

ENTERED
Office of Proceedings
August 16, 2021
Part of
Public Record

BAKER & MILLER PLLC

ATTORNEYS and COUNSELLORS
2401 PENNSYLVANIA AVENUE, NW
SUITE 300
WASHINGTON, DC 20037

TELEPHONE: (202) 663-7820
FACSIMILE: (202) 663-7849

William A. Mullins

Direct Dial: (202) 663-7823
wmullins@bakerandmiller.com

August 16, 2021

VIA E-FILING

Cynthia T. Brown
Chief of the Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: North Coast Railroad Authority – Abandonment Exemption – In Mendocino, Trinity, and Humboldt Counties, CA, AB-1305X

Dear Ms. Brown:

Enclosed is Mendocino Railway's Verified Reply in Opposition to North Coast Railroad Authority's Petition for Exemption from 49 U.S.C. §10904. If there are any questions concerning this e-filing, please contact me by telephone at (202) 663-7823 or by e-mail at wmullins@bakerandmiller.com. If I am unavailable, you may contact Crystal M. Zorbaugh, by telephone at (202) 663-7831 or by e-mail at czorbaugh@bakerandmiller.com.

Sincerely,

/s/ William A. Mullins

William A. Mullins

Enclosure

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

AB-1305X

**NORTH COAST RAILROAD AUTHORITY – ABANDONMENT EXEMPTION –
IN MENDOCINO, TRINITY, AND HUMBOLDT COUNTIES, CA**

**VERIFIED REPLY IN OPPOSITION TO NORTH COAST RAILROAD AUTHORITY’S
PETITION FOR EXEMPTION FROM 49 U.S.C. §10904**

**William A. Mullins
Crystal M. Zorbaugh
BAKER & MILLER PLLC
Suite 300
2401 Pennsylvania Ave, N.W.
Washington, D.C. 20037
Telephone: (202) 663-7823
Facsimile: (202) 663-7849**

August 16, 2021

Attorneys for Mendocino Railway

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

AB-1305X

**NORTH COAST RAILROAD AUTHORITY – ABANDONMENT EXEMPTION –
IN MENDOCINO, TRINITY, AND HUMBOLDT COUNTIES, CA**

**VERIFIED REPLY IN OPPOSITION TO NORTH COAST RAILROAD AUTHORITY’S
PETITION FOR EXEMPTION FROM 49 U.S.C. §10904**

BRIEF BACKGROUND & SUMMARY OF ARGUMENT

On May 14, 2021, North Coast Railroad Authority (“NCRA”) filed both a Notice of Exemption and Notice of Interim Trails Use (“NITU”)¹ related to the abandonment and discontinuance of rail service on a rail line, which begins generally from just north of Willits, CA (specifically, MP 139.5 at Willits for the abandonment and MP 142.5 at Outlet for the adverse discontinuance application²) and continues to the north ending at Korblex/Korbel and Samoa, California (“Subject Line”) as depicted on the map included as Exhibit A.³ On July 6, 2021,

¹ Concurrently with its Notice of Exemption (Filing ID 302339), which was filed on May 14, 2021 (“Abandonment NOE”), NCRA filed a Statement of Willingness to Enter into a Notice of Interim Trails Use (See Filing 302344) to railbank the rail line in its own name.

² In a related proceeding, NCRA is seeking an exemption from certain statutory provisions and waivers of certain regulatory requirements regarding the filing of a third-party, or “adverse,” application for discontinuance. Specifically, NCRA has indicated it plans to terminate the operating rights of Northwestern Pacific Railway Company (“NWP”) over an NCRA rail line extending from milepost 142.5, at Outlet Station, to the end of the line at milepost 302.86, at Fairhaven, on the Samoa Branch, including the Korblex/Korbel Branch and the Carlotta Branch in Mendocino, Trinity, and Humboldt Counties, Cal. See N. Coast R.R. Authority – Adverse Discontinuance Application – Nw. Pac. Ry. Co., AB-1313, at 2, 11 (Filed March 9, 2021) (“NWP Adverse Discontinuance”). The Board instituted a proceeding on June 7, 2021. Mendocino Railway does not oppose the discontinuance of NWP’s operating rights in AB-1313.

³ Exhibit A is a map of the involved rail line that was included in the petition filed in AB-1313.

Mendocino Railway (“MR”) filed a letter (“July 6th MR Letter”) with the Board expressing concerns that (1) the Board should be afforded the time necessary to make the required jurisdictional findings related to a connecting portion that connects with the Subject Line prior to publishing the notice of exemption; (2) NCRA was trying to circumvent the Offer of Financial Assistance (“OFA”) process without having sought a waiver and was intending to deny interested parties in an opportunity to file an OFA; and, (3) that the Board’s jurisdictional findings were relevant to interested parties determining whether to bring an OFA for all or part of the Subject Line. On July 26, 2021, NCRA filed a Motion for Exemption from Offer of Financial Assistance Provisions of 49 U.S.C. 10904 and 49 C.F.R. 1152.27 (“OFA Motion”).

