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February 17, 2005

VIA HAND DELIVERY - RETURN COPY

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW (7th fl.)
Washington, DC 20423-0001

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Dear Secretary Williams:

Enclosed for filing in STB Finance Docket No. 34337, Michael H. Meyer, Trustee in Bankruptcy for California Western Railroad, Inc. v. North Coast Railroad Authority, d/b/a Northwestern Pacific Railroad, are the original and ten copies of the Reply of Michael H. Meyer, Trustee in Bankruptcy for California Western Railroad, Inc.

Additional copies of this letter and of the Reply are enclosed for you to stamp to acknowledge your receipt of them and to return to me via the messenger.

Service of this letter and the Reply has been effected by facsimile transmitting and mailing copies thereof to Respondent's counsel.

If you have any question concerning the foregoing which you believe I may be able to answer or if I otherwise can be of assistance, please let me know.

Sincerely yours,


Fritz R. Kahn

enc.

cc: William A. Mullins, Esq.
David N. Chandler, Esq.

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BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

STB Finance Docket No. 34337

MICHAEL H. MEYER, TRUSTEE IN BANKRUPTCY FOR
CALIFORNIA WESTERN RAILROAD, INC.



v.

NORTH COAST RAILROAD AUTHORITY

d/b/a NORTHWESTERN PACIFIC RAILROAD

REPLY
OF
MICHAEL H. MEYER, TRUSTEE IN BANKRUPTCY FOR
CALIFORNIA WESTERN RAILROAD, INC.

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MICHAEL H. MEYER, TRUSTEE IN BANKRUPTCY
FOR CALIFORNIA WESTERN RAILROAD, INC.

Due and dated: February 17, 2005

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.



STB Finance Docket No. 34337

MICHAEL H. MEYER, TRUSTEE IN BANKRUPTCY FOR
CALIFORNIA WESTERN RAILROAD, INC.

v.

NORTH COAST RAILROAD AUTHORITY
d/b/a NORTHWESTERN PACIFIC RAILROAD

REPLY
OF
MICHAEL H. MEYER, TRUSTEE IN BANKRUPTCY FOR
CALIFORNIA WESTERN RAILROAD, INC.

Complainant, Michael H. Meyer, Trustee in Bankruptcy for California Western Railroad, Inc., pursuant to 49 C.F.R. 1104.13(a), replies to the Motion to Dismiss of the Respondent, North Coast Railroad Authority, d/b/a Northwestern Pacific Railroad, filed January 28, 2005, as follows:

A.

Respondent is a railroad subject to the Board's jurisdiction.

Respondent, at pages 6-7 of its Motion, contends that its status as an agency of the State of California renders it immune from the Complainant's claims for damages, pursuant to 49 U.S.C. 11704. The Board, as the Interstate Commerce Commission ("ICC") before it,

consistently has found that states or state agencies holding themselves out to be, and acting like, common carrier railroads are railroads subject to the agency's jurisdiction. See, STB Finance Docket No. 33134, North Carolina Railroad Company–Petition to Set Trackage Compensation and Other Terms and Conditions–Norfolk Southern Railway Company, et al., served May 3, 1999, and May 29, 1997; Southern Pacific Transportation Company–Abandonment Exemption–Los Angeles County, CA, 8 I.C.C.2d 495 (1992); Common Carrier Status of States, State Agencies, 363 I.C.C. 132 , 133 (1980), aff'd sub nom, Simmons v. Interstate Commerce Commission, 697 F.2d 326 (D.C. Cir. 1982); United States v. B.L.R. Co., 56 I.C.C. 121 (1919); California Canneries Co. v. Southern Pacific Co., 51 I.C.C. 500, 508 (1918). See, also, United States v. State of California, 297 U.S. 175, 185 (1936), in which the Supreme Court held that the State Belt Railroad, owned by the State of California, was a common carrier railroad subject to the provisions of the Federal Safety Appliance Act, 45 U.S.C. 2, as then administered by the ICC. (“California, by engaging in interstate commerce by rail, has subjected itself to the commerce power, and is liable for a violation of the Safety Appliance Act, as are other carriers . . .”)

