies] the same criteria as for offers of financial assistance under [the OFA statute]”); *Cheney Railroad Co. – Feeder Line Acquisition – CSX Transportation*, 5 I.C.C.2d 250, 268 (1989) (“[i]n valuing the line [in a feeder line application], we use the same criteria as are used for offers of financial assistance under [the OFA statute] to acquire a rail line to be abandoned.”), *aff’d sub nom. Cheney Railroad Company v. I.C.C.*, 902 F.2d 66 (D.C. Cir. 1990). The Port’s assertion that the Board’s refusal to assign a negative value to the subject bridges in this case constitutes “material error” flies in the face of these controlling precedents.

Even in the absence of such controlling precedent, the Board’s interpretation of its own feeder line regulations was entirely reasonable and well within its discretion. As the Port itself acknowledges (Reconsideration Petition at 8), an agency’s interpretation of its own regulations is entitled to substantial deference. *See, e.g., Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994). As the Supreme Court has explained, a court reviewing an agency interpretation of that agency’s regulations “is not to decide which among several competing interpretations best serves the regulatory purpose. Rather the agency’s interpretation must be given controlling

weight unless it is plainly erroneous or inconsistent with the regulation.” *Shalala*, 512 U.S. at 512 (emphasis added) (internal citations omitted).

The Port cites no provision of the feeder line statute or the Board’s regulations governing feeder line proceedings whose language even arguably “compels an interpretation” of the appropriate valuation standards contrary to that employed by the Board in this case. To the contrary, the Board’s interpretation of the standards governing forced sales under its feeder line regulations was entirely consistent with the language of the feeder line statute. Moreover, the Board correctly observed that there is “no logical basis to allow for a negative NSV in the calculation of one type of forced sale of a rail line, but prohibit it for another.” *October 31 Decision* at 14. The purpose of the Board’s NLV analysis in both OFA and feeder line cases is to determine the “constitutional minimum value” at which the incumbent carrier is required to sell the subject rail line. It would be utterly illogical to apply different standards of “constitutional minimum value” based solely upon a party’s decision to proceed via a feeder line application rather than an OFA. Indeed, applying different valuation standards in the two types of proceedings would encourage the very gamesmanship that the ICC sought to eliminate in the rulemaking in which it harmonized its feeder line regulations with the regulations governing abandonments and OFAs. *See Feeder Railroad Development Program*, 367 I.C.C. 261 (1983).

Even if it were otherwise appropriate to apply negative valuations to assets in a feeder line proceeding – and it is not – the Port did not meet its burden of proving that the Siuslaw and Umpqua River bridges would, in fact, have to be removed, nor does the record evidence support the Port’s proposed deduction of \$7,758,400 for bridge removal and tunnel closure costs. As the offeror, the Port bears the burden of proving that its evidence with respect to all elements of the NLV calculation are more reliable and probative than that submitted by the carrier. *See, e.g.*,

*San Joaquin Valley Railroad Company – Abandonment Exemption – In Tulare County, CA*, STB Dkt. No. AB-398 (Sub-7X), served Aug. 26, 2008 at 3-4 (“*SJVR*”). The Reconsideration Petition appears to assume that the Port is entitled to the claimed NLV reduction merely because it proffered some evidence with respect to those issues.

However, it is not enough for the Port to produce “some evidence.” Rather, it is well established that “the offeror must present more specific evidence or analysis or provide more reliable and verifiable documentation than that which is submitted by the carrier. If the offeror does not present such superior evidence and/or documentation, the Board accepts the carrier’s [NLV] estimates in these forced sale proceedings” *SJVR* at 4 (emphasis added). Moreover, “[i]n setting terms and conditions of a [forced] sale . . . [the Board] cannot credit speculative evidence.” *R.R. Ventures, Inc. – Abandonment Exemption Between Youngstown, OH and Darlington PA*, STB Dkt. No. AB 556 (Sub-No. 2X), 2001 WL 1470451 at \*9 (Oct. 4, 2000), *aff’d sub nom. Railroad Ventures, Inc. v. Surface Transportation Board*, 299 F.3d 523, 558 (6<sup>th</sup> Cir. 2002) (quoting Board standard rejecting speculative evidence). Based upon the record in this case, the Port’s assertion that CORP would be required to remove the Siuslaw and Umpqua River bridges is, at best, speculative. Moreover, the evidence underlying the Port’s estimate of bridge removal costs was clearly not superior to the evidence proffered by CORP.

