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VIA E-FILING

Cynthia T. Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: Great Redwood Trail Agency – Abandonment Exemption – In Mendocino, et al. Counties, CA, AB 1305X

Response to Request for the Production of Documents By Great Redwood Trail Agency's to Mendocino Railway as OFA Applicant and Motion for Protective Order.

Dear Cynthia:

On September 20, 2022, Mendocino Railway ("MR") was served the Request for the Production of Documents By Great Redwood Trail Agency ("GRTA") to Mendocino Railway as OFA Applicant ("Discovery Requests") in the above-captioned abandonment proceeding. Concurrently, GRTA also served MR a copy of a Motion for Protective Order ("Motion").¹ While MR supports the Board issuing an appropriate Protective Order and, in fact, intended to seek one in connection with information to be filed in connection with MR's upcoming Offer of Financial Assistance ("OFA") for a portion of the GRTA line proposed for abandonment extending from milepost 139.5 to milepost 152.5 ("GRTA Line"). MR objects to the entirety of GRTA's Discovery Requests², for the reasons explained herein.

¹ GRTA purports it requests the Board to enter a protective order to govern potential discovery in this proceeding. See Motion at 1.

² Per GRTA's instructions in its Discovery Requests, GRTA requests that MR respond to its Discovery Requests **on or before the day that MR is required to file its OFA**. See Discovery Requests at 1. Note – GRTA provided its response to MR's request for information necessary to file an OFA pursuant to 49 C.F.R. § 1152.27(a) on September 15, 2022. 30 days from September 15, 2022, is October 15, 2022 (a Saturday). Per the Board's specific OFA rules, the filing due date is not tolled for OFA's even if that due date falls on a weekend.

BACKGROUND

As the Board is aware, MR on May 31, 2022 timely filed a notice of intent to file an OFA to purchase a segment (“Notice of Intent”)³ of the rail line that is the subject of this abandonment proceeding. MR also concurrently pursuant to 49 C.F.R. § 1152.27(a) sent a letter to GRTA requesting information MR required for formulating and submitting its OFA. The Board accepted MR’s OFA on June 10, 2022. See North Coast Railroad Authority – Abandonment Exemption – In Mendocino, Trinity, and Humboldt Counties, Cal., AB-1305X, slip op. at 3 (STB served June 10, 2022) (“June 10th Decision”). GRTA, however, failed to timely provide the requested financial information necessary for MR to proceed with its OFA, causing MR on June 14, 2022 to petition to toll the OFA filing deadline. In a decision served on June 24, 2022, the Board granted MR’s petition to toll the OFA deadline until August 18, 2022, or 30 days after GRTA notified the Board in writing that it has provided MR with the requested information. MR provided the Board an update on August 18, 2022, which explained that MR continued to wait for GRTA’s compliance to provide the information required pursuant to 49 C.F.R. § 1152.27(a).

On September 15, 2022, over three months after MR’s initial request for information, GRTA filed a Certification of Filing and Service of Information Required Pursuant to 49 C.F.R. § 1152.27(a), causing the deadline for MR’s OFA to shift to 30 days from September 15, 2022.⁴ Five days later, GRTA filed its Discovery Requests and Motion. While MR supports the issuance of an appropriate Protective Order, GRTA is not entitled to discovery for the reasons explained herein.

ARGUMENT

1. GRTA, Not MR, Has the Obligation to Provide Information Necessary to File an OFA.

Board precedent clearly provides that the information needed for an OFA is intended to be a one-way exchange in that the relevant information is to be provided by the applicant for the abandonment, in this case GRTA, not the offeror of the OFA. See R.J. Corman Railroad Property, LLC – Abandonment Exemption – In Scott, Campbell, and Anderson Counties, Tenn., AB 1296X (STB Served May 26, 2020) (granting Arkansas-Oklahoma Railroad Co.’s request to toll the OFA deadline as AOK “had received only some of the necessary information it requested from RJC Railroad Property.”) When the Board tolled the OFA deadline in this proceeding, it noted that, “because the information necessary to formulate the OFA has not yet been provided to a potential offeror, MR’s petition will be granted.” These cases, and others,⁵ support the fact

³ In its Notice of Intent, MR provided information necessary to demonstrate that MR is preliminary financially responsible as described in the Board’s regulations.

