

MULLINS LAW GROUP PLLC

Transportation Solutions for the 21st Century

2001 L Street NW, Suite 720
Washington, DC 20036

Crystal M. Zorbaugh
czorbaugh@mullinslawgroup.net
mullinslawgroup.net

Telephone: (202) 663-7850
Direct: (202) 663-7831
Facsimile: (202) 464-9123

July 2, 2025

309730

VIA E-FILING

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

ENTERED
Office of Proceedings
July 2, 2025
Part of
Public Record

Re: Mendocino Railway – Petition for Declaratory Order, FD 36868

Expedited Consideration Requested

Pursuant to 49 U.S.C. §1321 and 5 U.S.C. §554(e), Mendocino Railway submits a Petition for Declaratory Relief. The filing fee of \$1,400.00 has been paid via pay.gov. If there are any questions about this matter, don't hesitate to contact me directly, either by telephone at 202-663-7831 or by e-mail: czorbaugh@mullinslawgroup.net. If I am unavailable, please contact John Edwards, either by telephone at (202) 663-7853 or by e-mail: jedwards@mullinslawgroup.net

Sincerely,

/s/ *Crystal M. Zorbaugh*

Crystal M. Zorbaugh
Counsel for Mendocino Railway

Enclosures
cc: Torgny Nilsson

FILED
July 2, 2025
SURFACE TRANSPORTATION BOARD

FEE RECEIVED
July 2, 2025
SURFACE
TRANSPORTATION BOARD

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 38686

**MENDOCINO RAILWAY – PETITION FOR DECLARATORY ORDER
EXPEDITED CONSIDERATION REQUESTED**

**Crystal M. Zorbaugh
John V. Edwards
Spencer M. Naake
Michaela R. Mastroianni
MULLINS LAW GROUP PLLC
2001 L St., N.W.
Suite 720
Washington, D.C. 20036
Tel.: (202) 663-7831**

Counsel for Mendocino Railway

July 2, 2025

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36868

**MENDOCINO RAILWAY – PETITION FOR DECLARATORY ORDER
EXPEDITED CONSIDERATION REQUESTED**

INTRODUCTION

Pursuant to 49 U.S.C. §1321 and 5 U.S.C. § 554(e), Mendocino Railway (“Mendocino”)¹ petitions the Surface Transportation Board (“STB” or “Board”) to issue a declaratory order confirming that Mendocino Railway is a Class III common carrier subject to the Board’s jurisdiction, entitled to the protections of any applicable federal preemption that comes with that status. Due to the nature of three pending cases in state and federal courts, described in more detail hereinafter, Mendocino respectfully requests an expedited review of its Petition for Declaratory Order, as critical litigation deadlines and hearing dates are imminent, as explained herein.

Following the submission of a Notice of Exemption filed with the STB,² Mendocino acquired the lines at issue through California Western Railroad’s (“CWR”) trustee in bankruptcy and with the approval of the Bankruptcy Court for the Northern District of California. The rail assets acquired consisted of “all rail lines owned by CWR between milepost 0 and milepost 40” (the “Line”).³ Pursuant to the April 9, 2004 Decision, Mendocino acquired ownership of the Line and has since that time been a freight common carrier under the Board’s jurisdiction, facilitating freight, passenger, and excursion services over the Line upon demand.

¹ Mendocino is a wholly owned subsidiary of Sierra Railroad Company (“SRC”)

² See Mendocino Ry. – Acquisition Exemption – Assets of the Cal. W. R.R., FD 34465, slip op. at 1 (STB served April 9, 2004) (“April 9, 2004 Decision”), attached as Exhibit A.

³ Id.

Irrespective of Mendocino's ongoing freight operations and despite the Board's April 9, 2004 Decision granting Mendocino's acquisition exemption, Mendocino's status as a common carrier and its entitlement to preemption have repeatedly been subjected to legal challenges from local municipalities and state agencies. The innumerable legal challenges have cost Mendocino millions of dollars in legal fees and lost opportunity costs thus far, costs that are ongoing.⁴ Mendocino is routinely forced to dedicate its limited funds to defending against unsubstantiated legal claims; these monies would have otherwise been committed to track safety, rehabilitation, maintenance, and improvements over the Line to better serve current and prospective customers (and expand transloading operations). To help clarify its status as a Class III common carrier, Mendocino now seeks a declaratory order confirming Mendocino's status as a Class III common carrier subject to the Board's jurisdiction, entitled to use any applicable protections of federal preemption.⁵

BOARD'S AUTHORITY & RELIEF SOUGHT

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 to issue a declaratory order to terminate a controversy or remove uncertainty. See Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C. 2d 675 (ICC served 1989). The Board has routinely issued a declaratory order to resolve a controversy concerning license, jurisdictional, and other issues, and/or to provide guidance to courts to help them

⁴ To date, Mendocino has spent over \$1.5 million in outside counsel fees alone fighting the senseless litigation concerning its status. This number is actually far higher when costs related to in-house counsel and management having to respond to discovery and participate in depositions, hearings, and trial attendance are factored in. Opposition by the City of Fort Bragg and the California Coastal Commission against Mendocino's RRIF loan accounted for additional hundreds of thousands of dollars in cost. Even more profoundly, relentless actions of these California state and local entities have contributed to Mendocino's loss of opportunities and businesses, as well as its inability to develop needed rail transloading and other essential freight facilities.

⁵ To be clear, Mendocino is not asking the Board, in this Petition for Declaratory Order, for any determinations with regard to the preemptive effects of any particular federal law or regulation. The law on preemption is fairly well developed. Instead, the request of Mendocino is fairly narrow – that is, having complied with the Board's notice of exemption regulations, and then having consummated the transaction contemplated thereby, Mendocino became a common carrier railroad subject to the jurisdiction of the Board as of the date of actual acquisition, and remains so until Board asserts otherwise.

resolve a controversy or remove uncertainty. See, e.g., Norfolk Southern Railway Company – Petition for Declaratory Order, FD 36522 (STB served June 17, 2022); Ohio Rail Development Commission – Petition for Declaratory Order, FD 36387 (STB served Dec. 22, 2020); North Country Transit District – Petition for Declaratory Order, FD 36433 (STB served May 23, 2023). Moreover, on many occasions, the Board has used the declaratory order process to address issues involving the federal preemption provision contained in 49 U.S.C. § 10501(b). See, e.g., 14500 Ltd. LLC – Pet. for Declaratory Order, FD 35788 (STB served June 5, 2014) (“14500 Ltd.”); CSX Transp., Inc. – Pet. for Declaratory Order, FD 34662 (STB served May 3, 2005) (“CSXT Petition”); Reading, Blue Mountain & Northern Railroad Company – Petition for Declaratory Order, FD 35956 (STB served June 6, 2016); CSX Transp., Inc. – Pet. For Declaratory Order, FD 35832 (STB served Feb. 29, 2016) (leaving factual determinations underlying preemption claim to the state court, but issuing guidance on applicability of preemption).⁶

In line with the Board’s previous decisions clarifying federal preemption provisions, Mendocino seeks a declaratory order that certifies Mendocino is a Class III common carrier subject to the jurisdiction of the Surface Transportation Board, entitled to any protections of applicable federal preemption.⁷ Mendocino’s status as a carrier, and the resulting protections of federal preemption

⁶ Here, Mendocino is not asking the STB to decide the underlying cases and determine whether 49 U.S.C. § 10501(b) should lie in the individual cases. Mendocino recognizes that the Board and the courts have concurrent jurisdiction to determine questions of federal preemption under 49 U.S.C. § 10501(b), applying existing court and Board precedent. See, e.g., 14500 Ltd.; CSXT Petition, slip op. at 8. Rather, to avoid manifest injustice (such as a local court erroneously ruling on Mendocino’s status as a common carrier), Mendocino is asking that the Board rule that “Mendocino is a Class III common carrier subject to the jurisdiction of the Surface Transportation Board, entitled to any protections of applicable federal preemption.” The ultimate decision on whether a carrier is a licensed common carrier is an issue exclusively within the Board’s jurisdiction.