The Board’s decision approving the abandonment and discontinuance of service over the Line did not require CORP to remove the Siuslaw or Umpqua River bridges. To the contrary, the Environmental Assessment issued by SEA in the abandonment proceeding declined to impose such a condition, noting that:

“[t]he Board does not typically require the removal of railroad bridges and other structures when a line is approved for abandonment. Bridges would be required for continued rail service under the Offer of Financial Assistance (OFA) under 49 U.S.C. 10904, and bridges can also be an important component of rail banking lines approved for abandonment under the Trails Act. . . . Accordingly, it would not be appropriate or consistent with Board precedent for SEA to recommend a condition regarding bridge removal.”

*See Coos Bay Abandonment*, Environmental Assessment served August 15, 2008 at 10. In its comments on the Environmental Assessment, the U.S. Coast Guard – the agency with exclusive jurisdiction over bridges spanning navigable waters – concurred with SEA’s recommendation.

*See Coos Bay Abandonment* at 16 and n.28. Thus, any decision whether (or under what circumstances) CORP might be required to remove the subject bridges would be made at a future date by another government agency pursuant to a different regulatory scheme.

Based upon the record, a finding by the Board that CORP would be required to remove one (or both) of the subject bridges would have been utterly speculative. CORP proffered evidence showing that the Trust for Public Lands (“TPL”) has a strong interest in acquiring the Line’s right-of-way for trail use, that TPL tendered a draft agreement for such a purchase to CORP, and that the parties held serious negotiations with respect to the price and other terms for such a sale. *See* Supplemental Response of CORP to Reply of Port (filed September 29, 2008) at 22-25, V.S. Cecil at 2-5. While TPL declined (for political reasons) to enter into a definitive purchase agreement while the abandonment proceeding was still pending, TPL confirmed in writing that it was “very interested” in acquiring the right-of-way, and that “[o]ur intention would be to facilitate the rail banking of the corridor, thereby preserving the community’s ability to make decisions about future uses of the corridor, whether for trail, rail or other purposes.” *See* CORP Response to Feeder Line Application, filed August 29, 2008 (“CORP’s Reply”), V.S. Pettigrew, Attachment 10. As both the Port and the Coast Guard have acknowledged, if the Line

is converted to trail use or some other land transportation function, Coast Guard regulations would not require removal of the bridges. *See, e.g.*, CORP's Reply, V.S. Pettigrew, Attachment 9; Port's Reply at 20-22; Feeder Line Application at 130. Given TPL's written expression of interest in acquiring the right-of-way, the record is at best uncertain as to whether the Coast Guard would ever be required to address the issue of bridge removal.

Moreover, the Coast Guard's authority to order bridge removal is discretionary, and there is no absolute requirement that a carrier remove the entire bridge in every case (as the Port contends). Rather, the Coast Guard applies a fact-specific analysis in determining whether and to what extent bridge removal or modification is required in each instance. *See, e.g.*, U.S. Coast Guard Bridge Administrator Elgaaly Letter to STB Acting Secretary Quinlan (Sept. 26, 2008); CORP Reply, V.S. Pettigrew, Attachment 9 at 4; Port Reply at 20-22. If the subject bridges were no longer used for land transportation, Coast Guard regulations and policy provide for several possible options, only one of which is complete removal of the bridge spans over the navigable waterway. *See* CORP Reply at 42-47 and V.S. Pettigrew, Attachment 9. Thus, the record does not support the Port's claim that the Board erred by failing to deduct from the NLV of the Line the cost of removing the Siuslaw and Umpqua River bridges in their entirety. To the contrary, the evidence upon which the Port's position relies is entirely speculative. *See R.R. Ventures.*

Nor did the Port satisfy its burden of proving by superior evidence that the cost of removing the Siuslaw and Umpqua River bridges would be \$7,758,400. To the contrary, the Port's evidence was neither credible nor adequately documented. The Port's evidence consisted of (1) an initial estimate by witness Davis, who had not examined the bridges and who (the Port later conceded) was not an expert with respect to bridge removal costs; (2) a purported "bid" from West Construction, a company with no demonstrated experience in bridge removal and

which is owned by the Port's President, Mr. Kronsteiner (a blatant conflict of interest); and (3) an estimate cobbled together by the Port from the bid presented by CORP from Staton Companies and estimated costs for certain additional demolition-related activities provided by Staton to the Port (even though Staton did not testify that those additional activities were necessary). By contrast, CORP presented three independent cost estimates prepared by firms with extensive bridge demolition experience. Those estimates, which were comparable and mutually reinforcing, demonstrated that the Port's cost estimate was wildly inflated. Thus, based on the record, the Port's bridge removal cost estimate clearly was not the best evidence of record, and its claim that the Board erred by failing to deduct nearly \$7.8 million from the NLV of the Line to account for bridge removal has no merit.

