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*Transportation Solutions for the 21<sup>st</sup> Century*

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June 21, 2024

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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  
June 21, 2024  
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:

Enclosed is Mendocino Railway's ("MRY") Response in Opposition to Great Redwood Trail Agency's ("GRTA") Request for Extension of Time which GRTA filed in the above-referenced proceeding. If there are any questions concerning this e-filing, please contact me by telephone at (202) 663-7823 or by e-mail at [wmullins@mullinslawgroup.net](mailto:wmullins@mullinslawgroup.net). If I am unavailable, you may contact John V. Edwards at (202) 663-7853 or by e-mail at [jedwards@mullinslawgroup.net](mailto:jedwards@mullinslawgroup.net).

Sincerely,

/s/ William A. Mullins

Attorney for Mendocino Railway

Enclosure

cc: Parties of Record

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**AB-1305 (Sub-No. 1)**

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**GREAT REDWOOD TRAIL AGENCY  
– ADVERSE ABANDONMENT –  
MENDOCINO RAILWAY IN MENDOCINO COUNTY, CALIFORNIA**

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**RESPONSE IN OPPOSITION TO GRТА’S REQUEST FOR EXTENSION OF TIME**

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**June 21, 2024**

**Attorneys for Mendocino Railway**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**AB-1305 (Sub-No. 1)**

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**GREAT REDWOOD TRAIL AGENCY  
– ADVERSE ABANDONMENT –  
MENDOCINO RAILWAY IN MENDOCINO COUNTY, CALIFORNIA**

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**RESPONSE IN OPPOSITION TO GRTA’S MOTION FOR AN EXTENSION OF TIME**

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**INTRODUCTION**

On April 12, 2024, more than two months ago, the Great Redwood Trail Agency (“GRTA/NCRA”)<sup>1</sup> filed an Application for Adverse Abandonment (“Adverse Application”) pursuant to 49 U.S.C. Section 10903(d) and 49 C.F.R. Section 1152.22. GRTA/NCRA seeks adverse abandonment of a line of railroad owned by Mendocino Railway (“MRY”), a freight common carrier railroad subject to the jurisdiction of the Board. The rail line segment that GRTA/NCRA seeks to have abandoned is the Mendocino Line, a line of railroad subject to the Board’s jurisdiction. On June 17, 2024, MRY filed its Protest and Response to the GRTA Adverse Abandonment Application (“MRY’s Protest”). That same day, MRY filed a Motion to Strike certain pejorative and irrelevant materials contained in the Adverse Application.

GRTA/NCRA now asks for two significant modifications to the process to govern the proceeding going forward. It asks for an additional thirty (30) days to respond to MRY’s Protest,

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<sup>1</sup> The Great Redwood Trail Agency is “the reorganized continuation of the same legal entity NCRA” (referring to the North Coast Railroad Authority (“NCRA”)), Adverse Application at 6. Many of the decisions and actions discussed herein are attributable to the period of time when the Great Redwood Trail Authority was called the North Coast Railroad Authority, and as such MRY will refer to it as “GRTA/NCRA”, given that the decisions and actions are attributable to the organization no matter what it is or was then called.

the MRY Motion to Strike, and the four other comments filed in the proceeding. Additionally (definitely implied, although not clearly stated), GRTA/NCRA asks for the opportunity to require additional discovery against MRY. Neither request is reasonable, and both should be denied.

### **PROCEDURAL TIMELINE**

This proceeding began more than a year ago, when GRTA/NCRA filed a Petition for Partial Waiver of Abandonment Regulations and for Exemption from Statutory Requirements.<sup>2</sup> After several filings back and forth, the Board granted several of the exemptions that GRTA/NCRA had sought in order for GRTA/NCRA to put together its then-anticipated adverse abandonment application.<sup>3</sup> In the decision served on August 21, 2023 (Decision No. 1), however, the Board specifically noted that MRY had already responded to several inaccurate statements raised by the GRTA/NCRA procedural petition. The Board did not find it necessary to address those comments at that time because they would be further addressed in the not-yet-filed adverse abandonment application.<sup>4</sup> Importantly, though, GRTA/NCRA knew at that point many of the facts that would be at issue in this proceeding, and the facts that it needed to show to present its case in chief.

Also of significance, in that Decision No. 1, the Board ordered MRY to produce to GRTA/NCRA certain data and information regarding the identity of current users of the line and traffic data associated with the line. On September 25, 2023, the Board approved the protective order that would govern information and pleadings in this proceeding.<sup>5</sup> MRY certified its compliance with that requirement on October 5, 2023. The discovery process was well underway.