⁷ Section 10501(b) categorically preempts states or localities from intruding into matters that are directly regulated by the Board (e.g., railroad rates, services, licensing, construction, or abandonment). The Board has recognized that, regardless of the merits of the underlying state law claims, any application of state law or any remedy “which infringes upon [the Board’s] exclusive jurisdiction to regulate rail transportation is preempted by section 49 U.S.C. § 10501(b). For example, it is for the Board to determine whether a non-carrier has been authorized to commence common carrier operations, and it is for the Board to determine if any alleged incorrect or misleading information contained in a notice of exemption is sufficient to make that notice of exemption void

associated with that status, are directly at issue in three court proceedings.⁸ To briefly summarize the current status of the three proceedings: one of the three cases is awaiting further action from the United States Supreme Court; one is scheduled for trial later this year; and the last case is awaiting the scheduling of an appellate hearing date.

BACKGROUND

On March 12, 2004, Mendocino Railway submitted a Notice of Exemption in Finance Docket No. FD 34465. On April 9, 2004, the Board published the Notice of Exemption in the Federal Register. See 69 Fed. Reg. 18999 (April 9, 2004). No party appeared to object to that notice. Mendocino acquired the subject Line in 2004 in line with its notice of exemption.⁹

Prior to Mendocino's acquisition of the Line, the Line was owned by California Western Railroad ("CWRR"). CWRR underwent bankruptcy proceedings and, by way of the trustee in bankruptcy, and with approval of the Bankruptcy Court for the Northern District of California, CWRR's rail assets were acquired by Mendocino. The Mendocino rail line has been providing freight service since it was originally constructed by the Fort Bragg Redwood Company as the Fort Bragg

ab initio. See Richard D. Robey, Juniata Valley Railroad Company, et. al. – Petition for Declaratory Order – Allen J. Levin and Lewistown Central Railroad Company, FD 33420, slip op. at 3 (STB served June 17, 1998) (allegation that a municipality exceeded its state authority to create non-carriers to acquire lines from Conrail are for a court to determine, but it is up to the STB to determine whether, if so, that alleged issue would be sufficient to cause the underlying STB authority to be revoked). Section 10501(b) also prevents states or localities from imposing requirements that, by their nature, could be used to deny a railroad's right to conduct rail operations or proceed with activities the Board has authorized, such as a construction or abandonment. Whether an action is categorically preempted, preempted "as applied," or not preempted is dependent on the circumstances presented.

⁸ See Mendocino Railway v. Jack Ainsworth, et al. (9th Cir. CA., Case No. 4:22-cv-04597-JST): Current status: Mendocino Railway has filed a petition to the U.S. Supreme Court for a *writ of certiorari*. The Supreme Court on May 15, 2025 ordered the California Coastal Commission and the City of Fort Bragg to file responses to Mendocino's petition; see also City of Fort Bragg v. Mendocino Railway (California Coastal Commission, intervenor) (Superior Court for the State of California, Mendocino County, Case No. 21CV00850): Current status: Trial is scheduled for December 9, 2025. The case was stayed until July 1, 2025, to allow for settlement discussions prior to proceeding to trial; Mendocino Railway v. John Meyer (Court of Appeal for the State of California, First Appellate District, Division One, Case Nos. A168497 & A168959) (on appeal from the Superior Court of California, County of Mendocino (Case No. SCU-K-CVED-2020-74939): Current status: The appeal has been fully briefed, and the parties are awaiting the scheduling of a hearing date.

⁹ See FN 2 *supra*.

Railroad in 1855. In 1905, the line was renamed as CWR and remained under CWRR's control until Mendocino rescued the rail line from bankruptcy in 2004.

Since its acquisition of the Line in 2004, Mendocino has been a common carrier subject to the Board's jurisdiction. Given the anticipated de minimis amount of freight anticipated at the time of the acquisition, Mendocino Railway, as was detailed in its notice of exemption, Mendocino initially fulfilled its common carrier obligation with the operating help of Mendocino's affiliate, now known as Sierra Northern Railway (also Class III rail carrier). Between 2004 and continuing through 2021, Mendocino Railway fulfilled its freight common carrier obligations through an operating arrangement with SNR.¹⁰ While Mendocino's freight service, provided via SNR, was minimal to begin with, freight service frequency increased in 2020/2021 as Mendocino began planning to rehabilitate its rail line and market/solicit new business opportunities. Due to these opportunities and other changes, effective January 1, 2022, Mendocino Railway took over direct operating responsibility from SNR for freight service over the Line.

Despite Mendocino having been a licensed rail common carrier for over two decades, Mendocino is engrossed in three separate court proceedings, which, in whole or in part, put at issue Mendocino's status as a common carrier, and therefore the availability of any applicable protections of federal preemption.¹¹ The mounting legal challenges involving Mendocino's status as a common carrier are proving debilitating. At present, Mendocino has spent over \$1.5 million on outside counsel fees alone fighting these senseless claims. And these costs continue. Should events continue to unfold without Board intervention, Mendocino will face an increasingly costly uphill battle, not only risking

¹⁰ From 2004 to 2007, Mendocino contracted out to its affiliated entity and entity (SNR) the task of transporting non-excursion passengers on the CWR. But starting in 2008, Mendocino directly performed the work of transporting such passengers. Mendocino has since 2008 been transporting non-excursion passengers without contracting out that work to any agent.

¹¹ See FN 7.

financial ruin, but also risking being compelled by the California Coastal Commission to cease all of its railroad operations.

The opposition to Mendocino's status as a common carrier subject to the Board's jurisdiction has extended beyond disputes concerning state and local authority and has financially impacted Mendocino's pursuit of federal funding programs as well. Two of the entities involved in the state court proceedings also vehemently opposed Mendocino's successful application for a Railroad Rehabilitation & Improvement Financing ("RRIF") express loan, in large part on the basis that they do not recognize Mendocino as a common carrier and believe that state and local laws should apply to Mendocino's RRIF application process. Mendocino has for some time now been fighting a battle for survival as a freight rail common carrier in the State of California, in state and federal courts against state and local governments that resent Mendocino's ability to assert federal preemption, simply because, in their opinion, Mendocino is not a rail common carrier entitled to assert preemption.¹²

ARGUMENT

I. While the STB has a process for Licensing Carriers, Certain State and Local Governments, and Administrative Agencies' Actions Seek to Usurp the Board's Authority.

Despite the April 9, 2004 Decision granting Mendocino's acquisition exemption and authorizing it to provide common carrier service over the Line, and Mendocino's acquisition of the Line in accordance with that authorization, state courts and state and local governments alike have continually refused to consider the Board's decision as authorizing or "licensing" Mendocino to operate as a common carrier subject to the Board's jurisdiction. Certain entities have offered all sorts of misleading factual circumstances and grossly distorted legal arguments and interpretations to try to demonstrate that Mendocino is not a freight common carrier. For example, evidence introduced into

¹² See Wichita Terminal Assoc., et al. – Pet. for Declaratory Order, FD 35765, slip op. at 6 (STB served June 23, 2015) (citing Maumee & W. R.R. Corp. – Pet. For Declaratory Order, FD 34354, slip op. at 2 (STB Served March 3, 2004) (stating that preemption may shield a railroad from state eminent domain laws where the effect of those laws is unreasonable interference with railroad operations)).

the state court proceedings includes statements by California state administrative agencies and attorneys stating that Mendocino is not a common carrier, even though the decision of who is and is not a freight common carrier belongs exclusively to the Board. In some of these entities' opinions, Mendocino's exemption appeared to be, in their minds, conditional, such as a rail carrier's status depending entirely on traffic volume.¹³

