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SERVICE DATE – OCTOBER 13, 2022

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1305X

GREAT REDWOOD TRAIL AGENCY
—ABANDONMENT EXEMPTION—
IN MENDOCINO, TRINITY, AND HUMBOLDT COUNTIES, CAL.

MOTION FOR PROTECTIVE ORDER

Decided: October 13, 2022

On May 14, 2021, the Great Redwood Trail Agency (GRTA), formerly named North Coast Railroad Authority (NCRA)¹ filed a verified notice of exemption under 49 C.F.R. part 1152 subpart F—Exempt Abandonments to abandon 175.84 miles of rail line from milepost 139.5 at Commercial Street in Willits to milepost 284.1 near Eureka, including appurtenant branch lines extending to milepost 267.72 near Carlotta, milepost 295.57 near Korblex, milepost 300.5 near Samoa, and milepost 301.8 near Korbel, in Mendocino, Trinity and Humboldt Counties, Cal. After the proceeding was held in abeyance to permit the Board to resolve certain jurisdictional issues,² the Board lifted the abeyance on May 17, 2022, and on May 20, 2022, notice of the exemption was served and published in the Federal Register (87 Fed. Reg. 31,056). The Board's notice indicated that the exemption would become effective on June 19, 2022, unless stayed by the Board or unless a formal expression of intent to file an offer of financial assistance (OFA) was filed by May 31, 2022.

¹ NCRA's name was changed to Great Redwood Trail Agency, effective March 1, 2022. (GRTA Letter 6, Jan. 10, 2022.) The proceeding has been recaptioned accordingly.

² GRTA's verified notice described the line sought to be abandoned as including the Arcata & Mad River subsidiary, between milepost 295.57, near Korblex, and milepost 301.8, near Korbel, a distance of approximately 6.23 miles. (Verified Notice 1 n.1.) By decision served on May 17, 2022, the Board determined that abandonment of the Arcata & Mad River subsidiary had previously been consummated, removing that segment from the Board's jurisdiction. N. Coast R.R. Auth.—Aban. Exemption—in Mendocino, Trinity, & Humboldt Cntys., Cal., AB 1305X, slip op. at 3-5 (STB served May 17, 2022). Therefore, the line GRTA sought to abandon was defined to consist of 169.61 miles extending between milepost 139.5, near Willits and milepost 284.1 near Eureka, including appurtenant branch lines extending to milepost 267.72 near Carlotta, milepost 295.57 near Korblex, and milepost 300.5 near Samoa (the Line).

On May 31, 2022, Mendocino Railway (MR) filed a notice of intent to file an OFA to purchase a 13-mile portion of the Line extending from milepost 139.5 to milepost 152.5. The filing of the notice of intent automatically stayed the effective date of the exemption until June 29, 2022, pursuant to 49 C.F.R. § 1152.27(c)(2)(i). Thereafter, on June 14, 2022, MR timely petitioned to toll the OFA filing deadline, stating that GRTA had not yet provided the OFA-related information MR had requested under 49 C.F.R. § 1152.27(a), and that such information was not contained in the verified notice of exemption. (MR Pet. to Toll 1.) By decision served on June 24, 2022, the Board granted MR's motion to postpone the deadline for the filing of any OFA until 30 days after GRTA certifies to the Board that it had provided to MR the information required by 49 C.F.R. § 1152.27(a). GRTA filed its certification on September 15, 2022.

On September 20, 2022, GRTA filed a motion for protective order to govern potential discovery in this proceeding. According to GRTA, it seeks discovery on various matters related to MR's anticipated OFA and, contemporaneously with its motion, served a request for document production upon MR. Included with its motion are a proposed protective order and undertakings.

Subsequently, on October 11, 2022, MR filed a responsive pleading agreeing that a protective order is necessary but arguing that GRTA's proposed protective order is inappropriate.³ According to MR, GRTA's protective order defines the term "party" as not limited to parties to this proceeding but including both "parties and non-parties producing and receiving documents, data, and other materials pursuant to discovery requests in this proceeding." (MR Mot. for Protective Ord. 4 (citing GRTA Mot. for Protective Ord. 6).) Thus, MR asserts that adoption of GRTA's protective order would enable GRTA to share MR's confidential and proprietary information with potential state and local trail activists. Additionally, GRTA's protective order would be commercially damaging to MR because it could escalate further retaliation against MR and MR's shippers and adversely impact MR's ongoing commercial relationships. (*Id.*) Accordingly, MR has proposed its own protective order and undertakings.

In an October 12, 2022 reply, GRTA notes, among other things, its opposition to MR's proposed protective order. Specifically, GRTA asserts that MR's proposal fails to include a clause permitting a party to disclose "confidential" or "highly confidential" information if a party is required to do so by law or by judicial body. (GRTA Reply 3, Oct. 12, 2022.) GRTA also states that MR's proposal is drafted to permit a party to designate for protection information that is publicly available. (*Id.*) According to GRTA, information that is publicly available or obtained outside of this proceeding from a person with a right to disclose it publicly should not be subject to the protective order, even if such information is designated as "confidential" or "highly confidential." (*Id.*)

Good cause exists to issue a protective order to prevent the unrestricted disclosure of confidential, proprietary, or commercially sensitive information and data that could cause commercial harm. While GRTA has not persuasively explained why a protective order should

³ In its filing, MR also objects, in its entirety, to GRTA's discovery requests.

permit the dissemination of confidential material beyond parties to this proceeding, the Board finds the provisions highlighted by GRTA in its October 12, 2022 filing to be reasonable as they only expand disclosure to situations where required by law or where such materials would otherwise be publicly available or obtained outside of this proceeding from a person with a right to disclose it publicly. Therefore, the protective order and undertakings contained in the Appendix to this decision will be adopted.

It is ordered:

1. The modified protective order and undertakings in the Appendix to this decision are adopted.
2. Materials designated as confidential or highly confidential will be kept under seal by the Board and not placed in the public docket or otherwise disclosed to the public, unless the appropriate attached undertaking is executed and the terms of the protective order are followed, or unless otherwise ordered by the Board.
3. The decision is effective on its service date.

By the Board, Mai T. Dinh, Director, Office of Proceedings.

APPENDIX

PROTECTIVE ORDER

1. For the purposes of this Protective Order:
 - a. “Confidential Documents” means documents and other tangible materials containing or reflecting Confidential Information.
 - b. “Confidential Information” means traffic data (including but not limited to waybills, abstracts, study movement sheets, and any documents or computer tapes containing data derived from waybills, abstracts, study movement sheets, or other databases, and cost work papers); the identification of shippers and receivers, in conjunction with shipper-specific or other traffic data; the confidential terms of contracts with shippers or carriers; confidential financial and cost data; and other confidential or proprietary business or personal information.
 - c. “Designated Material” means any documents designated or stamped as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” in accordance with Paragraph 2 or 3 of this Protective Order, and any Confidential Information contained in such materials.
 - d. “Proceeding” means those before the Surface Transportation Board (“Board”) concerning Docket No. AB 1305X, and any related proceedings before the Board, and any judicial review proceedings arising from this case.
2. If any party to this Proceeding determines that any part of a document it submits, discovery request it propounds, discovery response it produces, transcript of a deposition or hearing in which it participates, or pleading or other paper to be submitted, filed, or served in this Proceeding contains Confidential Information or consists of Confidential Documents, then that party may designate and stamp such Confidential Information and Confidential Documents as “CONFIDENTIAL.” Any information or documents designated or stamped as “CONFIDENTIAL” shall be handled as provided for hereinafter.
3. If any party to this Proceeding determines that any part of a document it submits, discovery request it propounds, discovery response it produces, transcript of a deposition or hearing in which it participates, or pleading or other paper to be submitted, filed, or served in this Proceeding contains specific financing information or other competitively sensitive or proprietary information, then that party may designate and stamp such Confidential Information as “HIGHLY CONFIDENTIAL.” Any information or documents so designated or stamped shall be handled as provided hereinafter.
4. Information and documents designated or stamped as “CONFIDENTIAL” may not be disclosed in any way, directly or indirectly, or to any person or entity except to an employee, counsel, consultant, or agent of a party to this Proceeding, or an employee of such counsel, consultant, or agent, who, before receiving access to such information or documents, has been given and has read a copy of this Protective Order and has agreed to

be bound by its terms by signing a confidentiality undertaking substantially in the form set forth at Exhibit A to this Order.

5. Information and documents designated or stamped as “HIGHLY CONFIDENTIAL” may not be disclosed in any way, directly or indirectly, to any employee of a party to this Proceeding, or to any other person or entity except to an outside counsel or outside consultant to a party to this Proceeding or to an employee of such outside counsel or outside consultant, who, before receiving access to such information or documents, has been given and has read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form set forth at Exhibit B to this order.
6. Any party to this Proceeding may challenge the designation by any other party of information or documents as “CONFIDENTIAL” or as “HIGHLY CONFIDENTIAL” by filing a motion with the Board or with an administrative law judge or other officer to whom authority has been lawfully delegated by the Board to adjudicate such challenges.
7. Designated Material may not be used for any purposes, including (without limitation) any business, commercial or competitive purposes, other than the preparation and presentation of evidence and argument in Docket No. AB 1305X, and/or in any related proceedings.
8. Any party who receives Designated Material in discovery shall destroy such materials and any notes or documents reflecting such materials (other than file copies of pleadings or other documents filed with the Board and retained by outside counsel for a party to this Proceeding) at the earlier of: (1) such time as the party receiving the materials withdraws from this Proceeding, or (2) the completion of this Proceeding, including any petitions for reconsideration, appeals, or remands.
9. No party may include Designated Material in any pleading, brief, discovery request or response, or other document submitted to the Board, unless the pleading or other document is submitted under seal, in a package clearly marked on the outside as “Confidential Materials Subject to Protective Order.” See 49 C.F.R. § 1104.14. All pleadings and other documents so submitted shall be kept confidential by the Board and shall not be placed in the public docket in this Proceeding except by order of the Board or of an administrative law judge or other officer in the exercise of authority lawfully delegated by the Board.
10. No party may include Designated Material in any pleading, brief, discovery request or response, or other document submitted to any forum other than this Board in this Proceeding unless (1) the pleading or other document is submitted under seal in accordance with a protective order that requires the pleading or other document to be kept confidential by that tribunal and not be placed in the public docket in the proceeding, or (2) the pleading or other document is submitted in a sealed package clearly marked, “Confidential Materials Subject to Request for Protective Order,” and is accompanied by a motion to that tribunal requesting issuance of a protective order that would require the pleading or other document be kept confidential and not be placed in the public docket in the proceeding, and requesting that if the motion for protective order is not issued by that tribunal, the pleading or other document be returned to the filing party.

