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November 12, 2008

Via E-filing

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

RE: STB Finance Docket No. 35160, Oregon International Port of Coos Bay—Feeder Line Application—Coos Bay Line of the Central Oregon & Pacific Railroad, Inc.

Dear Secretary Quinlan:

Enclosed for filing in the above-captioned docket please find the Reply to Both the Petition for Technical Correction and the Response of the Central Oregon & Pacific Railroad to the Third Valuation Update, being filed today by the Oregon International Port of Coos Bay.

Please feel free to contact me if you have any questions.

Very truly yours,


Sandra L. Brown

Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 35160

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

**REPLY TO BOTH THE
PETITION FOR TECHNICAL CORRECTION
AND THE RESPONSE OF THE
CENTRAL OREGON & PACIFIC RAILROAD TO
THE THIRD VALUATION UPDATE**

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I. INTRODUCTION

The Oregon International Port of Coos Bay ("Port") respectfully submits this Reply to the Petition for Technical Correction and the Response of the Central Oregon & Pacific Railroad to the Third Valuation Update pursuant to 49 CFR §§ 1104.13(a) and 1117.1. As shown below, the Board should reject the alleged "technical correction," which is actually a new supporting argument offered by the Central Oregon & Pacific Railroad ("CORP") regarding its real estate valuation. The Board should also reject the arguments made in CORP's Response to the Third Valuation Update as unsupported and beyond the scope of the Board's October 31, 2008 decision ("Decision") in this case. Finally, the Board should accept the Port's November 5th update of all the track assets as consistent with the Board's Decision.

II. THE BOARD SHOULD ACCEPT THIS REPLY

CORP has made two filings in the past few days which warrant reply from the Port under 49 CFR §§ 1104.13(a) and 1117.1. First, CORP filed its Response regarding the Third Valuation Update on November 7, 2008. As described below, a reply to CORP's Response is warranted under 49 CFR § 1117.1 because CORP mischaracterizes the Port's Third Valuation Update as "significantly exceed[ing]" and "flagrantly violat[ing]" the Board's Decision. Response at 1 and 3. A reply is also appropriate because CORP offers a number of new arguments in its Response that go well beyond the scope of the Board's Decision. *Keokuk Junction Railway Company – Feeder Line Acquisition – Line of Toledo, Peoria & Western Railway Corporation between La Harpe and Hollis, IL*, Docket 34335, slip op. at 5 (served Feb. 7, 2005) ("KJRY-TPW"). Second, CORP filed a Petition for Technical Correction on November 10, 2008 which proposes a new argument justifying a change in the valuation of the Line's real estate established by the Board Under 49 CFR § 1104.13(a), the Board should accept this reply to CORP's Petition.¹

III. THE PORT FOLLOWED THE DIRECTIVE IN THE BOARD'S DECISION

While CORP's Response describes the Port's Third Valuation Update with alarmist tones, evaluation of the Port's filing reveals that the Port followed the Board's Decision. As shown below, the Port conformed to all Board directions in the Decision, and made reasonable choices where the Decision was unclear

¹ Notwithstanding the rhetoric that the Port has faced from CORP and its owners at every step in this proceeding, the Port has made every effort to address these serious issues in a reasonable tone. Since this may have been misinterpreted at times in the past that the Port did not specifically object to some of CORP's arguments, the Port wants to make abundantly clear that the Port believes that it did not offer any new arguments or challenge the Board's methodology used in the Decision, but only stated that it would seek reconsideration if and when appropriate. Moreover, the Port strongly asserts that CORP has introduced new argument and evidence regarding the Board's NSV methodology and land valuation which should be rejected.

Track asset quantities The Board stated that valuations of the Line must use the track asset quantities from the Port's Reply Evidence (filed Sept. 12, 2008). Decision at 12. This is exactly what the Port did in Attachment C of both versions of the Third Update Verified Statement of Gene A. Davis ("T.U.V.S. Davis").

