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June 8, 2022

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 Reply in Opposition to North Coast Railroad Authority's Objection and Motion to Reject Mendocino Railway's Notice of Intent to File an Offer of Financial Assistance. 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**

**REPLY IN OPPOSITION TO NORTH COAST RAILROAD AUTHORITY'S
OBJECTION AND MOTION TO REJECT MENDOCINO RAILWAY'S NOTICE OF
INTENT TO FILE AN OFFER OF FINANCIAL ASSISTANCE**

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Attorney for Mendocino Railway

June 8, 2022

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

AB-1305X

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– ABANDONMENT EXEMPTION –
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BRIEF BACKGROUND & INTRODUCTION

On May 31, 2022, Mendocino Railway (“MR”) formally filed a Notice of Intent to File an Offer of Financial Assistance (“NOI”) for a 13-mile portion of the rail line that the North Coast Rail Authority (“NCRA”) seeks to discontinue and abandon. The NCRA line that is subject to the abandonment and discontinuance request extends from MP 139.5 in Willits to MP 330.5 in Samoa (the “Line”). MR, through the Offer of Financial Assistance (“OFA”), seeks to acquire a 13-mile portion from 139.5 to milepost 152.5, including whatever portion of the NCRA Willits yard that would be necessary to connect the NCRA Line with the existing MR line (“OFA Segment”).

On June 6, 2022, North Coast Rail Authority (“NCRA”) filed an Objection and Motion to Reject MR’s NOI (“June 6th NCRA Motion”) asserting as facts, without verification, that (1) MR’s operations are confined to tourist operations; (2) MR does not seek to move freight in interstate commerce for a shipper; and (3) MR lacks financial responsibility. NCRA also filed on June 6, 2022, Comments on Corrected Environmental Assessment expressing concerns that an OFA transfer will potentially violate the National Environmental Policy Act (“NEPA”).

MR has carefully reviewed the June 6th NCRA Motion and Comments on Corrected Environmental Assessment. As explained herein, the June 6th NCRA Motion contains numerous misleading and blatantly false statements. The June 6th Motion fails to provide any legal justification for rejecting MR's NOI at this stage of the proceeding. As such, the Surface Transportation Board ("STB" or "Board") should accept MR's NOI and allow MR's OFA to move forward to the next stage.

GOVERNING LEGAL STANDARDS

The Board adopted modifications to its procedures on OFA's to improve the process and protect against its abuse on June 28, 2017. Offers of Financial Assistance, EP 729 (STB Served June 29, 2017). The rule became effective on July 29, 2017. In its updated rule, the Board established that the first step in the OFA process is to file a notice of intent and to preliminarily establish that the proposed offeror is a financially responsible party. Under the regulations and the governing statute, 49 U.S.C. §10904, there is no requirement that a potential offeror be an active common carrier. Any "person" may file a notice of intent to file an OFA. Likewise, there is no requirement at this stage of the proceeding that the notice of intent contain the information required at 49 C.F.R. §1152.27(c)(1)(iv), which applies to when a person submits its actual offer. At this stage, any "person" may submit a timely filed notice of intent, and that notice of intent is accepted as long as that party establishes that it is a financially responsible person (implicit in an NOI and the statute is that the potential OFA also be for continued freight service).

The rule at 49 C.F.R. §1152.27 applicable to this class exemption abandonment request is simple:

(2) Class exemption proceedings -

(i) Expression of intent to file offer. Persons with a potential interest in providing financial assistance must, no later than 10 days after the Federal Register publication described in

[paragraph \(b\)\(2\)\(ii\)](#) of this section, submit to the carrier and the Board a formal expression of their intent to file an offer of financial assistance, indicating the type of financial assistance they wish to provide (i.e., subsidy or purchase) and demonstrating that they are preliminarily financially responsible as described in [paragraph \(c\)\(1\)\(ii\)](#) of this section. Such submissions are subject to the filing requirements of [§ 1152.25\(d\)\(1\)](#) through [\(d\)\(3\)](#). Submission of a formal expression of intent under this subsection will automatically stay the effective date of the notice of exemption under the class exemption for 40 days (normally, this will be 10 days beyond the date stated in the Federal Register publication)

The requirements for establishing preliminary financial responsibility are set out in 49

CFR § 1152.27 (c)(1)(ii) and read:

Persons submitting an expression of intent to file an offer of financial assistance as described in paragraph (c)(1)(i) or paragraph (c)(2)(i) of this section must demonstrate that they are financially responsible, under the definition set forth in paragraph (c)(1)(iv)(B) of this section, for the calculated preliminary financial responsibility amount of the rail line they seek to subsidize or purchase. If they seek to subsidize, the preliminary financial responsibility amount shall be \$4,000 (representing a standard annual per-mile maintenance cost) times the number of miles of track. If they seek to purchase, the preliminary financial responsibility amount shall be the sum of the rail steel scrap price per ton (dated within 30 days of the submission of the expression of intent), times 132 short tons per track mile or 117.857 long tons per track mile, times the length of the line in miles, plus \$4,000 times the number of miles of track times two. Persons submitting an expression of intent must provide evidentiary support for their calculations. If the Board does not issue a decision regarding the preliminary financial responsibility demonstration within 10 days of receipt of the expression of intent, the party submitting the expression of intent will be presumed to be preliminarily financially responsible and, upon request, the applicant must provide the information required under paragraph (a) of this section. This presumption does not create a presumption that the party will be financially responsible for an offer submitted under paragraph (c)(1)(iv) of this section.

Therefore, to establish preliminary financial responsibility, the Board requires that an offeror, here MR, demonstrate their financial responsibility per the calculated preliminary financial responsibility formula. Additionally, the Board requires evidentiary support that the offeror is preliminarily financially responsible for that calculated amount. *Id.* at 6-9. The Board clarified acceptable examples of evidentiary support to “include income statements, balance sheets, letters of credit, profit and loss statements, account statements, financing commitments,

and evidence of adequate insurance or ability to obtain adequate insurance. Id. at 14. The Board is not deciding the merits of the OFA but is simply deciding whether MR is financially responsible enough to file the OFA.

As explained in the next section, MR's NOI met all of the requirements. It was timely. It is for continued existing common carrier freight service. It contained evidence showing that MR is a financially responsible party. As such, the Board should reject NCRA's argument and find that MR is a financially responsible party.

ARGUMENT

In MR's NOI filed on May 31, 2022, it was clear that MR is interested in purchasing the OFA Segment because MR believes there is a continued and legitimate need for rail service on the OFA Segment. MR has complied with the Board's requirements for preliminary financial responsibility by submitting the calculation according to 49 CFR (c)(1)(ii), along with a scrap steel quote used for the calculation, a bank statement, a letter of support from MR's bank, and proof of adequate insurance.¹ All of these demonstrate that MR "has or within a reasonable time will have the financial resources to fulfill its proposed contractual obligations."

I. MR IS A PERSON ENTITLED TO FILE AN OFA AND THE PURPOSE OF THE OFA IS FOR CONTINUED FREIGHT COMMON CARRIER SERVICE

In the June 6th NCRA Motion, NCRA sets out an unsupported legal standard in arguing that MR must show that it has a legitimate interest and support for expanding into new markets and then falsely claims that MR's operations are "confined to excursion rail and rail bikes."² NCRA fails to show how those points are even relevant to the statute. Under the statute, any

¹ See Exhibits A-E attached to MR Notice of Intent to File an Offer of Financial Assistance in AB 1305X, filed May 31, 2022.

² See Objection and Motion to Reject Mendocino Railway Notice of Intent to File an Offer of Financial Assistance in AB 1305X, filed June 6, 2022.

“person” may file a notice of intent and an OFA. The person does not have to be an existing common carrier. There is no requirement, and especially not at this stage, that the person who desires to file an OFA show that it has freight rail experience and desires to “expand into new markets.” It is simply irrelevant to the Board’s statutory and regulatory requirements as to the existing business of the “person.” The person must be financially responsible, and although not explicit in the regulations at this stage of the proceeding, the purpose of the OFA (and indeed the purpose of the statute) must be for “continued” rail service – not expanded service into new markets or new service, but rather the desire to take over the existing common carrier obligation to provide freight service.

There is no dispute that MR is a "person" entitled to file an OFA. Furthermore, the purpose of MR's OFA is not for tourist operations, expanding the Skunk train, or excursion railbikes. The purpose of MR's intended OFA is to restore freight rail service on the OFA Segment and provide common carrier freight rail service to shippers located on the OFA Segment.