⁴ As explained in FN 2, MR has until October 15, 2022 to file its OFA.

⁵ See Central Railroad Company of Indiana - Abandonment Exemption - In Dearborn, Decatur, Franklin, Ripley and Shelby Counties, IN, AB 459 (Sub-No. 2X) (STB served April 1, 1997; see also Consolidated Rail Corporation – Abandonment Exemption – in Hudson County, NJ, AB 167 (Sub-no. 1189X) (STB served Sept. 24, 2014) (“CONRAIL”).

that GRTA, not MR, has the sole obligation to respond to provide discovery and respond to requests for information related to this abandonment proceeding.⁶

The Board strongly *disfavors* discovery in abandonment cases and, when sought, requires the moving party to strongly demonstrate both relevance and need. See Indiana Southwestern Railway Co. - Abandonment Exemption - In Posey and Vanderburgh Counties, IND., AB 1065X (STB served February 11, 2011) (“ISW”) (“[T]he Board disfavors discovery in abandonment proceedings due to the strict time constraints, it has set a standard for discovery in these situations. Parties seeking discovery in abandonments must demonstrate both relevance and need.”); citing Central Railroad Company of Indiana - Abandonment Exemption - In Dearborn, Decatur, Franklin, Ripley, and Shelby Counties, IN, AB 459 (Sub-No. 2X) (STB served April 1, 1997 (denying a motion to compel discovery because moving parties failed to show a need for the material or to provide sharply focused requests).

The Discovery Requests do not contain even a single sentence demonstrating the relevance of, or the need for, the information sought in relation to this abandonment proceeding. While GRTA’s accompanying Motion purports that “MR has made a number of inaccurate and misleading statements,” the statements referred to do not relate to the line proposed for abandonment but solely to a connecting line owned and operated by MR.⁷ The Discovery Requests serve no useful purpose relating to this abandonment proceeding and are transparently intended merely to retaliate against MR for filing its OFA. GRTA submitted nine discovery requests: six related to Mendocino Railway’s operations between Fort Bragg and Willits, California,⁸ two related to MR’s financial responsibility, and one related to MR’s efforts to serve shippers over the GRTA Line. The only reasonable conclusion is that the Discovery Requests constitute nothing but another egregious fishing expedition by GRTA. Especially when (1) the Discovery Requests are reconciled with other instances in which the Board permitted discovery based on the moving party’s demonstration of relevance and need, and (2) the Board has already held that GRTA is not entitled to file a reply. See Great Redwood Trail Agency – Abandonment

⁶ There is one case that could be considered an exception to the rule in which discovery was granted by the abandoning railroad against an OFA offeror but that precedent is not reconcilable with the facts present here. In ISW, the abandonment applicant, Indiana Southwestern Railway Co. (“ISW”), “sought information to pursue an appeal driven by the railroad’s concerns that the Town is not financially responsible or genuinely interested in providing freight rail service [over the line proposed for abandonment].” ISW timely filed an appeal within 10 days of the decision finding the Town to be financially responsible. See 49 C.F.R. § 1011.2(a)(7). While GRTA questioned MR’s general financial fitness prior to the Board’s June 10th Decision, GRTA did not directly challenge the Board’s finding of MR’s financial responsibility with an appeal or motion. As GRTA failed to timely appeal the Board’s finding and MR made the required showing of preliminary financial responsibility, Discovery Requests Nos. 6 and 7 untimely questioning into MR’s financial responsibility and are not needed by GRTA to substantiate an appeal or motion related to the OFA. More significantly, these two Discovery Requests are wholly irrelevant to preparing and filing of the OFA.

⁷ Even the case cited by GRTA in support of its Motion does not support the discovery sought. In that case, CONRAIL, the Board granted discovery against an abandonment applicant that failed to provide the information necessary for an OFA offeror to submit an OFA.

