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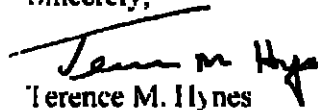
The Honorable Anne K. Quinlan, Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

Re: Docket No. AB-515 (Sub-No. 2), *Central Oregon & Pacific Railroad Inc. -
Abandonment and Discontinuance of Service - in Coos, Douglas, and Lane
Counties, Oregon (Coos Bay Rail Line)*

Dear Secretary Quinlan:

Enclosed for filing in the above-captioned proceeding is Applicant's Response in
Opposition to Port of Coos Bay's Petition for Reconsideration of Decision Granting Protective
Order and Motion to Hold Procedural Schedule in Abeyance.

Sincerely,


Terence M. Hynes

FMH:aat
Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

	)	
Central Oregon & Pacific Railroad, Inc. – Abandonment	)	
and Discontinuance of Service - in Coos, Douglas, and	)	Docket No AB-515 (Sub-No. 2)
Lane Counties, Oregon (Coos Bay Rail Line)	)	
	)	

**RESPONSE OF APPLICANT IN OPPOSITION TO PORT OF COOS BAY'S
PETITION FOR RECONSIDERATION OF DECISION GRANTING PROTECTIVE
ORDER AND MOTION TO HOLD PROCEDURAL SCHEDULE IN ABEYANCE**

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Dated July 23, 2008

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Central Oregon & Pacific Railroad, Inc - Abandonment)
and Discontinuance of Service - in Coos, Douglas, and) Docket No AB-515 (Sub-No. 2)
Lane Counties, Oregon (Coos Bay Rail Line))

**RESPONSE OF APPLICANT IN OPPOSITION TO PORT OF COOS BAY'S
PETITION FOR RECONSIDERATION OF DECISION GRANTING PROTECTIVE
ORDER AND MOTION TO HOLD PROCEDURAL SCHEDULE IN ABEYANCE.**

Central Oregon & Pacific Railroad Inc. ("CORP" or "Applicant") hereby responds to the "Petition for Reconsideration of Decision Granting Protective Order and Motion to Hold Procedural Schedule in Abeyance" (the "Port's Petition") filed in the above-captioned proceeding on July 16, 2008 by the Oregon International Port of Coos Bay (the "Port"). The Port's Petition asks the Board to "withdraw" the Protective Order issued in this proceeding on July 15, 2008, on the grounds that the Order is "overbroad" and that it was issued before the Port had an opportunity to oppose CORP's motion for such an order. In addition, the Port urges the Board to hold the procedural schedule in this case in abeyance "in light of the information that has been withheld from the public by CORP" (Port's Petition at 2) – even though the Port acknowledges that it received a copy of the Highly Confidential version of the Application within 24 hours after the Protective Order was issued. For the reasons set forth hereinafter, the Port's Petition should be denied.

CORP filed its Application for abandonment of, and discontinuance of service on, its "Coos Bay Subdivision" on July 14, 2008. The Application was accompanied by a standard Motion for Protective Order to govern the dissemination and use of confidential and commercially sensitive information during the course of this proceeding. The proposed form of Protective Order submitted by CORP was virtually identical to the protective orders issued by

the Board in numerous prior cases. Consistent with prior practice, the Board issued the requested Protective Order on July 15, 2008, finding that “[g]ood cause exists to grant the motion for protective order.” See Decision, STB Dkt. No. AB-515 (Sub-No. 2) (late release July 15, 2008) (“*Protective Order Decision*”).

The Board’s expeditious issuance of the *Protective Order Decision* enabled CORP promptly to make the Highly Confidential version of the Application available to interested parties. Counsel for the Port delivered the executed Undertakings contemplated by the Protective Order to CORP’s counsel via email on the evening of July 15, 2008. CORP then hand-delivered the Highly Confidential version of the Application to the Port’s counsel on July 16, 2008. See Port Petition at 3, n.1. Thus, as a result of the Board’s prompt action on CORP’s motion, the Highly Confidential version of the Application was served on the Port (and made available to other interested parties) less than 48 hours after it was filed with the Board.¹

Nevertheless, on the same day that it received a copy of the Highly Confidential version of the Application, the Port filed its Petition seeking “reconsideration” of the Board’s *Protective Order Decision*. In addition, the Port asked the Board to hold this proceeding in abeyance “until the appropriate information has been provided to the public by CORP” (Port’s Petition at 2) – even though the Port already had access to the entire unredacted Application. As the following discussion demonstrates, the Port has not satisfied the standards for reconsideration of the *Protective Order Decision*, nor has it articulated any legitimate basis for holding this case in “abeyance” or otherwise modifying the schedule prescribed by the Board’s abandonment regulations.

