

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. AB-515 (Sub-No. 2)

**CENTRAL OREGON & PACIFIC RAILROAD, INC.
ABANDONMENT AND DISCONTINUANCE OF SERVICE
IN COOS, DOUGLAS, AND LANE COUNTIES, OR**

**PETITION FOR RECONSIDERATION OF
DECISION GRANTING PROTECTIVE ORDER AND
MOTION TO HOLD PROCEDURAL SCHEDULE IN ABEYANCE**

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COMES NOW, the Oregon International Port of Coos Bay (the "Port") by and through this Petition for Reconsideration of Decision Granting Protective Order and Motion to Hold Procedural Schedule in Abeyance ("Petition") and, pursuant to 49 C.F.R. § 1115, respectfully requests that the Surface Transportation Board ("STB" or "Board") reconsider the Protective Order issued in the above-captioned proceeding on July 15, 2008. As more fully explained herein, the Port submits that the Motion for Protective Order ("Motion"), filed by the Central Oregon & Pacific Railroad, Inc. ("CORP"), on July 14, 2008, is overbroad in that it protects from disclosure information that CORP has previously made public, and that is typically made public during abandonment and discontinuance proceedings. Accordingly, the Port requests that the Board reconsider its decision granting the Protective Order, and require CORP to resubmit its Motion (if it chooses to do) supported by a full explanation of the basis therefore, including a description of the information that is purportedly confidential and/or proprietary.

Furthermore, in light of the information that has been withheld from the public by CORP, the Board should hold the procedural schedule for the abandonment and discontinuance in abeyance until the appropriate information has been provided to the public by CORP. The abandonment and discontinuance of service over the Coos Bay line which has recently moved 5,000 or more carloads a year, is of grave importance and concern to the public because of the potential devastating economic impact that may result from the permanent loss of rail service. Thus, CORP must bear the burden to justify why any information in its abandonment application should be withheld from the public and any regulatory time-frames for filing opposition or protest to the abandonment should be held in abeyance until CORP has provided that information.

I. THE TIMING OF THE BOARD'S DECISION MADE IT IMPOSSIBLE TO CHALLENGE THE MOTION FOR PROTECTIVE ORDER.

The Port is sympathetic to the compressed time-frame that governs the Board's consideration of an abandonment and discontinuance proceeding. 49 C.F.R. § 1152.26. However, those time-frames are not statutory and the basic considerations of due process require that interested parties have a meaningful opportunity to participate in matters brought before the Board, including matters of a seemingly routine nature, such as a request for a protective order. Here, the Board's decision granting the Protective Order was issued no more than a day after CORP filed its Motion. As such, the Port did not have the opportunity to submit its opposition or even make a full assessment of what had been redacted and labeled Highly Confidential in CORP's three volume application.

As a practical matter, the Port had less than twenty-four hours to respond to CORP's motion. Late in the afternoon on Monday, July 14, 2008, CORP's abandonment and discontinuance application and the accompanying Motion were listed on the "Filings" page of

the STB's website. Copies of both filings were not immediately available, and did not become available online until mid-morning on Tuesday, July 15th. The Port's counsel received a service-copy of the application and the Motion at the close of business on July 14th. Port's counsel began reviewed the Motion in detail, began reviewing the application, and commenced initial efforts to assess what data had been withheld. By mid-afternoon on the 15th, the Board had already released its decision granting CORP's protective order. Thus, the Port's counsel had less than a full work-day to attempt to ascertain what had been withheld from the three volume application, confer with its client, and to prepare, and file its opposition. By any measure, even under the compressed time-frame governing abandonment proceedings, the Port was not afforded a meaningful opportunity to oppose the Motion. For this reason alone, the Board should reconsider and withdraw its decision.¹

II. THE ORDER IS IMPROPER BECAUSE IT IS OVERBROAD.

A. CORP has used the Protective Order to protect information that it previously made public.

The Port also submits that the Protective Order is improper because it is overboard. In its Motion, CORP sought, and was (improperly) granted protection from releasing information that CORP has made public in other settings. For example, in the Verified Statement of Paul Lundberg accompanying the public version of CORP's Response to the Board's show cause

¹ Counsel for the Port signed the undertakings issued by the Board and submitted a copy to CORP's counsel yesterday (the same day the Board issues the Protective Order), with the reservation of the right of the Port to challenge the Protective Order. At 3:12 pm, the Port's counsel received a copy of the Highly Confidential version. However, CORP's counsel states it does not recognize or agree to such a reservation. There is apparently no confidential version of the document. Since the clock for the abandonment proceeding is presumably still ticking, notwithstanding all the information that has been withheld by CORP, the Port is filing this Motion before Port counsel has had a chance to review the Highly Confidential version to make a full assessment of what material has been redacted and fully compare the inconsistencies of the redactions within the application itself.

order in Finance Docket No. 35130, Mr. Lundberg stated that CORP's operating income for the Coos Bay Line for years 2002 and 2003 was, respectively, \$235,000 and \$552,000. V.S. Lundberg at 5. However, for purposes of CORP's abandonment and discontinuance application, the very same information is now withheld as highly confidential. Application at 5. Similarly, the public version of Mr. Lundberg's Verified Statement asserts that CORP's operating loss on the Coos Bay Line for the first nine months of 2007 was \$792,000. V.S. Lundberg at 5. Mr. Lundberg also disclosed CORP's operating loss for 2004 (\$578,000), 2005 (\$939,000), and 2006 (\$1.17 million.) Yet, in its Application, CORP declines to release its operating loss for its "base year" of September 2006 through August 2007.² Application at 2. Moreover, CORP's representations as to the sensitivity of the information that it has redacted are undermined substantially by CORP's public release of Exhibit 1 to the application, which appears to contain most of the information redacted from the Verified Statement of Michael R. Baranowski. While CORP may have made an inadvertent oversight, the release of this exhibit calls into question CORP's use of the highly confidential designation. Because the Port's counsel has just obtained access to the highly confidential version of CORP's application, the Port's counsel has not discerned the nature of all of the information that CORP has redacted from the public version in order to determine whether the information has been made public in other settings. In this regard, however, the protective order issued by the Board is overbroad, and the Board should direct CORP to review its designations to ensure that the underlying information is truly confidential, and has not been made available in other settings.

² CORP's application is itself inconsistent as to information that is public and information that is confidential: on page 2, CORP redacts its avoidable operating loss. But, on page 5, CORP states its base year operating loss as being approximately \$1.3 million. On page 11, CORP again redacts this figure.

B. The Protective Order is vague, and therefore potentially subject to abuse.

The Port also objects to the Protective Order's vague, and potentially overbroad definition of "Confidential Information." In STB Docket No. AB-459 (Sub-No. 2X), *Central Railroad Company of Indiana—Abandonment Exemption—in Dearborn, Decatur, Franklin, Ripley, and Shelby Counties, IN*, 1998 STB Lexis 1396 (Served Feb. 2, 1998), the Board modified a requested protective order that lacked sufficient specificity, limiting the order to information contained in the applicant's consolidated balance sheets. Similarly, in STB Docket No. AB-564, *Camas Prairie Railnet, Inc.—Abandonment—in Lewis, Nez Perce, and Idaho Counties, ID*, 2000 STB Lexis 314 (Served June 7, 2000), the Board granted a protective order covering a portion of the applicant's income statement and its forecasted car interchange and revenue division data. Thus, STB precedent supports narrowly-tailored protection of income statements and balance sheets concerning the overall financial condition of an applicant.

By contrast, CORP's definition of "Confidential Information" is vague, and apparently covers information that is typically disclosed in abandonment and discontinuance proceedings. CORP sought and (has apparently obtained) blanket protection of "traffic data," "confidential information" related to the "appraised-value of CORP-owned land," and "other confidential or proprietary business or personal information." Thus, in its application, CORP has withheld data concerning, among other things, aggregate carloads and revenues; avoidable on branch costs; maintenance of way expenses; maintenance of equipment costs; transportation costs; general administrative costs; avoidable off branch costs; net liquidation value; salvage value for rail, ties, and track materials, and property value. As explained below, such information is routinely made public in abandonment applications, and is seemingly of little competitive value.

