

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB FINANCE DOCKET NO. 35073**

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**NORTHWESTERN PACIFIC RAILROAD COMPANY  
– CHANGE IN OPERATORS EXEMPTION –  
NORTH COAST RAILROAD AUTHORITY,  
SONOMA-MARIN AREA RAIL TRANSIT DISTRICT, AND  
NORTHWESTERN PACIFIC RAILWAY CO., LLC**

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**NORTHWESTERN PACIFIC RAILROAD COMPANY'S  
REPLY IN OPPOSITION TO THE PETITION TO  
STAY OF MENDOCINO RAILWAY**

**Douglas H. Bosco  
Northwestern Pacific Railroad Company  
37 Old Courthouse Square  
Suite 200  
Santa Rosa, CA 95404  
Phone: (707) 525-8999  
Facsimile: (707) 542-4752**

**Robert A. Wimbish  
William A. Mullins  
Baker & Miller PLLC  
2401 Pennsylvania Avenue, NW  
Suite 300  
Washington, DC 20037  
Phone: (202) 663-7820  
Facsimile: (202) 663-7849**

**Attorneys for Northwestern  
Pacific Railroad Company**

**September 4, 2007**

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On August 31, 2007, Mendocino Railway (“Mendocino”) filed what it entitled a “Petition to Stay”<sup>1</sup> the change of operator class exemption invoked by Northwestern Pacific Railroad Company (“NWPCO”) in the above-captioned proceeding. Although nominally a request for the Board to impose a so-called “housekeeping” or “administrative” stay, Mendocino’s Petition instead appears predominantly to be a request for the Board to – (1) render null and void ab initio NWPCO’s notice, or, in the alternative, (2) condition its “approval” of NWPCO’s notice of exemption upon the enforcement of certain claims that Mendocino purports to have with respect to properties owned the by the North Coast Railroad Authority (“NCRA”) in and around Willits, CA. See Mendocino Petition at 5 (“WHEREFORE” paragraph summarizing Mendocino’s request for relief).

For the reasons set forth below, Mendocino’s stay petition (if indeed there is truly a stay request contained in Mendocino’s filing) must be denied. Similarly, there is no

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<sup>1</sup> Hereinafter, Mendocino’s Petition to Stay will be referred to as the “Petition.”

basis for the Board to reject NWPCO's notice of exemption as void ab initio or to impose any conditions upon the proposed transaction.

As background and to put Mendocino's presence here in perspective, NCRA selected NWPCO to replace Northwestern Pacific Railway Co., LLC ("NWPY") as the operator of the rail properties that are the subject of NWPCO's notice of exemption. NWPCO's notice of exemption contemplates a transaction that is a significant step in the process of restoring service to shippers on lines of railroad that currently are inactive. NCRA selected NWPCO based on a competitive bidding and negotiation process. Mendocino participated in this bidding process, but it was not selected.

Whether Mendocino's Petition contains a fully-developed stay request is questionable. The full extent of its argument for a stay is contained on numbered page 1 of the Petition, where Mendocino cites in a footnote three relatively recent proceedings where the Board has imposed housekeeping stays.<sup>2</sup> Mendocino does not draw any connection between the cases it cites<sup>3</sup> and the facts at issue in the subject proceeding to establish that a stay of any sort would be appropriate here, nor does Mendocino explain what a stay would accomplish or for how long the consummation of NWPCO's proposed

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<sup>2</sup> In all likelihood, Mendocino has invoked housekeeping stay precedent because Mendocino recognizes that it cannot qualify for a conventional stay under the 4-part standard set forth in Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977). The Board should not reward Mendocino for its facile attempt at an end-run around the appropriate standard by which a party seeking a stay should obtain one.

