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304826
ENTERED
Office of Proceedings
June 22, 2022
Part of
Public Record

Crystal M. Zorbaugh

Direct Dial: (202) 663-7831
czorbaugh@bakerandmiller.com

June 22, 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, Cal., AB-1305X.

Dear Ms. Brown:

Mendocino Railway (“MR”) hereby submits a Reply to NCRA/GRTA Reply to Mendocino Railway and Motion to Modify Deadline to Respond to OFA. If there are any questions concerning this e-filing, please contact me by telephone at (202) 663-7831 or by e-mail at czorbaugh@bakerandmiller.com.

Sincerely,

/s/ Crystal M. Zorbaugh

Crystal M. Zorbaugh
Attorney for Mendocino Railway

Enclosures

cc: Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

AB 1305X

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

**REPLY TO NCRA/GRTA REPLY TO MENDOCINO RAILWAY AND MOTION TO
MODIFY DEADLINE TO RESPOND TO OFA**

As the Board is aware, on June 14, 2022, Mendocino Railway (“MR” or “Petitioner”) filed a Petition to Toll the Date that an Offer of Financial Assistance Must be Filed (“Petition”)¹ after (1) MR filed a Notice of intent to file an Offer of Financial Assistance (“OFA”) on May 31, 2022,² (2) Great Redwood Trail Agency (“GRTA”), formerly named North Coast Railroad Authority (“NCRA”) (collectively NCRA/GRTA) failed to timely respond to MR’s May 31, 2022 request (“May 31st Letter”) pursuant to 49 C.F.R. § 1152.27(a) for information required for formulating and submitting an OFA (“OFA Letter”), and (3) the Board by decision served June 10, 2022, found that MR “made the required showing of preliminary financial responsibility ... (notwithstanding that MR may have overstated the necessary preliminary financial responsibility amount).” See N. Coast R.R. Auth. – Abandonment Exemption – In Mendocino, Trinity, and Humboldt Counties, CAL, AB1305X (STB served June 10, 2022). While MR is aware of the Board’s general prohibition against replies to replies, the NCRA/GRTA Reply to Mendocino Railway and Motion to Modify Deadline to Respond to OFA (“NCRA/GRTA Reply”) is not limited to responding to the Petition

¹ Petitioner requested that the period within which to file an OFA be 60 days from the original effective date of the Board’s notice of exemption or until 30 days after receipt by MR of the 49 C.F.R. § 1152.27(a) information MR has requested, whichever is later.

² MR filed an OFA for 13 miles of the NCRA/GRTA system namely, from MP 139.5 (Commercial Street in Willits) to MP 152.5.

but instead seeks to unnecessarily interpose NCRA/GRTA and further unverified, uncorroborated, and/or misleading statements³ into an established process. Despite NCRA's failure to timely provide financial information in response to the May 31st Letter, the overarching focus of NCRA/GRTA Reply appears to be to seek Board permission for NCRA/GRTA to file additional evidence. NCRA/GRTA's attempts to create an additional evidentiary round and disrupt the Board's established process for evaluating OFAs has compelled MR to file this reply to address these issues.

ARGUMENT

1. The Offer of Financial Assistance Procedures, Precedent, Nor the Arguments Presented by NCRA/GRTA Warrant Deviating From Established OFA Procedures.

Since 1996, the Board has had in place thorough procedures for timely handling of OFAs brought in abandonment and discontinuance proceedings. See Abandonment and Discontinuance of Rail Lines and Rail Transp. Under 49 U.S.C. 10903, 1 S.T.B. 894 (STB served Dec. 24, 1996). These procedures set forth specific detailed requirements, processes, and deadlines for (1) filing a Notice of Intent to file an OFA, (2) accepting or rejecting a Notice of Intent to file an OFA, (3) obtaining financial information from the abandoning carrier,⁴ (4) petitioning to toll an OFA