All of these entities fail to appreciate that [t]he federal government has licensed rail common carrier entry and exit since 1920 pursuant to the Interstate Commerce Act, and that the STB has exclusive jurisdiction over rail lines over which railroads provide point-to-point "common carrier" line-haul service to shippers (i.e., mainlines).¹⁴ These entities continue to assert that Mendocino either never became a common carrier subject to the Board's jurisdiction or that it is not currently a carrier, despite the Board being clear that this is simply incorrect. See Middletown & New Jersey Railroad, LLC – Lease and Operation Exemption – Norfolk Southern Railway Company, FD 35412, slip op. at 4-5 (STB served March 27, 2013) ("Middletown"), explaining:

To avoid any further misunderstanding, we reiterate here that, after obtaining acquisition authority from the Board, an entity that goes forward and acquires an existing railroad line becomes a rail carrier authorized to use 49 U.S.C. § 10902 as of the date of the acquisition, even if it is not actually called upon to provide service until some later time.... Because the common carrier obligation cannot be terminated without abandonment authorization from the Board, the transfer of [a] railroad line and the common carrier obligation that goes with it immediately imposes[s] upon the new owner the continuing obligation to provide common carrier rail transportation service over the line upon reasonable request. As was the case with [a] prior owner, it does not matter whether the line has been inactive for a time, or even if it remains inactive after it is acquired. Either way, because a rail line itself is part of "transportation," on the date that an acquiring entity ... consummates a Board-authorized transaction by acquiring a common carrier railroad line, it becomes a "rail carrier" as defined by § 10102(5) (i.e., a "person providing common carrier railroad transportation for compensation"), and a "rail carrier providing transportation subject to the jurisdiction of the Board...."

¹³ See April 19, 2023 Decision After Trial in Mendocino Railway v. John Meyer, 2023 CA Super. Ct. SCU-K-CVED-2020-74939; see also April 28, 2022 Ruling on Demurrer to the Complaint in City of Fort Bragg v. Mendocino Railway, et al., 2022 CA Super. Ct., 21CV00850.

¹⁴ See Allied Indus. Dev. Corp. – Pet. for Declaratory Order, FD 35477 (STB served Sept. 17, 2015).

Unfortunately, while publication of Board decisions is commonly understood by the Board and STB practitioners to convey common carrier status to petitioners 30 days after publication, the conditional ambiguity on the face of such decisions leaves open alternative interpretations and related arguments to be raised in state and local forums. This is especially true for some courts, as well as some state and local government entities, searching for any reason to circumvent federal preemption and the limitations of their own jurisdiction, as is the case with Mendocino.

In arguing against federal preemption, state and local governments, administrative agencies, and courts support their position by claiming that other regulated transportation entities, such as trucking and even maritime providers, have physical licenses, similar to driver's licenses, to designate their status as a licensed entity.¹⁵ Proponents of these arguments do not consider conditional decisions, such as an acquisition exemption, to constitute such a "license." And by doing so, these state and local governments, and some courts, fail to understand, acknowledge, or recognize that a Board-published conditional decision automatically renders an acquiring entity a common carrier subject to the STB's jurisdiction after 30 days, as long as the licensed carrier also acquires operating or ownership rights for the associated line of railroad. The underlying rationale is simple that if the railroad is not a carrier, there can be no preemption, either expressed or implied.

II. Mendocino Railway is a Class III common carrier subject to the jurisdiction of the Surface Transportation Board

Mendocino is a Class III carrier subject to the Board's jurisdiction, and clearly exhibits characteristics of that status. First, Mendocino uses the reporting mark CWR, which is used to identify

¹⁵ For example, trucking companies that operate commercial vehicles hauling cargo in interstate commerce must be registered with the Federal Motor Carrier Safety Administration ("FMCSA") and must have a United States Department of Transportation ("USDOT") number. See <https://www.fmcsa.dot.gov/registration/do-i-need-usdot-number> (noting that commercial intrastate hazardous materials carriers who require a safety permit must register for a USDOT number). Similarly, the Federal Maritime Commission ("FMC") issues licenses to qualified Ocean Transportation Intermediaries ("OTIs") in the United States and ensures that all OTIs are bonded or maintain other evidence of financial responsibility. OTIs are companies that facilitate the movement of freight by ocean. See <https://www.fmc.gov/licensing-and-certification/>.

its railcars on freight trains that are operated by Mendocino on the Line. Mendocino also publishes a freight tariff, Freight Tariff CWR 9500, under the CWR reporting mark for its switching and interchange services.¹⁶ As previously mentioned above, and further exemplifying Mendocino’s status as a common carrier, the Line at issue has been used for common carrier service since the late 1800’s with Mendocino continuing to provide freight services as a light-density Class III freight carrier since its acquisition of the Line in 2004.¹⁷

Beyond the use of the actual line itself supporting its freight common carrier status, Mendocino has been determined to be a covered employer under the Railroad Retirement Act (“RRA”) and the Railroad Unemployment Insurance Act (“RUIA”) as demonstrated by a decision issued by the Railroad Retirement Board.¹⁸ In that decision, the Railroad Retirement Board further found that Mendocino is “a common carrier subject to STB jurisdiction.”¹⁹ Likewise, Mendocino, in connection with its affiliate SNR, received a \$31.4 million RRIF loan to make improvements to the SNR Line and the Mendocino Line, a loan that was predicated on SNR and MR being common carriers.²⁰

Mendocino’s RRIF improvements to support restored freight, passenger, and excursion traffic and new traffic are well underway. Specifically, 3,261 ties have been replaced through June 21, 2025, several sticks of rail have been replaced, bridge repairs are underway (cap and deck replacement), a

¹⁶ See <https://www.skunktrain.com/wp-content/uploads/2022/02/MENDOCINO-2021-FREIGHT-TARIFF-FINAL.pdf>. Mendocino also publishes a tariff (Local Passenger Tariff No. 3-R) for its passenger commuter services. See <https://www.skunktrain.com/wp-content/uploads/2022/02/Commute-Fares-2022.1-FINAL.pdf>.

¹⁷ Mendocino has continuously reinvented itself and supplemented its revenues by providing passenger and excursion service to remain financially viable and available to provide freight common carrier service in the region.

¹⁸ See BCD 2023-30, Employer Status Determination, Mendocino Railway (BA No. 5761).

¹⁹ *Id.*

²⁰ See “U.S. Department of Transportation Announces \$31.4 Million Loan to Upgrade Critical Rail Lines in California,” U.S. DOT press release, issued January 29, 2024, attached as Exhibit B (discussing the fact that the loan will aid in rehabilitating an important tunnel and 40 miles of track on the Mendocino trackage).

stair-stepped approach to reopening the tunnel is underway, and several railcar renovation projects are either completed or will be completed by Quarter 3 - 2025.

While admittedly Mendocino is not the biggest freight railroad in the United States, it continues to move freight both in the intrastate and interstate markets, is attempting to expand transloading operations, and continues to receive requests for freight service. Moreover, Mendocino continues to invest in its line to provide freight, passenger, and excursion services to the community it serves. At a time when railroads are shying away from investing in infrastructure, Mendocino, a smaller carrier, is currently underway on a project that will invest tens of millions of dollars so that Mendocino can continue to honor, and even improve, its common carrier obligation today, tomorrow, and in the future just as it has for over three decades. Unfortunately, continued attacks against smaller carriers such as Mendocino will eventually sound the death knell on their ability to continue to serve their small communities as a common carrier.²¹

III. Establishing an Official List or Licensing Mechanism Certifying Rail Carriers Subject to the Board's Jurisdiction Would Avoid Future Baseless Legal Actions for Preempted Entities

In the absence of any official list of STB-regulated rail carriers, railroad licensing, or an unconditional Board decision confirming Mendocino's status as a Class III common carrier subject to the Board's jurisdiction, entitled to any applicable protections of federal preemption, Mendocino and other similarly situated short line railroads belonging to the American Short Line and Regional Railroad Association ("ASLRRA")²² will continue to be forced to expend excessive money and resources defending against baseless claims asserted in courts by state and local governments who

²¹ The Board also accepted the Amicus Curiae Brief of Mendocino on December 16, 2024, into consideration in Township of Pilesgrove, N.J. – Petition for Declaratory Order, FD 36770, a declaratory proceeding involving preemption issues similar to those faced by Mendocino.