¹ To date, no party other than the Port has requested a copy of the Highly Confidential version of the Application.

I. THE PORT HAS FAILED TO SATISFY THE STANDARDS FOR RECONSIDERATION OF THE *PROTECTIVE ORDER DECISION*.

A petition for reconsideration of a Board decision will be granted only if the petitioner demonstrates either that

- (1) The prior action [of the Board] will be affected materially because of new evidence or changed circumstances [and/or]
- (2) The prior action involves material error.

49 C.F.R. § 1115.3(b) If a reconsideration petition does not meet one or both of these standards, it must be denied. *Pro-Go-Corp - Operation Exemption - In Suffolk County, NY*, STB Fin. Docket No. 35126 (June 13, 2008); *Union Pac. Corp - Control & Merger - S. Pac. Rail Corp.*, STB Fin. Docket No. 32760 (Sub-No. 42), 2006 WL 2348495, at *4 (Aug. 14, 2006)

The Port's Petition does not even mention these standards, much less make any serious attempt to satisfy them. The Port does not present any "new evidence" or "changed circumstances" that would warrant reversal of the *Protective Order Decision*. Nor does the Port's Petition demonstrate that the issuance in this proceeding of a Protective Order virtually identical to those routinely issued by the Board in numerous prior cases constituted "material error." Accordingly, the Port's Petition should be denied.

As an initial matter, the Port's Petition is difficult to fathom in light of the Port's failure to object to the virtually identical Protective Order issued recently by the Board in the related proceeding in Finance Docket No. 35130, *Central Oregon & Pacific Railroad Inc. - Coos Bay Rail Line (Show Cause Proceeding)*. The *Show Cause Proceeding* involves the same rail line, the same parties, many common facts and much of the same highly confidential information regarding the traffic, revenues and expenses associated with the Coos Bay Subdivision. The Port has been an active participant in the *Show Cause Proceeding*, filing extensive comments (and accompanying exhibits) on June 3, 2008. The Port did not object to the nearly identical

protective order issued in the *Show Cause Proceeding* – to the contrary, the Port availed itself of the protections afforded by that order by submitting both a “public” and a redacted “highly confidential” version of its submission in that case. There is no principled basis for the Port to challenge the Board’s decision to issue an essentially identical Protective Order in this proceeding

A. Protective Orders Are Both Common and Appropriate To Protect Highly Confidential Information Filed In Abandonment Proceedings.

The Port’s contention that “it is irregular for an abandonment applicant to request, and for the Board to grant a protective order” in abandonment proceedings (Port’s Petition at 6) is incorrect. The Board has issued protective orders in other abandonment cases – indeed, it did so as recently as three weeks ago. *See Los Angeles Metropolitan Transportation Authority – Abandonment Exemption – In Los Angeles County, CA*, Order, STB Dkt. No. AB-409 (Sub-No. 5X) (served July 2, 2008). The Protective Order issued in this case is indistinguishable from those the Board has issued in many prior abandonment and discontinuance of service cases. *See, e.g., id.: Denver & Rio Grande Ry. Historical Found. - Adverse Abandonment - In Mineral County, CO*, STB Docket No. AB-1014 (Dec. 20, 2007); *Norfolk Southern Ry. Co. - Discontinuance of Service Exemption - In Stanly County, NC*, STB Docket No. AB-290 (Sub-No. 254X) (Sept. 1, 2006); *BNSF Ry. Co. - Abandonment Exemption - In Oklahoma County, OK*, STB Docket No. AB-6 (Sub-No. 430X) (Nov. 23, 2005) (“Issuance of the protective order ensures that the confidential information will be used solely for these proceedings and not for other purposes.”); *CSX Transp. Inc. - Abandonment Exemption - In LaPorte, Porter, & Starke Counties, IN*, STB Docket No. AB-55 (Sub-No. 643X) (April 28, 2004) (“The unrestricted disclosure of confidential, proprietary, or commercially sensitive material could cause serious competitive injury.”) Indeed, the Port itself cites several cases in which the Board issued a