³ Two examples of NCRA's false claims thus far include: (1) MR is solely a tourist railroad (not true because MR despite the collapse of Tunnel #1 has provided freight service when called to do so; in fact, on average MR has provided freight service a handful of times a year). Likewise, MR has also transported emergency responders and assisted police with manhunt efforts; (2) no shippers have expressed an interest in resuming service over the NCRA line (while not technically a shipper, MR has approached NCRA multiple times about expanding service over the NCRA line from Willits, CA south to serve potential shippers and transport MR railroad and track maintenance equipment across the line; time and again NCRA claimed it was working to reopen the line and despite many years passing by service over the rail line is still yet to resume. Examples of MR's communications with NCRA can be found in Exhibit A. It is entirely possible that any potential shippers from Willits, CA north faced the same resistance and may have given up efforts to become rail-served after seeing their service requests rebuked due to NCRA's desire to railbank the corridor.

⁴ An applicant must provide **promptly** upon request to a party considering an offer of financial assistance to continue existing rail service, and concurrently to the Board certain information which is necessary for a proponent to bring and the Board to evaluate an OFA. This information is set forth at 49 C.F.R. §1152.27(a).

deadline, (5) replying to a petition to toll, (6) deciding whether to grant a petition to toll, (7) filing an OFA, (8) deciding whether an OFA meets the statutory requirements and should be accepted, (9) filing a request for the Board to establish terms and conditions, (10) replying to requests for the Board to establish terms and conditions; (11) establishing terms and conditions, and (12) finalizing an OFA based on Board established terms and conditions.

Step 3 above directs NCRA/GRTA to “promptly” upon request provide certain information set forth at 49 C.F.R. §1152.27(a) to MR and concurrently to the Board because that information is necessary for MR to file an OFA. Yet, 22 days have passed and NCRA/GRTA has not provided any of the required information. This explains why in the NCRA/GRTA Reply, NCRA/GRTA “does not object” to MR’s request to toll the procedural schedule for filing an OFA for 60 days from the original effective date of the Board’s notice of exemption or until 30 days after receipt by MR of the 49 C.F.R. § 1152.27(a) information MR has requested, whichever is later. See NCRA/GRTA Reply at 3. It would have been disingenuous for NCRA/GRTA to object to MR’s extension request, given NCRA/GRTA’s dereliction of its obligation to timely provide the specified financial information.

As summarized above, the Board carefully crafted a detailed process for bringing and evaluating an OFA. This process has been confirmed time and again since 1996, including most recently in 2018 and 2020.⁵ Once the required financial information is obtained, as noted in step 7, an offeror prepares an OFA, setting forth an offer that satisfies the detailed and information-intensive requirements for an offer, which are outlined at 49 C.F.R. § 1152.27(c)(1)(iv). See CSXT 2018 at 2 and R.J. Corman at 2. Once submitted, in step 8, the OFA is reviewed by the Director of the Office of Proceedings to determine whether the offer satisfies the standards of 49 U.S.C. §

⁵ CSX Transp., Inc. – Abandonment Exemption – In Trumbull Cty., Ohio, AB 55 (Sub-No. 779X) (STB served August 30, 2018) (“CSXT 2018”); R.J. Corman R.R. Prop., LLC – Abandonment Exemption – In Scott, Campbell, and Anderson Counties, TENN, AB-1296X (STB served June 26, 2020) (“R.J. Corman”).

10904(d) and the Board's regulations and should be accepted. See CSXT 2018 at 2 and R.J. Corman at 2. For good reason, neither the Board's regulations nor precedent allows for a reply by the railroad that is the subject of the OFA. As explained thoroughly in R.J. Corman the Director of the Office of Proceedings carefully evaluates multiple factors including, but not limited to, whether offeror (1) demonstrates pursuant to 49 CFR §1152.27(c)(1)(iv)(E), through evidence a continued need for freight rail service on the line, (2) explains why potential shippers have decided to use rail again (if the line has been inactive), (3) establishes service to shippers on the subject line is economically feasible. Throughout the years, the Director of the Office of Proceedings after evaluating the totality of the circumstances has rejected OFAs where the offeror fails to meet its burden. See R.J. Corman at 4. See also Roaring Fork R.R. Holding Auth. – Aban. Exemption—in Garfield, Eagle, & Pitkin Ctys., Colo., 4 S.T.B. 116, 119 (1999), *aff'd sub nom.*, Kulmer, 236 F.3d at 1256-57. The Director of the Office of Proceedings has consistently made this determination without needing a reply from the railroad that was the subject of the OFA to decide whether an OFA satisfies the established requirements and should be accepted. Likewise, no reply is needed here.

