

BEFORE THE SURFACE TRANSPORTATION BOARD

Great Redwood Trail Agency --)

305351

Abandonment Exemption --) AB 1305X

in Mendocino, et al., Counties, CA)

ENTERED

Office of Proceedings
September 20, 2022

Part of
Public Record

Motion for a Protective Order

Expedited Consideration Requested

This is a motion for a protective order filed on behalf of Great Redwood Trail Agency (“GRTA”), formerly named North Coast Railroad Authority (“NCRA”), pursuant to 49 C.F.R. 1104.14. For the reasons stated herein, GRTA requests this Board to enter a protective order to govern potential discovery in this proceeding. The potential discovery relates to an “offer of financial assistance” (“OFA”) which Mendocino Railway (“MR”) has heretofore indicated it intends to file within 30 days of receiving information from GRTA pursuant to 49 C.F.R. 1152.27(a). GRTA certified service upon MR to this Board of that information on September 15, 2022. A proposed protective order is attached.

Background. GRTA/NCRA seeks abandonment (and railbanking) authorization for a line of railroad defined as MP 139.5 (Commercial Street in Willits) to end of line at MP 300.2 (Samoa), plus branches, in Mendocino,

Trinity, and Humboldt Counties, CA. In the course of the proceeding, Mendocino Railway (“MR”) submitted a “notice of intent to file an OFA” for a segment of this line, defined as MP 139.5 (Willits) to MP 152.5 (no longer existent community at Longvale). This Board accepted MR’s notice of intent to OFA, and granted MR’s motion to postpone the due date for the OFA until 30 days after GRTA certified that it had provided information required by 49 C.F.R. 1152.27(a) to MR. GRTA provided the certification of service on September 15, 2022. MR’s OFA is accordingly due on or before October 15, 2022.

Argument. MR has made a number of inaccurate and misleading statements in connection with its filings in this proceeding to date. For example, MR claims to have actually delivered freight rail service on its line, a position contradicted inter alia by its statements to the Railroad Retirement Board. MR claims freight shipper interest in MP 139.5 to 152.5, a position contradicted inter alia by the lack of any request for service on this segment. MR claims financial responsibility, but has not identified any bank accounts held in its name or any other assets, much less unencumbered assets, held in its name. In addition, it is evidently seeking federal government financial assistance to rehabilitate its own line from Fort Bragg to Willits, severed by a tunnel collapse since 2015. This renders incredible the notion that MR possesses the resources, let alone the

intention, not only to purchase but also to rehabilitate the track and collapsed tunnel from MP 139.5 to MP 152.5 for freight rail purposes. GRTA accordingly seeks discovery on these and related matters germane to MR's projected OFA, and, contemporaneous with this motion, has served document requests upon MR (attached as Appendix B).

GRTA anticipates that MR will claim that the documents include information that is business confidential and on that purported basis object to providing any documents, thus frustrating timely discovery. Because OFA's are ordinarily fast-track proceedings, and GRTA desires the discovery information for prompt use in a motion to dismiss any OFA filed by MR, GRTA does not and cannot await MR's spurious objections, but proactively and necessarily makes this motion for expeditious entry of the protective order attached as Appendix A.

The form of protective order set forth in Appendix A is drawn from Consolidated Rail Corporation – Abandonment Exemption – in Hudson County, NJ, AB 167 (Sub-no. 1189X), served Sept. 24, 2014. The protective order in that proceeding also involved confidential information sought from a putative OFA applicant. The protective order and the “undertakings” provided therein are similar to STB protective orders entered in “control” proceedings such as Genesee & Wyoming, Inc. – Acquisition of Control Exemption – Arkansas

Midland Railroad Company, Inc., The Prescott and Northwestern Railroad Company, and Warren & Saline River Railroad Company, F.D. 35877, served December 5, 2014.

Because MR's "OFA" is due no later than thirty (30) days from September 15, 2022, and because GRTA is seeking discovery responses from MR no later than the due date for any OFA MR intends to submit, GRTA requests expedited consideration of this Motion.

Conclusion. For the reasons stated, GRTA moves that the Board adopt the protective order contained in the appendix hereto.

Certificate of service. By my signature below, the undersigned, counsel for GRTA, certifies service by email attachment on the date set forth below on all parties to this proceeding at the email addresses for same as listed on the Board's website for docket AB 1305X.

Respectfully submitted,

s/ Charles H. Montange

Charles H. Montange

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Attorney for GRTA/NCRA

September 20, 2022

Attachments:

Appendix A – Proposed Protective Order

Appendix B – GRTA document requests to MR

APPENDIX A

PROTECTIVE ORDER

Definition: The term “party” as used in this Protective Order is not limited to parties to this proceeding, but includes both parties and non-parties producing and receiving documents, data, and other materials pursuant to discovery requests in this proceeding.