²² See Exhibit C - Amicus Curiae Brief of the American Short Line and Regional Railroad Association ("ASLRRA") filed on January 29, 2025, in Mendocino v. John Meyer (explaining to the court the Board's licensure processes).

refuse to recognize the Board's jurisdiction. Specifically in Mendocino's case, the courts and state and local governments, have refused to give weight to the Board's published Decision issued on April 9, 2004, as a license to operate as a common carrier, which has cost Mendocino over \$1.5 million in outside counsel fees alone fighting the senseless litigation. An erroneous decision by any of the three courts on Mendocino's status as a common carrier could result in state and local governments taking actions to cease Mendocino's operations entirely.

Many other short lines have similarly been forced to devote significant time and money simply trying to educate state and local courts and agencies as to the STB's process for a railroad to become a licensed common carrier subject to the Board's jurisdiction. Although the Board's processes are clear to industry members and practitioners, the message is entirely lost in these court proceedings, which force short line railroads, such as Mendocino, to constantly relitigate their common carrier status and entitlement to use applicable protections of federal preemption against state and local agencies that are continually looking to expand their regulatory authority over railroads within their states.

The existence of some sort of official license or a process by which a carrier could obtain an official proclamation that it is indeed subject to the STB's jurisdiction, or even just a list of licensed carriers on the Board's website, is long overdue as a means by which short lines can defend themselves against state and local government entities and state administrative agencies and state and local courts in states such as California that do not recognize the notice of exemption process. The only way to refute such attacks on Mendocino's status is for Mendocino to be able to present a decision or some form of judicially noticeable evidence that could be presented to the three courts that Mendocino is indeed a carrier subject to the STB's jurisdiction.

EXPEDITED CONSIDERATION

Unfortunately, Mendocino is running out of time, as summary judgment motions are due in mid-August and the appellate court could set a hearing any day. Should any of the three proceedings

end in a finding that Mendocino is not a common carrier, both the City of Fort Bragg and the California Coastal Commission will take every action possible to halt Mendocino's freight and other railroad operations, both in the short-term and over the long term as "short-term" very quickly becomes "permanently." Mendocino was hesitant to file for a declaratory order to confirm its status because historically, the declaratory judgment process has been a slow process. But this is no longer a matter of the efforts undertaken by these state and local governments, resulting in Mendocino's limited resources being diverted from enhancing infrastructure, expanding service, and making necessary safety and other improvements. The "next shoe to fall" could not only halt the forward progress Mendocino is making but also impact Mendocino's ability to continue its rail operations and provide services to the communities it serves. For these reasons, and given three critical state and local proceeding reply deadlines and hearing dates being imminent, expedited consideration is requested.

CONCLUSION

The ambiguities in the Board's licensing process continue to force Mendocino to repeatedly defend its common carrier status against persistent baseless attacks from state and local governmental agencies who fail to recognize Mendocino as a common carrier subject to the Board's jurisdiction. Mendocino not only has had to expend excessive funds defending against these claims, but Mendocino's ability to make necessary improvements and dedicate awarded federal funds to improve its ability to serve as a common carrier is under attack. To help put an end to the baseless claims against Mendocino, the Board must issue a decision declaring that "Mendocino is a common carrier subject to the Board's jurisdiction entitled to any protections of applicable federal preemption." While it may not be typical for the Board to do so, Mendocino hopes the Board will recognize that this simple step is necessary here, given the totality of the circumstances and the exigencies of Mendocino's situation.

Respectfully submitted,

/s/ *Crystal M. Zorbaugh*

**Crystal M. Zorbaugh
John V. Edwards
Spencer M. Naake
Michaela R. Mastroianni
MULLINS LAW GROUP PLLC
2001 L St., N.W.
Suite 720
Washington, D.C. 20036
Tel.: (202) 663-7831**

July 2, 2025

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36868

MENDOCINO RAILWAY – PETITION FOR DECLARATORY ORDER

EXHIBIT A

APRIL 9, 2004 ACQUISITION EXEMPTION

34584

SERVICE DATE - APRIL 9, 2004

DO

FR-4915-01-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34465]

Mendocino Railway–Acquisition Exemption–Assets of The California Western Railroad

Mendocino Railway (Mendocino), a noncarrier, has filed a verified notice of exemption under 49 CFR 1150.31 to acquire, through California Western Railroad's (CWR) trustee in bankruptcy and with the approval of the Bankruptcy Court for the Northern District of California, the rail assets of CWR.¹ The assets consist of all rail lines owned by CWR between milepost 0 and milepost 40. Mendocino states that, on February 11, 2004, the sale of CWR's assets was authorized by order of the Bankruptcy Court and that CWR's trustee was authorized to sell the railroad assets of CWR to SRC.

Mendocino intends initially to operate CWR with the help of Mendocino's affiliated entities: Sierra Northern Railway (a Class III rail carrier), Midland Railroad Enterprises Corporation (a railroad construction and track maintenance company), and Sierra Entertainment (a tourism, entertainment, and passenger operations company). Mendocino states that it is negotiating an agreement with Hawthorne Timber Company, LLC (Hawthorne) for the transfer to Mendocino of Hawthorne's fee interest in the real property underlying

¹ Mendocino is a California corporation formed for the purpose of acquiring and operating CWR. It is a wholly owned subsidiary of Sierra Railroad Company (SRC),

CWR's tracks. Mendocino anticipates completing the acquisition by mid March 2004 and to begin operations on or about May 1, 2004.

Mendocino certifies that its projected revenues as a result of this transaction do not exceed \$5 million per year and do not exceed those that would qualify it as a Class III rail carrier.

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 34465, must be filed with the Surface Transportation Board, 1925 K Street, N.W., Washington, DC 20423-0001. In addition, one copy of each pleading must be served on Torgny Nilsson, General Counsel, 341 Industrial Way, Woodland, CA 95776.

Board decisions and notices are available on the Board's website at "WWW.STB.DOT.GOV."

Decided: April 2, 2004.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams

Secretary

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36868

MENDOCINO RAILWAY – PETITION FOR DECLARATORY ORDER

EXHIBIT B

U.S. DOT PRESS RELEASE, ISSUED JANUARY 29, 2024

U.S. Department of Transportation Announces \$31.4 Million Loan to Upgrade Critical Rail Lines in California

Monday, January 29, 2024

New and Improved Rail Infrastructure Will Enhance Safety and Supply Chain for the Region

WASHINGTON – The U.S. Department of Transportation (DOT) today announced that its [Build America Bureau](#) (Bureau) provided a \$31.4 million [Railroad Rehabilitation and Improvement Financing](#) (RRIF) loan to the Sierra Northern Railway (SNR) and Mendocino Railway (MRY) to expand and rehabilitate rail infrastructure in the Central Valley and Mendocino County, California. By providing [RRIF and Transportation Infrastructure Finance and Innovation Act](#) (TIFIA) loans, the Bureau helps communities expedite infrastructure projects and reduce project costs.

“USDOT is pleased to support this important project in California that will increase safety, reduce harmful greenhouse gas emissions, and improve freight service benefitting the entire region,” said **Deputy Secretary Polly Trottenberg**. “The Biden-Harris Administration is committed to investing in clean transportation and enhancing supply chains.”

The loan finances nearly 100 percent of the planned improvements, including SNR expansion of 6.7 miles of Oakdale Branch track for engine and carriage storage; MRY rehabilitation of Noyo Canyon Tunnel No. 1, 27 bridges and 40 miles of track.

