

BEFORE THE SURFACE TRANSPORTATION BOARD

ENTERED

Office of Proceedings

October 17, 2022

Part of

Public Record

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

Great Redwood Trail Agency's

Motion to Strike/Exclude Portions of Mendocino Railway's "OFA" dated
 October 15, 2022, on the basis, inter alia, of Illegally Obtained "Evidence"

The discussion of rail valuation in Mendocino Railway's "Offer of Financial Assistance" filed October 15, 2022, fatally relies -- both as to NLV rail and real estate valuation -- on evidence derived from unpermitted trespass on GRTA's property. All such evidence and argument based on same should be stricken or excluded from the record as evidence obtained in violation of STB regulations and California criminal trespass law, or precluded from acceptance by this agency under federal constitutional law. Great Redwood Trail Agency (GRTA) accordingly so moves.¹

¹ Nothing herein should be construed as agreement by GRTA to any of the claims or arguments presented by MR in its OFA based on its illegal invasion of GRTA's property. GRTA waives no rights and intends to contest any and all of MR's claims in its OFA on substantive grounds as GRTA deems appropriate, including but not limited to MR's misplaced claim that it has shown financial responsibility or its fatally flawed showings as to rail need and/or rail feasibility.

Relevant facts. Mendocino Railway in effect acknowledged that it needed the authorization of GRTA to enter GRTA property: in its letter to this Board filed and dated August 22, 2022, Mr. Mullins (MR's counsel) specifically requested such authorization. By letter dated and filed with this Board on August 24, GRTA advised as follows (p.6):

"3. Inspection. Mr. Mullins's May 29 letter requested inspection. This is outside the scope of 49 C.F.R. 1 152.27(a). However, Mendocino Railway can direct requests for inspection to Elizabeth Coleman, contact information below. In order to inspect, Mendocino Railway will be expected to identify the inspecting parties, their qualifications, and the date of proposed inspection, and, prior to inspection, each inspecting party will be required to execute a right of entry prepared by GRTA inter alia indemnifying GRTA for personal injury and property damage."

Ms. Coleman was never contacted by Mendocino Railway or any agent of or contractor for Mendocino Railway and thus did not authorize entry. No one else authorized entry. See Ms. Coleman's Verification attached to this Motion to Strike/Exclude. Any entry onto GRTA's property north of the Willits Yard is therefore an unauthorized trespass and illegal. Any evidence obtained by reason of an unauthorized trespass is illegally obtained.

MR's President Pinoli in his Verified Statement boasts that his "team" conducted a physical invasion of GRTA's line, underscoring its "boots on the ground" approach. He says the invasion encompassed "the entire 13-mile GRTA/NCRA line," and he explains that his team took photos during the invasion

which are included in OFA attachment D – NWP Line Report, October 3, 2022.

See Pinoli V.S. at 8, page 129 of the MR OFA.

Mr. Pinoli then goes on to confess that his team made a “thorough inspection” of GRTA’s property, on the basis of which they developed their “\$7,242,814” estimate to rehabilitate it to Excepted Class status, and an additional \$1,652,640 to reach Class I, set forth in MR’s attachment E. See Pinoli V.S. at 8, page 129 of the MR OFA and note 12 (references attachment E – Assessment and Calculation of Track Rehab). Pinoli claims that based on his team’s illegal trespass and inspection, GRTA’s estimates for rehabilitation are overstated. Id.

Mr. Pinoli next confesses that his team’s “RII[]Appraisal Report “is similarly tainted with illegality. He claims that MR conducted an “in-person inspection of the entire section [of rail] at issue” and on this basis purports to pan the assessment presented by GRTA’s engineering firm, ARE. See id.

Mr. Pinoli then boasts (Pinoli at 9, OFA at 130) again of his illegally obtained pictures contained in his attachment D.

