

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**

**TONGUE RIVER RAILROAD COMPANY, INC.’S REPLY TO
NORTHERN PLAINS RESOURCE COUNCIL’S PETITION FOR LEAVE TO FILE A
SUR-REPLY TO TONGUE RIVER RAILROAD COMPANY, INC.’S FEBRUARY 3,
2014 REPLY TO NORTHERN PLAINS RESOURCE COUNCIL’S MOTION TO
COMPEL**

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Dated: March 11, 2014

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INTRODUCTION

On February 19, 2014, Northern Plains Resource Council (“NPRC”) filed a Petition for Leave to File a Sur-reply to Tongue River Railroad Company, Inc.’s (“TRRC”) Reply to NPRC’s Motion to Compel (“Petition”). NPRC attached its Sur-reply to its Petition for Leave. TRRC hereby responds to NPRC’s Petition and requests that it be denied and that the Sur-reply be rejected.

As NPRC acknowledges, its Sur-reply is not authorized by 49 CFR 1104.13(c), which prohibits the filing of replies to replies. Although the Board may waive section 1104.13(c) for good cause, the Board has made clear that good cause exists only where a sur-reply will add

newly discovered evidence to the record, point to new precedent that has emerged since the initial filing, or where a sur-reply is necessary to compile a complete record.¹

NPRC has not shown such good cause. In the present case, NPRC claims that its sur-reply is necessary to clarify the record by replying to what it perceives as mischaracterizations by TRRC. Sur-reply at 1. NPRC may disagree with the arguments presented by TRRC but TRRC has not mischaracterized anything. NPRC's sur-reply in contrast, does contain some significant mischaracterizations, as explained further below. More importantly, NPRC's sur-reply is essentially just an explanation of why NPRC believes TRRC is incorrect in its view of its discovery obligations and the relevance of certain issues to this proceeding. This is precisely the type of sur-reply the Board has held should be rejected. *See Norfolk Southern Railway Company – Petition for Exemption – Baltimore City and Baltimore County, MD, Docket No. AB-290 (Sub No. 311X) (STB served March 22, 2010) (reply to reply stricken where “is repetitive or irrelevant . . .”); Waterloo Railway Company—Adverse Abandonment—Lines of Bangor and Aroostook Railroad Company and Van Buren Bridge Company in Aroostook County, Maine, Docket Nos. AB-124 (Sub-No. 2), AB-279 (Sub-No. 3), slip op. at 3 (STB served May 6, 2003) (“The Trustee argues that we should accept its pleading because CN's reply ‘blatantly mischaracterizes case law pertaining to the availability of discovery in abandonment cases’ and ‘grossly overstates the*

¹ *See, e.g., CSX Corp.—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc. (Arbitration), Docket No. 28905 (Sub-No. 28), 2 STB 554, 556 (served Sept. 3, 1997) (“Under 49 CFR 1104.13(c), replies to replies are not permitted. While we may allow additional pleading for good cause shown, CSXT has not shown good cause. CSXT did not submit newly discovered evidence or precedent arising after the submission of its appeal.”); Los Angeles County Metropolitan Transportation Authority—Abandonment Exemption—in Los Angeles County, Ca, Docket No. AB-409 (Sub-No. 5X), slip op. at 2 n.4 (STB served July 17, 2008) (“[P]ursuant to 49 CFR 1104.13(c), a reply to a reply is not permitted; however, he requests that the Board accept his filing for the purpose of providing the Board with a more complete record. Riffin's filing does not add any additional substance to the record . . . Therefore, Riffin's ‘supplemental comments’ will be rejected.”)*

alleged burden of complying with the Discovery Requests.’ This, however, is merely an argument that CN's interpretation of case law and view of its compliance burden is incorrect.”).