⁸ GRTA’s Discovery Requests Nos. 1, 2, 3, 4, 5, and 8 relate to freight rail service on MR’s line. There is simply no need for GRTA to obtain documents related to these requests as such documents are not needed for the preparation and filing of an OFA. Moreover, such information is wholly irrelevant to the preparation and filing of the OFA by MR for freight rail service over the GRTA Line proposed for abandonment.

Exemption – In Mendocino, Trinity, and Humboldt Counties, CAL, AB-1305X, at 3 (STB served June 24, 2022) (denying GRTA’s request that the Board enter a procedural schedule to allow GRTA no less than 20 days to respond to any OFA and move to dismiss.) The June 24th Decision further explained that the Board’s regulations, which reflect Congress’s enactment of strict time limits for the OFA process, do not provide for replies to the filing of an OFA.)

As far as GRTA’s Discovery Request No. 9 goes, which requests “documents relating to, or reflecting, communications from potential shippers, concerning freight rail service on GRTA’s line,” MR is already required to submit this information in connection with its OFA. There is simply no need for a separate discovery request for information that MR is already required submit in support of its OFA pursuant to 49 C.F.R. § 1152.27(c)(iv).

For the above-stated reasons, GRTA has not demonstrated either the relevance of, or the need for, its Discovery Requests. GRTA also wholly misses the mark in serving its Discovery Requests on MR in that information requests related to an OFA are a one-way exchange from the abandonment applicant to the offeror. This streamlined approach allows the Board to expeditiously process OFAs in abandonment proceedings consistent with Congressional intent. Because GRTA has not established the relevancy of, or any need for, discovery, MR objects to GRTA’s Discovery Requests in its entirety. As explained in the next section, MR supports the issuance of an appropriate protective order.

2. MR Supports Issuance of an Appropriate Protective Order

As noted above, GRTA has been improperly collaborating with other entities that support the establishment of a trail, and only a trail, without any rail as well, over the corridor proposed for abandonment. It is thus not surprising that GRTA has attempted to utilize a protective order that would facilitate GRTA exchanging documents with parties and non-parties. In Appendix A to the Motion, which is a draft protective order, GRTA defines “[t]he term “party” as used in this Protective Order [a]s not limited to parties to this proceeding but [as] include[ing] both parties and non-parties producing and receiving documents, data, and other materials pursuant to discovery requests in this proceeding.” In connection with its OFA, MR will be submitting confidential and proprietary financial information (as required pursuant to 49 C.F.R. § 1152.27). GRTA’s sharing of MR’s confidential and proprietary information with other state and local trail activists would be commercially damaging to MR and would escalate further retaliation against MR, and MR’s shippers, and adversely impact MR’s ongoing commercial relationships. Thus, MR proposes that the Board adopt Appendix 1 - Protective Order,⁹ which is more appropriate given the nature of this proceeding and GRTA’s actions thus far.

⁹ Appendix 1 is based on a Protective Order adopted in Norfolk & Western Railway – Abandonment Exemption – Between Indianapolis & Tipton In Marion, Hamilton & Tipton Counties, IND, AB-290 (Sub-No. 117X) (STB served June 17, 2019).

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CONCLUSION

Because GRTA has not established the relevancy of, or a need for, discovery, MR objects to GRTA's Discovery Requests in their entirety. While MR agrees with GRTA that a protective order is necessary, GRTA's protective order proposed is inappropriate. MR respectfully requests that the Board adopt the Protective Order proposed in Appendix 1.

Respectfully,

/s/ Crystal M. Zorbaugh

Crystal M. Zorbaugh

cc: Robert Pinoli, Torgny Nilsson
Parties of Record

Appendix 1 – 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 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.

Appendix 1 – Protective Order

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 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.

Appendix 1 – Protective Order

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. Any party that files with the Board a document containing Confidential Information must simultaneously file with the Board a public version of that document.

Appendix 1 – Protective Order

15. 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.
16. 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.

Appendix 1 – Protective Order

EXHIBIT A UNDERTAKING—CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order governing the production and use of Confidential Information and Confidential Documents in 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 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.

Dated:

Appendix 1 – Protective Order

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 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 AB-1305X, and any related proceedings before the Surface Transportation Board, or any judicial review proceedings in connection with 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.

OUTSIDE [COUNSEL] [CONSULTANT]

Dated: