

LAW OFFICES OF
LOUIS E. GITOMER

LOUIS E. GITOMER
LOU_GITOMER@VERIZON.NET

April 22, 2009

THE ADAMS BUILDING, SUITE 301
600 BALTIMORE AVENUE
TOWSON, MARYLAND 21204-4022
(202) 466-6532
FAX (410) 332-0885

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

224935

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*

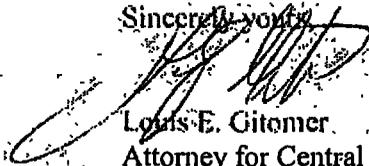
Dear Acting Secretary Quinlan:

224936

Enclosed for e-filing is a Motion to Strike of Central Oregon & Pacific Railroad, Inc. in the above-entitled proceedings.

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

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

MOTION TO STRIKE OF CENTRAL OREGON & PACIFIC RAILROAD, INC.

Scott G. Williams Esq.
Senior Vice President & General Counsel
RailAmerica, Inc.
7411 Fullerton Street, Suite 300
Jacksonville, FL 32256
(904) 538-6329

Louis E. Gitomer, Esq.
Law Offices of Louis E. Gitomer
600 Baltimore Avenue
Suite 301
Towson, MD 21204
(202) 466-6532

Attorneys for: CENTRAL OREGON &
PACIFIC RAILROAD, INC

Dated: April 22, 2009

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

MOTION TO STRIKE OF CENTRAL OREGON & PACIFIC RAILROAD, INC.

Central Oregon & Pacific Railroad, Inc. ("CORP") moves the Surface Transportation Board (the "Board") to strike the Surrebuttal Evidence tendered on April 20, 2009 (the "Surrebuttal"), by Roseburg Forest Products Co. ("RFP"), Timber Products Company, LC ("TPC"), Suburban Propane, LP, Cowley D&L, Inc., Sousa Ag Service, and Yreka Western Railroad Company, jointly the "Petitioners." The Surrebuttal should be rejected by the Board as a violation of 49 C.F.R. §1104.13(c), as a violation of the Board's decision,¹ as unreliable under 49 C.F.R. §1114.1, and as an attempt to untimely supplement the Petition filed by Petitioners on August 26, 2008.

¹ *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—*

Petitioners claim that this is the first time they have had the opportunity to address the volume of traffic moving over the Siskiyou Pass on CORP's 218-mile rail line that extends northward from CORP's connection with Union Pacific Railroad Company at Black Butte, CA, milepost 346.00, to Dillard, OR, milepost 562.00 (the "Line"). Petitioners are wrong.

ARGUMENT

The Surrebuttal contains argument and a chart that Petitioners contend reflects an increase of traffic on the Line from 2006 to 2007.

In response to the Petition, the Board concluded 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.²

However, the Board then made the unprecedented and unexplained ruling requiring the parties to supplement the record by responding to specific data requests and within a specific procedural format.³ Petitioners and CORP filed Supplements and Responses.

1. The Surrebuttal is an impermissible reply-to-reply.

The Board developed a specific schedule for the filing of the supplemental clarifications that it sought. Moreover, the Board specified the information it sought. The parties complied with that schedule, as modified.

Lumber or Wood Products, Ex Parte No. 346 (Sub-No. 25-C) (STB served March 4, 2009) (the "Interim Decision").

² *Interim Decision* at 9.

³ *Interim Decision* at 7.

Now, Petitioners seek to file the Surrebuttal to respond to CORP. This is clearly an impermissible reply-to-reply under 49 C.F.R. §1104.13(c). Petitioners have had this information available to them since December 2007, but have elected not to present it to the Board until the very end of this proceeding. Indeed, the Surrebuttal is impermissible cumulative evidence of the statement made in the verified statement accompanying Petitioners' April 9, 2009 Reply, and should have been included therein, if not in the Petition.

2. The Surrebuttal violates the schedule ordered by the Board.

The *Interim Decision* provided a very streamlined and limited schedule, with no right to file surrebuttal. In filing the Surrebuttal, Petitioners have violated the procedural schedule and the Surrebuttal should not be allowed into the record.

3. The Surrebuttal is unreliable.

Pursuant to 49 C.F.R. §1114.1, evidence before the Board must be reliable. The Surrebuttal is not reliable for the purpose tendered. The Surrebuttal only addresses the traffic of REP and TPC; it does not address the traffic of any other shipper. Second, it is unclear whether the traffic is north bound or south bound over the Siskiyou Pass, since the traffic in issue in this proceeding is the north bound traffic. CORP urges the Board to reject as unreliable the evidence submitted in the Surrebuttal.

4. The Surrebuttal is an attempt to untimely supplement the Petition.

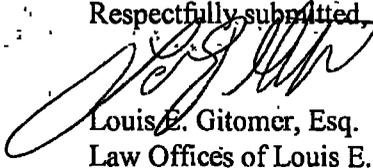
Petitioners must carry the burden of proof in this proceeding. The petition for the relief sought by Petitioners must contain "all supporting evidence." 49 C.F.R. §1146.1(b)(i). In the *Interim Decision*, the Board found that Petitioners had not met their burden and had not justified alternative rail service. Petitioners seek to provide evidence to the Board in the Surrebuttal that was available and should have been presented in the Petition under the Board's rules. Instead, Petitioners have waited until after the last opportunity provided them to carry their burden to present the purported evidence. Under the Board's schedule, the Petitioners were not entitled to the last word, but seek to have the last word through the Surrebuttal.

CONCLUSION

CORP respectfully requests the Board to reject the Surrebuttal for the reasons discussed.

Respectfully submitted

Scott G. Williams Esq.
Senior Vice President & General Counsel
RailAmerica, Inc.
7411 Fullerton Street, Suite 300
Jacksonville, FL 32256
(904) 538-6329


Louis E. Gitomer, Esq.
Law Offices of Louis E. Gitomer
600 Baltimore Avenue
Suite 301
Towson, MD 21204
(202) 466-6532

Attorneys for: CENTRAL OREGON &
PACIFIC RAILROAD, INC

Dated: April 22, 2009

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing document to be served electronically or
by overnight delivery upon:

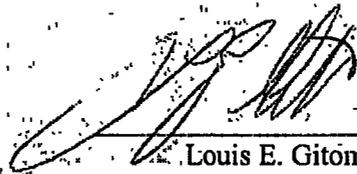
Fritz R. Kahn, Esq.
Fritz R. Kahn PC
1920 N Street NW, 8th Floor
Washington, DC 20036-1601

Thomas F. McFarland, Esq.
Thomas F. McFarland, P.C.
208 South LaSalle St., Suite 1890
Chicago, IL 60604

Mack H. Shumate, Esq.
Union Pacific Railroad Company
101 North Wacker Drive, Suite 1920
Chicago, IL 60606

John D. Heffner, Esq.
1750 K Street, N.W., Suite 200
Washington, DC 20006

Office of the Chief Counsel
Federal Railroad Administration
1200 New Jersey Avenue, SE
Mail Stop 10
Washington, DC 20590



Louis E. Gitomer
April 22, 2009