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SERVICE DATE – SEPTEMBER 30, 2003

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 30186 (Sub-No. 3)

TONGUE RIVER RAILROAD COMPANY, INC.–CONSTRUCTION
AND OPERATION–WESTERN ALIGNMENT

Decided: September 26, 2003

By appeal filed jointly on July 15, 2003, in this sub-numbered proceeding (Tongue River III), the United Transportation Union-General Committee of Adjustment and the United Transportation Union-Montana State Legislative Board (UTU-GCA/MT) asked the Board to revise a procedural decision that was served on July 7, 2003. Northern Plains Resource Council, Inc. (Northern Plains) filed an appeal on July 17, 2003, in support of UTU-GCA/MT's appeal. Tongue River Railroad Company¹ replied on July 23, 2003. The appeals of UTU-GCA/MT and Northern Plains (collectively, Appellants) will be denied.

BACKGROUND

An extensive description of the background of this proceeding is set forth in two decisions served earlier this year,² and it need not be repeated in detail. It is sufficient to note that, on

¹ In a decision served September 2, 2003, the Board allowed Tongue River Railroad Company, Inc. (TRRC Inc.) to be substituted for Tongue River Railroad Company (TRRC Partnership) as the applicant in the Tongue River III proceeding. Although UTU-GCA/MT filed a petition for reconsideration on September 22, 2003, of the Board's September 2 decision, the Board has retitled the proceeding to reflect the substitution while the petition is pending. The Board will make any additional changes, if warranted, when it decides the merits of UTU-GCA/MT's petition for reconsideration. In the instant decision, the applicant/respondent will be referred to collectively as TRRC, with some limited references as needed to the separate entities.

² See Tongue River Railroad Co.-Construction and Operation-Western Alignment, STB Finance Docket No. 30186 (Sub-No. 3) (STB served Mar. 11, 2003); Tongue River Railroad Co.-Construction and Operation-Western Alignment, STB Finance Docket No. 30186 (Sub-No. 3) (STB served May 19, 2003).

January 17, 2003, TRRC requested that the Board permit it to update its previously submitted evidence on the transportation aspects of its Tongue River III application. In a decision served March 11, 2003, the Board authorized TRRC to file the updated evidence. The Board also stated that it would establish a procedural schedule for replies after TRRC filed its evidence. TRRC filed its updated evidence on May 1, 2003. In the decision directly at issue here, served July 7, 2003, the Board, through its Secretary, established a procedural schedule for parties to file comments and replies to this evidence. The decision also advised anyone interested in becoming a party of record (POR) to file a notice of intent to participate with the Board within 10 days of the service date of that decision. The Board will soon issue an updated service list, including the new PORs who filed notices of intent to participate.

DISCUSSION AND CONCLUSIONS

Under 49 CFR 1115.1(c), an appeal of an employee decision made under authority delegated by the Chairman will be granted only in “exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice.” Appellants have not made such a showing here, and the appeals will be denied.

UTU-GCA/MT argues that the Secretary’s decision here contains a clear error in judgment since it does not require TRRC to furnish the new PORs with copies of its Tongue River III application or its supplemental pleadings. According to UTU-GCA/MT, the failure to require TRRC to furnish these items conflicts with the requirements of 49 CFR 1150.10(b). UTU-GCA/MT argues that the Board should rectify this by requiring TRRC to furnish the new PORs with copies of the Tongue River III application, TRRC’s reply to the comments opposing the application filed on November 2, 1998 (November 2 Reply), and the supplemental evidence TRRC filed on May 1, 2003.

UTU-GCA/MT has apparently interpreted the requirement in the July 7 decision that pleadings filed “since” May 1, 2003, must be served on the new PORs in a way that would exclude TRRC’s May 1 supplemental evidence from the requirement. UTU-GCA/MT has misread the Secretary’s decision. The decision’s reference to pleadings filed since May 1 requires all current PORs to serve the new PORs with filings made on that date as well as any filed after that date. Thus, the Board has already required TRRC to serve its supplemental evidence on the new PORs.

UTU-GCA/MT’s argument concerning the Tongue River III application and November 2 Reply are also misplaced. The Board’s regulations at 49 CFR 1150.10(b) set forth procedures for a party filing an application under 49 U.S.C. 10901, and provide in part that: “Copies of documents shall be furnished promptly to interested parties upon request.” Thus, contrary to UTU-GCA/MT’s assertion, absent a request from one of the new PORs, there is no need for the applicant to unilaterally provide the documents to which UTU-GCA/MT refers. Nor was there any need for the July 7 decision to impose such a requirement. Yet, although there is no error here, the Tongue River III

application and November 2 Reply provide information that helps a party understand TRRC's supplemental evidence. The Board has therefore placed these filings on its website to make them more accessible to the parties.

UTU-GCA/MT also claims that the Secretary should not have issued a procedural schedule until the Board ruled on TRRC Partnership/TRRC Inc.'s petition for substitution of parties.³ UTU-GCA/MT seems to argue that parties could not file informed comments while the substitution of parties petition was pending. The Board disagrees. Whether the applicant in the Tongue River III proceeding is a partnership or a corporation should not hinder a person's ability to analyze or comment on the supplemental evidence, and UTU-GCA/MT has presented no persuasive argument to the contrary. The Secretary did not err in this regard.

Lastly, Northern Plains argues that the Secretary's decision does not provide adequate notice to persons who may wish to become PORs. According to Northern Plains, the 10-day period for persons to file notices of intent to participate is an inadequate amount of time to notify and elicit a response from the public because the Secretary's decision allegedly takes 7 days to reach Montana by mail. Northern Plains argues that the Secretary should have provided 30 days to file a notice of intent to participate and should have alerted the public of this opportunity in a local newspaper. There is no merit to this argument. The Secretary's July 7 decision was published in the Federal Register on that date, and this alone is sufficient notice of the matter. The decision has also been available on the Board's website since approximately the same date. Furthermore, several parties from Montana did, in fact, file their notices of intent to participate within the 10-day window. The Secretary's decision thus provided ample notice and opportunity to participate in this proceeding.

Finally, TRRC states that it would not object if the Board includes on the service list any person who, up until the date the updated service list is issued, requests to be made a POR. The Board will not leave this matter as open-ended as TRRC suggests, but notes that interested parties may file a petition to intervene at any time under 49 CFR 1112.4.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The appeals filed by UTU-GCA/MT and Northern Plains are denied.

³ As noted above, the Board on September 2, 2003, granted a petition allowing TRRC Inc. (a corporation) to be substituted for TRRC Partnership (a partnership) as the applicant in the Tongue River III proceeding.

2. This decision is effective on its service date.

By the Board, Chairman Nober.

Vernon A. Williams
Secretary