

BEFORE THE SURFACE TRANSPORTATION BOARD

304863

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

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NCRA/GRTA Reply to Seeker Enterprise, LLC

Great Redwood Trail Agency (“GRTA”), formerly named North Coast Railroad Authority (“NCRA”) and hereinafter referred to as “NCRA/GRTA,” is an agency of the State of California, and pursuant to 49 C.F.R. 1152.50, seeks abandonment authority for the line of railroad extending from MP 139.5 (Willits) to end of line at, inter alia, MP 300.5 (Samoa). NCRA/GRTA also requested issuance of a Notice of Interim Trail Use, and consented to negotiate an interim trail use agreement, noting that as a state agency it intended to “railbank” the corridor with itself.

The Board authorized abandonment by notice of exempt abandonment served May 20, 2022, subject to notices of intent to OFA, and deferred action on issuance of a NITU. Three notices of intent to OFA were filed, but only one (by Mendocino

Railway, hereinafter “MR”) survived motions to reject.¹ The surviving notice of intent to OFA (by MR) pertains only to MP 139.5 (Willits) to MP 152.5 (Longvale). It does not apply to MP 152.5 to MP 300.5 (Samoa), or to the Korblex or Carlotta branches.

Applicable Deadlines for Trail Use and Public Use Conditions

The Board’s May 20 decision also provided that requests for trail use were due by May 31, and requests for public use conditions were due on June 9. Accord, 87 Fed. Reg. 31056 (May 20, 2022).

Seeker’s Requests Are Inexcusably Late and Substantively Deficient

On or about June 22, 2022, well after the applicable deadlines, Seeker Enterprises (whose May 31 notice of intent to file an OFA had previously been rejected on June 10, see note 1, supra) filed a pleading styled “request for public use/rail banking conditions.” (The Board’s website lists the pleading as filed on June 22 but entered on June 23, and states that it is a “request for trail use.”) As a trail use request, it is three weeks late. As a public use condition request, it is approximately two weeks tardy. Seeker’s excuse for late-filing is it “did everything within its resources to ascertain that it was submitting a proper filing.”

¹ The other two notices of intent were filed by North Coast Railroad Company, LLC (rejected because it was filed after the deadline for notices had passed) and by Seeker Enterprises LLC (rejected on grounds of failure to comply with the Board’s preliminary financial responsibility regulations). Decision in AB 1305X, served June 10, 2022.

Seeker Request at p. 2. All Seeker needed to do was read the Board's May 20 decision which states the deadline for public use requests. Seeker had the resources to read the decision, for it met the deadline in respect to its ill-fated notice of intent to file an OFA. Seeker is simply seeking leave to late file for other relief without any excuse or explanation at all. NCRA/GRTA opposes the unexcused late-filing, particularly since it seeks public use conditions that are beyond the Board's authority. In addition, on June 23, Seeker Enterprises filed a pleading styled a "Supplement to Its Request for Public Use/Rail Banking Conditions." This also is late-filed without excuse and seeks relief beyond this Board's authority.

If Seeker Enterprises intended to file a trail use request, then its trail use request must be rejected not only as tardy but also because the entity has not filed a "statement of willingness" in the form required by 49 C.F.R. 1152.29.²

² Contrary to the heading ("trails use request") that the Board's website gives Seeker's pleading, NCRA/GRTA believes, based on Seeker's representation in its June 23 "supplement" that Seeker is not applying for a NITU but that it instead has an "understanding" with Timber Heritage Association ("THA"), a rail museum, under which Seeker will operate rail bikes "harmoniously" with THA should THA become interim trail manager. Since NCRA/GRTA intends to "railbank" the entire right of way authorized for abandonment with itself, THA's "statement of willingness" as to portions of the right of way is moot. NCRA/GRTA declines to negotiate an interim trail use agreement with THA or Seeker (a private for-profit rail bike business) and thus no NITU may be issued to them. This does not preclude joint use projects once NCRA/GRTA railbanks the premises with itself, but it does mean that all joint use projects (forms of rail with trail for THA or

If Seeker Enterprises intended to file a request for a public use condition, then its request not only must be rejected as out-of-time but also as manifestly deficient. The Board treats its authority to impose public use conditions as confined by 49 U.S.C. 10905. In particular, the only public use condition authorized is a prohibition on sale or disposition of property for 180 days unless the property is first offered, on reasonable terms, for public purposes. See Connecticut Trust for Historic Preservation v. ICC, 841 F.2d 479, 483 (2d Cir 1988) (affirming ICC/STB limited authority under what was then section 10906, now recodified as 10905).

