

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.

Digest:¹ Northern Plains Resource Council (NPRC) asks the Board to require Tongue River Railroad Company, Inc. (TRRC) and two of its owners to produce information so that NPRC can file additional comments on TRRC's construction and operation application. This decision finds that some of this information should be made available to NPRC.

Decided: September 9, 2014

By motion filed on January 13, 2014, Northern Plains Resource Council (NPRC) asks that the Board compel Tongue River Railroad Company, Inc. (TRRC) and two of its owners to produce various documents and to answer various interrogatories. In this decision, the Board finds that TRRC and two of its owners should provide some, but not all, of the documents and information sought by NPRC.

BACKGROUND

TRRC seeks a Board license under 49 U.S.C. § 10901 to construct and 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 currently in the state permitting process at Otter Creek, Mont., and other possible future mines that might be developed in the Otter Creek and Ashland, Mont. area. TRRC filed a revised application for construction authority on October 16, 2012.² After the Board issued a decision requesting additional information, TRRC filed a

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² TRRC's October 16, 2012 revised application represented the revival of a similar line construction 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. In light of TRRC's renewed interest in pursuing a line

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supplemental application on December 17, 2012. As discussed in the supplemental application, TRRC has selected as its preferred alignment the “Colstrip Alignment,” a 42-mile route running between Colstrip, Mont., and Ashland/Otter Creek, which would connect with an existing BNSF Railway Company (BNSF) line known as the Colstrip Subdivision.

In a decision served on January 8, 2013, the Board accepted TRRC’s supplemental application for consideration. On April 2, 2013, the Board received three comments on the transportation merits of the application, including one from NPRC and Wally McCrae/Clint McCrae, d.b.a. the Rocker Six Cattle Company (collectively, NPRC Parties or NPRC).³ On June 7, 2013, TRRC filed its reply to the comments. In its filing, TRRC replied to arguments raised in opposition to its application and provided the statement of Seth Schwartz, its expert witness on coal transportation markets. Mr. Schwartz responded to claims from the NPRC Parties on the issue of whether coal markets would be available for the coal to be hauled by the proposed line.

On June 5, 2013, two days before TRRC filed its reply to the comments, the NPRC Parties filed a petition asking the Board to revise the procedural schedule to allow for a six-month discovery period. In the petition, the NPRC parties explained that they anticipated that the new expert evidence that TRRC would be submitting in reply to the comments on the transportation merits would create contested issues of fact. They further explained that they anticipated that the contested issues would relate to whether the proposed line construction would be in the public interest. TRRC filed a reply in opposition to the NPRC Parties’ petition on June 25, 2013.

On July 2, 2013, the NPRC Parties filed a surreply to TRRC’s June 7 reply to the comments and a motion asking that the Board accept the surreply into the record. In the surreply, the NPRC Parties also argued that TRRC’s June 7 filing underscored the need for discovery in this case, claiming that the filing highlights several factual disputes in TRRC’s pleadings. The NPRC Parties also asserted that discovery could lead to the development of a better record on the merits of TRRC’s supplemental application. On August 9, 2013, TRRC submitted a reply asking that the Board deny the NPRC Parties’ motion for leave to file a surreply and reject the surreply. Alternatively, TRRC requested that the Board accept its attached evidence concerning operating expenses. TRRC also again opposed discovery.

In a decision served on August 27, 2013, the Board noted that the proceeding will require the agency to resolve a number of important and complex issues and that further evidence might assist the agency in rendering its decision. Therefore, the Board accepted the parties’ filings into the record and permitted limited discovery. The Board also provided a new schedule allowing the NPRC Parties to provide additional comments based on discovery by December 16, 2013,

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similar to the Tongue River I line, the Board reopened the proceeding in a decision served on June 18, 2012.

³ Other comments were filed by the United Transportation Union, General Committee of Adjustment (UTU/GO-386), and jointly by Montana Environmental Information Center, National Wildlife Federation, and Sierra Club.

and TRRC to file rebuttal by January 6, 2014. The Board also adopted a protective order to safeguard commercially sensitive material submitted into the record. On November 22, 2013, the Board granted a request to extend the discovery period until January 31, 2014, or 45 days after the Board rules on any motion to compel discovery, and extending the time for NPRC to file its reply until 21 days after the close of discovery and the time for TRRC to file its rebuttal until 42 days after the close of discovery.