Indeed, MR does currently conduct tourist operations, but MR has and does provide common carrier freight service on its line. MR’s operations are not confined to excursion rail and rail bikes or tourist trains. It has shipped freight before and is planning to do so in the future. In 2004, MR acquired the assets of the former California Western Railroad (“CWR”), a Class III carrier in Mendocino Railway – Acquisition Exemption – Assets of the California Western Railroad, FD 34465 (STB served April 9, 2004). Given that freight service had not been provided over that rail line for some time and given the then anticipated *de minis* amount of freight anticipated at the time of the acquisition, MR explained that it intended to operate and

fulfill CWR's common carrier obligation with the help of MR's affiliated entity, Sierra Northern Railway (a Class III rail carrier).

Between 2010 and continuing through 2019, MR fulfilled its common carrier obligations through an operating arrangement with its affiliate. During that time, MR, as a common carrier, moved lumber, logs rock, and other materials for a variety of customers. In addition, it transported passengers, not just tourists, but transit passengers, such as police when conducting manhunts through the forests, fire crews fighting regional forest fires, and construction crews.

MR would have moved more freight and could move more today, except NCRA refused to abide by its common carrier obligation and has embargoed the Line for over 25 years. But for NCRA's own failure to repair and rehabilitate its Line, both south and north of Willits, such failure resulted in the FRA order taking the line out of service and prohibiting MR from conducting even more freight service, MR would be moving a significant amount of freight today. Indeed, MR made repeated requests to NCRA (and its operator, NWP) to reopen portions of the Line and/or allow MR to provide freight service over those portions, but those requests were rejected. In effect, NCRA has squatted on the Line for decades, turning down repeated requests and offers to reopen some or all of the Line. But for the NCRA's existence, the Line, or at least portions of it, would have been operating freight for decades. This OFA provides MR the opportunity to remedy, at least for those customers located on the OFA Segment, the problems caused by NCRA's neglect and flagrant disregard for its common carrier obligations.

The collapse of the MR tunnel indeed exacerbated MR's inability to provide additional freight service, but MR is working to repair the tunnel. Indeed, due to service frequency increases in 2020/2021 and the potential new business opportunities for freight service, on January 1, 2022, MR took over direct operating responsibility from Sierra Northern Railway for

freight service over its rail line. Sierra and MR have also sought government funding, either in the form of grants or loans, for the repair of the tunnel. Those efforts are being done for the purpose of providing freight and expanded rail service. Therefore, NCRA's statement that MR is confined to "rail excursion (tourist)" is simply false and rooted in a lack of research and information.

The purpose of the OFA is to restore active freight service, not tourist service, on the OFA segment. NCRA could have been providing common service on the OFA segment but refused to do so. When appropriate, and assuming MR is found to be a financially responsible party, MR will provide, at the appropriate time, all of the information required by the regulations to show that its OFA is a bona fide OFA.

II. MR HAS COMPLIED WITH BOARD NOI REQUIREMENTS AT THIS STAGE

In addition to falsely stating that MR is confined to tourist operations, NCRA also states that MR "does not even represent that the new market involves a shipper, and certainly does not identify any, much less any with business sufficient to pay for the rehabilitation of facilities and operational costs necessary to support the expansion." NCRA fails to identify any precedent, rules, or regulations where the Board has ever required a showing of interested shippers at the NOI stage or that it has to make a financial showing concerning potential rehabilitation costs, or that its OFA has to be for the purpose of "expansion into a new freight market." June 6th NCRA Motion at 5. Without any legal basis, NCRA fails to show why MR needed to include such information and how the absence of this information affects MR's compliance with the rules related to NOI and preliminary financial responsibility. MR has fully complied with the Board's rules and regulations. NCRA's counsel simply sets up a false legal standard and then claims MR

did not meet it. NCRA's approach should be rejected for what it is: a blatant attempt to continue to prevent shippers from obtaining freight service.

Despite not being required by the regulations to provide any information about the shippers at this stage, MR has already identified several shippers at this time that would be willing to use MR for movements to Willits and Fort Bragg if the collapsed tunnel is reopened. As noted previously, MR is currently working on reopening the tunnel. At the appropriate time, MR will provide any required additional information upon filing the OFA. MR has thoroughly reviewed the OFA procedures, which is why MR is aware of the requirements at each stage and has taken the necessary steps to secure the appropriate information and provide it at the appropriate time.

