

May 19, 2017

JOHN D. HEFFNER
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BY E-FILING

Ms. Cynthia T. Brown
Chief of Administration
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

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ENTERED
Office of Proceedings
May 19, 2017
Part of
Public Record

**RE: FD 36117, LRY, LLC D.B.A. LAKE RAILWAY – Petition for
Declaratory Order – Rail Line in Lake County, OR, and Modoc, CA**

Dear Ms. Brown:

I am submitting on behalf of Lake County, Oregon, its Reply to the above-captioned petition filed by LRY, d.b.a. Lake Railway. This Reply consists of two documents. The first is Lake County's Reply Argument including exhibits A and B. The second document identified as Exhibit C is a copy of the Reply that Defendant Lake County filed in the United States District Court for the District of Oregon in response to Lake Railway's Motion for TRO and Preliminary Injunction.

Sincerely yours,



John D. Heffner

Enclosures

cc: service list parties

8966823.1/SP/15556/1467/051717

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36117

**LRV, LLC D.B.A. LAKE RAILWAY
- PETITION FOR DECLARATORY ORDER -
RAIL LINE IN LAKE COUNTY, OR AND MODOC COUNTY, CA

REPLY OF LAKE COUNTY, OREGON**

Submitted by

John D. Heffner
Strasburger & Price, LLP
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(202) 742-8607

James E. Bailey, III
Bailey & Yarmo
780 NW York Drive
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Bend, OR 97701
(541)317-9000

Counsel for Lake County, OR

Date due: May 22, 2017

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36117

**LRY, LLC D.B.A. LAKE RAILWAY
- PETITION FOR DECLARATORY ORDER -
RAIL LINE IN LAKE COUNTY, OR AND MODOC COUNTY, CA**

REPLY OF LAKE COUNTY, OREGON

I.

Introduction

Lake County, OR (“Lake County”), a political subdivision established under Oregon law, files this response to the Petition for Declaratory Order submitted by LRY d.b.a. Lake Railway (“LRY”) in the above-captioned proceeding before the Surface Transportation Board (“the Board”). Confused as to the appropriate Board procedure or terminology, LRY has filed a Petition for Declaratory Order seeking a Board order *staying* any adverse discontinuance application that Lake County may file at some *future date*. The Board should deny LRY’s request as its petition presents neither the basis for any declaratory relief nor for a stay of any current Board proceeding.

II. Statement of Facts

This Board proceeding arises out of a civil lawsuit that LRY instituted in the United States District Court for the District of Oregon, Medford Division, on April 28, 2017.¹ The basis for that litigation is a notice of lease termination letter dated April 12, 2017,² and sent by Lake County's attorney to LRY's then counsel, Martin Hansen. LRY filed a complaint as well as motions for preliminary injunction and a temporary restraining order alleging not only Lake County's breach of contract and unjust enrichment but also violation of LRY's constitutional due process rights under the Fifth and Fourteenth Amendments.

The rail line ("the Line") that is the subject of this litigation is a light density rail line that extends between Alturas, Modoc County, CA, and Lakeview, Lake County, OR, a distance of 54.45 miles. The Line was originally owned by the Southern Pacific Railroad. Lake County acquired it after Southern Pacific received abandonment authority.³ Lake County initially installed a Class III short line railroad to operate it⁴ and then later obtained a modified certificate⁵ permitting it to

¹ *LRY, LLC dba Lake Railway v. Lake County*, No. 17-cv-00675.

² Attached hereto as Exhibit A.

³ *Southern Pac. Transp. Co. – Aband. – In Modoc County, CA and Lake County, OR*, AB-12(Sub-No. 84)(ICC served Oct. 20, 1985).

⁴ *The Great Western Railway Co.-Modified Rail Certificate*, FD 30777 (ICC served Feb. 26, 1986).

operate the Line as a common carrier in its own right. Subsequently, it contracted with another Class III short line railroad to operate it.⁶ On one occasion Lake County provided service as a common carrier in its own right under its modified certificate after terminating Modoc Railway's service and before LRY commenced operations. On January 1, 2010, LRY began service over the Line under an agency agreement with the County and continued service under a Lease And Operating Agreement ("the Lease") with the County dated November 3, 2010.⁷

Recently disputes have arisen between LRY, Lake County, and the two principal online customers⁸ causing Lake County to provide notice of lease termination to the railroad. Among other things, LRY suspended service allegedly on account of bad track and bridge conditions with little notice to Lake County and the customers and without filing an embargo notice with the Association of American Railroads. Moreover, LRY threatened to suspend service or refused to deliver cars to customer sidings unless the customers agreed to rate increases again on little notice. After LRY failed to address Lake County's concerns which it

⁵ *Lake County Railroad--Modified Rail Certificate*, FD 33581 (STB served April 24, 1998).

⁶ *Modoc Railway and Land Company, LLC—Acq. & Oper. Exempt.—in Lake County, OR*, FD 34995 (STB served Feb. 28, 2007); and *Modoc Northern Railroad Co.—Acq. & Oper. Exempt.—in Lake County, OR*, FD 34996 (STB served Feb. 28, 2007).

⁷ Service authorized in *LRY, LLC D.B.A. Lake Railway—Lease and Operation Exemption—Rail Line in Lake County, OR*, FD 35250 (Sub-No. 1)(STB served Dec. 18, 2009).

⁸ Cornerstone Industrial Minerals (Cornerstone) and Collins Pine (Collins). Lake County is submitting verified statements on behalf of both customers. Cornerstone wants to see Lake Railway replaced. Collins wants a carrier that will provide reliable and economic service.

identified in a letter sent to the railroad dated November 7, 2016,⁹ Lake County provided LRY with aforementioned notice of lease termination. Subsequently, LRY filed suit against Lake County and obtained an *ex parte* temporary restraining order to prevent the lease termination from taking effect. Lake County had neither notice nor opportunity to appear at that hearing. On May 12 the court held a hearing on Lake Railway's preliminary injunction request. Lake County will advise the Board when the court issues its decision.¹⁰

III. Argument

A. There is no basis for LRY's Declaratory Order Request.

As a general proposition, 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 allow the Board to issue a declaratory order to terminate a controversy or remove uncertainty in a matter related to the Board's subject matter jurisdiction. However, there is no basis for the relief that LRY seeks. While Lake County will likely file a request with the Board for LRY's discontinuance at the appropriate time, there is no such request pending before the Board presently. Although LRY has initiated litigation in the Federal District Court for Oregon, Lake County has taken no action before the Board that threatens LRY's ability or obligation to continue providing common carrier service to online customers. Consequently, there is no controversy to

⁹ Attached hereto as Exhibit B.

¹⁰ Lake County's court pleadings are attached as a separate document identified as Exhibit C.

terminate. And this proceeding does not present some ambiguous or unusual issue requiring the Board's attention or clarification.

Declaratory petition requests frequently involve questions of preemption, matters referred by a court to the Board under the agency's primary jurisdiction, or issues as to how a party should or should not proceed before the Board. This declaratory petition presents none of these situations. LRY claims that this proceeding presents an issue of preemption; however, it fails to identify specifically any state or local laws that directly or indirectly conflict with the Board's jurisdiction or impede LRY's ability to meet its common carrier obligation to customers. While LRY claims that Lake County is attempting to "regulate" the rates that LRY is charging its customers, Lake County has not taken any regulatory measures regarding rates. The petition does not allege any matter involving the uniform application of federal transportation law. Furthermore, unlike *Finch Paper LLC-Petition for Declaratory Order*, FD 35981(STB served February 11, 2016)¹⁰ cited by LRY, no court has referred this dispute to the Board for adjudication under the agency's primary jurisdiction. Finally, even assuming that a

¹⁰ LRY would have the Board interpret the *Finch* ruling as allowing it to stay this proceeding at the request of a party because of pending civil litigation brought by that party. That is not what happened in *Finch*. There it was *the court* and not the Board that entered a stay so that the court could refer the matter to the Board under the agency's primary jurisdiction.

basis for federal preemption exists, the Board has repeatedly ruled that state and federal courts have concurrent jurisdiction to decide such disputes.¹¹

B. LRY has not justified its stay request

In light of the foregoing, LRY's request must be evaluated under those criteria the Board routinely employs: whether (1) there is a strong likelihood that the movant will prevail on the merits; (2) the movant will suffer irreparable harm in the absence of a stay; (3) other interested parties will or will not be substantially harmed; and (4) the public interest supports the granting of the stay.¹² LRY has not satisfied any of those criteria or even cited the applicable law.

As to the first criterion, there is little likelihood that LRY would prevail before the STB. As stated above, LRY has not shown any basis for granting its declaratory order request because it has not satisfied the normal standards for

¹¹ Issues involving federal preemption under 49 U.S.C. § 10501(b) can be decided either by the Board or the courts in the first instance. *See, e.g., 14500 Ltd.—Pet. for Declaratory Order*, FD 35788, slip op. at 2 (STB served June 5, 2014); *CSX Transp., Inc.—Pet. for Declaratory Order*, FD 34662, slip op. at 8 (STB served May 3, 2005). Inasmuch as the Lease provides for adjudication of disputes by arbitration, that panel could resolve any preemption issues.