Respondent cannot reasonably argue that it is not subject to the Board's jurisdiction, since, at page 4 of its Motion, Respondent concedes that it is a common carrier railroad, having acquired the 273-mile railroad line extending between Arcata and Shellville, California, pursuant to a series of transactions approved by the Board. Respondent, nevertheless, contends that the Supreme Court's decision in Federal Maritime Commission v. South Carolina Ports Authority, 535 U.S. 743 (2002), denies the Board the authority to grant the Complainant the relief he seeks for Respondent's failure to fulfill its obligations as a common carrier railroad, simply because Respondent is a State agency. Nothing in the cited case, however, indicates that the South

Carolina State Ports Authority submitted itself to the jurisdiction of the Federal Maritime Commission, in sharp contrast with the Respondent's repeated invocation of the Board's authority to become a common carrier railroad on the line between Arcata and Shellville. In the cited case, the State of South Carolina did not need the Federal Maritime Commission's approval to establish a port at Charleston. Respondent, however, could not have become a common carrier railroad without submitting itself to the Board's jurisdiction, notwithstanding that it was an agency of the State of California. If the Board were to be denied the right to enforce the provisions of the statute it has been entrusted to administer against a common carrier railroad which also happens to be an agency of a state, such pardoning power should be enacted by the Congress and not be assumed by the Board by dismissal of the Complainant's action, as the Respondent urges. See, Square D Co. v. Niagara Frontier Tariff Bur., 476 U.S. 409, 424 (1986); Lone Star Package Car Co. v. United States, 379 F. Supp. 1215, 1218 (N.D. Tex. 1974); Ownership of Stock in Freight Forwarders, 265 I.C.C. 73, 77 (1947).

B.

The Claimant's damages are not time barred.

Noting that 49 U.S.C. 11705(c) ordinarily requires a complaint for damages to be filed with the Board within two years after the claim accrues, the Respondent, at pages 7-9 of its Motion, contends that Board should dismiss the Complainant's damage claims, since his Complaint was filed more than two years after the last possible date that, according to the Respondent, any of the damage claims arose.

Respondent seems to have forgotten that the Complainant is the Trustee of a railroad in a pending bankruptcy proceeding and that section 108(a) of the Bankruptcy Act, 11 U.S.C. 108(a),

extends the statute of limitations so as to include any claims which are not time barred as of the date of the filing of the bankruptcy petition, so long as the debtor's or trustee's complaint for damages is filed within two years of the date of the filing of the bankruptcy petition. See, B. J. McAdams, Inc. v. Sugar Foods Corporation, 171 B.R. 12 (Bankr. S.D. N.Y. 1994); North Penn Transfer, Inc. v. Victaulic Company, 859 F. Supp. 154, 164 (E.D. Pa. 1994); Motor Carrier Audit and Collection Company v. Lighting Products, Inc., 113 B.R. 424 (Bankr. N.D. Ill. 1989).

California Western Railroad ("CWR") filed its bankruptcy petition on December 3, 2002, and the Complaint in the instant proceeding was filed on December 1, 2004. Accordingly, Complainant can recover damages sustained by CWR any time after December 3, 2000. The railroad's principal shipper, Georgia Pacific Corporation, operated its lumber mill at Fort Bragg until September 2002. As asserted in the Complaint, Georgia Pacific Corporation tendered an average of 60 carloads of lumber each month, yielding the railroad average revenue of \$500 per car. Respondent's failure to maintain an interchange at Willits or to operate its railroad line between Willits and Penngrove during the twenty-two months between December 3, 2000, and September 2002 cost CWR some \$660,000 of lost freight revenue. With an operating ratio of approximately eighty percent, that represents a loss of \$132,000 net revenue.

Moreover, Respondent errs in contending, at pages 3 and 8 of its Motion, that Complainant is seeking to recover damages only for the loss of the Georgia Pacific Corporation's lumber business. The Complaint notes that the Complainant has received expressions of interest in having CWR haul logs and containers of waste to sites on the Respondent's railroad line and has had to turn away that business because the line is dormant, occasioning CWR further losses for which damages are sought by Complainant.

C.

Respondent neither avoided nor responded to Order No. 21.

At page 9-12 of its Motion, Respondent, in effect, maintains that it cannot be faulted for not operating its railroad line between Arcata and Shellville, because the Federal Railroad Administration ("FRA") shut it down when it entered FRA Emergency Order No. 21. The FRA's Order, a copy of which was attached to the Complaint, details how many times representatives of the FRA and the California Public Utilities Commission ("CPUC") performed track inspections of the Respondent's railroad line, pointing out the defects in Respondent's facilities and practices which posed a threat to the safety of operations on the property. The FRA's Order notes that Respondent and others time and again promised FRA and CPUC that the railroad line would be rehabilitated to minimum standards, only to later break those promises. FRA finally, on November 25, 1998, concluded that continued use of the Respondent's railroad line posed an imminent and unacceptable threat to public safety and ordered the cessation of operations on its entire length, between Arcata and Shellville.