The filing of the OFA Motion confirms that MR’s concerns were well-founded. NCRA seeks to preclude even the potential for an OFA for all or any part of the Subject Line. The sole basis for this request is NCRA’s desire, and the desire of some local communities and politicians, to convert the entire Subject Line to a trail. Precedent is clear: absent another strong public purpose, the mere potential use of a rail corridor for a trail does not justify a waiver from the statutory right to file an OFA. Such waivers are rarely granted, and only when there is no continued interest in rail service and a pressing public purpose beyond the establishment of a trail to be used for recreational purposes. NCRA has not met the legal standard to grant such a waiver to preclude even the possibility of an OFA for all or part of the Subject Line. It may be that a duly filed OFA may not meet the standards for a grant of an OFA, but parties should not be precluded from attempting to meet those standards merely because of the desire to establish a trail. As such, NCRA’s OFA Motion should be denied.

IDENTITY AND INTEREST OF MR

MR⁴ is a small privately-owned Class III railroad and California Domestic Stock company based in Fort Bragg, California. It is licensed by the STB and subject to the STB's jurisdiction.⁵ MR also owns the "Skunk Train," which provides passenger services over the MR's 40-mile rail line (referred to herein as "MR Line") that extends from Fort Bragg, California to Willits, California.⁶ Dating back to the late 1800s, MR and/or its predecessor provided both freight and passenger services over the MR Line. Over the past several years, MR has diligently worked to grow both freight and passenger (excursion) traffic over the MR Line.

Based upon information and belief, MR believes there is potential traffic that could move over a portion of the Subject Line to/from Fort Bragg. Without further investigation and information, it is unclear at this stage whether such potential traffic can meet the stringent standards to justify granting an OFA; however, MR should not be prohibited from even the opportunity to make its case, as NCRA seeks to do. If MR does file an OFA, and if that OFA is eventually rejected, then the trail use can proceed. On the other hand, if the OFA is successful, shippers will benefit. To the extent the OFA does not cover the entire Subject Line, the part of the Subject Line not covered by the OFA can be converted to a trail, but MR should at least be allowed to provide service to shippers over a portion of the Subject Line who need it.

⁴ MR is owned by Sierra Railroad Company ("SRC"), who also owns the Sierra Northern Railway ("SNR"), another small common carrier Class III railroad subject to the STB's jurisdiction.

⁵ See Mendocino Ry. – Acquisition Exemption – Assets of the Cal. W. R.R., FD 34465, slip op at 1 (S.T.B. served April 9, 2004).

⁶ As explained herein, a collapsed tunnel at approximately milepost 3.5 that links Fort Bragg, California, which is located on a remote section of the California coast, with difficult roads, to Willits, California, a town 40 miles inland to the east has temporarily suspended freight offerings from the Subject Line to Fort Bragg. However, MR has obtained initial approval for funding that will allow the tunnel to reopen as early as late 2022.

GOVERNING LEGAL STANDARDS

The Board's focus in deciding an OFA exemption request (as opposed to the standards applicable to deciding whether to grant an OFA itself) is not, as NCRA claims, whether the OFA proponent has shown that shippers are likely to make use of the line if continued service is made available or whether there is sufficient traffic for the line to be viable, showings that may need to be made when and if an actual OFA is filed. Rather, the focus is whether there is continued interest in rail service and whether a strong public purpose for granting an exemption from the OFA beyond merely the desire to establish a trail outweighs the strong Congressional intent to preserve existing or future rail service. The filing of NCRA and the Friends of Eel river's ("FOER") filing in support of the OFA Motion on July 30, 2021 (Filing No. 302805) fail to meet that standard or even to address it.

As an initial matter, one of the principal goals of the Rail Transportation Policy established by Congress is intended to ensure the development and continuation of a sound rail transportation system to meet the needs of the public. 49 C.F.R. § 10101(4). The Board and its predecessor have consistently held that the OFA provisions reflect a strong Congressional desire to preserve legitimate prospects for continuing or resuming freight rail service on corridors that would otherwise be abandoned.

When there is an interest in preserving rail service, as there is here, the Board has time and again confirmed that the OFA provisions set forth at 49 USC 10904 take precedence over the mere desire to use the corridor for a trail, stating that the OFA provisions:

permit a party genuinely interested in providing continued rail service to acquire a line for that purpose over the objections of the owner [and] reflect a Congressional intent that rail service be preserved whenever possible. While exemptions from 49 U.S.C. 10904 have been granted from time to time, they have been granted when the right of way is needed for an overriding public purpose and there is no apparent interest in continued rail service. See Almono LP –

Abandonment Exemption – In Allegheny Cty., PA, AB-842X, slip op at 2 (S.T.B. served Jan. 13, 2004) (denying exemption from OFA provisions set forth at 49 USC 10904 where OFA offeror showed interest in providing continued rail service and Board found no basis for undercutting the Congressional objective of maintaining rail service).