## **II. THE BOARD'S VALUATION OF RELAY RAIL BASED UPON THE PORT'S REPLY FILING WAS NOT MATERIAL ERROR.**

The Port's claim that the Board committed material error by basing its valuation of relay rail on unit prices set forth in the Port's Reply, rather than the unauthorized evidence submitted by the Port on November 5, 2008 (the "Port's November Supplement") is wrong. There was nothing "arbitrary" or "random" about the Board's reliance upon the relay rail prices set forth in the Port's Reply. To the contrary, the NLV determination set forth in the *November 20 Decision* was based entirely on the record as of September 12, 2008, with one exception: in light of compelling evidence that the price of scrap rail had declined sharply during September and October, the Board instructed the parties to update the record to include more current pricing for scrap rail. *October 31 Decision* at 12.

The NSV estimates for track assets set forth in CORP's Reply, \$19,580,204, and the Port's Reply, \$19,408,031, were "strikingly similar." *October 31 Decision* at 12. Indeed, the parties' NSV calculations for relay materials were based upon the very same unit prices because

the Port's Reply adopted the relay rail prices sponsored by LB Foster in CORP's Reply. See Port's Reply, V.S. Davis at 14, Attachment H. The *October 31 Decision* resolved minor differences in the parties' estimated quantities in the Port's favor, and adopted the Port's NSV estimate of \$19,408,031 as the basis for the Board's NSV determination. However, because the record showed that scrap rail prices had declined precipitously during September and October, the Board instructed the parties to file supplemental evidence with respect to a single factual issue – the impact of AMM index prices for scrap rail as of October 31, 2008 on the NSV estimate set forth in the Port's Reply. *Id.* at 12-14.

Ignoring the Board's admonition regarding the narrow scope of the supplemental evidence requested, the Port's November Supplement purported to "update" not only the AMM index prices for scrap materials, but also the market price of relay rail. The Board refused to consider the Port's unauthorized evidence regarding relay rail prices on the grounds that such data "is outside the scope of supplemental evidence ordered by the October 31 Decision."

*November 20 Decision* at 3. More importantly, the Board held that:

"the Board will rely on the valuation of relay rail from the Port's September 12, 2008 filing (\$9,907,300). In the October 31 Decision we found that the Port's September 12 quantities were the best evidence of record. The Port's September 12 filing is still the best evidence of record of the valuation of relay material."

*November 20 Decision* at 3 (emphasis added). Thus, the Board determined that, as of October 31, 2008, the best record evidence of the NSV of relay rail consisted of (1) the quantities set forth in the Port's Reply, and (2) the unit prices for relay rail sponsored by LB Foster in connection with CORP's Reply, which were adopted by the Port in its Reply.

The Board's determination was neither arbitrary nor erroneous. As of September 12, 2008, the record indicated that the parties were in agreement regarding unit prices for relay rail materials. The Board's determination of the NLV of the Line as of October 31, 2008 was based

almost entirely upon evidence of record as of September 12, 2008. Specifically, the Board's calculation of the value of the real estate underlying the Line, the quantities of track assets on the Line, and the prices for relay rail, ties and other non-steel materials were all based upon the record as of that date. The only component of the Line's NLV for which the Board utilized a different reference point (October 31, 2008) was scrap rail. The Board's decision to request supplemental evidence regarding index prices for scrap rail as of October 31 was justified by the precipitous decline in scrap rail prices during September and October, which called into question the continuing validity of evidence based upon August scrap rail prices. There was no indication in the record that relay rail prices (which are subject to different market forces) had experienced a similar decline. Under these circumstances, it was entirely reasonable for the Board to base its final NSV determination on the relay rail prices set forth in the Port's Reply, and doing so certainly did not constitute material error.<sup>3</sup>

Even if the Board were to reconsider its decision to calculate the value of relay rail based on the Port's September 12 Reply – and it should not – the record does not support the Port's claim that the value of relay materials as of October 31 was nearly \$2,000,000 lower than it was as of September 12. The lower relay rail valuation set forth in the Port's November Supplement is based entirely upon a price quote from Menard's Railroad Materials ("Menard's November Quote"). *See* Port's November Supplement, Update V.S. Davis, Attachment Q. As an initial matter, it is not clear that Menard's November Quote constitutes "record evidence" upon which the Port may properly rely. In admonishing the parties to limit their supplemental filings to the

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<sup>3</sup> The Port's suggestion that the Board's NSV determination "set[s] a troublesome precedent" by valuing relay materials as of "arbitrary, seemingly random dates" (Reconsideration Petition at 14) is nonsense. To the contrary, rewarding the Port's self-serving efforts to introduce multiple new valuations long after the date for reply evidence had passed would create an undesirable precedent by encouraging parties to ignore limits on the proper scope of reply and rebuttal filings in future Board proceedings.

issue of AMM scrap rail index prices as of October 31, 2008, the Board stated unequivocally that evidence regarding other subjects “will not be accepted into the record.” *October 31 Decision* at 12 (emphasis added). In the *November 20 Decision*, the Board held that “[w]e will not consider the information contained in the Port’s November 5, 2008 filing concerning the price of relay rail.” *November 20 Decision* at 3. These statements appear to indicate that the Board refused to accept Menard’s November Quote into the record, and the Port did not resubmit Menard’s November Quote (or any other evidence) as “new evidence” with its Reconsideration Petition.

In any event, Menard’s November Quote does not support the Port’s claim that relay rail prices were lower as of October 31 than they were as of September 12. In the Port’s September 30, 2008 supplemental filing, Port witness Davis presented a revised estimate of relay rail prices based on an “average” of price quotes that he obtained from Menard’s and A&K Railroad Materials (“A&K”). *See* Port’s September 30 Supplement, Supp. Reply V.S. Davis at 3. The prices quoted by A&K in September were substantially higher than those quoted by Menard’s – indeed, A&K’s prices for relay rail were higher than those quoted to CORP by LB Foster and Unitrac. In its November Supplement, the Port “manufactured” the appearance of a decline in relay rail prices between September and October by omitting the A&K price quote and relying solely upon the Menard’s November Quote. But a comparison of the unit prices for relay rail quoted by Menard’s on September 25 and on October 31 demonstrates that, according to Menard’s, there was little change in relay rail prices between September 25 and October 31. *Compare* Port’s September 30 Supplement, V.S. Davis, Attachment Q *with* Port’s November Supplement, V.S. Davis, Attachment H. The unit prices quoted by Menard’s as of October 31 were slightly higher than Menard’s September 25 quotes for two of eight categories of relay rail (which accounted for approximately 20% of total relay tons), and were the same on both dates

for four other categories (which accounted for an additional 60% of total relay tons). Thus, the Menard's November Quote does not support a finding that relay rail prices declined significantly between September 12 and October 31.

The testimony of CORP witness Pettigrew in response to the Port's November Supplement further refutes the Port's position. See CORP November 7 Supplement, V.S. Pettigrew at 4-6 and Attachment A.<sup>4</sup> As witness Pettigrew showed, "[i]n recent, years, the demand for relay quality rail and OTM has far exceeded supply. That was true in July, August and September 2008, and it remains true today. As of October 31, 2008 and through the date of this statement [November 7], the supply of relay materials continued to be low in relation to demand, and relay prices have remained at the same levels." *Id.*, V.S. Pettigrew at 5. In a letter attached to witness Pettigrew's statement, LB Foster likewise confirmed that "[b]ecause of tight supply conditions in the relay markets, prices for relay rail and OTM have not changed appreciably since Foster submitted its prior bid for this line in August 2008." *Id.*, V.S. Pettigrew, Attachment A (emphasis added). This testimony undercuts the credibility of the Port's assertion that relay rail prices declined after September 12, 2008, and provides strong evidentiary support for the Board's finding that the Port's September 12 Reply was still the "best evidence" of the value of relay material as of the date of the *November 20 Decision*.

