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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

VFRC, LLC, an Oregon Limited Liability
Company, VENELL FARMS, INC., an
Oregon Business Corporation, ALBANY &
EASTERN RAILROAD COMPANY, an
Oregon Business Corporation,

Complainants,

v.

PORTLAND & WESTERN RAILROAD,
INC., a New York Corporation; GENESEE
& WYOMING, INC., a Delaware
Corporation, UNION PACIFIC
RAILROAD COMPANY, a Delaware
Corporation,

Defendants.

Docket No. NOR 42187

**COMPLAINANTS' REPLY TO UNION
PACIFIC RAILROAD COMPANY'S
MOTION TO DISMISS**

I. SUMMARY OF REPLY

Pursuant to 49 C.F.R. § 1104.13(a) Complainants hereby submit this Reply to the Surface Transportation Board (the "Board") to Defendant Union Pacific Railroad Company's ("UP") Motion to Dismiss.

To prevail on its Motion to Dismiss, UP was required to show that there is no basis upon which the Board could grant the relief sought by Complainants.¹ For the reasons stated below, UP failed to carry this burden; therefore, its Motion must be denied. Through both their

¹ *Grain Land Coop. v. Canadian Pac. Ltd.*, NOR 41687, slip op. at 2-3 (STB served Dec. 8, 1999)(emphasis added).

Amended Complaint and this Reply, Complainants have provided the Board with ample reasonable grounds for investigation and action against UP.²

This Reply is supported by the attached exhibits and the following points and authorities.

II. FACTUAL BACKGROUND

A. UP's history of ownership and involvement with the Bailey Branch.

This dispute is centered around the collapse of the Marys River Bridge in Corvallis, Oregon, which is located on the Bailey Branch line. UP admits that the section of the Bailey Branch which includes the Marys River Bridge is owned by UP.

Prior to UP's ownership of the bridge and line, this section of the line was owned by Southern Pacific ("SP"), who constructed the Bailey Branch in approximately 1913. In 1992, SP contracted with Portland & Western Railroad, Inc., ("PNWR") (formerly Willamette & Pacific Railroad ("WPRR")) to operate the Bailey Branch, including the Marys River Bridge.³ UP succeeded the rights of SP under this lease as a result of UP and SP's merger.⁴ This lease between UP and PNWR has been extended as recently as 2025 in Docket No. FD 36827 (hereinafter referred to as "the Lease"). A copy of the Lease is attached hereto as Exhibit A.

² 49 U.S.C § 11701(b).

³ As previously noted in Complainants' other filings in NOR 42187, WPRR is an affiliate and closely related sister company to PNWR. Both are operated together under Defendant Genesee & Wyoming. In 2000, PNWR adopted all the stations of WPRR and PNWR incorporates WPRR as part of its operations. For the purposes of this Reply, any reference to PNWR includes and incorporates WPRR.

⁴ See generally *Union Pacific Corp., et al. – Control and Merger – Southern Pac. Rail Corp. et al*, ICC Finance Docket No. 32760, Decision 44, 1996 WL 46736 (served August 6, 1996).

B. The Collapse of the Marys River Bridge

On May 2, 2022, the Marys River Bridge caught fire and burned for approximately nine hours. The wooden trestles and cross braces of the 75-year-old structure were severely scorched and sustained substantial damage. As required by their lease with UP, PNWR assumed responsibility for the repair of the bridge and worked to replace the ties and light rail equipment. They continued to assume responsibility by having their certified bridge inspectors inspect the bridge in 2022, 2023, and 2024.

Less than three years after the fire, on January 4, 2025, the Marys River Bridge collapsed while railcars operated by PNWR travelled across it. This caused approximately 200 tons of urea to be dumped into the Marys River. Again, as required by their lease with UP, PNWR immediately assumed responsibility for the bridge collapse by removing the bridge from the river below. Moreover, in November 2025, the Oregon Department of Environmental Quality (“DEQ”) sent PNWR a Notice of Civil Penalty for unlawfully discharging waste into waters of the state.

However, since the collapse of the bridge over 19 months ago, no action has been taken by any Defendant to reconstruct the Marys River Bridge. This has left Complainants, along with the other shippers on the line, completely isolated from the interstate rail network and unable to ship by rail. This has caused substantial damage to their respective businesses, which ultimately resulted in the filing of their Complaint with the Board. One such major shipper is Nutrien Ag Solutions (“Nutrien”), which on information and belief, will also be filing a Complaint against the above-named Defendants with the Board shortly.