“Sierra’s and Mendocino’s RRIF loan will help modernize the rail line, which will greatly enhance existing freight service and make the railroad more attractive to new freight customers.” said **Build America Bureau Executive Director Morteza Farajian, Ph.D.** “We are pleased that a short-line railroad has been able to take advantage of our low-interest financing and deliver improvements that might not have been possible otherwise.”

The project should be complete in 2027 and will provide many benefits to the community, including:

- Increased safety, operating capacity, efficiency
- Reduction of derailments and grade-crossing incidents
- Reduced congestion and air pollution on local roads and highways

“We appreciate the Bureau and all their hard work helping us with the RRIF loan,” said **Sierra Northern Railway President Kennan H. Beard III**. “This project will provide the region with new construction jobs and greatly benefit the Central Valley.”

“The RRIF loan helps enhance our freight and passenger services in Mendocino County by providing additional jobs, improving safety, lowering emissions, and advancing our regional transportation options,” said **Mendocino Railway President Robert Jason Pinoli**.

The RRIF program maintains a \$7 billion set-aside to support small railroads like SNR and MRY. This is the Bureau’s first loan to a short-line (Class III) railroad since it was created in 2016. In total, DOT has closed \$7.6 billion RRIF loans, \$39.8 billion in TIFIA financings, supporting more than \$143 billion in infrastructure investment across the country.

For more information and to learn more about the Build America Bureau, please visit the website [here](#). For updates, subscribe to the Bureau newsletter and announcements [here](#).

###

The Build America Bureau advances investment in transportation infrastructure by lending Federal funds to qualified borrowers; clearing roadblocks for credit worthy projects; and encouraging best practices in project planning, financing, delivery, and operations. The Bureau draws on expertise across DOT to serve as a point of coordination for states, municipalities, private partners, and other project sponsors seeking Federal financing and technical assistance.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36868

MENDOCINO RAILWAY – PETITION FOR DECLARATORY ORDER

EXHIBIT C

**AMICUS CURIAE BRIEF OF THE AMERICAN SHORT LINE AND REGIONAL
RAILROAD ASSOCIATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION ONE

A168497
(Consolidated with Case No. A168959)

MENDOCINO RAILWAY
Plaintiff–Appellant,

v.

JOHN MEYER
Defendant-Respondent.

On Appeal from the Superior Court of California,
County of Mendocino
(Case No. SCUKEVED202074939, Hon. Jeanine Nadel)

**(1) APPLICATION OF AMERICAN SHORT LINE AND
REGIONAL RAILROAD ASSOCIATION
FOR LEAVE TO FILE AMICUS CURIAE BRIEF
IN SUPPORT OF APPELLANT MENDOCINO RAILWAY;
(2) AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT
MENDOCINO RAILWAY**

DAVID A. DIEPENBROCK
State Bar No. 215679
Weintraub Tobin
400 Capitol Mall, Fl. 11
Sacramento, CA 95814
Telephone: 916-558-6000
ddiepenbrock@weintraub.com

Attorneys for Amici Curiae
American Short Line and Regional Railroad Association

Document received by the CA 1st District Court of Appeal.

CERTIFICATE OF INTERESTED PARTIES

Pursuant to Rules 8.208 and 8.488 of the California Rules of Court, there are no interested entities or persons that must be listed in this certificate.

I certify that the foregoing is true and correct.

Dated: January 29, 2025

s/ David Diepenbrock
Attorney for Amici Curiae

Document received by the CA 1st District Court of Appeal.

APPLICATION FOR LEAVE TO FILE

AMICUS CURIAE BRIEF

The American Short Line and Regional Railroad Association (“ASLRRA”) respectfully requests permission to file the accompanying amicus curiae brief in support of Plaintiff and Appellant Mendocino Railway pursuant to California Rules of Court, rule 8.200(c), to expand upon key issues of federal railroad law that Respondent has confused. ASLRRA is a non-profit trade association representing the interests of approximately 520+ short-line railroads in legislative and regulatory matters. ASLRRA represents the interests of the short-line railroads in ensuring that freight policies promote a stronger, safer, and more efficient national transportation infrastructure in federal and state forums and ASLRRA is filing this amicus to advance those very same objectives here.

The issues confronted by Mendocino Railway in this proceeding are shared by or could potentially impact ASLRRA’s members throughout the nation, including other ASLRRA members in the State of California. As such, ASLRRA’s brief addresses these important topics globally, not just with respect to Mendocino Railway. Specifically, ASLRRA seeks to file an amicus brief to explain that (1)

the Surface Transportation Board (the “STB” or “Board”) has an established process for railroads, including Mendocino Railway, to become and cease being a common carrier subject to the Board’s jurisdiction; (2) Mendocino Railway’s status as a Common Carrier is relevant to its ability to take property by eminent domain under California law; and (3) the Mendocino Railway line remains connected to the interstate rail network through an embargoed line formerly operated by North Coast Railroad Authority because railroads can connect to the interstate rail system via other rail lines (not formerly abandoned), port facilities; interim trail use; and transloading. Accordingly, ASLRRA respectfully requests that the Court accept the proposed amicus curiae brief for filing.

Sarah Yurasko (General Counsel for the ASLRRA) and Crystal Zorbaugh (Vice Chair of the ASLRRA General Counsel Committee) authored the proposed amicus brief. ASLRRA funded the preparation and submission of the brief.

Dated: January 29, 2025

/s/ David Diepenbrock
Attorney for Amici Curiae

Document received by the CA 1st District Court of Appeal.

TABLE OF CONTENTS

INTRODUCTION	10
STATEMENT OF INTEREST	11
ARGUMENT	11
I. The Surface Transportation Board Has An Established Process for Railroads, Including Mendocino Railway, to Become a Licensed STB Common Carrier (and Abandon Operations) Subject to the Board’s Jurisdiction	11
II. Once a Federal Common Carrier Obligation is Established, California Law Cannot Decline to Recognize the Common Carrier’s Status as a Federally Recognized Common Carrier.....	18
III. Railroads Can Connect to the Interstate Rail System Via Other Rail Lines (Not Formerly Abandoned), Port Facilities; Interim Trail Use; and Transloading.	22
CONCLUSION.....	27
CERTIFICATE OF COMPLIANCE	28

TABLE OF AUTHORITIES

	Page(s)
Federal Cases	
<u>Allied Indus. Dev. Corp. - Petition for Declaratory Order,</u> FD 35477 (S.T.B. served Sept. 17, 2015)	12
<u>Bar Ale, Inc. v. California Northern Railroad Co. and</u> <u>Southern Pacific Transportation Company,</u> FD 32811, 2001 STB LEXIS 633 (STB served July 18, 2001).....	23
<u>Borough of Riverdale – Petition for Declaratory Order – The</u> <u>New York Susquehanna and Western Railway Corporation,</u> 4 S.T.B. 380 (1999)	20
<u>Borough of Riverdale-Pet. for Declaratory Order-N.Y.</u> <u>Susquehanna & W. Ry.,</u> FD 33466 (STB served Feb. 27, 2001	20
<u>California High-Speed Rail Authority - Construction</u> <u>Exemption - In Merced, Madera, and Fresno</u> <u>Counties, CAL.,</u> FD 35724 (STB served June 13, 2013).....	22
<u>City of Rochelle, Illinois – Notice of Exemption –</u> <u>Commencement of Rail Common Carrier Obligations,</u> FD 33587 (STB served July 7, 1998).....	14
<u>Common Carrier Obligation of Railroads, Ex Parte No.</u> 677, slip op. at 1 (STB served February 22, 2008)	21
<u>DesertXpress Enters., LLC-Pet. for Declaratory Order,</u> FD 34914 (DesertXpress) (STB served May 7, 2010).....	24, 25

<u>Eastside Community Rail, LLC - Acquisition and Operation Exemption - GNP RLY Inc., FD 35692, Ballard Terminal Railroad Company, LLC - Lease Exemption - Eastside Community Rail, LLC, FD 35730, GNP RLY, Inc. - Abandonment Exemption in King County, Wash., (STB served April 24, 2023)</u>	26
Freight Rail & Intermodal, available at https://www.aar.org/issue/freight-rail-intermodal/ (explaining over 13.5 million units moved intermodally in 2022)	24
<u>Jefferson Terminal Railroad Company - Acquisition and Operation Exemption - Crown Enterprises, Inc., FD No. 33950 (STB served March 19, 2001)</u>	14
<u>Joint Petition for Decl. Order – Boston & Maine Corp. & Town of Ayer, MA, 5 S.T.B. 500 (2001)</u>	20
<u>Mendocino Ry. - Acquisition Exemption - Assets of the Cal. W.R.R., FD 34465 (STB served April 9, 2004).</u>	16
<u>Middletown & New Jersey Railroad, LLC – Lease and Operation Exemption – Norfolk Southern Railway Company, FD 35412 (STB served March 27, 2013) ("Middletown")</u>	18
<u>N.Y. Susquehanna & w. Ry. Corp. v. Jackson, 500 F.3d 238 (3rd Cir. 2007)</u>	20
<u>Pipe Line Machinery & Equipment, Various States to Alaska, 349 I.C.C. 799, 1975 I.C.C. LEXIS 50 (I.C.C. served May 29, 1975)</u>	26
<u>Reading, Blue Mountain & Northern Railroad Company – Petition for Declaratory Order, Docket No. FD 35956, 2016 STB LEXIS 155 (STB served June 3, 2016)</u>	21

<u>State of Maine, Department of Transportation – Acquisition and Operation Exemption – Maine Central Railroad Company; Maine Central Railroad Company/Springfield Terminal Railroad Company – Trackage Rights – State of Maine Department of Transportation,</u> 8 I.C.C. 2d 835, 1991 ICC LEXIS 105 (ICC served May 20, 1991).....	22
<u>Suffolk & S. R.R. LLC - Lease & Operation Exemption - Sills Road Realty, FD 35036 (S.T.B. served Nov. 16, 2007).....</u>	12
<u>Utah Transit Authority - Acquisition Exemption - Line of Union Pacific Railroad Company, FD 32186 (ICC served April 8, 1993).....</u>	15
Federal Statutes	
49 U.S.C. 10502.....	14
49 U.S.C. 10901.....	12, 14
49 U.S.C. 10901(a)(4)	14
49 U.S.C. 10902.....	12
49 U.S.C. 11101(a)	20, 23
49 U.S.C. §§ 10101 <i>et seq.</i>	19
49 U.S.C § 10501(a)(1)(A).....	24
49 U.S.C. § 10501(b).....	12, 19, 21, 22
49 U.S.C. § 10901.....	11, 12, 13
49 U.S.C. § 10901(a)(4)	13
49 U.S.C. § 10903.....	12, 23
49 USC § 10501(a)(2)(A).....	24, 25

Regulations

49 C.F.R. 1121	14
49 C.F.R. 1150, subpt. D	13
49 C.F.R. 1150.31	14
49 C.F.R. 1150.32(b)	16
49 C.F.R. 1150.32(e)	16
49 C.F.R. 1152.33	15
49 C.F.R. 1152.34	15
49 CFR 1150.31	14, 15

INTRODUCTION

ASLRRA has filed for leave to file an amicus curiae brief because it wishes to explain for the benefit of the court that the Surface Transportation Board (the “STB” or “Board”) has the exclusive authority to decide what entities are or are not common carriers. ASLRRA is further concerned that applying different definitions for a common carrier under state law than under federal law could unreasonably interfere with a rail carriers’ common carrier obligation and provision of services, as authorized by the Board, and as such would likely be preempted. ASLRRA represents short-line railroads of all shapes and sizes and having a conflict between federal and state law on who is and who is not a common carrier has significant downstream implications for the operations of ASLRRA’s 520+ members as well as on the overall function of the nation’s interstate railroad network. Lastly, ASLRRA believes this court would benefit from a better understanding of how the rail lines in the interstate rail system are connected - via other rail lines (embargoed, but not abandoned), port/waterway facilities; interim trail use; and transloading. For all of these reasons, ASLRRA is submitting this amicus brief.

STATEMENT OF INTEREST

ASLRRA is a non-profit trade association representing the interests of approximately 600 short-line railroads in legislative and regulatory matters. ASLRRA represents the interests of the short-line railroads in ensuring that freight policies promote a stronger, safer, and more efficient national transportation infrastructure in federal and state forums, and ASLRRA is filing this amicus brief to advance those very same objectives here. The issues confronted by Mendocino Railway in this proceeding are shared by or could potentially impact ASLRRA's members throughout the nation, including other ASLRRA members in the State of California. ASLRRA's brief addresses these important topics globally, not just with respect to Mendocino Railway's operations.

ARGUMENT

I. The Surface Transportation Board Has An Established Process for Railroads, Including Mendocino Railway, to Become a Licensed STB Common Carrier (and Abandon Operations)¹ Subject to the Board's Jurisdiction.

Under 49 U.S.C. § 10901 mainline track requires STB authority to construct, acquire, operate, discontinue (to cease operations), and

¹ Further discussed in this section and Section III *infra*.

abandon under 49 U.S.C. § 10903 (to permanently remove from the interstate rail network). See Allied Indus. Dev. Corp. – Petition for Declaratory Order, FD 35477 (S.T.B. served Sept. 17, 2015) (explaining that [t]he federal government has licensed rail common carrier entry and exit since 1920 pursuant to the Interstate Commerce Act; the STB has exclusive jurisdiction over rail lines over which railroads provide point-to-point "common carrier" line-haul service to shippers (i.e., mainlines); and, failure to seek authority to operate pursuant to 49 U.S.C. § 10901 would deprive a common carrier of the ability to assert federal preemption under 49 U.S.C. § 10501(b). See also Suffolk & S. R.R. LLC – Lease & Operation Exemption – Sills Road Realty, FD 35036, slip op. 1 (S.T.B. served Nov. 16, 2007) (explaining while § 10901 (mainline) track required a license, so did the acquisition of existing track that would otherwise be characterized as “spur” track when a new common carrier was created for the “purpose and effect” of extending service of a carrier into new territory; also explaining, railroad lines that are part of the interstate rail network, require a Board license under 49 U.S.C. 10901 (for non-railroad entity) to construct or acquire and operate, or 49 U.S.C. 10902 to acquire and operate (for existing Class II and III common

carriers). In short, § 10901 (mainline track) utilized to serve shippers is subject to the full spectrum of the STB's entry and exit licensing authority. The aforementioned precedent explains that a rail common carrier subject to the Board's jurisdiction requires licensing authority (not a physical license similar to a driver's license), the next few paragraphs explain how an entity becomes a federally licensed common carrier railroad.

Under Federal law, a non-railroad entity² may “acquire a railroad line or acquire or operate an extended or additional railroad line upon the STB exempting/authorizing a certificate permitting the proposed operations....”³ To acquire a railroad line, the non-railroad entity would file a “Notice of Exemption” pursuant to 49 C.F.R. 1150, Subpart D; the regulations provide for the abbreviated “Notice of Exemption” procedure for a new non-carrier (i.e., its status before it acquires a railroad) to obtain authority to operate an STB jurisdictional line of rail (common carrier mainline trackage) pursuant

² Mendocino Railway was a non-carrier prior to 2004. See specific discussion on Mendocino Railway's license *infra*.