### **III. THE BOARD CORRECTLY DENIED THE PORT'S DEMAND FOR AN "ESCROW ACCOUNT"**

The Port claims that the Board materially erred by failing to create an "escrow account" of more than \$15 million from the proceeds of the feeder line sale to pay for "necessary Line repairs caused by CORP neglect of the Line." Reconsideration Petition at 15. The Port does not

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<sup>4</sup> If Menard's November Quote may properly be considered part of the record for purposes of the Port's Reconsideration Petition, CORP's evidence responding to that quote must likewise be considered.

even attempt to demonstrate new evidence or changed circumstances that would warrant such extraordinary relief. Rather, the Reconsideration Petition merely rehashes arguments that the Board has already considered and rejected. The Port's arguments are plainly without merit, for the reasons articulated by the Board in its *October 31 Decision* in this proceeding and in the decision issued on the same date in Docket No. AB-515 (Sub-No. 2), *Central Oregon & Pacific Railroad, Inc. – Abandonment and Discontinuance of Service – In Coos, Douglas and Lane Counties, OR* (“*Coos Bay Line Abandonment*”).

The Reconsideration Petition ignores entirely the fact that the Board rejected the fundamental premise underlying the Port's various claims for “damages” – i.e., that CORP “neglected” the Line. In *Coos Bay Line Abandonment*, the Board clearly addressed and rejected allegations by the Port and other parties that “CORP deferred maintenance in an unlawful manner.” *Coos Bay Line Abandonment* at 11. Specifically, the Board took note of the undisputed evidence that, between 2002 and 2007, CORP spent 49.4% of the gross freight revenues generated by the Line for both ordinary maintenance and capital expenditures, and that CORP's investment in the Line increased even as operating losses mounted. *Coos Bay Line Abandonment* at 11. See also *October 31 Decision* at 17. More importantly, the Board found that “there is no evidence that CORP intended to cause the Line to be unserviceable or took affirmative steps to degrade the Line.” *October 31 Decision* at 17 (emphasis added). To the contrary, the record demonstrated that CORP had invested in repairs to a bridge on the Line even after the embargo went into effect. *Coos Bay Line Abandonment* at 17.<sup>5</sup> The Board likewise

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<sup>5</sup> The Port's halfhearted attempt to diminish the significance of the evidence regarding CORP's post-embargo repairs, on the grounds that those repairs “were apparently due to fire” and that CORP did not repair other bridges on the Line (Reconsideration Petition at 17 n.11) is misplaced. CORP's decision to spend any money on bridge repairs after the embargo definitively disproves the Port's accusations that CORP employed a strategy to “milk the asset”

rejected the Port's claim that CORP's failure to undertake extensive tunnel rehabilitation on the Line violated its common carrier obligation, finding that "an analysis of the traffic on the Line and CORP's maintenance costs shows that CORP attempted to 'economize' by declining to invest substantial sums into a line with limited earnings potential." *Coos Bay Line Abandonment* at 12. Based upon these findings, the Board correctly held that "we find no merit to the Port's assertion that we should place a large portion of the purchase price into an escrow account for repairs on the Line." *Id.* (emphasis added) Thus, the Board unequivocally rejected the Port's baseless rhetoric about CORP's alleged "neglect" of the Line. The mere repetition of those same allegations in the Reconsideration Petition provides no basis for the Board to reverse its well-supported findings or to reconsider its decision to deny the relief requested by the Port.

The Board correctly held that Section 10907 does not permit the Board to "discount" the NLV of a line by subtracting the cost of allegedly necessary rehabilitation. *October 31 Decision* at 16. The Board's rejection of the Port's argument that its request for an escrow account is supported by *Railroad Ventures, Inc.—Abandonment Exemption—Between Youngstown, OH and Darlington, PA, in Mahoning and Columbiana Counties, OH, and Beaver County, PA*, STB Docket No. AB-556 (Sub-No. 2X) was also correct. As the Board explained, *Railroad Ventures* involved an instance of blatant, intentional damage to a rail line by a party that unlawfully acquired the line without Board authorization and later misrepresented to the Board that it intended to restore rail service when in fact it had sold the salvage rights to the track materials. The facts in *Railroad Ventures* presented a *sui generis* situation that is in no way similar to the facts in the present case, where CORP invested millions of dollars in maintenance and capital expenditures on the Line even after it became unprofitable. The Board correctly concluded that

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and that it intended to abandon the Line at the time of the embargo.

