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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
NORTHERN PLAINS RESOURCE COUNCIL'S MOTION TO COMPEL
SUPPLEMENTAL DOCUMENT PRODUCTION**

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Company, Inc.

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Tongue River Railroad Company, Inc. (“TRRC”) hereby replies to the December 30, 2014 Motion to Compel Supplemental Document Production (“December 30 Motion”) filed by Northern Plains Resource Council (“NPRC”). As explained below, the Board should deny this untimely request for supplemental document production as it is without legal basis, is being raised too late in this proceeding and would impose an undue burden on TRRC. The Board’s regulations do not provide for the supplemental document production that NPRC seeks here and the Board should not compel such production at this late date.

BACKGROUND

In most rail construction cases before the Board, there is no discovery. Nevertheless, after comments had been submitted on the merits of TRRC’s Application for Construction and Operation Authority (“TRRC’s Application”), NPRC filed a request to seek discovery over a six-month period. In August 2013, the Board granted NPRC’s request in part, permitting “limited

discovery” over a 90-day period rather than the requested six-month period.¹ In September 2013, NPRC served 66 interrogatories and 60 document requests on TRRC.² NPRC did not specify the time period for which it was seeking discovery. Nor did it request that document request responses be supplemented with newly generated documents.

Subject to objections, TRRC provided substantive responses to 53 of the 66 interrogatories and agreed to produce documents in response to 41 of the 60 document requests.³ In its responses, TRRC stated that the time period for its document production would be documents created on or after June 18, 2012, the date the Board reopened this proceeding. *Id.* On December 6, 2013, TRRC completed the production of documents (almost 6,500 pages) that it had agreed to produce in response to NPRC’s discovery requests.

On January 13, 2014, NPRC filed a motion to compel seeking, among other things, to compel NPRC to produce documents responsive to certain requests from a time period two years earlier than the date selected by TRRC, *i.e.* it sought documents created on or modified after July 1, 2010.⁴ NPRC did not request the Board to order TRRC to supplement its production with documents created or received subsequent to TRRC’s final production in early December 2013.

On February 3, 2014, TRRC opposed the motion. On September 10, 2014, the STB granted in part and denied in part NPRC’s motion to compel. Among other things, the Board

¹ *Tongue River Railroad Company, Inc.—Railroad Construction and Operation—in Custer, Powder River and Rosebud Counties, Mont.*, STB Docket No. 30186 (served Aug. 27, 2013).

² See Appendices A, B to the Motion to Compel filed by NPRC on January 13, 2014 (hereafter “Jan. 2014 NPRC Motion to Compel”).

³ See Tongue River Railroad Company, Inc.’s Reply to Northern Plain Resource Council’s Motion to compel dated Feb. 3, 2014 at 6 (hereafter “2014 TRRC Reply”).

⁴ Jan. 2014 NPRC Motion to Compel at 13-15.

ordered TRRC to produce documents responsive to certain requests that were created from the earlier time period between July 1, 2010 and June 17, 2012.

Since September 10, 2014, TRRC has expended significant resources collecting, reviewing and producing the older documents that the Board ordered TRRC to produce. The vast majority of the documents were produced by December 31, 2014. Specifically, by the close of 2014, TRRC had produced almost 39,000 pages in total. TRRC's final production (another 1,000 pages) was dispatched to NPRC on January 13, 2015. TRRC's total production in this case consists of almost 40,000 pages.

In mid-December 2014, NPRC asked TRRC for the first time whether it was going to supplement its production "for the almost one-year gap between Northern Plains' discovery requests and the Board's September 9, 2014 Order on Northern Plains' Motion to Compel."⁵ TRRC declined to supplement its production, explaining that it had no duty to provide such supplementation under the Board's rules, that NPRC's failure to raise the issue of supplementation previously constituted a waiver of its right to seek such supplementation, and that any such supplementation would impose a "heavy burden" on TRRC since it would involve a substantial new document search and review effort and further prolong discovery.⁶

ARGUMENT

I. **The STB Regulations Do Not Require Document Production Supplementation Under These Circumstances And It Would Be Unduly Burdensome to Require It**

The Board has a regulation – 49 CFR §1114.29 -- that defines the limited circumstances under which a party must supplement its discovery responses. Under this regulation, a party has

⁵ See letter from Mr. Rumelt, counsel for NPRC, to Mr. Coburn and Ms. Stein, counsel for TRRC, dated December 16, 2014, attached as Exhibit 1 hereto.

⁶ See letter from Mr. Coburn and Ms. Stein, counsel for TRRC, to Mr. Rumelt, counsel for NPRC, dated December 19, 2014, attached as Exhibit 2 hereto.

a duty to supplement a response with information acquired after the response only if (1) the discovery question relates to the identity of persons with knowledge of discoverable matters or information relating to expert witnesses, or (2) the party learns his prior response is incorrect. 49 CFR § 1114.29 (a), (b). Otherwise, a party has a duty to supplement only upon agreement of the parties or if ordered to do so by the Board. 49 CFR § 1114.29 (c).

Under subsections (a) or (b) of this regulation, TRRC has no duty to supplement its document production with documents created or modified in the one-year gap between NPRC's discovery requests and the Board's ruling on its 2013 motion to compel. NPRC implicitly recognizes this because it does not rely on those subparts as support for its motion to compel.

Instead, NPRC relies on subpart (c) of the regulation to support its motion. Under that subpart, TRRC would be required to supplement its production only if the Board orders it to do so or TRRC agrees to such supplementation. As explained above, TRRC declined to supplement its production for several very good reasons – NPRC's request for such supplementation was made on the verge of TRRC's final document production in response to the Board's September 2014 order and, thus, was too late. As TRRC told NPRC, “[w]e note that you did not seek supplementation in the instructions served with your original interrogatories or document requests; did not seek a supplementation order from the Board either in your initial request for discovery or in your [Jan. 2014] motion to compel; did not request an agreement on supplementation during any of the many conversations we had at the time TRRC served on you its initial discovery requests; and did not raise the issue during any of the several conversations we had over the last few months on our plans for completing discovery following the Board's September 9 ruling on your motion to compel.” *See Exhibit 2 at 1.*

As TRRC also explained to NPRC, NPRC's late request for document supplementation would create a heavy burden for TRRC because it would require a substantial new document collection and review effort. *See* Exhibit 2 at 2. TRRC has just completed a very significant document collection and review effort to produce documents in compliance with the Board's September 9, 2014 order. That process resulted in the production of an additional 33,000 pages of documents between November 2014 and mid-January 2015. It would be prejudicial and unduly burdensome to require TRRC to undertake another substantial document collection and review process to supplement its document production with more recent documents, particularly in this proceeding where the Board provided for only "limited discovery" and given that there has historically been no discovery in construction proceedings.

II. NPRC Has Not Justified Its Request That TRRC Supplement Its Document Production

None of the three reasons that NPRC presents in support of its motion provides a basis for requiring TRRC to undergo the extreme burden of supplementing its production at this late date. First, NPRC claims that the supplemental information it seeks regarding demand for Otter Creek coal and the financial relationships involved in the TRRC project is relevant. However, that relevance is not strong given NPRC's ability to access more recent public information on these topics as well as NPRC's ability to ask the Arch Coal and BNSF witnesses it deposes about current demand and financial relationships.⁷ Further, any such relevance is vastly outweighed by the heavy burden that would be imposed on TRRC if it were required to collect and review documents for such supplementation.

⁷ With concurrence from NPRC counsel, depositions of four TRRC witnesses, two employed by BNSF and two by Arch, are being scheduled for January and February or early March 2015.

Second, NPRC claims that document supplementation should be required because current information about demand and financial relationships is “not capable of being discovered adequately through a deposition.” December 30 Motion at 3. Again, NPRC ignores the undue burden that would be imposed if TRRC were ordered to supplement its document production. That burden outweighs any marginal relevance that more recent confidential Arch Coal and BNSF documents would provide, particularly given the fact that more recent public information exists on those topics.

Finally, NPRC claims “the Board should not allow TRRC to rely on information it now inappropriately refuses to produce . . .” This NPRC reason has no merit either. TRRC will not rely on confidential information that it has not produced to support its Application in its supplemental comments on the merits.

CONCLUSION

For the above-stated reasons, the Board should deny NPRC’s December 30, 2014 Motion to Compel Supplemental Discovery.

Respectfully submitted,



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January 20, 2015

Attorneys for Tongue River Railroad
Company, Inc.

Exhibit 1

VERMONT LAW SCHOOL



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December 16, 2014

Via Electronic Mail

David Coburn, Esq.
Linda Stein, Esq.
Steptoe & Johnson LLP
1330 Connecticut Ave, NW
Washington, DC 20036

Re: TRRC Discovery

Dear David and Linda:

During our call last week, I learned for the first time that TRRC will not supplement its discovery to account for the almost one-year gap between Northern Plains' discovery requests and the Board's September 9, 2014 Order on Northern Plains' Motion to Compel. TRRC's unilateral decision not to supplement discovery is unacceptable and represents yet another attempt to keep important information from Northern Plains and the Board.

I think we can agree that more current information is highly relevant to the Board's decision. Obviously, the Board should know whether Arch and BNSF's projections over the last year have soured—and all indications are that they have—and whether Arch's financial ability or desire to open the Otter Creek mine or finance construction of the Tongue River Railroad are in further doubt.

