

BEFORE THE
SURFACE TRANSPORTATION BOARD

AB-1305 (Sub-No. 1)

GREAT REDWOOD TRAIL AGENCY
- ADVERSE ABANDONMENT -
MENDOCINO RAILWAY IN MENDOCINO COUNTY, CA

GREAT REDWOOD TRAIL AGENCY'S OPPOSITION TO MOTION TO STRIKE
FILED BY MENDOCINO RAILWAY

Great Redwood Trail Agency ("GRTA") through counsel respectfully requests that the Surface Transportation Board (the "STB" or the "Board") deny the Motion to Strike (the "Motion") filed by Mendocino Railway ("MR"). In support of its opposition, GRTA states the following:

I. BACKGROUND

On March 14, 2024, GRTA filed a Notice of Intent to Initiate Case, Doc. ID No. 308100, and an accompanying Draft Environmental and Historic Report, Doc. ID No. 308088. The Environmental and Historic Report included Exhibits A-O. *See id.* The same Environmental and Historic Report and its accompanying exhibits were attached to GRTA's Application for Adverse Abandonment (the "Application") filed on April 12, 2024, as Exhibit 3 to the Application. *See* Doc. ID No. 308189. MR filed a protest to the Application on June 17, 2024. Doc. ID No. 308399 (the "Protest"). MR was not, however, satisfied to merely offer arguments that the Board should consider regarding the Application. Instead of raising its arguments in its Protest where they belong, MR decided to burden GRTA and the Board with a perplexing 29-page Motion to Strike, including a five-page list of arguments and exhibits offered by GRTA in its Application which MR now wants stricken. MR's Motion essentially asks the Board to make an advance assessment of and ruling on portions of the Application, separate from its consideration of whether adverse

abandonment is appropriate. As discussed further below, MR's unfounded arguments are properly raised in a protest but provide absolutely no basis for striking materials.

II. ARGUMENT

"The Board may order that any redundant, irrelevant, immaterial, impertinent, or scandalous matter be stricken from any document." 49 C.F.R. § 1104.8; *see also* <https://www.merriam-webster.com/dictionary/impertinent> (defining "impertinent" as "given to or characterized by insolent rudeness", "not restrained within due or proper bounds especially of propriety or good taste", and irrelevant). This type of request to the Board is obviously an extreme remedy requiring convincing evidence of abuse of the Board's processes. *Offers of Financial Assistance*, EP 729, slip op. at 18 (STB served June 29, 2017) ("In this decision, the Board again reiterates its commitment to increasing enforcement of 49 C.F.R. § 1104.8 to prevent abuse of the OFA process and the Board's processes generally.")

If anything, the Board should strike as redundant and impertinent MR's 29-page Motion to Strike which addresses matters already raised in its Protest and merely argues against longstanding STB law. Therefore, the Motion should be denied because it raises arguments the Board can consider in its ruling on the Application and because MR is entirely incorrect about the standard for striking at issue here.

A. The STB Should Deny MR's Motion Because It Is Redundant and Seeks a Premature Ruling on the Application.

MR's Motion constitutes a redundant pleading riddled with precisely the sort of "pejorative" language that MR inaccurately claims to have been compelled by in raising this Motion. *See, e.g.,* Mot. at 5 ("The venom that GRTA/NCRA spews forth in its Adverse Abandonment Application..."). MR's 29 pages of argument boils down to the fact that MR disagrees with the import of specific Board precedent that GRTA quotes in its Application.

Compare Application at 2 (“The ‘primary question’ in an adverse abandonment case is whether ‘removal of [the Board’s] jurisdiction as a shield against state law is in the public interest.’”) *with* Mot. at 13 (“GRTA/NCRA claims that this character test arises out of the fact that the primary question in any and all adverse abandonment cases is whether removal of [the Board’s] jurisdiction as a shield against state law is in the public interest. GRTA/NCRA is wrong.”) (internal quotations omitted). However, MR has already raised and addressed this issue in its Protest. *See* Protest at 17 n. 38 (“GRTA/NCRA also argues that the primary question in an adverse abandonment case is whether removal of [the Board’s] jurisdiction as a shield against state law is in the public interest. This is an incorrect statement of the law.”) (internal quotations omitted).