October 31, 2008 valuation. The Board stated that the Port should update the valuation using American Metals Market ("AMM") steel prices as of October 31, 2008. Decision at 12. This is what the Port did in Attachments C, H, and P of the T.U.V.S. Davis

Relay and tie valuation The Decision did not address valuation of track assets that are not included in the AMM index. On the one hand, the Board directed the Port to update its AMM prices as of October 31, 2008. Decision at 12. Yet, on the other hand, the Board stated that "[w]e conclude that the NSV of the Line should be calculated as of the day of this decision" and "the fair market value of the Lines assets should be based on the current prices " Decision at 10. Hence, as the Port described in its Third Valuation Update, the Decision was somewhat ambiguous on the issue of relay steel and tie valuations. Third Valuation Update at 2. The Port addressed this ambiguity by providing the Board with two versions of its updated valuation. That is, the Port directed its expert witness, Gene Davis, to create two verified statements. the first one (titled "With All Track Asset Values Updated") includes the updated AMM prices and updated relay and tie valuations as of October 31st; the second one (titled "With Updated Reroller, Scrap Rail, and OTM") includes only the updated AMM prices. The Port used Menard's current price quote for the remaining track assets because Menard's was the only vendor to timely reply to the Port's request. As the Board will note, the Port did not "cherry-pick" the steel prices since the Port used all of the updated numbers even though some of the numbers went up, such as the relay tie prices. The Port believes that the language and the spirit

of the Board's Decision found that the Line's assets, all of those assets, should be based on the current prices as of October 31, 2008. . Furthermore, CORP also previously argued, when market prices were increasing to its favor, that "[u]sing current prices is important... for relay, re-roll, and scrap rail and OTM." See Response of CORP to Port's Feeder Application, V.S. Pettgrew at 7-82 (filed August 29, 2008 *emphasis added*).

IV. IF UPDATED RELAY AND TIE VALUES ARE NOT USED, THE PORT'S USE OF VALUATIONS FROM ITS SEPTEMBER 30TH SUPPLEMENTAL REPLY FILING WAS REASONABLE

As mentioned above, the Board did not address relay steel or tie valuations in the Decision. A reasonable interpretation of the Decision suggests that these items, as part of the track assets, should be valued as of October 31, 2008, as stated in the Decision at page 10 See section III above The Port agrees with the Board's methodology that the Line's assets should be valued as of October 31, 2008. If for some reason, the Board would now change this methodology and value some assets on different dates, the Port's use of relay steel and tie valuations from the September 30th Supplemental Reply was reasonable as an alternative valuation. In the Decision, the Board specifically accepted the Supplemental Reply into the record and did not reject the updated relay and tie prices included by the Port in the Supplemental Reply.² In fact, the Board did not mention relay or tie valuations at all in the

² CORP has never specifically disputed the relay and tie values included in the Port's Supplemental Reply. Instead, CORP merely stated that the Board should reject the alleged "new evidence" in the Supplemental Reply See Reply of CORP to Port's Motion to Strike at 2 (filed October 21, 2008). CORP mentioned the entities that provided relay steel and tie valuations to the Port, but did not use the term "relay" in its October 21st filing. *Id.* at 9. The Port has consistently used the most current steel prices, both scrap and relay, that it has had available to it. For example, when the Port used the relay prices cited in CORP's August 29 filing in the Port's September 12 filing, those were the most current relay prices available to the Port. Likewise, when the Port filed its Supplemental Reply it was able to obtain two relay quotes which it used in the Supplemental Reply with no specific objection by CORP to vendor or the accuracy of the quoted relay prices. In addition, CORP did not previously raise the position it now takes that the relay prices have been stagnant or its subjective argument that they have "not changed appreciably" in three months. In fact, as cited in Part III above, when the change or updated

Decision. Given this lack of specificity, and the fact that the Board never rejected any part of the Port's track asset valuation in the Decision, it was reasonable for the Port to use its September 30th and previous most recent relay and tie valuations as the fall-back option for the Third Valuation Update. The Port's action was all the more reasonable because Board and court precedent favors use of more recent valuation data. See Second Valuation Update at 1 (filed Oct. 30, 2008); Valuation Update at 2-3 (filed Oct. 17, 2008). The Board should reject CORP's inflammatory assertion that use of the most recent relay and tie values as a back-up was "misleading," particularly where the Board gave no specific direction on the issue. CORP Response, V.S. Pettigrew at 6.

