

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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SURFACE TRANSPORTATION BOARD FINANCE DOCKET NO. 30186

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

**NORTHERN PLAINS RESOURCE COUNCIL'S
MOTION FOR LEAVE TO FILE A SUR-REPLY TO TONGUE
RIVER RAILROAD COMPANY, INC.'S FEBRUARY 3, 2014 REPLY TO
NORTHERN PLAINS RESOURCE COUNCIL'S MOTION TO COMPEL**

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Pursuant to 49 C.F.R. § 1117.1, Northern Plains Resource Council (Northern Plains) petitions the Board for leave to file a sur-reply to Tongue River Railroad Company, Inc.’s (TRRC) Reply to Northern Plains’ Motion to Compel dated February 3, 2014. Although the Board prohibits replies to a reply, Northern Plains can demonstrate good cause for the Board to waive this rule, as set out below, and in detail in its Sur-reply. 49 C.F.R. § 1104.13(c). In the interest of clarifying the record and simplifying the issues before the Board, Northern Plains requests that the Board accept a sur-reply submitted for that purpose.

In the interest of compiling a complete and clear record, the Board should grant Northern Plains’ request to reply to these mischaracterizations. The Board has previously waived its procedural rules in efforts to obtain a complete record. *See Rail Switching Services, Inc.—Operation Exemption—Pemiscot Cnty. Port Authority*, Finance Docket No. 35685, *Pioneer Railcorp—Continuance in Control Exemption—Rail Switching Services, Inc.*, Finance Docket No. 35686, 2013 WL 100887, at *3 (S.T.B. served Jan. 8, 2013) (granting leave to reply to the incorrect assertions contained in a reply); *Union Pacific R.R. Co.—Abandonment Exemption—in*

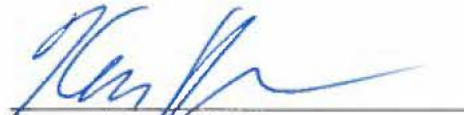
Rio Grande and Mineral Cnty., CO, Docket No. AB-33 (Sub-No. 132X) at 3 (S.T.B. served June 22, 2004) (granting leave to file a sur-reply in the interest of compiling a full and complete record); *Arizona Pub. Serv. Co. & PacifiCorp v. The Burlington Northern and Santa Fe R.R. Co.*, Docket No. 42077 at 4 n.7 (S.T.B. served October 14, 2003) (granting leave to file a sur-reply in the interest of obtaining complete record).

Specifically, the Board has permitted a sur-reply to a reply to a motion to compel. To correct mischaracterizations by opposing parties, the Board has granted petitions for leave to file a sur-reply when a reply misinterprets a motion to compel. *See N. States Power Co. Minn. D/B/A Xcel Energy v. Union Pacific Railroad Co.*, Docket No. 42059, 2002 WL 1046013, at *1, *1 n. 3 (S.T.B. served May 23, 2002) (granting leave to file sur-reply in interest of assembling a complete record).

In its Reply, TRRC has complicated the issues presented to the Board in Northern Plains' Motion to Compel. TRRC's Reply creates a false impression of the information sought by Northern Plains and mischaracterizes the discovery process to date. Furthermore, TRRC's Reply includes new arguments and a new verified statement that Northern Plains' needs to respond to in order to clarify and provide the Board with a complete and accurate record. As such, Northern Plains requests to clarify the record in efforts to save the Board time and confusion over issues mischaracterized and/or others that the Board need not decide.

Granting Northern Plains' request to clarify the record will not cause prejudice. However, an incomplete and/or inaccurate record would prejudice Northern Plains. As such, Northern Plains requests the Board to grant this opportunity out of fairness. A sur-reply clarifying these misrepresentations will aid the Board in reviewing Northern Plains' Motion to Compel and TRRC's Reply, resulting in a complete and accurate record. For these reasons, Northern Plains respectfully requests the Board's leave to file a sur-reply.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that the foregoing has been served by U.S. mail on all parties of record this 19th day of February, 2014.



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INTRODUCTION

Northern Plains sought permission from the Board to address: (1) inconsistencies in TRRC’s pleadings; (2) the credulity of TRRC’s evidence; (3) the level of commitment to the project from TRRC’s financial backers (Arch Coal, BNSF Railway, and TRR Financing); and (4) Arch Coal’s estimates for the demand for coal. *See* Aug. 27, 2013 Order at 2-3. The Board considered these issues and granted Northern Plains’ request over TRRC’s strenuous objections. *Id.* at 3. These issues are highly relevant and among the “important and complex issues” for the Board to consider when determining whether to approve the proposed railroad line. *See Id.*

