

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

234471

STB FINANCE DOCKET NO. 30186

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**TONGUE RIVER RAILROAD COMPANY, INC. – RAIL CONSTRUCTION
AND OPERATION – IN CUSTER, POWDER RIVER
AND ROSEBUD COUNTIES, MT**

**TONGUE RIVER RAILROAD COMPANY, INC.'S REPLY TO
PETITION TO ISSUE REVISED PROCEDURAL
SCHEDULE TO ACCOMMODATE DISCOVERY**

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Dated: June 25, 2013

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On June 5, 2013, Petitioners Northern Plains Resource Council Inc. and Clint and Wally McRae, dba Rocker Six Cattle Company, Inc. (jointly, “NPRC”) petitioned this Board to issue a revised procedural schedule to allow for discovery in this rail construction/operation proceeding because of the expert testimony provided by Tongue River Railroad Company, Inc. (“TRRC”) in its reply to the comments of NPRC. Petitioners request six months to complete discovery. For the reasons explained below the Board should deny this request.

I. BACKGROUND

NPRC has had multiple opportunities to seek discovery in this re-opened proceeding, but has not even suggested the need for discovery until now. The procedural schedule in this proceeding was initially set by a Board decision served November 1, 2012 and then modified by a Board decision served February 26, 2013. The initial procedural schedule contemplated that TRRC’s Supplemental Application (“Application”) would be filed on December 17, 2012; that

comments on the Application would be due on March 1, 2013 and that TRRC's Reply would be due on April 15, 2013. The Board's February 26, 2013 decision extended the date for the filing of comments to April 2, 2013 and the date for TRRC's reply to May 16, 2013.¹ Under the Board's procedural schedule, NPRC thus had about three and one half months following the filing of the December 17 Application to seek discovery before it was required to file its comments on April 2. It did not do so.

In fact, NPRC filed an extensive set of Comments on the Application on April 2, totaling 60 pages of text with over 1,000 pages of exhibits. Other parties also filed comments. Neither NPRC nor any other party suggested the need for discovery in their Comments, which addressed at length all aspects of the TRRC Application.

NPRC's belated June 5, 2013 request for a modification of the procedural schedule to allow six months for discovery apparently was triggered by the fact that TRRC had noted in an April 22, 2013 request for extension of time to file its Reply that it would be submitting a statement from an expert witness responding to expert reports submitted with the NPRC and other Comments. In other words, NPRC decided to seek discovery only after learning that TRRC would be replying to its expert reports with the statement of its own expert.

TRRC filed its Reply on June 7, 2013. The Reply was accompanied by the Statement of Seth Schwartz, TRRC's expert witness on the coal transportation market who submitted a statement responsive to expert reports submitted by NPRC. Mr. Schwartz's Statement addressed in detail the coal markets available for the coal that would be transported on the TRRC line in response to the claims of NPRC that no such markets will be available for the coal. That

¹ That due date for TRRC's Reply was subsequently extended to June 7, 2013.

testimony was based entirely on numerous cited public materials concerning the coal transportation market.

II. THE PETITION SHOULD BE DENIED

As described above, NPRC failed to seek discovery or a modification of the procedural schedule until June 5, 2013 – well over 6 months after TRRC filed its December 17 Application and over two months after NPRC responded by filing its Comments on that Application. NPRC was obviously able to respond to the Application in detail without any need for discovery. It also had more than adequate time to conduct discovery under the Board’s schedule. That fact alone calls into question NPRC’s sudden need for discovery.

NPRC now seeks discovery ostensibly because TRRC advised that it would submit expert testimony with its June 7, 2013 Reply.² *See* NPRC Petition to Issue Revised Procedural Schedule at 5 (“TRR’s new expert reports will create contested issues of fact that lie at the heart of the dispute over whether the construction of this new railroad is truly in the public interest. Discovery constitutes the most appropriate means to test the credulity of TRR’s experts.”). Oddly, NPRC made its discovery request several days before it even saw the testimony of TRRC’s expert. The fact is that discovery from TRRC’s expert would not yield any relevant information for NPRC. As noted, the statement of that expert is based entirely on publicly

² NPRC suggests that it is somehow inappropriate for TRRC to introduce expert testimony in its Reply to rebut the expert testimony and other coal market evidence provided in NPRC’s Comments. Of course it is only fundamentally fair that TRRC have an opportunity to offer rebuttal testimony in response to NPRC’s evidence. The Board has held that where opponents of a construction application have provided evidence challenging an application, it is permissible for an applicant to supplement the record with additional evidence to rebut the evidence provided by opponents. *See Dakota, Minnesota and Eastern Railroad Corporation Construction into the Powder River Basin*, Finance Docket No. 33407, 1998 WL 398189, at *3-4 (STB served July 16, 1998); *Dakota, Minnesota and Eastern Railroad Corporation Construction into the Powder River Basin*, Finance Docket No. 33407, 3 S.T.B. 847, 865 (STB served Dec. 10, 1998).

available information from a variety of cited sources on the markets available to the coal that would be transported on the TRRC line. Accordingly, NPRC has access to the materials on which Mr. Schwartz based his views. Allowing discovery from TRRC's expert would therefore only needlessly prolong the merits phase of this proceeding.

Further, no additional filings are permissible for the merits side of this proceeding under the current procedural schedule, and NPRC has not requested the Board's permission to file any supplemental submission. For this additional reason, allowing discovery at this late date in the merits phase of this proceeding, much less a six month period for discovery, would be an inappropriate waste of resources. Indeed, while it has tied its discovery request to the fact that TRRC has offered expert testimony, NPRC offers no reason why six months of discovery would be warranted or how it intends to use this six month period. Its request for such a long period is consistent with its pattern of seeking to prolong TRRC proceedings at every opportunity.³

³ NPRC also suggests that discovery is warranted because co-petitioner Rucker Six Cattle Company, Inc. ("Rucker Six") could have several miles of its property condemned by TRRC. Whether or not any of Rucker Six's or other property will be condemned is at best speculative, but in any event this is not a condemnation proceeding and NPRC has failed to adequately explain why discovery is needed now when it was not sought before NPRC and Rucker Six filed their Comments.

For the above reasons, NPRC's belated and unwarranted request for discovery should be denied.

Respectfully submitted,



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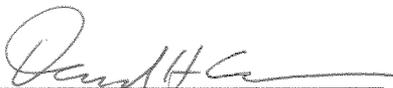
Attorneys for Applicant

Tongue River Railroad Company, Inc.

June 25, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of June 2013, I have caused a copy of the foregoing Reply to Petition to Issue Revised Procedural Schedule to Accommodate Discovery 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