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<sup>2</sup> Document 306234, filed February 28, 2023.

<sup>3</sup> Great Redwood Trail Agency – Adverse Abandonment – Mendocino Railway in Mendocino County, Cal., Docket No. AB-1305 (Sub-No. 1), served August 21, 2023 (“Decision No. 1”).

<sup>4</sup> Id., slip op at 3.

<sup>5</sup> Great Redwood Trail Agency – Adverse Abandonment – Mendocino Railway in Mendocino County, Cal., Docket No. AB-1305 (Sub-No. 1), served September 25, 2023 (“Decision No. 2”).

Finally, on April 12, 2024, GRTA/NCRA filed its case in chief in its application for the adverse abandonment of the Mendocino Line. At that time, discovery against MRY should have been complete.

On May 2, 2024, the STB issued a notice specifying that GRTA/NCRA had filed its application for adverse abandonment on April 12, 2024.<sup>6</sup> In that same decision, the STB forth a procedural schedule to govern the remainder of the proceeding. Protests or comments should be filed by May 28, 2024. GRTA/NCRA's reply would be due two weeks later, under that schedule by June 11, 2024. Decision No. 3 was silent as to whether GRTA/NCRA could file discovery against any protesting or commenting parties after such parties filed such comments or protests. But given that GRTA/NCRA was granted only two weeks to file its reply to any protests and comments, and given that the Board's rules provide for a minimum of fifteen days for a party to respond to any discovery, 49 C.F.R. §1114.26, the implication was clear: The Board did not intend to provide a period for GRTA/NCRA to file discovery before filing its reply to any protests and comments.

On May 16, 2024, MRY requested, and the Board granted, a 20-day extension of time to file its Protest, a request that was based explicitly on two important factors: (1) GRTA/NCRA had requested and MRY granted several extensions of time for GRTA/NCRA to produce discovery necessary for MRY to file its Protest, and (2) GRTA/NCRA did not object to the requested extension. Pursuant to that extension, MRY's Protest would be due on June 17, 2024, and, extending the earlier procedural schedule on out, GRTA/NCRA's reply is now due on July 1, 2024.

On the morning of June 17, 2024, *before* MRY filed its Protest, GRTA/NCRA served its first set of discovery requests. GRTA/NCRA broached the possibility of an extension of time for GRTA/NCRA to file its response.

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<sup>6</sup> Great Redwood Trail Agency – Adverse Abandonment – Mendocino Railway in Mendocino County, Cal., Docket No. AB-1305 (Sub-No. 1), served May 2, 2024 (“Decision No. 3”).

MRY filed its Protest and Motion to Strike in the late afternoon/early evening of June 17, 2024 in accordance with the new procedural schedule.

Discussions with regard to GRTA/NCRA's request for an extension of time continued after the filing of the MRY Protest and Motion to Strike. MRY was willing to consent to the extension of time that GRTA/NCRA requested for the filing of its response, provided that GRTA/NCRA would abide by the implied rule that the Board did not intend to grant a period for discovery and would agree not to press new discovery. GRTA/NCRA would not agree that the discovery it sought was not timely,<sup>7</sup> and as such MRY withheld its consent to both an extension of time to file and for service of additional discovery. The GRTA/NCRA Request for Extension of Time followed.

## **ARGUMENT**

The GRTA/NCRA Request for Extension of Time, and the implicit request for additional discovery contained therein, should be denied. The requests do not hold up under scrutiny.

### **A. The GRTA/NCRA Implicit Request for Additional Discovery should be Denied.**

GRTA/NCRA states that "it has pending discovery requests which it served on MR on June 17, 2024." Request for Extension of Time at 2. As noted earlier, the Board did not intend for there to be a period of discovery after the filing of the protests and comments and discovery is not appropriate at this stage of the proceeding, especially when such discovery is not directed at the protests and comments as the discovery was filed before GRTA/NCRA even had reviewed the protests and comments. Even if the Board does provide an extension of time for GRTA/NCRA to submit a response to the MRY Protest, and its Motion to Strike, the Board should make it clear that

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<sup>7</sup> The due date for response to the GRTA/NCRA first round of discovery was set by GRTA/NCRA at 15 days from service, or July 2. At the time of service of the GRTA/NCRA first round of discovery, the GRTA/NCRA response to the MRY Protest was due July 1. GRTA/NCRA did not agree that, even if discovery was timely and otherwise permitted, discovery responses would not be due prior to the July 1, 2024 GRTA/NCRA response due date.

such an extension does not implicitly authorize the service of discovery mentioned by GRTA/NCRA in its pleading.

