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April 10, 2009

Honorable Anne K. Quinlan  
Acting Secretary  
Surface Transportation Board  
395 E Street, S.W.  
Washington, D. C. 20423

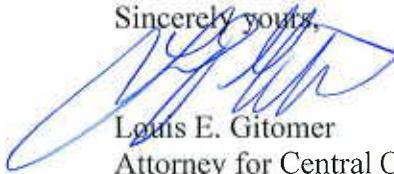
RE: Finance Docket No. 35175, *Roseburg Forest Products Co., Timber Products Company, LC, Suburban Propane, LP, Cowley D&L, Inc., Sousa Ag Service, and Yreka Western Railroad Company—Alternative Rail Service—Central Oregon & Pacific Railroad, Inc.*  
Ex Parte No. 346 (Sub-No. 25C), *Rail General Exemption Authority—Petition for Partial Revocation of Commodity Exemption—Lumber or Wood Products*

Dear Acting Secretary Quinlan:

Enclosed for e-filing is the Response of Central Oregon & Pacific Railroad, Inc. to Supplemental Statement in the above-entitled proceeding.

Thank you for your assistance. If you have any questions please call or email me.

Sincerely yours,



Louis E. Gitomer  
Attorney for Central Oregon & Pacific  
Railroad, Inc.

Enclosure

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 35175

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ROSEBURG FOREST PRODUCTS CO., TIMBER PRODUCTS COMPANY, LC,  
SUBURBAN PROPANE, LP, COWLEY D&L, INC., SOUSA AG SERVICE, AND YREKA  
WESTERN RAILROAD COMPANY--ALTERNATIVE RAIL SERVICE--  
CENTRAL OREGON & PACIFIC RAILROAD, INC.

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Ex Parte No. 346 (Sub-No. 25C)

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RAIL GENERAL EXEMPTION AUTHORITY--PETITION FOR PARTIAL REVOCATION  
OF COMMODITY EXEMPTION--LUMBER OR WOOD PRODUCTS

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RESPONSE OF CENTRAL OREGON & PACIFIC RAILROAD, INC.  
TO SUPPLEMENTAL STATEMENTS

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Attorneys for: CENTRAL OREGON &  
PACIFIC RAILROAD, INC

Dated: April 10, 2009

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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As provided for in the decision served March 4, 2009<sup>1</sup>, the Central Oregon & Pacific Railroad, Inc. (“CORP”) is responding to the supplemental information filed by Roseburg Forest Products Co. (“RFP”), Timber Products Company, LC (“TPC”), Suburban Propane, LP (“SP”), Cowley D&L, Inc. (“CDL”), Sousa Ag Service (“SAS”), and Yreka Western Railroad Company (“YWRC”), jointly the “Petitioners,” (the “Supplement”) and the West Texas & Lubbock Railway Company, Inc. (“WTL”).

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<sup>1</sup> *Roseburg Forest Products Co., Timber Products Company, L.P., Suburban Propane, L.P., Cowley D&L, Inc., Sousa Ag Service, and Yreka Western Railroad Company—Alternative Rail Service—Central Oregon & Pacific Railroad, Inc.*, STB Finance Docket No. 35175; *Rail General Exemption Authority—Petition for Partial Revocation of Commodity Exemption—Lumber or Wood Products*, Ex Parte No. 346 (Sub-No. 25-C) (STB served March 4, 2009), at 11 (the “*Interim Decision*”). The Board extended the time for the parties to file their opening statements and to respond by decision served February 13, 2009.

Pursuant to 49 C.F.R. §1146, Petitioners are seeking temporary alternative service to be provided by the WTL, and its agent, YWRC, over CORP's 218-mile rail line that extends northward from CORP's connection with Union Pacific Railroad Company ("UP") at Black Butte, CA, milepost 346.00, to Dillard, OR, milepost 562.00.<sup>2</sup> The alternative service will be provided only to Petitioners and only for traffic originating in California.

CORP offered to negotiate a more permanent solution with Petitioners and WTL, conditioned upon CORP being compensated for the use of its property according to the formula developed by the Surface Transportation Board ("the "Board").<sup>3</sup> Negotiations were not successful. CORP remains willing to have WTL operate over the Line for the limited purpose sought by Petitioners as long as CORP is compensated based on *Pyco 2008*.<sup>4</sup> Absent such an agreement by Petitioners and WTL, CORP contends that Petitioners have not met their burden of proof under 49 C.F.R. §1146.

## **BACKGROUND**

CORP provided five or six day per week service over the Line until the fourth quarter of 2007. At that time, CORP noticed that traffic moving from California north to Oregon over the Line began to decline. As the traffic declined and the number of cars per train decreased, for the

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<sup>2</sup> UP owns the 79.25-mile portion of the Line between Black Butte and Bellview, OR, milepost 425.29, and CORP owns the remaining 138.75 miles.

<sup>3</sup> In *Pyco Industries, Inc.—Alternative Rail Service—South Plains Switching, Ltd. Co.*, STB Finance Docket No. 34889 (STB served January 11, 2008) at 6 ("*Pyco 2008*"), the Board stated that: "compensation should consist of three components: (1) the variable cost incurred by the owning carrier as a result of the tenant carrier's operations over the owning carrier's tracks; (2) the tenant carrier's proportionate share of the track's maintenance and operation expenses; and (3) an interest or rental component designed to compensate the owning carrier for the tenant carrier's use of its capital dedicated to the track."