The June 6th NCRA Motion also argues that the scrap steel quote used by MR in their preliminary financial responsibility calculations "appears 'low.'" However, NCRA's scrap estimate at \$625 per gross ton provides no support or detail as to how they got this number. NCRA's Exhibit A contains no indication of who Montey Sneed is or how he is qualified to give the quote. The quote lacks any detail about whether that is the delivered price or the price minus transportation or why the movement to Chicago Heights Steel (wherever that is) is the appropriate market. Regardless of whether the steel is priced at \$300 or \$625, MR has the finances available to buy the OFA Segment, as supported by a copy of MR's bank statement and letter of support.³

Finally, it is important to note that if it acquires the OFA Segment, MR is not opposed to a trail on the remainder of the line. It is also open to a trail that would parallel the active OFA

³ A price of \$625 would bring the preliminary financial calculation for the OFA Segment to \$1,176,500. As shown in the NOI, Exhibit C (Bank Statement), and Exhibit D (Letter of Support), MR has the financial resources to pay this amount.

Segment. MR has always been supportive of a trail/rail use. For example, in 2004 MR applied to operate the entire NCRA Line but was rejected because of MR's position that the Eel River Canyon should not be used for rail purposes but should be turned into a trail. MR's position has not changed in the ensuing 18 years, but it is good to see that the NCRA's position has evolved to come to MR's point of view that the Eel River portion is best suited for trail. MR strongly supports the notion of a trail for the substantial majority of the Line and would work to accommodate this vision for the OFA Segment it seeks to acquire.

III. THE STB DOES NOT REQUIRE NEPA REVIEW FOR LINE SALES OR TRANSFERS

Finally, on June 6th, NCRA also submitted comments on the Corrected Environmental Assessment issued by the Board on May 23, 2022. NCRA contends that it will be a "violation of NEPA if the Board orders an OFA transfer without the benefit of an [environmental assessment] if the transfer may result in environmental effects exceeding certain thresholds."⁴ In its May 23, 2022, Corrected Draft Environmental Assessment, the Board clearly stated that "a potential change in rail service on the Line would not be a federal action subject to environmental review under NEPA" and that the environmental review in this abandonment proceeding "is limited to the analysis of the potential diversion of rail traffic to other transportation modes and impacts from any salvage activities resulting from the proposed abandonment."⁵ Transferring ownership of the OFA Segment for continued operation under a new operator would not trigger NEPA because such a transfer does not affect "the existing quality of the human environment and

⁴ See p. 2 of NCRA's Comments on Corrected Environmental Assessment in AB 1305X, filed June 6, 2022.

⁵ See Corrected Draft Environmental Assessment in AB 1305X STB, (STB Served May 23, 2022).

energy consumption should not be affected”⁶ and is categorically exempt from NEPA under 49 C.F.R. §1105.6(c).

CONCLUSION

For all of the reasons explained herein, NCRA has failed to support its request that the Board reject MR’s Notice of Intent to File an Offer of Financial Assistance. Neither NCRA’s lack of knowledge regarding the preliminary financial responsibility requirements 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 rejection of MR’s NOI. As such, MR respectfully requests that the Board deny the Motion to Reject.

Respectfully submitted,

/s/ William A. Mullins

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Attorney for Mendocino Railway

June 8, 2022

⁶ Id. at 12.

VERIFICATION

I, Robert J. Pinoli, President for Mendocino Railway (“MR”) declare under penalty of perjury that I have read the foregoing Reply in Opposition to North Coast Railroad Authority’s Objection and Motion to Reject Mendocino Railway’s Notice of Intent to File an Offer of Financial Assistance and to the best of my knowledge, the facts stated therein with respect to MR are true and correct. Further, I certify that I am authorized to file this verification on behalf of MR. Executed this 8th day of June 2022.



Robert J. Pinoli
President
Mendocino Railway

CERTIFICATE OF SERVICE

I hereby certify that a true copy of Mendocino Railway's Reply in Opposition to North Coast Railroad Authority's Objection and Motion to Reject Mendocino Railway's Notice of Intent to File an Offer of Financial Assistance was served by first-class mail, postage prepaid, or by a more expeditious manner, this 8th of June 2022, on all parties of record.

/s/ William A. Mullins

William A. Mullins

Attorney for Mendocino Railway