protective order in an abandonment case. *See, e.g., Camas Prairie Railnet Inc. – Abandonment – In Lewis, Nez Perce, and Idaho Counties, ID*, (served June 7, 2000) (granting protective order covering all information applicant requested be protected, without modification), *Central Railroad Company of Indiana – Abandonment Exemption – in Dearborn, Decatur, Franklin Ripley, and Shelby Counties, IN*, STB Dkt. No. AB 259 (Sub-No. 2X) (granting protective order to cover all material that applicant had designated, denying remainder as insufficiently specific and substituting Board's standard protective order for non-specific portion).

Any suggestion that confidential and commercially sensitive information should be afforded less protection in abandonment cases than in other types of Board proceedings makes no sense. It is not the nature of the proceeding that determines whether confidential data and information is worthy of protection. Rather, it is the nature of the information itself, and the potential harm that might result from public disclosure of such information, that warrants issuance of a protective order. For example, 49 U.S.C. § 11904 prohibits a rail carrier from publicly disclosing shipper-specific traffic data. The statute does not distinguish among particular types of proceedings in which such disclosure is made, because it is the release of the information itself, not the context in which it is publicly disclosed, that may cause competitive harm. It is for that reason that the Board routinely issues protective orders in any proceeding in which the parties are likely to make reference to shipper-specific traffic and revenue information.

The Port's further suggestion that CORP's motion for a protective order should be viewed as "peculiar" because the applicants in some prior abandonment cases chose not to request such an order (*see* Port's Petition at 6-7) is likewise without merit. The fact that a different applicant in a different case made a judgment not to seek protection of its proprietary

information from public disclosure provides no basis for a finding that the Protective Order issued in this proceeding is either unnecessary or inappropriate

Moreover, there is an important distinction between the circumstances of this case and of the cases upon which the Port relies. For example, *Union Pacific Railroad Co. Abandonment – In Carver and Scott Counties MN*, STB Dkt. No. AB-33 (Sub-No. 255) (filed Dec. 13, 2007), involved the proposed abandonment by a large Class I carrier, UP, of a 5.6-mile rail line with only one active shipper. Public disclosure of UP's revenues from, and costs of operating, such a miniscule portion of its rail system would not reveal meaningful information regarding UP's overall cost structure or revenues from other traffic. By contrast, public disclosure of the "Handling Carrier Charge" that CORP receives for moving cars in UP's account over the Coos Bay Subdivision (or other terms of CORP's arrangement with UP) would jeopardize the confidentiality of CORP's per-car revenues on traffic moving over its Siskiyou Subdivision, because CORP's marketing agreement with UP applies to traffic moving over both subdivisions. Likewise, because CORP's Coos Bay Subdivision accounts for nearly one-third of the total trackage operated by CORP, disclosure of detailed information regarding operating costs for the Coos Bay Subdivision would provide significant insight into the costs that CORP incurs in operating the adjoining portions of its rail system. Public dissemination of such data could cause substantial competitive harm to CORP.

In sum, the Protective Order issued in the instant case is fully consistent with longstanding Board precedent and the purpose of such orders. The Board correctly found that "good cause exists to grant the motion for protective order" proposed by Applicants, and the Port has not shown that the *Protective Order Decision* involved "material error." See 49 CFR § 1115.3(b)(1).

B. The Challenged Protective Order Contains Terms And Conditions That Are Fully Consistent With The Board's Well-Established Practice.

