

BEFORE THE
SURFACE TRANSPORTATION BOARD

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DOCKET NO. FD 36199

OREGON INTERNATIONAL PORT OF COOS BAY AND
COOS BAY RAIL LINE, INC. –
INTRA-CORPORATE FAMILY TRANSACTION EXEMPTION

**REPLY OF OREGON INTERNAL PORT OF COOS BAY AND
COOS BAY RAIL LINE, INC. TO PETITION TO REJECT AND
REQUEST FOR STAY OF COOS BAY RAILROAD
OPERATING COMPANY, LLC d/b/a COOS BAY RAIL LINK**

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**ATTORNEYS FOR OREGON INTERNATIONAL
PORT OF COOS BAY AND COOS BAY RAIL
LINE, INC.**

Dated: June 26, 2018

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Oregon International Port of Coos Bay (the “Port”) and Coos Bay Rail Line, Inc. (“Coos Rail”) – collectively, the “Port Parties” – hereby reply in opposition to the June 19, 2018 petition (the “Petition”) of Coos Bay Railroad Operating Company, LLC d/b/a Coos Bay Rail Link (“CBRL”) to – (1) reject the Port Parties’ intra-corporate family notice of exemption (the “Exemption Filing”) filed in this docket on May 31, 2018; and (2) stay the effectiveness of the exemption pending Surface Transportation Board (“Board”) consideration of CBRL’s rejection request. As discussed below, the subject transaction between the Port Parties does not present any matters of controversy for the Board; Coos Rail has properly invoked the Board’s class exemption procedures; the Port Parties have not misled the Board concerning any relevant or material transaction details; and, accordingly, CBRL’s Petition, including the stay request component, should be denied in its entirety.

BACKGROUND

As the record in this proceeding already reflects, the Port is a rail carrier owner of an active railroad line (the “Line”) subject to the Board’s jurisdiction extending roughly 133 miles from Danebo, Oregon, to Coquille, Oregon. The Port does not operate the Line, having elected instead to contract with an independent short line railroad, CBRL, to operate the Line pursuant to a management agreement (the “Management Agreement”) inadvertently referred to in the Exemption Filing as a “lease agreement.”¹ A contractual dispute has recently emerged as between the Port and CBRL, and, in evaluating its options for the future operation of the Line, the Port has determined that the Port and the shippers on the Line would benefit from the Port taking rail operations in-house. In contemplation of in-house operations, the Port has concluded that, for a number of reasons, it would be better for the Port to establish a sister entity, Coos Rail, to assume operations instead of the Port. Accordingly, Coos Rail filed for Board authority to enter into a transaction under which the Port would retain its existing rail line ownership status but would convey to Coos Rail the right to engage in rail common carrier operations in place of the Port, should the Port elect to commence in-house common carrier operations. On May 31, 2018, the Port Parties tendered their Exemption Filing, and, on June 15, 2018, the Board formally accepted that filing by publishing a Notice of Exemption on its website and in the Federal Register.

¹ As discussed in more detail in this Response, CBRL claims that the Port Parties’ filing is misleading because it inadvertently referred to the Port-CBRL contract for operation of the Line as a lease agreement rather than as a management agreement. Such distinction is without any real difference, but for purposes of clarification, the Port Parties’ acknowledge that the agreement governing the relationship between the Port and CBRL, which is not the subject of the intra-corporate family transaction at issue here, is entitled as a management agreement.

As reflected in the Exemption Filing, the Port Parties are hopeful that the Port and CBRL can reach an amicable arrangement where CBRL meets its obligations under the contract, but the Port Parties understand that an amicable arrangement is not currently assured. By way of its June 20th Petition, CBRL has made clear that it currently does not plan to cooperate with the Port in a transition of operations to Coos Rail, and, in keeping with its position on matters, CBRL has invoked arbitration, ostensibly under the terms of the Management Agreement. As an outgrowth to its opposition to the Port's transition plans, CBRL also has sought to derail the subject class exemption proceeding via a scattershot petition to reject.

The Port Parties desire to effectuate an orderly transition from CBRL to Coos Rail, but the Port also seeks to protect its interests and interstate commerce generally by being prepared to commence operations under a Coos Rail regime, should the Port conclude that a new operator must be installed quickly to prevent harm to shippers or to reverse or protect against deterioration of the Line.² Accordingly, Coos Rail seeks to have its operating authority in place in the event that the Port seeks to commence in-house operations in place of CBRL, with or without CBRL's consent. Finally, while the Port would far prefer a transition of operators where coordinated, two-carrier operation may be avoided, the Port Parties are willing to coordinate with CBRL on joint operations should the Port, in the exercise of its contract rights, determine that installing a new operator pending removal of the incumbent operator is preferable to exclusive service via CBRL.

² Among the Port's chief concerns is its view that CBRL has failed adequately to maintain the Line in accordance with CBRL's contractual obligations. This has become point of considerable contention between the CBRL and the Port, not so much because CBRL contends that the Line's condition has not deteriorated, but rather because CBRL contends that any track deterioration is due to allegedly insufficient capital investment in the Line by the Port.

ARGUMENT

The Port Parties' have properly invoked the intra-family corporate family class exemption. There is nothing novel or extraordinary about a rail line owner's decision to establish a sister entity to hold operating rights in place of the line owner, particularly, where, as here, the Port has valid reasons not to be saddled with the various legal, regulatory and tax ramifications of assuming common carrier operations itself. Moreover, the Port Parties' invocation of the class exemption is not controversial in and of itself. Rather, the controversy, if any, relates to an emerging dispute under the terms of the Port-CBRL Management Agreement, which can, and evidently will, be resolved in another venue, but not here. Indeed, in similar situations, the Board has allowed the class exemption to take effect, noting in the process that the exemption authority is permissive, and that authorizing the proposed transaction does not constitute a Board determination of the parties' respective rights in any underlying contract dispute, which can be addressed in a separate forum.³

CBRL's Petition is little more than an exercise in hair-splitting, and it seeks here to leverage its contract dispute with the Port by attempting to block the Port's efforts to prepare to take rail operations of the Line in-house. In that regard, CBRL insists that it does not wish to end operations on the line, stating that it wants to find a buyer for CBRL, so that CBRL's current franchise (which will expire one way or another under the terms of the Management Agreement) will continue, albeit under different ownership – a proposed change of control arrangement for CBRL to which, incidentally, the Port objects. And while a contract dispute may have emerged

³ The Port Parties do not object to the Board issuing a statement that in allowing the effectiveness of the instant class exemption, it is not ruling, and has not ruled, on the parties' respective contract rights.

as between the Port and CBRL, it is clear that such a dispute is not the province of this agency, and that such a dispute is decidedly not a basis for depriving the Port Parties of the subject class exemption.

A. The Intra-Corporate Family Class Exemption Should Be Permitted to Take Effect

CBRL contends that the Port Parties' proposed bifurcation of Line ownership and operation between the Port (as owner) and Coos Rail (as affiliated operator) "does not qualify for an exemption."⁴ The contention is misleading, because nowhere does CBRL contend that the transaction does not satisfy all of the standard criteria for an exemption pursuant to 49 C.F.R. § 1180.2(d)(3); it clearly does, and similar such transactions have been authorized under the same procedures as invoked here, as the Port Parties explained in the Exemption Filing.⁵ Rather, CBRL attempts to make more nuanced arguments that, due to the presence of a contract dispute over whether the Port may seek terminate the Management Agreement and press for termination of CBRL's operations at this time, the subject transaction is ill-suited to a class exemption due to the presence of "controversy;" and that the Exemption Filing should be rejected as containing material false and misleading statements. In the absence of the contract dispute, CBRL would have no basis to pursue rejection of the Exemption Filing, and, if the Port is entitled to install a new operator in place of, or in addition to, CBRL, then, in that case also, CBRL's rejection efforts must fail. The contract issues to which CBRL points as a basis for its Petition are unavailing, as Board precedent establishes, and, for that matter, the Port Parties' Exemption Filing contains no materially false or misleading statements to warrant rejection under CBRL's alternative line of argument.

⁴ Petition at 5.

⁵ Exemption Filing at 3, n. 4.

1. Contractual Disputes Do Not Constitute a Genuine Controversy, and, thus, the Port Parties' Exemption Should be Permitted to Take Effect in the Ordinary Course.

It is well-settled that the Board does not adjudicate disputes involving contracts like the Management Agreement. Nevertheless, CBRL seeks to have the Board pre-judge the merits of any such contract dispute by declaring the Port Parties' class exemption invalid. CBRL hopes that the Board might overlook extensive precedent under which the agency has upheld such invocations of its class exemption procedures, and in which it has recognized that:

[T]he authorization granted through an exemption is permissive: it gives the parties permission to proceed with a transaction or activity, using whatever underlying contractual rights they may have, but it is not dispositive as to whether or not a party actually has a specific contractual right . . . [W]e will leave [contract] interpretation to an arbitrator in the first instance . . .⁶

CBRL's contract-driven efforts to thwart the Port Parties from putting in place the necessary regulatory authority to implement the installation of a new operator on the Port's Line conflicts with the agency's strong preference for non-interference.

Recent cases such as Wisconsin Central Ltd. – Trackage Rights Exemption – Lines of Union Pacific Railroad Company and Illinois Central Railroad Company, Docket No. FD 35992, (STB Served Mar. 4, 2016) ("Wisconsin Central"), and those cited in the foregoing footnote, are controlling here, and dictate the Port Parties' class exemption should be permitted to take effect.

⁶ BNSF Trackage Rights, FD 35601 (STB Served June 19, 2013) slip op. at 7 (footnote omitted) (citing Saratoga & N. Creek Ry. -Operating Exemption – Tahawus Line, Docket No. FD 35631 (STB Served Oct. 11, 2012), slip op. at 4); BNSF Ry - Discontinuance of Trackage Rights Exemption - in Peoria & Tazewell Cntys., Ill. Docket No. AB 6 (Sub- No. 470X) et al. (STB Served April 26, 2011) slip op. at 11-12; Sioux Valley Reg'l R.R. Auth - Trackage Rights Emption – Lines of South Dakota, Docket No. FD 34646 (STB Served Jan 19, 2005) slip op. at 4; Buckingham Branch R. R. – Lease – CSX Transp., Inc., Docket No. 34495 (STB Served Nov. 5, 2005), slip op. at 11); see also Wisconsin Central Ltd. – Trackage Rights Exemption – Lines of Union Pacific Railroad Company and Illinois Central Railroad Company, Docket No. FD 35992 (STB Served Mar. 4, 2016).

In Wisconsin Central, like the situation here, an interested rail carrier (in that case, Union Pacific Railroad Company – “UP”) argued that the Board should, at a minimum, withhold action of the disputed class exemption due to an asserted disagreement over the terms of the governing trackage rights contract. The Board disagreed with UP, noting that the challenged exemption was merely permissive, was not dispositive of the parties’ respective contract rights, and that the notice-filer had presented a transaction qualifying for an exemption. The Board observed that UP’s contract-based objections were not properly before the Board, but instead should be raised in an appropriate forum elsewhere. After a brief housekeeping stay to permit the prompt disposition of UP’s arguments for more extensive postponement, the Board ruled that the class exemption should be permitted to take effect. The present proceeding does not differ materially from the facts in Wisconsin Central, and, accordingly, the Board should deny the Petition.

As with Wisconsin Central, whether CBRL has breached the Management Agreement is open for resolution in a separate forum, but that question and has no bearing on the Exemption Filing at issue here. The transfer of rights between related corporate entities is not controversial from a Board perspective, and CBRL strains to convince the Board that the Port Parties’ invocation of the Board’s class exemption procedures is anything but “plain vanilla,” although that is precisely what it is – the routine invocation of the class exemption proceedings for an intra-corporate family transaction. As an attempt to grab at the last straw, CBRL cannot leverage its case by pointing to a dispute that may be addressed elsewhere, and, as such, the Board must deny the Petition.

While it may be that the Port and CBRL are to become involved in a contract dispute, the Board repeatedly has held that such matters typically do not give rise to the sort of

controversy that warrants rejection of a class exemption filing.⁷ Moreover, the cases upon which CBRL relies in support of its argument for rejection of the Exemption Filing – such as Rail Switching Services, Inc. – Operation Exemption – Pemiscot County Port Authority, Docket No. FD 35685, et al. (STB served Jan. 8, 2013); and US Rail Corporation – Lease and Operation Exemption – Shannon G., a New Jersey Limited Liability Company, Docket No. FD 35042 (STB served Oct. 8, 2008) – are factually distinguishable as agency precedent bears out. As the Board put it in Steelriver, in a virtually identical context:

The Board rejected or revoked the notices in these cited cases [including Winamac Southern Railway – Trackage Rights Exemption – A. & R. Line, Inc., FD 35208 (STB served Jan. 9, 2009) (“Winamac”), one of the cases upon which CBRL relies here] because of questions and controversy surrounding key components of the transaction at issue. For example, in Winamac, parties disputed the validity of the trackage rights agreement upon which the sought trackage rights exemption would be based. None of these cases involved controversy merely due to pending litigation.⁸

