

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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Office of Proceedings

August 9, 2013

**STB FINANCE DOCKET NO. 30186**

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**TONGUE RIVER RAILROAD COMPANY, INC. – RAIL CONSTRUCTION  
AND OPERATION – IN CUSTER, POWDER RIVER  
AND ROSEBUD COUNTIES, MT**

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**TONGUE RIVER RAILROAD COMPANY, INC.’S REPLY TO  
NORTHERN PLAINS RESOURCE COUNCIL AND ROCKER SIX CATTLE CO.’S  
MOTION FOR LEAVE TO FILE A SURREPLY**

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Dated: August 9, 2013

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On July 2, 2013, Northern Plains Resource Council Inc. and Clint and Wally McRae, dba Rocker Six Cattle Company, Inc. (jointly, “NPRC”) moved for leave to file a surreply to Tongue River Railroad Company, Inc.’s (“TRRC”) June 7, 2013 Reply Comments (“Reply”) in support of TRRC’s December 17, 2012 Supplemental Application (“Application”) under 49 U.S.C. § 10901 to construct a rail line in Montana to be operated by one of TRRC’s owners, BNSF Railway Company (“BNSF”). For the reasons explained below the Board should deny NPRC’s Motion for Leave.<sup>1</sup>

The Board’s procedural schedule for this proceeding called for two rounds of filings regarding the merits of TRRC’s application—comments by participants in support of or opposition to TRRC’s application, and reply comments by TRRC. *See* Nov. 1, 2012 Decision

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<sup>1</sup> The Board extended the deadline for TRRC to respond to NPRC’s Motion for Leave and accompanying Surreply to August 9, 2013. *See Tongue River Railroad Company, Inc. – Rail Construction and Operation – In Custer, Powder River and Rosebud Counties, MT*, Finance Docket 30186 (served July 18, 2013).

at 5, as amended by Feb. 26 and May 10, 2013 Decisions. Those two rounds of filings are complete. TRRC filed its Application on December 17, 2012. NPRC filed an extensive set of Comments on the Application on April 2, 2013, totaling 60 pages of text with over 1,000 pages of exhibits. Other parties also filed comments. TRRC filed its Reply on June 7, 2013.

Despite submitting extensive Comments, NPRC now seeks leave to file a surreply consisting of 22 pages of argument and a 23-page verified statement. However, the procedural schedule does not authorize the filing of surreplies in this proceeding, and the Board's longstanding rule is that "[a] reply to a reply is not permitted." 49 C.F.R. § 1104.13(c). Although the Board may waive this rule "[w]hen good cause is shown, or when additional information is necessary to develop a more complete record," *Waterloo Ry. Co.—Adverse Abandonment—Lines of Bangor & Aroostook R.R. Co.*, Docket No. AB-124 (Sub-No. 2), slip op. at 3 (STB served May 6, 2003), NPRC's motion for leave to file a surreply falls short of making either showing.

First, NPRC argues that it should be allowed to file a surreply on the basis that the projected net income statement in TRRC's Application is purportedly incomplete because it is not based on traffic projections. *See* NPRC Motion at 1-2. The obvious problem with NPRC's logic is that it had the opportunity in its April 2 Comments to identify any and all alleged deficiencies that it perceived with the Application, including this purported concern with the projected net income statement in TRRC's Application. TRRC's projected net income statement has remained the same since its Application was filed on December 17, 2012. While NPRC raised various concerns regarding TRRC's projected net income statement in its April 2 Comments, it did not raise the concern that is specified in its Motion for Leave to File a Surreply or in the Surreply itself. NPRC does not have good cause to file a surreply to make a new

argument that NPRC could (and should) have made in its Comments. *See S. Kan. & Okla. R.R., Inc.—Acquis. & Op. Exemption—The Atchison, Topeka & Santa Fe Ry. Co.—Pet. to Revoke*, Docket No. FD 31802 (Sub-No. 1), 1992 WL 347288, at \*1 n.3 (ICC served Nov. 27, 1992) (denying leave to file a surreply where the surreply consisted of “arguments which were available and could have been included” in an earlier brief).