Seeker Enterprises apparently wishes to run a private for-profit rail bike excursion service on portions of NCRA/GRTA's lines, similar to private for-profit rail bikes operated by MR on portions of its Fort Bragg to Willits "Skunk Train" excursion line. This is not public recreational use but private for-profit business use.³ It is therefore not properly covered by the "public use" conditioning statute.

In the event this agency authorizes abandonment, NCRA/GRTA by California statute is bound to hold the property itself for actual public use; namely, as the Great Redwood Trail. Consistent therewith, NCRA/GRTA has filed a statement of

Seeker) must be voluntary on the part of NCRA/GRTA and must conform to all requirements imposed by STB and by the State of California.

³ Seeker appears to concede the "business" nature of its use, especially in its June 23 "Supplement," which candidly speaks of a "business" investment and the "transformation of the NCRA into GRTA and the COVID-19 pandemic" putting Seeker's "business on hold for four years."

willingness, consented to negotiate a railbanking agreement with itself, and consistent therewith, has urged this Board to issue a Notice of Interim Trail Use for the entire property authorized for abandonment as soon as possible. This renders public use conditioning irrelevant, and in addition essentially moots other trails use requests pertaining to the line or fragments of the line as surplusage.

Seeker's Specific Conditions Are Beyond this Board's Authority

Seeker appears to request two public use conditions – first, an order by this Board requiring NCRA/GRTA to negotiate “in good faith ... a license [with Seeker] to operate rail bikes” (Seeker Request at p. 1) and, second, an order directing NCRA/GRTA and its alleged lessee (Humboldt County) to obtain approval of Seeker to any “flangeway filler” needed to make trestles “useable by cyclists.”(Id.)⁴ In its Supplement, Seeker says its intent is to have the Board “direct GRTA to take up our [rail bike] proposal as if [the past] four years had not intervened.” As summarized below, the conditions sought by Seeker are beyond this Board's power and/or moot.

⁴ If bicycle tires get caught in a flangeway, cyclists may lose control and be smitten to the ground, incurring inter alia broken hips, collarbones or skulls. Thus, if a light weight recreational track use like rail bikes is proposed on the same trestle also to be used as a trail (which Seeker apparently assumes will be the case), then flangeway fillers adequate to protect cyclists that are adequate if the rail equipment is “heavy” (like excursion rail passenger cars and engines) may be inconsistent with the (much) lighter weight rail bikes. This is ordinarily not something the Surface Transportation Board gets involved with, but it is the issue on which Seeker's second condition seeks the Board's intervention.

As to requiring “good faith” negotiations for rail bike use, the Board has never construed 49 U.S.C. 10905 to authorize it to impose terms or to require negotiations, much less to evaluate “good faith.” Instead, from the days of ICC, this Board has construed what is now section 10905 only to authorize the Board to bar sale or transfer by the railroad of its real property, except for public purposes, and then only for a period not in excess of 180 days. E.g., Connecticut Trust, supra. In short, the first condition requested by Seeker is beyond the Board’s power. In addition, NCRA/GRTA is not planning any sale or transfer, so there is nothing to bar anyway.⁵ For this reason, any application of section 10905 is inherently moot.

As to the proposed condition requiring NCRA/GRTA to submit designs for flangeway filler to Seeker for Seeker’s approval, this condition assumes that NCRA/GRTA must agree to Seeker’s rail bike use and then subordinate or sacrifice Great Redwood Trail interests to the whims of Seeker’s management concerning measures essential for trail use safety on trestles. This Board lacks the power to compel that result, or to subordinate safety of public trail users to a private business seeking a rail bike concession for pecuniary gain. This Board instead can only bar sale or use for non-public purposes for a period no longer than

⁵ NCRA/GRTA neither proposes nor foresees any sale or transfer of the right of way.

180 days. A bar on use of safe flangeways, as apparently sought by Driscoll/Seeker, does not involve prevention of sales for private use; it is rather insistence that public property in the form of trestles be subordinated to a private rail bike excursion business. This is rather the opposite of a true public use condition. In any event, Seeker evidently intends a condition that operates indefinitely, and that is beyond the Board's power under section 10905 as well.