On January 13, 2014, NPRC filed the motion we are addressing here wherein NPRC asks that the Board compel discovery from TRRC and two of its owners, BNSF and Arch Coal, Inc. (Arch Coal) (collectively, TRRC Parties). NPRC wants the TRRC Parties to fully answer various interrogatories and produce documents that it argues pertain to TRRC's application. In particular, NPRC asserts that it seeks information to determine whether TRRC's owners are committed to financing and pursuing the rail construction project, whether the mine at Otter Creek would be a viable concern, and whether there is a demand for the coal to be hauled by the line in question. NPRC claims that its inquiries are narrowly tailored to matters raised in TRRC's supplemental application and relevant to the Board's decision-making process.

On February 3, 2014, TRRC filed a reply opposing NPRC's motion. TRRC claims that the discovery NPRC seeks is unnecessary to the disposition of this case and would impose undue and unwarranted burdens. It notes that it has already provided NPRC substantive answers to many interrogatories, turned over a significant number of documents, and agreed to make available four persons for deposition.⁴ On February 19, 2014, NPRC filed a surreply and moved that the Board accept it into the record. TRRC submitted a filing on March 11, 2014, opposing this request on grounds that the surreply only revisits prior arguments. To assure a complete record, both the February 19 filing and the March 11 filing will be included in the record.

DISCUSSION AND CONCLUSIONS

In Board proceedings, parties are entitled to discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding." 49 C.F.R.

⁴ According to TRRC, it provided substantive responses to 53 of NPRC's 66 interrogatories and agreed to produce documents in response (or stated no substantive response existed) to 41 of NPRC's 60 document requests. TRRC objected and did not provide a substantive response to Interrogatory Nos. 11, 12, 24, 25, 26, 40, 41, 43, 59, 60, 62, 63, and 64. It objected and did not agree to produce documents in response to RFP Nos. 5, 9, 18, 22-27, 30-31, 42-49. Because TRRC has no employees of its own at this stage, potentially responsive documents were collected from 11 individuals at BNSF and Arch Coal who have responsibilities related to the TRRC project. TRRC also agreed to make available for deposition all of the people NPRC requested to depose. TRRC limited its production of documents to those created or modified on or after June 18, 2012, the date the Board reopened the Tongue River construction proceeding.

§ 1114.21(a)(1).⁵ “The requirement of relevance means that the information might be able to affect the outcome of a proceeding.” Waterloo Ry.—Adverse Aban.—Lines of Bangor & Aroostook R.R. & Van Buren Bridge Co. in Aroostook Cnty., Me., AB 124 (Sub-No. 2), *et al.* (STB served Nov. 14, 2003). Further, it “is not grounds for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” 49 C.F.R. § 1114.21(a)(2). Under 49 C.F.R. § 1114.21(c), however, discovery may be denied if it would be unduly burdensome in relation to the likely value of the information sought.⁶

Here, the TRRC Parties have already produced or agreed to provide information that responds to the majority of NPRC’s discovery requests. Although some of the additional material sought by NPRC should be produced by TRRC, not all the requested material satisfies the Board’s discovery standards, as requiring that that material be produced would be either beyond the scope of this proceeding or overly burdensome. Each item sought by NPRC is discussed in turn below.

A. Documents Created Between 2010 and 2012. NPRC notes that a number of its document requests relate to coal demand, markets, and the competitiveness of Otter Creek coal; market conditions that could delay or prevent development of Otter Creek or reduce production levels below capacity; export terminal capacity; and revenue projections for TRRC.⁷ In response to these coal document requests, TRRC has already produced documents that were created or modified on or after June 18, 2012 (when the Board reopened this proceeding) from internal BNSF and Arch Coal files. Among these documents are Arch Coal’s highly confidential quarterly forecasts of the domestic market and export market for coal prepared from mid-2012 through the most recent 2013 quarter available at the time of production.