FRA Emergency Order No. 21, however, pointed out that, if Respondent made specified repairs and took other corrective steps, the Order would be lifted, if not for the entire line, at least for those portions of the line which FRA inspection established could be operated safely. In fact, FRA's Order in the meantime has been amended to permit certain operations at Willits and between Lombard and Penngrove. For the most part, however, Respondent has failed to rehabilitate its railroad line to permit the safe resumption of service, and the preponderance of railroad line remains shut down.

In short, it was the Respondent's refusal to correct the specified defects in its railroad line

that resulted in the entry of FRA's Order, and Respondent's failure to make the necessary repairs and adopt the corrective measures has kept the FRA's Order in force and the railroad line, between Arcata and Penngrove, inoperable.

The Respondent seeks to avoid being blamed for having brought on the FRA's Order and not effecting the railroad line's rehabilitation by stating, on page 11 of its Motion, that the FRA's Order recognized that operations on the Respondent's line at the time were being conducted under contract by Rail-Ways, Inc. Rail-Ways, Inc., however, was not the common carrier railroad authorized by decision of the Board to render service on Respondent's railroad line. Rail-Ways, Inc., was a mere contract operator, and the responsibility for rendering service on the railroad line remained with the Respondent. See, STB Finance Docket No. 34551, Standard Terminal Railroad of New Jersey–Acquisition Exemption–Rail Line of Joseph C. Horner, served October 8, 2004; STB Finance Docket No. 33995, SF&L Railway, Inc.–Acquisition and Operation Exemption–Toledo, Peoria and Western Railway Corporation Between La Harpe and Peoria, IL, served January 16, 2001.

D.

Respondent's lease of its line was not consummated.

Respondent, at pages 12-14 of its Motion, contends that it cannot be held responsible for repairing and correcting the defects in its railroad line or for resuming operations on the property, because the Respondent entered into a lease of 318 miles of its railroad line, between Fairhaven and Lombard, to Northwestern Pacific Railway Co, L.L.C., approved by the Board by its Notice in STB Finance Docket No. 33998, Northwestern Pacific Railway Co. LLC–Lease and Operation Exemption–North Coast Railroad Authority, Northwestern Pacific Railroad Authority and

Golden Gate Bridge, Highway and Transportation District, served February 6, 2001. The grant of authority by the Board was merely permissive, however, and not mandatory. See, STB Finance Docket No. 34630 (Sub-No. 1), Dakota Southern Railway Company–Trackage Rights Exemption–State of South Dakota, et al., served December 29, 2004; STB Finance Docket No. 33905, Lackawanna County Railroad Authority–Acquisition Exemption–F&L Realty, Inc., served October 22, 2001; STB Finance Docket No. 33508, Missouri Central Railroad Company–Acquisition and Operation Exemption–Line of Union Pacific Railroad Company, served September 14, 1999.

The lease by Northwestern Pacific Railway Co., L.L.C. , of the Respondent’s railroad line never was consummated. The commitment by the State of California of sufficient funds to permit the rehabilitation of the line -- which was a condition of the lease -- has not been forthcoming. Accordingly, at no time did, or could, Northwestern Pacific Railway Co., L.L.C., exercise the authority conferred by the Board and commence common carrier railroad operations on Respondent’s railroad line between Arcata and Shellville.¹ The company never held itself out as a common carrier railroad, and its name did not and does not appear in The Official Railway Guide or any of the other standard railroad references. It was not and is not a member of the American Short Line and Regional Railroad Association; nor was it or is it listed in the directory of regional and short line railroad published by Trains magazine.²

¹ Between mid-February 2001 and mid-September 2001, Northwestern Pacific Railway, L.L.C., handled some traffic for the Respondent over the 27-mile segment between Petaluma and Shellville, when it terminated its contract with the Respondent over a payments dispute.