C. UP's Lease Agreement with PNWR requires PNWR to repair the bridge.

Under the Lease, PNWR has the right to operate common carrier freight service on the line provided that PNWR maintain the track and structures on the line.⁵ UP also leases the real property together with the Track and Track Support Structures (including bridges) to PNWR.⁶ {{

[REDACTED]

[REDACTED]
[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED] }}

There is no question that under the terms of the Lease, PNWR is obligated to maintain, repair, and restore the Marys River Bridge. This obligation is further demonstrated by PNWR's course of performance since the bridge caught fire in 2022. Yet for 19 months and counting, PNWR has failed to fulfill—and now seeks to disclaim—its obligations as both a common carrier and the lessee under the Lease.

However, PNWR's obligations under the Lease and its failure to rebuild the bridge **does not** relinquish UP's responsibility to Complainants as owner and lessor of the track and bridge. Since the bridge collapsed, UP has clearly failed to enforce its Lease against PNWR by not requiring PNWR to honor its lease obligation to repair the bridge. Additionally, both PNWR's failure to perform its repair obligation under the Lease and its failure to perform as a common

⁵ Exhibit A, at 5.

⁶ *Id.* at 1-2.

⁷ *Id.* at 6.

⁸ *Id.*

carrier engages UP's residual common carrier obligation to Complainants based on governing law, the plain terms of the Lease, and the retention of their overhead trackage rights and freight easement on the line. Defendants also overlook the fact that Complainants are clearly third party beneficiaries under the Lease and can therefore enforce its terms. For these reasons, as discussed in greater detail below, UP's Motion to Dismiss must be denied by the Board.

III. MOTION TO DISMISS STANDARD

Pursuant to 49 U.S.C § 11701(b), the Board "may dismiss a complaint it determines does not state reasonable grounds for investigation and action."⁹ However, "the Board may not dismiss a complaint made against a rail carrier providing transportation subject to the jurisdiction of the Board under this part because of the absence of direct damage to the complainant."¹⁰

Motions to dismiss are generally disfavored.¹¹ While reviewing a motion to dismiss, the Board will view the alleged facts in a light most favorable to the complainant.¹² A complaint is dismissed under § 11701(b) **only** when the Board finds that there is **no basis** upon which it could grant the relief sought.¹³

⁹ 49 U.S.C § 11701(b).

¹⁰ *Id.*

¹¹ *Cent. Valley Ag Gridding, Inc. v. Modesto & Empire Traction Co.*, Docket No. NOR 42159, slip op. at 4 (STB served July 25, 2018).

¹² *Consumers Energy Co. v. CSX Transp., Inc.*, NOR 42142, slip op. at 1 (STB served June 15, 2015); *Montana v. BNSF Ry.*, NOR 42124, slip op. at 3 (STB served Feb. 16, 2011).

¹³ *Grain Land Coop.*, *supra* note 1, at 2-3 (emphasis added).

IV. POINTS AND AUTHORITIES

A. UP owes Complainants and other shippers on the line a duty as a residual common carrier.

In its Motion to Dismiss, UP admits that as lessor, it holds a residual common carrier obligation over the line.¹⁴ However, UP is incorrect as to when that obligation is triggered in this context. The residual common carrier obligation is “one that engages only if the primary freight carrier fails to perform.”¹⁵ In blatant disregard to PNWR’s ongoing failure to perform for the last 19 months and counting, UP attempts to frame their obligation as only coming to fruition “if the lease were to terminate for some reason.”¹⁶ This extraordinary leap is not only self-serving, but also completely unsupported by the law. Multiple Board decisions make it clear that the residual common carrier obligation engages when the operator fails to perform, not when a lease or contract between parties is terminated.¹⁷ Thus, UP currently owes Complainants an obligation as a residual common carrier.

If there is any doubt that PNWR “failed to perform” its obligations by simply doing nothing to replace the bridge over the last 19 months, the Lease itself removes that doubt by expressly defining such inaction as constituting three different Events of Default:

{{ [REDACTED]
[REDACTED]
[REDACTED] }}

¹⁴ UP’s Motion to Dismiss, at 2.

¹⁵ *Mass. Dept’t of Transp.—Acquisition Exemption—Certain Assets of CSX Transp., Inc.*, Docket No. FD 35312, at 11 (STB served May 3, 2010); *see also Wash. State Dep’t of Transp.—Acquisition Exemption—Palouse River & Coulee City R.R.*, Docket No. FD 35024, at 2-3 (STB served May 25, 2007) (“WSDOT will not operate the lines, but will retain the residual common carrier obligation should the operators prove unable to perform.”).

¹⁶ UP’s Motion to Dismiss, at 7.

¹⁷ *Id.*

¹⁸ Exhibit A, at 26.

PNWR has unequivocally failed to accomplish any of the above obligations owed by it under the Lease. Due to PNWR's "failure to perform," UP owes Complainants an obligation as a residual common carrier to replace the bridge and restore service to the line. Moreover, even if the Board were to accept UP's incorrect assertion that its residual common carrier obligation engages only "if the lease were to terminate for some reason," pursuant to Section 14.01 of the Lease, {{ [REDACTED]

[REDACTED] }} The Complainants should not suffer damages from the loss of rail service simply because UP decides not to enforce the very provisions of the Lease that were meant to protect carriers and shippers such as Complainants.

The Board's decisions also make it clear that UP remains subject to the jurisdiction of the Board by virtue of its acquisition and ownership of the track.²⁰ Moreover, "[a] common carrier need not actually conduct the operations over the line itself, so long as it provides for service by a carrier and stands ready to assume responsibility for service to shippers if the operating carrier discontinues service."²¹ This is similarly true for parties who construct a line but do not operate the line—they still hold common carrier obligations. The Board's predecessor agency, the Interstate Commerce Commission ("ICC"), has spoken directly to this point:

"[The ICC has] a well-established policy of granting requests for authority to construct rail lines where the constructing entity would not operate the line. In these cases, we have determined that the constructing entity holds itself out to fulfill the common carrier obligation that attaches to the line. That obligation remains with the constructing entity even though its

¹⁹ *Id.* at 22.

²⁰ *Bulkmatic R.R. Corp.—Acquisition and Operation Exemption—Bulkmatch Transp. Co.*, Docket No. 34145, at 6 (STB Decided November 18, 2002).

²¹ *Midwest Generation, LLC—Exemption from 49 U.S.C. 10901—For Construction in Will County, IL*, Docket No. FD 34060, at 6 fn 16 (STB Decided March 20, 2002)(emphasis added).

fulfillment may be undertaken by operating railroads under track rights, leases, or similar arrangements.”²²

This is relevant to the present case because SP constructed the Bailey Branch line in approximately 1913. In 1996, UP and SP merged, and at that time, UP succeeded the rights of SP with regard to the Bailey Branch along with any residual common carrier obligation held by SP as the constructing entity.

Accordingly, there is no question that UP has a residual common carrier obligation over the section of the Bailey Branch which they own. Pursuant to governing law, this duty arose by virtue of the following:

1. Upon PNWR’s ongoing failure to perform over the last 19 months;
2. By UP standing ready to assume responsibility for service; and
3. By acquiring and maintaining ownership of the line from the constructing entity.

Therefore, Complainants have properly stated a claim against UP.

B. UP is failing to enforce its Lease with PNWR.

For 19 months and counting, UP has failed to enforce the terms of the Lease which assigns PNWR the responsibility as lessee for rebuilding the bridge. UP’s failure to do so is causing ongoing harm to Complainants and other shippers on the Bailey Branch. Along with UP’s obligation as a residual common carrier, UP is also contractually authorized to assume PNWR’s rights and obligations upon PNWR’s default. Section 19.01 of the Lease states:

{{ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] }}

²² *Big Stone-Grant Industrial Development and Transportation, L.L.C.—Construction Exemption—Ortonville, MN and Big Stone City, SD*, Finance Docket No. 32645 (ICC served September 26, 1995).

²³ Exhibit A, at 27.

This again demonstrates how UP stands ready to assume responsibility for service to shippers if the operating carrier discontinues service. Here, there has been no service by PNWR for over 19 months, and the Lease specifically provides UP the authority to step in as operator and assume common carrier duties should PNWR fail to do so. This establishes yet another basis under which UP is responsible for maintaining and restoring service to their line.

C. UP maintains both Overhead Trackage Rights and a Freight Easement on the line which includes the Marys River Bridge.

In its Answer, UP surprisingly denied that it retained any overhead trackage rights on the Bailey Branch.²⁴ This is clearly incorrect. Prior to Complainant VFRC, LLC's ("VFRC") purchase of the portion of the Bailey Branch from Mileposts 687.60 to 682.25 (the "Venell Line") in 2010, UP owned the entire line. Once VFRC acquired the Venell Line, Albany & Eastern Railroad Company ("AERC") obtained the operating rights. In 2010, AERC and UP entered an Overhead Trackage Rights Agreement in which UP expressly *retained* overhead trackage rights on the Venell Line. A copy of this agreement is attached hereto as Exhibit B. This included the {{ [REDACTED] [REDACTED] }}

UP's express *retention* of overhead trackage rights is also expressly mentioned in the 2010 Freight Easement Deed and Agreement between UP and AERC, a copy of which is attached hereto as Exhibit C.²⁶ Thus, because UP has retained overhead trackage rights on the Venell

²⁴ UP's Answer, at 2.

²⁵ Exhibit B, at 1.

²⁶ Exhibit C, at 1. {{ [REDACTED] [REDACTED] [REDACTED] }}

Line, it follows that they must *maintain* them on the remainder of UP's line which includes the Marys River Bridge.