<sup>4</sup> Although CORP does not agree that any Aesop Fable is analogous to this serious matter, CORP has maintained that it is willing to "share its hay" with WTL, so long as WTL does not continue to maintain that such hay should be provided without just compensation.

sake of efficiency, CORP determined to operate fewer trains to retain the density generated by longer trains. *See* Mr. Kerr's Verified Statement (the "Kerr VS"). Hence, a reduction in traffic on the Line led CORP to reduce the number of trains operated per week. During this time, CORP continued to communicate with its shippers as it had in the past. At the same time, CORP began the process of renegotiating a contract with RFP and negotiating a new contract with TPC. *See* Kerr VS.

During the contract negotiations, it is interesting to note that RFP and TPC did not mention that they required rail service as part of a Just in Time ("JIT") manufacturing process. *See* Kerr VS.

On December 13, 2007, in a letter from Mr. Hawksworth, CORP notified shippers on the Line that after January 15, 2008, CORP "will operate twice a week in each direction, but we will modify our schedule as appropriate for the traffic." *See* Tab 6 of the Supplement. After January 15, 2008, RFP and TPC continued to ship on CORP. However, the volume of traffic tendered to CORP had declined substantially since the third quarter of 2007, so that there were few instances when CORP had to "modify our schedule as appropriate for the traffic" because there was limited traffic. As the Board recognized, "CORP ran extra trains to clear up backlogs when physical limitations prevented it from moving all of the carloads tendered to it."<sup>5</sup>

The negotiations for a new contract with RFP and TPC were unsuccessful. Because of the reduced traffic and high cost of operating over the Siskiyou Pass, CORP provided notice of a rate increase on April 15, 2008, which took effect on May 6, 2008. RFP stopped shipping over CORP on May 2, 2008 and TPC stopped shipping over the Line on April 15, 2008.

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<sup>5</sup> *Interim Decision* at 6.

Since diverting their traffic to truck in the highly competitive lumber and wood products market, neither RFP nor TPC have requested rail service over the line from CORP. Indeed, RFP and TPC have failed to take advantage of the rate reduction that CORP made on May 28, 2008, which is still in effect.

Petitioners then filed a petition seeking alternative rail service pursuant to 49 U.S.C. §11123(a) and 49 C.F.R. §1146 (the “Petition”) on August 26, 2008. CORP responded on September 3, 2008 and Petitioners and WTL filed rebuttal on September 8, 2008. The Board served a decision on September 19, 2008 holding this proceeding in abeyance for 30 days so that the parties could negotiate pursuant to CORP’s proposal. The parties negotiated, but were unable to come to terms. In CORP’s opinion, the stumbling block in the negotiations was the amount of compensation that CORP is entitled to under the *Pyco 2008* formula. On October 6, 2008, the parties notified the Board that negotiations had been unsuccessful and asked the Board to proceed to decision.

The *Interim Decision* found that:

The record does not establish the existence of a rail transportation emergency having a substantial adverse effect on rail shippers. Although petitioners have experienced a reduction in service frequency and have documented some service inadequacy, they have not established that a substantial, measurable service deterioration exists that would justify an alternative service order.<sup>6</sup>

Without explanation, instead of denying the relief sought based on its finding, as it has done in the past without exception<sup>7</sup>, the Board directed :

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<sup>6</sup> *Interim Decision* at 9.

<sup>7</sup> *Pyco Industries, Inc.—Alternative Rail Service—South Plains Switching, LTD. Co.*, STB Finance Docket No. 34889 (STB served Nov. 21, 2006); *Pyco Industries, Inc.—Alternative Rail Service—South Plains Switching, LTD. Co.*, STB Finance Docket No. 34802 (STB served Jan.

the parties to supplement the record to clarify: (1) the frequency and severity of the delays RFP and TPC have endured in supplying finished goods to their customers and the consequences, if any, to them of those delays; (2) the extent to which internal difficulties at their Oregon mills contribute to the various problems about which RFP and TPC complain; and (3) the feasibility of addressing these problems through means other than a return to a 5-day-a-week service schedule (i.e., building more track at the mills for loading and unloading cargo or storing raw materials at the mills).<sup>8</sup>

## ARGUMENT

CORP continues to hold itself out to provide common carrier service upon reasonable request. CORP is ready, willing, and able to provide reasonable service to the shippers located on the Line in California for shipments destined to Oregon. The Line has been maintained in condition whereby CORP can restart service upon request. CORP continues to carry insurance. There is nothing that has disabled CORP from providing service over the Line, other than the failure of shippers to tender traffic.<sup>9</sup>

CORP remains amenable to making the Line available to another operator for the purpose of moving loaded cars north California to locations on the Line in Oregon and empties from the