<sup>3</sup> The cases that Mendocino lists merely support the notion that the Board may, to protect its processes and to uphold the policy objectives of the agency, suspend proceedings where further analysis of a proposed transaction is warranted and/or where that transaction could threaten adverse impacts that must be more thoroughly scrutinized. But it is entirely unclear how Mendocino believes that a stay would protect Board policy or processes here. Instead, Mendocino appears merely to cite these cases for the proposition that the Board could impose a housekeeping stay if it wanted to.

transaction should be enjoined. Mendocino does not, and indeed cannot, articulate any basis for a stay of any kind. That may be why Mendocino begins its Petition as a request for a stay, but then devotes most of its effort to arguing for either rejection of NWPCO's notice or the imposition of conditions upon NWPCO's exercise of its exemption.

Mendocino advances two theories about why NWPCO's notice is void ab initio, both of which lack merit. First, Mendocino characterizes selected passages in NWPCO's notice and in the caption summary filed with it as intentionally false or misleading. Specifically, noting that the lines over which NWPCO proposes to operate have not seen trains for some time as a consequence of safety orders issued by the Federal Railroad Administration ("FRA"), Mendocino maintains that the notice is misleading because it could be read to suggest that NWPY currently "is operating" over those lines.

There is nothing whatsoever misleading in NWPCO's notice, including the passages in it that Mendocino quotes. Admittedly, in retrospect, the language in the draft caption summary attached to the notice might better and more accurately have read "NWPCO will replace [NWPY], which *has the authority to operate* those lines..." rather than "NWPCO will replace [NWPY], which *has been operating over* those lines..." But there is nothing in the allegedly offensive passage in the draft caption summary that was intended to, or would, mislead the public concerning material aspects of the proposed transaction, and Mendocino has nowhere established that the passage has given the Board or the public an incorrect understanding of the transaction. Thus, Mendocino has failed to show that NWPCO's notice should be rejected. See, e.g., Central Illinois Railroad Company – Lease and Operation Exemption – Lines of The Burlington Northern and Santa Fe Railway Company at Chicago, Cook County, IL, STB Finance Docket No.

33960, slip op. at 4 (STB served September 12, 2002) (erroneous passages that are trivial and/or not material to the grant of the exemption are not basis for rejection of the notice); Mendocino Coast Railway, Inc. – Acquisition Exemption – Assets of California Western Railroad, Finance Docket No. 31058, 1988 ICC LEXIS 224 at \*8 (ICC decided July 14, 1988) (rejection of a notice of exemption is not required “where the allegedly false or misleading information is immaterial”).

Second, Mendocino argues that NWPCO is wrong to state that the proposed transaction would not exceed the thresholds for environmental review. NWPCO is not wrong. In fact, Mendocino appears to be unaware of the correct thresholds used to determine whether a transaction that would restore service to a non-abandoned rail line should be subjected to the Board’s environmental review processes.<sup>4</sup> The correct measure in this case is whether the transaction would result in an increase of eight trains per day over any section of the line to be operated [49 CFR 1105.7(e)(5)(i)(C)], not the 100% threshold of 49 CFR 1105.7(e)(5)(i)(A).<sup>5</sup> NWPCO certifies that the eight-trains-

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<sup>4</sup> Mendocino is correct in one respect – the lines that NWPCO will operate have been out of service due to FRA emergency orders.

<sup>5</sup> See Missouri Central Railroad Company – Acquisition and Operation Exemption – Lines of Union Pacific Railroad Company, et al., STB Finance Docket No. 33508, slip op. at 7 (STB served Apr. 30, 1998), aff’d sub nom., Lee’s Summit, Mo. v. STB, 231 F.3d 39, 42 (D.C. Cir. 2000) (affirming the Board's finding that, where there had been no recent traffic on a rail line that would be reactivated, the relevant threshold for environmental review is eight trains per day)

When a line currently carries no traffic, any resumption of service, no matter how small, represents an increase mathematically of infinite magnitude. But, the Cities have cited no instance, nor are we aware of any, where an increment of one train a day each way as proposed by MCRR has been deemed to suffice to trigger our environmental reporting and documentation requirements. The fact that the 100% standard is paired in the same sentence with an absolute standard of an increase of eight trains a day suggests that the 100% standard applies to an anticipated increment that greatly exceeds the one train a day each way operations proposed by MCRR. Moreover, MCRR's actions are most closely analogous to

per-day threshold at 49 CFR 1105.7(e)(5)(i)(C) will not be exceeded and that, accordingly, no environmental review is necessary. (NWPCO stipulates, however, that, were the facts otherwise and the relevant thresholds exceeded, the Board would have primary jurisdiction to assess the transaction’s environmental impacts.) For these reasons, NWPCO’s notice of exemption is neither false nor misleading.