UP also maintains a Freight Easement over the Bailey Branch. UP both reserved itself, including {{ [REDACTED] }} In 2010, UP transferred their Freight Easement over the Venell Line to AERC.²⁸

Similarly, UP continues to maintain a Freight Easement over the line it owns which includes the Marys River Bridge.

By expressly reserving to themselves Overhead Trackage Rights and a Freight Easement on the Venell Line, UP has admitted that it still possesses Overhead Trackage Rights and a Freight Easement over the UP-owned section of the Bailey Branch. This further supports Complainants' contention that UP has positioned itself to assume responsibility for service to shippers on its line if the operating carrier fails to do so. As stated above, there is no question that PNWR has failed to fulfill its obligations as the operating carrier, thus, it is also UP's responsibility to restore service to their line.

D. Complainants are entitled to enforce the Lease as creditor beneficiaries.

Creditor beneficiaries "are entitled to enforce directly contractual promises intended to be for their benefit, even though they are strangers to the contract."²⁹ For a complainant to be a creditor beneficiary, "the performance by the promisor must be to 'satisfy an actual or supposed or asserted duty of the promise to the [complainant].'"³⁰ Absent an express intent to benefit a

²⁷ See Line Sale Contract, at 2, attached hereto as Exhibit D.

²⁸ See Exhibit C.

²⁹ *Stonecrest Props., LLC v. City of Eugene*, 280 Or App 550, 557, 382 P3d 539, 543 (2016).

³⁰ *Sisters of St. Joseph of Peace, Health, & Hosp. Servs. v. Russell*, 318 Or 370, 375, 867 P2d 1377, 1380 (1994).

third party, an intent to benefit may be inferred from “not only the terms of the contract, but also the circumstances under which the contract was made.”³¹

Here, one of the primary purposes of the UP Lease was to grant PNWR operating rights as a common carrier.³² This alone necessarily implies an “actual or supposed duty” for PNWR to provide “transportation service on reasonable request.”³³ As part of discharging their duties to Complainants and other shippers on the line as a common carrier under the UP Lease, PNWR was required to {{ [REDACTED] [REDACTED] }} Furthermore, the circumstances surrounding the execution of the Lease—and its renewal as recently as 2025—further support the conclusion that Complainants are creditor beneficiaries. By its nature, a grant of operating rights over a rail line delegates to the operator the primary obligation to perform the common carrier duties associated with that line, including the duty to provide service to third parties. From the time the Lease with UP was executed, PNWR’s performance under that Lease necessarily ran to the benefit of third parties, including the shippers it was obligated to serve as the common carrier. UP and PNWR plainly understood this when they entered into the Lease, as the Lease’s purpose was to ensure that those common carrier obligations would continue to be fulfilled and that the Track Structures would be maintained. That understanding further confirms that Complainants, along with the other shippers on the line, are creditor beneficiaries of the Lease.

For these reasons, Complainants have every right to enforce the UP Lease and compel PNWR to rebuild the bridge. Complainants also have the right to enforce the remedy set forth in

³¹ *Id.* at 378.

³² Exhibit A, at 5.

³³ 49 U.S.C. § 11101(a).

³⁴ Exhibit A, at 6.

Section 19.01, {{ [REDACTED] }}
[REDACTED] }} Lastly, should the Board accept PNWR's argument in their Joint Motion to Dismiss that the bridge collapse was a force majeure event, Complainants are entitled to enforce the provision of Section 16.01 in which Lessee is required to {{ [REDACTED] }}
[REDACTED] }}

V. CONCLUSION

Viewing the alleged facts in the light most favorable to Complainants, Complainants have demonstrated multiple bases upon which relief could be granted against UP in this case. Complainants have provided ample support to compel Board investigation and action, and Defendant UP failed to carry its burden of establishing that there is absolutely no basis upon which the relief sought by Complainants could be granted. Therefore, UP's Motion to Dismiss must be denied by the Board.

DATED this 24th day of July, 2026

FRANCIS HANSEN & MARTIN LLP

/s/ Martin E. Hansen
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Attorney for Complainants

³⁵ *Id.* at 27.

³⁶ *Id.* at 25 (emphasis added).

CERTIFICATE OF SERVICE

I certify on the 24th day of July, 2026, I served the foregoing **COMPLAINANTS' REPLY TO UNION PACIFIC RAILROAD COMPANY'S MOTION TO DISMISS** on the parties below by email:

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DATED this 24th day of July, 2026

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EXHIBIT A

UP and PNWR Lease Agreement

Highly Confidential – Redacted

EXHIBIT B

Overhead Trackage Rights Agreement

Highly Confidential – Redacted

EXHIBIT C

Freight Easement Deed and Agreement

Highly Confidential – Redacted

EXHIBIT D

Line Sale Contract

Highly Confidential – Redacted