

ORIGINAL

Before the
SURFACE TRANSPORTATION BOARD



Finance Docket No. 30186

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

234017

COMMENTS ON SUPPLEMENTAL APPLICATION

ENTERED
Office of Proceedings

APR - 2 2013

Part of
Public Record

GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036

Attorney for Jay L. Schollmeyer

April 2, 2013

Before the
SURFACE TRANSPORTATION BOARD

Finance Docket No. 30186

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

COMMENTS ON SUPPLEMENTAL APPLICATION

Introduction

Jay L. Schollmeyer,^{1/} for and on behalf of United Transportation Union, General Committee of Adjustment (UTU/GO-386), pursuant to the Board's decisions dated January 4, 2013 (served January 8), 78 Fed. Reg. 1936 (Jan. 9, 2013), and February 25, 2013 (served February 26), submits these comments with respect to the Supplemental Application for Construction and Operating Authority (Supp.App), filed December 17, 2012, by Tongue River Railroad Company, Inc. (TRRC). As explained in these comments, at the present time, and on the present record, UTU/GO-386 does not oppose TRRC's request to construct the line, but that the Board should deny or dismiss TRRC's apparent request to operate the line, in light of BNSF's request for Board approval to operate the same line; and does not oppose BNSF's request to solely operate the line.

^{1/} General Chairman for United Transportation Union, with offices at 400 E. Evergreen Blvd., Vancouver, WA.

Background

1. 1986 ICC Decision. TRRC received approval from the former Interstate Commerce Commission (ICC) to construct an 89-mile line between Miles City and Ashland, MT. The ICC's action was taken in 1986 in the instant captioned proceeding and docket number. However, the 1986 ICC authorization was never consummated.^{2/}

2. Oct. 2012 Revised Application. TRRC on October 16, 2012, filed a Revised Application (Rev.App.) for the 89-mile Miles City-Ashland proposed line, now reduced in length to 83 miles, as modified by refinements, which TRRC described as generally entailed a straightening and shortening of the rail alignment approved in 1986, with a few new refinements of very minor curve adjustments at Miles City and adjustments along the Otter Creek spur. (TRRC, 10/16/12, Rev.App. 1-2).

3. Nov. 2012 STB Decision. The Board on October 31, 2012 (served November 1, 2012), declared it was now necessary to review TRRC's plan for the entire 83-mile line project, including environmental and transportation issues. Accordingly, the Board directed TRRC to supplement its application with additional information, with TRRC invited to include material from the 1983 application which is relevant in its supplemental filing, along with any additional evidence and argument. (STB, 11/1/12, 2-3). The Board's November 1 decision required that the supplement to the revised application be filed by December 17, 2012, with the

^{2/} A brief history of events subsequent to the 1986 ICC decision is set forth in the Board's January 8, 2013 decision.

Board to publish Federal Register notice accepting or rejecting the application on January 9, 2013, followed by a March 1, 2013 due date for comments in support of or opposition to the application, with TRRC to reply April 15, 2013. (Ibid., 3-5). The Board did not give Federal Register notice of its November 1, 2012 decision, and thus did not publish notice of the schedule requiring that comments to the Rev.App. were due on or before March 1, 2013.

4. Dec. 2012 Supplemental Application. TRRC on December 17, 2012 did not supplement its October 16, 2012 Rev.App.; instead, TRRC filed a "Supplemental Application" (Supp.App.), which materially changed the proposed route. Instead of an 83-mile line between Miles City and Ashland, MT, TRRC now proposed a 42-mile extension to BNSF's existing Colstrip Subdivision so as to reach the Ashland area. The BNSF Colstrip Subdivision connects at the north end with the BNSF Forsyth subdivision of the BNSF main line at Nichols Wye, MT. The proposed construction, termed the Colstrip Alignment, would run south from Colstrip to the Ashland area, some 22 of the 42 miles being trackage already mostly approved for construction in the 1986 decision between Miles City and Ashland. (Supp.App., 3 & Ex. C).

5. 2013 STB Decisions. The Board on January 8, 2013, served its January 4 decision, effective January 13, 2013, accepting the Supp.App. (STB, 1/8/13). Publication was made January 9, 2013 in Federal Register. 78 Fed. Reg. 1936-37. The Board noted the Supp.App. supersedes the October 16, 2012 Rev.App. (STB,

1/8/13, 1,3; 78 Fed. Reg. at 1936).^{3/} The Board directed that parties follow the time schedule set forth in the November 1, 2012 decision; in particular, that the public file comments on or before March 1, 2013, with TRRC to reply April 15, 2013.^{4/} In the text of the Board's decision, the agency stated comments due March 1 should be directed to "transportation aspects" of the Supplemental Application, inasmuch as "environmental review" of the project is proceeding separately from review of the "transportation merits." (STB, 1/8/13, 4; 78 Fed. Reg. at 1937).

Subsequently, on February 25, 2013 (served February 26), the Board extended the time for submitting comments on TRRC's application, and TRRC's thereto, to April 2 and May 16, 2013, respectively. (STB, 2/26/13).

These comments are submitted in accordance with the STB decisions served January 8, and February 26, 2013.

Position of UTU/GO-386

UTU/GO-386, on the present record, does not oppose the Supplemental Application (Supp.App.), insofar as it seeks authority to construct the Colstrip Alignment. BNSF has joined in the

^{3/} TRRC's Supp.App. also noted that it supersedes the Rev.App. (TRRC, 12/17/12, Supp.App. at 1).

^{4/} The Board's decisions served January 8 and February 26, do not provide that public commenters may reply to the initial comments of other commenters--reply is restricted to TRRC. The Board's rules for construction applications provide a limited 5-day period for an applicant to reply to comments, with no mention of public replies to comments of others. Here, TRRC specifically has been accorded a 44-day reply period between April 2-May 16, with no provision for public replies to comments of others. The Board's general rules allow any party to reply to another party's pleading within 20 days. Cf. 49 CFR 1150.10(h), 49 CFR 1104.13(a) (2012ed).

application. (Supp.App. 5). The TRRC line will be operated solely by BNSF. (Supp.App. 1, 5, 11). The Board's January 8 and February 26, 2013 decisions both acknowledge the line is to be operated solely by BNSF. (STB, 1/8/13, 3; STB, 2/26/13, 4).^{5/} UTU is the collective bargaining representative for BNSF employees in various operating crafts.

The UTU/GO-386 present position must be qualified at this time in that applicant, contrary to the Board's rules, has not filed concurrently all directly related applications. 49 CFR 1150.10(d). Missing are (1) the forthcoming application for BNSF to control TRRC, acknowledged in the Supp.App. at 13, and (2) the agreement between TRRC and BNSF for BNSF's operation of the line, acknowledged in the Supp.App. at 11,28,30,Ex.D. These two ancillary matters directly involve operation of the line, and are of concern to BNSF rail employees. UTU/GO-386 considers TRRC's application to be incomplete at this time, 49 CFR 1150.10(d), although the Board has indicated otherwise. See: STB, 1/8/13 & 2/26/13. In any event, these other applications must be considered along with the Supp.App., such that UTU/GO-386, if necessary, may seek an opportunity to file further or revised comments on transportation issues in the instant proceeding. 49 CFR 1150.10(d).

UTU/GO-386 opposes the Supp.App. to the extent it may be deemed a request by TRRC, that TRRC as well as BNSF, be authorized to operate the line.

^{5/} Cf. 78 Fed. Reg. at 1937. The STB-OEA's recent Final Scope-EIS decision (served March 22, 2013), states the line would be constructed by TRRC and operated by BNSF. (STB-OEA, 3/22/13, 1n.1).

These comments by UTU/GO-386 are addressed to the Supp.App., and are not directed to the October 16, 2012 Rev.App. which has been superseded by the December 17, 2012 Supp.App. The Rev.App. is wholly inapplicable. The Board decisions of January 8, and February 26, 2013, make it clear that the Rev.App. is totally superseded. STB, 1/8/13, 3; STB, 2/26/13, 4. Indeed, the Board's invitation for comments is specifically directed to the Supp.App., without mention of the Rev.App. STB, 1/8/13, 3; STB 2/26/13, 4.

I. THE TRRC REQUEST TO OPERATE THE PROPOSED 42-MILE LINE SHOULD BE DISMISSED OR DENIED.

The Supp.App. is a joint application by TRRC and BNSF--both are parties to the proceeding. Not only does the Supp.App. specifically name BNSF as a party (Supp.App. 5), but TRRC and the Board in their application and orders, specifically name BNSF as the proposed operator. The Board's rules require that the proposed operator must join in the application, and provide all information required for an applicant. (emphasis supp.) 49 CFR 1150.3(c) (2012-ed). BNSF has provided the customary information. e.g. Supp.App. 10-12, 13-15, Ex.D; Ex.E,p.2; Ex.F, p.2; Ex.G; App.A,V.S. Bobb.