Moreover, much of NPRC’s sur-reply simply rehashes arguments it previously made in its Motion to Compel. The Board has held that where a sur-reply seeks to restate arguments already made, it should be rejected. *Los Angeles County Metropolitan Transportation Authority—Abandonment Exemption—in Los Angeles County, Ca*, Docket No. AB-409 (Sub-No. 5X), slip op. at 2 n.4 (STB served July 17, 2008) (“Riffin filed ‘supplemental comments’ consisting of rebuttals to cases cited in LACMTA’s reply, a rehash of arguments previously made, and maps identifying potential shippers' locations... Therefore, Riffin's ‘supplemental comments’ will be rejected.”). For these reasons, elaborated upon below, the Board should deny NPRC’s petition and reject the sur-reply.

I. The Sur-reply Rehashes Baseless Arguments Alleging that TRRC Has Engaged In Selective and Evasive Discovery and Mischaracterizes TRRC’s Discovery Requests

NPRC claims that TRRC engaged in selective and evasive discovery and improperly limited the time frame of its discovery responses to the period after June 18, 2012 (the date this proceeding was re-opened) because TRRC itself has sought information from NPRC dating back to 2009. Sur-reply at 4-5. This claim is highly misleading. In its very limited discovery addressed to NPRC, TRRC expressly restricted its document requests to the time period June 18, 2012 or later, consistent with its position relative to the time frame for responding to NPRC’s requests. See TRRC’s Feb. 3, 2014 Reply at Exhibit 1, page 3. The only information TRRC requested dating back to 2009 was in TRRC’s sole interrogatory, which requested no documents, but a list of reports and testimony provided by NPRC’s expert witness to government regulatory or legislative entities. See TRRC Feb. 3, 2014 Reply at Ex. 1, Interrog. No. 1. TRRC seeks to identify the proceedings in which the NPRC’s expert had participated in recent years so that that

testimony could be assessed relative to the testimony provided in this case. The time frame for this interrogatory was perfectly appropriate; and since the requested response required no document review there was no associated burden. This stands in contrast to the numerous document requests served by NPRC as to which it now wants files to be reviewed once again to locate and produce documents dating back three and one half years.² NPRC's mischaracterization of TRRC's discovery demonstrates that its Sur-reply clouds the issues, and does not clarify them.³

The Sur-reply argues that it is appropriate that TRRC produce documents dating back to July 2010 because the decision made one year later by the current owners to invest in the TRRC project, at a time when coal markets were stronger, is relevant to determining if TRRC's investors continue to be committed to the project. Sur-reply at 5-6. This argument was previously made by NPRC, and TRRC has responded by explaining the basis for its decision to produce responsive documents dating back to the reopening of this proceeding. *See* Motion to Compel at 9-10; TRRC Reply at 10-13. NPRC's reiteration of its meritless position does not constitute good cause for waiving 49 CFR 1104.13(c).

NPRC also suggests that TRRC is being evasive by refusing to identify Arch Coal employees with responsibilities for specific activities. Sur-reply at 3-4, 7-9. As previously explained in TRRC's Reply, TRRC has provided documents from those employees at Arch Coal with any significant responsibilities related to the rail project and has addressed NPRC's claims

² TRRC did not specify this time frame, or any time frame, when it served its document requests. Its argument that TRRC should produce documents dating back to a time that precedes the current owners' purchase of the TRRC was pressed after TRRC completed its document production.

³ NPRC correctly notes that it has now produced documents responsive to TRRC's request. Those documents arrived one business day after TRRC filed its February 3 reply.