² The U.S. Railroad Retirement Board on August 27, 2001, found Northwestern Pacific Railway Company, L.L.C., to be a covered employer, because, as of July 25, 2000, the company

Since the acquisition and operation exemption granted by the Board never was consummated by Northwestern Pacific Railway Company, L.L.C., Respondent remains the only common carrier railroad on its railroad line. That the rehabilitation of the railroad line is estimated to cost in the millions of dollars and will require the overcoming of environmental and wildlife hurdles, as the Respondent laments on page 12 of its Motion, does not excuse the Respondent's failure to fulfill its common carrier obligation. As the Board said in STB Finance Docket No. 33989, Pejeboscot Industrial Park, Inc., d/b/a Grimm Industries—Petition for Declaratory Order, served May 15, 2003:

Respondents cannot lawfully make fulfilling their statutory obligations contingent upon whether they think it is "worth it" to do so. Rather, a carrier must adhere to its statutory obligations even if it suffers hardship in so doing. See, e.g., Decatur County Comm'rs v. Surface Transp Bd., 308 F.3d 710, 715 (7th Cir, 2002) ("[railroads] may not refuse to provide service merely because to do so would be inconvenient or unprofitable")(citing G. S. Roofing Prods. Co. v. Surface Transp Bd., 143 F.3d 387, 391 (8th Cir. 1998)); Classification Ratings on Chemicals, 3 I.C.C.2d 331, 337-38 (1986) (Classification Ratings).(railroads may not avoid their obligations to provide rates or service because the commodities in question are hazardous and, if not handled safely, could potentially expose the carriers to substantial financial liability). The only appropriate mechanisms a railroad may employ to excuse itself, permanently or temporarily, from its common carrier obligations on a line of railroad are abandonment or embargo, and MEC has pursued neither.

Similarly, in Interstate Commerce Commission, et al. v. Baltimore and Annapolis R. Co., et al., 398 F. Supp 454, 466-67 (D. Md. 1975, aff'd, 537 F.2d 77 (4th Cir. 1976), the court held:

The Interstate Commerce Act and the common law impose duties upon the railroad to provide and furnish transportation upon reasonable request therefor and to furnish safe and adequate car service. Under neither the statute nor the common law is the duty to provide transportation and car service absolute. The carrier has a right to issue a temporary embargo in times of emergency and a validly imposed embargo may therefore be a defense to a damage action under the

had hired an unspecified number of maintenance of way employees.

statute or the common law for failure to provide transportation or car service upon reasonable request. But while the railroad's duty can be qualified or excused by the existence of a valid embargo, the railroad will nevertheless become liable for damages subsequent to the time at which the embargo's validity ceases [citations and footnotes omitted].

Respondent neither has secured the Board's abandonment authorization; nor has it embargoed its railroad line. At page 10 of its Motion, Respondent infers that its railroad line is embargoed. Respondent may have embargoed the line following the entry of FRA Emergency Order No. 21; however, Respondent's embargo, no. 1-99, expired December 3, 1999. Northwestern Pacific Railway Co., L.L.C., posted an embargo of Respondent's railroad line even before it obtained the Board's authorization to lease it, but its embargo, no. 1-01, amendment no. 1, expired February 21, 2001. Accordingly, the Respondent remains under a statutory obligation to fulfill its duties as a common carrier railroad, and this it has failed to do to Complainant's damage.

D.

Complainant need not engage in a useless gesture.

Finally, at pages 12-13 of its Motion, the Respondent contends that it did not have to rehabilitate its railroad line and resume operations on it in the absence of a request by Complainant for service. Complainant is able to read the Federal Register as well as the next person, and, thus, has been on notice that Respondent, for want of critical repairs to its railroad line, has not been able to interchange traffic at Willits or to render any service on it railroad line between Willits and Pennngrove since November 25, 1998, when the FRA's Order was entered. Under the circumstances, for the Complainant to have asked the Respondent to start hauling shipments originating on the CWR and consigned to industries on the Respondent's railroad line

or on the lines of connecting carriers would have made no sense whatsoever. The Board at no time has demanded that parties engage in useless and frivolous undertakings. See, 49 C.F.R. 1104.8.

WHEREFORE, Complainant, Michael H. Meyer, Trustee in Bankruptcy for California Western Railroad, Inc., asks that the Motion of Respondent, North Coast Railroad Authority, d/b/a Northwest Pacific Railroad, be denied.

Respectfully submitted,

MICHAEL H. MEYER, TRUSTEE IN BANKRUPTCY
FOR CALIFORNIA WESTERN RAILROAD, INC.

By his attorneys,

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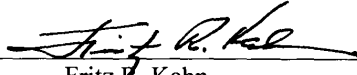

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Due and dated: February 17 , 2005

CERTIFICATE OF SERVICE

I certify that on this day I served a copy of the foregoing Reply upon North Coast Railroad Authority, d/b/a Northwestern Pacific Railroad, by facsimile transmitting a copy and mailing a copy, with first-class postage prepaid, to its counsel, William A. Mullins, Esq.

Dated at Washington, DC, this 17th day of February 2005.


Fritz R. Kahn