CBRL does not dispute the validity of the transaction among the Port and Coos Rail, and CBRL nowhere argues that the Port is not legally entitled to vest common carrier responsibilities in a sister entity as other rail line owners have done. Instead, CBRL contends that the Port’s desire to take operations of its own Line in-house has engendered an external dispute not about the legitimacy of the agreement governing the transfer of operating rights to Coos Rail from the Port, but instead concerning the Management Agreement between the Port and CBRL. There is no genuine controversy over “key components” of the intra-corporate family transaction that is

⁷ See, e.g., Grand Elk Railroad, Inc. – Acquisition of Incidental Trackage Rights Exemption – Norfolk southern Railway Company, Docket No. FD 35187 (Sub-No. 1) (STB served Nov. 1, 2016) slip op. at 3 (citing to Wisconsin Central to deny rejection of an exemption notice over a transaction opponent’s argument that the presence of a contractual dispute warranted rejection of the notice as controversial); Steelriver Infrastructure Partners LP, et al. – Control Exemption – Patriot Rail Corp., et al., Docket No. FD 35622 (STB served Jun. 15, 2012) (“Steelriver”) slip op. at 3 (litigation among parties does not create a controversy warranting rejection of an exemption notice).

⁸ Steelriver, slip op. at 3, footnote 5.

the subject of the Exemption Filing, and, in keeping with precedent, the Board should deny CBRL's attempt to have the Port Parties' filing rejected as allegedly "controversial."

2. The Exemption Filing Contains No Materially False or Misleading Statements; But CBRL's Petition Does.

Perhaps sensing the weakness of its claims of controversy as a basis for rejection of the Exemption Filing, CBRL pivots, arguing that the Exemption Filing should be rejected as void ab initio due to the presence of allegedly false and misleading statements. The Exemption Filing contains no false or misleading statements that could fairly be characterized as material to the disposition of this proceeding. Rather, the only party here that has attempted to mislead the agency is CBRL, not the Port Parties.

In support of outright rejection of the Exemption Filing, CBRL claims that the Port Parties' exemption notice is factually deficient in the following respects:

- The Port Parties inaccurately stated that the agreement governing CBRL's operations over the Line is a "lease," when in fact it is a Management Agreement.

In order for a verified notice of exemption to be deemed void on the basis of false or misleading statements, the statements or information set forth therein must actually be material to the transaction and the class exemption procedures invoked; where the complained-of statements are not material to whether the filer has properly invoked the disputed class exemption, the Board will not reject the notice.⁹ Here, the Port Parties agree that the Exemption

⁹ R.J. Corman Railroad Company/Pennsylvania Lines, Inc. – Abandonment Exemption – In Clearfield, Jefferson, and Indiana Counties, PA, Docket No. AB-491 (Sub-No. 2X) (STB served Dec. 11, 2008), slip op. at 2-3; Northwestern Pacific Railroad Company – Change in Operators Exemption – North Coast Railroad Authority, Sonoma-Marín Area Rail Transit District and Northwestern Pacific Railway Co., Docket No. 35073 (STB served Sep. 7, 2007) slip op. at 2 (citing Central Illinois Railroad Company – Lease and Operation Exemption – Lines of The Burlington Northern and Santa Fe Railway Company at Chicago, Cook County, Ill., Docket No. FD 33960 (STB served Sep. 12, 2002), slip op at 4) (trivial misstatements contained in a notice of exemption are not material to the invocation of the class exemption proceeding and

Filing incorrectly described the Management Agreement as a lease, but such a minor, erroneous reference to the agreement is not materially false or misleading. The inadvertent reference to a “lease” is neither prejudicial to CBRL nor pivotal to the class exemption, particularly when the Management Agreement is not the agreement governing the intra-corporate family transaction that is the subject of this proceeding. CBRL presents a technical distinction without difference. Notably, CBRL provides no explanation for why this minor and inadvertent misstatement is consequential or renders the exemption predicated on false pretense.

- The Port Parties did not mention in the Exemption Filing that the Port and CBRL have a contract dispute for which CBRL has initiated arbitration.

In the first place, the Port Parties did mention the possibility an emerging contractual dispute. See Exemption Filing at p. 2. Additionally, at the time the Exemption Filing was made, CBRL had not yet sent its Arbitration Demand. The Port Parties could not have disclosed a fact (an arbitration demand) that did not yet exist. But the fact that the Port and CBRL have an agreement under which CBRL currently operates on the Line, and the fact that CBRL has invoked arbitration in an effort to prevent the Port from taking Line operations in-house by way of Coos Rail do not mean that the Port Parties cannot secure permissive authority for Coos Rail to assume operations should the Port’s rights to install Coos Rail and to end its relationship with CBRL be found to be legally enforceable.¹⁰

thus do not constitute the sort of false and misleading statements that would warrant voiding an exemption filing); cf. Central Kansas Railway, LLC – Abandonment Exemption – In Marion and McPherson Counties, Kan., Docket No. AB-406 (Sub-No 6X) (STB served Dec. 8, 1999) (in the context of class exemption, an omission or misstatement would be material to the transaction only if the information affects bears on eligibility to invoke the class exemption).

¹⁰ Ohio River Partners LLC – Acquisition and Operation Exemption – Hannibal Develop., LLC. Docket No. FD 35984 (Apr. 1, 2016) slip op. at 3 (where the notice-filer “has provided the information required by our regulations, . . . its failure to disclose” the presence of a contractual dispute involving a third party potentially bearing on the contract rights of the notice-filer does not make the notice false and misleading).

- The Port Parties falsely represented to the Board that CBRL no longer wished to operate the Line.

CBRL has been unclear about its intentions with regard to its succession planning in operating the Line, which is part of the purpose behind the Exemption Filing. CBRL is now representing that CBRL does not want to end operations on the Line. Rather, CBRL's owners wish to exit the railroad business, and so are seeking to sell a controlling interest in CBRL to a third party. While the Port Parties better understand the intent of CBRL's owners – that is, their current plan to transfer of control of CBRL – the Port objects to such an arrangement for a number of reasons, including CBRL's failure to provide relevant information regarding a potential new party operating the Port's railroad. On that note, the Port has determined that CBRL is failing to comply with its obligations under the Management Agreement, which is primary among the reasons why the Port has decided to pursue in-house operation of the Line and to press CBRL to end terminate its common carrier status on the Line.

Although the Port Parties' characterization of CBRL's evolving wishes may be imprecise given CBRL's lack of communication, the Port Parties submit that this statement is immaterial to the subject class exemption proceeding, and that the subject is not controlling to the outcome of the Petition. The facts that are truly relevant to the Exemption Filing are unchanged. Specifically, the Port plans to take operation of the Line in-house, and, although it currently possesses the regulatory authority to conduct common carrier operations in its own name, the Port has determined that it would be advisable to transfer operating rights to a sister entity to which the Port would look going forward to provide rail service in place of or alongside (if necessary) CBRL.

- The Port Parties did not advise the Board that neither the Port nor Coos Rail may operate the Line without approval from the Oregon Department of Transportation's Rail Administrator ("ODOT") and the Governor.

This point is flatly wrong and, even if it was correct (which it is not), it is immaterial to the Port Parties' efforts to secure advance authorization for the transaction. CBRL provides no support for the bald assertion that the Port and/or Coos Rail require advance approval from ODOT and the Governor to commence operations. There is no law or regulation requiring such approval prior to the commencement of common carrier operations or a change in operator. CBRL nowhere identifies the source of the asserted legal obligation under state law, nor does it supply any document to substantiate its assertion that the Port Parties must obtain state permission to undertake the proposed intra-corporate family transaction. For that matter, CBRL fails to supply any precedent supporting the proposition that not mentioning any state pre-approval process in the Exemption Filing warrants rejecting that filing or voiding the notice, particularly where CBRL made no such disclosure of alleged state approval processes in its own operation notice of exemption filing back in August of 2011.

The alleged state pre-approval process is more fiction than fact. It appears that the basis of CBRL's claim derives from its Demand for Arbitration, and that the Demand for Arbitration (which is spectacularly unspecific), in turn, relates to a funding instrument under which the Governor is entitled, at her discretion, to require prior approval for certain, unspecified actions relating to the operation and maintenance of, and capital investment in, the Line. Selected portions of the subject funding instrument – Exhibit F to an Oregon Financing Contract – are attached hereto as Exhibit A. CBRL's statement is misleading in that it presupposes a state pre-approval process for in-house operation of the Line that does not necessarily exist, and suggests (falsely) that the Port Parties have either breached a legal obligation or that they would be unable

to obtain state approval in the first place if permission actually were needed.¹¹ In either event, CBRL is misleading the Board, not the Port Parties. This allegation is just more of the same CBRL grasping, untethered to fact and intended merely to block the Port's transition plans.

A. The Subject Class Exemption Authority Should Not Be Stayed.

Wrongly assuming, as it does, that the Board will be persuaded to reject the Exemption Filing, CBRL then urges the Board to stay the effectiveness of the exemption – which otherwise would take effect in the absence of adverse Board action on June 30, 2018 – pending a ruling on the rejection element of CBRL's Petition. But the foregoing discussion of the first part of CBRL's Petition demonstrates that CBRL will not prevail in its efforts to have the Board reject the Exemption Filing, and for that reason and others CBRL's request for injunctive relief must be denied also. CBRL is not entitled to the extraordinary relief of an injunction;¹² it cannot satisfy any of the four prongs for such relief under the applicable Holiday Tours¹³ standard, let alone all of them.

¹¹ As matter has it, ODOT and the State of Oregon have advised the Port that they will not intervene in this matter, and thus do not object to the Port's plans

¹² "A preliminary injunction is an extraordinary remedy that should be granted only when the party seeking the relief, by a clear showing, carries the burden of persuasion." Cobell v. Norton, 391 F.3d 251, 258 (2004) (citing Mazurek v. Armstrong, 520 U.S. 968, 972 (1997)). The Board requires a party to make a very strong showing of entitlement to equitable relief. "A preliminary injunction is an extraordinary remedy and will generally not be granted unless the requesting party can show that it faces unredressable actual and imminent harm that would be prevented by an injunction." Richard Best Transfer, Inc. v. Union Pac. R.R. Co., Docket No. 42149 (STB served Dec. 22, 2016) ("Richard Best") (emphasis added) (denying a preliminary injunction in connection with an unreasonable practices dispute, where the complainant argued that it needed the injunction or it would go out of business due to carrier rate increases). Just as in Richard Best, such an extraordinary remedy is not warranted here.

¹³ Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 842-43 (D.C. Cir. 1977) (citing Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958)).

1. No Likelihood of Success on the Merits.

For all the reasons laid out above, it is highly unlikely that CBRL will prevail in its efforts to have the Board pre-judge the merits of its contract-based claims and reject the Port Parties' invocation of the subject class exemption procedures. The Port Parties have demonstrated that there is no genuine controversy here, and certainly not any that warrants Board review of the proposed transaction under a more exacting regulatory process. And they have shown that they have not tendered any materially false or misleading statements in the Exemption Filing, although CBRL has done so in response. The Port Parties have demonstrated above that precedent supports allowing the subject exemption to take effect. Accordingly, CBRL has presented no sustainable case for rejection of the Exemption Filing, and, for this reason, CBRL's stay request fails to demonstrate any likelihood that it will prevail on the merits.

2. CBRL Will Suffer No Irreparable Harm Absent a Stay.

CBRL has not proven, and has not provided any facts to support the proposition, that it will suffer irreparable harm if the class exemption is allowed to take effect here. In fact, if CBRL is legally entitled to bar the Port from installing a new carrier on the Line, then it can seek to enjoin that transaction elsewhere, or, if damages are the more appropriate remedy under the circumstances, then it can pursue that relief in the appropriate venue. CBRL contends that shippers and rail service generally may suffer in the absence of a stay, suggesting, wrongly and unfairly, that the Port would deal with CBRL in a fashion that would compromise service to customers on the Port's Line. And, in any event, such misplaced concerns have nothing to do with harm to CBRL.

Furthermore, CBRL's claim of potentially serious operational and safety problems flowing from mere effectuation of the subject exemption requires wild speculation and, again, an assumption that the Port would act rashly and unwisely with its own assets. The Port and Coos Rail have every incentive to ensure smooth operations over the Line to preserve service for its customers with or without a transfer of operators. If anyone could threaten unsafe or inefficient operations by way of its actions or inactions, it would be CBRL. In fact, CBRL's irreparable harm argument suggests that CBRL would make a transition in operations problematic. And for these reasons, CBRL has failed to show that it will suffer irreparable harm, yet another reason why its request for a stay must be denied.

3. The Port Parties and the Public Face Harm From a Stay.

A stay would harm the Port and the public generally by forcing the Port to postpone its efforts to bring operation of the Line in-house, and to undertake related steps to address inadequate track maintenance under current operations concurrently with the commencement of in-house operations. A stay also would leverage CBRL's position in its contract dispute, as would rejection of the Exemption Filing. In arguing for a continuation of the *status quo*, CBRL is trying to advance its economic interests at the expense of the Port, which has determined that the public interest and the future of the Line depend upon a change in the manner in which the Line is operated and maintained. As such, CBRL's procedural handcuffs inure to the detriment of the Port, the Line it owns and the customers located on it, and, accordingly, CBRL has failed to satisfy yet another essential prong of the Holiday Tours standard.

4. Granting a Stay is not in the Public Interest.

The very reason that the Port Parties have made the Exemption Filing is in the interest of improved and effective rail service that also protects the Port's investments in its infrastructure. The Port Parties' Exemption Filing seeks authorization for a transaction that, whether effectuated very soon or in the more distant future, affords the Port much greater flexibility to more quickly assume operations under amicable or contentious circumstances, all in the interest of assuring customers access to efficient rail service that also properly accounts for rail line maintenance and upkeep. The Port Parties have no interest in, nor would they benefit from, a disorganized transition in operation, but the Port cannot act in the furtherance of the public interest if it lacks the flexibility to move to in-house operations as circumstances may warrant. CBRL's stay request runs counter to the public interest, and thus it must be denied.

CONCLUSION

WHEREFORE, the Port Parties respectfully request that CBRL's Petition To Reject Notice of Exemption and Request For Stay of Effective Date be denied.

Respectfully Submitted,

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**ATTORNEYS FOR OREGON INTERNATIONAL
PORT OF COOS BAY AND COOS BAY RAIL
LINE, INC.**

Dated: June 26, 2018

STATE OF OREGON
ECONOMIC AND COMMUNITY DEVELOPMENT DEPARTMENT
SPECIAL PUBLIC WORKS FUND
FINANCING CONTRACT

PROJECT NUMBER: L09007

PROJECT NAME: Acquisition of Coos Bay Rail Line

This Financing Contract ("Contract") is entered into between the State of Oregon acting by and through its Economic and Community Development Department ("Department") and the Oregon International Port of Coos Bay ("Borrower") with respect to financing for the Project. Unless the context requires otherwise, capitalized words and phrases not defined in the main body of this Contract shall have the meanings assigned to them in Exhibit A attached hereto.

The parties agree as follows:

1. Effective Date and Contract Documents. This Contract shall become effective on the date this Contract is fully executed and approved as required by applicable law. This Contract consists of the following parts:

- The Contract without Exhibits
- Exhibit A - General Definitions
- Exhibit B - Project Description
- Exhibit C - Project Budget
- Exhibit D - Sources of Repayment
- Exhibit E - Collateral
- Exhibit F - Additional Covenants
- Exhibit G - Legal Description of Real Property Collateral
- Exhibit G-1 - Legal Description for Real Property Collateral in Coos County
- Exhibit G-2 - Legal Description for Real Property Collateral in Lane County
- Exhibit G-3 - Legal Description for Real Property Collateral in Douglas County
- Exhibit H-1 - Form of Promissory Note for Loan I
- Exhibit H-2 - Form of Promissory Note for Loan II
- Exhibit I - Form of Legal Opinion
- Exhibit J - Permitted Liens on Real Property Collateral

2. Financing. In accordance with the terms and conditions of this Contract, Department shall provide Borrower, and Borrower shall accept from Department under this Contract, financing for the Project in a maximum amount of \$12,615,987 (the "Department Financing") which shall consist of the following:

- a. A short-term loan in the maximum amount of \$7,200,773 from the Special Public Works Fund created by ORS 285B.455 ("Loan I")
- b. A long-term loan in the maximum amount of \$5,415,214 from the Special Public Works Fund created by ORS 285B.455 ("Loan II").

Borrower shall complete the Project no later than the Closing Date (the "Project Completion Deadline") set by order of the Surface Transportation Board ("STB") in the matter of STB Finance Docket No. 35160 dated October 31, 2008 ("STB Order"), and except for payment of the amounts due pursuant to Section 9.f., the availability of the Department Financing under this Contract shall end on the date (the "Availability Termination Date") which is the earlier of the Project Completion Deadline or December 31, 2009. Department shall have no obligation to disburse any moneys under this Contract after the Availability Termination Date. All Department Financing is subject to, and Borrower shall comply with, the terms and conditions of this Contract.

