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SURFACE TRANSPORTATION BOARD

DECISION

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

TONGUE RIVER RAILROAD COMPANY--CONSTRUCTION
AND OPERATION--WESTERN ALIGNMENT

Decided: April 10, 1998

In this decision, we are denying appeals filed by Great Northern Properties Limited Partnership (Great Northern), the Northern Plains Resource Council (Northern Plains), and two union officials¹ of a February 13, 1998 letter by the Chief of the Board's Section of Environmental Analysis (SEA), granting the Tongue River Railroad Company's (TRRC) request for a waiver of the 6-month prenotification period that generally is required for rail construction applications.²

PRELIMINARY MATTERS

Great Northern's and Northern Plains' appeals are accompanied by petitions seeking leave to file out of time. Petitioners assert that the appeals were late-filed because Northern Plains was served with a copy of the waiver ruling at an old address and Great Northern was not served at all. Consequently, the petitioners did not learn of the waiver ruling until the 10-day appeal period had passed. The union officials, parties to the Sub-No. 2 proceeding but not this one, also seek leave to late-file their appeal. Good cause exists for granting petitioners leave to file their appeals and for considering their filings, and we will do so.

BACKGROUND

TRRC currently has authority to construct and operate a line of railroad between Ashland and Decker, MT, subject to various conditions. See Tongue River Railroad Co.--Rail Construction and Operation--Ashland to Decker, Montana, Finance Docket No. 30186 (Sub-No. 2) (STB served

¹ John D. Fitzgerald on behalf of United Transportation Union--General Committee of Adjustment (GO-386) on lines of The Burlington Northern and Santa Fe Railway Company and Francis G. Marceau on behalf of United Transportation Union--Montana State Legislative Board.

² On February 17, 1998, Great Northern filed a reply opposing TRRC's waiver request. Because Great Northern's appeal contains arguments virtually identical to those in the reply, we will not separately discuss the latter pleading here.

Nov. 8, 1996).³ In that proceeding, the Board considered two alternative routes for the Ashland-Decker line. The first proposed route, TRRC's preferred route, closely follows the Tongue River. The Board found that this route presented adverse environmental impacts that could not be effectively mitigated. The second route, the so-called "Four Mile Creek Alternative," avoids an environmentally sensitive section of the Tongue River, but follows a more circuitous route and allegedly offers less favorable operating characteristics than TRRC's preferred route. For reasons set forth in the November 1996 decision, we rejected TRRC's preferred route and approved the Four Mile Creek Alternative.

On July 15, 1997, TRRC petitioned to reopen the November 1996 decision. In its petition, TRRC proposed the Western Alignment, a new alignment for an approximately 17-mile portion of the Four Mile Creek Alternative routing. The Western Alignment would allegedly require less construction and offer improved operating characteristics over the approved Four Mile Creek Alternative routing. We denied the petition by decision served December 1, 1997, but stated that TRRC could file a new application for authority to construct the Western Alignment.

As a result of that decision, on December 19, 1997, TRRC filed a notice of intent, informing the Board that TRRC will file at the earliest practical time a new construction and operation application in the STB Finance Docket No. 30186 (Sub-No. 3) proceeding. By letter filed February 9, 1998, TRRC requested from SEA a waiver of the 6-month prefiling notice generally required for construction projects under 49 CFR 1105.10(a)(1).⁴ The waiver was granted by the Chief of SEA in a letter dated February 13, 1998, pursuant to 49 CFR 1105.10(c)(1), which allows the 6-month lead time requirement to be waived or modified "where appropriate."

Subsequently, on March 5, 1998, Great Northern filed its appeal of the waiver letter. On March 10, 1998, TRRC filed an opposition to the appeal. The union officials filed their appeal on March 20, 1998, to which TRRC filed opposition on March 30, 1998. Great Northern filed its appeal on March 23, 1998, to which TRRC replied on March 31, 1998.

³ That decision also embraced Tongue River R.R.--Rail Construction and Operation--In Custer, Powder River and Rosebud Counties, Montana, Finance Docket No. 30186; and Tongue River Railroad Company--Issuance of Securities, Finance Docket No. 30186 (Sub-No. 1). In Finance Docket No. 30186, TRRC had previously been authorized to construct a rail line between Miles City, MT, and Ashland. The November 1996 decision denied a request to revoke that authorization, eliminated a condition to that authorization, and imposed some new conditions on the proposed construction of the line, which would connect with the Ashland-Decker line. Petitions for review of the November 1996 decision are pending in the Ninth Circuit in Nos. 97-70037, 97-70099, and 97-70217, Northern Plains Resource Council, Inc. v. STB.

⁴ There actually has been a long lead time in this case. SEA was introduced to the Western Alignment in July 1997, when TRRC petitioned to reopen the November 1996 decision. Moreover, more than 3 months have passed since TRRC filed its notice of intent to file a new application.

DISCUSSION AND CONCLUSIONS

The environmental procedures pertaining to rail construction and operation applications are governed by the environmental rules at 49 CFR part 1105 and the rail construction rules at 49 CFR part 1150. The regulations require that, if an environmental impact statement is required or contemplated for a proposed project, the prospective applicant generally must provide SEA with a prefiling notice at least 6 months prior to filing the application. 49 CFR 1105.10(a)(1), 1150.1(b). The purpose of the lead time requirement is to allow the Board's environmental staff to familiarize itself with the parameters of the proposed project and to identify the potential environmental issues that may be associated with it. See 49 CFR 1150.1(b). Waivers of the 6-month waiting period are permitted under 49 CFR 1105.10(c), where appropriate, to enable tailoring of the Board's internal procedures to the specific circumstances of individual cases. The SEA Chief granted a waiver here, explaining that SEA had adequate information about the proposed Western Alignment to waive the requirement for 6 months of lead time in this case.

On appeal, Great Northern⁵ argues that the authority to grant or deny a waiver has not been delegated to the Chief of SEA and, therefore, her action in granting the waiver was ultra vires and, hence, invalid. However, 49 CFR 1105.2 specifically delegates the authority to the Chief of SEA "to render initial decisions on requests for waiver. . . ."⁶ Accordingly, the Chief of SEA acted within her authority to issue a letter waiver of the 6-month waiting period.⁷

Great Northern argues that TRRC's waiver request did not comply with the informational requirements at 49 CFR 1105.10(c)(2), which require such a request to describe as completely as possible the anticipated environmental effects and the timing of the proposed action, and to show that all or part of the 6-month prenotification period is not appropriate.⁸ But TRRC's waiver request was fully adequate. TRRC filed a lengthy 13-page waiver request accompanied by numerous exhibits, charts, and graphs showing the proposed Western Alignment and comparing that rail line to

⁵ Northern Plains states that it "adopts and incorporates by reference the appeal filed by Great Northern." Hereinafter, references to the arguments of Great Northern will be deemed to incorporate the arguments of Northern Plains.

⁶ SEA's waiver decisions may be appealed to us. 49 CFR 1105.2. Thus, if specific deficiencies are brought to the agency's attention, we will reassess any waivers given by SEA, if warranted.

⁷ As TRRC notes in its opposition to Great Northern's appeal, it has been a routine practice for the Chief of SEA to issue letter rulings on requests for waiver of the 6-month prefiling notice requirement. See Missouri Mining, Inc. v. ICC, 33 F.3d 980, 983-84 (8th Cir. 1994) (no statute or regulation requires that SEA's initial waiver decisions must be in writing or be made public).

⁸ Great Northern did not contend that TRRC failed to show that all or part of the 6-month prenotification period is not appropriate.

the alternatives already considered by SEA. The waiver letter and the attached exhibits describe the proposed rail line and its anticipated environmental effects, the timing of the proposed application, and included several reasons why 6 months lead time is not necessary in this case. This provided an adequate basis for SEA to conclude that 6 months lead time was not required here.

In addition to the material in TRRC's waiver request, SEA also factored in its knowledge of the proposed Western Alignment from information TRRC had provided in its July 1997 petition to reopen Finance Docket No. 30186 (Sub No. 2). This information included maps, engineering studies, and preliminary estimates of potential environmental impacts. The waiver decision was also based on TRRC's notice of intent to file a new application for the Western Alignment, as well as SEA's preliminary verification and investigation of the Western Alignment, including informal consultation with several federal and state agencies and TRRC representatives. In sum, we find that, based on the information in TRRC's waiver request and numerous other sources, the Chief of SEA did not abuse her discretion in concluding that TRRC's request met the requirements of 49 CFR 1105.10(c)(2).