TRRC’s focus on “limited discovery” in its Reply is nothing more than a pretext to avoid these issues and engage in selective, incomplete, and evasive discovery. Indeed, TRRC makes the puzzling claim that the issues raised in Northern Plains’ request for discovery and referenced in the Board’s decision granting discovery are not “legitimate topics for discovery.” *See* TRRC Reply at 6 n.7. However, the Board’s grant of “limited discovery” does not mean that TRRC can avoid the very issues that formed the basis of the Board’s grant of discovery. Nor does it mean

TRRC can effectively turn the discovery process on its head. For example, “limited discovery” does not mean TRRC can prevent discovery of documents from before June 2012 while it asks Northern Plains to produce information dating back to 2009. *See* TRRC Reply at 11 *and* TRRC Interrog. No. 1. Likewise, “limited discovery” does not mean TRRC can avoid identifying anyone at Arch Coal and BNSF as having responsibilities related to Otter Creek mine and the Tongue River Railroad. *See e.g.* TRRC Reply at 1 *and* TRRC Ans. to Interrog. Nos. 3-10. Nor does it mean TRRC and its owners can avoid searching files of high-level employees who are responsible for the Otter Creek mine and the TRR project simply because those employees did not “suppl[y] information [to counsel] for use in connection with the TRRC project.” *See* TRRC Reply at 14. Finally, “limited” discovery does not authorize TRRC and its owners to justify withholding relevant documents because they believe there is “already substantial information” on the record and that other documents are “self-explanatory.” *See* TRRC Reply at 10-11.

TRRC’s Reply also creates the false impression that Northern Plains’ Motion to Compel seeks more information than it does. The Reply ignores the efforts and progress both parties made during the meet and confer process to narrow the scope of discovery and resolve objections. For example, TRRC claims that Northern Plains seeks information about Arch Coal’s Appalachian coal holdings. TRRC Reply at 15. Yet Northern Plains never mentions Arch Coal’s Appalachian holdings in any of its pleadings or discovery requests. Indeed, Northern Plains expressly disclaimed any interest in having Arch Coal produce documents specific to its Appalachian holdings during meet and confer discussions. In reality, there are only 25 requests

for production of documents and 10 interrogatories at issue in Northern Plains' Motion to Compel.¹

Even though TRRC claims to have spent substantial time collecting and reviewing documents, its efforts appear merely to represent a concerted attempt to withhold information damaging to its application. This is evident from the fact that the 350 hours it spent collecting and reviewing files yielded only 342 documents.² The Board should reject TRRC's red herrings and focus on the issues presented in Northern Plains' Motion to Compel.

ARGUMENT

A. TRRC and Its Owners Are Not Entitled to Selective, Incomplete, and Evasive Discovery.

As noted in the Introduction, TRRC and its owners use the pretense of "limited" discovery to engage in *selective* discovery. The Board did not grant TRRC and its owners the right to be selective, incomplete, and evasive in answering interrogatories and producing documents. There are numerous examples of TRRC and its owner using *selective* discovery. For example, as discussed below, TRRC and its owners are willing to provide documents relating to Wyoming PRB coal in response to certain document requests, but not others. Similarly, TRRC provides in its Reply a verified statement about specific Arch Coal employees to disclaim

¹ TRRC also creates the false impression that Northern Plains attempts to delay this proceeding and is unwilling to produce documents in response to TRRC's discovery requests. See TRRC Reply at 1, 2 n.1. The Board should reject these comments outright. Northern Plains is conducting discovery pursuant to the Board's August 27, 2013 Order to create a complete record for the Board to determine whether the transportation merits justify granting a certificate of public convenience and necessity. Similarly, TRRC's statement that Northern Plains has not produced "even a single document" is incorrect. TRRC Reply at 2. Northern Plains produced documents to TRRC on February 3, 2014. If the pace and extent of Northern Plains' production is not to TRRC's satisfaction, TRRC is obligated to meet and confer. If still unsatisfied, TRRC can file a motion to compel. TRRC has done neither, giving every indication that TRRC has no need of further production. Instead, it appears TRRC is merely interested in using its own discovery requests to limit its obligation to respond to Northern Plains.

² TRRC states for the first time in its Reply that it intends to produce additional documents. TRRC Reply at 21 n.28 (stating that "TRRC will produce documents relating to PRB coal generally, including Wyoming PRB coal, that are responsive to RFP No. 1.").

responsibility for relevant matters, but is unwilling to identify those employees with such responsibilities. *Compare* Jan. 31, 2014 Blumenfeld Verified Statement (“Blumenfeld V.S.”) at 2 and TRRC Reply at 24 with Northern Plains’ Motion to Compel App. C at TRRC Ans. to Interrog. Nos. 3-10. TRRC also claims that “internal information dating back to July 2010 is too outdated to have much relevance,” but seeks information from Northern Plains dating back to 2009. *See* TRRC Reply at 11 and Northern Plains’ Motion to Compel App. C at TRRC Interrog. No. 1. The Board’s rules do not authorize TRRC and its owners to satisfy their discovery obligations by selectively choosing which documents to produce and which to withhold.