The Board has rejected time and time again a request for a waiver from the OFA provisions when that request is not justified by a strong public purpose beyond that of the establishment of a trail. See CSX Transp., INC.--Abandonment Exemption--In Chesterfield and Darlington Counties, S.C., 2008 STB LEXIS 179, slip op at 9 (S.T.B. served Jan. 19, 2011) (holding the desire to establish a trail does not justify an exemption from the OFA process);⁷ Roaring Fork R.R. Holding Auth. – Abandonment Exemption – In Garfield, Eagle, and Pitkin Counties, Co., AB-547X, slip op at 5 (S.T.B. served Oct. 16, 1998) (“Roaring Fork I”) (denying OFA exemption because there was minimal traffic on the line, active shippers, and OFA proponent expressed desire for rail service to continue, even though local government had plans to establish trail use pending future reactivation of rail service and noting that statute contemplates multiple offers to subsidize or purchase a rail line could be made); 1411 Corp. – Abandonment Exemption – In Lancaster Cty., PA, Middletown & Hummelstown R.R. Co. – Abandonment Exemption – In Lancaster Cty., PA, AB-581X, AB-529X, slip op at 5 (S.T.B. served Sept. 6, 2001) (“1411 Corporation”) (Denying OFA exemption despite absence of traffic for over a decade when the shipper was the OFA proponent and provided an explanation for using other modes of transportation during the same period and rejecting argument that trail use was such an important public purpose that it should be prioritized over continued rail service).

⁷ See also Mid-Michigan R.R., Inc.--Abandonment Exemption--In Kent, Ionia, and Montcalm Counties, MI, 2008 STB LEXIS 326, slip op at 7 (S.T.B. served June 5, 2008). See also BNSF Ry. Co.--Abandonment Exemption--In King County, WA, 2008 STB LEXIS 726, slip op at 11 (S.T.B. served Nov. 25, 2008).

NCRA (with FOER's support) is attempting to conflate the test for justifying a grant of an actual OFA, which hasn't even been filed yet – and when filed NCRA (FOER and any other interested parties) will have every opportunity to comment – with the statutory standards applicable to granting an exemption from the OFA statute itself. The Board should reject this approach. Instead, as the Board has done time and time again, the Board should deny the waiver from the statutory provision, allow for the possibility of filing an OFA, and then if an OFA is filed, decide the merits of the OFA at that time. See, e.g., 1411 Corporation where the Board clarified in a previous case that it rejected an OFA brought in Roaring Fork II⁸ because the OFA was being brought for some other purpose, not for continued rail service;⁹ but cf., Ill. Cent. R.R.--Abandonment Exemption--In Perry Cty., IL, AB-43 (Sub No. 164X) (I.C.C. served Nov. 8, 1994), reconsideration denied and terms set (I.C.C. served Jan. 12, 1995) (The ICC found an OFA to be bona fide where the offeror, a coal company, proposed to subsidize a carrier's costs to preserve a line to meet a potential future need for rail freight service). Simply put, the Board will decide the merits of the OFA once it is brought. As explained in the next section, it is clear NCRA's argument that this proceeding is "not

⁸ See also Roaring Fork R.R. Holding Auth. – Abandonment Exemption – In Garfield, Eagle, and Pitkin Counties, Co., AB-547X, slip op at 1 (S.T.B. served May 21, 1999) ("Roaring Fork II")

⁹ See 1411 Corp. (explaining in Roaring Fork R.R. Holding Auth. – Abandonment Exemption – In Garfield, Eagle, and Pitkin Counties, Co., AB-547X, slip op at 4 (S.T.B. served May 21, 1999) the Board stated that ". . . when disputed, an offeror must be able to demonstrate that its OFA is for continued rail freight service. Where, as here, the line is not currently active, there must be some assurance that shippers are likely to make use of the line if continued service is made available and that there is sufficient traffic to enable the operator to fulfill its commitment to provide that service." But Roaring Fork does not set out a rigid test requiring an offeror to demonstrate that the line would be viable. It merely requires a sufficient showing to support a finding that an offer is, indeed, for continued freight service and not for some other purpose.

appropriate for an OFA” is based on a misunderstanding of the Board’s precedent and in no way supports the exemption that NCRA seeks.

ARGUMENT

As stated in the July 6th MR Letter, MR is waiting for the Board to make its jurisdictional findings and publish the notice for the AB-1305X abandonment to determine whether it will even have the opportunity to bring an OFA for all or part of the Subject Line. To be clear, MR’s intent in potentially bringing an OFA is for the purpose of continued freight and passenger (excursion) service. Neither NCRA’s misapplication of precedent nor its many misleading and/or simply incorrect statements about MR, its financial viability, its operations, potential shippers, etc., satisfy NCRA’s burden to justify the OFA exemption it seeks.

I. NCRA’s REQUEST FOR AN EXEMPTION FROM 49 U.S.C. § 10904 SHOULD BE DENIED.

NCRA’s argument is basically four-pronged: (1) an emergency embargo was imposed in 1998 for most of the trackage; (2) the entirety of the Subject Line (except for a 62-mile portion of the trackage to which NCRA dedicated large sums of money to rehab for commuter operations) remains inactive; (3) it does not believe MR has a legitimate interest or the financial capability to provide freight service; and (4) NCRA purports there are no shippers in need of rail service. See OFA Motion at 1-2. As such, NCRA purports it is entitled an exemption from the OFA provisions set forth at 49 USC 10904. Id. NCRA cites a couple of cases in support of its requested exemption.

The problem with NCRA’s arguments, and those in support of the OFA Motion offered by FOER, is that these may be arguments that apply to whether to grant or deny an OFA, but they are not arguments to justify granting a waiver from the statutory requirement that allows the filing of OFA. Other than expressing the desire for the establishment of a trail, neither NCRA

nor FOER presents a strong public policy to justify the waiver request. Furthermore, even if one were to conflate the two different standards (i.e., the one for granting an OFA waiver and the one applicable to granting or denying an OFA), NCRA still fails to support its argument. The cases cited by NCRA do not support a grant of a waiver from the statutory requirements or provide a basis for denying MR, or any other party, the opportunity to file an OFA.

The first case actually supports MR's argument that there must be a strong public purpose beyond merely the establishment of a trail to justify a waiver from the OFA statute. In Norfolk and W. Ry. Co. – Ab. Exemption – In Cincinnati, Ohio AB-290, slip op at 10 (Sub-No. 184X) (S.T.B. served May 13, 1998), the STB actually granted a waiver from the OFA standard because there was no continued need for rail service, abandonment authority was sought to accommodate an important public works project, and no parties objected. Here, there is a continued interest in rail service. And there is no pressing public works project, such as flood control,¹⁰ municipal redevelopment,¹¹ a highway,¹² an airport runway, or mass transit¹³

¹⁰ See K & E Ry. Co. - Abandonment Exemption - In Alfalfa, Garfield, and Grant Counties, Okla., and Barber Cty., Kan., AB-480X, (STB. served Dec. 23, 1996) (granting OFA exemption when there was no continued interest in rail service and delaying transfer of the two-line segments could adversely impact a valid, pressing public use purpose - completion of a necessary flood control project).

¹¹ See Doniphan, Kensett and Searcy Ry. - Abandonment Exemption - In Searcy, White Cty., Ariz., AB-558X, (STB. served May 5, 1999) (granting OFA exemption when there was no continued interest in rail service, and the property was needed for urban redevelopment to support a university's expansion).

¹² See Central Kansas Railway, L.L.C. – Abandonment Exemption – In Sedgwick County, KS, AB-406 (Sub-No. 14X) (STB served (granting OFA exemption because there was no continued interest in rail service and the rail lines were needed to allow the State of Kansas and local municipalities to implement flood control and highway improvements to enhance safety in the region).

¹³ See Union Pacific Railroad Company – Abandonment Exemption – In Adams, Weld, and Boulder Counties, CO., AB-33 (Sub-No. 307X) (STB served Oct. 17, 2012) (granting OFA exemption because there was no continued interest in rail service and the rail lines were needed for mass transit).

expansion, to outweigh the strong Congressional intent favoring the filing of an OFA, and MR does, in fact, object to the waiver of the OFA requirement.

The second case is Roaring Fork II, and it is clear from the OFA Motion that NCRA misunderstands what that case stands for as well. Contrary to NCRA's claims, Roaring Fork II did not establish a rigid test requiring an offeror to demonstrate that the line would be viable. It merely established that an OFA proponent must be filing the OFA for the purpose of continued freight service and not for some other purpose. See 1411 Corp., slip op at 5 (explaining a shipper (and OFA proponent) met the requirements for bringing an OFA despite no rail service being provided over the line for 10 years and stating that while the shipper had not yet nailed down firm contracts for other traffic that was apparently available, a party filing an OFA does not need to prove in advance that its efforts to revive a failing line will without question succeed).

NCRA's attempt to justify the waiver of the OFA requirement simply because the cost to rehabilitate the entirety of the Subject Line (over and beyond the scope of AB-1305X) to the point of interconnection with the national rail system might, according to NCRA, exceed 2.35 billion, is also not supported.¹⁴ This of course assumes that an OFA offered would be brought for the entirety of the Subject Line. MR has no desire to bring an OFA for the entire Subject Line.

