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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB Finance Docket No. 30186**

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

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**REPLY OF TONGUE RIVER RAILROAD COMPANY, INC. TO  
PETITION FOR RECONSIDERATION OF PROCEDURAL SCHEDULE OF JAY L.  
SCHOLLMAYER**

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Company, Inc.

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Tongue River Railroad Company, Inc. (“TRRC”) hereby replies to the December 11, 2014 “Petition for Reconsideration of Procedural Decisions” (“December 11 Petition”) filed by Jay L. Schollmeyer, for and on behalf of SMART-Transportation Division, General Committee of Adjustment (“SMART-TD”).

**BACKGROUND**

SMART-TD’s Petition is the second petition for reconsideration that it has filed in recent weeks addressed to the procedural schedule in this proceeding. On September 17, 2014, it filed a “Petition for Reconsideration of Procedural Schedule” (“September 17 Petition”). That Petition sought reconsideration of the Board’s decision served September 10, 2014 fixing dates for the submission of (i) an additional, post-discovery filing by the Northern Plains Resource Council (“NPRC”) on the merits of TRRC’s rail construction application in light of discovery being conducted by NPRC and (ii) for the submission of a reply by TRRC. Even though it never sought Board permission to undertake discovery and previously submitted (on April 2, 2013) its views on the merits of TRRC’s application, SMART-TD’s September 17 Petition requested the

right to file an additional submission on the merits based on discovery materials that NPRC may rely upon its supplemental submission. TRRC opposed that request, in part on the grounds that SMART-TD had not previously sought permission to pursue its own discovery and thus there is no basis for it to now to have an opportunity to make a further submission on the merits of the TRRC Application or raise issues distinct from those raised in its April 2013 submission.

By decision served November 21, 2014, the Board (through its Director of the Office of Proceedings) granted SMART-TD the right to reply to NPRC's submission on the merits "to the extent that [NPRC's supplementary submission] relates to matters discussed in [SMART-TD's] April 2, 2013 comment." Further, on December 10, 2014, the Board (again through the Director of the Office of Proceedings) approved the procedural schedule to which TRRC and NPRC had consented, incorporating the limitation on SMART-TD's participation as set forth in the November 21 Decision. SMART-TD now seeks reconsideration of both the November 21 Decision and the December 10 Decision, which implemented the November 21 Decision. TRRC opposes such reconsideration for reasons stated below.

### **ARGUMENT**

First, TRRC notes that the December 11 Petition appears to be procedurally infirm to the extent that it appeals from the November 21 Decision. Under the Board's rules at 49 CFR §§ 1101.6(b) and 1115.1(c), appeals from decisions of employees acting under authority delegated by the Board Chairman under the Board regulation at 49 CFR § 1011.6 "must be filed within 10 days of the date of the action taken by the employee . . ." Here, the Director of the Office of Proceedings, presumably acting under authority delegated pursuant to the Board's rule at section

1011.6, issued her decision on November 21, 2014, more than 10 days before the December 11 Petition was filed.<sup>1</sup>

Second, apart from any procedural infirmity, the Petition should be denied because SMART-TD has once again failed to assert any sound reason why it should be allowed to make further representations on the merits of this proceeding or raise issues other than those that it has already raised in its April 2013 Comments on the TRRC Application. In fact, SMART-TD offers no new reasons to support its request and instead relies on its September 17 Petition, on which the Board has already ruled. SMART-TD thus fails to assert any viable basis for the Board to revisit the prior decision.

As its December 11 Petition acknowledges at page 4, SMART-TD “has not been involved in discovery . . .” The Board’s November 21 Decision nonetheless provides SMART-TD with an opportunity to submit further comments to the extent that NPRC raises issues relevant to the issues previously raised by SMART-TD in its April 2013 Comments. The Decision strikes a reasonable balance between SMART-TD’s request to make a further submission and the risk that any such further filing might provide that party with a license to inject new issues into this proceeding at this late date.

Indeed, SMART-TD underscores this very risk of unduly broadening the issues by suggesting in its December 11 Petition that the Board should now consider in this proceeding BNSF’s plans, as reported in a September 15, 2014 letter from BNSF’s President to former STB Chairman Daniel Elliot, to invest resources into its northern operating region, including Montana. SMART-TD fails to explain how BNSF’s investment plans, which are designed to

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<sup>1</sup> While TRRC would not object should SMART-TD file a belated request to accept its December 11 Petition notwithstanding that it appears to be out of time, TRRC does object to the filing of seriatim petitions addressed to the same issue. For reasons discussed further below, TRRC further objects to the merits of the December 11 Petition.

address current service challenges (including service issues related to the increased volume of coal being transported by BNSF as described in the September 15 letter), have any bearing on TRRC's Application. Moreover, BNSF's current service issues and related investment plans do not relate in any way to issues previously raised by SMART-TD in this proceeding.

Finally, while SMART-TD claims that it is being deprived of a full and fair hearing, like every other party to this proceeding it had a full and fair opportunity to submit comments on the merits of TRRC's Application in 2013. Further, SMART-TD will have a further opportunity to respond to any supplemental comments submitted by NPRC on issues relevant to SMART-TD's April 2013 Comments.<sup>2</sup>

### CONCLUSION

For the above-stated reasons, the Board should deny the December 11 Petition for Reconsideration.

Respectfully submitted,



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<sup>2</sup> SMART-TD will also have an opportunity to comment on the Board's forthcoming Draft Environmental Impact Statement in this proceeding.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 7<sup>th</sup> day of January 2015, I have caused a copy of the foregoing Reply of Tongue River Railroad Company, Inc. to Petition for Reconsideration of Procedural Decisions of Jay L. Schollmeyer to be served by first-class mail, postage prepaid, on each of the parties of record in STB Finance Docket No. 30186.



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David H. Coburn