

The Punch List Capper — Or, Why the North Coast Railroad Authority Needs Help In Its Lease Negotiations

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The NCRA-Northwestern Pacific lease will soon be renegotiated, as the current agreement has a deadline of June 30, 2012. The lease is a lengthy, complicated document and will require a good deal of time before an agreement is reached. In order to do the job correctly NCRA should have outside counsel and the process should allow public review and transparency. We also need a good handle on whatever benefits the line might provide.

That we need assistance can be seen from the history of what might be called the “punch list capper”. In March 2010 NCRA staff reported that the “62-mile Lombard-Windsor repair project” was substantially complete. However a four-item punch-list of repairs needed to be completed so as to have the line pass FRA inspection. NCRA’s Operator, NWP, estimated the cost to be less than \$1 million. On April 14, 2010, we were told that our engineer had determined the estimated cost at \$1,112,000.

Ordinarily this would call for bids to be let, but staff decided not to. Instead NWP was put in charge of completing the work by September 1, 2010. NCRA Counsel wrote that NWP “will perform this work at its cost by contracting out to its subcontractors it will use in conducting routine maintenance on the rail line.” This was a justification for avoiding bids, for Counsel stated that in his opinion “this is probably not a sole source contract”. Getting the work timely done was also an important consideration for avoiding the bidding process and was set out (thrice) in the Agreement approved April 14. NWP agreed “to perform the work... at its costs, with such costs to be capped at \$1.112 million under the supervision” of NCRA’s engineer. The parties anticipated that the federal government (FRA) would loan them funds to cover the costs. Interestingly, the FRA requires bids for the work covered by its loans, but in April 2010 there was no mention of that.

By August 11 the costs had increased 75% to \$1.940 million. The completion date became “no later than October 1, 2010”. NWP again agreed “to perform the work... at its costs. There was no mention of bids.

In early 2011 the FRA inspected the line to Windsor and in March it lifted the order forbidding operations. In June freight operations commenced. None-the-less, hundreds of thousands of dollars of work – well beyond the agreed-to “cap” – were spent on the punch list work months after the inspection and order termination. On October 19, 2011 NCRA was presented with a summary of the expenses: \$3,180,494, including \$300,000 for future automation of Black Point Bridge. Thus the work was not finished by October 1, 2010, and the costs had risen by 200% above the initial estimate. It is doubtful whether the work was completed “at cost” by NWP, and, of course, no bids were solicited. Nor had the Agreement of August 11, 2010 been amended.

The punch list capper is only one example of why NCRA needs to reform its dealings with NWP. The initial lease of September 21, 2006 is uniformly recognized as unfair and unworkable. It had the potential of handing the line to NWP for a century after NCRA spent approximately \$60 million taxpayer dollars to repair only the first 62 miles and yet under the Lease NWP could conceivably not pay a dime to NCRA. Some of these egregious provisions were deleted by the June 20, 2011 Amendment. But by October, NWP was demanding a reversal of those June 20 changes and adding new onerous provisions that were contrary to the existing lease. For example, under the lease \$20,000 monthly advance lease payments were paid to NCRA. They were explicitly without interest and were to be credited to NWP once operations started. Suddenly NWP was demanding prompt repayment of all the funds and retroactive interest! Meanwhile, NWP decided against making any lease payments to NCRA – it would only “loan” money to NCRA. NWP demanded that NCRA sell its Ukiah Depot property and that NWP have first rights to the proceeds to cover all of what NWP perceives as its due.

Before NCRA expends additional millions of taxpayer dollars it should know what benefits the public can derive from the expenditures. It should promptly examine this issue and properly prepare for the lease negotiations.