¹² *Beaufort Railroad Company, Inc.—Modified Rail Certificate*, FD 34943 (STB served July 21, 2009) and cases cited therein including *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); and *Cuomo v. United States Nuclear Regulatory Comm.*, 772 F.2d 972, 978 (D.C. Cir. 1985). The parties seeking a stay carry the burden of persuasion on all of the elements required for such extraordinary relief. *Canal Authority of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974).

relief. Moreover, there is no basis for the stay request as the County's actions do not jeopardize LRY's ability to provide or its customers' ability to receive rail service. The filing of any petition or application seeking discontinuance of LRY's service has not been prepared, let alone filed, at this time. However, once it is filed, Board procedures will give LRY an ample opportunity to address how the public convenience and necessity will (or will not) be served.

Similarly, as to the second criterion, there has been no showing of irreparable harm if its stay request is denied. The claimed harm is both speculative and economic. Under the ICC Termination Act and longstanding precedent, LRY is *required* to continue operating over the Line until the Board grants any discontinuance request filed by it or the County¹³ and a new carrier acceptable to Lake County and the shippers takes over the service. Accordingly, LRY's service will continue.

As to the third criterion, other interested parties such as Lake County and its shippers would be harmed by a grant of the stay. Any indefinite continuation of a stay could adversely affect Lake County's ability to secure a new operator for the Line or even provide service in its own right under its modified certificate authority as the presence of two operators could pose safety issues on an

¹³ Under a longstanding agency precedent starting with *Thompson v. Texas Mexican R. Co.*, 328 U.S. 134 (1946), a carrier may not terminate service until the Board grants discontinuance authority regardless of the status of its lease or access rights to the line.

unsignaled light density line in a remote part of the State. In view of the unreliable and uneconomic service that the customers have received, Lake County wants to begin the process of transitioning to a new carrier promptly. In fact, the Lease *mandates* a smooth transition from LRY to a new railroad. It believes that a decision delaying that process would be contrary to its and the customer's best interests by forcing the County and the customers to continue relations with a poorly run carrier providing inconsistent service and charging excessive rates.

Finally, granting a stay would be contrary to the public interest as embodied by the needs of the two principal online shippers. *Cf., Cheatham County Rail Auth. Application and Petition for Adverse Discontinuance*, FD 32049, renumbered as AB-379X (ICC served Nov. 4, 1992) (indicating that the Board and the Interstate Commerce Commission equate the shippers' interest with the public interest in considering whether to grant an adverse discontinuance application). LRY has submitted with its court pleadings attached to its petition here emails and messages suggesting that Cornerstone and Collins support LRY's position. Nothing could be further from the truth. LRY took these messages out of context. Those messages expressed the shippers' desires that their service continue and they would be willing under the circumstances here to pay a surcharge to keep their service available. In fact both customers support Lake County's desire to have a carrier

that will provide consistent, reliable, and economic service as the attached verified statements clearly indicate.

IV.
Conclusion

Lake County urges the Board to deny LRY's Petition for Declaratory Order as there is no controversy for the agency to terminate or uncertainty warranting agency clarification. Furthermore, to the extent that the Petition is a stay request, LRY has not shown any basis for staying any action by the Board as there is none currently before the agency.

Respectfully submitted,



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Counsel for Lake County, OR

Date due: May 22, 2017

BAILEY & YARMO, LLP

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Aron D. Yarmo

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April 12, 2017

Martin Hansen
Francis Hansen & Martin LLP
1148 NW Hill St.
Bend, OR 97703

Via Email

Re: Lake County and Lake Railway

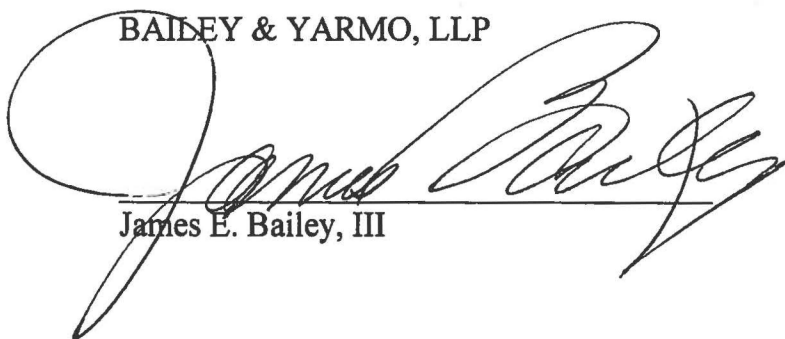
Dear Mr. Hansen:

The Lake County Board of Commissioners has directed me to inform you that the County is exercising its right to terminate the lease with Lake Railway under Section 13.05 of the Lake Railway Lease Agreement. Termination of the Lease will be effective as of April 30, 2017 at which time Lake County will forward \$25,000 to Lake Railway as called for under Section 13.05.

In connection with the termination, Lake County expects Lake Railway to carry out its obligations under Section 13.04.

Yours truly,

BAILEY & YARMO, LLP



James E. Bailey, III

JEB/jlm

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

Notary Public
Commission Expires: _____

I certify that I hold the title set forth below, that this instrument was signed on behalf of the Lessee and that I acknowledge that the execution of the foregoing instrument was the free act and deed of the Lessee. I further declare under penalty of perjury that the foregoing is true and correct.

**THE KANSAS CITY SOUTHERN RAILWAY
COMPANY, a Missouri Corporation**

By: _____
Name: _____
Title: _____
Date: _____

STATE OF _____)
) ss:
COUNTY OF _____)

On this _____ day of _____, 2017 before me personally appeared _____ to me personally known, who being by me duly sworn, says that (s)he is the _____ of The Kansas City Southern Railway Company, a Missouri Corporation, that the seal affixed to the foregoing instrument is the corporate seal of said corporation, that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors, and (s)he acknowledged that the execution of the foregoing instrument was the free act and deed of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

Notary Public
Commission Expires: _____

BAILEY & YARMO, LLP

ATTORNEYS AT LAW

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jonilyn@byllp.com

November 7, 2016

Paul Didelius
LRY, LLC
337 Grain Terminal Road
Burbank, WA 99323

Via Email: pd@lakerail.com

Re: Lake County and Lake Railway

Dear Mr. Didelius:

Lake County has asked me to convey its concerns over the recent operations of Lake Railway. While there have been interruptions of service and lapses in operation that have negatively affected Lake County businesses, it appears that Lake Railway has either breached or come very close to breaching the Lease and Operating Agreement.

For instance, Section 1.01 sets the goal of the agreement as being "for the purpose of providing rail transportation operations and services..." recent events call into question whether that purpose is actually being accomplished in a realistic sense.

Section 5.03 requires Lake Railway to maintain the condition of the line in the condition it was on the Commencement Date. Recent interruptions of service and derailments raise the concern that the condition of the line has actually deteriorated below the condition on the Commencement Date.

Section 6.06 requires that Lake Railway provide a variety of written reports to Lake County in a timely manner. It appears that this has never been done, and that Lake Railway has only referred Lake County a "dropbox" location and only when Lake County has asked for the reports. This failure appears to be a breach of the Lease & Operating Agreement.

Section 24.01 states that any disruption of service in violation of the Agreement constitutes a default of the Agreement and allows Lake County to terminate the Agreement. I also note that even if Lake Railway conducts its operations in a manner

November 7, 2016

Page 2

that technically avoid a breach of the Agreement, Section 13.05 allows Lake County to terminate the Agreement "without reasonable cause."

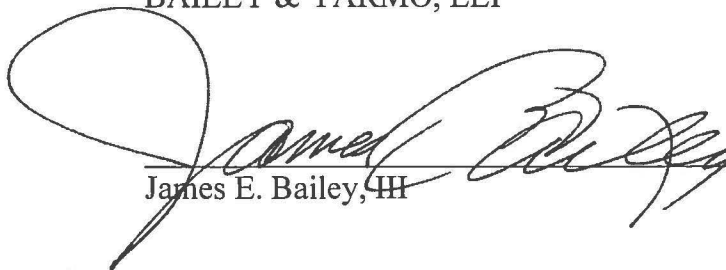
Again, to be clear, Lake County is not at this point declaring a breach or termination of the Agreement, but Lake County is notifying Lake Railway of its concerns regarding the level of quality of operations.

Finally, as part of the obligation to provide a copy of the contract it concluded with Red Rocks Biofuels. This is something that Section 6.05 requires be produced since it is a record of Lake Railway and goes directly to the nature of the operation of the railway as related to cargo and the condition of the line to safely move cargo. Please provide us with a copy of your contract with Red Rocks.

Lake County is hopeful that the above concerns can be addressed quickly such that both sides can continue to provide effective rail service to the County's businesses. We look forward to continuing to work positively with Lake Railway on all rail service issues.