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26, 2006); *Pioneer Industrial Railway Co.—Alternative Rail Service—Central Illinois Railroad Company*, STB Finance Docket No. 34917 (STB served Jan. 12, 2007); *Albemarle Corporation—Alternative Rail Service—Line of the Louisiana and North West Railroad Company*, STB Finance Docket No. 34931 (STB served Oct. 6, 2006); *Arkansas Midland Railroad Company, Inc.—Alternative Rail Service—Line of Delta Southern Railroad, Inc.*, STB Finance Docket No. 34479 (STB served Mar. 19, 2004); *Keokuk Junction Railway Company—Alternative Rail Service—Line of Toledo, Peoria and Western Railway Corporation*, STB Finance Docket No. 34397 (STB served Oct. 31, 2003); *American Plant Food Corporation—Alternative Rail Service—Line of Texas Northeastern Railroad*, STB Finance Docket No. 33795 (STB served Dec. 7, 1999); and *Denver Rock Island Railroad—Alternative Rail Service—Lines of Kansas Southwestern Railway, L.L.C.*, STB Finance Docket No. 33762 (STB served June 6, 1999).

<sup>8</sup> *Interim Decision* at 7.

<sup>9</sup> CORP is not disabled from providing rail service as the Delta Southern Railroad, Inc. (“DSRR”) was in *Arkansas Midland Railroad Company, Inc.—Alternative Rail Service—Line of Delta Southern Railroad, Inc.*, STB Finance Docket No. 34479 (STB served Mar. 11, 2004) (“AMRR”).

Oregon facilities to the California facilities, so long as CORP receives the appropriate compensation established by the Board in *Pyco 2008*. CORP also believes that the northern terminus should be established at Medford, OR where there is sufficient yard space for interchange. By terminating the operations at Medford, the compensation due to CORP will be decreased and the overlap of operations will also be substantially reduced.

#### **CORP'S RESPONSE TO WTL'S SUPPLEMENT**

WTL submitted its supplemental information on March 30, 2009. CORP has no comments in response to WTL's supplement. CORP merely notes that the use of three SD-40-2 locomotives as proposed by WTL, will allow it to move a maximum of 21 carloads over the Siskiyou Pass in each train.

#### **CORP'S RESPONSE TO PETITIONER'S SUPPLEMENT**

Petitioners filed their supplemental information on March 31, 2009 (the "Supplement"). RFP and TPC were the only Petitioners to respond to the information requested by the *Interim Decision*. The failure of SP, CDL, and SAS to respond to the *Interim Decision* must be considered an admission of the truth of the Board's conclusion<sup>10</sup> in the *Interim Decision*, at 9, as to those three parties that "the record does not establish the existence of a rail transportation emergency having a substantial adverse effect on rail shippers." Therefore, SP, CDL, and SAS should not be entitled to alternative rail service.

Because, as the Board recognized in the *Interim Decision* at 9, the Petitioners did "not establish the existence of a rail transportation emergency having a substantial adverse effect on rail shippers," Petitioners now attempt to equate "a substantial, measurable deterioration or other

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<sup>10</sup> See 49 C.F.R. §1112.6.

demonstrated inadequacy in rail service provided by the incumbent carrier” (49 C.F.R. §1146.1(a)) with a railroad not providing sufficient service to meet the shippers’ “dependence on Just in Time (“JIT”) inventory management.” Supplement. Barbee at 1. In attempting to shift the measure of inadequate service to the high standard of JIT, Petitioners have failed to provide the specific clarification sought by the Board, which will be addressed below.

Before comparing the specific clarification sought by the Board with the discussion provided by RFP and TPC, CORP will address the attempt by RFP and TPC to equate adequate rail service with a Just in Time inventory management system.

The standard for determining whether adequate service is being provided requires the application of:

a balancing test similar to the test applied in abandonment proceedings. We will weigh the public need for service over the line at the level sought in the complaint and compare that need with the burden on the carrier and on interstate commerce of providing service at that level. In applying this test, we will consider such factors as the traffic and revenue potentials of the line, the availability of alternative transportation, the condition and type of track, and the costs of putting the track into the condition necessary for the sought service and of maintaining the track in that condition.<sup>11</sup>

It appears to CORP that RFP and TPC have defined adequate service as service five days per week, bringing loaded cars from their facilities in California to their facilities in Oregon over the Siskiyou Pass and the return of empty cars from their facilities in Oregon to their facilities in California five days per week. However, RFP and TPC have not addressed the other factors necessary to determine if adequate service is available from CORP.

RFP and TPC obliquely describe the traffic available. They never address the revenue potentials of the traffic they are offering because it would become immediately apparent to the

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<sup>11</sup> *Illinois Central Gulf R. Co.-Abandonment*, 363 I.C.C. 690, 695 (1980).

Board that their claim for alternative service is based on rates, not service. RFP and TPC do not discuss whether the JIT service they claim to need can be served on the Line in its current condition of FRA Class 1 and 2 and whether they are willing to pay rates necessary to upgrade the Line if that is necessary for the service they seek.

As a threshold matter, RFP and TPC have failed to demonstrate under the established criteria that the service they seek is adequate service instead of specialized service.

CORP will next address the specific clarifications sought by the Board from Petitioners and the non-responsive information provided by RFP and TPC. CORP will then address the gratuitous Monday morning quarterbacking provided by Mr. Hammond. Finally, CORP will discuss the error that the Board made in its interpretation of *AMRR* to discount the diversion of traffic from CORP to trucks by RFP and TPC.