The terms and conditions of the challenged Protective Order are virtually identical to those the Board has routinely issued in prior proceedings. *See, e.g., Nittany and Bald Eagle Railroad Company – Temporary Trackage Rights Exemption – Norfolk Southern Railroad Company*, Decision, STB Dkt. No. 35119 (served April 9, 2008); *Canadian Pacific Railway Company et al – Control – Dakota, Minnesota & Eastern Railroad Corp., et al* Decision, STB Fin. Dkt. No. 35081 (served Sept. 21, 2007); *Fortress Investment Group, LLC et al. – Acquisition – Florida East Coast Railway, LLC*, Decision, STB Dkt. No. 35031 (served June 6, 2007); *The Indiana Rail Road Company - Acquisition - Soo Line Railroad Company*, STB Fin. Dkt. No. 34783 (served Dec. 22, 2005); *Paducah & Louisville Railway Inc – Acquisition – CSX Transportation, Inc.*, Decision STB Fin. Dkt. No. 34738 (served Aug. 19, 2005). Like the Protective Order issued here, the protective orders in these and many other cases define “Confidential Information” to include, *inter alia*, “traffic data . . . the identification of shippers and receivers in conjunction with shipper-specific or other traffic data; the confidential terms of contracts with shippers or carriers; confidential financial and cost data; divisions of rates, trackage rights compensation levels and other compensation between carriers, and other confidential or proprietary business or personal information.” Thus, the scope of the confidentiality provisions adopted in the *Protective Order Decision* is supported by longstanding precedent. Accordingly, the Port’s suggestion that the definition of “Confidential Information” set forth in the challenged Protective Order is either “vague” or “potentially overbroad” is meritless.

The sole difference between the categories of “Confidential Information” enumerated in the challenged Protective Order and the orders issued in prior cases is the inclusion in the

challenged Protective Order of a reference to "confidential information regarding the appraised value of CORP-owned land." *See* Protective Order, ¶ 1(b). Even absent such a specific reference, confidential appraisals and related information concerning the value of CORP's right-of-way would be eligible for protection under the definition of "Confidential Information" which includes "other confidential or proprietary business or personal information." *See id*. Nevertheless, CORP added a specific reference to appraisal information in order to eliminate any doubt regarding protection of that information under the proposed protective order. The *Protective Order Decision* explicitly acknowledged that confidential "information regarding the appraised value of CORP-owned land" is within the scope of the "Confidential Information" subject to the Protective Order. *Protective Order Decision* at 1.

There can be no real dispute that CORP's parcel-by-parcel appraisal of the value of the real property underlying the Coos Bay Subdivision is both highly confidential and commercially sensitive. Public disclosure of such information would be highly prejudicial to CORP because it would inform prospective purchasers of CORP's assessment of the value of the land. Public availability of CORP's appraisal would confer a substantial competitive advantage on potential buyers in land sale negotiations and would, in all likelihood, significantly reduce the amount that CORP would receive for its property (by establishing CORP's appraised value as the "ceiling" on any offer). The challenged Protective Order appropriately protects CORP's land appraisal from public disclosure, while providing a mechanism through which the Port's counsel and outside real estate expert can make use of that information for purposes of this proceeding.²

² The Port's assertion that a party seeking to acquire the land or rail assets constituting the Coos Bay Subdivision "would presumably perform its own due diligence" regarding the value of those assets (*see* Port's Petition at 7-8) misses the point. Giving one party access to the other party's internal valuation of the assets that are the subject of purchase negotiations would confer an undeniable advantage in such negotiations.

C. The Port Has Not Shown That The Terms Of The Protective Order Prejudice Its Ability To Participate Fully In This Proceeding.

The Port makes no attempt to show that its interests, or its ability to participate fully in this proceeding, are prejudiced by the Protective Order. The Port is represented by experienced transportation counsel in this abandonment proceeding. In addition, the Port has retained several outside consultants who submitted Verified Statements in support of the Port's related Application in Finance Docket No. 35160, *Oregon International Port of Coos Bay – Feeder Line Application – Coos Bay Line* (filed July 11, 2008). Under the terms of the Protective Order, those outside counsel and consultants will have full access to any information that CORP designates as "Highly Confidential" in either this abandonment case or in connection with proceedings on the Port's Feeder Line Application. Indeed, the Port's counsel executed the required Undertaking and obtained the Highly Confidential version of the Application within 24 hours after the Board issued the *Protective Order Decision*. See Port's Petition at 3, n 1. Counsel and consultants routinely represent the interests of their clients ably in proceedings that are subject to a protective order. The Port has made no allegation to the contrary, nor has it made any showing that its interests would be prejudiced in any way if the Protective Order remains in place.