Respectfully, the Board should strike MR’s Motion on the basis that it is redundant to its Protest. MR’s Motion purports to be an argument for removing information which is irrelevant, impertinent or scandalous. *See* Mot. at 6. However, MR’s Motion is really a bid to get an advance partial ruling on GRTA’s Application by attacking piecemeal the arguments raised and evidence relied upon therein. Oddly, although its argument is weakly framed around the character of MR, the entire Motion is based on the specific “jurisdiction as a shield against state law” factor that Board has used in numerous adverse abandonment cases in the past. It appears that MR is trying to overturn longstanding STB law by somehow framing it incorrectly as a character argument. The Motion, as well as its request to reverse existing precedent, should be denied, because the appropriate place for MR to raise substantive disputes with the Application is in its Protest. Indeed, MR has already done so in a 70-page pleading. *See* Doc. ID No. 308399.

B. The Board Can Consider the Use and Misuse of the Privileges of STB Jurisdiction When Considering Applications for Adverse Abandonment.

The Board should also reject MR’s Motion because it fails to rebut GRTA’s reliance on Board precedent for the proposition that the Board’s jurisdiction is not meant to be inappropriately

used as a shield from the operation of state law. See Application at 2 (citing *CSX Corp. & CSX Transp., Inc. – Adverse Abandonment Application – Canadian Nat’l Ry. Co., & Grand Trunk W. R.R. Inc.*, STB Docket No. AB-31 (Sub-No. 38), at 6 (STB served Feb. 1, 2002) (“primary question” in an adverse abandonment case is whether “removal of [the Board’s] jurisdiction as a shield against state law is in the public interest.”); see also *Minn. Commercial Ry. Co. Adverse Discontinuance – In Ramsey Cty., MN*, STB Docket No. AB-882, at 3 (STB served Jul. 16, 2008) (“*Minn. Commercial*”) (“we do not allow our jurisdiction to be used to shield a line from the legitimate processes of state law where no overriding Federal interest exists.”); *Modern Handcraft, Inc. – Abandonment in Jackson Cty., MO*, 363 I.C.C. 969, 972 (1981) (“We will not allow our jurisdiction to be used to shield a carrier from the legitimate processes of State law where there is no overriding Federal interest in interstate commerce.”); *Paulsboro Ref. Co. LLC – Adverse Abandonment – in Gloucester Cty., N.J.*, STB Docket No. AB-1095 (Sub-No. 1) (STB served Dec. 2, 2014); *Grand Trunk* at 6 (“Where no overriding federal interest exists, we will not allow our jurisdiction to be used to shield a carrier from the legitimate processes of state law.”); see also *City of Chicago, IL – Adverse Abandonment – Chicago Terminal R.R. in Chicago, IL*, STB Docket No. AB-1036, at 3 (STB served Jun. 16, 2010) (“*City of Chicago*”).

GRTA cites these cases to point out that railroads within the Board’s jurisdiction enjoy significant privileges to ensure there is no interference with interstate commerce, including avoiding certain constraints of state law. Moreover, GRTA relies on this law to contrast the fact that no interstate rail shipments have originated or terminated on the MR line since 2004 with MR’s routine use of its “rail carrier” status to obtain property – a fact which Mike Hart the CEO of MR’s parent company, Sierra Railroad Company, proudly espouses. See Video Interview of Mike Hart (“I started buying railroads back in the nineties. I like them because they’re a great way