NPRC claims, however, that the TRRC Parties should be required to produce documents that predate the date on which the proceeding was started. Specifically, NPRC seeks documents created or modified after July 1, 2010, the date one year prior to the July 1, 2011 transaction in which all of the stock in TRRC was sold to a holding company in which BNSF, Arch Coal, and TRR Financing, LLC hold membership interests. See TRRC Reply, Ex. 4. NPRC states that it wants to examine the coal analyses and information on market conditions that Arch Coal and BNSF relied on when they were deciding whether to become involved with the construction project. See NPRC Motion 13. NPRC notes that the TRRC Parties might withhold these documents because they are privileged, and, if so, asks that the Board require the TRRC Parties

⁵ Under 49 U.S.C. § 10901(c), the Board must approve an application to construct a proposed rail line “unless the Board finds that such [construction is] inconsistent with the public convenience and necessity.”

⁶ See also M&G Polymers USA, LLC v. CSX Transp., Inc., NOR 42123 (STB served Nov. 24, 2010, and Dec. 23, 2010).

⁷ NPRC explains that these documents are sought in RFP Nos. 1-4, 6-8, 11-13, 15-17, 19-21, and 28-29.

to provide a privilege log.⁸

The Board will compel the TRRC Parties to expand the timeframe for TRRC's responses to these documents requests to include documents created or modified after July 1, 2010. NPRC's request is reasonable because documents created immediately prior to the time TRRC was sold to its current owner, and thereafter filed its application, might contain information relevant to the transportation merits of the proposed project as it relates to coal markets and other related issues.⁹

B. Collecting Documents from Additional Employees and Identifying Employees. The TRRC Parties limited their document review to the files of 11 employees at Arch Coal and BNSF who have supplied information for use in connection with the reopened proceeding and who have been primarily involved in the TRRC project.¹⁰ NPRC claims that the TRRC Parties' choice of document custodians was improper and should be expanded to include the files of other Arch Coal and BNSF employees.

This request to expand the number of employees whose files should be reviewed will be denied for the most part. TRRC has explained that, at this stage, it has no employees. However, in response to NPRC's discovery requests, TRRC identified those employees at BNSF and Arch Coal who are likely to have responsive documents, relying on Entergy Arkansas, Inc. v. Union Pacific Railroad Company, FD 42104, slip op. at 4 (STB served May 19, 2008). TRRC has explained that the 11 BNSF and Arch Coal employees whose files have been reviewed are the employees who have supplied information for use in connection with the TRRC project and are the ones likely to have responsive, non-duplicative documents. NPRC has not shown that other employees are likely to have relevant, non-duplicative documents.¹¹ Given that the TRRC Parties have already provided responsive, non-duplicative documents from the employees likely to possess them,¹² requiring a search of documents from additional employees not shown to be

⁸ Given that the TRRC Parties have not withheld documents on the basis of privilege, the request for a privilege log will be denied as premature.

⁹ We note that TRRC has itself suggested that older material could be relevant by asking NPRC to produce data starting in 2009 concerning NPRC's consultant, Synapse Energy Economics, Inc.

¹⁰ The employees and their responsibilities are described in TRRC's reply 7-8.

¹¹ NPRC suggests that TRRC has only reviewed the files of employees who have provided information to TRRC's counsel. See NPRC Surreply 7-9. However, TRRC has not made such an assertion – rather, when TRRC states that it reviewed the files of employees “who have supplied information for use in connection with the TRRC project” (see TRRC Reply 14), the Board understands that TRRC means that these employees of BNSF and Arch Coal have supplied information for use on the TRRC project in general, and not just exclusively to TRRC's counsel.

¹² NPRC will also be able to depose employees from BNSF and Arch Coal, including Mr. Blumenfeld, the Arch Coal employee most likely to have access to information concerning coal markets.

likely to possess such documents is unnecessary and would be overly burdensome. However, consistent with section A above, if there are additional employees who worked on this project from July 1, 2010, to June 18, 2012, and these employees are likely to have responsive, non-duplicative documents, TRRC should review those individuals' files and produce any documents responsive to NPRC's requests.

NPRC also moves to compel additional responses to Interrogatories 3-10, in which NPRC requests that TRRC “[i]dentify every person who was or is responsible for” certain activities, such as projecting certain data for the proposed railroad or locating potential customers for Otter Creek coal. The motion to compel as it concerns Interrogatories 3-10 is denied. As TRRC asserts, these interrogatories, which seek identification of “every person who was or is responsible for” certain activities, are overly broad, unduly burdensome, and vague. Moreover, with regard to Interrogatories 3-5, TRRC has provided the names of the persons who appear to have primary responsibility over the activities in question. While TRRC did not use the word “responsible” in its responses, the Board understands TRRC’s responses to identify the persons with primary responsibility for the relevant activities. With regard to Interrogatories 6-10, which seek identification of persons with responsibility for sales and marketing (including finding customers) for Otter Creek coal, TRRC adequately explains that it is not responsible for the sales and marketing of the coal to be carried on the proposed rail line, and that Arch Coal, which would have such responsibility, has not yet assigned such responsibility to any of its employees. As TRRC explains, because the permitting process is still on-going at the Otter Creek mine, and production is likely years away, Arch Coal has not begun conducting specific activities concerning the sales and marketing of Otter Creek coal. Moreover, even though TRRC cannot yet identify specific employees or other persons in response to Interrogatories 6-10, TRRC did provide the name of its expert, who may have information concerning the potential sales and marketing of Otter Creek coal.¹³

C. Otter Creek Mine Economics. In RFP No. 31, NPRC asks that the TRRC Parties produce all documents related to projected revenue, expenses, and profits for the Otter Creek mine. In RFP No. 18, NPRC seeks documents related to the estimated shipping costs for coal from the mine. TRRC argues that this information is not relevant because it is not related to

¹³ NPRC suggests that an employee of Arch Coal, Ken Cochran (who is Senior Vice President of Operations for Arch Coal and a Director of TRRC) should have been identified in response to Interrogatories 3-10. See NPRC Surreply 8-9. In response, TRRC claims that Mr. Cochran has “no day-to-day management or other direct responsibilities for TRRC’s efforts to seek permission to construct its rail line.” TRRC Reply to NPRC Surreply 5. Interrogatories 3-10 request identification of employees responsible for certain demand-related projections and sales and marketing activities—not employees responsible for TRRC’s efforts to seek permission to construct its rail line. Thus, TRRC’s response does not indicate whether or not Mr. Cochran has any responsibility for the activities identified in Interrogatories 3-10. With regard to Interrogatories 3-5, as discussed above, TRRC has provided the names of the persons who appear to have primary responsibility over the activities in question, which is an adequate response. With regard to Interrogatories 6-10, if Mr. Cochran has responsibility for activities identified in an interrogatory, TRRC should amend its response(s) to reflect that responsibility.

construction of the rail line, but to development of the coal mine. TRRC also argues that it would be overly burdensome to produce these documents and that it has already produced documents that are more directly relevant to the issues the RFPs are designed to address.

The Board finds that these requests are reasonable. Information concerning potential production at the Otter Creek mine may be relevant to whether the proposed rail line is inconsistent with the public convenience and necessity. While responding to these requests may burden TRRC to some degree, and TRRC may have already produced some responsive documents, the relevance of the requested documents outweighs the burden TRRC claims it would bear. Therefore, the motion to compel is granted with respect to RFP Nos. 18 and 31.

NPRC also seeks information on potential customers for Otter Creek coal in Interrogatory No. 49. The motion to compel with respect to Interrogatory No. 49 will be denied. TRRC has reasonably explained that it is not responsible for marketing Otter Creek coal. Moreover, TRRC reasonably explained that Arch Coal has not identified specific customers for Otter Creek coal because the mine will not be operational for several years. While Arch Coal is familiar with, and in some instances, has business relationships with potential domestic customers, TRRC states that it would be premature for Arch Coal to begin negotiations with such customers, because the commencement time for both the mine and railroad operations is uncertain, given the status of permitting for both projects.¹⁴ TRRC also reasonably explains that Arch Coal has not yet conducted any specific activities to identify international customers, because, in Arch Coal's experience, international customers do not purchase coal more than one year in advance. Ultimately, when NPRC deposes the BNSF representatives and Mr. Blumenfeld of Arch Coal, it can seek updates concerning any potential sales and marketing activities.

Lastly, in Interrogatory No. 42, NPRC seeks information concerning whether the Otter Creek mine might be sold. The motion to compel concerning this interrogatory will be denied. Whether the potential mine might be sold in the future is not relevant to whether the TRRC rail line is inconsistent with the public convenience and necessity. Arch Coal may choose to sell, or retain, the Otter Creek mine in the future for any number of reasons. Information concerning any future sale of the Otter Creek mine at this time is simply too attenuated. Requiring TRRC to respond would be unduly burdensome and not likely to lead to the discovery of information relevant to the issues currently before the Board.

D. Factors Influencing the Demand for Montana Coal. In RFP No. 22, NPRC asks that the TRRC Parties produce all documents related to the competitiveness of coal as affected by natural gas, environmental regulations on coal, and the decommissioning of power plants.

¹⁴ NPRC claims that a February 6, 2013 letter from TRRC's counsel to the Board's Office of Environmental Analysis (OEA) in response to an OEA information request shows that TRRC or Arch Coal has begun specific activities to identify potential customers for Otter Creek coal. See NPRC Motion 22. However, as TRRC explains, that letter simply identifies the Upper Midwest utilities that consumed Montana coal from 2007 to 2012 and states that Arch anticipates that these same utilities would be potential customers for Otter Creek coal. See TRRC Reply 26 n.33.

TRRC objects to this request as unduly broad because it seeks documents concerning how the competitiveness of coal *in general* might be affected by these issues, not just coal that would be carried by TRRC. NPRC's motion to compel with regard to Request No. 22 will be granted – but only to the extent it seeks documents concerning how these issues may affect the competitiveness of coal that would be carried on TRRC. The Board agrees that RFP No. 22 is overly broad to the extent that it seeks documents concerning how these issues may affect the competitiveness of coal generally.

E. TRRC's Actions and Access to Funds. NPRC asks for documents concerning: (1) TRRC's policies and procedures for authorizing expenditures of TRRC funds (RFP No. 46); (2) TRRC's solicitation of additional funds from its owners (RFP No. 47); (3) funds requested or received from TRRC's owners (RFP No. 48); and (4) actions TRRC is prohibited from taking without authorization from TRRC's parent company or the owners of TRRC's parent company (RFP No. 49). NPRC states that it seeks this information to determine what limitations have been placed on TRRC in terms of financing and whether and under what conditions TRRC would construct the line. TRRC generally objects to these requests as overly burdensome given the marginal relevance of any potentially responsive documents. TRRC also notes that it has agreed to produce pertinent BNSF policies and procedures for authorizing expenditures of funds that would apply to the TRRC project. Moreover, TRRC has provided a redacted agreement between its owners and TRRC that, among other things, demonstrates what actions can be taken to acquire funds and under what circumstances.¹⁵

NPRC's motion to compel with respect to RFP Nos. 46-49 will be granted. While TRRC has produced certain documents responsive to these requests, there may be additional responsive documents that are relevant to the finances of and financial relationships involved in the TRRC project. While locating and identifying such documents may require additional efforts on the part of the TRRC Parties, they have not demonstrated that such efforts will be overly burdensome.

F. Wyoming Coal. NPRC asks that the Board compel the TRRC Parties to produce documents sought in RFP Nos. 1, 4, 16, and 17. These requests seek information about the competitiveness of Otter Creek coal, which would be mined in Montana's portion of the Powder River Basin (PRB), with coal mined in Wyoming's portion of the PRB. TRRC responds that the requests related to Wyoming coal are irrelevant here.

NPRC's motion to compel with respect to RFP Nos. 1, 4, 16, and 17 will be granted. The documents NPRC seeks in these requests may contain relevant information and should be produced. Specifically, the question of whether this coal from the Montana PRB would be competitive with the coal from the Wyoming PRB may be relevant to the demand for Montana PRB coal.

¹⁵ NPRC asks that TRRC provide an unredacted version of this agreement. This request will be denied. TRRC has reasonably explained that the redacted information is sensitive and does not relate to NPRC's inquiries.

G. Other Documents. NPRC discusses certain other allegedly responsive documents that are referenced in documents it has already received but that have not been produced. See NPRC Motion 20-21 (discussing, inter alia, documents referenced in a 2012 powerpoint presentation). However, NPRC does not identify the RFPs to which these other documents would allegedly be responsive. Therefore, the motion to compel will be denied with regard to such documents.

H. Procedural Schedule. Based on the ruling here and the Board's procedural decision served on November 22, 2013, the discovery period shall end October 25, 2014. A reply based on discovery is due from NPRC on November 17, 2014, and a rebuttal is due from TRRC December 8, 2014.

It is ordered:

1. NPRC's February 18 filing and TRRC's March 11 response are accepted into the record.
2. NPRC's motion to compel discovery is granted in part and denied in part, as discussed above, and the parties are directed to abide by the procedural schedule in this decision.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.