Lastly, NCRA's statement that to "the extent Mendocino Railroad (in the absence of shippers) is seeking to protect a possible connection (to the interstate rail network) of its

¹⁴ NCRA purports rehabilitating the entirety of the Subject Line north of Willits would be \$1.7 billion. But again, an OFA could be brought for a smaller portion of the Subject Line to the north, which would significantly reduce rehabilitation costs. Most of those exorbitant rehabilitation costs, even if legitimate, are for the northern portion of the Subject Line, far north of where MR might consider filing an OFA.

unusable line from Fort Bragg to Willits, it is also pointless because the national rail system connection is south of Willits, not north. Mendocino has no shippers, real or imagined, who “need” service from Willits north,”¹⁵ OFA Motion at 7, likewise does not support granting a waiver from the OFA statute. This issue may be relevant to whether an OFA itself is justified, but it does not establish that there is a strong public purpose beyond a trail justifying a waiver from the OFA statute. Furthermore, there may be shippers located north of Willits who can ship to/from Fort Bragg and thus would not need to use NCRA’s line to the south of Willits. NCRA’s position would completely foreclose such a possibility contrary to the Congressional intent behind the OFA statute.¹⁶

II. THE MISLEADING AND/OR INCORRECT STATEMENTS OFFERED BY NCRA ARE INSUFFICIENT GROUNDS FOR UNDERCUTTING THE CONGRESSIONAL OBJECTIVE OF PRESERVING RAIL SERVICE.

NCRA makes numerous misleading and erroneous claims in support of the OFA exemption. Yet, none of these statements are even relevant to the Board’s standard for granting or denying an OFA waiver. Like all of NCRA’s arguments, at best, they may or may not be relevant to whether an OFA for all or a portion of the Subject Line should be accepted, but they are not relevant now. Even if they were relevant at this stage, which they are not, NCRA’s statement that MR is financially incapable of operating its existing MR line due to a tunnel collapse and does not have the ability to repair the tunnel due to financial constraints, and its statement that MR has no interest in providing freight service, is simply untrue.¹⁷

¹⁵ As explained in the next section contrary to NCRA’s claims, MR has identified and is in discussions with a shipper to the North of Willits, which it would need to bring an OFA to serve.

¹⁶ The remainder of NCRA’s arguments in support of the OFA exemption it seeks relates to the cost of providing rail service, while likely relevant to the merits of any filed OFA, they are irrelevant to whether MR or another potential offeror should be foreclosed from bringing an OFA in the first place.

¹⁷ For example, NCRA claims that MR has never provided freight service. However, prior to

It is true that one of the two tunnels on the MR line collapsed just over five years ago¹⁸ and this has prevented MR from moving traffic originating or terminating on the Subject Line to Fort Bragg or to points on NCRA's line south of Willits (a line that NCRA is not yet proposing to abandon) so that MR could connect to other railroads, NCRA completely disregards or is ignorant to the fact that MR has been making continuous process towards bringing the tunnel back online. But the implication that MR has no desire to restore rail service or to provide rail service is simply false. Since 2015, MR has worked diligently to rebuild and stabilize the hillside where the tunnel is located.¹⁹ Despite heavy rainfalls in 2015-2016, 2016-2017, and then again in 2018-2019, the hillside remains stable, and in late 2021, MR anticipates making significant progress towards restoring freight and passenger service through the tunnel.²⁰

Despite revenues being suppressed in 2020 as a result of Covid-19, the fact remains that to date MR has spent just shy of \$1.8m of MR's resources (not government subsidies)

Tunnel #1 collapsing, MR transported carloads of redwood over the MR Line. NCRA also conveniently ignores that its own actions have along the way hindered MR's ability to reopen Tunnel #1. For example, in 2018, MR sought to obtain the right to take over the Northwestern Pacific, but NCRA and SMART had deep pockets and diligently sought to prevent MR's expansion of rail service. Of course, had MR's efforts to operate the line operated by Northwestern Pacific been successful, MR would have been able to serve additional shippers and reconnect to the national rail system.

¹⁸ In 2015 during the modernization process of Tunnel #1, a landside was triggered bringing down the west face of the hill above the western portal.

¹⁹ The engineering work done for Tunnel #1 proposed two possible approaches. One was to put the hillside back in a sloped fashion. While the second design called for a terraced approach. MR selected this later method and engineered the hill so that each bench/step down fell back into the hill vs away from it. The purpose of this is to prevent any slip outs from coming down the west face again. At the back of each bench a drain was installed which then runs down the sidewall of the hill and removes water from puddling and settling. Additionally, MR installed both an inclinometer and piezometer to measure ground movement and static water levels respectively.

²⁰ MR intended to restore freight and passenger service over the MR Line sooner, but encountered delays associated to Covid-19 and weather.

rehabilitating Tunnel #1. This clearly shows that MR is not only committed to reopening Tunnel #1 but has devoted its own resources to do so, contrary to NCRA's claims.²¹ The idea that MR does not want to restore freight service is not supported by the facts.

NCRA also claims that "there is evidently insufficient excursion traffic out of Willits to Fort Bragg to allow Skunk to fix its own line, let alone hope to fix the line from Willits to Eureka."²² This statement too fails to recognize several important truths about MR's efforts and finances. First, MR proposed a > 50% match on each BUILD application, demonstrating its strong financial commitment to reopening the MR line for both freight and passenger offerings. Second, because no state or local resources are available to contribute towards the rehabilitation project, MR created a \$6 per passenger excursion ticket assessment to facilitate reopening the MR Line fully for freight and passenger offerings. Third, contrary to NCRA's claims, MR has sought a public-private partnership to rehabilitate the MR Line, not simply looked to subsidies as NCRA has in the past.²³ Fourth, 2021 has been a record-setting year for MR, its subsidiary SNR, and its parent company. All companies have experienced record growth, and fortunately, as a result, MR recently has been given conditional approval for funding that will fund the necessary repairs to Tunnel #1 and other improvements necessary to ensure the MR Line is viable for freight and passenger offerings for decades to come.