C. CORP's Motion was not consistent with other recent abandonment applications that have not required such an order.

The Port believes that it is irregular for an abandonment applicant to request, and for the Board to grant a protective order covering its application. For example, the Port notes a comprehensive, 355-page abandonment application filed by the Union Pacific Railroad ("UPRR") in Docket No. AB-33 (Sub-No. 255), which included and made public detailed information about the subject line's net liquidation value and operating revenues and costs.³ UPRR provided information not only about the salvage value of its track and rail assets (Appendix C), but also the fair market value of the real property along the subject line (Appendix G). UPRR also provided, apparently without issue, data as to on-branch and off-branch costs (Appendix E). In Docket No. AB-303 (Sub-No. 27), Wisconsin Central Ltd. ("WCL") filed a comprehensive, two volume application, which did not entail simultaneous filing for a protective order.⁴ WCL publicly stated the subject line's operating losses, the salvage value of the track assets (Guthrie V.S.), and the value of the underlying real property (statement of Kenneth Young & Associates). Also, WCL provided shipper-specific carload and tonnage information (Exhibit 5). In Docket AB-55 (Sub-No. 640) CSX Transportation, Inc. submitted an exhaustive, 317 page application, which also was not filed subject to a protective order.⁵ None of the foregoing applicants sought protection of the type of data that CORP has redacted from the Verified Statements of Michael Baranowski (cost and revenue data, and net liquidation value), Charles W.

³ *Union Pacific Railroad Co.—Abandonment—In Carver and Scott Counties, MN (Chaska Industrial Lead)* (Application filed Dec. 13, 2007).

⁴ *Wisconsin Central, Ltd.—Abandonment—In Ozaukee, Sheboygan and Manitowoe Counties, WI* (Application filed June 30, 2004).

⁵ *CSX Transportation, Inc.—Abandonment—In Atkinson and Ware Counties, GA (Between Pearson and Waynesboro)* (Application filed Sept. 5, 2003).

Rex III (net liquidation value real estate), and Marc R. Bader (net liquidation value track assets). In fact, in a recent abandonment proceeding for another RailAmerica subsidiary, no protective order was sought or granted. *See* STB Docket No. AB-398 (Sub-No. 7X) *San Joaquin Valley Railroad Company—Abandonment Exemption—In Tulare County, CA* (Petition filed February 19, 2008). Accordingly, the Port believes that CORP’s request is peculiar and that it should have been incumbent upon CORP to explain more fully its reasons for seeking to protect information that is typically made public in an abandonment and discontinuance proceeding. The Port notes that the Motion rests entirely upon the conclusory assertions of CORP’s counsel that certain information contained in the abandonment application is “propriety and commercially sensitive.” Motion at 1. Given CORP’s use of the protective order to make wholesale redactions of expert testimony, the Port believes that CORP’s Motion should have been supported by a Verified Statement from its senior management explaining the nature of the harm CORP might suffer for specific information that CORP intends to redact from the application.

D. CORP’s competitive harm justification is dubious.

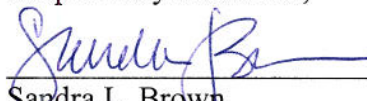
With regard to cost information pertaining to its rail operations and the net liquidated value of the subject line, CORP’s competitive harm / proprietary interest justification is particularly dubious. If CORP obtains authority to abandon and discontinue service over the balance of the Coos Bay Line, then its rail operations will cease entirely and it will have no competitive interest to protect. The information would not be relevant to competitors on CORP’s remaining Siskiyou Branch because of differences between operations. Similarly, CORP’s competitive and/or proprietary interest in the net liquidation value is difficult to discern. A potential purchaser of the rail assets would presumably perform its own due diligence, and its purchase offer would be informed by its own analysis of contemporaneous market conditions.

The same may be said of the eventual piecemeal distribution of CORP's right of way. A purchaser would be unlikely to rely upon CORP's assertion of a parcel's worth, and would instead conduct its own due diligence. Thus, it is difficult to see the harm that CORP faces from releasing such information. Furthermore, the information redacted and labeled Highly Confidential by CORP encompasses the information that CORP is required to provide the state and any interested party under the Board's regulations. 49 C.F.R. § 1152.14 and 1152.27.

III. CONCLUSION.

Accordingly, for the foregoing reasons, the Port respectfully requests that the Board withdraw the Protective Order issued in this proceeding on July 14, 2008, and require that CORP resubmit a new motion for a protective order that fully explains its basis, and describes in sufficient detail the nature of the information that CORP seeks to protect. In addition, the procedural schedule for the abandonment should be held in abeyance until all information that should be public is fully disclosed to the public.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that on this 16th day of July 2008, I caused the foregoing Petition for Reconsideration of Decision Granting Protective Order and Motion to Hold Procedural Schedule in Abeyance to be served upon all parties of record in this proceeding.


Michael H. Higgins