11. No party may present or otherwise use any Designated Material at a Board hearing in this Proceeding, unless that party has previously submitted, under seal, all proposed exhibits and other documents containing or reflecting such Designated Material to the Board, to an administrative law judge, or to another officer to whom relevant authority has been lawfully delegated by the Board, and has accompanied such submission with a written request that the Board, administrative law judge, or other officer (a) restrict attendance at the hearing during any discussion of such Designated Material, and (b) restrict access to any portion of the record or briefs reflecting discussion of such Designated Material in accordance with this Protective Order.
12. If any party intends to use any Designated Material in the course of any deposition in this Proceeding, that party shall so advise counsel for the party producing the Designated Material, counsel for the deponent, and all other counsel attending the deposition. Attendance at any portion of the deposition at which any Designated Material is used or discussed shall be restricted to persons who are authorized to review that material by the terms of this Protective Order. All portions of deposition transcripts or exhibits that consist of, refer to, or otherwise disclose Designated Material shall be filed under seal and be otherwise handled as provided in Paragraph 9 of this Protective Order.
13. To the extent that materials reflecting Confidential Information are produced by a party to this Proceeding, and are held and/or used by the receiving person in compliance with Paragraphs 1, 2 and 3 above, such production, disclosure, holding, and use of the materials and of the data that the materials contain are 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.
14. 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.
15. 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.
16. Any party that files with the Board a document containing Confidential Information must simultaneously file with the Board a public version of that document.
17. All parties must comply with all of the provisions of this Protective Order unless the Board, an administrative law judge, or other officer exercising authority lawfully delegated by the Board determines that good cause has been shown warranting suspension of any of the provisions herein.

18. Nothing in this Protective Order restricts the right of any party to disclose voluntarily any Confidential Information originated by that party, or to disclose voluntarily any Confidential Documents originated by that party, if such Confidential Information or Confidential Documents do not contain or reflect any Confidential Information originated by any other party.

Exhibit A

UNDERTAKING—CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order governing the production and use of Confidential Information and Confidential Documents in Docket No. AB 1305X, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any Confidential Information or Confidential Documents obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in Docket No. AB 1305X, and/or in any related proceedings. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed Undertakings in the form hereof, and that at the conclusion of this Proceeding (including any proceeding or administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting materials designated or stamped as “CONFIDENTIAL,” other than file copies, kept by outside counsel, of pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential information or confidential documents shall be entitled to specific performance and injunctive and/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.

Signed: _____

Dated: _____

Exhibit B**UNDERTAKING—HIGHLY CONFIDENTIAL MATERIAL**

I, _____, am outside [counsel] [consultant] for _____, for whom I am acting in this proceeding. I have read the Protective Order governing the production and use of Confidential Information and Confidential Documents in Docket No. AB 1305X, understand the same, and agree to be bound by its terms. I agree not to use or to permit the use of any Confidential Information or Confidential Documents obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in Docket No. AB 1305X, and any related proceedings before the Surface Transportation Board, or any judicial review proceedings in connection with Docket No. AB 1305X, and/or with any related proceedings. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed undertakings in the form hereof.

I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any information or documents designated or stamped as “HIGHLY CONFIDENTIAL,” that I will take all necessary steps to assure that said information or documents 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 materials or information by employees of my client or its subsidiaries, affiliates, or owners, and that at the conclusion of this proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting information or documents designated or stamped as “HIGHLY CONFIDENTIAL,” other than file copies, kept by outside counsel, of pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this undertaking and that parties producing confidential information or confidential documents shall be entitled to specific performance and injunctive and/or other equitable relief as a remedy for 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.

Signed: _____
 Outside [counsel] [consultant]

Dated: _____