Moreover, the Board recently revised its OFA procedures and could have created a reply period for railroads that are the subject of an OFA. See Offers of Financial Assistance, EP 729 (STB served June 29, 2017). The fact that it did not do so further reinforces the fact that such replies are not necessary for the Director of the Office of Proceedings to decide on whether an OFA should be accepted.

Neither the established procedures nor precedent support granting NCRA/GRTA a reply to any OFA brought by MR and likewise the arguments offered by NCRA/GRTA fail to warrant an additional evidentiary round. While NCRA/GRTA acknowledges that MR has the burden and must make a variety of showings, including not only actual financial responsibility (presumably to pay the purchase price and operate the railroad for at least two years), a continued need for rail service,

and operational feasibility, NCRA/GRTA argues that it should be allowed to submit additional evidence rebutting MR's evidence in support of its OFA on the very same topics. See NCRA/GRTA Reply at 3-5. NCRA/GRTA offers a Wikipedia source from 2016 to support its request for permission to submit additional evidence, despite being fully aware that MR has a plan for addressing the rehabilitation of the MR rail line. MR as the party with the burden will provide the Director of the Office Proceedings, with the information necessary to evaluate its OFA. MR not only bears the evidentiary burden but is the party that will bear the consequences should it fail to fully support its OFA. Thus, affording NCRA/GRTA an additional evidentiary round to submit conjecture, outdated information, and self-serving opinions serves no useful purpose and would be a waste of Board resources.

CONCLUSION

MR respectfully requests that the Board deny NCRA/GRTA's request for an additional evidentiary round and attempts to disrupt the Board's established process.

Respectfully submitted,

/s/ ***Crystal M. Zorbaugh***

William A. Mullins
Crystal M. Zorbaugh
BAKER & MILLER PLLC
2401 Pennsylvania Ave., N.W., Ste 300
Suite 300
Washington, DC 20037
Telephone: (202) 663-7820

Attorneys for Mendocino Railway

Dated: June 22, 2022

CERTIFICATE OF SERVICE

I hereby certify that a true copy of Mendocino Railway's Reply to NCRA/GRTA Reply to Mendocino Railway and Motion to Modify Deadline to Respond to OFA was served by first-class mail, postage prepaid, or by a more expeditious manner, this 22nd day of June 2022, on all parties of record.

Dated: June 22, 2022

/s/ *Crystal M. Zorbaugh*
Crystal M. Zorbaugh
Attorney for Mendocino Railway

From: [William Mullins](#)
To: [Chris Hart](#); [Mike Hart](#); [Torgny Nilsson](#); [Robert Pinoli](#)
Subject: Fw: Urgent Letter from Mendocino Railway Re Board Meeting
Date: Tuesday, May 19, 2020 4:20:54 PM
Attachments: [Letter To Mr Lucan - SMART \(Final\).pdf](#)

Sent!!!

William ("Bill") A. Mullins
Partner
Baker and Miller PLLC
Suite 300
2401 Pennsylvania Ave, N.W.
Washington, D.C. 20037
(202) 663-7823 (Direct)
(202) 663-7849 (Fax)

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-----Forwarded by William Mullins/bakermiller on 05/19/2020 04:09PM -----

To: ELucan@Novato.org
From: William Mullins/bakermiller
Date: 05/19/2020 04:08PM
Cc: LRosas-Mendoza@SonomaMarinTrain.org, dbosco@boscolaw.com, "Mike Hart" <mike@sierraenergy.com>, ncra.mstogner@sbcglobal.net
Subject: Urgent Letter from Mendocino Railway Re Board Meeting

(See attached file: Letter To Mr Lucan - SMART (Final).pdf)

Please review the attached. If you have an questions, please contact me or Mr. Hart, President of Mendocino Railway.