Yours truly,

BAILEY & YARMO, LLP

A handwritten signature in black ink, appearing to read "James E. Bailey, III", is written over a horizontal line. The signature is stylized with a large loop at the beginning and a long, sweeping tail.

James E. Bailey, III

JEB/jlm

c: Board of Commissioners (Fax: (541) 947-5775)

VERIFIED STATEMENT
OF BRUCE ADDINGTON

Bruce Addington, duly sworn, deposes and states as follows:

My name is Bruce Addington. Since 2012, I have been the owner and full time president of Cornerstone Industrial Minerals, Inc. ("Cornerstone"), located in southeastern Oregon at 96078 Industrial Lane, Lakeview, OR 97630. Cornerstone is a privately held industrial minerals company engaged in the mining, processing, and marketing of perlite, a naturally occurring volcanic glass. Perlite has many uses including for lightweight acoustical and thermal insulating plaster materials, construction products, and horticultural applications. While Cornerstone can use a transload facility at Klamath Falls, OR, with access to both BNSF Railway and the Union Pacific Railroad, it prefers to have direct rail service at its plant at Lakeview, OR.

Currently, Cornerstone currently ships about 700 carloads of material outbound depending upon service provided by Lake Railway, Petitioner in this proceeding. Cornerstone has a siding at the end of the County-owned line of railroad that Lake Railway currently leases. In and outbound railcars move to or from Cornerstone's plant to Alturas, CA, where they reverse direction and move over a line that Lake Railway currently leases from Union Pacific Railroad to an interchange point with that carrier at Perez, OR.

Cornerstone is supporting Lake County's efforts to replace Lake Railway with a carrier that is more responsive to our needs. During the several years that I have owned Cornerstone, the quality and dependability of Lake Railway's service has declined precipitously. While I will save any detailed testimony for any discontinuance application or petition that the County may be forced to file with the Board, my purpose in filing this statement is to show that evidence submitted by Lake Railway in its civil litigation purporting to indicate my company's support for that carrier's continued service has been taken out of context and misinterpreted.

The proffered testimony consists of a series of text messages between Lake Railway personnel and myself regarding our rail service. On numerous occasions over the past year, Lake Railway has suspended or threatened to suspend service allegedly due to bad track or bridge conditions or disputes over demurrage or other charges. The messages merely demonstrate that we need reliable service and we are prepared to pay reasonable charges for that service. On several occasions Lake Railway insisted that we pay a rate surcharge to enable them to continue providing service after Lake County's April termination date. Having little choice but to agree to pay more, we accepted a \$525 surcharge on top of the railroad's published rate for the service. However, the Board should not confuse our stated desire that Lake Railway continue to provide common carrier service after April 30 and our

reluctant acceptance of the surcharge with any support for Lake Railway's continued lease of Lake County's rail line. Simply stated, Cornerstone supports the County's efforts to find a replacement carrier.

VERIFICATION

STATE OF Oregon)

)

CITY OF Lakeview)

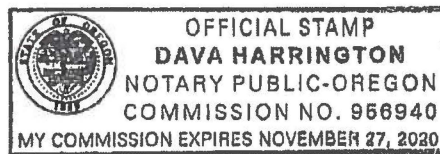
Bruce Adden being duly sworn according to law, hereby deposes and states that (s)he holds the position of PRES with affiant, is authorized to make this Verification, had read the foregoing document, and knows the facts asserted therein are true and accurate as stated, to the best of (her)his knowledge, information, and belief.

Bruce Adden

Subscribed to and sworn to before me, a Notary Public, in and for the County of Lake in the State of Oregon, this 11th day of May, 2020

Dava Harrington

Notary Public



My Commission expires:

November 27th, 2020

**VERIFIED STATEMENT
OF LARRY BROADFOOT**

Larry Broadfoot, duly sworn, deposes and states as follows:

My name is Larry Broadfoot and I submit this statement on behalf of Collins Pine ("Collins"), a customer of Lake Railway and division of The Collins Companies. Since March 2016, I have been with The Collins Companies as VP Sales and Marketing. Prior to my present employment, I spent about 20 years working for a Canadian forest products company.

Headquartered in Wilsonville, OR, Collins is one of several divisions of The Collins Companies that is engaged in the forest products business. Collins has a plant located at 1600 Missouri Avenue, in Lakeview, Lake County, OR. Collins' Lakeview plant takes tree logs and turns them into lumber and wood chips. The plant has a rail siding at which it loads about 550 to 650 cars of outbound freight divided between two products, lumber (250-300 cars) and wood chips (300-350 cars). Inbound empties and outbound loaded cars move to or from Collins' plant to Alturas, CA, where they reverse direction and move over a line that Lake Railway currently leases from Union Pacific Railroad to an interchange point with that carrier at Perez, OR.

Collins owns a facility at Klamath Falls with access to both BNSF Railway and the Union Pacific Railroad where it can transload to rail inbound truck traffic, it prefers to have direct rail service at its plant at Lakeview, OR. While Collins can use truck service to handle its lumber traffic, the wood chip traffic is best suited to rail movement. Wood chips can (and need to) be compacted more easily for rail movement than for truck hauls.

Collins is supporting Lake County's efforts to have a rail carrier that is responsive and economical to Collins needs. During the past several years the quality and dependability of Lake Railway's service has been erratic. While I will save any detailed testimony for any discontinuance application or petition that the County may be forced to file with the Board, my purpose in filing this statement is to show that evidence submitted by Lake Railway in its civil litigation purporting to indicate my company's support for that carrier's continued service has been taken out of context and misinterpreted.

The proffered testimony consists of a series of text messages between Lake Railway personnel and Collins' personnel regarding our rail service. On numerous occasions over the past year, Lake Railway has suspended or threatened to suspend service allegedly due to bad track or bridge conditions or disputes over demurrage

or other charges. The messages merely demonstrate that we need reliable service and we are prepared to pay reasonable charges for that service. On several occasions Lake Railway insisted on short notice that we pay a rate surcharge to enable them to continue providing service. Having little choice but to agree to pay more, we accepted a \$525 surcharge on top of the railroad's published rate for the service. However, the Board should not confuse our stated desire that Lake Railway continue to provide common carrier service after April 30 and our reluctant acceptance of the surcharge with for our reliable and economic rail carrier.

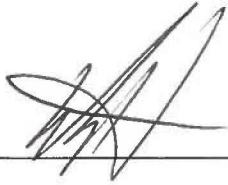
VERIFICATION

STATE OF OREGON)

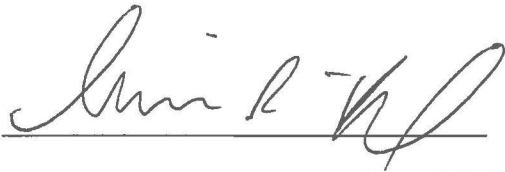
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CITY OF WASHINGTON)

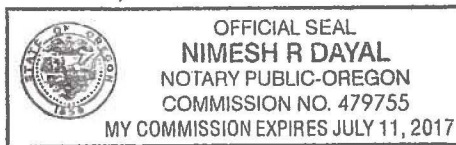
LARRY BRANFAS being duly sworn according to law, hereby deposes and states that (s)he holds the position of VP Sales & Marketing with affiant, is authorized to make this Verification, had read the foregoing document, and knows the facts asserted therein are true and accurate as stated, to the best of (her)his knowledge, information, and belief.



Subscribed to and sworn to before me, a Notary Public, in and for the County of WASHINGTON in the State of OREGON, this 19 day of MAY, 2017.



Notary Public



My Commission expires: July 11, 2017

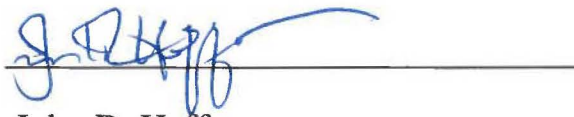
CERTIFICATE OF SERVICE

I, John D. Heffner, hereby certify that on May 19, 2017, a copy of the Reply of Lake County, Oregon, to the Petition For Declaratory Order filed by LRY, LLC d.b.a. Lake Railway was sent by electronic mail to all parties of record in this proceeding.

James Savage, Esq.
James H.M. Savage, Esq.
22 Rockingham Court
Germantown, MD 20874

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Elissa M. Boyd, Esq., OSB No. 111679
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John D. Heffner

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3 Bend, Oregon 97703
TEL: (541) 317-9000
4 FAX: (541) 389-0159
Of Attorneys for Defendant
5
6
7

8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF OREGON**
10 **MEDFORD DIVISION**

11 **LRY, LLC dba LAKE RAILWAY, an**
Oregon LLC,

12
13 Plaintiff,

14 v.