The Port's assertion that CORP should be required to "justify why any information in its abandonment application should be withheld from the public" simply because the proposed abandonment "is of grave importance and concern to the public" (Port's Petition at 2) is wrong. As an initial matter, the Port's suggestion that the Protective Order prejudices the interests of the "public" is belied by the fact that no party other than the Port has requested access to the Highly Confidential version of the Application. Moreover, almost all Board proceedings are of "importance and concern" to a variety of interested parties. The alleged "importance" of a

proceeding does not provide a rational basis for denying protection to commercially sensitive information that may be used in the proceeding. To the contrary, issuance of a protective order promotes the interests of the litigants (and the Board) in obtaining data and information that may be helpful in reaching a just decision, while protecting parties from competitive or financial harm as a result of improper (and unnecessary) disclosure of their proprietary data and information.

The gravamen of the Port's complaint regarding the Protective Order appears to be that CORP has used the order to designate as "Highly Confidential" certain information that, the Port believes, should not be accorded "Highly Confidential" treatment. See Port's Petition at 3-5. 7 The Port's disagreement with CORP's designation of particular data and information as "Highly Confidential" does not provide a basis for "reconsideration" or "withdrawal" of the *Protective Order Decision*. Rather, Paragraph 10 of the Protective Order issued by the Board in this proceeding provides a procedure under which Port may challenge the designations made by CORP. If the Port genuinely believes that certain information has been inappropriately designated by CORP, the Protective Order affords it the right to file a motion pursuant to Paragraph 10 seeking redesignation of particular categories of information. Alternatively, the Port can raise its concerns with CORP and seek to negotiate modifications to CORP's designations. In either case, the Protective Order itself does not prejudice the Port's ability to seek access for in-house personnel to information to which the Port believes they should have access.³

³ Counsel for the Port and CORP have, in fact, engaged in discussions concerning the desire of Port in-house personnel to obtain access to certain materials that CORP has designated as "Highly Confidential." Those discussions are ongoing.

II. THE PORT HAS NOT SHOWN THAT ANY OF CORP'S DESIGNATIONS ARE INAPPROPRIATE.

Even if the Board were to treat the Port's Petition as, in essence, a motion challenging CORP's designations under Paragraph 10 of the Protective Order, there would be no basis to grant the Port's motion or to direct CORP to withdraw any designation. The materials designated as "Highly Confidential" by CORP fall into three categories: shipper-specific traffic and revenue data; information regarding CORP's operating expenses (and avoidable loss) on the Coos Bay Subdivision; and the confidential appraisal of the value of CORP's right-of-way land. As discussed above, the designation of these categories of data and information as "Highly Confidential" is fully consistent with both the terms of the Protective Order and the treatment of such data and information in prior Board proceedings.

The Port argues that CORP's designation of certain information as "Highly Confidential" was improper because that information (or similar information) was made public in other proceedings. *See* Petition at 4. Specifically, the Port points to the fact that CORP's 2002 and 2003 operating income for that portion of the Coos Bay Subdivision that was embargoed in September 2007 was disclosed in the public version of CORP's submission in the *Show Cause Proceeding*, but was designated "Highly Confidential" in this proceeding. *Id.* This discrepancy was due to an oversight on CORP's part in preparing its submission in the *Show Cause Proceeding*. Nevertheless, CORP acknowledges that the information is now in the public domain, and CORP does not object to giving all parties access to that particular information for purposes of this case. (Indeed, the public availability of those figures in the record before the Board in the *Show Cause Proceeding* effectively moots any concern about the ability of the "public" to have access to that information.)

The Port also suggests that Exhibit 1 to the Application, and all references to data set forth on Exhibit 1 in the Application and testimony of CORP's witnesses, ought to be reclassified as "public" information because CORP inadvertently included an unredacted Exhibit 1 in the "Public" version of the Application.¹ CORP's inadvertent error does not justify public dissemination of Exhibit 1 -- which contains both detailed cost information for the Coos Bay Subdivision and CORP's "avoidable loss" on the line calculated in accordance with the Board's abandonment regulations -- in this proceeding. As stated above, CORP's Coos Bay Subdivision constitutes a substantial portion of its existing rail operations. For that reason, disclosure of detailed information regarding operating costs for the Coos Bay Subdivision could compromise the confidentiality of the costs incurred by CORP in operating its adjoining lines. The Port offers no compelling reason why this commercially sensitive information should not be treated as Highly Confidential.

