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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 30186

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

**REPLY OF TONGUE RIVER RAILROAD COMPANY, INC. TO
PETITION FOR RECONSIDERATION OF PROCEDURAL SCHEDULE OF JAY L.
SCHOLLMAYER**

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Company, Inc.

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Tongue River Railroad Company, Inc. (“TRRC”) hereby replies to the September 17, 2014 “Petition for Reconsideration of Procedural Schedule” (“Petition”) filed by Jay L. Schollmeyer, for and on behalf of SMART-Transportation Division, General Committee of Adjustment (“SMART-TD”).

I. BACKGROUND

TRRC filed its Application in this proceeding on December 17, 2012. The Board accepted that Application on January 8, 2013 and set a due date of April 2, 2103 for comments on the Application. SMART-TD’s predecessor¹ filed comments on that date, as did other parties, including Northern Plains Resource Council and Wally McRae/Clint McRae d.b.a. Rocker Six Cattle Company (collectively, “NPRC”).

On June 5, 2013, NPRC filed a petition asking the Board to reopen and revise the procedural schedule in this proceeding (which had not contemplated either discovery or further public comments on the Application) to allow for a six-month discovery period. In a decision

¹ SMART-TD states that it is the successor to the United Transportation Union.

served on August 27, 2013, the Board agreed to provide NPRC with an opportunity to seek limited discovery on some specific issues raised by NPRC regarding the competitiveness of the coal to be transported by the TRRC line and related issues. The Board's August 27 Decision further revised the procedural schedule in this proceeding to allow NPRC to file an additional comment on the TRRC Application once its discovery was completed and allow TRRC to respond.

TRRC produced a large number of documents in response to NPRC's discovery, but did not agree to all of NPRC's requests. NPRC thereupon filed a motion to compel on January 13, 2014. On September 10, 2014, the Board granted NPRC's motion to compel in part and denied it in part. That decision also set forth a new procedural schedule whereby document discovery and planned depositions by NPRC of TRRC witnesses would be completed by October 25, 2014; a reply based on the new discovery would be due from NPRC by November 17, 2014; and a reply would be due from TRRC by December 8, 2014.²

On September 17, 2014, SMART-TD filed its Petition requesting that it be granted an opportunity to review any discovery materials advanced as evidence or otherwise made part of NPRC's November 17 reply and to file supplemental comments based on those materials. That Petition should be denied for the reasons explained below.

II. ARGUMENT

SMART-TD has had every opportunity, prior to the submission of its April 2, 2013 comments or at the point when the Board reopened this proceeding to allow NPRC limited discovery, to request that the Board allow it discovery on any issues it thought might be relevant to the arguments it has presented to the STB. Whatever the merits of such a request may have

² TRRC is today filing a Petition for Extension of these deadlines.

been, SMART-TD's current request to make further comments to the Board based on discovery provided to NPRC is entirely unfounded.

SMART-TD apparently decided that it had already sufficiently expressed its views on the issues relevant to it when it submitted its April 2, 2013 comments on TRRC's Application and that no further information from TRRC was necessary. SMART-TD should not now be permitted to supplement its comments on the basis of documents produced in response to the limited discovery allowed another party given that, unlike NPRC, SMART-TD did not timely seek its own discovery.³ If SMART-TD believed that TRRC possessed relevant information or documents that would have allowed it to submit more meaningful comments to the Board, it might have sought that information or those documents much earlier in this proceeding. Because SMART-TD failed to act in a timely manner, the Board should find that SMART-TD has forfeited its right to piggy-back on another party's discovery at this late date.

SMART-TD's Petition should also be denied because the information and documents produced to NPRC are unrelated to the issues that SMART-TD has identified in its April 2, 2013 comments as being relevant to its members. SMART-TD has stated in its Petition that it wishes to file supplemental comments regarding any information NPRC decides to include its post-discovery supplemental comments. However, the issues on which NPRC has sought discovery are completely unrelated to the issues raised previously by SMART-TD's predecessor. In its initial comments, the SMART-TD predecessor made the following two primary arguments: (1) there is some ambiguity in the application regarding whether TRRC is seeking authority to operate the rail line or if the line will be operated solely by BNSF and (2) the relevant standard

³ TRRC notes that many of the documents already produced are confidential and much of the future production will likely be confidential as well. Therefore, NPRC's response will have to be filed under seal. Accordingly, SMART-TD will not be able to review the documents included in NPRC's reply as it suggests.

for approving TRRC's application is the pre-ICCTA version of section 10901 rather than the current version of section 10901. Further, the comments made clear that SMART-TD's predecessor does not oppose TRRC's construction of the line or BNSF's operation of it.⁴

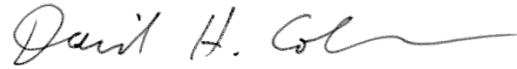
By contrast, NPRC's initial comments and its discovery requests have focused on entirely unrelated issues, namely, whether there will be sufficient demand for coal mined at Otter Creek to make the railroad financially viable and other issues related to the competitiveness of the coal to be transported by the TRRC line. The evidence that will be included in NPRC's upcoming supplemental comments regarding coal demand and the financial viability of the railroad will not change the analysis regarding the different issues raised by SMART-TD's predecessor or in fact shed any light on the issues set forth in the April 2, 2013 comments filed by its predecessor. Thus, allowing SMART-TD to submit supplemental comments regarding documents and information submitted by NPRC will not add anything relevant to this proceeding. However, it will serve to waste the time and resources of the Board and the other parties to this proceeding, as well as unnecessarily prolong the proceeding.

⁴ TRRC has since responded by clarifying that BNSF would be the sole operator of the TRRC line, which should resolve the first concern raised in the comments of SMART-TD's predecessor.

CONCLUSION

For the above-stated reasons, the Board should deny the Petition for Reconsideration of Procedural Schedule.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of October 2014, I have caused a copy of the foregoing Reply of Tongue River Railroad Company, Inc. to Petition for Reconsideration of Procedural Schedule of Jay L. Schollmeyer to be served by first-class mail, postage prepaid, on each of the parties of record in STB Finance Docket No. 30186.



David H. Coburn