



GrassRoots Institute

Progressive Solutions for the Common Good

IS MENDOCINO RAILWAY (MR) A PUBLIC UTILITY EX-EMPT FROM LOCAL OVERSIGHT?

MR says yes. The STB, RRB, CPUC, and judges have said no.

The below information is sourced from materials available on <https://savenoyheadlands.com/>, except where footnoted.

- “Common carrier railroads” are railroads that transport people or freight from one place to another. In contrast to a private contract carrier, a common carrier must provide service to anyone willing to pay its fee, even when freight is hazardous or otherwise undesirable.¹ Common carrier railroads are a form of public utility, legally entitled to use eminent domain for railroad purposes. Tourist excursion trains that primarily offer sightseeing – a round-trip “luxury service, as contrasted with regular route, point-to-point transportation between cities, commuter service, or home-to-work service” – do not provide the kind of transportation that confers public utility status.
- Common carrier railroads that connect to the interstate rail network are “federally preempted”: state and local regulatory agencies cannot interfere with common carrier railroad operations that occur on the interstate rail network.
- MR – the owner and operator of the Skunk Train tourist attraction and the owner of Fort Bragg’s former mill site – claims it is a common carrier railroad connected to the interstate rail system. MR claims it has the power of eminent domain and is not subject to certain state and local regulatory oversight.
- After MR bought a portion of the mill site in 2019 and its sister company Sierra Northern Railway bought another portion in February 2021, MR acquired the remainder of the mill site by filing an eminent-domain lawsuit, which was resolved with a November 2021 settlement in which GP sold the property and associated toxic liability to MR for \$1.23 million. The settlement also granted MR 70 acres along the banks of Pudding Creek, foiling plans to make the property freely accessible to the public as a state park.² MR has since installed a hiking trail along Pudding Creek, available to customers for \$100 per person, \$20 for a dog.³ Fort Bragg is currently suing MR to establish that the mill-site development should



be subject to state and local oversight; the California Coastal Commission (CCC) recently intervened to join Fort Bragg in the lawsuit. In turn, MR is suing the CCC and Fort Bragg in federal court to develop the mill site without coastal development permits. MR's lawsuit emphasizes its alleged right to undertake "rail-related activities" without state or local approval. City officials have voiced concern that MR will blur the lines between rail-related and non-rail-related development to broadly avoid oversight.⁴

- MR has reportedly also claimed, among other things, that it should not have to obtain a business license or allow County Environmental Health to inspect an oil spill on its property.



- In 2007, the federal Surface Transportation Board (STB), which regulates railroads, noted that the Skunk Train had been severed from the interstate rail network since 1998, and therefore had not provided service subject to the STB's jurisdiction. In 2019, the CCC relied on this decision to question MR's claim that it was exempt from permitting requirements in developing the mill site. Because federal preemption does not apply to activities over which STB jurisdiction does not extend, even rail-related development on the mill site should not be exempt from local oversight, the CCC argued.

- MR is also currently suing to take 20 acres in Willits from John Meyer through eminent domain. The Meyer case went to trial in August 2022. Meyer argued that MR is not truly a public utility and is not entitled to use eminent domain. Meyer also argued that MR did not truly intend to use his property for a legitimate railroad purpose that would justify eminent domain. MR had stated in its December 2020 complaint that it wanted Meyer's land for construction and maintenance of rail facilities related to alleged "ongoing and future freight and passenger rail operations," without providing specifics. By the time of trial, MR's stated plan for the property was to build a trans-load facility (for exchanging freight between trucks and train cars) and maintenance shed. But Meyer argued that "high-level company officials spent months corresponding about how to use Meyer's property as a campground, only creating a document outlining the current plan in late June of this year," Redheaded Blackbelt reported.⁵ Meyer's lawyer "relied heavily on an email thread between [MR CEO Robert] Pinoli and Mike Hart, the CEO of Sierra Railroad Company, which owns Mendocino Railway, about buying a property outside of Willits. The topics of freight and maintenance never came up, he said, citing several passages that extolled the sightseeing virtues of various parcels, and considered the benefits of running a campground." A judgment is expected in October.

- In 2020, when MR filed an eminent-domain lawsuit to acquire 476 Alger Street in Fort Bragg, it claimed to need the land for railroad purposes, but told the seller that MR would use the property for a "day camp" where people will "picnic, hike and explore."

- In a 2016 interview published on YouTube, MR's Mike Hart explained why he got into railroads. "I started buying railroads back in the '90s. I like them, because they're a great way of acquiring real estate. Once you have the railroad, you have the right of eminent domain. You're not subject to a lot of laws that other companies are," he said.