NPRC’s second argument for allowing a surreply is that TRRC’s Reply includes an expert verified statement “containing information that should have accompanied the original application.” NPRC Motion at 2. The verified statement NPRC complains of is the Statement of Seth Schwartz, TRRC’s expert witness on the coal transportation market who submitted a statement responsive to expert reports and other purported market evidence submitted by NPRC. Mr. Schwartz’s Statement addressed in detail the coal markets available for the coal that would be transported on the TRRC line in response to the claims of NPRC that no such markets will be available for the coal. NPRC suggests that it is somehow inappropriate for TRRC to introduce expert testimony in its Reply to rebut the expert testimony and other coal market evidence provided in NPRC’s Comments, and NPRC cites as support decisions in which the Board allowed parties to file surreplies addressing “new evidence.” NPRC Motion at 2-3. However, the very general statements made in those decisions are not applicable here. In more analogous circumstances, the Board has held that where opponents of a construction application have provided evidence challenging an application, it is permissible for an applicant to supplement the record with additional evidence to rebut the evidence provided by opponents. *See Dakota, Minnesota and Eastern Railroad Corporation Construction into the Powder River Basin*, Docket No. FD 33407, 1998 WL 398189, at \*3-4 (STB served July 16, 1998); *Dakota, Minnesota and Eastern Railroad Corporation Construction into the Powder River Basin*, Docket No. FD 33407,

3 S.T.B. 847, 865 (STB served Dec. 10, 1998). Because TRRC’s Reply did not go beyond the proper scope of a reply, NPRC has no grounds to file a surreply. *See San Jacinto Rail Limited Construction Exemption*, Docket No. FD 34079, 2003 WL 21542058, at \*1 n.5 (STB served July 9, 2003) (denying leave to file surreply and noting that “[t]he City does not argue that San Jacinto or BNSF did anything in their reply except address arguments that the City made in its petition”).

Finally, NPRC argues it should be allowed to file a surreply so that it can respond to what it views as overstated assumptions “on the Montana Powder River coal market” and mischaracterizations of “Northern Plains’ arguments” in TRRC’s Reply. *See* NPRC Motion at 2. However, if the Board accepts this reasoning, then 49 C.F.R. § 1014.13(c)’s prohibition on surreplies would essentially be nullified. Virtually all parties would argue that they take issue with the statements made by their opponents on reply. None of the cases cited by NPRC on page 3 indicate that surreply is appropriate when a party has purportedly “mischaracterized” the other party’s arguments or made “overstated assumptions.”<sup>2</sup>

For the above reasons, NPRC’s Motion for Leave to File a Surreply should be denied. However, if the Board grants NPRC’s Motion, then the Board should grant TRRC leave to respond to NPRC’s surreply because, among other things, the surreply raises new arguments that should have been raised in NPRC’s April 2 Comments or in its June 5 Petition to Issue Revised Procedural Schedule to Accommodate Discovery (“June 5 Petition”). For example, as explained above, NPRC is now raising for the first time a new concern with the projected net income statement in TRRC’s Application—that it was not based on traffic projections. As another

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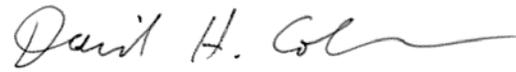
<sup>2</sup> NPRC’s Motion also purports to “reaffirm” NPRC’s request for a discovery schedule. *See* NPRC Motion at 2. That request, which has already been briefed by the parties and is pending before the Board, is irrelevant to whether NPRC should be allowed to file a surreply.

example, NPRC also has provided several new purported reasons why the Board should accommodate discovery that were not raised in its June 5 Petition. In the June 5 Petition, NPRC argued only that discovery is necessary “to test the credulity of TRR’s experts.” June 5 Petition at 5. In its Motion for Leave at 2, NPRC claims for the first time that discovery is needed so it may “reply to TRRC’s traffic projections.” In its surreply at 13-14, NPRC identifies for the first time several other topics that it believes should be the subject of discovery. TRRC should be given an opportunity to respond to new arguments made by NPRC for the first time in its surreply. *See Norfolk S. Ry. Co.—Pet. for Decl. Order—Interchange with Reading Blue Mountain & N. R.R. Co.*, Docket No. 42078, slip op. at 1 n.1 (STB served Apr. 29, 2003) (granting party’s alternative request that it be allowed to file a rebuttal to a surreply). TRRC is separately filing today its reply to NPRC’s surreply for the Board’s consideration in the event the Board decides to grant NPRC’s Motion for Leave.

#### CONCLUSION

For the reasons stated above, TRRC requests the Board to deny NPRC’s Motion for Leave to File Surreply or, in the alternative, grant NPRC’s Motion and permit TRRC to submit the separately filed reply to NPRC’s surreply.

Respectfully submitted,



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August 9, 2013

**CERTIFICATE OF SERVICE**

I hereby certify that on this 9th day of August 2013, I have caused a copy of the foregoing Reply to Motion for Leave to File a Surreply and the separately filed Public Version of the Reply to Surreply to be served by first-class mail, postage prepaid, on each of the parties of record in STB Finance Docket No. 30186.

A handwritten signature in cursive script, reading "David H. Coburn", with a long horizontal flourish extending to the right.

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David H. Coburn