“the facts of the current case are distinguishable” from those before the Board in *Railroad Ventures*. The Port articulates no reason why the Board’s analysis of its decision in *Railroad Ventures* was erroneous.

Finally, the Port fails to demonstrate that the appropriate remedy for CORP’s supposed “neglect” of the Line would be to confer upon the Port a massive discount from the NLV of the Line. As the Board explained in *Coos Bay Line Abandonment* (at 14), the appropriate forum for seeking relief based on an alleged violation of CORP’s common carrier obligation would be through the Board’s complaint procedures at 49 C.F.R. Part 1111. Under the Board’s regulations, shippers may seek relief for a carrier’s refusal to provide common carrier service upon reasonable demand. However, the Port is not a shipper, nor does any rail-water traffic move between its port facilities and CORP’s rail lines. Therefore, the Port has no standing to recover damages based upon CORP’s alleged neglect of the Line or failure to provide rail service. Nor is there any other authority for permitting a feeder line applicant to deduct millions of dollars from the NLV of a line on account of service failures that did not affect the prospective purchaser.

In short, the Port’s request for an escrow account is nothing more than a stubborn repetition of arguments that the Board has already considered and rejected. The Reconsideration Petition falls far short of establishing any “material error” that would justify reconsideration of the Board’s decisions.

#### **IV. THE BOARD’S REJECTION OF THE PORT’S LAND VALUATION WAS NOT MATERIAL ERROR.**

The Port argues 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.” Reconsideration Petition at 18. The Board’s decision to reject the Port’s appraisal, and to base

its NLV determination on the appraisal submitted by CORP witness Rex, is supported by the record and Board precedent.

The Board's decisions establish that sale to adjacent landowners is the highest and best non-rail use for most railroad corridors. *CSX Transportation, Inc.—Abandonment Exemption—in LaPorte, Porter, & Starke Counties, IN*, STB Docket No. AB-55 (Sub-No. 643X), April 30, 2004 at 5-6 (“*LaPorte*”). For that reason, “the Board has historically employed the ATF (“across-the-fence”) methodology for valuing rail line corridors. *October 31 Decision* at 13. *See Railroad Ventures*, 299 F.3d at 557. In conducting his appraisal, witness DeVoe chose not to employ an ATF methodology, basing his analysis instead on a “base homesite theory” (apparently invented by him) and “opinions” that led him to conclude, among other things, that 78% of the land underlying the Line had no value whatsoever. As the Board correctly held, witness DeVoe’s appraisal utterly failed to “properly calculate the highest and best nonrail use for the Line’s right-of-way.” *October 31 Decision* at 12.

The Port contends that “[t]he Board’s apparent failure to credit Mr. DeVoe’s particularly relevant experience represents a critical oversight.” Reconsideration Petition at 19 (emphasis added). However, the fact that Mr. DeVoe had 20 years of appraisal experience in Oregon is not “particularly relevant” in the context of this case. Neither witness DeVoe’s analysis nor the Port’s criticism of CORP’s appraisal turned on any question of Oregon law, or upon any facts or circumstances that were alleged to be unique to Oregon. Rather, the most “relevant experience” in abandonment and feeder line proceedings is experience in appraising the value of a rail corridor. Witness DeVoe’s curriculum vitae does not indicate that he possesses significant experience in appraising rail corridors. *See Feeder Line Application, Volume III, Addenda*

Section A. By contrast, CORP witness Rex has conducted approximately 100 significant rail property valuation projects and appraisals. CORP Reply, V.S. Rex, Attachment 2 at 5-11.

In any event, the Board's rejection of the Port's appraisal evidence was not based upon witness DeVoe's experience (or lack thereof). Rather, the Board found that the methodologies employed by witness DeVoe, and the conclusions that he reached, were not credible. For example, in rejecting the appraisal of residential real estate based upon witness DeVoe's novel "base homesite theory," the Board held that "[w]e are not convinced of the theory's premise that excess property is undesirable or that an adjacent land owner would have little to no interest in acquiring the property. Therefore, we do not believe the theory calculates values for the highest and best nonrail use for the right-of-way." *October 31 Decision* at 12.<sup>6</sup>