The authority to construct a line of railroad, differs from authority to operate a line of railroad. The provisions of 49 U.S.C. 10901 apply separately to actions designed to construct, operate, acquire, or provide transportation over a rail line. The various class exemptions involving §10901 distinguish these various terms.

UTU/GO-386, on the present record, has insufficient information, and thus does not oppose TRRC's request to construct the

42-mile line.^{6/} However, UTU/GO-386 urges that TRRC's Supp.App., insofar as it is deemed to request authority to operate the trackage, should be dismissed or denied.

The Board should dismiss or deny TRRC authority to operate the line, as TRRC operation would be contrary to repeated language, examples already cited, that the line would be operated solely by BNSF. Supp.App. 1,5,11,30,32; Ex. D, p. 4; STB, 1/8/13, at 3; 2/26/13, at 4.

Despite clear statements or recitations by the Board, and perhaps the understanding of various parties, that TRRC will not provide train service, nevertheless, there is some ambiguous language in the Supp.App. suggesting that TRRC might desire an agency decision authorizing TRRC, as well as BNSF, to operate the line. The Supp.App., in its opening paragraph, states "TRRC hereby submits this Supplemental Application for Construction and Operation Authority.." (Supp.App. 1); TRRC in its Conclusion asks that the Board grant TRRC authority to construct a common carrier rail line between Colstrip, MT and Terminus Points 1 & 2 south of Ashland, MT.....and that BNSF be authorized to serve as the operator over that line. (emphasis supp.). Supp.App. 33-34.

A carrier "operating over" a line is customarily a feature of trackage right operations over the line of another rail carrier,

^{6/} It may be argued--but UTU/GO-386 does not--that the 42-mile trackage would constitute "spur" and thus excepted from §10901. Cf. 49 U.S.C. 10906. The Supp.App. is devoid of shipper/receive support other than Otter Creek Coal, an operating subsidiary of Arch Coal, Inc. (Supp.App., App. A, Rowland). Arch Coal's V.P., Andrew Blumfield, terms the proposed trackage to constitute a "rail spur." (TRRC Reply, 1/28/13, V.S. Blumfield, at 3).

or the extension of line over that of another carrier. §§10901, 11323.

Contrary to the repeated and primary thrust of the Supp.App. that BNSF will operate the line, Stevan Bobb, Exec. V.P. and Chief Marketing Officer for BNSF (and who also serves as TRRC President), indicated that TRRC will hold itself to transport freight, along with BNSF. (Supp.App., App. A, 4):

Because the TRRC line will be operated as a common carrier line, TRRC will hold itself out to transport freight for any shipper that locates on the line and makes a reasonable request for rail service, just as BNSF does.

The record does not provide evidence to support both TRRC and BNSF will "operate" the line, or even to "operate over" the line. Nevertheless, UTU/GO-386 cannot ignore the above statement by the BNSF official who also is the TRRC President.

The Board should dismiss the Supp.App. insofar as it would authorize TRRC to operate the trackage, or deny TRRC authority to operate for failure of proof that essentially duplicate operation would be consistent with the public convenience and necessity.

II. THE GOVERNING STATUTE IS §10901 PRIOR TO THE 1995 ICCTA AMENDMENT.

The Supp.App. suggests that the Board consideration of the statutory standard for approval is the current reading of §10901, rather than §10901 prior to the 1996 effective date of ICCTA. (Supp.App. 17-19). TRRC cites the Board's November 1, 2012 decision in Rev.App. for authority on this score. (Supp.App. 18).

Contrary to TRRC, the instant Supp.App. is governed by the savings clause of ICCTA, as the proceeding was in existence prior

to 1996, despite the fact that a supplemental application may be involved. There is nothing in the November 1, 2012 decision which speaks to the contrary. The difference between the pre-ICCTA and post-ICCTA versions of §10901 are important for the governing statutory criteria, as well as for possible employee protection.

CONCLUSION

The Board should dismiss or deny approval of the Supp.App. insofar as TRRC would operate the Colstrip Alignment. At this time, and on this record, UTU/GO-386 does not object to TRRC's request to construct line, or to BNSF's request to operate the line.

Opportunity for further comments should be accorded if an when related applications or agreements involving BNSF control of TRRC, and/or agreement between BNSF and TRRC for operation are finalized.

Respectfully submitted,


GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036

April 2, 2013

Attorney for Jay L. Schollmeyer

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.

Washington, DC

Gordon P. MacDougall