Order:

1. Any party producing information, data, documents, or other material (hereinafter collectively referred to as “material”) in discovery to another party to this proceeding, or submitting material in pleadings, that the party in good faith believes reflects proprietary or confidential information, may designate and stamp such material as “CONFIDENTIAL,” and such material must be treated as confidential. Such material, any copies, and any data or notes derived therefrom:
 - (a) Shall be used solely for the purpose of filing or preparing to file an Offer of Financial Assistance in connection with this proceeding, or commenting thereon, or moving to dismiss same, and any judicial review proceeding arising therefrom, and not for any other business, commercial, or competitive purpose.
 - (b) May be disclosed only to employees, counsel, or agents of the party requesting such material who have a need to know, handle, or review the material for purposes of this proceeding and any judicial review proceeding arising therefrom, and only where such employee, counsel, or agent has been given and has read a copy of this Protective Order, agrees to be bound by its terms, and executes the attached Undertaking for Confidential Material prior to receiving access to such materials, and provides a copy of the executed Undertaking to counsel for party providing the CONFIDENTIAL material.

- (c) Must be destroyed by the requesting party, its employees, counsel, and agents, at the completion of this proceeding and any judicial review proceeding arising therefrom. However, counsel and consultants for a party are permitted to retain file copies of all pleadings which they are authorized to review under this Protective Order, including Paragraph 12.
 - (d) If contained in any pleading filed with the Board, shall, in order to be kept confidential, be filed only in pleadings submitted in a package clearly marked on the outside “Confidential Materials Subject to Protective Order.” See 49 C.F.R. § 1104.14.
 - (e) If any party wishes to challenge such designation, the party may bring such matter to the attention of the Board.
2. Any party producing material in discovery to another party to this proceeding, or submitting material in pleadings, may in good faith designate and stamp particular material, such as material containing shipper-specific rate or cost data, or other competitively sensitive information, as “HIGHLY CONFIDENTIAL.” Material that is so designated may be disclosed only to outside counsel or outside consultants of the party requesting such materials who have a need to know, handle, or review the materials for purposes of this proceeding and any judicial review proceeding arising therefrom, provided that such outside counsel or outside consultants have been given and have read a copy of this Protective Order, agree to be bound by its terms, execute the attached Undertaking for Highly Confidential Material prior to receiving access to such materials, and provide a copy of the executed undertaking to counsel for the party providing the “HIGHLY CONFIDENTIAL” material. Material designated as “HIGHLY CONFIDENTIAL” and produced in discovery under this provision shall be subject to all of the other provisions of this Protective Order, including without limitation Paragraph 1(a), (c), (d), and (e).
3. In the event that a party produces material which should have been designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” and inadvertently fails to designate the material as “CONFIDENTIAL” or

“HIGHLY CONFIDENTIAL,” the producing party may notify the other party in writing within 5 days of discovery of its inadvertent failure to make the confidentiality designation. The party who received the material without the confidentiality designation will return the non-designated portion (including any and all copies) or destroy it, as directed by the producing party, or take such other steps as the parties agree to in writing. The producing party will promptly furnish the receiving party with properly designated material.

4. In the event that a party inadvertently produces material that is protected by the attorney-client privilege, work product doctrine, or any other privilege, the producing party may make a written request within a reasonable time after the producing party discovers the inadvertent disclosure that the other party return the inadvertently produced privileged document. The party who received the inadvertently produced document will either return the document to the producing party or destroy the document immediately upon receipt of the written request, as directed by the producing party. By returning or destroying the document, the receiving party is not conceding that the document is privileged and is not waiving its right to later challenge the substantive privilege claim, provided that it may not challenge the privilege claim by arguing that the inadvertent production waived the privilege.
5. If any party intends to use “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material at hearings in this proceeding, or in any judicial review proceeding arising herefrom, the party so intending shall submit any proposed exhibits or other documents setting forth or revealing such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material to the Board, or the court, as appropriate, with a written request that the Board or the court: (a) restrict attendance at the hearings during discussion of such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material, and (b) restrict access to the portion of the record or briefs reflecting discussion of such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material in accordance with the terms of this Protective Order.
6. If any party intends to use “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material in the course of any deposition in this

proceeding, the party so intending shall so advise counsel for the party producing the materials, counsel for the deponent, and all other counsel attending the deposition, and all portions of the deposition at which any such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material is used shall be restricted to persons who may review the material under this Protective Order. All portions of deposition transcripts and/or exhibits that consist of or disclose “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material shall be kept under seal and treated as “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material in accordance with the terms of this Protective Order.