Great Northern complains that TRRC's waiver request is silent as to the additional train traffic that the Western Alignment would generate, and as to increased air and noise pollution and other environmental degradation that would result. However, Great Northern has not shown that the waiver request should not have been granted. The proposed application concerns a new alignment for previously-approved (but unbuilt) rail line construction. Therefore, future train traffic for the alignment, and the amount of air and noise pollution likely, would be similar to the projections and conclusions in the environmental impact statement in Finance Docket No. 30186 (Sub-No. 2). Moreover, TRRC indicated in its waiver request that it believes the Western Alignment would reduce or avoid various environmental impacts associated with the Four Mile Creek Alternative and TRRC's original preferred route.

The 6-month lead time rule is designed to allow SEA adequate time to prepare for the environmental review process. See 49 CFR 1150.1(b). Any environmental analysis that takes place at that time is simply preliminary; the bulk of SEA's environmental review takes place only after an application is filed. Given the long history of proceedings involving this rail line, and the information provided in TRRC's waiver request, SEA had an adequate basis to determine that it did not need the entire 6-month period to prepare for the environmental review that will be required if TRRC's application for the Western Alignment is filed.

Finally, Great Northern complains that the waiver request fails to explain how TRRC expects to complete the environmental review process, secure Board approval, and complete construction of the entire line between Miles City and Decker by December 1999, the time period imposed by the Board in its November 1996 decision. Although TRRC did not specify in its waiver request a completion date for the proposed new segment, the filing of an application to build the Western Alignment would not automatically relieve TRRC of its obligation to build the 89-mile line from Miles City to Decker within 3 years of the service date of the November 1996 decision. See December 1997 decision at 8.

The union officials contend that they were prejudiced and deprived of due process when they were not invited to participate in an ex parte meeting held on December 17, 1997, between TRRC representatives and SEA. The officials ask us to vacate the Chief of SEA's February 13 ruling for that reason, and direct that a notice for a new meeting be served on all parties of record in the Sub-No. 2 proceeding.

We find no merit to this argument. The environmental review process is informal in nature, and it is common for SEA to have informal, preliminary meetings with an applicant to discuss the environmental review process before the applicant seeks authority from the Board to construct and operate a rail line. Moreover, as the courts have held, it is not improper for SEA to issue a waiver that is not in writing and not published. Missouri Mining, 33 F.3d at 983. SEA's waiver decisions, which are placed in the official docket comprising the administrative record may be appealed to the Board. 49 CFR 1105.2. Also, SEA's environmental documents (Environmental Assessments or Environmental Impact Statements, as appropriate) explain what waivers have been granted and the basis on which SEA did so. This gives the public adequate notice of the agency's waiver decisions, and an opportunity to comment on them. See Missouri Mining, 33 F.3d at 984.

The officials also assert that the full 6-month prenotification period is necessary, at a minimum, here because any environmental analysis in this proceeding must encompass the entire 130-mile project, not just the newly-proposed 17-mile segment. We disagree. As noted, the purpose of the 6-month period is to afford SEA an opportunity to familiarize itself with a construction proposal. As the Chief of SEA said in her waiver ruling, a period of that length is simply not necessary here. SEA is already very familiar with the Tongue River project, for which a voluminous record has already been compiled. Moreover, the purpose of the prenotification period is not, as the union officials suggest, to enable the agency to perform an environmental review of the proposal. Rather, only preliminary environmental analysis is undertaken during this period. SEA will determine the scope of environmental review that will be necessary for this proceeding after the application for the Western Alignment has been filed.

In sum, Great Northern, Northern Plains, and the union officials have not shown that SEA's waiver of the 6-month prenotification period in this proceeding was improper. Accordingly, we will deny their appeals of the waiver ruling.

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

It is ordered:

1. Great Northern, Northern Plains, John D. Fitzgerald and Francis G. Marceau are granted leave to late-file their appeals.

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2. The appeals of the waiver decision are denied.

3. This decision is effective on the service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary