

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 30186

TONGUE RIVER RAILROAD COMPANY, INC.—RAIL CONSTRUCTION AND
OPERATION—IN CUSTER, POWDER RIVER AND ROSEBUD COUNTIES, MONT.

Decided: November 21, 2014

On September 17, 2014, Jay L. Schollmeyer, on behalf of SMART-Transportation Division, General Committee of Adjustment (GO-386) (hereinafter, SMART-386),¹ filed a petition seeking reconsideration of the procedural schedule set forth in a September 10, 2014 Board decision. The September 10 decision resolved a motion to compel filed by the Northern Plains Resource Council (NPRC) seeking production of documents and responses to interrogatories served on Tongue River Railroad Company, Inc. (TRRC) and two of TRRC's owners (BNSF Railway Company (BNSF) and Arch Coal, Inc.).²

SMART-386's petition requests a schedule modification. SMART-386 notes that the September 10 decision provided that discovery between NPRC and the TRRC parties be completed by October 25, 2014, that NPRC file a supplemental reply by November 17, and that TRRC file a rebuttal by December 8. Petitioner further notes that its predecessor in interest filed a comment concerning TRRC's supplemental application on April 2, 2013.³ Citing the length of time since that filing, SMART-386 requests that the Board allow it to file a reply 14 days after

¹ Schollmeyer is the General Chairman for SMART-Transportation Division, the successor to the United Transportation Union.

² TRRC has filed a supplemental application seeking authority under 49 U.S.C. § 10901 for it to construct and for BNSF to operate a rail line in southeast Montana. The primary purpose of the proposed line is to transport low sulfur sub-bituminous coal from a planned coal mine at Otter Creek, Mont., currently in the state permitting process, and other possible future mines that might be developed in the Otter Creek and Ashland, Mont. area. This application represents the revival of a similar line construction proposal approved by the Board's predecessor agency in 1986. See Tongue River R.R.—Rail Constr. & Operation—in Custer, Powder River & Rosebud Cntys., Mont. (Tongue River I), FD 30186 (ICC served Sept. 4, 1985), modified (ICC served May 9, 1986), pet. for judicial review dismissed, N. Plains Res. Council v. ICC, 817 F.2d 758 (9th Cir. 1987). This earlier proposed line, however, was never built. The September 10 decision provides a more detailed background of this proceeding.

³ Jay Schollmeyer, for and on behalf of the United Transportation Union, General Committee of Adjustment (UTU/GO-386), filed this prior comment.

NPRC files its supplemental submission and that TRRC's rebuttal deadline be extended by 14 days.

On October 7, 2014, TRRC filed in opposition to the relief sought by SMART-386.⁴ It argues that SMART-386 should not be allowed to view the NPRC submission, which TRRC states will probably be filed under seal because of its confidential material. TRRC also opposes SMART-386's request to file a reply, arguing that its discovery dispute with NPRC has lasted many months and that SMART-386 has had ample opportunity to participate in discovery, but has chosen not to do so. Furthermore, TRRC claims that the matters NPRC will comment on in its submission will have no bearing on the matters SMART-386's predecessor commented on in April of 2013.

If NPRC files its submission under seal, SMART-386 may view the NPRC submission by agreeing to the terms of the protective order set in the Board's August 27, 2013 decision. The protective order will maintain the confidentiality of the NPRC submission. TRRC has not identified a rationale for barring SMART-386's access to the NPRC submission through the protective order's framework.

It is possible that matters raised by NPRC in its supplement might relate to matters discussed by SMART-386's predecessor in the April 2, 2013 comment. Therefore, SMART-386 may reply to NPRC's forthcoming supplement to the extent that the supplement relates to matters discussed in the April 2, 2013 comment. Accordingly, TRRC's forthcoming schedule must provide SMART-386 with a 14-day period after the filing of NPRC's supplement to reply and must extend TRRC's rebuttal deadline by 14 days.

It is ordered:

1. TRRC is directed to modify its forthcoming schedule as discussed above.
2. This decision is effective on its date of service.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

⁴ On the same date, TRRC also requested an extension of the procedural schedule establishing the November 17 and December 8 deadlines. TRRC asked that, in light of voluminous discovery, it be allowed to submit a new schedule by November 25, 2014, setting forth a completion date for discovery and filing dates for TRRC and NPRC. TRRC represented that NPRC agreed with TRRC's request. The Board granted TRRC's extension request on October 14, 2014.