Board regulations provide that a duty to supplement responses may be imposed by order or agreement of the parties. 49 C.F.R. § 1114.29(c). Therefore, I am seeking your agreement to supplement responses to requests related to the demand for Otter Creek coal (Request Nos. 1-8, 11-13, 15-22, 28, 29, 31), and those relevant to the finances of and financial relationships involved in the TRRC project (Request Nos. 46-49).

Board regulations also require that TRRC “seasonably supplement [its] response with respect to any question directly addressed to: (1) The identity and location of persons having knowledge of discoverable matters” 49 C.F.R. § 1114.29(a). Interrogatory Nos. 3-10 sought the identity of individuals with knowledge of discoverable matters. Consequently, TRRC is under a duty to supplement those responses.

The Board interpreted TRRC's earlier responses as having identified individuals with "primary responsibility" for relevant activities. TRRC should either confirm that those individuals previously identified remain "primarily responsible" or supplement its responses accordingly.

The Board has accommodated our requests for scheduling changes in the past and I do not anticipate a problem should the need arise again.

I would like to have this issue resolved by the end of the week. If we cannot reach an agreement then I will seek an order from the Board. Please let me know if you want to schedule a conference call.

Sincerely,

A handwritten signature in black ink, appearing to read "Ken Rumelt", with a long horizontal flourish extending to the right.

Ken Rumelt

Exhibit 2

David H. Coburn
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December 19, 2013

VIA E-MAIL

Kenneth J. Rumelt, Esq.
Environmental and Natural Resources Law Clinic
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krumelt@vermontlaw.edu

**Re: Tongue River Railroad Discovery: NPRC's Request for Native Files and Color Files
STB Finance Docket No. 30186**

Dear Ken:

I am writing in response to your December 16 letter concerning supplementation of the discovery responses of Tongue River Railroad Company, Inc. ("TRRC"). As we advised when you first raised this issue with us during a telephone conversation about a week ago, we are quite surprised that you are seeking supplementation at this late date in the process, as we are on the verge of finalizing our document production in response to the Board's September 9 Order. We note that you did not seek supplementation in the instructions served with your original interrogatories or document requests; did not seek a supplementation order from the Board either in your initial request for discovery or in your motion to compel; did not request an agreement on supplementation during any of the many conversations we had at the time TRRC served on you its initial discovery responses; and did not raise the issue during any of the several conversations we had over the last few months on our plans for completing discovery following the Board's September 9 ruling on your motion to compel. Instead, you have now waited until the 11th hour, when you are about to receive TRRC's final batch of documents that we committed to supply by December 31, to raise the issue for the first time and to threaten a further filing with the Board.

We believe that your failure to raise the issue previously constitutes a waiver of your right to request such supplementation to the extent that you have any such right, which as discussed next you do not have with respect to the document requests for which you now seek supplementation. Moreover, we believe that your action in raising the issue now is part of a long

pattern of seeking to prolong and delay this proceeding. We also note that the Board's August 13, 2013 decision allowing you discovery was explicit in describing the permitted discovery as "limited."

The Board's rules limit TRRC's obligation to supplement responses to certain specific circumstances specified in those rules. *See* 49 CFR 1114.29. One of those circumstances, as you note, requires supplementation with respect to questions "directly addressed to: (1) the identity and locations of persons having knowledge of discoverable matters." Pursuant to that rule and your request, TRRC agrees to supplement its responses to Interrogatory Nos. 3-10 to the extent that such interrogatories seek information addressed by the quoted supplementation rule. TRRC accordingly hereby confirms that the persons identified in its October 7, 2013 answers remain the persons with "primary responsibility" for the obligations described in the interrogatory answers.

With respect to your request for supplementation of TRRC's responses to twenty-six of the document requests served on TRRC (i.e., those requests pertaining to the demand for Otter Creek coal and finances of and financial relationships involved in the TRRC Project), you implicitly acknowledge that there is no duty to supplement under the Board's rules and thus seek TRRC's agreement to supplement. TRRC declines to supplement these answers. Doing so at this time would involve a substantial new document search and review effort, imposing a heavy burden on TRRC well beyond the "limited" scope of discovery allowed to NPRC by the Board. In that regard, when TRRC completes its document production in the coming days, it will have produced many thousands of pages to NPRC, providing NPRC with extensive information about TRRC's plans, projections with respect to Otter Creek coal and finances. By contrast, and as you know, opponents in construction cases at the Board have historically not received any discovery. Imposing a supplementation requirement at this late date would also further prolong this discovery, likely by several more months.

Of course, you remain free at the planned depositions of four TRRC witnesses to inquire of the witnesses as to any matter relevant to the proceeding.

Sincerely,



David H. Coburn
Linda S. Stein
Counsel for Tongue River Railroad Company, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of January 2015, I have caused a copy of the foregoing Reply of Tongue River Railroad Company, Inc. to Northern Plains Resource Council's Motion to Compel Supplemental Document Production 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