William ("Bill") A. Mullins
Partner
Baker and Miller PLLC
Suite 300
2401 Pennsylvania Ave, N.W.
Washington, D.C. 20037
(202) 663-7823 (Direct)
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William A. Mullins

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

May 19, 2020

VIA E-MAIL

Mr. Eric Lucan
Chairman
The Sonoma-Marín Area Rail Transit District
5401 Old Redwood Highway, Suite 200
Petaluma, CA 94954

Re: Item 7 – May 20, 2020 Board Meeting Agenda

Dear Mr. Lucan:

I am writing in my capacity as outside counsel for Mendocino Railway (“Mendocino”). You may recall that Mendocino is the successor to the California Western Railroad and is the operator of the “Skunk Train.” Mendocino is a common carrier railroad authorized by the Surface Transportation Board (“STB”) to provide freight rail service on Mendocino’s rail line between Fort Bragg and Willits, California. Mendocino’s line connects with the North Coast Railroad Authority’s (“NCRA”) rail line at Willits. Through that connection, Mendocino Railway connects to the national rail network.

It has come to Mendocino’s attention that item 7 on the agenda for the May 20, 2020 meeting of the Board of Directors for Sonoma-Marín Area Rail Transit District (“SMART”) reflects some discussion or action to be taken relating to the “Expansion of SMART Right-of-Way and Scope of Operations by adding Freight Service Responsibility and Executing Related Agreements.” Having just learned of the agenda item and briefly reviewed the published documents, Mendocino is attempting to fully understand the scope of the previous discussions and of the proposed plan of action.

Mendocino has a strong interest in ensuring that common carrier operations will be maintained on the entire NCRA line. In fact, Mendocino is very interested in acquiring the freight rights currently held by Northwestern Pacific Company (“NWP”) on the NCRA/NWP line or, at the very least, the rights to that portion of the line between Cloverdale and Willits, California which directly connect with its railroad. Working with SMART and local and statewide stakeholders, Mendocino believes that a comprehensive plan can be developed that

BAKER & MILLER PLLC

Mr. Eric Lucan
May 19, 2020
Page 2

would allow for SMART transit operations, freight operations, and trail use to coexist in the entire corridor up to Willits, not just portions of it. Indeed, Mendocino has previously notified the NCRA that there are shippers located on the Mendocino line that would like to connect with the interstate railroad network via a functional NCRA/NWP line but have been prevented from doing so. Mendocino's most recent notification was via a February 6, 2020 letter to Mitch Stogner, a copy of which is attached hereto.

Mendocino believes that it is uniquely positioned to restore freight traffic on the entire NCRA line, providing the people and businesses of the region – including freight customers in Fort Bragg, Willits, and the communities between Willits and Cloverdale – with a service that has too long been absent. It can do so while ensuring that SMART preserves its ability to perform its passenger operations and the state can develop a trail.

In order to provide an opportunity for discussion and for the SMART Board to hear Mendocino's plans, Mendocino would like to respectfully request that you defer any final votes relating to Item 7 on the agenda. Such a deferral would allow time to discuss this matter with SMART, NCRA, NWP/NWP, and Senator Mike McGuire. Absent a better understanding of how the common carrier rights of Mendocino's customers will be preserved under the proposed plan as outlined in Item 7, Mendocino intends to carefully monitor any proceedings at the STB and may be forced to oppose any regulatory approvals or take other actions at the STB to preserve the common carrier rights of its shippers.

Sincerely,

/s/ William A. Mullins

William A. Mullins
Attorney for Mendocino Railway

cc: Mike Hart, President, Mendocino Railway
Mitch Stogner, Executive Director, North Coast Railroad Authority
Doug Bosco, President & Legal Counsel, Northwestern Pacific Co.
Leticia Rosas-Mendoza, Clerk of the Board



MENDOCINO RAILWAY

Foot of Laurel Street
Fort Bragg, California 95437
707-964-6371 T
707-634-6428 F

February 6, 2020

Mitch Stogner
Executive Director
North Coast Railroad Authority
419 Talmage Road, Suite M
Ukiah, California 95482

Dear Mitch,

I am, as you may recall, Vice President of Mendocino Railway. I am writing to formally request that the North Coast Railroad Authority (“NCRA”) restore rail service on its rail line extending south from Willits, California so that we can provide freight service for our shippers who seek rail transportation services on the national rail network.

As you may also recall, Mendocino Railway is the successor to the California Western Railroad (“CWR”), operator of the “Skunk Train”, and a common carrier railroad authorized by the Surface Transportation Board (“STB”) to provide freight rail service on Mendocino Railway’s rail line between Fort Bragg and Willits, California. *See Mendocino Railway—Acquisition Exemption—Assets of the California Western Railroad*, STB Finance Docket No. 34465 (STB served Apr. 9, 2004). Mendocino Railway’s line connects with the NCRA’s line at Willits. Through that connection, Mendocino Railway connects to the national rail network.

Since 1998, the NCRA’s line has been embargoed as a result of unsafe operating conditions and noncompliance with federal railroad safety laws and regulations. This embargo ended, and has continued to prevent, Mendocino Railway’s access to the national rail network beyond Willits. Shippers located on our line cannot access the national rail network until the NCRA restores service on its line.

In 2004, prior to our purchase of the CWR, the CWR’s bankruptcy trustee filed a claim with the STB against the NCRA alleging that the NCRA had violated its common carrier obligation by failing to reopen the line from Willits south. This lawsuit is addressed in *Michael H. Meyer, Trustee in Bankruptcy for California Western Railroad, Inc. v. North Coast Railroad Authority, d/b/a Northwestern Pacific Railroad*, STB Finance Docket No. 34337 (STB served Jan. 31, 2007). The STB rejected the trustee’s claim on the grounds that there was no evidence of a continuing demand for service on the line. In the absence of evidence that freight shippers were interested in service over the embargoed line, the STB appeared to conclude that the NCRA did not have a common carrier obligation to reopen its line.

Mitch Stogner
Executive Director
North Coast Railroad Authority
February 6, 2020
Page 2

Though the NCRA's line has been closed for over 20 years, stranding Mendocino Railway's line from the national rail network, there is now strong evidence of shipper interest in rail freight transportation using Mendocino Railway's line and the NCRA line. Mendocino Railway accordingly in 2019 applied for a federal grant under the U.S. Department of Transportation's Better Utilizing Investments to Leverage Development ("BUILD") program to improve its line for such service. In connection with its grant application, Mendocino Railway determined that there are several companies located on or near Mendocino Railway's line with a strong interest in freight service in conjunction with a connection to the national rail network at Willits. Many of these companies supported Mendocino Railway's grant application, with local manufacturers, lumber companies, an aggregate company, and a brewery expressing their desire for a rail freight alternative to trucks.

A market for rail freight service on Mendocino Railway's line clearly exists but we need a viable connection to the national rail network at Willits in order to serve that market. We have tried to work with the Northwestern Pacific Railroad Company ("NWPCO"), the current operator of the NCRA's line, to restore service on the NCRA's line, and we recently expressed our willingness to take over operation of the NCRA's line in order to ensure its reopening. But our efforts have not been successful. If the NCRA continues to maintain its embargo of its line from Willits south we believe that the NCRA will be in violation of its common carrier obligations. We therefore urge the NCRA to take immediate steps to restore service on its line so that we can restore interstate freight service to the customers who desire it.

Thank you for your attention.