The bulk of Mendocino’s Petition focuses on claims surrounding a “trackage rights agreement” that Mendocino makes clear is beyond the Board’s regulatory authority. The tracks that are the subject of this agreement are apparently either switching or yard tracks “within the meaning of 49 U.S.C. 10501(b)(2) and 10906.” Mendocino Petition at 4 (numbered paragraph 7). Moreover, it is clear that Mendocino’s request for a Board condition, as atypical as that relief would be in the context of a class exemption under 49 CFR 1150.31 *et seq.*,<sup>6</sup> hinges upon claims that entail interpretation of the terms of Mendocino’s contract for the use of such tracks. There is no reason for the Board to leverage NWPCO’s notice of exemption for the purposes of assessing the merits of Mendocino’s claim for damages under this contract. (NCRA, incidentally, has advised NWPCO that Mendocino’s claim under the trackage rights agreement is meritless.)

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the situation that arises when a carrier reinstitutes service on a line where service has been discontinued. In such a case, under 49 CFR 1105.7(e)(5)(i)(C), the environmental requirements are not triggered unless the proposed operations will amount to at least eight trains per day.

<sup>6</sup> In desperation, Mendocino cites to the formal application provisions at 49 U.S.C. 10901(c) as authority for the idea that the Board may condition its acceptance (or, using Mendocino’s inaccurate terminology, its “approval”) of a change of operator notice of exemption. The notice of exemption procedures are available to NWPCO precisely because the agency determined in creating the class exemption that transactions such as the one proposed here by NWPCO do not warrant regulatory scrutiny and do not threaten impacts for which protective conditions would be appropriate or necessary.

In fact, there is no logical connection between NWPCO's invocation of the class exemption and Mendocino's private-contract-oriented request for a condition.

Mendocino, which is represented here by the same counsel that advanced the recent request of Baywood Partners, Inc. ("Baywood") for a condition in this proceeding, already should know where to go to pursue its purported rights and interests. See NWPCO's August 30, 2007 Response to Baywood's Request for Conditions at 1-2. In short, the claims that underpin Mendocino's request for conditions do not belong before the Board, and so the request for conditions itself should be denied out-of-hand.

In sum, Mendocino seeks a delay of the usual class exemption procedures for delay's sake, and it relies upon trivialities and a mistaken understanding of the Board's environmental rules to request rejection of NWPCO's notice of exemption. Finally, Mendocino asks for Board-imposed conditions in the hope that the Board will endorse its contract claims. As NWPCO has shown, Mendocino is entitled to none of the relief it seeks in its Petition, and, for those reasons, the Petition should be denied in its entirety.

Respectfully submitted,

Douglas H. Bosco  
Northwestern Pacific Railroad Company  
37 Old Courthouse Square  
Suite 200  
Santa Rosa, CA 95404  
Phone: (707) 525-8999  
Facsimile: (707) 542-4752

  
Robert A. Wimbish  
William A. Mullins  
Baker & Miller PLLC  
2401 Pennsylvania Avenue, NW  
Suite 300  
Washington, DC 20037  
Phone: (202) 663-7820  
Facsimile: (202) 663-7849

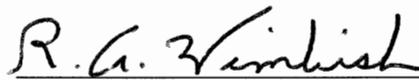
Attorneys for Northwestern Pacific  
Railroad Company

Dated: September 4, 2007

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of the foregoing Reply in Opposition to the Petition to Stay of Mendocino Railway by facsimile transmitting and mailing by prepaid first class mail copies to counsel for Mendocino Railway and Baywood Partners, Inc., Fritz R. Kahn.

Dated at Washington, D.C. this 4<sup>th</sup> day of September, 2007.



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Robert A. Wimbish