²¹ MR applied for Better Utilizing Infrastructure to Leverage Development ("BUILD") grants in 2018, 2019, and 2020 to completely rehabilitate the MR Line and facilitate reopening of the Tunnel #1. One of those attempts resulted in the project receiving a highly recommended rating and making it to the Secretary's desk, but it unfortunately was not selected for final approval.

²² See OFA Motion at 13.

²³ Speaking of subsidies and rehabilitation efforts, NCRA also fails to recognize that many years ago MR sought the right from the NCRA to restore the Subject Line. NCRA chose to award the rehabilitation project to another company, which did not complete the work.

Moreover, over the past few years, in anticipation of reopening the MR Line for freight and passenger (excursion) services, MR has been diligently working to market the MR Line and grow both its passenger and freight traffic. On the freight side, MR has been in discussions with the City of Fort Bragg to transport municipal solid waste, and with numerous potential shippers, including North Coast Brewing Company, Lyme Redwood Forest Company, Geo Aggregates, FloBeds, and various other businesses. MR is in the process of establishing operations at the 400-acre former Georgia-Pacific Site, which is being developed for industrial and mixed-use purposes.

In addition to NCRA's faulty statements about the MR Line, NCRA also makes several erroneous statements about the Subject Line, including that there is "no public need for continued rail service. See OFA Motion at 13. But NCRA has not talked to shippers and has undertaken no efforts to restore service on any part of the Subject Line. Instead, a choice was made many years ago to abandon the line and establish a trail. No wonder there isn't any existing business on the line. But there is the potential for business. MR is actively seeking to develop business at the former Georgia Pacific site. In the past three to six months, while seeking to identify freight shippers for the MR Line, MR has engaged in discussions with potential shippers for the Subject Line, including Wylatti, which owns a quarry at Dos Rios (NWP MP 166.50) and moves 40,000 - 50,000 tons per year from there to Fort Bragg. Wylatti currently uses trucks but when the tunnel is reopened, Wylatti has expressed strong interest in moving its aggregate over a small portion of the NCRA line at Dos Rios (MP 166.50) to Willits and then over the MR Line to

Fort Bragg, CA to be shipped via barge to various destinations.²⁴ MR also became aware of a possible additional shipper at Nashmead, CA (MP 175.50).

It is because of this potential business that MR is exploring filing an OFA. Indeed, for MR to serve these shippers, MR would need to file an OFA for a portion of the Subject Line starting at Willits, CA, and continuing to the north for approximately 40 miles. MR is currently evaluating whether to file an OFA for a portion of the Line, including the aforementioned segment on its own, in partnership with potential rail shipper(s) located on the Subject Line, or jointly with an investment group that recently approached MR. While MR (or another partner) intends to provide freight service over the Subject Line, it may be possible to accommodate both rail service and trails depending on the logistics of such operations. MR or another operator would certainly not need any portion of the line north of these locations or any portion that was the focus of the FOER filing.

Lastly, NCRA's misleading and flawed OFA Motion is supported by a verified statement, from Mitch Stogner, Executive Director of the North Coast Railroad Authority. Mr. Stogner's

²⁴ Mr. Stogner and NCRA offer in support of the OFA motion, a letter from Robert Pinoli, President of MR dated November 30, 2020 in which he states that the "line north of Willits is too great of disrepair to allow for economic railroad operation at this time and should thus be railbanked to preserve such an opportunity for all the future should it again become economic to operate over that portion of the line." At the time of Mr. Pinoli's November 30th letter, this statement was true for the entirety of the Subject Line from Willits, CA north. MR's conversations with potential shippers for a smaller portion of the Subject Line occurred subsequent to those comments. Mr. Stogner attempts to double down on his statement by indicating on May 21, 2021 he had a follow up conversation with Mr. Pinoli related to MR's interest in the NCRA line south of Willits. While it is true that the topic of the conversation between Mr. Stogner and Mr. Pinoli that day related to MR's interest in the NCRA line south of Willits, at no point during that conversation or any prior conversations did Mr. Pinoli disavow an interest in providing service should shippers to the North of Willits, CA need service.

verified statement is the basis of many of the unfounded claims in the OFA Motion.²⁵ While Mr. Stogner is quick to criticize MR and argue that the requested OFA exemption should be granted, he conveniently omits all mention of the fact that his agency has been questioned and criticized publicly for its failure to accommodate and promote freight service over the Subject Line and that a former state congressman called NCRA out for failing to recognize the viability of implementing freight rail north of Willits for a relatively minimal cost. See California regulators say debt-ridden North Coast rail agency needs clearer plans, The Press Democrat, available at <https://www.northbaybusinessjournal.com/article/industry-news/california-regulators-say-debt-ridden-north-coast-rail-agency-needs-clearer/>.

