

ORIGINAL

Before the
SURFACE TRANSPORTATION BOARD

Finance Docket No. 30186 (Sub-No. 2)

TONGUE RIVER RAILROAD COMPANY-RAIL CONSTRUCTION
AND OPERATION-ASHLAND TO DECKER, MONTANA

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

TONGUE RIVER RAILROAD COMPANY, INC.-CONSTRUCTION
AND OPERATION-WESTERN ALIGNMENT

REPLY TO PETITIONS

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Dated: May 7, 2012

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Preliminary Statement

Jay L. Schollmeyer,^{1/} for and on behalf of United Transportation Union-General Committee of Adjustment (UTU/GO-386), submits this reply to the petitions, (1) jointly filed April 17, 2012, by Northern Plains Resource Council (NPRC) and Mark Fix (FIX), and (2) separately filed April 19, 2012, by Tongue River Railroad Company, Inc. (TRRC), both petitions seeking to govern further proceedings in both F.D. No. 30186 (Sub-No. 2) (TRRCII), and F.D. No. 30186 (Sub-No. 3) (TRRCIII), to be adopted by the Surface Transportation Board (STB, on remand from the reviewing court.^{2/}

^{1/} General Chairman for United Transportation Union (UTU/GO-386), with offices at 400 E. Evergreen Blvd., Vancouver, WA 98660. He is the successor to M.M. Winter and John D. Fitzgerald.

^{2/} Northern Plains Resource v. Surface Transp. Bd., 668 F.3d 1067 (9th Cir. Dec. 29, 2011; reh. den. Feb. 23, 2012).

1. The Petitions. The NPRC/FIX petition seeks to reopen TRRCII and TRRCIII for a new Supplemental Environmental Impact Statement (SEIS) in TRRCI (the authorized line between Miles City and Ashland). This would be in addition to the pending NPRC/FIX petition for reconsideration to reopen TRRCI, TRRCII, and TRRCIII, filed July 25, 2011. NPRC/FIX also suggests a procedural schedule for hearings, along with an updated and accurate service list.

The TRRC petition, styled a "notice of intent," announces it no longer intends to construct rail lines south of Ashland that were the subject of TRRCII and TRRCIII, and that it intends to withdraw its TRRCII application. However, TRRC desires to file an amended TRRCIII application to seek whatever approval is needed for refinements to the line proposed in TRRCI, which were considered in the TRRCIII proceeding, as well as to provide updated information in TRRC's ownership, traffic forecasts, financial projections, and updates for other matters.

2. Status of Remand. The STB has not issued an order on remand reopening TRRCII or TRRCIII, with proper notice to the public. The usual procedure is for the STB to issue a new notice--not for parties, as here, to take the initiative.^{3/} TRRCII was filed in 1991; TRRCIII was filed in 1998. There undoubtedly have been many changes in the interest of parties, along with potential additional or dropped parties, suggesting a new public notice. Moreover, TRRCII and TRRCIII concerned proposed line construction primarily for "bridge" coal trains, whereas the remaining TRRCI

3/ Cf. F.D. No. 33407, Dakota, Minnesota & Eastern Railroad Company Corporation Construction into the Powder River Basin (served March 3, 2004), following Mid States Coal. Progress v. Surface Transp. Bd., 345 F.3d 520 (8th Cir. 2003), reh. den. Jan. 30, 2004.

proposal primarily concerns proposed originated traffic. Entirely different interests may now be involved.

It is not positively clear that court litigation has concluded. The time for seeking Supreme Court certiorari will not expire until May 23, 2012. (S.Ct.R13).^{4/}

ARGUMENT

UTU/GO-386 is not at this time in a position to definitively express its views on all of the points raised by NPRC/FIX and TRRC in their respective petitions. Thus, this reply is preliminary, and subject to change or revision, particularly after receipt of further information. Railroad employee organizations did not actively participate in TRRCI during the period 1983-86, either at the agency (ICC) or before the reviewing court. However, UTU/GO-386 may desire to participate in any proceeding involving the proposed line between Miles City and Ashland, after review of further information.

1. Dismissal. TRRC's statement that it no longer intends to construct rail lines south of Ashland, that were the subject of TRRCII and TRRCIII, requires that those proceedings be dismissed. The applications are moot. TRRC indicates it will withdraw TRRCII, but desires to "amend" TRRCIII, apparently to utilize TRRCIII as a vehicle to consider modifications to TRRCI. The STB should reject such use for TRRCIII. The proper technique if TRRC desires to use part of the record from TRRCIII is to incorporate such relevant parts in TRRCI pursuant to Board rules, e.g., 49 CFR 1112.27,

^{4/} Moreover, a further 60-days extension is possible. 28 U.S.C. 2101(c).

1113.10. TRRC might consider an amended TRRCI or a TRRCIV. UTU/GO-386 expresses no opinion on these alternatives at this time.

2. BNSF/Arch Coal/Mars Agreement. UTU/GO-386 has been aware of a purported agreement, entered into on or about July 1, 2011, for sale of TRRC to Tongue River Holding Co., in which 1/3 membership interests are held by BNSF, Arch Coal, and "a non-rail private industrial entity." FD 30186 (Sub-No. 2), Report (7/8/11); the later entity has been identified as TRR Financing, LLC, controlled by Forrest E. Mars, Jr. (Amended Report (8/29/11)). See also: FD 30186 (Sub-Nos. 2&3), TRRC Reply, at ii & 3-4 (8/25/11); FD 30186 (Sub-No. 2), Report (11/4/11); FD 30186 (Sub-No. 3), Coburn letter to OEA (9/2/11); and FD 30186 (Sub-No. 2), Report (3/2/12).

UTU/GO-386 has not seen the purported agreement. The involvement of BNSF gives rise to the question of BNSF control, or power to control TRRC, and whether BNSF should be joined as an applicant in TRRCI. The relationship between BNSF and TRRC, with TRRC's sole connection being BNSF, also suggests employee protection considerations under 49 U.S.C. 10901 (1980ed), and/or 11323-26.

UTU/GO-386 expresses no opinion at this time on the above serious matters, other than to suggest that the purported agreement be made publicly available, and that TRRCII and TRRCIII be dismissed.

Respectfully submitted,

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May 7, 2012

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CERTIFICATE OF SERVICE

I hereby certify I have served a copy of the foregoing upon
all parties of record by first class mail postage-prepaid.

May 7, 2012

Gordon P. MacDougall
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