15 **LAKE COUNTY, a political**
16 subdivision of the State of Oregon,

17 Defendant.
18

Case No. 17-cv-00675

**DEFENDANT'S RESPONSE TO
MOTION FOR TRO AND
PRELIMINARY INJUNCTION**

19 **INTRODUCTION**

20 LRY's request for an injunction is primarily premised on the contentions
21 that the termination of the lease will cause a disruption of interstate commerce,
22 harm the public and cause irreparable harm to LRY. Not one of these claims is
23 true.
24

25 First, the Lease requires that any dispute be submitted to arbitration, so
26 federal court is not the proper forum.

1 Second, there will be no disruption of interstate commerce because the
2 Lease and federal law mandate a smooth transition to a new railroad operator when
3 a contract is terminated. The letter of termination does not immediately terminate
4 LRY's operations, but is more accurately described as initiating the process of
5 transitioning to a new rail line operator.
6

7 Third, because service will not be interrupted, there is no harm to the public.
8 There are only two shippers serviced by the Lakeview Branch, and both are in
9 favor of a new operator taking over operations.
10

11 Fourth, this is a dispute over interpretation of contract provisions which by
12 the terms of the Lease must be submitted to arbitration. Depending on how the
13 Lease is interpreted, LRY may or may not be entitled to monetary damages, but it
14 is not entitled to equitable relief. Also, because ultimately this is a dispute over
15 interpretation of contract terms, LRY cannot establish that it will likely prevail on
16 the merits of its interpretation of those contract terms.
17

18 Fifth, there has been no showing of irreparable harm. At most, LRY might
19 be entitled to monetary damages. LRY's claim that it may be forced to return
20 "millions" of dollars to the State of Oregon is not true. LRY would not be required
21 to return funds to the *ConnectOregon* project because funds are not distributed in
22 advance but are distributed as reimbursement for work already carried out. LRY
23 did the work and was paid for it.
24
25
26

1 Finally, Lake County terminated the contract according to the specific
2 provisions of the contract that allow termination without cause and payment of
3 liquidated damages. Terminating for breach of contract would have resulted in
4 litigation which would have been more costly and less efficient than terminating
5 without cause.
6

7
8 ***All Disputes Must Be Submitted to Arbitration***

9 According to the Lease Agreement, any disputes regarding the Lease must
10 be submitted to arbitration:
11

12 **31. GOVERNING LAW, ARBITRATION, AND FORUM**

13 This agreement and all rights of the parties thereunder shall be
14 governed and construed in accordance with applicable Federal law
15 and the laws of the State of Oregon. **Any dispute arising out of this**
16 **agreement under State law shall be submitted to arbitration** under
17 the Oregon Uniform Arbitration Act, ORS 36.600 and brought in
18 Circuit Court in Lake County, Oregon. **Any dispute arising out of**
19 **this agreement under Federal law shall be submitted to**
20 **arbitration** under the Federal Arbitration Act and shall be brought in
21 the United States District Court for the District of Oregon. (Emphasis
22 added.)
23

24 Thus, LRY's request for an injunction (and the filing of a Complaint) is in
25 violation of the Lease. By agreement of the parties, this Court is not the proper
26 forum for resolving disputes over the Lease Agreement.

//

//

1 ***Rail Service Will Not Be Interrupted***

2 According to both federal law and the terms of the Lease Agreement, rail
3 service by LRY must continue after termination of the lease until a new operator
4 takes over operation of the line.
5

6 The relevant federal regulations are 49 U.S.C. 10905(d) and 49 U.S.C. 1152.1 (a).
7

8 49 U.S.C. section 10905(d) states:

9 (d) ***A rail carrier*** providing transportation subject to the jurisdiction of
10 the Board under this part ***may—***

11 (1) abandon any part of its railroad lines; or

12 (2) ***discontinue the operation*** of all rail transportation over any
13 part of its railroad lines; ***only if the Board finds that the present or***
14 ***future public convenience and necessity require or permit the***
15 ***abandonment or discontinuance.*** In making the finding, the Board
16 shall consider whether the abandonment or discontinuance will have a
17 serious, adverse impact on rural and community development.
(Emphasis added.)

18 49 U.S.C. 1152.1 states:

19 (a) 49 U.S.C. 10903 et seq. governs abandonment of rail lines and
20 discontinuance of rail service by common carriers. Section 10903(d)
21 provides that ***no line of railroad may be abandoned and no rail***
22 ***service discontinued unless the Board finds that the present or***
23 ***future public convenience and necessity require or permit the***
24 ***abandonment or discontinuance.***

25 (b) Part 1152 contains regulations governing abandonment of, and
26 discontinuance of service over, rail lines. ***This part also sets forth***
procedures for providing financial assistance to assure continued
rail freight service under 49 U.S.C. 10904, for acquiring rail lines for
alternate public use under 49 U.S.C. 10905, and for acquiring or using
a rail right-of-way for interim trail use and rail banking. (Emphasis
added.)

1 As the Court can see, federal law prohibits interruption of service, and interstate
2 commerce will not be disrupted. LRY's claim to the contrary is false.

3
4 Further, even without federal law, the Lease itself specifies that the line
5 remain operational and that LRY continue operation in a manner that ensures a
6 smooth transition to a new operator. Section 13.04 (which was specifically
7 referenced in Lake County's termination letter) states:
8

9 ***In the event of termination*** of this Lease, the County shall have the
10 right to initiate termination proceedings before the Surface
11 Transportation Board in LRY's name, and ***LRY shall cooperate with***
12 ***the County and its third-party operator designee in arranging for the***
13 ***transfer*** of the common carrier obligation ***in an orderly manner so as***
not to disrupt service to customers of the Rail Line.

14 LRY's claim that rail service will be interrupted by termination of the
15 contract is factually and legally incorrect. Put bluntly, LRY misstated the facts and
16 the law in its TRO and injunction requests.
17

18 ***No Harm to the Public***

19 Because rail service will not be interrupted but will transition smoothly,
20 there is no risk of harm to the public. The "public" that uses the rail line in
21 question consists of two local shippers: Cornerstone and Collins Pine. (See
22 Declarations of Commissioner Brad Winters, Bruce Addington, Cornerstone, and
23 Larry Broadfoot, Collins.) Not only are both shippers in favor of termination of
24 the contract with LRY so that a better railroad operator can take over the Lakeview
25
26

1 Branch, but in the face of LRY's recent 100% rate increase, both shippers had
2 made arrangements to ship their product by truck. (*Id.*) While rail shipment is
3
4 *usually* more economical, it is not the exclusive means of transport.

5 Contrary to LRY's claim, the "public" is not at risk of any harm whatsoever
6 because rail service will not be interrupted, and the only businesses serviced by the
7
8 line are in favor of the termination.

9 ***LRY Cannot Show It is Likely to Succeed on the Merits***

10 As already noted, any dispute over the Lease must be submitted to
11
12 arbitration, and LRY has not shown that it is likely to succeed in that context. This
13 is particularly true since the dispute is over interpretation of lease provisions that
14 describe who must pay for certain repairs to the railroad line. The lease in question
15 contains apparent contradictions or ambiguities regarding those obligations, and it
16
17 is not possible to conclude that LRY is likely to succeed regarding its interpretation
18 of the contract terms.

19
20 For example, Section 5.03 states that LRY will maintain the leased premises
21 *normal wear and tear excepted*; however, Section 5.07 states that Lake County is
22 only responsible for repairs necessitated by natural disasters and *non-routine*
23 maintenance, implying that LRY is responsible for routine maintenance. Similarly,
24 Section 5.08 states that Lake County is responsible for the cost of compliance with
25 FRA bridge standards; however, *LRY is required to do the work only after*
26

1 obtaining the County's approval which indicates that any work performed by LRY
2 without County approval was in violation of the Lease. Other sections of the Lease
3 are also open to dispute and interpretation as well. Thus, it is not possible in the
4 context of a preliminary injunction to determine the likelihood of success on
5 interpretation of responsibilities under the Lease in arbitration.
6

7
8 ***No Irreparable Harm Has Been Shown***

9 While LRY claims irreparable harm exists, it has not provided any evidence
10 that irreparable harm is even possible. The only direct discussion of irreparable
11 harm is three sentences of boilerplate legal principles on page 16 of LRY's brief
12 with no showing or description of irreparable harm. LRY's inability to show
13 irreparable harm is not surprising since the only harm even theoretically possible is
14 that an arbitrator might interpret the Lease so as to require Lake County to
15 reimburse LRY for making repairs to the rail line.
16

17
18 Furthermore, LRY's assertions of potential loss are either speculative or
19 incorrect. LRY states that "it may" be required to give back *ConnectOregon* grant
20 money. This is not correct. The *ConnectOregon* grant program does not award
21 money prior to work being done; *ConnectOregon* is a reimbursement program.
22 (See Exhibit A, the *ConnectOregon* webpage describing the program.) Any work
23 done by LRY has either already been reimbursed or would be reimbursed based on
24 invoices submitted to ODOT by LRY.
25
26

1 LRY also claims that "it may" have obligations under the *ConnectOregon*
2 grant agreement that it would be forced to breach potentially causing LRY to incur
3 millions of dollars of liabilities to the State of Oregon. (Brief, p. 10 & 15) This is
4 not true. Grant money is dispensed upon completion of work, and the grant
5 obligations are transferrable. Termination of the Lease would not force LRY to
6 breach any obligations under the *ConnectOregon* grant. The obligations and
7 potential future awards would be transferred to either Lake County or another
8 operator. (See Declaration of Commissioner Brad Winters.)
9
10

11 LRY claims that if the grant project is not completed, LRY would be
12 required to give back all of the *ConnectOregon* funds it has received. (Brief, p. 6)
13 This is not true. As already noted, the grant program reimburses based on invoices
14 showing that the work in question has been done. There would be no money that
15 LRY would have to return to the State of Oregon.
16
17

18 Finally, none of these above constitute "irreparable harm"; they only deal
19 with speculative, potential money damages following interpretation of a contract.
20 LRY is simply not entitled to equitable relief in the face of speculative, theoretical
21 economic damages.
22

23
24 //

25 //
26

1 *The Termination Was According to the Express Terms of the Agreement*

2 Directly related to the likelihood of success on the merits is application of
3 Section 13.05 of the Lease agreement which provides for termination without
4 cause:
5

6 In the event the County terminates this lease agreement without
7 reasonable cause... the County shall pay termination costs of twenty-
8 five thousand dollars (\$25,000) to LRY as liquidated damages.

9 LRY contends that this section does not mean what it says and that it is
10 “merely” a liquidated damages provision. That interpretation would render the
11 section superfluous because under that interpretation the section would never come
12 into play: if Lake County cannot terminate the contract without cause, then LRY
13 would never be entitled to liquidated damages. Furthermore, the section clearly
14 describes the \$25,000 as “termination costs,” not “attempted termination costs.”
15 The liquidated damages are to be paid if the Lease is terminated without cause, as
16 Lake County did.
17
18

19 Moreover, *any* contract can be terminated without cause. When that occurs,
20 the affected party may seek damages for such termination. Even if Section 13.05
21 were interpreted solely as stating liquidated damages, Lake County would
22 nonetheless be entitled to terminate the contract without cause and pay the stated
23 liquidated damages.
24
25
26

1 Finally, other grounds for terminating the contract for breach by LRY exist;
2 however, terminating for breach of other grounds would lead to arbitration since
3 LRY could dispute the contended acts of breach. By terminating without cause
4 and paying liquidated damages, Lake County chose the most efficient and
5 economical means of termination.
6

7
8 ***Balance of Hardships Does Not Favor LRY***

9 Lake County terminated the Lease in order to contract with a new railroad
10 operator. If Lake County is not allowed to proceed with finding a new operator,
11 the shippers and Lake County will be harmed by being forced to continue relations
12 with a poorly run, over-priced operator who does not provide valuable service and
13 who has no legal right to remain as the operator of the line.
14
15

16 LRY on the other hand is not harmed by the termination because any
17 damages it claims for breach of obligations under the contract would be addressed
18 in arbitration as agreed by the parties.
19

20 ***LRY's TRO and Preliminary Injunction Request Are Frivolous and Based on***
21 ***Misleading and False Assertions***

22 The following is a list of statements made by LRY in support of its TRO and
23 Injunction requests that are either misleading or false. They demonstrate that
24 LRY's filings with the Court are frivolous.
25
26

1 1) *Interstate commerce would be disrupted. (Brief, p. 9, 10, & 17;*
2 *Didelius Declaration, #26).* By federal law and the Lease itself, LRY must
3
4 continue to operate the rail line until a new operator takes over. No disruption of
5 service or interstate commerce would occur.

6 2) *LRY has obligations to the STB that LRY would be forced to violate if*
7 *Lake County's termination was effectuated. (Brief, p. 9)* This statement is not
8 substantiated in LRY's brief, and Lake County is unaware of any obligations to the
9 STB that termination of the lease would force LRY to violate because service
10 would continue during the transition period.
11

12 3) *The shippers would have no alternative method to transport their*
13 *products. (Brief, p. 17)* Either the shippers would continue to use either LRY until
14 a new operator takes over or they would truck their product as they were ready to
15 do when LRY increased its rates by 100% at the end of March. (See Declarations
16 of Brad Winters, Bruce Addington and Larry Broadfoot.)
17
18

19 4) *LRY may be required to give back ConnectOregon grant money.*
20 *(Brief, p. 5)* The ConnectOregon grant program does not award money prior to
21 work being done; ConnectOregon is a reimbursement program. (See Exhibit A,
22 ConnectOregon webpage.) Any work done by LRY has either already been
23 reimbursed or would be reimbursed based on invoices submitted to ODOT by
24 LRY.
25
26

1 5) *"LRY may have obligations under the Connect Oregon grant*
2 *agreement that it would be forced to breach... potentially causing LRY to incur*
3 *millions of dollars of liabilities to the State of Oregon."* (Brief, p. 10 & 15) This is
4 not true. Grant money is dispensed upon completion of work, and the grant
5 obligations are transferrable. LRY would not be in breach of any obligations under
6 the grant. The obligations and potential awards would be transferred to either Lake
7 County or another operator.

10 6) *If the grant project is not completed, LRY would be required to give*
11 *back all of the ConnectOregon funds it has received.* (Brief, p. 6) This is not true.
12 See previous points 5 and 6 describing the ODOT program. If the work has been
13 done, ODOT reimburses upon submission of invoices showing the work has been
14 done. LRY would only be required to return funds improperly reimbursed for work
15 outside of the project; however, no such reimbursements have been made.

18 7) *Lake County, on behalf of LRY, made the application presentation to*
19 *the State of Oregon of the ConnectOregon VI grant proposal.* (Didelius Decl. #13.)
20 This is false. The grant application and award process is a multi-tiered process and
21 no single application presentation is ever made to the State of Oregon. Lake
22 County did not make "the application presentation" to the State of Oregon. (See
23 Declaration of Brad Winters, #7)
24
25
26

1 8) *The ConnectOregon program requires that the recipient of funds*
2 *operate and maintain the funded improvement for 20 years. (Brief, p. 5)* This is not
3 correct. ODOT issues grants for maintaining existing rail lines and seeks assurance
4 that *someone* (such as Lake County or a new operator) will be in position to
5 administer maintenance for at least 20 years. A single recipient of funds does not
6 need to be in place for 20 years. The grant is transferable to a subsequent operator
7 or Lake County. (See Declaration of Brad Winters, #8)

10 9) *There is no method in place for the work on ConnectOregon projects*
11 *to be completed if LRY were unable to complete the projects. (Brief, p. 6)* This is
12 not true. By the terms of the grants themselves, the grants are transferable to either
13 the County or to a new operator. The grants would not be lost but would be
14 transferred to whomever was operating the line after LRY ceases operation. (See
15 Declaration of Brad Winters, #9)

18 10) *Prior to the termination letter, the County Commissioners were*
19 *pressuring LRY to lower its shipping rates. (Didelius Decl. # 20)* This never
20 happened. Negotiations over rates have always been exclusively between the
21 shippers and LRY. (See Declaration of Brad Winters, #10)

24 11) *Lake County has attempted to set rates (and thereby usurp STB*
25 *authority). (Brief, p. 9, 13 & 16)* LRY has not pointed to any evidence supporting
26

1 this claim. In fact, LRY's counsel was specifically told otherwise. (See Ex. B
2 attached.) Lake County cannot set rates and has not attempted to set rates.

3
4 12) *Lake County told LRY that Lake County was not responsible for the*
5 *cost of bridge repairs. (Brief, p. 7; Didelius Decl. #18)* This is false. Lake County
6 has admitted responsibility for *bridge* repairs, but Lake County disputes
7 responsibility for repair of the track *on the bridges* and the railbeds leading up to
8 the bridges. This is based on the STB regulation definition of the term "bridge."
9 (See Declaration of Brad Winters, #11)
10

11
12 13) *The shippers support continuation of agreements with LRY and do not*
13 *support the termination of the Lease. (Brief, p. 9)* This is not true. The shippers are
14 not satisfied with service provided by LRY and are in favor of termination of the
15 Lease and a new operator. (See Declarations of Brad Winters, Bruce Addington
16 and Larry Broadfoot.)
17

18 The foregoing list of misleading and false statements shows that LRY's
19 requests for a TRO and a preliminary injunction are not merely without merit but
20 constitute a frivolous filing that could only be made to appear legitimate by
21 distortions and misstatements.
22

23
24 //

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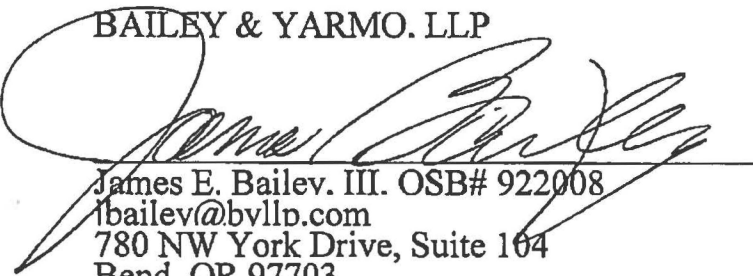
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CONCLUSION

LRY has not established any of the bases necessary for a preliminary injunction. Its request should be denied and the TRO dismissed.

DATED this 10th day of May, 2017.

BAILEY & YARMO. LLP



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TEL: (541) 317-9000
FAX: (541) 389-0159
Of Attorneys for Defendant



Oregon Department of Transportation

ConnectOregon VI

Payment and Grant Agreement Facts

Preface

This document is a short compilation of important facts regarding *ConnectOregon* payment procedures and *Grant Agreement* obligations. Applicants should familiarize themselves with payment procedures and *Grant Agreement* obligations prior to applying for *ConnectOregon* funds to ensure they are aware of the requirements should they be awarded a grant. *Sample Grant Agreements* are available for review at the *ConnectOregon* website:

<http://www.oregon.gov/ODOT/TD/TP/pages/connector.aspx>.

Failure to sign a grant agreement within 180 days of award of a grant by the Oregon Transportation Commission (OTC) will result in forfeiture of the grant. Early review by proper applicant staff is encouraged.

ConnectOregon

ConnectOregon is a lottery funded initiative that ODOT uses to provide grants to public and private entities to invest in air, rail, marine, transit, bicycle and pedestrian infrastructure to ensure Oregon's transportation system is strong, diverse, and efficient.

Payment Procedures

ConnectOregon is a reimbursement program which means grant recipients expend funds on their project then submit invoices to Oregon Department of Transportation (ODOT) for reimbursement. Applicants must have sufficient financial standing to be able to perform necessary work prior to reimbursement. Terms for reimbursement:

- Funds expended prior to *ConnectOregon Grant Agreement* execution are not eligible for reimbursement.
- Recipients shall not submit more than one (1) reimbursement request each month.
- Recipients should pay careful attention to the designated *Grant Agreement* reimbursement percentage. ODOT will reimburse recipients for the percentage noted in their *Grant Agreement*.
- Previously expended funds are eligible for grant match and will be reflected in the *Grant Agreement* reimbursement percentage. If you are planning to use previous expenditures as part of your match you **must** notify the *ConnectOregon* Program Manager prior to execution of your *Grant Agreement*, as specific documentation is required prior to approval of the request.
- Applicants must submit invoices that indicate the total *ConnectOregon* expenditure including recipient match, and must provide detailed itemization of expenditures.
- Generally, recipients will be reimbursed for 70% of project costs unless otherwise indicated in the *Grant Agreement*.
- To comply with House Bill 5008 of the 2013 Legislative Session ODOT will withhold five percent (5%) of the grant award from each reimbursement request. The retainage will be released to grant recipients in the following fashion:

Oregon Department of Transportation**October 5, 2015**

- o Eighty-percent (80%) of withholdings will be released to recipient upon Final Project Acceptance by the ODOT Program Manager.
- o Twenty-percent (20%) of withholdings will be released upon receipt by the ODOT Program Manager of a project report that, at a minimum, describes project performance measures and jobs retained or created as a result of the project within 18 months of project completion.

Example

Total Invoice:	\$100,000
Grant Eligible Portion:	\$70,000
Applicant Match:	\$30,000
Retainage of Grant Portion (5% of \$70,000):	\$3,500
Total Invoice Reimbursement (\$70,000 - \$3,500):	\$66,500

Grant Agreement

Recipients should review the *Sample ConnectOregon Grant Agreement* prior to completing an application. Key conditions of the *Grant Agreement* recipients should consider:

- ✓ Exhibit A of the *Grant Agreement* contains key project milestones and will be used to evaluate the performance of each project. Milestones will be developed from the answers provided in the initial project application.
- ✓ The General Terms of the *Grant Agreement* require that applicants submit a Request for Change Order if delays of more than ninety days are anticipated on key milestones occur. Recipients must submit a Request For Change Order before the milestone due date.
- ✓ The General Terms of the *Grant Agreement* require each grant recipient to submit Monthly Progress Reports to ODOT.
- ✓ The General Terms of the *Grant Agreement* requires that upon project completion, the Recipient request Final Project Acceptance..
- ✓ The General Terms of the *Grant Agreement* require a final written report be submitted and approved by ODOT prior to release of retainage. The final written report shall include at a minimum: final project pictures and other job creation information as specified on the Final Performance Report Form..
- ✓ Exhibit B of the *Grant Agreement* includes Recipient obligations such as the requirement to complete and file with the appropriate county a Memorandum of Agreement and Acknowledgement of ODOT Assistance.
- ✓ Exhibit B of the *Grant Agreement* contains information regarding Special Conditions that may be added to the Agreement based on project type (e.g. rail, marine, etc.).

Questions

Contact Marie Wright at 503-986-3327 or Marie.A.WRIGHT@odot.state.or.us

Jim Bailey

From: Jim Bailey
Sent: Wednesday, April 26, 2017 5:36 PM
To: David Rossmiller
Subject: Re: Lake Rwy

The County isn't saying that we must approve the agreement.

Jim Bailey
Bailey & Yarmo, LLP

On Apr 26, 2017, at 5:25 PM, David Rossmiller <drossmiller@bpmlaw.com> wrote:

Jim, saying "I'm not going to be involved in the negotiations, all you have to do is come up with something I approve of" is being involved in the negotiations. Fact is, the County has no authority to set rates. If anyone has authority over that, it's the STB. Nor is such approval by the County even a purported term of the Lease. The County can't add lease terms through blackmail, takings and brinksmanship.

Best,

Dave

David P. Rossmiller
Shareholder
*Admitted in Oregon, Washington, Idaho,
Montana, North Dakota, Wyoming and Utah*
111 SW Fifth Avenue, Suite 3650
Portland, OR 97204
(503) 961-6328 (direct)
(503) 961-6339 (fax)
(503) 341-6294 (cell)

drossmiller@bpmlaw.com

www.bpmlaw.com

<image001.jpg>

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From: Jim Bailey [<mailto:jbailey@byllp.com>]
Sent: Wednesday, April 26, 2017 5:16 PM
To: David Rossmiller
Subject: Re: Lake Rwy

Ex. B-1

Dave,

I actually said we would not be involved in the discussions between Lake Rwy and the shippers; come up with a long-term agreement that they like and we can move forward.

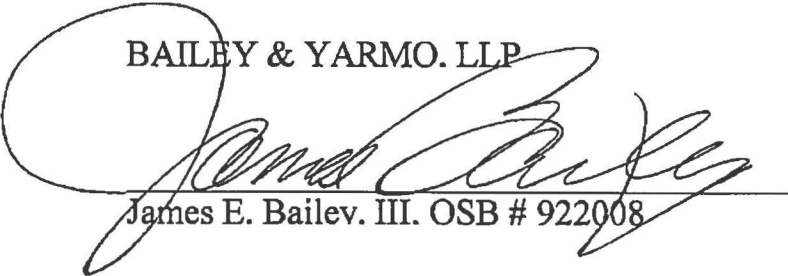
Jim Bailey
Bailey & Yarmo, LLP

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on May 10, 2017, I served the foregoing **RESPONSE**
3 via electronic mail to:

4 David P. Rossmiller, OSB # 983395
5 Elissa M. Boyd, OSB # 111679
6 Betts, Patterson & Mines, PS
111 SW 5th Ave., Suite 3650
Portland, OR 97204

7
8 **BAILEY & YARMO. LLP**

9
10 
11 James E. Bailev. III. OSB # 922008

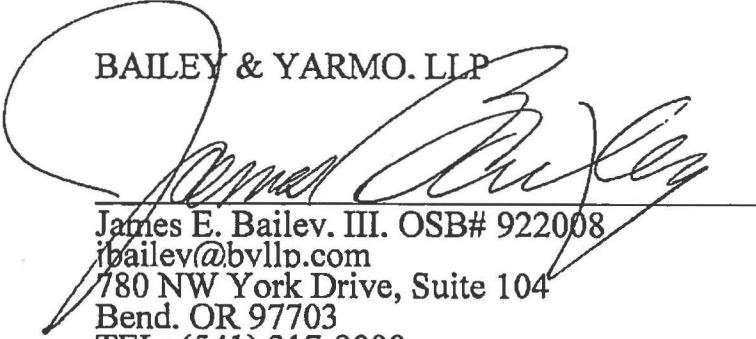
12 **CERTIFICATE OF FILING**

13 I hereby certify that on May 10, 2017, I filed the foregoing **RESPONSE** via
14 electronic filing to the following:

15 District Court Clerk
16 Mark O. Hatfield US Courthouse
1000 SW Third Avenue
17 Portland, OR 97204-2902

18 DATED this 10th day of May, 2017.

19
20 **BAILEY & YARMO. LLP**

21
22 
23 James E. Bailev. III. OSB# 922008
24 jbailev@bvllp.com
25 780 NW York Drive, Suite 104
26 Bend. OR 97703
TEL: (541) 317-9000
FAX: (541) 389-0159
Of Attorneys for Lake County

CERTIFICATE OF SERVICE

James E. Bailey, III, OSB# 922008

jbailey@byllp.com

BAILEY & YARMO, LLP

780 NW York Drive, Suite 104

Bend, Oregon 97703

TEL: (541) 317-9000

FAX: (541) 389-0159

Of Attorneys for Defendant

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

Medford Division

LRY, LLC dba LAKE RAILWAY, an
Oregon LLC,

Plaintiff,

v.