³ 49 U.S.C. § 10901(a)(4).

to 49 U.S.C. 10901, including 49 U.S.C. 10901(a)(4).⁴ The Board has time and again explained that the notice of exemption process involves the Board licensing a new carrier's operations. See City of Rochelle, Illinois – Notice of Exemption – Commencement of Rail Common Carrier Obligations, FD 33587 (STB served July 7, 1998) (explaining that to assume/commence common carrier operations, a

⁴ 49 C.F.R. 1150.31. "Under the licensing provisions of 49 U.S.C. 10901, a noncarrier ... may acquire and operate a rail line only if the Board makes an express finding that the proposal is not inconsistent with the "public convenience and necessity." That means that the Board must examine and weigh the public interest. There are instances, however, where full regulatory scrutiny is not necessary, and so, under 49 U.S.C. 10502 and 49 C.F.R. 1121, any party may request an exemption from the otherwise applicable regulatory provisions, on the grounds that full regulatory scrutiny is not necessary to carry out the national transportation policy and that either the exemption is limited in scope or regulation is not needed to protect shippers from an abuse of market power. This is through the so-called "individual petition for exemption" process. In the 1980's, individual petitions for exemptions became so common that the Board adopted a "class exemption" (a/k/a/ "Notice of Exemption" process) allowing parties to obtain Board authorization quickly. Thus, under our regulations at 49 CFR 1150.31, a noncarrier can obtain approval to acquire and operate a line of railroad" in an abbreviated time "subject to that authority being later revoked (if our regulatory scrutiny is found to be necessary) or treated as void ab initio (if the exemption notice is found to have contained false or misleading information)." Jefferson Terminal Railroad Company – Acquisition and Operation Exemption – Crown Enterprises, Inc., FD No. 33950 (STB served March 19, 2001) ("Jefferson Terminal"), slip op. at 4 (footnotes omitted).

non-carrier invokes the Board’s class exemption at 49 CFR 1150.31);
see also Utah Transit Authority – Acquisition Exemption – Line of
Union Pacific Railroad Company, FD 32186 (ICC served April 8,
1993).

The notice of exemption to be filed with the Board must include the identity of the applicant and its representative, the proposed operator of the rail line, “[a] statement that an agreement has been reached or details about when an agreement will be reached” (generally referring to an agreement permitting the operation anticipated to result from the transaction described in the notice of exemption), the identify of transferor, “[a] brief summary of the proposed transaction” including the name of the party transferring the property to be operated, and whether the proposed transaction includes an interchange commitment.⁵ If the proposed transaction does include an interchange commitment, then details concerning the interchange commitment (including any relevant agreements) must be

⁵ 49 C.F.R. 1152.33, 49 C.F.R. 1152.34. This requirement was added in the 2010 decade.

provided (on a confidential basis), and the title of the proceeding will be modified to note the inclusion of the interchange commitment.

Upon the filing of a notice of exemption,⁶ a summary of the transaction is published in the Federal Register/on the STB website exempting/licensing the proposed operations.⁷ As stated in 49 C.F.R 1150.32(b), the exemption (the license) automatically becomes effective by operation of law 30 days after the notice is filed.

Consistent with the Board's licensing requirements, in 2004, Mendocino Railway became a freight common carrier subject to the STB's jurisdiction.⁸ Mendocino Railway continues to date to be a Class III short-line railroad and a valued member of the American Short Line and Regional Railroad Association ("ASLRRA"). Despite these facts, there seems to be some confusion in Respondent's brief as to when a license exempted/or authorized by the Board begins and terminates. In that decision, the Board in a 2013 decision specifically

⁶ When initial operations are expected to generate more than \$5 million, additional disclosures or steps are required. See 49 C.F.R 1150.32(e).

⁷ 49 C.F.R 1150.32(b).

⁸ See Mendocino Ry. – Acquisition Exemption – Assets of the Cal. W.R.R., FD 34465, slip op. at 1 (STB served April 9, 2004).

addressed this issue as it applies to **all** federally recognized common carriers. The Board made clear when a rail common carrier's license takes effect and ends, holding:

To avoid any further misunderstanding, we reiterate here that, after obtaining acquisition authority from the Board, an entity that goes forward and acquires an existing railroad line becomes a rail carrier authorized to use 49 U.S.C. § 10902 as of the date of the acquisition, even if it is not actually called upon to provide service until some later time....

Because the common carrier obligation cannot be terminated without abandonment authorization⁹ from the Board, the transfer of [a] railroad line and the common carrier obligation that goes with it immediately impose[s] upon the new owner the continuing obligation to provide common carrier rail transportation service over the line upon reasonable request. As was the case with [a] prior owner, it does not matter whether the line has been inactive for a time, or even if it remains inactive

⁹ Abandonment is the process of terminating a rail carrier's license to operate and removing the Board's jurisdiction over such operations.

after it is acquired. Either way, because a rail line itself is part of ‘transportation,’ on the date that an acquiring entity ... consummates a Board-authorized transaction by acquiring a common carrier railroad line, it becomes a ‘rail carrier’ as defined by § 10102(5) (i.e., a "person providing common carrier railroad transportation for compensation"), and a "rail carrier providing transportation subject to the jurisdiction of the Board...."

See Middletown & New Jersey Railroad, LLC – Lease and Operation Exemption – Norfolk Southern Railway Company, FD 35412 (STB served March 27, 2013) (“Middletown”)

ASLRRA hopes this explanation resolves any ambiguity with respect to how the STB has licensed rail carrier entry and exit since 1920 and continues to do so today.¹⁰ Put simply a rail carrier remains a rail carrier until the STB specifically says it is not.

II. Once a Federal Common Carrier Obligation is Established, California Law Cannot Decline to Recognize the Common Carrier’s Status as a Federally Recognized Common Carrier.

¹⁰ The Interstate Commerce Commission Termination Act of 1995 (ICCTA) is a federal law that ended the Interstate Commerce Commission (ICC) and established the Surface Transportation Board (STB). See Public Law 104–88, 109 Stat. 803.

Per 49 U.S.C. § 10501(b), the Board has exclusive jurisdiction over common carriers: “**(1)** transportation by rail carriers, and the remedies provided in this part [49 U.S.C. §§ 10101 *et seq.*] with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and **(2)** the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State.” The Board’s jurisdiction “is exclusive. Except as otherwise provided in this part [49 U.S.C. §§ 10101 *et seq.*], the remedies provided under this part [49 U.S.C. §§ 10101 *et seq.*] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” 49 U.S.C. § 10501(b) applies to all tracks and facilities owned by a jurisdictional carrier, whether used in part or whole to provide freight services.

In interpreting the reach of preemption under § 10501(b), both the Board and the courts have found that § 10501(b) categorically prevents states and localities from intruding into matters that are directly regulated by the Board (e.g., rail carrier rates, services,

licensing, entry/exit authority, and construction authority for new rail lines). Other state actions may be preempted as applied, that is, only if they would have the effect of unreasonably burdening, interfering with, or discriminating against rail transportation, which is a fact-specific determination based on the circumstances of each case. See N.Y. Susquehanna & W. Ry. Corp. v. Jackson, 500 F.3d 238, 252-54 (3rd Cir. 2007); Joint Petition for Decl. Order – Boston & Maine Corp. & Town of Ayer, MA, 5 S.T.B. 500, 510-12 (2001); Borough of Riverdale—Pet. for Declaratory Order—N.Y. Susquehanna & W. Ry., FD 33466, slip op. at 2 (STB served Feb. 27, 2001); and Borough of Riverdale – Petition for Declaratory Order – The New York Susquehanna and Western Railway Corporation, 4 S.T.B. 380, 387 (1999).

Mendocino Railway¹¹ has been a federally licensed rail common carrier for over 20 years, and per the STB, the common carrier obligation refers to the statutory duty of railroads to provide “transportation or service on reasonable request;” thus, Mendocino Railway is also a common carrier under state law. See 49 U.S.C.

¹¹ Mendocino holds itself out as a common carrier and offers transportation services on demand.

11101(a). See Common Carrier Obligation of Railroads, Ex Parte No. 677, slip op. at 1 (STB served February 22, 2008). ASLRRRA is concerned that attempts to apply a different state-created definition for what constitutes an interstate common carrier would likely have the effect of unreasonably burdening interstate transportation and discriminating against interstate commerce. Further, such an action would likely be preempted as applied under 49 U.S.C. § 10501(b).