**1. The shippers have not clarified the frequency and severity of the delays RFP and TPC have endured in supplying finished goods to their customers and the consequences, if any, to them of those delays.**

There are three items that the Board seeks clarification from RFP and TPC. As CORP reads the request for clarification, the Board is seeking quantifiable clarification, and RFP and TPC have failed to provide quantitative clarification.

The Board asks RFP and TPC to identify “the frequency and severity of the delays.” RFP and TPC have not responded to the Board’s question. Instead, RFP and TPC have now determined that adequate rail service must meet their demands for JIT. RFP and TPC argue that if CORP was not meeting their new demands for JIT, which have never been presented to CORP (*See Kerr VS*), then they are entitled to alternative rail service. If the delays were as frequent and severe as RFP and TPC allege, they would have been able to present the Board with data,

perhaps even in chart form identifying each carload, when it was expected to be delivered, when it was actually delivered, and the effect on production. CORP has studied the Supplement and does not see a hint of such data. RFP and TPS have not clarified the record with data. Instead, they have presented a unique theory without verifiable or quantifiable data. They have failed to respond to the second chance given them by the Board.

The Board also asked about the effect of CORP service on “supplying finished goods to their customers.” RFP and TPC have not done this. Instead of identifying their customers, RFP and TPC have stated that their own facilities are their customers. Again RFP and TPC avoid the Board’s straight forward inquiry by creating a new class of customer for the first time in the Supplement. RFP and TPC do not identify their non-affiliated customers, nor do they do any more than indicate that their unidentified customers use JIT and that RFP and TPC use JIT. The Supplement contains no verifiable or quantifiable clarification of the customers or the finished products that RFP and TPC claim are affected by CORP’s alleged inadequate rail service.

The Board also asks RFP and TPC to clarify the consequences of the delays alleged by RFP and TPC. There is no response to this request for clarification. If there had been consequences, CORP would have expected to see RFP and TPC provide the number of orders canceled and the amount of revenue that RFP and TPC did not receive or the liquidated damages they paid for failing to fulfill contracts. There is no such data contained in the Supplement. RFP and TPC fall back on the old refrain that CORP’s service is inadequate because it does not meet the needs of JIT. There is no quantifiable or verifiable evidence concerning the “consequences” because there have been no consequences that RFP and TPC can prove.

Petitioners have failed to present any evidence that clarifies “the frequency and severity of the delays RFP and TPC have endured in supplying finished goods to their customers and the consequences, if any, to them of those delays.”

**2. Petitioners do not recognize the extent to which internal difficulties at their Oregon mills contribute to the various problems about which RFP and TPC complain.**

In responding to this request for clarification, Petitioners again rely on their need for JIT to justify that there is no problem with their facilities. They fail to recognize the inconsistency of claiming that their unchanged aged facilities can accommodate JIT.

Ms. Hart states that “Our plywood mills have been in existence at these locations since 1938 in Medford and 1945 in Grants Pass. Each of our Oregon facilities was designed to accommodate both the shipping of finished goods and accepting raw materials by rail. We inventory raw material at our California facility and then ship on a Just in Time basis to meet our manufacturing requirements.” Supplement, Hart at 2. Obviously mills constructed in 1938 and 1945 were not built based on JIT (which was not fully developed until the 1950’s by Toyota and not transferred to the United States until much later). Indeed, those mills were most likely built to accommodate 40-foot or smaller boxcars. Ms. Hart does not indicate when TPC adopted JIT, but she certainly does not state that any changes were made to the Medford and Grants Pass mills to accommodate JIT rail delivery. Indeed, Ms. Hart claims that it is “a nearly insurmountable task to modify rail access.” Supplement, Hart at 4. Instead of incurring costs to modify its mills to meet its JIT philosophy, TPC is attempting to push the costs onto CORP by seeking low density five day per week rail service. Claiming that rail facilities constructed in 1938 and 1945 are adequate for JIT is inconsistent and fails to respond to the Board’s request for clarification.

RFP also fails to address the Board's request. RFP indicates that its mills and their rail facilities in Oregon "have been in place for decades." Supplement, Jeffers at 4-5. As with TPC, RFP has not explained how decades old facilities can meet the new JIT process without passing the costs onto CORP as far as freight delivery.

Based on WTL's projected use of three SD-40-2 locomotives that are capable of hauling up to 21 cars in a train and WTL's projected five day per week operation, it seems that each of the RFP and TPC mills is capable of unloading about five cars per day.<sup>12</sup> RFP and TPC are unwilling to concede that any other changes are needed and that their limited ability to unload cars is not an issue they need to address, but one that requires the railroad to adapt.

Petitioners' have not addressed the Board's clarification request. Instead, they contend that facilities that were designed in another era are still adequate despite a change in their manufacturing process. Petitioners have not presented the quantifiable or verifiable evidence sought by the Board in its clarification request.

**3. Petitioners have not clarified the feasibility of addressing these problems through means other than a return to a 5-day-a-week service schedule (i.e., building more track at the mills for loading and unloading cargo or storing raw materials at the mills).**

As discussed above, Petitioners contend that their facilities are adequate and that to have provided adequate service, CORP must provide rail service that allows RFP and TPC meet their new JIT philosophy. RFP and TPC contend that it would be costly for them to build more track. Instead, they claim that CORP is providing inadequate service because CORP refuses to incur additional costs of operation by operating more frequent less dense trains, while at the same time RFP and TPC refuse to pay a reasonable rate.