LAKE COUNTY, a political
subdivision of the State of Oregon,

Defendant.

Case No. 17-cv-00675-MC

**DECLARATION OF McGREGOR
LYNDE IN SUPPORT OF
DEFENDANT'S RESPONSE TO
MOTION FOR TEMPORARY
RESTRAINING ORDER AND
PRELIMINARY INJUNCTION**

I, McGregor Lynde, under penalty of perjury do hereby declare:

1. I am the Manager of the Active Transportation Section, a segment of the Transportation Development Division within the Oregon Department of Transportation ("ODOT"). I work in Salem, Oregon.

2. As part of my duties as the Manager of the Active Transportation Section, I supervise the administration of grant agreements arising under the

ConnectOregon Program, an initiative to invest in rail and other types of transportation infrastructure to ensure that the State's transportation system is strong, diverse, and efficient.

3. Grant funds under the *ConnectOregon* Program are disbursed as reimbursement payments for eligible project costs. Grant funds are paid after grant recipients seek reimbursement for the expenses they have incurred by providing ODOT with a Request for Reimbursement.

4. In November of 2014, ODOT and LRY, LLC ("LRY") entered into Grant Agreement No. 30151 to provide funding to LRY under the *ConnectOregon* Program for project work to replace deteriorated 75-pound rail and certain rail track switches. The Agreement was effective November 12, 2014 and was modified by Amendment No. 1, which was effective on August 17, 2015.

5. On November 13, 2016, ODOT accepted as complete the project work described in Agreement No. 30151, as amended.

6. Section VII of Exhibit B to Agreement No. 30151 states:

Recipient shall pay back all of the Grant Funds to ODOT if Project is not completed in accordance with, or consistent with Exhibit A and Exhibit E, as each may be amended. Recipient obligations for Recovery of Grant Funds are provided in Section 6.d of this Agreement.

7. Section 6.d of Agreement No. 30151 states:

Any Grant Funds disbursed to Recipient under this Agreement that are expended in violation of one (1) or more of the

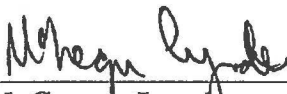
provisions of this Agreement ("Misexpended Funds") or that remain unexpended on the earlier of the Availability Termination Date or termination of this Agreement must be returned to ODOT. Recipient shall return all Misexpended Funds to ODOT promptly after ODOT's written demand and no later than fifteen (15) days after ODOT's written demand. Recipient shall return all Unexpended Funds to ODOT within fourteen (14) days after the earlier of the Availability Termination Date or termination of this Agreement.

8. Section IX of Exhibit B to Agreement No. 30151 states:

Recipient shall, at its own expense, maintain and operate Project upon completion and throughout the useful life of Project at a minimum level that is consistent with normal depreciation or service demand or both. ODOT and Recipient agree that the useful life of Project is defined as twenty (20) years. Recipient has, by submitting its application for this ConnectOregon V grant, represented and certified to sufficient funds and to its ability to operate and maintain Project. Recipient agrees to require any successor owner of the Project property to comply with this requirement. Failure to comply with this requirement may be remedied by Recipient or its successor in interest by (a) restoring the property to the uses(s) required by this Agreement or (b) repayment of expended funds. In the event repayment of expended funds is required, the amount determined using the Straight Line Depreciation (SLD) method must be repaid to ODOT. The SLD is calculated by taking the grant amount divided by twenty years. ODOT may conduct site reviews of the Project as provided in Section 8.a of this Agreement throughout the useful life of the Project. This paragraph shall survive any expiration or termination of this Agreement.

Pursuant to 28 USC § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED this 11th day of May, 2017.



McGregor Lynde

James E. Bailey, III, OSB# 922008
jbailey@byllp.com
BAILEY & YARMO, LLP
780 NW York Drive, Suite 104
Bend, Oregon 97703
TEL: (541) 317-9000
FAX: (541) 389-0159
Of Attorneys for Defendant

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

Medford Division

LRY, LLC dba LAKE RAILWAY, an
Oregon LLC,

Plaintiff,

v.

LAKE COUNTY, a political
subdivision of the State of Oregon,

Defendant.

Case No. 17-cv-00675

**DECLARATION OF BRAD
WINTERS IN SUPPORT OF
DEFENDANT'S RESPONSE TO
MOTION FOR TRO AND
PRELIMINARY INJUNCTION**

I, Brad Winters, under penalty of perjury do hereby declare:

- 1) I am one of three Commissioner on the Lake County Board of Commissioners.
- 2) I have been directly and consistently involved in discussions with LRY and the shippers on the Lakeview Branch line.

- 3) There are only two shippers on the Lakeview Branch line, Córneirstone Minerals and Collins Pine.
- 4) The shippers can either ship their product over the rail line or can truck their product as they were ready to do when LRY increased its rates by 100% at the end of March.
- 5) The ConnectOregon grant program is a reimbursement program. Any work done by LRY has already been or would be reimbursed based on invoices submitted to ODOT by LRY.
- 6) Obligations and potential awards under the various grants are transferable to either Lake County or another operator.
- 7) The grant application and award process is a multi-tiered process and no single application presentation is ever made to the State of Oregon.
- 8) ODOT issues grants for maintaining existing rail lines and seeks assurance that someone (such as Lake County or a new operator) will be in position to administer maintenance for at least 20 years. No single recipient of funds needs to be in place for 20 years because the grant is transferable to a subsequent operator or Lake County.
- 9) By the terms of the grants themselves, the grants are transferable to either the County or to a new operator. The grants would not be lost if the Lease

with LRY is terminated but would be transferred to whomever was operating the line after LRY ceases operation.

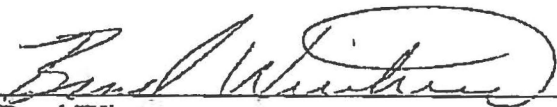
10) Negotiations over rates have always been between the shippers and LRY. Lake County cannot set rates and has not attempted to set rates.

11) Lake County has admitted responsibility for bridge repairs, but disputes responsibility for repair of the track on the bridges and the railbed leading up to the bridges. Lake County's position is based on the federal regulations definition of the term "bridge" as well as an opinion from ODOT (See attached excerpt from 49 C.F.R. 237.5 and email from Robert Melbo, State Rail Planner, ODOT.)

12) The shippers have repeatedly expressed to me that they are not satisfied with service provided by LRY and are in favor of termination of the Lease and a new operator.

Pursuant to 28 USC § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED this 10 day of May, 2017.



Brad Winters

in which state agencies have performed bridge inspections and evaluations in which the bridge was found to be seriously deficient, and where the operating railroad was never notified or advised of the problem. FRA accident records include at least one such instance in which the bridge failed under a train, resulting in a catastrophic train accident. Section 237.109 requires that the track owner keep the bridge inspection reports, and must therefore obtain them from a state agency or any other party that performs bridge inspections in conformance with the requirements of these regulations. This provision will prevent a loss of vital communication among concerned parties.

Paragraph (f). Where an owner of track to which this part applies has previously assigned responsibility for a segment of track to another person as prescribed in 49 CFR 213.5(c), additional notification to FRA is not required.

Paragraph (g). This paragraph provides that FRA reserves the right to reject an assignment of responsibility under § 237.3(b) for cause shown. As stated in paragraph (c) of this section, FRA may hold the track owner or the assignee, or both, responsible for compliance with this part and subject to penalties under § 237.7. Consequently, if FRA rejects an assignment of responsibility, FRA will not consider the rejected assignee responsible for compliance with part 237 pursuant to paragraph (c) of this section.

Section 237.5 Definitions

The definitions in this section are only intended to apply to this part, and not to alter the same terminology wherever used outside this part for other purposes.

Bridge modification and bridge repair. "Bridge modification" means a change to the configuration of a railroad bridge that affects the load capacity of the bridge, while "bridge repair" means remediation of damage or deterioration which has affected the structural integrity of a railroad bridge. This part requires that modifications and repairs to bridges be designed by railroad bridge engineers, and the work supervised by designated railroad bridge supervisors. This definition clarifies that minor modifications and repairs, such as replacing a wire rope handrail with one made of pipe, or painting a bridge, do not need to be designed and supervised pursuant to this part. However, this does not exempt the track owner from properly supervising the personal safety of the individuals performing the work

because that issue is addressed in other rules.