Board precedent supports MRY's position that discovery is not permitted at this stage of the proceeding. In an almost parallel situation, the Board reached that very practical result, grounded in the intent and spirit of its regulations.<sup>8</sup> Salt Lake City had filed an application for adverse abandonment of a portion of a line of railroad operated by Union Pacific Railroad Company ("UP"). UP opposed that adverse abandonment application. In response to the adverse abandonment application, UP filed a protest. Salt Lake City sought discovery to respond to UP's protest. UP filed a motion seeking a protective order that further discovery not be had. The Board was succinct in its decision:<sup>9</sup>

We will grant UP's motion for a protective order that discovery not be had because discovery would serve no useful purpose. The City has already filed its application, which, according to our regulations, must contain its entire case in support of abandonment of the rail line. At this stage of the proceeding, any further filing by the City may only be in response to UP's protest; it may not contain any new or additional evidence in support of the application. Moreover, discovery is not necessary for the City to respond to the protest. The City is fully capable of addressing, and the Board is fully capable of deciding, the relevant issue in this proceeding – whether the public convenience and necessity (PC&N) require or permit the abandonment of the rail line – without the City conducting the sought discovery, particularly given the breadth and timing of its discovery request. In view of this action, the City's motion to compel will be denied.

The STB gave Salt Lake City an extra seven days to respond to the UP Protest of the Salt Lake City adverse abandonment application, in large part given the time taken up in dealing with the motion for a protective order concerning discovery, but the Board did not permit the service of additional discovery.

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<sup>8</sup> Salt Lake City Corporation – Adverse Abandonment – in Salt Lake City, UT, Docket No. AB-33 (Sub-No. 183) (STB served Jan. 11, 2002)("Salt Lake").

<sup>9</sup> Id., slip op at 2.

GRTA/NCRA filed its case in chief back on April 12, 2024. By that time in the proceeding, GRTA/NCRA had had several months to serve discovery. GRTA/NCRA had the benefit of the discovery ordered by the Board in its decision served in August 2023 (nearly 8 months before it filed its adverse abandonment application), but during that entire time GRTA/NCRA filed no discovery. GRTA/NCRA had complete control over the timing of its application for adverse abandonment, so it is curious that if it needed additional discovery, it did not conduct that discovery during the eight months it took for them to prepare and file their adverse application. But it did not. It filed its adverse abandonment application on April 12, 2024. At that point, and consistent with the Salt Lake case, discovery for GRTA/NCRA was done, as it had filed its case in chief. Only now, at this late date and *three months* after it filed its adverse abandonment application, does GRTA/NCRA served its first set of discovery requests, discovery requests that are by definition not responsive to the MRY Protest because they were served *before* that MRY Protest was filed.

GRTA/NCRA had months in which to serve discovery. It chose not to. It filed its adverse abandonment application. At that time, it had to file its case in chief. The time for discovery was over. And as discussed below, consistent with the Salt Lake case, any attempt by GRTA/NCRA to justify its extension request so that it can pursue discovery should be denied.

**B. The GRTA/NCRA Request for an Extension of Time should be Denied.**

In its pleading requesting an extension of time, GRTA/NCRA bases its extension request in part on the fact that it “has pending discovery requests which it served on MR on June 17, 2024,” but what GRTA/NCRA does not say is when those requests were served – in the morning of June 17, 2024, well before the time that MRY filed its Protest. What that means is that the discovery was not responsive to the MRY Protest, even if it were to be permitted, which it is not. The request for an extension of time should be denied to the extent that it is grounded in pending discovery.

GRTA's second basis for an extension likewise does not justify an extension. GRTA claims that “at 715 pages, MR’s protest is voluminous” and thus it needs more time to review it and reply to it. But GRTA's comments are hyperbole. The Protest is but 70 pages, with a few of those pages consisting of the cover letter, the title page and the table of contents. By all accounts, the vast majority of the pages in the pleading are attachments provided to ease the reader’s review. There are 8 pages of the Little Stinker newsletter, reproduced in total (including the riveting article entitled “Skunk Saves Salmon! (Working Paw in Fin with Trout Unlimited to restore vital waterways to Mendocino County).” Also included is a 151-page report “North Coast Railroad Authority and Viability of a Great Redwood Trail, Report to the Legislature 2020.” MRY included in its filing 5 pages of Responses to Frequently Asked Questions Regarding NCRA and NWP Co., dated December 7, 2010. Another 109 pages consist of a report issued jointly by the Federal Railroad Administration and the Federal Highway Administration, a March 2020 report entitled “Rails with Trails, Best Practices and Lessons Learned”. Included as well are 5 pages of a report bearing the name of one of the GRTA/NCRA consultants, as well as 206 pages of deposition transcription (including the word index) of that same consultant – a deposition transcript that GRTA/NCRA already has had (and for a period of weeks) because its counsel participated in that deposition. While the grand total of 715 pages may seem daunting, when one views the facts, it is not. The number of pages contained in the MRY Protest certainly do not provide an independent reason for an extension of time beyond the 14 days that GRTA/NCRA already has to provide a response. This is particularly the case when the Protest was in response to the adverse abandonment application that GRTA/NCRA put together over a period of at least thirteen (13) months.

GRTA/NCRA argues that it should be granted an extension of time here because, faced with a similar request from MRY, “GRTA cooperat[ed] in the extension of time requested by MR....” This is true with respect to the extra 20 days that MRY sought to prepare and file its Protest. But

what GRTA/NCRA does not say is that the extension requested by MRY, and consented to by GRTA/NCRA, was based primarily on the fact that MRY had filed discovery against GRTA/NCRA as necessary for MRY to draft and file its Protest and that it was GRTA/NCRA who needed “several extensions” in order to respond to MRY’s timely-served discovery requests. Due to GRTA/NCRA’s numerous requests for extensions to respond to MRY’s discovery and to produce documents, MRY was merely needing additional time. But this additional time was due to GRTA/NCRA’s own action in delaying providing the requested discovery information. Of course, GRTA/NCRA consented to MRY’s deadline extension request. It was simple courtesy given that the extension was necessitated by GRTA/NCRA’s own actions, and that MRY had previously granted GRTA/NCRA several extensions of time, at GRTA/NCRA’s request, to complete its discovery response.

Even in this context and even though MRY has taken no actions to delay or hinder GRTA/NCRA’s ability to timely reply on July 1, when GRTA/NCRA requested an extension so as to allow 21 days to reply rather than 14, MRY was willing to provide GRTA/NCRA with its consent for an extension of time to file its response. The only condition MRY put on its consent was that the extension of time could not be used to validate otherwise invalidly served discovery. MRY requested that the discovery be withdrawn, especially because it was not aimed at anything that MRY had said in its Protest and Comment; having been served before MRY even filed its Protest. GRTA/NCRA refused the offered extension, refused to withdraw its invalidly served discovery, and filed its request with the Board.

GRTA/NCRA third basis for an extension is the fact that counsel for GRTA/NCRA plans to be out of the office between June 28<sup>th</sup> (a Friday) and July 3 (a Wednesday). The schedule for this proceeding has been set since May 2, 2024, and counsel for GRTA/NCRA has had, since that time, the ability to deal with that issue. Counsel for GRTA/NCRA is not a solo practitioner and belongs

to a multi-person law firm. Given that the due date for the response to the Protest and the Motion to Strike is July 1, not July 3, the fact that GRTA/NCRA counsel will be out for the last two days before its filing is due should not serve as a basis for an extension. Even if counsel's absence provides a basis for an extension, and it should not given the procedural status at this point, such a five day absence does not support a disproportionate additional 30 days to prepare a response.<sup>10</sup> GRTA/NCRA counsel's personal schedule does not, and should not, provide a basis for granting an extension.

### **CONCLUSION**

The request for an extension of time should be denied to the extent that it is grounded in pending discovery because (1) that discovery is not permitted, and (2) even if for some reason discovery was permitted at this stage, and it is not, it would not have been timely served under the then-existing procedural schedule, which itself supports denial of the extension and discovery request. Likewise, the volume of the MRY Protest, which consists largely of reports, newsletters and deposition transcripts long already in the possession of GRTA/NCRA, does not support an extension. Finally, MRY has no control over GRTA/NCRA's counsel personal schedule, and that schedule does not justify an extension.

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<sup>10</sup> Again, MRY was willing to grant an extension to July 8 as long as counsel would agree that MRY should not have to respond to the invalidly served discovery but counsel for GRTA/NCRA rejected this courtesy. But if the Board does grant an extension, which there is no basis for doing so, such an extension should be short, *i.e.*, to July 8, and the Board should make it clear that such an extension does not implicitly authorize the service of discovery mentioned by GRTA/NCRA in its pleading.

Respectfully Submitted

/s/ William A. Mullins

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June 21, 2024

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