In addition to the attacks offered by Mr. Stogner as outlined in the OFA Motion and discussed above, it appears NCRA and Mr. Stogner appear to be arguing that because NCRA management entered uneconomical operating agreements and made numerous business missteps, the Subject Line could not be operated profitably. This, like many of the arguments offered in opposition, overlook one key fact that differentiates MR and NCRA; MR's parent company SRC has already revived two railroads (SNR and the California Western) and has a history of succeeding where others have not. The fact that the NCRA has not succeeded in operating the Subject Line is simply not grounds for the OFA exemption NCRA seeks. Indeed, none of the various misleading statements address the Board's legal standard for granting a waiver from the OFA statute. At best, they may be relevant to the Board's consideration of whether to grant or reject a properly filed OFA, but if then, they are not accurate and would not support rejection of an OFA.

²⁵ Mr. Stogner makes various erroneous claims, such as Mendocino's current ownership has never provided freight service over the MR. Line. As stated above, MR's current management has provided freight service during the tenure of its ownership.

CONCLUSION

For all of the reasons explained herein, NCRA has failed to support its request for an exemption from the OFA provisions. Other than the desire to establish a trail, NCRA fails to even address whether there is another overriding public purpose that would justify a waiver from the OFA statute, nor could they, as there is none. NCRA's attempts to apply the test relevant to whether to accept or reject an OFA should also be rejected. Its statements are either misleading and/or simply incorrect. These misleading statements do not override the strong Congressional objective of preserving rail service through application of the OFA process. As such, MR respectfully requests that the Board deny the OFA Motion.

Respectfully submitted,

/s/ William A. Mullins

William A. Mullins

Crystal M. Zorbaugh

BAKER & MILLER PLLC

Suite 300

2401 Pennsylvania Ave, N.W.

Washington, D.C. 20037

Telephone: (202) 663-7823

Facsimile: (202) 663-7849

Attorneys for Mendocino Railway

August 16, 2021

Verification

I, Robert J. Pinoli, President for Mendocino Railway hereby verify under penalty of perjury that to the best of my knowledge, the foregoing Mendocino Railway's ("MR") Verified Reply in Opposition to North Coast Railroad Authority's Petition for Exemption from 49 U.S.C. §10904 is true and correct. Further, I certify that I am qualified and authorized to make such verification on behalf of MR in connection with this proceeding before the Surface Transportation Board.

Executed this 13th day of August 2021

A handwritten signature in black ink, appearing to read 'Robert J. Pinoli', written over a horizontal line.

Robert J. Pinoli
President
Mendocino Railway

CERTIFICATE OF SERVICE

I hereby certify that a true copy of Mendocino Railway's Verified Reply in Opposition to North Coast Railroad Authority's Petition for Exemption from 49 U.S.C. §10904 was served by first-class mail, postage prepaid, or by a more expeditious manner, this 16th of August 2021, on all parties of record.

/s/ William A. Mullins
William A. Mullins
Attorney for Mendocino Railway

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

AB-1305X

**NORTH COAST RAILROAD AUTHORITY – ABANDONMENT EXEMPTION –
IN MENDOCINO, TRINITY, AND HUMBOLDT COUNTIES, CA**

**VERIFIED REPLY IN OPPOSITION TO NORTH COAST RAILROAD AUTHORITY’S
PETITION FOR EXEMPTION FROM 49 U.S.C. §10904**

EXHIBIT A - MAPS

Route map of North Coast Railroad Authority (2020)

(from NCRA website)

Korbel = MP 301.8

Korblex = MP 295.5

Outlet = MP 142.5

Willits = MP 139.5

Healdsburg = MP 68

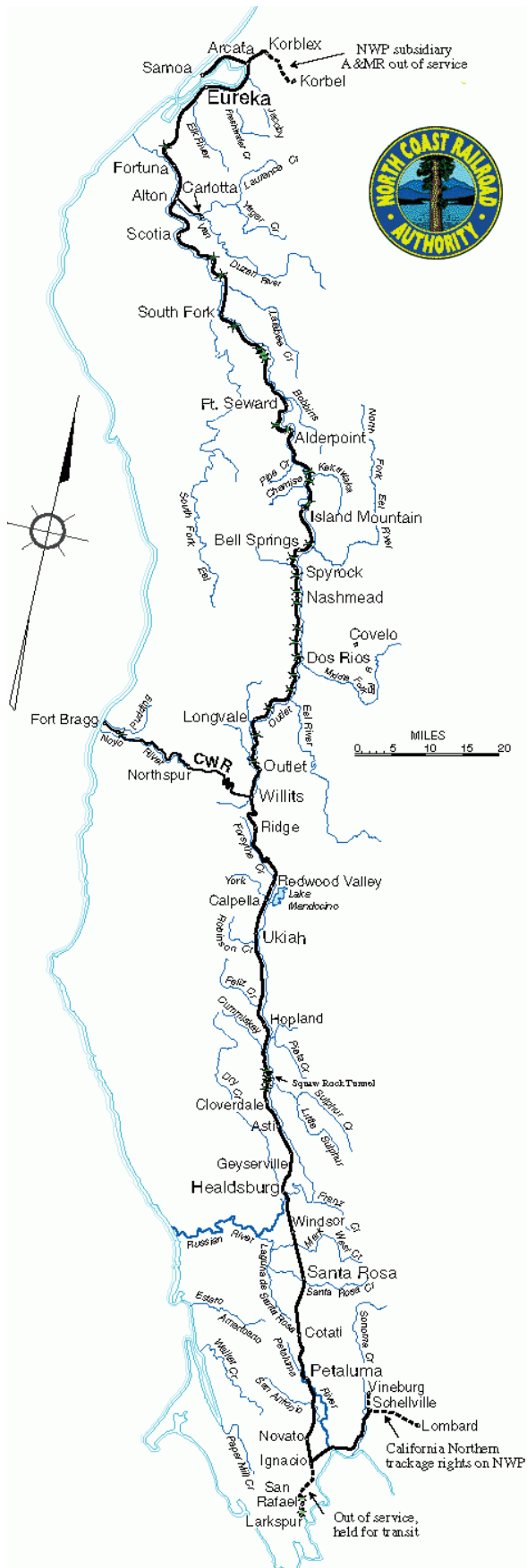
Petaluma = MP 38.5

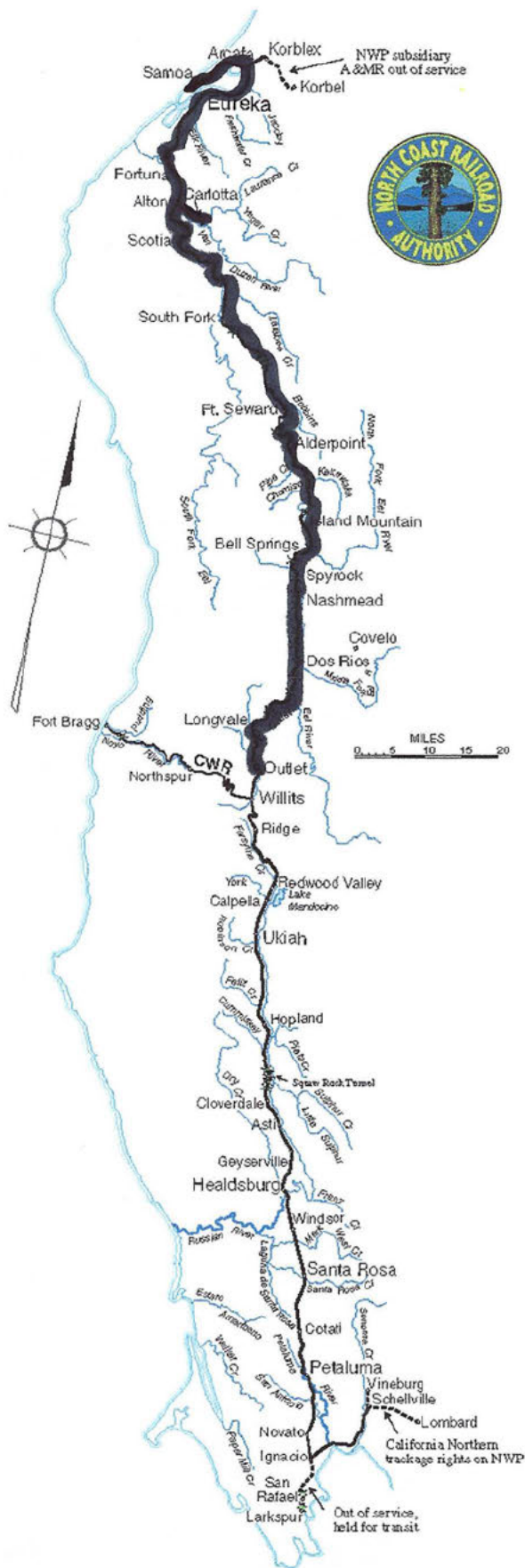
Novato = MP 30

Ignacio = MP 25.6

Lombard/Napa Junction = MP 63.4
(redesignated MP 49.8 S)

[Mileposts approximate]





Attachment 1: Route map of North Coast Railroad Authority (2020)
(from NCRA website)

FAIRHAVEN (END DISC.) =

MP 302.86

Samoa = 301.5

Korbel = MP 301.8

Korblex = MP 295.5

OUTLET (BEGIN DISC.) =

MP 142.5

Willits = MP 139.5

Healdsburg = MP 68

Petaluma = MP 38.5

Novato = MP 30

Ignacio = MP 25.6

Lombard/Napa Junction = MP 63.4
(redesignated MP 49.8 S)