7. To the extent that “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” material is produced by a party in these or any related proceedings, and is held and used by the receiving person in compliance with the terms of this Protective Order, such production, disclosure, and use of the material and of the data that the material contains will be deemed essential for the disposition of these and any related proceedings and will not be deemed a violation of 49 U.S.C. § 11904 or of any other relevant provision of the ICC Termination Act of 1995.
8. Except for this proceeding, the parties agree that if a party is required by law or order of a governmental or judicial body to release “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” material produced by the other party or copies or notes thereof as to which it obtained access pursuant to this Protective Order, the party so required shall notify the producing party in writing within three working days of the determination that the “CONFIDENTIAL” material, “HIGHLY CONFIDENTIAL” material, or copies or notes are to be released, or within three working days prior to such release, whichever is soonest, to permit the producing party the opportunity to contest the release.
9. Information that is publicly available or obtained outside of this proceeding from a person with a right to disclose it publicly shall not be subject to this Protective Order even if the same information is produced and designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” in this proceeding.
10. Each party has a right to view its own data, information, and documentation

(i.e., information originally generated or compiled by or for that party), even if that data, information, and documentation has been designated as “HIGHLY CONFIDENTIAL” by a producing party, without securing prior permission from the producing party. If a party (the “filing party”) files and serves upon the other party (the “reviewing party”) a pleading or evidence containing “HIGHLY CONFIDENTIAL” material of the filing party, the filing party shall also contemporaneously provide to outside counsel for the reviewing party a list of the “HIGHLY CONFIDENTIAL” information of the filing party contained in the pleading that must be redacted from the “HIGHLY CONFIDENTIAL” version prior to review by the in-house personnel of the reviewing party.

11. Nothing in this Protective Order restricts the right of any party to disclose voluntarily any “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” material originated by that party, if such material does not contain or reflect any “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” material originated by any other party.
12. Any party filing with the Board a “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” pleading in this proceeding should simultaneously file a public version of the pleading.

UNDERTAKING
CONFIDENTIAL
MATERIAL

I, _____, have read the Protective Order served on _____, 2022, governing the production of confidential documents in AB 1305X, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any data or information obtained under this Undertaking, or to use or permit the use of any techniques disclosed or information learned as a result of receiving such data or information, for any purposes other than for proceedings in connection with the filing of an Offer of Financial Assistance, or the filing of a motion to dismiss an Offer of Financial Assistance, in connection with AB 1305X or any judicial review proceeding arising therefrom. I further agree not to disclose any data or information obtained under this Protective Order to any person who has not executed an Undertaking in the form hereof. At the conclusion of these proceedings and any judicial review proceeding arising therefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that counsel and consultants may retain copies of pleadings which they were authorized to review under the Protective Order.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Outside [counsel][consultant] to

[Party name]

Dated: _____

UNDERTAKING
HIGHLY CONFIDENTIAL
MATERIAL

As outside [counsel] [consultant] for _____, for which I am acting in this proceeding, I, _____, have read the Protective Order served on _____, 2022, governing the production of highly confidential documents in AB 1305X, understand the same, and agree to be bound by its terms. I further agree not to disclose any data, information or material designated “HIGHLY CONFIDENTIAL” to any person or entity who: (i) is not eligible for access to “HIGHLY CONFIDENTIAL” material under the terms of the Protective Order, or (ii) has not executed an Undertaking for Highly Confidential Material in the form hereof. I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any documents designated “HIGHLY CONFIDENTIAL” that I will limit my use of those documents and the information they contain to proceedings in connection with the filing of an Offer of Financial Assistance, or the filing of a motion to dismiss an Offer of Financial Assistance, in AB 1305X, and any judicial review proceeding arising therefrom; that I will take all necessary steps to assure that said documents and information will be kept on a confidential basis by any outside counsel or outside consultants working with me; that under no circumstances will I permit access to said documents or information by personnel of my client, its subsidiaries, affiliates, or owners; and that at the conclusion of this proceeding and any judicial review proceeding arising therefrom I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel and consultants may retain file copies of pleadings filed with the Board. I further understand that I must destroy all notes or other documents containing “HIGHLY CONFIDENTIAL” information in compliance with the terms of the Protective Order. Under no circumstances will I permit access to documents designated “HIGHLY CONFIDENTIAL” by, or disclose any information contained therein to, any persons or entities for which I am not acting in this proceeding.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive

any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Outside [Counsel][Consultant] to

[Party name]

Dated: _____

APPENDIX B

BEFORE THE SURFACE TRANSPORTATION BOARD

Great Redwood Trail Agency -)
Abandonment Exemption -) AB 1305X
In Mendocino, et al Counties, CA)

Request for the Production of Documents
By Great Redwood Trail Agency to Mendocino Railway
as OFA Applicant

Pursuant to 49 C.F.R. 1114.30 and other applicable authority, abandonment applicant Great Redwood Trail Agency ("GRTA"), formerly named North Coast Railroad Authority ("NCRA") hereby requests, in the event that Mendocino Railway, Inc. (hereinafter "MR") files an "offer of financial assistance" ("OFA"), in the above-captioned proceeding, that MR deliver copies of the documents requested below to counsel for GRTA at his address below such that they are received by counsel **on or before the day that MR files its OFA**. GRTA requests delivery be by email attachment (scans). If MR elects to make copies, GRTA requests deliver by next day delivery service for arrival on or before the day that MR files its OFA. GRTA will supply Federal Express account number for that purpose on request and will agree to pay reasonable costs for duplication of originals upon presentation of an itemized bill.

Definitions. For purposes of this Request, "document" shall mean any writing, notation, or record, regardless of form, and including but not limited to both electronic and non-electronic media, including emails, diaries, business records,

and all documents maintained, retained, authored, copied on, or received by consultants, officers, employees, negotiators, board members, attorneys otherwise working for or on behalf of MR or related or parent companies.

"MR's line" shall mean the line which encompasses the assets which MR was authorized to acquire in the Surface Transportation Board ("STB") decision served April 9, 2004, in STB Finance Docket 34465, and described in that decision as "all of the rail lines owned by [California Western Railroad] between milepost 0 and milepost 40" in Mendocino County, CA.

Additional instructions. If MR claims privilege against disclosure of one or more documents, such as an attorney client privilege, then please identify the document by providing its author, the persons to whom it was directed, the persons who received copies of it, its date, its basic subject matter, the document request to which it is responsive, and the basis for the claim of privilege.

These requests are continuing. If the recipient becomes aware of additional responsive material after making its response to these requests, that responsive material must be made available to GRTA as otherwise provided within two (2) business days of MR's awareness of the additional responsive material.

Document requests. All the following documents are hereby requested pursuant to the foregoing definitions and conditions:

1. If MR claims to have delivered freight by rail on MR's line, and/or if MR claims to have arranged for another entity to deliver freight by rail on MR's line, then supply documents sufficient to show (a) the date of each and every such delivery, (b) the commodity or other product delivered, (c) the person or entity to whom shipment was made, (d) the person or entity from whom shipment was made, (e) the location where the shipment originated on MR's railroad, (f) the location where the shipment was delivered on MR's railroad, (g) the tariff (and/or contract price) paid for the delivery, (h) the identity of the person or entity paying the tariff (and/or contract price), (i) the number of rail cars and the type of rail cars used in the shipment, and (j) the entity providing the freight service if other than MR.
2. If MR claims to have delivered freight by rail on MR's line, and/or if MR claims to have arranged for another entity to deliver freight by rail on MR's line, then supply documents sufficient to show each and every tariff for freight traffic on MR's line and the dates during which that tariff was applicable.

3. Documents sufficient to show (a) all freight rail equipment (motive power and rail cars) owned or leased by MR, (b) the date of acquisition of each piece of equipment, (c) if the piece of equipment has been sold or is not in service, the date sale or placement out of service, (d) the current location of said equipment still owned by MR.
4. Copies of all applications for financial assistance to governmental agencies or private entities for repair or rehabilitation of MR's line (or any portion thereof) and/or for the acquisition of motive power or freight rail cars to operate on MR's line.
5. Copies of all contracts for financial assistance with governmental entities or private entities for repair or rehabilitation of MR's line (or any portion thereof) and/or for the acquisition of motive power or freight rail cars to operate on MR's line.
6. (a) Documents sufficient to show all MR's accounts at financial institutions and the ending balance in said accounts on a monthly basis for the last 18 months of account statements received.

(b) If MR relies on accounts at financial institutions of other entities for purposes of any OFA made in this proceeding, then documents sufficient to show the ending

balance in said accounts on a monthly basis for the last 18 months of account statements received.

7. (a) Documents sufficient to show all MR's unencumbered assets as of the date of the response to this document request.

(b) If MR relies on assets of other entities for purposes of any OFA made in this proceeding, then documents sufficient to show all unencumbered assets of such other entities as of the date of the response to this document request.
8. Documents sufficient to show all requests for freight rail service received by MR for MR's line from 2004 to the current time.
9. All documents relating to, or reflecting, communications from potential shippers, or by MR to potential shippers, concerning freight rail service on GRTA's line between MP 152.5 and MP 139.5.

Respectfully submitted,

s/ Charles H. Montange

Charles H. Montange

426 NW 162d St.

Seattle, WA 98177

206-546-1936

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for GRTA

Certificate of Service

I hereby certify service on 20 September 2022 of these document requests by email attachment addressed to William Mullins, counsel for Mendocino Railway, wmullins@bakerandmiller.com and by US Mail, postage pre-paid, Express (next day delivery), Williams Mullins, 2401 Pennsylvania Avenue NW, Suite 300, Washington, DC 20037.

Charles H. Montange