Finally, to the extent that any party has a legitimate need for access to information set forth in Exhibit 1, counsel for such party may obtain access to the information by executing the Undertaking prescribed by the Protective Order.

III. THE PORT'S MOTION TO HOLD THIS PROCEEDING IN ABEYANCE SHOULD BE DENIED.

The Port's "motion" to hold this proceeding in abeyance -- consisting of a single paragraph on page 2 of the Port's petition -- should be denied. As an initial matter, it is ironic that the Port -- which vociferously criticized CORP for its alleged delay in addressing the status

¹ The Port recognized that CORP's inclusion of Exhibit 1 in public version may have been an "inadvertent oversight." Port's Petition at 4. When CORP became aware of this oversight, it promptly filed a letter with the Board requesting that Exhibit 1 be removed from the "Public" version of the Application. See P. Hemmersbaugh Letter to Acting Secretary Quinlan (July 17, 2008), STB Dkt. No. AB-515 (Sub-No. 2). CORP also sent letters to all parties by hand delivery or overnight express, requesting that they remove Exhibit 1 from the "Public" version of the Application.

of the Coos Bay Subdivision – seeks to defer the proceeding in which the future of the line may be determined. The Board initiated the *Show Cause Proceeding* in response to concerns expressed by the Port (and other parties) that CORP was not acting swiftly enough to address the service disruption on the Coos Bay Subdivision. Nevertheless, the Port sought (and was granted) additional time to file its reply to CORP's submission in the *Show Cause Proceeding*. See Joint Motion for Extension of Time, SFB Lin. Dkt. No. 35130 (May 14, 2008). The Port's instant motion to hold this proceeding in abeyance is a transparent attempt by the Port to obtain a similar extension of time to respond to CORP's Application in this case.

In any event, as Parts I and II of this Reply demonstrate, the Port's assertions that the Board committed material error in issuing the *Protective Order Decision*, and that CORP has improperly designated certain data and information as "Highly Confidential" pursuant to the terms of the Protective Order have no merit. Accordingly, there is no legitimate reason for the Board to hold this proceeding in abeyance, or otherwise to modify the procedural schedule prescribed by its abandonment regulations, in order to permit further dissemination of that data and information to the "public." (Indeed, the Port obtained access to the information designated by CORP as "Highly Confidential" on July 16, 2008, and no other party has requested access to that information.) The Board should adhere to the procedural schedule established by its regulations, and the Port's unsupported motion to hold this proceeding in abeyance should be denied.

CONCLUSION

For all of the foregoing reasons, CORP respectfully urges the Board to deny the Port's
Petition in its entirety

Respectfully submitted,

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Counsel for Central Oregon & Pacific Railroad, Inc

Dated July 24, 2008

CERTIFICATE OF SERVICE

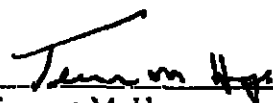
I hereby certify that I have caused the foregoing Response of Applicant in Opposition to Port of Coos Bay's Petition for Reconsideration of Board Decision Granting Protective Order and Motion to Hold Procedural Schedule in Abeyance to be served by email and/or first class mail, postage prepaid, this 24th day of July 2008 on all parties of record and the following persons:

Governor Theodore R. Kulongoski
State of Oregon
160 State Capitol
900 Court Street
Salem, Oregon 97301-4047

Lee Beyer, Chairman
Public Utility Commission of Oregon
550 Capitol St. N.E. #215
P O Box 2148
Salem, OR 97308-2148

Matthew Garrett, Director
Oregon Department of Transportation
355 Capitol St. N.E.
Salem, OR 97301-3871

I have also caused the foregoing Response of Applicant in Opposition to Port of Coos Bay's Petition for Reconsideration of Board Decision Granting Protective Order and Motion to Hold Procedural Schedule in Abeyance to be served by email and/or first class mail, postage prepaid, this 24th day of July 2008 on all parties who participated in SIB Finance Docket No. 35130, *Central Oregon & Pacific Railroad, Inc —Coos Bay Rail Line*.



Terence M. Hynes