regarding specific Arch Coal employees that NPRC claimed were likely to possess additional relevant documents. TRRC Feb. 3 Reply at 13-14, 24. NPRC's Sur-reply now for the first time names another individual, Ken Cochran, that it believes to be an Arch Coal employee in possession of responsive documents. Sur-reply at 8. However, NPRC failed to raise any arguments with respect to this individual during extensive meet and confer sessions with TRRC counsel or in its Motion to Compel. It should not now be permitted to do so in an unauthorized sur-reply. Mr. Cochran is, and has been since 2011, a director of TRRC, but has no day-to-day management or other direct responsibilities for TRRC's efforts to seek permission to construct its rail line. While NPRC correctly notes that TRRC provided documents from the files of another TRRC director, Stephen Branscum, NPRC fails to mention that Mr. Branscum, who was employed by BNSF until his recent retirement, also served as the president of TRRC and therefore had significant responsibilities related to the management and operation of the company, and therefore relevant files. Thus, once again, NPRC's Sur-reply misleads rather than clarifies. Moreover, the Sur-reply's argument regarding TRRC's failure to identify certain Arch Coal employees is nothing more than a rehash of an argument it already made in its Motion to Compel, this time with Mr. Cochran's name added. See Motion to Compel at 13-15. TRRC has previously responded. See TRRC Reply at 13-14.

II. The Sur-reply's Remaining Points Regarding Wyoming PRB Coal and the Relevance of the Otter Creek Mine Do not Justify Accepting the Sur-reply

NPRC's Motion to Compel argued that TRRC should be required to produce documents related to markets for Wyoming PRB coal in response to RFP Nos. 4, 16 and 17. Motion to Compel at 19-20. In TRRC's Feb. 3, 2014 Reply, it pointed out that these requests go beyond the scope of what is relevant given that the TRRC will not transport Wyoming PRB coal and that any relevance is outweighed by the burden, particularly since TRRC has already provided

documents regarding Montana PRB coal and Otter Creek coal specifically. TRRC Feb. 3, 2014 Reply at 20-21. NPRC's Sur-reply simply refers to TRRC's position as "meritless" and reiterates NPRC's belief that the market for Wyoming PRB coal is relevant to the proceeding. Sur-reply at 6-7. As explained above, Board precedent indicates that a sur-reply simply claiming that the other party's position is incorrect or restating arguments already made, and already answered, should be rejected.

The fact that NPRC seeks the production of documents relating to the competitiveness of Wyoming coal relative to Indonesian and Australian thermal coal in certain Asian nations (RFP 4) and documents relating to limits on the marketability of Wyoming coal based on its sodium content (RFPs 16 and 17) underscores that its discovery is anything but "limited." Further, while NPRC quotes (at page 6 of its Sur-reply) TRRC witness statements about the extraction cost advantage of Otter Creek coal relative to coal from certain Wyoming mines as the basis for allowing the discovery it seeks, the requests at issue here have absolutely nothing to do with probing that cost advantage.

NPRC concludes its Sur-reply with a discussion of the relevance of the Otter Creek mine and TRRC's response to Interrogatory No. 42, which asks for the identification of documents and communications pertaining to the possibility of selling the Otter Creek mine. Sur-reply at 9-10. In any event, these same issues were raised by NPRC in its Motion to Compel, and addressed by TRRC in its Reply. Motion to Compel at 7-8, 21-22; TRRC Feb. 3, 2014 Reply at 16-17, 24-25.⁴ The Sur-reply does nothing but restate NPRC's position and quibble with TRRC's response.

⁴ It merits note that in 2010, an affiliate of Arch paid the State of Montana over \$85 million to lease the Otter Creek tracts and that Arch is currently prosecuting a mine permit application for Otter Creek before the Montana Department of Environmental Quality.

CONCLUSION

The Sur-reply continues NPRC's pattern of repeatedly filing unauthorized sur-replies in an effort to delay and complicate these proceedings. It is not necessary to clarify any mischaracterizations, provide any new evidence or to compile a complete record. Accordingly, NPRC's Petition should be denied and its Sur-reply should be rejected.

Respectfully submitted,



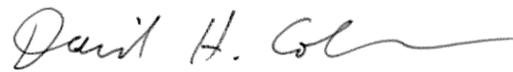
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March 11, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of March 2014, I have caused a copy of the foregoing Reply to Northern Plains Resource Council's Petition for Leave to File a Sur-reply to Tongue River Railroad Company, Inc.'s Reply to NPRC's Motion to Compel 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