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<sup>12</sup> CORP is forced to make this extrapolation from the evidence presented since RFP and TPC have not specified the volume of rail traffic that they are seeking to have delivered to each mill.

Instead of CORP operating two trains per week with a weekly total of 10 locomotives and crews for each train (in one direction), RFP and TPC believe adequate service requires CORP to operate five trains per week with a weekly total of 15 locomotives and crews for each train, without an increase in volume and at rate that CORP has determined is not remunerative.

Petitioners have failed to present quantifiable and verifiable evidence in response to the Board's request for clarification.

**4. CORP did not quote RFP a rate for logs moving from Weed, CA to Saginaw, OR because RFP told CORP not to quote the rate.**

RFP contends that one of the indicia of CORP's failure to provide adequate service was CORP's failure to quote a rate for the movement of logs from Weed, CA to Saginaw, OR. Supplement, Jeffers 1-3. RFP has told the Board only the first half of the story.

RFP asked CORP to quote rates for logs from Weed to Saginaw.<sup>13</sup> CORP was working to prepare the rates and suggested meeting with RFP once the rates were prepared. Instead of agreeing to a meeting or waiting for CORP to quote the rate, Mr. Jeffers himself sent an email to Mr. Kerr dated February 29, 2008 stating "Forget it Patrick." *See* Kerr VS. Since Mr. Jeffers, RFP's Traffic Manager – Rail, told CORP not to quote the rate, CORP complied and did not quote a rate.

It is disingenuous at best for RFP to contend that CORP is not being responsive or providing inadequate service because CORP did not quote a rate when RFP told CORP to "Forget it."

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<sup>13</sup> RFP asked CORP to quote a rate for the movement of exempt logs. Rate quotes for exempt commodities are not subject to the requirements of 49 U.S.C. §11101(b) or 49 C.F.R. §1300.3.

**5. RFP and TPC have not provided evidence of bunching.**

RFP claims that CORP's service was inadequate because of bunching of cars at RFP's Oregon mills. As support for this claim, Mr. Jeffers states "I am able to document that empty cars were bunched in Oregon on 2-3 days in January 2008 alone, and in turn loaded cars were bunched in California 2-3 days in January 2008 as well." Supplement, Jeffers at 3. Where is Mr. Jeffer's documentation? It is not in the Supplement or elsewhere in the record. Moreover, it seems unusual that empty cars would be bunched in Oregon where CORP delivered loaded cars and that loaded cars would be bunched in California where CORP delivered empty cars for loading. CORP urges the Board to give no weight to Mr. Jeffer's unsubstantiated claims of bunching.

Ms. Hart also claims that cars were bunched at TPC's Oregon mills. She also fails to provide any documentation concerning bunching. If the cars were bunched, TPC should have been able to provide information such as dates of delivery, length of time bunched, car numbers and whether the cars were loaded or empty. TPC provides none of this information. Instead, TPC just uses the term bunching without any support, just as it uses the term JIT without any support.

Petitioners have not proven that CORP engaged in bunching when it operated the Line in response to a request for service.

**6. The Board erred in discounting the voluntary diversion of traffic to truck.**

In the *Interim Decision* at 7-8, the Board stated:

The parties dispute whether truck transportation is a logistically or economically feasible alternative for shipper petitioners, assuming that if it is,

then we may not find a substantial, measurable deterioration in rail service. But we have made such a finding at least once before when shippers diverted all of their traffic to trucks. *See Arkansas Midland Railroad Company, Inc.—Alternative Rail Service—Line of Delta Southern Railroad, Inc.*, STB Finance Docket No. 34479, slip op. at 6 (STB served Mar. 11, 2004). We see no reason to depart from this precedent, especially because it is part of the rail transportation policy to ensure the continuation of a sound rail transportation system with effective competition between rail and other modes of transportation. *See* 49 U.S.C. 10101(4). Thus, we conclude that a shipper's ability to divert its traffic to trucks does not preclude a finding under section 11123 that rail service has deteriorated sufficiently to justify an alternative service order.

The decision in *AMRR* is clearly distinguishable from the facts in this proceeding and should not be given any precedential weight. In *AMRR*, the DSRR was disabled from providing rail service. DSRR had experienced continual derailments and had lost its insurance so that it could not provide service even if it had wanted to. Based on those facts, the shippers had no alternative but to divert traffic to truck. The facts are different concerning service over the line. CORP's insurance is in good standing and it did not suffer continual derailments on the Line. Indeed, the track on the Line is classified as FRA Class 1 or 2 track. Moreover, CORP has continuously been ready, willing and able to provide service over the line pursuant to the payment of reasonable rates. Unlike in *AMRR* where the rail carrier was disabled from providing service, CORP was and is able to provide service. As Mr. Kerr states:

It is not coincidental that at the end of the price agreement between CORP and RFP and the time of the proposed increase of CORP's rates that RFP and TPC voluntarily diverted their traffic to truck, even though CORP was ready, willing, and able to provide service. RFP and TPC stopped using CORP to move between California and Oregon over the Siskiyou Pass because they considered the rail service of lesser value than truck service. Even the decrease in rates that CORP adopted on May 28, 2008 was too high for RFP and TPC. It is reasonable to conclude that RFP's and TPC's arguments of poor service are pretext because, throughout this proceeding, neither RFP nor TPC have been willing to advise the Board of the rates they are paying for trucking compared to the rail rates available.