35. **Attorney Fees and Other Expenses.** To the extent permitted by the Oregon Constitution and the Oregon Tort Claims Act, the prevailing party in any dispute arising from this Note shall be entitled to recover from the other its reasonable attorney fees, expenses, and costs at trial and on appeal. Reasonable attorney fees shall not exceed the rate charged to the State by its attorneys. The Borrower shall, on demand, pay to the State reasonable expenses incurred by the State in the collection of Loan payments.

36. **Governing Law, Consent to Jurisdiction.** This Contract and all other Financing Documents shall be governed by and construed in accordance with the laws of the State of Oregon without regard to principles of conflicts of law. Any claim, action, suit or proceeding (collectively, "Claim") between Department (and/or any other agency or department of the State of Oregon) and Borrower that arises from or relates to this Contract or the other Financing Documents shall be brought and conducted solely and exclusively within the Circuit Court of Marion County in the State of Oregon, other than Claims which must be brought and conducted in another Circuit Court of the State of Oregon; provided, however, if a Claim must be brought in a federal forum, then it shall be brought and conducted solely and exclusively within the United States District Court for the District of Oregon. In no event shall this Section be construed as a waiver by the State of Oregon of any form of defense or immunity, whether sovereign immunity, governmental immunity, immunity based on the eleventh amendment to the Constitution of the United States or otherwise, from any Claim or from the jurisdiction of any court. BORROWER, BY EXECUTION OF THIS CONTRACT, HEREBY CONSENTS TO THE IN PERSONAM JURISDICTION OF SAID COURTS.

37. **Counterparts.** This Contract may be executed in several counterparts, all of which when taken together shall constitute one agreement binding on all parties, notwithstanding that all parties are not signatories to the same counterpart. Each copy of this Contract so executed shall constitute an original.

IN WITNESS WHEREOF, the parties hereto have executed this Contract as of the dates set forth below their respective signatures. Borrower, by signature of its Authorized Officer, hereby acknowledges that it has read this Contract, understands it, and agrees to be bound by its terms and conditions.



STATE OF OREGON
acting by and through its Economic and
Community Development Department

By:

Laird Bryan, Operations Manager
Community Development Division

Date:

2/25/07



OREGON INTERNATIONAL PORT OF COOS BAY

By:

David Kronsteiner, Commission President

Date:

MARCH 12, 2009

EXHIBIT F
ADDITIONAL COVENANTS

Operation of Rail Line

The State of Oregon has an interest in the operation of the rail line that is the subject of this Contract and that will be purchased, in part, using the funds provided under this Contract. That interest includes, but is not limited to, the line's operation as a viable part of the transportation system in the State of Oregon during the term of the Loans and beyond. Such operation is in the public interest of the people of the State of Oregon.

Borrower shall comply with the following covenants during the term of this Contract:

1. Borrower shall consult with the ODOT Rail administrator regarding the line, including decisions to hire or contract for an operator, for the operation of the currently embargoed portion of the rail line. It is recognized that such State of Oregon consultation is necessary to protect the State's interest in the rail line operation, and provides additional rail expertise.
2. Borrower agrees that the Governor of the State of Oregon, or the Governor's designee, may intervene in the Port's management upon the occurrence of any events that the Governor or designee determines constitute a threat to the continuing viability or sustainable operation of the rail line, including the operation, maintenance and capital investment of the line. The Governor or designee, at their sole discretion and to the extent consistent with the federal regulation of the line, may require Borrower to obtain Governor or designee prior written approval for specified Borrower actions relating to operation, maintenance and capital investment. The Governor shall provide by letter to the Borrower the name and address of any individual so designated as the Governor's designee for these purposes.
3. Borrower shall provide the Governor and any designee, as so designated above, with such written notice as is required under the Public Meetings law of agenda items or any proposed action concerning rail line operation, rail line maintenance or capital investment concerning the rail line.

All of the above obligations and covenants are secured by the Collateral identified in this Contract.

The Governor may determine that the above obligations and covenants are no longer necessary to protect the interest of the State of Oregon. In the event of such determination, The Governor will notify Borrower, with a copy of such notice to the Department, of the termination of these requirements.

CERTIFICATE OF SERVICE

I hereby certify that I have today served the following party of record with a copy of the foregoing Reply of Oregon Internal Port of Coos Bay and Coos Bay Rail Line, Inc. to the Petition to Reject and Request for Stay of Coos Bay Railroad Operating Company, LLC d/b/a Coos Bay Rail Link by electronic delivery and U.S. Postal Service delivery, first class postage prepaid:

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Robert A. Wimbish

Dated: June 26, 2018