Sincerely,



Robert Jason Pinoli
Vice President

From: [Robert Jason Pinoli](#)
To: [Mitch Stogner](#)
Cc: [Alan Hemphill](#)
Subject: NCRA & Mendocino Railway (Right to Ship Letter)
Attachments: [NCRA - Stogner - Right to Ship Letter Cert w Rtn Rcpt 2020.2.5.pdf](#)

Mitch –

Hello & Good Afternoon!

I just got off the phone with Allan Hemphill and he mentioned you hadn't received the attached letter sent in February which was signed for by one of your staff. I look forward to receiving NCRA's response to this letter.

Thank you,

Robert

Robert Jason Pinoli
Mendocino Railway - Foot of Laurel Street, Fort Bragg, California 95437
707.964.6371 x101 Office / 707.964.6428 Fax



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Foot of Laurel Street
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Thank you for your attention.

Sincerely,



Robert Jason Pinoli
Vice President

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Mitch Stogner
North Coast Railroad Auth.
419 Talmage Road
Suite M
Ukiah CA 95482



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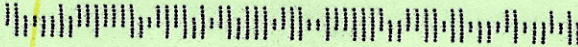
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Mendocino Railway
100 W. Laurel St.
Fort Bragg CA 95437



From: [MITCH STOGNER](#)
To: ["Robert Jason Pinoli"](#)
Cc: ["vingure@comcast.net"](#); ["Elizabeth Coleman"](#)
Subject: RE: NCRA & Mendocino Railway (Right to Ship Letter)
Date: Monday, June 1, 2020 12:26:24 PM

Robert- Apparently, Hiedy inadvertently neglected to pass this letter on to me. I have it now and have forwarded to legal counsel for response. Regards, Mitch

From: Robert Jason Pinoli [mailto:rjp@mcn.org]
Sent: Thursday, May 28, 2020 1:03 PM
To: 'Mitch Stogner' <ncra.mstogner@sbcglobal.net>
Cc: 'Alan Hemphill' <vinguru@comcast.net>
Subject: NCRA & Mendocino Railway (Right to Ship Letter)

Mitch –

Hello & Good Afternoon!

I just got off the phone with Allan Hemphill and he mentioned you hadn't received the attached letter sent in February which was signed for by one of your staff. I look forward to receiving NCRA's response to this letter.

Thank you,

Robert

Robert Jason Pinoli

Mendocino Railway - Foot of Laurel Street, Fort Bragg, California 95437
707.964.6371 x101 Office / 707.964.6428 Fax

From: [Robert Jason Pinoli](#)
To: [MITCH STOGNER](#)
Cc: vingure@comcast.net; "Elizabeth Coleman"
Subject: RE: NCRA & Mendocino Railway (Right to Ship Letter)

Thank you very much Mitch for the acknowledgement of this email and letter.

From: MITCH STOGNER <ncra.mstogner@sbcglobal.net>
Sent: Monday, June 1, 2020 9:26 AM
To: 'Robert Jason Pinoli' <rjp@mcn.org>
Cc: vingure@comcast.net; 'Elizabeth Coleman' <Elizabeth.Coleman@sonoma-county.org>
Subject: RE: NCRA & Mendocino Railway (Right to Ship Letter)

Robert- Apparently, Hiedy inadvertently neglected to pass this letter on to me. I have it now and have forwarded to legal counsel for response. Regards, Mitch

From: Robert Jason Pinoli [<mailto:rjp@mcn.org>]
Sent: Thursday, May 28, 2020 1:03 PM
To: 'Mitch Stogner' <ncra.mstogner@sbcglobal.net>
Cc: 'Alan Hemphill' <vinguru@comcast.net>
Subject: NCRA & Mendocino Railway (Right to Ship Letter)

Mitch –

Hello & Good Afternoon!

I just got off the phone with Allan Hemphill and he mentioned you hadn't received the attached letter sent in February which was signed for by one of your staff. I look forward to receiving NCRA's response to this letter.

Thank you,

Robert

Robert Jason Pinoli
Mendocino Railway - Foot of Laurel Street, Fort Bragg, California 95437
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