of acquiring real estate.”), *available at* <https://savenoyohedlands.com/mrcorp/Hart%20on%20Eminent%20Domain.mp4>. MR would have the Board entirely disregard a railroad’s use of the STB’s jurisdictional coverage. *See* Mot. at 16 (“There is no character test to being a rail carrier subject to the jurisdiction of the Board and the question of whether the Board’s jurisdiction is acting as a shield to the application of state law in a particular case does not make it a prerequisite or integral part of each and every application of the PN&C test.”). MR thus takes the position that the Board has no right to consider whether a rail line is reaping rewards from the Board’s jurisdictional coverage while transporting no freight in interstate commerce, despite such transport being the very basis upon which covered rail lines gain privileges such as state law preemption and eminent domain. *See id.* at 6 (“Even if MRY was nefarious bad actor (it is not) that lies, cheats and steals to get what it wants (it does not), that is not a legal cognizable reason for removing a rail line from the jurisdiction of the Board.”). In other words, MR seeks to ignore the longstanding “state shield” argument by changing it to a character argument in order to avoid any examination of its acts.

Instead, MR’s attempt to dissuade the Board from considering whether MR’s enjoyment of the Board’s jurisdiction also benefits MR in its endeavors to evict private residents from their property via eminent domain on the basis that it needs the land for interstate commerce, *see, e.g.*, Exhibit 3(D) to the Application, merely highlights that MR has a substantive dispute with GRTA’s Application and Board precedent, which is properly considered by the Board in its assessment of MR’s Protest. MR’s lengthy argument attempting to factually distinguish several of the cases cited by GRTA makes clear that GRTA did not cite “redundant, irrelevant, immaterial, impertinent, or scandalous” law or evidence in support of its Application, but identified useful relevant information for the Board’s consideration. Indeed, it is an issue that MR is going to great lengths

to persuade the Board to ignore. While GRTA strenuously disagrees with MR's position, GRTA respects the procedural right of interested parties to raise their disagreements with applications for adverse abandonment in protests. GRTA intends to refute MR's arguments in its own Reply – not to strike them from the record. MR is not so satisfied, seemingly because it feels that it was wrongly characterized. *See* Mot. at 14 (“GRTA/NCRA essentially argues that Mendicino Railway is a bad actor’ with regard to certain matters unrelated to the standards for granting adverse abandonment, arguing that the Board should use its independent Federal regulatory jurisdiction to prevent a bad actor from ever being able to do bad things again.”). Although MR refers to itself as a “bad actor” twelve times in its Motion, GRTA does not once use the phrase “bad actor”¹. Instead, GRTA merely presented past and ongoing cases involving MR's use of its status as a “rail carrier” to avoid state law or acquire property through eminent domain. This is a far cry from scandalous, irrelevant claims.

GRTA validly points out that MR enjoys the benefits of the Board's jurisdiction but does not utilize the Board's jurisdiction to provide interstate rail shipments. The Motion to Strike should be denied as baseless for that reason.

C. MR Fails to Specifically Address the Statements and Evidence It Seeks Stricken.

Following MR's strenuous disagreement with GRTA's position and Board precedent, MR provides insufficient clarity on which material it seeks to strike and for what reason. Instead, MR appends a five-page list of what it labels as “not relevant” and “pejorative and inappropriate” statements and evidence. MR does not address specific exhibits or statements in its brief that it

¹ It also references GRTA's use of the terms “ne'er do wells and scofflaws” on numerous occasions. GRTA did not use these terms with respect to MR but forewarned that certain individuals could abuse the legal rights of rail carriers for financial gains if “a shield against state law” can be used without restraint.

believes should be stricken. The materials it seeks to be stricken are voluminous and undefined. Instead, it makes a series of accusations and then asks the Board to infer which statements are inappropriate without reason. MR asserts that GRTA included all of these items to “bolster the argument that MRY is a bad actor” and to “shift the burden of proof in this proceeding to MRY.” Mot. at 21-22. To the contrary, all of the statements, arguments, and facts referenced in Appendix A to MR’s brief were properly submitted to the Board for its consideration of adverse abandonment in the Application and as noted, follow longstanding STB precedent regarding “a shield against state law.”