In the end, Seeker's request for public use conditions does not conform to the requirements of 49 C.F.R. 1152.28. 49 C.F.R. 1152.28(a)(2)(ii) requires Seeker to show the public importance of the condition. The only argument Seeker mounts in that regard is that its principal (Mr. Driscoll) sought a rail bike deal in 2019, got several local governmental entities to supply some support, but Covid intervened before a deal could be struck, and now due to intervening California legislation it must deal with GRTA. Seeker complains that its principal (Mr. Driscoll) has made \$90,000 in investments, and now apparently wants this Board to pressure NCRA/GRTA to grant him a rail bike concession. But none of these "showings" demonstrate that the public use conditions Mr. Driscoll/Seeker seeks are of any "public importance." Moreover, the California legislature determined that the public interest is best served by trail use and railbanking of the entire NCRA line

north of Willits.⁶ Seeker in essence wants its private rail bike business to be viewed as overwhelming California’s prioritization of the Great Redwood Trail, but that is a boon for Mr. Driscoll beyond this Board’s authority to grant. Seeker also fails to specify a time period for its conditions, evidently seeking something of indefinite duration, far in excess of the 180-day statutory maximum, which in turn means that Seeker is in violation of 49 C.F.R. 1152.28(a)(2)(iii). And because Seeker fails to specify a time period, it utterly fails to justify any time period at all, notwithstanding the requirements of 49 C.F.R. 1152.28(a)(2)(iv).

In sum, NCRA’s board heard a presentation on Mr. Driscoll’s proposed rail bike business in 2019, but the parties failed to enter into a contract (NCRA/GRTA’s California counsel states that Mr. Driscoll’s proposed rail bike agreement did not meet baseline requirements for Board approval). According to NCRA/GRTA’s California counsel, Mr. Driscoll was informed in early 2020 that NCRA staff would not be recommending that the Board enter into an agreement

⁶ “Senate Bill No. 69” was approved by the Governor of California on September 30, 2021 and duly filed with the California Secretary of State. See https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB69. Insofar as relevant here, the California legislation changed the name of NCRA to Great Redwood Trail Agency (“GRTA”) effective March 1, 2022, and in essence affirmed the determination of the California Transportation Commission that NCRA’s line north of Willits is no longer appropriate, or needed, for rail service and instead should be a railbanked trail. The new legislation is carefully crafted so as not to interfere with NCRA’s rail obligations under STB regulation.

promoting Mr. Driscoll's rail bike business, and that he should revisit negotiations with GRTA once the legislature had completed its work on what is now known as Senate Bill 69. Mr. Driscoll's (now d/b/a Seeker) chief response to date has not been negotiation but instead an unsuccessful notice of intent to file an OFA. Now he wants STB to "direct" NCRA/GRTA to "take up" Seeker's rail bike proposal "as if" the past four years had not happened (Seeker Supplement, last substantive paragraph). Under applicable precedent, this Board lacks authority to ignore four years of events, or otherwise to require that NCRA/GRTA negotiate with Seeker, much less subordinate all flangeways necessary for safe trail use to Seeker's views on what conveniences its proposed rail bike operations, for which it has not negotiated any agreement with NCRA/GRTA anyway. Nothing in section 10905 authorizes this Board to exalt one claimed "public purpose" (assuming arguendo that a private for-profit rail bike business is a public purpose) over other actual "public purposes" (e.g., public recreational trail). This is especially the case when the property belongs to a California State agency and the State's Legislature, Governor, and Transportation Commission have all determined that the Great Redwood Trail has "public purpose" priority.⁷ Seeker also fails to comply with the required showings under 49 C.F.R. 1152.27, and its request for public use

⁷ See note 2 *supra*, final sentence.

conditions is out of time. For all these reasons, the relief sought by Seeker must be denied.⁸

Certificate of Service. I hereby certify service of the foregoing by email attachment on June 28, 2022 on all parties of record in AB 1305X per the STB website service list as of said date.

Respectfully submitted,

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⁸ Seeker attaches a number of “exhibits” to its Request. Since NCRA/GRTA views none as relevant to any issue currently before the Board, NCRA/GRTA is not commenting on them, except to say that to the extent Seeker claims they somehow support its use, they are out-dated, superceded by SB 69, and fail to take into account the overwhelming public support (manifest in the record of this proceeding) for railbanking and interim trail use of the railroad line at issue.