- In 2006, the Railroad Retirement Board (RRB) determined that MR was not connected to the interstate rail system, was not performing common carrier service, and was not an RRB-covered employer. In 2022, the Great Redwood Trail Agency's lawyer wrote to the STB about this 2006



RRB determination, stating, “MR represented to the RRB that it had no freight traffic and was a purely tourist excursion operation, and therefore was entitled to an exemption from rail labor retirement taxation. RRB granted MR an exemption on the basis of its representations. In short, by MR’s own admission to RRB, it is not an actual freight railroad. If it were an actual freight railroad, then it has made a misrepresentation to the federal government on the basis of which it is avoiding taxes.”⁶

John Meyer’s lawyer wrote, in a 2022 court filing, that the RRB determination “makes it readily apparent that Mendocino Railway is not a common carrier and does not wish to be a common carrier if it is going to be required to make retirement payments to its employees, but it wishes to be deemed a common carrier in order to take property through eminent domain.”⁷



- The California Public Utilities Commission (CPUC) stated, in 2022 and 1998, that, as a tourist train, MR is not a public utility. The California Court of Appeal said the same in 2004,⁸ as did Mendocino County Superior Court Judge Clayton Brennan in 2022.
- MR’s own statements do not support its public-utility status:
 - Online records show that since at least 2014, MR has not reported any freight miles to the Federal Railroad Administration (FRA)⁹; and that in at least 2009 and 2010, MR identified itself as a “tourist train” to the FRA in railroad crossing reports.¹⁰
 - In 2022, MR submitted proof of insurance to the STB that showed coverage for a “Tourist/Excursion Railroad” – MR apparently did not carry freight insurance.¹¹
 - In 2022, MR named some alleged non-tourist customers – contract service for AT&T and PG&E¹² and ad hoc transportation of police, fire, and construction crews¹³ – but this does not seem to be the sort of regular service by tariff that confers public utility status. “A railroad may provide transportation services either by tariff, where it is acting as a common carrier; or by contract, where it is acting as a contract carrier,” explained one source on railroad law. “If the railroad is acting as a common carrier, then the STB retains jurisdiction over such transportation and a host of federal rules regulate the railroad’s rates and service levels. If a railroad is acting as a contract carrier, then the STB lacks jurisdiction and the relationship is governed by private contract.”¹⁴ MR also claimed as freight service an instance when it hauled 120 cars of steel and aggregate for a streambed restoration project with Trout Unlimited¹⁵; this was to repair MR’s own culverts and river crossings.¹⁶
 - MR is currently trying to acquire 13 miles of track north from Willits, potentially to transport gravel from Wylatti’s Grist Creek Aggregates facility near Longvale.¹⁷ In this effort, MR is due in mid-October to file an “offer of financial assistance” (OFA, a form of eminent domain) in STB proceeding AB-1305X, a proceeding the North Coast Railroad Authority (now known as the Great Redwood Trail Agency, or GRTA) initiated to obtain approval to railbank the dilapidated tracks from Willits to Humboldt Bay and build the Great Redwood Trail (GRT) on their rail bed.¹⁸ MR’s OFA is the last major obstacle to the GRT securing the right-of-way north of Willits. If MR succeeds, it may gain a freight operation and this might strengthen its claim to be a public utility. It would remain disconnected from the interstate rail network unless MR or another railroad restores the tracks from Willits to Cloverdale.¹⁹ In a September 2022 STB filing, the GRTA’s lawyer voiced skepticism about both the OFA and



MR's rationale for the Meyer property:

“Although MR frequently intimates otherwise, it has never operated the Willits to Fort Bragg line for freight. ... It is hard to understand how a transload at Willits on highway 20 makes any economic sense if MR intends to pursue an OFA from Willits (where it would acquire the Willits Yard roughly a mile away from its proposed highway 20 facility) all the way to Longvale ... where yet another transload would presumably be necessary if MR intends to maintain the pretense of actual freight rail service. A fact-based and consistent explanation for why a tourist operation now finds it necessary to rely on state and federal eminent domain remedies to acquire three transload sites (and a line between two of them) over a distance of roughly 15 miles for currently non-existent freight operations on currently dilapidated lines which have no functioning connection to the interstate rail network (or even to any town in California other than Willits, population 4998 at the 2020 census), has yet to be delivered by MR.”

1 <https://www.investopedia.com/terms/c/common-carrier.asp>; <https://ageconsearch.umn.edu/record/303739/files/2020-04-23%20Final%20Report%20to%20DOA.pdf>; June 21, 2004 decision of the California Court of Appeal, City of St. Helena v. Napa Valley Wine Train, <https://caselaw.findlaw.com/ca-court-of-appeal/1239956.html>.

2 <https://www.pressdemocrat.com/article/news/skunk-train-owners-acquisition-of-fort-bragg-mill-site-upend-s-city-plans-a/>

3 See <https://www.skunktrain.com/hike-to-the-glen/>.

4 E.g.

<https://www.sfgate.com/california-politics/article/Skunk-Train-Mendocino-County-Fort-Bragg-16663076.php>, <https://www.pressdemocrat.com/article/news/skunk-train-operator-sues-city-of-fort-bragg-and-california-coastal-commiss/>

5 <https://kymkemp.com/2022/09/06/judgment-expected-next-month-in-skunk-trains-attempt-to-acquire-private-property-west-of-willits-through-eminent-domain/>

6 Document 305328, proceeding AB_1305_0_X, <https://www.stb.gov/proceedings-actions/dockets-and-service-lists/>.

7 Meyer's September 12, 2022 court filing was posted to Facebook on September 14 by Bruce Broderick: <https://www.facebook.com/groups/135497508406445/posts/516994670256725/>.

8 June 21, 2004 decision of the California Court of Appeal, City of St. Helena v. Napa Valley Wine Train, <https://caselaw.findlaw.com/ca-court-of-appeal/1239956.html>.

9 MR files a monthly Injury/Illness Summary form with the FRA's Office of Safety Analysis ("OSA"), and in this form, there is a section for operational data where MR is required to report "Freight Train Miles" (see <https://railroads.dot.gov/forms-guides-publications/forms/618055-injuryillness-summary>). The OSA publishes the latest year of this data for all reporting railroads and companies online and calls it the "Annual Railroad Classification report." To download the OSA's latest Annual Railroad Classification report, go to <https://safetydata.fra.dot.gov/OfficeofSafety/publicsite/downloads/auxiliary.aspx>. In this data, MR is identified as "CWR" (for California Western Railroad). Note that data for MR is not available for all years; it is possible that MR's missing information was included in reports for MR affiliate Sierra Northern Railway (identified in the data as "SERA"). The data file structure for Injury/Illness reports can be viewed here: https://safetydata.fra.dot.gov/OfficeofSafety/publicsite/Ne-wregulation.aspx?doc=rrsfile_ThruMay2011.pdf.

In addition, operational data from Injury/Illness Summary reports back to January 2014 is available on a newer



Transportation.gov data site:

<https://data.transportation.gov/Railroads/Injury-Illness-Summary-Operational-Data/m8i6-zdsy>.

10 On crossing inventory forms from 2009 and 2010 that MR filed with the FRA, MR identified itself as a “tourist train” and not a “freight train,” even though it could have selected both categories on the form. To view MR’s crossing records, go to OSA’s main web page: <https://safetydata.fra.dot.gov/OfficeofSafety/Default.aspx>. In this data, MR is identified as “CWR” (for California Western Railroad). The crossing inventory forms ask for “type of train,” with options including “Tourist/Other” and “Freight.” The form’s instructions say “Check each box that describes the type of rail service that uses the crossing. Check all that apply.”

11 Document 304658, proceeding AB_1305_0_X, <https://www.stb.gov/proceedings-actions/dockets-and-service-lists/>.

12 <https://mendovoice.com/2022/08/mendocino-railway-will-file-to-use-13-miles-of-great-redwood-trail-agency-track/>

13 Document 304726, proceeding AB_1305_0_X, <https://www.stb.gov/proceedings-actions/dockets-and-service-lists/>.

14 <https://www.kellogghansen.com/assets/htmldocuments/Kellogg%20Hansen%20Railroad%20Presentation.pdf>

15 <https://kymkemp.com/2022/09/06/judgment-expected-next-month-in-skunk-trains-attempt-to-acquire-private-property-west-of-willits-through-eminent-domain/>

16 <https://www.mendocinolandtrust.org/trout-unlimited-restores-salmon-habitat-in-mlt-preserve/> and page 5 of https://issuu.com/skunktrain/docs/little_stinker_-_fall_2021_-_volume_1_issue_1/1.

17 Document 304658, proceeding AB_1305_0_X,

<https://www.stb.gov/proceedings-actions/dockets-and-service-lists/>. At California State Senator Mike McGuire’s June 1, 2022 town hall meeting about the GRT, Great Redwood Trail Agency chair Caryl Hart stated that MR wanted to ship gravel mined from Outlet Creek by Grist Creek Aggregates.

18 Proceeding AB_1305_0_X, <https://www.stb.gov/proceedings-actions/dockets-and-service-lists/>.

19 In May 2020, MR stated that it would like to acquire the freight rights to Cloverdale, but it is unknown whether it has taken further steps toward this goal. See pages 120-121 of https://transdef.org/media/TRAC_Submission.pdf.





P. O. Box 1607, Mendocino, CA 95460 • (707) 593-6084
grassrootsinstitute707@gmail.com • <http://www.grassroots-institute.org/>