Moreover, it is hard to understand how Mendocino Railway could not be considered under state law to be a common carrier, as defined under California Public Utility Code § 211, “[e]very person and corporation providing transportation for compensation to or for the public or any portion thereof, except as otherwise provided in this part.” See Cal. Pub. Util. Code § 211. Based on that definition, it is clear that Mendocino Railway is a common carrier under both federal and state law. Lastly, any alternative interpretation of what constitutes a “common carrier” cannot be reconciled with the jurisdiction and authority of the Board and would likely be preempted. See Reading, Blue Mountain & Northern Railroad Company – Petition for Declaratory Order, Docket No. FD 35956, 2016 STB LEXIS 155,

*21-22 (STB served June 3, 2016) (holding any state law remedy that

infringes upon the Board's exclusive jurisdiction to regulate rail transportation is preempted by § 10501(b) and may only be effectuated upon obtaining the requisite Board authority). See State of Maine, Department of Transportation – Acquisition and Operation Exemption – Maine Central Railroad Company; Maine Central Railroad Company/Springfield Terminal Railroad Company – Trackage Rights – State of Maine Department of Transportation, 8 I.C.C. 2d 835, 1991 ICC LEXIS 105, *4, n. 4 (ICC served May 20, 1991) (“State law cannot transform what is a rail line under Federal law (or by extension who is a common carrier) into something else.”)

III. Railroads Can Connect to the Interstate Rail System Via Other Rail Lines (Not Formerly Abandoned), Port Facilities; Interim Trail Use; and Transloading.

As stated in Section I, and discussed in the Middletown decision, once a rail carrier’s operations become effective, only a Board action specifically authorizing the carrier to abandon service terminates the common carrier obligation of the carrier to provide common carrier rail transportation service over the line upon reasonable request. This is because railroads connect to the interstate rail system in a variety of ways. The key being that all of these ways collectively are “part of” the interstate rail network.

First, railroads can be directly connected to other jurisdictional rail lines, or to a line that remains jurisdictional trackage (not formerly abandoned). This is true even when the jurisdictional rail line is embargoed. “Although a valid embargo temporarily excuses the duty to provide service on reasonable request, it does not permanently eliminate the common carrier obligation under 49 U.S.C. 11101(a). To be relieved of its common carrier obligation, a railroad must seek discontinuance (temporarily suspends the connect carrier’s common carrier obligation) or abandonment authorization under 49 U.S.C. § 10903 (permanently removes that connecting line segment from the Board’s jurisdiction). While a valid embargo is an appropriate defense to an action for a breach of the common carrier's duty, an embargo cannot be used by a railroad to unilaterally abandon or discontinue service on a line at its own election.” See Bar Ale, Inc. v. California Northern Railroad Co. and Southern Pacific Transportation Company, FD 32811, 2001 STB LEXIS 633, *11 (STB served July 18, 2001).

Second, railroads can likewise connect to the interstate rail system by a connection to a port or waterway that links to other modes including trucks, and downstream railroads. Interstate freight ports and railroads work together to transport goods by rail, truck, and

barge. This process is called intermodal transportation and it is a key part of the supply chain, both domestically and globally.¹²

For the court’s benefit, two statutory provisions are most on point here: 49 U.S.C §10501(a)(1)(A) and 49 USC §10501(a)(2)(A) which provides that the STB has jurisdiction over transportation by a rail carrier that is provided by a railroad between a place in a state and a place in the same state as part of the interstate rail network. In 2013, in a passenger rail case, the Board confirmed “[u]nder 49 U.S.C. § 10501(a)(2)(A), the Board has jurisdiction over transportation by rail carrier between a place in a state and a place in the same state, as long as that intrastate transportation is carried out ‘**as part of the interstate rail network.**’” See California High-Speed Rail Authority – Construction Exemption – In Merced, Madera, and Fresno Counties, CAL., FD 35724 (STB served June 13, 2013) (“CHSRA-I”) (emphasis added) (citing DesertXpress Enters., LLC—Pet. for Declaratory Order, FD 34914 (DesertXpress), slip op. at 9 (STB served May 7, 2010)). As long as the rail lines are

¹² See Freight Rail & Intermodal, available at <https://www.aar.org/issue/freight-rail-intermodal/> (explaining over 13.5 million units moved intermodally in 2022).

constructed/operated as part of the interstate rail network, the Board has jurisdiction under § 10501(a)(2)(A). Id. at 14.

The railroad does not need to be physically connected to another STB-regulated railroad to be part of the interstate rail system and subject to the STB's jurisdiction. A perfect example of this is the Alaska Railroad, which is an STB-regulated railroad, but is connected to the rest of the nation's physical rail network through ferry, transloading, air freight, the movement of commodities that have had a prior or subsequent move on another STB regulated rail carrier, and by being part of the Strategic Rail Corridor Network (STRACNET) & Defense Connector Lines.¹³ Another example is the Alaska Hydro-Train, a water carrier, a division of Puget Sound Tug & Barge Company. Hydro-Train in conjunction with the Alaska Railroad and other railroads provide a through common carrier service by rail from any point in the continental United States to the State of Alaska. See

¹³ See, Strategic Rail Corridor Network (STRACNET) & Defense Connector Lines, 2023 Edition, published by the Military Surface Deployment and Distribution Command Transportation Engineering Agency at <https://www.sddc.army.mil/sites/TEA/Functions/SpecialAssistant/RND%20Publications/STRACNET%202023.pdf>, at 1 (identifying “civil rail lines most important to national defense”).

Pipe Line Machinery & Equipment, Various States to Alaska, 349 I.C.C. 799, 1975 I.C.C. LEXIS 50, *5 (I.C.C. served May 29, 1975).

Third, railroads can be connected to other railroads through railbanked lines. See Eastside Community Rail, LLC – Acquisition and Operation Exemption – GNP RLY Inc., FD 35692, Ballard Terminal Railroad Company, LLC – Lease Exemption – Eastside Community Rail, LLC, FD 35730, GNP RLY, Inc. – Abandonment Exemption in King County, Wash., AB 1316X, slip op. at 8 (unconsolidated proceedings addressed in the same decision) (STB served April 24, 2023) (noting that a line that is subject to interim trail use/railbanking protection will not isolate and strand a segment otherwise connected to the interstate freight rail network so long as the commitment to railbanking is enforceable and not illusory).

A fourth way railroads can be connected to the interstate system is via transloading. Examples of "island" railroads cut off from a direct physical connection to a larger, interstate railroad but that nonetheless remain under STB's jurisdiction include facilities that remain "part of" the interstate rail system via transloading. The statute does not require a railroad to have a physical connection with the interstate rail network to be "part of" the interstate railroad system.

CONCLUSION

ASLRRA respectfully requests that the court give careful consideration to the STB's licensing process which for over a century has been in place. While not a conventional license such as a driver's license, the Board licenses a carrier every time it exempts or approves a new carrier or an existing carrier's expansion of proposed freight rail operations. The Board determines under federal law who is a freight rail common carrier, and applying different definitions of a common carrier could unreasonably interfere with a rail carrier's common carrier obligation and provision of services, as authorized by the Board. As such, attempts to find under state law that a federal common carrier is not an interstate common carrier would likely be preempted. Rail lines in the interstate rail system are connected and constitute "part of" the interstate rail network through a connection with other rail lines (not formerly abandoned), port/waterway facilities, interim trail use, transloading, and more. ASLRRA hopes these comments help aid the court in its understanding of the issues before it.

DATED: January 29, 2025.

By: /s/ David Diepenbrock

Attorney for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing BRIEF AMICUS CURAIE is proportionately spaced, has a typeface of 13 points or more, and contains 3,576 words.

DATED: January 29, 2025

/s/ David Diepenbrock