Curiously, Mr. Pinoli does not admit explicitly that his “team” illegally compiled evidence of the collapsed tunnel, but he implicitly indicates that they did, in that he obviously acknowledges that the tunnel is collapsed. He claims that MR, which cannot repair its own collapsed tunnel, “is quite familiar with tunnel

rehabilitation” and has a current estimate in that regard. Because his team evidently could not go in, he spends most of his speech on the issue assuming that ARE did not inspect the tunnel either. Pinoli at 10, OFA at 131.²

Finally, Mr. Pinoli, acknowledging that the Longvale to Willits line even if rehabilitated for the purported shipper, “is not a high-volume rail line” (Pinoli V.S. at 15, OFA at 136) proposes a compromise (rail with trail) provided GRTA pays for it. But he explains that “during MR’s [trespass on GRTA’s] Line, MR took lots of photos, to demonstrate to the Board that we have taken seriously the idea that rails and trails could exist on the NCRA/GRTA Line,” and he then attaches two trespass-obtained photos purporting to show the concept. Pinoli V.S. at 14-15, OFA at 135-36.

In short, Mr. Pinoli by his own Verified Statement repeatedly admits to trespass on GRTA’s premises. Mr. Pinoli blithely acknowledges, indeed brags, under penalties for perjury that attachments D (NWP Line Report, OFA pp. 154-208), E (Assessment and Calculation of Track Rehab, OFA pp. 209-11), and Appendix 1 (the RII Appraisal Report, OFA pp. 23-120) are based on that trespass. Of course,

² GRTA mentions this to show the speculative claims and characterizations throughout Pinoli’s verified statement. He obviously wishes to paint MR as having illegally conducted a thorough “on the ground” inspection and repeatedly assumes or opines that ARE on behalf of GRTA did not. Pinoli’s insinuations are speculative and false.

so are key portions of Pinoli's own Verified Statement as well; in particular his summary and arguments about the illegally-obtained alleged evidence set forth in Pinoli V.S. at 6- 11 and 14-15 (OFA Appendix 2, at pp. 127 -132 and 135-36).

MR's rail counsel relies on the illegal trespass and unlawfully obtained alleged evidence therefrom for the explanation of disparity found at pp. 6-17.

Motion to strike/exclude. Based on the facts above, GRTA moves to strike and exclude from this proceeding pages 6-17, 23-120, 127-132, 135-36, 154-208 and 209-11 of the OFA, and any additional assertions or alleged evidence derived from the illegal entry to which Mr. Pinoli attests.

Argument. This Board's discovery regulations at 49 CFR 1114.30(a)(2) provide that a party may request entry on land for inspection, but must specify a reasonable time, place and manner, and then may only proceed subject to "appropriate liability releases and safety and operating considerations." MR never filed a 49 CFR 1114.30(a)(2) discovery request; MR in fact takes the position that discovery is disfavored here, and there should be none.³ In consequence, MR was never qualified to seek an order from this Board compelling entry by means of a

³ Letter, Ms. Zorbaugh to Ms. Brown (STB), filed in AB 1305X, Oct. 11, 2022, at pp. 1 & 2-3.

motion to compel, filed no motion, and has no order from this Board allowing entry.

In its request for 49 CFR 1150.27(a) information, MR informally requested entry. GRTA responded in a letter filed with this Board that to enter GRTA's premises, MR must first obtain a right of entry ("ROE") from GRTA's California counsel, Ms. Coleman.⁴ MR failed to follow up with Ms. Coleman (V.S. attached). This ROE requirement is entirely reasonable for a host of reasons that should be apparent, liability for accidents and concern for health and safety being among the more important. Those reasons are mirrored in the relevant discovery regulation which provides that entry may only proceed subject to "appropriate liability releases and safety and operating considerations." See 49 CFR 1114.30(a)(2).

Wholly apart from the protection STB regulations provide against "open entry" for purposes of discovery, it is criminal trespass to enter into another's property without consent. California Penal Code 602(m) defines criminal trespass to include: "Entering and occupying real property or structures of any kind without the consent of the owner, the owner's agent, or the person in lawful possession."