V. THE PORT MENTIONED THE BRIDGE REMOVAL AND TUNNEL CLOSURE COSTS TO ENSURE NO WAIVER COULD BE ARGUED

In the Decision, the Board did not include the removal costs for the Umpqua and Siuslaw River Bridges, nor did the Board include tunnel closure costs. Decision at 14. For the purpose of the Third Valuation Update, the Port deferred to the Decision on this point and provided specific NLV figures for the track assets without the bridge and tunnel costs. Third Valuation Update at 3. However, the Port respectfully believes the Decision was wrong on these two issues, and included the bridge removal and tunnel closure costs in separate line items in the T.U V.S. Davis to ensure that the Port had not waived its right to seek reconsideration on these two issues. Third Update at 4 (Port states it will seek reconsideration on the removal costs). Given the contentious nature of this and the related proceedings, the Port's filing was prudent in order to prevent any future arguments by CORP that the Port had waived its bridge removal and tunnel closure arguments

relay prices might help increase the value for CORP, CORP argued that all the prices should be based on current prices which is what the Port submitted on November 5th.

VL VALUATION AS OF OCTOBER 31, 2008 IS APPROPRIATE

The Board appropriately set the valuation date for the track assets on the Line as October 31, 2008. Contrary to CORP's claim that this date is "arbitrary," the date is appropriate because it is the date of the Board's Decision approving the sale. CORP Response at 11 (alleging that October 31st was an arbitrary date). A truly "arbitrary" decision would be valuation of the Line as of some date other than the date of sale. If CORP wants to argue that the valuation should be as of some other date, this argument should be made on reconsideration or appeal, not in a response to the Board's request for updated steel prices

The Board should also reject CORP's assertion that the October 31st prices are otherwise inappropriate. CORP Response at 8-11; V.S. Pettigrew at 3-4. As the Board noted, use of averaging may be appropriate where fluctuation in prices occurs during a long proceeding. Decision at 11; *KJRY-TPW*, slip op. at 12 (served Feb. 7, 2005) However, the procedural schedule in this proceeding has not been long and, in fact, was shortened by 60 days from that provided in the feeder regulations for developing the record. In addition, based upon the time period in the abandonment regulations for issuance of a decision once the record is closed, this proceeding is at least 110 days (60 plus 50 days) shorter than any other feeder line proceeding³ Moreover, the drop in AMM steel prices has returned the prices to a level consistent with prices experienced during most of CORP's ownership of the Line. See page 8 of S.R.V.S. Davis, attached to Supplemental Reply (filed Sept. 30, 2008). As the Board recognized, CORP would

³ It is ironic that CORP would now argue that the October 31 date of the Board's decision should not be used to value this line since CORP has controlled the timing for this Line at every step of the way. CORP controlled the timing of the abrupt stop in rail service on this Line, CORP controlled the timing by holding the Line hostage in its attempts to coerce money from various third parties, and then CORP controlled the timing of this proceeding by its desperate announcement that it would abandon part of this Line in the face of skyrocketing steel prices and once CORP realized the public outcry would not let it just sit on the Line.

be urging the Board to use the most recent data if the price had continued to rise. Decision at 10-11, note 26. In this context, valuation of the Line as of any date other than October 31, 2008 would be arbitrary. Cf. *KJRY-TPW*, slip op. at 6 (served Feb. 7, 2005) (a feeder line case must end at some point even though the constitutional minimum value is at issue).

Lastly, the Board should reject CORP's attempt to skew the picture by attempting to substitute other steel types for the AMM scrap rail index ("random rails") used throughout the proceeding by the Port. The Board asked the Port to update its AMM values using its expert. Decision at 12. Eventually, CORP conceded that use of the "random rails" index was appropriate. CORP Response, *Pettigrew V.S.* at 3. CORP's use of other indexing is an attempt to inappropriately seek reconsideration of the Board's Decision to set the valuation date as of October 31, 2008.

VII. THE NEW L.B. FOSTER ESTIMATE SHOULD BE REJECTED BECAUSE IT COULD HAVE BEEN PROVIDED EARLIER AND IS STILL NOT A "FIRM" OFFER

After disparaging the Port for its alleged transgression of the Board's directive in the Decision, CORP itself then tries to further skew its Response by submitting yet another track asset "bid" by L.B. Foster. Response at Exhibit A. The Board unequivocally rejected CORP's earlier estimates by L.B. Foster and Unitrac because they contained conditions and were not "firm" bids. Decision at 11. The Board should reject CORP's attempt to resuscitate its evidence on an issue already decided by the Board. While L.B. Foster appears to have removed some limiting language from its "bid," presumably at the direction of its large customer, RailAmerica, the L.B. Foster letter very clearly still states that the offer is valid for ninety (90) days. However, L.B. Foster knows that CORP cannot accept L.B. Foster's bid within 90 days because CORP does not have authority to scrap any of the Line and CORP has not even filed for abandonment

of the Danbo to Vaughn portion. Thus, there is nothing "firm" about the self-serving material and assertions provided by either L. B. Foster or the Vice President of CORP's parent company