In Appendix A, MR identifies several argument sections in GRTA’s Application which refer to MR’s use of the Board’s jurisdiction. *See* Mot. at 23-24. MR’s request to strike these argument sections should be rejected for all of the reasons previously stated and because MR fails to address with specificity the significant amount of material it requests that Board strike. For example, MR asks the Board to strike almost seven pages of the Application without contending with the statements, evidence, or facts therein. *See* Mot. at 23 (seeking to exclude a section beginning on page 42 and ending on page 49). MR also provides no discernable explanation for seeking to exclude footnote 31 on page 27 of the Application relating to MR’s inability to maintain culverts. *See* Mot. at 24 (citing Application at 31 n. 27). MR has merely identified GRTA’s arguments with which it disagrees and claimed striking, rather than refuting, is appropriate.

In Appendix A, MR also seeks to strike Exhibits 3(F), 3(K)-(O), 6, 7, and 10-12 to the Application, which contain various orders in litigation to which MR is a party. *See* Mot. at 24, 26-27. MR seeks to strike these orders and final judgments presumably on the basis that MR should not be “relitigating” state law proceedings before the Board. *See* Mot. at 9. MR is mistaken that GRTA seeks to relitigate these proceedings. GRTA provides them for the Board’s consideration

as evidence of MR's use of the Board's jurisdictional coverage as "a shield against state law." GRTA has not raised any arguments to contest the fact that MR is a party to these cases or to dispute the outcomes. Further, Exhibits 3(F), 3(H), and 3(K) through 3(O), which MR only refers to by the letter, are components of GRTA's previously filed Environmental and Historic Report. *Compare* Exhibit 3 to the Application with Doc. ID No. 308088. Section 1104.8 does not provide a basis for striking from the Application a copy of a previously filed and required Environmental and Historic Report, which is already on the record and before the Board. Similarly, MR's pleas to strike other components of the Environmental and Historic Report should be rejected: "paragraph appearing on page 19 accompanying footnote 14 of the Environmental and Historic Report" and "the sentence appearing at the top in the carry over paragraph on page 20 of the Environmental and Historic Report". *See* Mot. at 24.

Finally, Section 1104.8 and MR's arguments thereon do not provide a basis for striking information relied upon in the expert reports and opinions GRTA submitted. *See* Mot. at 24-25, 27 (attacking various provisions of the Feasibility & Market Analysis of Freight Rail Service in the Fort Bragg, Willits, & Cloverdale Corridor (hereinafter "Feasibility & Market Analysis")). GRTA filed the Feasibility & Market Analysis as part of GRTA's previously filed Environmental and Historical Report, as well. *See* Doc. ID No. 308088. MR further seeks to strike it as an attachment of Marie Jones Verified Statement. *See* Mot. at 24-25, 27. MR also seeks to strike portions of the Verified Statement of Elaine Hogan. *See id.* MR's disagreement with expert or witness statements does not render them "redundant, irrelevant, immaterial, impertinent, or scandalous".

MR's arguments about these parts of GRTA's filings are inaccurate and certainly do not rise to the level of irrelevant or scandalous. The Board has been faced with similar unfounded

requests which it has flatly rejected in the past. See *Union Pacific R.R. Company – Abandonment Exemption – In Lafayette County, Mo.*, AB-33 (Sub-No. 297X) (STB served Jul. 22, 2011) (motion to strike denied as unsupported); *International Brotherhood of Electrical Workers, Local Union 465 – Petition for Declaratory Order – San Diego Trolley*, FD 31862 (STB decided May 17, 1993) (arguments that evidence is incorrect does not warrant striking material). Instead, MR’s concerns should only go to the weight of GRTA’s argument on the public interest in having this rail line abandoned as opposed to being stricken.

III. CONCLUSION

MR’s use of the Motion to Strike is redundant and premature. It is also incorrect. Its voluminous list of provisions to strike are also insufficiently supported. The Board should reject MR’s Motion for these reasons. The Board should also discourage the use of Motions to Strike to bolster issues raised in a Protest. MR’s Motion reflects an unfounded and time-consuming use of the Board’s regulation put in place to avoid exactly the type of filing that MR has set forth here.

WHEREFORE, for all the reasons previously stated, MR’s Motion to Strike should be denied.

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 8th day of July 2024, I caused the foregoing pleading to be served by First Class Mail or more expedient method on the following:

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