Before the

SURFACE TRANSPORTATION BOARD

DEC 11 2014
RECEIVED

Finance Docket No. 30186

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

PETITION FOR RECONSIDERATION OF PROCEDURAL DECISIONS

237211

ENTERED
Office of Proceedings
December 11, 2014
Part of
Public Record

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

Attorney for Jay L. Schollmeyer

December 11, 2014

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.

PETITION FOR RECONSIDERATION OF PROCEDURAL DECISIONS

Preliminary Statement

Jay L. Schollmeyer,[1/] for and on behalf of SMART-Transportation Division (SMART-TD), General Committee of Adjustment (GO-386), submits this petition for reconsideration, in part, of the Director, Office of Proceedings (DOP), decision dated and served November 21, 2014; and the subsequent decision of the Board's Director, Office of Proceedings (DOP), dated December 9, 2014 (served December 10).

The November 21, 2014 DOP decision would restrict the content of any potential SMART-TD (GO-386) reply to the supplemental comments which may be filed sometime after February 27, 2015, by another party to the proceedings, specifically Northern Plains Resource Council (NPRC), to the extent such post-February 2015

1/General Chairman for SMART-Transportation Div., with offices at 400 E. Evergreen Blvd., Vancouver, WA. SMART-TD is the successor to United Transportation Union, merger implemented August 2014.

supplemental NPRC comments might relate to matters discussed some two years earlier, on April 3, 2013, by SMART-TD (GO-386)'s predecessor.[2/] The December 10, 2014 DOP decision approves the procedural schedule drawn up by applicant Tongue River Railroad Company, Inc. (TRRC), with consultation and consent by NPRC, purportedly in compliance with the DOP's November 21 decision restricting the SMART-TD (GO-386) participation.[3/]

The Board should reconsider the DOP's November 21, 2014 decision, and revise the third final paragraph to read:

> "SMART-386 may reply to NPRC's forthcoming supplement. Accordingly, TRRC's revised schedule must provide SMART-386 with a 14-day period after the filing of NPRC's supplement to reply and must extend TRRC's rebuttal deadline by 14 days."

The Board accordingly should vacate the DOP's approval served December 10, 2014.

ARGUMENT

This is not and should not be the environmental phase of the proceeding. The Board is taking submissions on the merits of transportation issues under the "public convenience and necessity" criteria of a construction and operation application pursuant to

---

2/The text of the objectional portion of the November 21 decision is as follows: "It is possible that matters raised by NPRC in its supplement might relate to matters discussed by SMART-386's predecessor in the April 2, 2013 comment. Therefore, SMART-386 may reply to NPRC's forthcoming supplement to the extent that the supplement relates to matters discussed in the April 2, 2013 comment."

3/The TRRC-NPRC schedule reads: "Pursuant to the Board's November 21, 2014 decision, SMART-386 may file a reply to NPRC's submission (provided that any such reply relates to issues raised in SMART-386's April 2013 submission to the Board) 14 days after NPRC's submission. TRRC's reply to NPRC and to any SMART-386 submission would be due 21 days following the due date for the SMART-386 submission."

49 U.S.C. 10901. The environmental phase is another matter and is being conducted concurrently but separately. The application was filed December 17, 2012.[4/] After initial statements were filed in April 2013, TRRC (perhaps more accurately BNSF) and NPRC have been in an almost two-year discovery hassle now approaching conclusion.

1. SMART-TD (GO-386) has not been involved in discovery, and has not been in communication with NPRC counsel; instead, SMART-TD (GO-386) has been content to await the filing of evidence or other matter resulting from discovery, and then possibly to present evidence and/or argument, if deemed appropriate and helpful to the Board's resolution of the issues. We do not here repeat the contentions advanced in our earlier September 17, 2014 petition on the resumed procedural schedule following completion of discovery. We emphasize that SMART-TD (GO-386) may or may not file a reply submission. No decision has been made at this time.

2. Recent developments strongly suggest that many parties may wish an opportunity to update their earlier statements in light of whatever NPRC may submit following February 2015. There are some fifty (50) parties to this proceeding. Following serious difficulties during the 2013-14 winter in handling freight traffic owing to weather conditions and increased demand, BNSF has announced what it terms "unprecedented track expansion" plans for its Northern Region, which embraces Montana. Perhaps the best description is described by BNSF's President to STB Chairman Dan Elliott, on September 15, 2014, in response to the latter's August 19 re-

---

4/The November 21, 2014 decision states the application is for TRRC to construct and for BNSF to operate. (Decision, 1n.2). We read it somewhat differently, as for TRRC to both construct and operate, and for BNSF also to operate.

quest.[5/] The proposed Tongue River project should include evaluation in light of BNSF system investment plans in the area.

3. The DOP decisions of November 21 and December 10, 2014, if not corrected to permit SMART-TD (GO-386) to submit a meaningful reply to whatever NPRC may produce, would serve to deprive SMART-TD (GO-386) of a full and fair hearing on the merits of the TRRC/BNSF application in issue. The two decisions are arbitrary and capricious, and fail to accord due process.

WHEREFOR, the Board should reconsider the two decisions, and grant the relief requested set forth above.

Respectfully submitted,

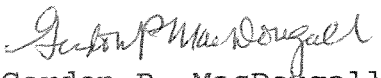
GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036

December 11, 2014

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

5/The BNSF communication is available on the STB's website.