Moreover, there was nothing preventing CORP from submitting another "bid offer" earlier in this case; hence, CORP's newly devised L.B. Foster estimate is an improper attempt to supplement the record and reassert its argument that the Board rejected.⁴ *Duke Energy Corporation v. Norfolk Southern Railway Company*, Docket 42069, slip op. at 2 (served March 25, 2003) (supplementation of the record only allowed when the information could not have been introduced earlier). Acceptance of CORP's new L.B. Foster bid would eviscerate one of the Board's determinations in its Decision that these bids are not the best evidence of what these track assets currently are worth in the marketplace. Instead, the Board should accept the Port's updated valuation that is based upon updated steel prices from the AMM publication and an undisputed independent vendor's price quote for October 31, 2008.

VIII. THE BOARD SHOULD REJECT CORP'S TECHNICAL CORRECTION

In the Decision, the Board corrected a calculation error made by CORP in valuing real estate underlying the Line Decision at 14. Now, however, CORP has provided a new justification for the sales figures used during the eleven-year sell-off period for the Line's real estate. CORP now claims that the unsold portion from years one and two of the eleven-year sell-off period should be apportioned equally among the remaining nine years. Petition for Technical Correction at 2-3. This reasoning was not present in CORP's Reply filing addressing the real estate valuation issue. Instead, CORP merely stated that "the current downturn in the real estate market. .would impact the initial rate of sales." Charles Rex Verified Statement, Attachment 1

⁴ In addition, the L.B. Foster bids continue to use its error in track quantity calculations which is presumably why the Board has adopted the quantities that were developed by the Port's expert. Likewise, the L.B. Foster bids use inflated scrap prices that are not consistent with the October 31st AMM prices as directed by the Board for valuation of this Line.

at page 39 (filed Aug 29, 2008 as part of CORP's Reply). It was reasonable for the Board to interpret this statement as explaining the reduced sales in years one and two. CORP did not mention apportionment of the foregone sales among the later years of the eleven-year period, and it was reasonable of the Board to not take this step on its own

Moreover, CORP's Petition does not raise an issue that is either "technical" in nature or a mere "correction."⁵ Instead, the Petition is "an attempt to bolster the arguments made" previously by CORP in the Reply. *The Kansas City Southern Railway Company – Abandonment Exemption – Line in Warren County, MS*, Docket AB-103 (Sub-No. 21X), slip op at 2 (served Feb. 6, 2008) (rejecting alleged "technical corrections" filed after abandonment decision). Board precedent from rate reasonableness cases reveals that technical corrections are more appropriately thought of as those issues upon which both parties can agree. *Public Service Company of Colorado d/b/a Xcel Energy v. Burlington Northern Santa Fe Railway Company*, Docket 42057, slip op. at 2 (served Dec. 14, 2004). The Port does not agree with CORP's new justification argument and it could have been provided earlier and, therefore, is not a technical correction.

⁵ Under CORP's justification for a technical correction, the Port would be permitted to seek a "technical correction" rather than reconsideration of the Board's error in finding that CORP had repurchased the timber rights in Douglas County when in fact RailTex Logistics, Inc. purchased the Douglas County timber rights and there was no evidence submitted by CORP to show that CORP actually owns these rights. See Response of CORP to Port's Feeder Application, V.S. Cecil, Attachment 1 (filed August 29, 2008). This means CORP would be compensated for rights that it does not own

IX. CONCLUSION

For all the reasons described above, the Board should reject both CORP's Response to the Third Valuation Update and CORP's Petition for Technical Correction and accept the Port's Third Valuation Update. The Port further supports and urges the Board to not change the Board's constitutionally support declaration that it would value the track assets of the Line as of the date of the Board's October 31, 2008 Decision.

Respectfully submitted,



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November 12, 2008

CERTIFICATE OF SERVICE

This is to certify that on this 12th day of November 2008, I caused the foregoing to be served upon all parties of record in this proceeding, STB Docket No. 35160



David E Benz