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May 25, 2023

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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

ENTERED
Office of Proceedings
May 25, 2023
Part of
Public Record

Re: Great Redwood Trail Agency – Adverse Abandonment – Mendocino Railway in Mendocino County, California, AB-1305 (Sub-No. 1)

Dear Ms. Brown:

Mendocino Railway (“MR”) writes in response to May 24, 2023 letter filed by Humboldt Trails Council (“HTC”) (“HTC Letter”). In its letter, HTC submitted two recent United States District Court decisions involving only the proper forum for evaluating efforts by the California Coastal Commission (“Commission”) and the City of Ft. Bragg (the “City”) to unlawfully interfere with MR’s rail activities in Fort Bragg. MR does not intend to litigate those cases here. MR would like to note, however, that the statement by the Superior Court in *City of Fort Bragg v. Mendocino Railway*, Case Number 22-cv-06317-JST, that because MR “is simply a luxury sightseeing excursion service with no connection to interstate commerce,” “its ‘railroad activities,’ for the purposes of federal preemption, are extremely limited,” *id.* at 42, is contrary to the facts—as MR also provides, and holds itself out to provide, common carrier freight services—and contrary to 49 U.S.C. §10501. Such a statement could set a dangerous precedent.

There is no “sliding scale” of preemption based upon how little or how much freight service is being conducted by an STB licensed common carrier at any one time. One either is, or is not, subject to the jurisdiction of the STB. No state court should have the right to avoid a proper preemption analysis under Section 10501 by simply declaring that, in its view, the carrier does not conduct “interstate commerce” and therefore is not entitled to assert preemption under

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Section 10501.¹ Otherwise, state and local courts throughout the nation will be able to get around preemption by simply declaring that the STB licensed carrier, in their view, does not conduct *enough* “interstate commerce” to qualify under 49 U.S.C. §10501, thereby removing that carrier from being able to assert its preemption rights or its eminent domain rights as a STB licensed railroad. And the court could do so notwithstanding that the carrier is licensed by the STB, has previously conducted freight rail service, currently holds itself out to provide common carrier service, is connected to other lines that are part of the interstate rail service (even if those lines are STB regulated track and have no active freight service at the time), and the carrier intends, and is taking actions, to develop and conduct a transload service (an activity clearly within interstate commerce)—all factors present with respect to MR.² State courts should not have the ability to determine, based upon how much “interstate commerce” a carrier conducts, whether that carrier is or isn’t a “railroad” properly licensed by the STB so as to allow that carrier to assert any rights that carrier has under Section 10501

As relevant to this proceeding, it is simply incorrect that the reason “MR wants to continue their STB status is to avoid costly regulations and utilize eminent domain proceedings to get the land they are interested in developing.” HTC Letter at 3. While MR does operate passenger excursion service, MR also operates, and holds itself out to operate, as a common carrier licensed by the STB. Yes, MR is attempting to use its eminent domain powers, but for the purpose of developing a freight transload yard that would utilize both rail and trucks. There are hundreds of trucks a day that travel between Fort Bragg and Willits over a very curvy, narrow, and dangerous road. MR desires to transfer that truck traffic to rail for movement to Willits and beyond. HTC and allied landowners in the area simply do not want a rail yard so that they can replace much-needed railroad tracks with a hiking trail.

Indeed, HTC makes its motives quite clear:

However, if they are allowed to maintain their STB status, it will make it impossible for the Great Redwood Trail Agency (GRTA) to rail-bank their corridor between Willits and Cloverdale. Without the rail-banking, the Great Redwood Trail between SF Bay and Humboldt Bay will be delayed many years or never completed. The economic impact to Humboldt County would be substantial.

¹ A proper preemption analysis goes to the specific activity and conduct that the City or the Commission is trying to regulate. Application of Section 10501 is not limited by how much “interstate commerce” a carrier happens to be conducting at any one time.

² Assuming it is not now procedurally improper, and it may be at this stage, MR intends to request the state court in a separate case—*Mendocino Railway v. Meyer*—to refer the question of the jurisdictional status of MR and the scope of the applicability of Section 10501 to MR’s planned transload activities.

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HTC Letter at 3. But under ICCTA, trails use has never been held to trump freight use, and the Board should not allow it to do so here.³

Furthermore, there is nothing preventing HTC and GRTA from developing their trail along the railroad line between Willits and Cloverdale, without any need to permanently remove that line. There are many places in the United States where trails are located along the right-of-way of active rail lines.⁴ The presence of MR is simply being used as excuse for GRTA's failure to develop a trail along the right-of-way of a carrier and a line that it currently owns and controls.

MR intends to vigorously oppose any adverse abandonment application. MR is confident that the facts will more than support the denial of any such application.

Sincerely,

/s/ William A. Mullins

William A. Mullins
Attorney for Mendocino Railway

cc: Parties of Record

³ See, e.g., Central of Georgia Railway Company--Abandonment Exemption--In Atkinson, Berrien and Coffee Counties, GA, AB-290 (Sub-No. 170X) (STB served Apr. 10, 1996) (OFA to continue freight rail service under 49 U.S.C. 10904 takes precedence over both interim trail use/rail banking and the public use procedures. Furthermore, the STB cannot require "rail-banking" and interim trail use arrangements under the Trails Act. See National Wildlife Federation v. ICC, 850 F.2d 694, 698-702 (D.C. Cir. 1988); Washington State Dept. of Game v. ICC, 829 F.2d 877, 879-881 (9th Cir. 1988); Connecticut Trust Connecticut Trust for Historic Preservation v. ICC, 841 F.2d 479 (2d Cir. 1988); See also Preseault v. ICC, 110 S.Ct. 914, 924 n.8 (1990) (noting that Section 1247(d) has been construed "as not providing federal power to condemn railroad rights-of-way for interim trail use"). Yet that is basically what HTC and GRTA are attempting to do here.

⁴ As of 2021, there are more than 399 rails-with-trails in the United States, with the length located along active railroad corridors totaling more than 1025 miles.
<https://www.railstotrails.org/build-trails/trail-building-toolbox/basics/rail-with-trail/#:~:text=As%20of%202021%2C%20there%20are,are%20being%20built%20each%20year.>