The Board further found that even if it "were to consider this methodology credible, the Port's witness applied it incorrectly because he performed no pricing calculations to reflect the higher-valued base homesite portions in valuation units specified as residential properties." *Id.* The Board correctly observed that witness DeVoe "used a limited set of comparable sales data, which resulted in applying ATF values to right-of-way properties not located within the relative geographic areas of the historical sales" and "ignored historical sales data that would have influenced the values that the ATF methodology attempts to determine." *Id.* at 13. Indeed, as CORP demonstrated, witness DeVoe's valuation of residential property was based entirely upon calculations applying his "base homesite theory" in a single community (Swisshome) – where

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<sup>6</sup> The Port's contention that the "base homesite theory" is "supported by a professional treatise and relevant articles" (Reconsideration Petition at 19) is nonsense. As CORP showed, none of the authorities cited in the Port's Reply even mentions the theory, and the Port's discussion of those authorities was, at best, incomplete and highly misleading. *See* Supplemental Response of CORP To Port's Reply, filed September 29, 2008 at 33-37. Witness Rex testified that "in my 34 years of appraising land, teaching appraisal courses and researching the appraisal literature, I have never heard of the 'base homesite theory.'" CORP Reply, V.S. Rex at 13 (*emphasis added*).

residential real estate values are the lowest of any community along the 111-mile Line – to every residential parcel along the Line. CORP’s Reply, V.S. Rex at 20-21. The Board’s decision to reject such a patently flawed analysis did not constitute “material error.”

Lastly, the Board held that “we do not find credible the Port’s argument that 78% of the right-of-way would have no resale value.” *October 31 Decision* at 13. In support of this holding, the Board discussed several “prime examples” of assumptions made, and conclusions reached, by witness DeVoe that the Board found “not credible.” *Id* at 13-14.

The Port’s contention that the Board failed to perform “a careful, reasoned analysis of Mr. DeVoe’s testimony” or to “adequately consider[ ] Mr. DeVoe’s appraisal on its own terms” (Reconsideration Petition at 19-20) is simply not true. As the foregoing discussion shows, the Board evaluated the theoretical merits of the methodologies employed by witness Rex, the manner in which he implemented them, and the conclusions that he reached based upon those methodologies and his supposed experience. At bottom, the gravamen of the Port’s complaint is that (according to the Port) the Board did not accord witness DeVoe’s analysis sufficient weight. However, it is well-established that, in determining the relative weights and credibility of the evidence before it, “the Board is at the zenith of its powers and thus entitled to particular deference.” *N. Am. Freight Car Ass’n v. STB*, 529 F.3d 1166, 1170 (D.C. Cir. 2008). The Board’s decision to reject witness DeVoe’s appraisal is amply supported by the Board’s analysis, and the Port has not demonstrated any persuasive basis for overturning the Board’s conclusions.

Finally, the Port’s assertion that the Board “uncritically accept[ed]” CORP’s land appraisal is not correct. While the Board found that, because CORP “applied the ATF methodology in a reasonable manner” its land appraisal was the “best evidence of record” (*October 31 Decision* at 14), the Board reviewed and confirmed the calculations underlying

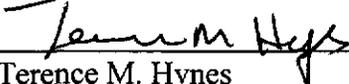
CORP's real estate valuation, and corrected what it perceived to be an error in the third year of CORP's discounted cash flow.<sup>7</sup> The Reconsideration Petition (at 21-22) rehashes the Port's prior arguments regarding a few alleged minor errors in CORP's land valuation. Those issues, which have been argued extensively by the parties (and which have only a *de minimis* impact on the overall value assigned to the Line's right-of-way) provide no basis for the Board to grant the Port's petition or to reconsider its rejection of witness DeVoe's appraisal.

### CONCLUSION

For the reasons set forth in this Reply, CORP respectfully requests that the Board deny the Port's Petition for Reconsideration in its entirety.

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Respectfully submitted,

  
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Dated: December 29, 2008

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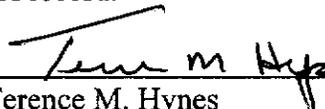
<sup>7</sup> CORP subsequently filed a Petition for Technical Correction in which it explained that witness Rex's Year Three calculations were, in fact, correct, and the Board adopted witness Rex's calculations in its final NLV determination. See *November 20 Decision* at 2.

**CERTIFICATE OF SERVICE**

I hereby certify that I have caused the Reply of Central Oregon & Pacific Railroad, Inc. to the Petition for Reconsideration of Oregon International Port of Coos Bay to be served by hand-delivery this 29th day of December 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.

  
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Terence M. Hynes