⁴ GRTA's August 24 letter filed in this proceeding as quoted on p. 2, supra.

In short, STB regulations make clear that no entry onto property may be authorized by the agency, much less undertaken by a private party, except subject to “appropriate liability releases and safety and operating considerations.” If permission to enter is denied, and no order compelling entry is obtained from STB, then unauthorized entry onto GRTA’s rail property for inspection or play or whatever is criminal (and civil) trespass. It follows that MR’s president, Mr. Pinoli, in his Verified Statement has repeatedly attested under penalties for perjury to a violation of STB regulations and to trespass on GRTA’s property by MR and its “team.” He has further attested that he and MR thus rely on evidence illegally obtained in breach of STB regulations and California’s criminal trespass statute.

The fact that MR has instituted a legal process at STB to seize GRTA’s property does not mean that MR has some right to enter it to collect evidence. It instead means that MR must comply with STB’s rules that it and its team enter only pursuant to “appropriate liability releases and safety and operating considerations.” For the benefit of the parties, STB’s relatively recent decision in Application of the NRPC – CSX Transp. and Norfolk Southern Railway, F.D 36496, served Nov. 29, 2021, demonstrates how the process works. In addition, any implied “right” to enter without owner permission or on order of the STB would amount to an unconstitutional per se taking by STB of GRTA’s property rights under the rule confirmed recently by the Supreme Court in Cedar Point

Nursery v. Hassid, __ U.S. __, 141 S.Ct. 2063 (2021) (government cannot authorize intrusion on private property for otherwise lawful activity).

All purported evidence adduced by MR from its illegal entry, and all argument presented by MR based on that alleged evidence, as found in the OFA should accordingly be excluded from the proceeding. It was procured in violation of STB regulations. It is the product of “unclean hands.” Allowing exploitation of illegally obtained evidence by STB would amount to STB authorization (in violation of its regulations as well) in an unconstitutional per se taking (entry) upon GRTA’s property. MR can adduce no rationale for doing what it did other than cavalier disregard for STB’s regulations, GRTA’s constitutionally protected property rights, and California’s laws criminalizing what amounts to a flagrant and intentional trespass.

The only relief that will deter such conduct in the future is to suppress the purported evidence and argument that MR bases on its flagrant trespass. This result is consistent with federal rail policy favoring operation of facilities consistent with public health and safety, and the encouragement of honest and efficient management. 49 U.S.C. 10101(8) & (9).

Conclusion. This Board should strike from the record or otherwise suppress pages 6-17, 23-120, 127-132, 135-36, 154-208 and 209-11 of Mendocino

Railway's October 15 OFA, and any additional assertions or alleged evidence derived from the illegal entry attested to under penalties of perjury by Mr. Pinoli.

Certificate of Service. I hereby certify service of the foregoing by email attachment on October 17, 2022 on all parties of record in AB 1305X per the STB website service list as of said date.

Respectfully submitted,

s/Charles H. Montange

Of counsel: Elizabeth Coleman, Esq.
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For filing: 17 October 2022

Verification by Elizabeth Coleman

I, Elizabeth Coleman, hereby attest and verify, under penalties of perjury, that

(1) I am Deputy County counsel in the Office of County Counsel, Sonoma

County, serving as outside general counsel for Great Redwood Trail

Agency, formerly North Coast Railroad Authority;

(2) Neither Mr. Pinoli, nor his attorneys, nor any agent, representative or

contractor for Mendocino Railway or Sierra Railroad or any affiliated

organization sought, much less obtained, a right of entry from me or any

other counsel, agent, representative, contractor, or employee of

GRTA/NCRA for any kind of inspection of MP 139.5 (Willits) to MP 152.5

(Longvale) or any portion thereof.

Dated: 17 Oct. 2022

A handwritten signature in blue ink, appearing to be 'Elizabeth Coleman', is written over a horizontal line.