*AMRR* is not valid precedent for this proceeding. The facts are so substantially different that the premise of *AMRR* is inapplicable here. RFP and TPC did not divert traffic to truck because CORP could not provide service; they diverted traffic to trucks because they did not like the rate that CORP would charge. Without the premise underlying the Board's conclusion to follow *AMRR*, the Board is in error in concluding that a shipper who voluntarily diverts traffic to truck may be entitled to alternative rail service.

**7. Mr. Hammond's after the fact analysis is entitled to no weight.**

Mr. Court Hammond, the President of Yreka Western Railroad Company, has submitted a verified statement that was not requested by the Board for clarification. Mr. Hammond engages in Monday morning quarterbacking of CORP's response to snow in the Siskiyou Pass in February 2008. The only useful portions of Mr. Hammond's statement are his acknowledgement that his proposal for snow removal would be "a time consuming and costly feature of snow removal." Supplement, Hammond at 3. Mr. Hammond also suggests the use of even more expensive bulldozers.

CORP urges the Board should give no weight to Mr. Hammond's testimony. First, it was not requested by the Board.<sup>14</sup> Of greater import is that it is provided by a third party who is not responsible for the costs he seeks to impose on CORP. Snow can be cleared, but only if the cost of removal is not a factor. For a line used as little as the Line, competent management must weigh the cost of snow removal against other factors including the use of the Line. For the distance that traffic must move over the Line, it must be considered a light density line. The

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<sup>14</sup> The Board has refused to consider information that "is outside the scope of supplemental evidence ordered by the" Board. See *Oregon International Port of Coos Bay—Feeder Line Application—Coos Bay Line of the Central Oregon & Pacific Railroad, Inc.*, STB Finance Docket No. 35160 (STB served November 20, 2008) at 3.

judgments made by CORP and confirmed by the Board concerning snow removal were appropriate, and Mr. Hammond's after the fact comments are entitled to no weight in determining whether CORP provided adequate service.

**8. The *Pyco 2006* precedent does not apply to the facts in this proceeding.**

Petitioners argue that *Pyco Industries, Inc.—Alternative Rail Service—South Plains Switching, Ltd. Co.*, STB Finance Docket No. 34889 (STB served January 26, 2006) (“*Pyco 2006*”), is precedent for this proceeding. Petitioners are wrong.

In *Pyco 2006*, South Plains Switching, Ltd. Co. (“SAW”) served two plants owned by Pyco Industries, Inc. (“Pyco”), that were in close proximity to each other. They were so close that Pyco switched rail cars between the two plants by itself. A dispute arose between SAW and Pyco and SAW placed a derailer on the track to prevent Pyco from switching between its own plants, canceled a track lease, failed to deliver sufficient empties, suspended operations, and reduced the volume of switching between Pyco's plants. None of those situations exist in this proceeding. Indeed, CORP is ready, willing and able to provide service over the Line in return for the payment of a reasonable rate.

The only action taken by CORP has been a reduction in the days of service provided over the Line from five to two because of the reduced volume of traffic tendered over the Line. CORP reduced service to operate more efficiently. RFP continued to use CORP's service while its rates were governed by a contract, and TPC continued to use CORP's service until CORP announced a rate increase. Contract talks with RFP and TPC had also terminated because the rate CORP proposed to charge was too high.

CORP provided adequate service to handle the traffic tendered, and is ready, willing and able today to provide service over the Line. CORP should not be deemed to be providing inadequate service because RFP and TPC are unwilling to make any changes to their mills and rail infrastructure that were built as long ago as 1935 to accommodate their needs today. RFP and TPC have also not shown a willingness to engage CORP about other potential solutions such as track leases. RFP and TPC refused to continue contract talks because of the proposed rate.

**9. This is not a rate case.**

The complaint in this proceeding is not about a lack of service, but about the remunerative reasonable rate that CORP is charging for adequate service. Petitioners and WTL are asking the Board to exercise an extraordinary power: the temporary taking of the property of CORP and mandating WTL to operate over that property.<sup>15</sup> As is clear from the diversion of traffic to trucks by RFP and TPC after a rate increase by CORP and from the failure of negotiations for the voluntary operation of the line by WTL because WTL and Petitioners were unwilling to pay CORP the compensation developed by the Board, Petitioners and WTL are using the Board's processes under 49 C.F.R. §1146 in an effort to obtain rate concessions from CORP either through reduced rate or through non-compensatory rental.

It is also apparent that RFP and TPC are not seeking adequate service, but a specialized service developed solely to meet their newly devised JIT needs.

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<sup>15</sup> Indeed, Petitioners and WTL are asking for more extraordinary relief by limiting WTL's service obligation to Petitioners and requiring CORP to continue to provide service to any other shippers who would want service over the line, ensuring decreased density and increased rates for all shippers.

**CONCLUSION**

Petitioners have failed to provide quantifiable and verifiable responses to the clarification sought by the Board. Instead of providing such information, Petitioners have attempted and failed to substitute the use of JIT as the measure of adequate rail service. CORP respectfully requests the Board to deny the emergency service sought by Petitioners because they have failed to demonstrate that over an identified period of time, there has been a substantial, measurable deterioration or other demonstrated inadequacy in rail service provided by CORP.

Respectfully submitted,



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Attorneys for: CENTRAL OREGON &  
PACIFIC RAILROAD, INC

Dated: April 10, 2009

**CERTIFICATE OF SERVICE**

I hereby certify that I have caused the foregoing document to be served electronically or

by overnight delivery upon:

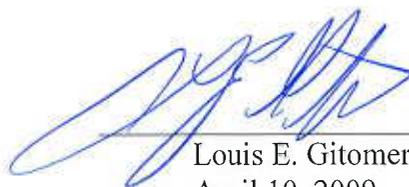
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\_\_\_\_\_  
Louis E. Gitomer  
April 10, 2009

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 35175

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ROSEBURG FOREST PRODUCTS CO., TIMBER PRODUCTS COMPANY, LC,  
SUBURBAN PROPANE, LP, COWLEY D&L, INC., SOUSA AG SERVICE, AND YREKA  
WESTERN RAILROAD COMPANY–ALTERNATIVE RAIL SERVICE–  
CENTRAL OREGON & PACIFIC RAILROAD, INC.

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Ex Parte No. 346 (Sub-No. 25C)

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RAIL GENERAL EXEMPTION AUTHORITY–PETITION FOR PARTIAL REVOCATION  
OF COMMODITY EXEMPTION–LUMBER OR WOOD PRODUCTS

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VERIFIED STATEMENT OF PATRICK KERR

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My name is Patrick Kerr. I was the Manager of Marketing and Sales for the Central Oregon & Pacific Railroad, Inc. (“CORP”) from January 2008 to November 2008. In my position I was involved in all marketing activities with CORP’s customers, including negotiation of contracts. In addition, I am also familiar with CORP’s operations. I previously filed a verified statement in this proceeding.

The purpose of this statement is to respond to some of the claims made in the Supplemental information provided by Roseburg Forest Products Co. (“RFP”) and Timber Products Company, LC (“TPC”).

In preparing this statement, I have consulted with the operations and marketing personnel of CORP, RailAmerica Operations Support Group, Inc., and RailAmerica, Inc., who have all been involved with RFP and TPC.

As far as CORP can determine, the communications from CORP to RFP and TPC did not change in 2007. No change occurred until the shippers terminated contract negotiations and after CORP announced its two day per week schedule for service from California to Oregon.

I did not have nor am I aware of any communication between anyone at CORP with Fortress Investment Group or heard that anyone from Fortress Investment Group had requested or instructed any changes to customer service or operations.

RFP and TPC also mention the Just in Time (“JIT”) inventory management system in the Supplement. The concept of using CORP’s rail service as part of JIT was not mentioned in the contract negotiations between CORP and RFP and TPC. In fact, at no time during CORP’s contract service for RFP (which was terminated in May 2008) did anyone with RFP request a service that could be construed as JIT (until the filings of RFP and TPC before you) from CORP. In my opinion, the JIT concept has been raised only for the purpose of this litigation, in trying to impose a new standard of service on CORP and all railroads. Contract negotiations did not fail because of the JIT concept but because of a dispute over prices, as I explained in my earlier statement.

Mr. Jeffers of RFP contends that RFP requested a rate from CORP to move logs from Weed, CA to Saginaw, OR, and that CORP never quoted a rate. Mr. Jeffers fails to admit that CORP never quoted a rate because Mr. Jeffers told CORP not to. I have attached a series of emails between Mr. Jeffers and me as an exhibit. The last email is from Mr. Jeffers telling CORP not to quote the rate. Also of interest is Mr. Jeffers statement that RFP would use the rates of the Union Pacific Railroad Company to ship logs from Weed to Saginaw, which contradicts Mr. Jeffers own discussion in section 3 of his statement.

Mr. Jeffers also contends that CORP did not always carry 37 cars in its trains moving from California to Oregon with five locomotives. CORP never said that every train would contain 37 cars. Instead CORP stated that a typical train would carry approximately 4,000 tons or 37 cars. The number of cars carried in a train in mountainous terrain depends on a number of factors, including demand pattern, the horsepower of the locomotive consist, the weather, and the mix of loaded and empty cars. If the consist of locomotives has less horsepower, then the train can handle fewer tons and cars. If there are more loaded cars than normal, then a train will be able to handle fewer total cars. If the weather is bad, as it was in the Siskiyou Pass on the dates cited by Mr. Jeffers, then a train will also carry fewer cars. Cars are not left behind because the railroad does not want to include them in a train but because of physical limitations and safety concerns.