Railroad bridge. A "railroad bridge" is any structure which spans an opening under the track except for a small culvert, pipe, or other such structure that is located so far below the track that it only carries dead load from soil pressure and is not subjected to measurable bending, tension or compression stresses from passing trains. Unloading pits, track scales, and waterfront structures such as piers and wharves that fall within the definition of a "railroad bridge" are considered bridges for purposes of this part.

FRA does not intend to relieve a railroad from taking any action necessary to protect the safety of trains in the case of any structure, including small culverts, retaining walls, tunnels or overhead structures by providing for their inspection and maintenance, but it exempts them from the specific requirements of this regulation. A structure in a locomotive or car maintenance facility which is used to support cars or locomotives for maintenance is not included in the specific requirements of this regulation.

Section 237.7 Penalties

This provision conforms to provisions of the enabling legislation and stated agency policy. Consistent with FRA's Statement of Agency Policy Concerning Enforcement of the Federal Railroad Safety Laws, a penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to \$100,000 for any violation where circumstances warrant. See 49 CFR part 209, appendix A.

Section 237.9 Waivers

This section provides that each petition for a waiver under this part shall be filed in the manner and contain the information required by 49 CFR part 211, which prescribes rules of practice that apply to waiver proceedings. The processing of petitions for waiver of safety rules is found at subpart C to part 211.

Subpart B—Railroad Bridge Safety Assurance

This subpart prescribes minimum requirements for persons responsible for railroad bridges to implement programs to assure the structural integrity of those bridges and to protect the safe operation of trains over those bridges. The responsibility for the safety of a railroad bridge rests with the owner of the track supported by that bridge, who relies upon the work of the engineer who

makes the critical decisions regarding the management and use of that bridge.

Section 237.31 Adoption of Bridge Management Programs

Congress mandated that FRA "promulgate a regulation requiring owners of track carried on one or more railroad bridges to adopt a bridge safety management program to prevent the deterioration of railroad bridges and reduce the risk of human casualties, environmental damage, and disruption to the Nation's railroad transportation system that would result from a catastrophic bridge failure." Section 417(a), Public Law 110-432, 122 Stat. 4890 (49 U.S.C. 20103, note). This section requires track owners to adopt a bridge safety management program that prevents the deterioration of railroad bridges by preserving their capability to safely carry the traffic to be operated over them. Class I carriers and owners of track segments which are part of the general railroad system of transportation and which carry more than ten scheduled passenger trains per week shall implement their bridge safety programs no later than March 14, 2011. Class II carriers which carry ten or fewer scheduled passenger trains per week shall implement their bridge safety programs no later than September 13, 2011. All other track owners subject to this part shall implement their bridge safety programs no later than September 13, 2012.

FRA considers this implementation schedule to be realistic and effective, with priorities given to railroads with the highest levels of freight or passenger traffic. The implementation dates apply to the track owner, not to specific track segments. However, it is reasonable to consider that the specific provisions of each program will be implemented in a manner that accords higher priority to individual track segments with high volumes of freight or passenger traffic.

Section 237.33 Content of Bridge Management Programs

Certain elements of a bridge management program are essential to its effectiveness. Those elements are enumerated in this section. Track owners and individuals responsible for the safety of railroad bridges are encouraged to adapt these elements to the needs of their areas of responsibility, and to adopt additional elements not inconsistent with the requirements of this part.

Paragraph (a). Congress mandated that the new regulations require each track owner to "develop and maintain an accurate inventory of its railroad bridges, which shall identify the

Sent: Tuesday, February 7, 2017 2:33 PM
To: Brad Winters <bwinters@co.lake.or.us>
Subject: RE: bridges

Hi, Brad

Unless your agreement says otherwise, I would say that a bridge is a structure and that excludes the railroad embankments or subgrade leading up to it on either side, AND the track. Bridges are comprised of substructure (foundation, abutments, piers, bents, etc.) and the superstructure (the stringers, girders, etc. comprising the deck). The track is laid on the deck but if you're responsible for maintaining the bridge itself that, by definition, should exclude the track laid over the bridge deck. A bridge is a structure complete unto itself before the track is ever laid over it. If the track were removed tomorrow the bridges could still be useful for motor vehicles or a trail.

Some confusion may be caused by the FRA's description of excepted track, which I believe the Lakeview line is. When a railroad declares a line to be in excepted status that declaration automatically excludes bridges because the FRA excepted rule reads, "The [excepted] segment of track is not located on a bridge including the track approaching the bridge for 100 feet on either side, or located on a public street or highway." If track over a bridge and for 100 feet on either side in approach to the bridge can't be placed in excepted status then it has to at least meet Class 1 specifications. The reasoning is to hopefully prevent a track-caused derailment from happening while

traversing a bridge and possibly damaging it. It's kind of a token gesture because even at 10 mph if a derailment happens within 100 feet of a bridge, it's questionable that the train can get stopped before dragging a car onto the bridge. Of course, there are a lot of variables that can enter into that scenario but I'm sure that was the thinking behind wording the excepted rule the way it is.

The point is that the FRA's excepted track rule should have no bearing on interpretation of the county's obligation to maintain bridges.

Robert I. Melbo

State Rail Planner
Oregon Department of Transportation
Rail and Public Transit Division
555 13th Street, N.E., Suite 3
Salem, Oregon 97301
(503) 986-4137 FAX (503) 986-3183
robert.i.melbo@odot.state.or.us

From: Brad Winters [<mailto:bwinters@co.lake.or.us>]

Sent: Tuesday, February 07, 2017 1:20 PM

To: MELBO Robert I

Subject: bridges

Bob, I'm trying to get clarification on railroad bridges, what all is considered a bridge. My understanding is that it's the bridge structure itself not the approach the rail or the ties. You may be aware of our contractual agreement with LRY and our obligation to do bridge repair as the County. Obviously we are not bridge experts and need a little guidance of a definition of a bridge and who maintains what part. If you can help in any way I would really appreciate it.

Bradley J Winters
Lake County Commissioner
513 center street
Lakeview OR 97630
Office 541-947-6005
Cell 541-219-1894

Lake County where we make things happen.

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Of Attorneys for Defendant

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

Medford Division

LRY, LLC dba LAKE RAILWAY, an
Oregon LLC,

Plaintiff,

v.

LAKE COUNTY, a political
subdivision of the State of Oregon,

Defendant.

Case No. 17-cv-00675

**DECLARATION OF BRUCE
ADDINGTON IN SUPPORT OF
DEFENDANT'S RESPONSE TO
MOTION FOR TRO AND
PRELIMINARY INJUNCTION**

I, Bruce Addington, under penalty of perjury do hereby declare:

1. I am the Owner and President of Cornerstone Industrial Minerals

Corporation based in Lakeview, Oregon.

2. Cornerstone is one of the two shippers on the Lakeview Branch line,

Collins Pine being the other.

3. Cornerstone has not been receiving reliable service from Lake Railway (LRY).

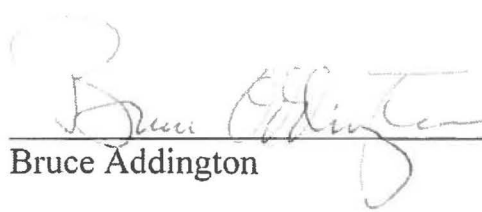
4. LRY's attitude in dealing with customers has been aggressive bordering on abusive by threatening to suspend service or drop cars at points some distance from the customer's facility unless the customer agreed on short notice to pay surcharges.

5. LRY's customers were forced to accept steep rate increases as the only way to keeping service (in effect their service was held hostage to agreeing to accept a rate surcharge). The most recent agreed to surcharge was \$525 per car for Cornerstone.

6. Because of uncertainty over rates and continued service, Cornerstone and Collins have both arranged to move their product by truck to a transloading facility at or near Klamath Falls until a new rail carrier assumes operation of the line.

Pursuant to 28 USC § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED this 9TH day of MAY, 2017.



Bruce Addington

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FAX: (541) 389-0159

Of Attorneys for Defendant

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

Medford Division

LRY, LLC dba LAKE RAILWAY, an
Oregon LLC,

Plaintiff,

v.

LAKE COUNTY, a political
subdivision of the State of Oregon,

Defendant.

Case No. 17-cv-00675

**DECLARATION OF LARRY
BROADFOOT IN SUPPORT OF
DEFENDANT'S RESPONSE TO
MOTION FOR TRO AND
PRELIMINARY INJUNCTION**

I, Larry Broadfoot, under penalty of perjury do hereby declare:

1. I am the Vice President of Sales & Marketing for Collins Pine.
2. Collins Pine is one of the two shippers on the Lakeview Branch line.
3. Collins Pine has not always been satisfied with the service that has been provided by Lake Rwy.

4. Collins Pine needs an operator committed to providing consistent service on the Lakeview Branch line.

5. Collins Pine could not support the proposed 100% surcharge and actively searched out a more economical service via truck shipment.

Pursuant to 28 USC § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED this 10 day of May, 2017.

A handwritten signature in black ink, appearing to read 'Larry Broadfoot', is written over a horizontal line.

Larry Broadfoot