RFP and TPC also contend that CORP started running fewer trains in late 2007. They are correct. However, the reason CORP started operating four days per week instead of five was because of a decline in the volume of traffic being shipped. As the Board well knows, one of the major benefits of rail service is density. Longer trains have lower costs per car than shorter trains and are more efficient. When the number of cars tendered per train fell to a level where CORP would be running shorter, more costly and less efficient trains by continuing five or six day per week service, CORP determined that it could reduce costs by operating four or five days per week. CORP reduced service in response to a reduction in traffic tendered. For that same reason, CORP reduced service to two days per week beginning in 2008.

It also appears that RFP and TPC want to use CORP's service between California and Oregon as an interplant shuttle service. CORP would take loaded cars north and bring empty

cars south on a schedule dictated by RFP and TPC. CORP continues to hold itself out to provide reasonable service on reasonable demand. CORP did not decide to divert traffic to competitive truck service, RFP and TPC did. It is not coincidental that at the end of the price agreement between CORP and RFP and the time of the proposed increase of CORP's rates that RFP and TPC voluntarily diverted their traffic to truck, even though CORP was ready, willing, and able to provide service. RFP and TPC stopped using CORP to move between California and Oregon over the Siskiyou Pass because they considered the rail service of lesser value than truck service. Even the decrease in rates that CORP adopted on May 28, 2008 was too high for RFP and TPC. It is reasonable to conclude that RFP's and TPC's arguments of poor service are pretext because, throughout this proceeding, neither RFP nor TPC have been willing to advise the Board of the rates they are paying for trucking compared to the rail rates available.

The CORP line between Black Butte, CA and Dillard, OR consists of FRA Class 1 and 2 track. The running times between Weed, CA and Medford, OR is about 10 hours, between Medford and Dillard, OR about 12 hours, and between Dillard and Saginaw, OR about six hours. In addition to running time, there is additional time for crew changes and other operations functions. CORP ran a relay system where north and south bound trains meet and crews are changed and take the train back to the crews' origin. One crew often has to wait for a train to arrive, so that substantial additional time must be added to the running time. CORP does not guarantee its delivery times in common carrier service. CORP would need to be presented with a lucrative and realistic contract in order to guarantee delivery in contract service.

Based on my interaction with RFP and TPC, they have stopped using CORP's service over the Siskiyou pass for one reason only, they believe that the rates are too high. CORP has

continued to offer reasonable service on reasonable demand. CORP remains ready, willing, and able to provide reasonable service on reasonable demand today. The only reason that no trains run over the Siskiyou Pass today is because RFP and TPC voluntarily diverted the traffic to trucks.

EXHIBIT –EMAIL EXCHANGE WITH MR. JEFFERS

**Louis E. Gitomer**

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**From:** Andy Jeffers [AndyJ@rfpco.com]  
**Sent:** Friday, February 29, 2008 3:57 PM  
**To:** Kerr, Patrick (SJVR)  
**Subject:** RE: UP 274195 loaded 2/22/08

Forget it Patrick.

I fully understand the implications of shipping without rates in place but I honestly didn't think it would take this long to develop something. I can turn a rate request on any Class 1 railroad within 7 days and shortlines are usually less than two days.

UP has rates in place from Weed to Saginaw and we will use and ship on those. Please close your file.

Andrew E. Jeffers  
 Traffic Manager - Rail  
 1-800-801-7142  
 541-679-2741 (FAX)

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**From:** Kerr, Patrick (CORP) [mailto:Patrick.Kerr@railamerica.com]  
**Sent:** Friday, February 29, 2008 12:45 PM  
**To:** Andy Jeffers  
**Subject:** RE: UP 274195 loaded 2/22/08

Andy, I don't know where the break down was and I know you have been waiting for a rate for this more for awhile but you just can't ship a car without a rate in place. So I will need the car # and info to work with the UP on getting this car to Saginaw. I will be in Boca next week for meetings and we will be discussing the Siskiyou issues including the rates. We will be wanting to get with you guys most likely the week of March 11th to sit down and roll this out. Nothing set in stone as to the date yet but we will be in touch on that issue. Lets talk about this on our call.

Patrick

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**From:** Andy Jeffers [mailto:AndyJ@rfpco.com]  
**Sent:** Friday, February 29, 2008 11:02 AM  
**To:** Kerr, Patrick (CORP)  
**Subject:** UP 274195 loaded 2/22/08

Patrick  
 This car was released at Weed on 2/22. The paperwork shows it's a load for Whitsell Mfg. Saginaw, OR and has a CORP siding plainly displayed.

We are still waiting on a rate for this movement which I asked your predecessor for about a month before he retired.

Rate issues aside, instead of moving this car over the Siskiyou, you interchanged it to UP where it has been bouncing around as a no bill car.

The car is in Hinkle, OR now and we have to pay UP a no-bill charge and our customer will be delayed receiving his product.

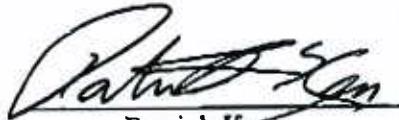
I'm sure you've got your reasons but things like this are making it really hard to do business with you guys.

Andrew E. Jeffers

Traffic Manager - Rail  
1-800-801-7142  
541-679-2741 (FAX)

**VERIFICATION**

I, Patrick Kerr declare under penalty of perjury that to the best of my knowledge the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement. Executed this 9<sup>th</sup> day of April 2009.



Patrick Kerr