B. The Board Should Reject TRRC’s Artificially Limited Time Frame.

TRRC argues it is “too late” for Northern Plains to ask the Board to require production of documents back to July 1, 2010. *See* TRRC Reply at 13. TRRC’s argument is a complete departure from its position during the meet and confer process. After notifying TRRC early on that the June 18, 2012 cutoff was unacceptable, and with opposing counsel’s consent, Northern Plains waited until TRRC completed its document production to see what objections remained. This sensible plan grew from TRRC’s agreement to produce documents it “relied upon” in connection with its application. *See* Northern Plains’ Motion to Compel App. D at TRRC Resp. to RFP Nos. 1-4, 6-8, 11-13, 15-17, 19-21, 28-29. Northern Plains could not know what documents TRRC and its owners “relied upon” in the application process until TRRC completed its document production. Likewise, the parties agreed that it made little sense to argue about issues in the abstract. Indeed, TRRC did not object to extending the time for completing discovery to allow the parties to “attempt to work out any remaining discovery disputes, and if necessary obtain a decision from the Board on a motion to compel.” Nov. 15, 2013 Decision Granting Northern Plains’ Request for an Extension. Consistent with this approach, Northern

Plains suggested the July 1, 2010 time frame after TRRC completed its document production. TRRC rejected that offer and Northern Plains filed its Motion to Compel. Contrary to what it represented previously, TRRC now suggests that this agreed-upon approach was inappropriate and unfair. *See* TRRC Reply at 12-13. It is improper for TRRC now to suggest that Northern Plains acted unreasonably. It is also improper to blame Northern Plains for whatever additional burden TRRC and its owners now face after arbitrarily setting June 18, 2012 as the cutoff for discovery.

TRRC's substantive argument is that information from July 1, 2010 to June 18, 2012 is not relevant because such information is "too outdated to have much relevance," since coal markets are inherently volatile. TRRC Reply at 11. However, this argument is entirely inconsistent with TRRC's own discovery requests, which asks Northern Plains to "identify all reports or testimony submitted by Synapse Energy Economics, Inc. to any state or federal public utilities commission, other regulatory agency or legislative body *on or after October 1, 2009.*" TRRC Reply at Ex. 1 Interrog. No. 1 (emphasis added). TRRC cannot claim that the July 1, 2010 time frame is minimally relevant when its own discovery seeks information from 2009.³

TRRC further ignores the relevance of older market data to TRRC's financial fitness. As set forth in the Motion to Compel, TRRC's financial fitness is entirely dependent on its owners' commitment to the project. TRRC claims that its owners' "substantial financial investment" in the TRRC project to date is evidence of that commitment. *See e.g.* Northern Plains' Motion to Compel App. C at TRRC Ans. to Interrog. No. 55. Consequently, a review of Arch Coal and BNSF's decision to invest in the TRRC project when coal markets were stronger will assist the

³ TRRC's objections also illustrate that June 18, 2012 is not a bright-line cutoff. TRRC agreed to produce documents from before June 2012 if it "relied upon" them in any filings in the reopened proceeding. *See e.g.* TRRC Resp. to RFP No. 1.

Board in understanding whether they are still committed following the sharp decline in coal markets. In view of the above, the Board should compel production of documents dating back to July 1, 2010.

C. Information About the Demand and Marketability of PRB Coal Is Not Made Irrelevant, as TRRC Claims, Because Some Of That Coal Is Sourced From Wyoming.

TRRC directly placed Wyoming PRB coal at issue in this proceeding in Blumenfeld's January 28, 2013 verified statement: "*I anticipate that coal mined at Otter Creek will be highly competitive with PRB coal mined elsewhere in Montana and Wyoming . . .*" Jan. 28, 2013 Blumenfeld V.S. at 3 (emphasis added). Blumenfeld further stated that there are "significant extraction cost advantages enjoyed by Otter Creek/Ashland area coal *in comparison to coal from many other Montana and Wyoming mines.*" *Id.* (emphasis added). Yet during discovery, TRRC limits information it produced on Wyoming PRB coal and what it describes as "PRB coal generally."⁴ TRRC cannot claim that Wyoming PRB coal is relevant to the demand and need for Otter Creek coal in its application and then argue it is not relevant for purposes of discovery.

Yet TRRC continues to object to producing information about Wyoming PRB coal and "PRB coal generally" in connection with responses to RFP Nos. 4, 16, and 17. TRRC Reply at 21-22. These requests seek documents relating to the ability of PRB coal to compete on a delivered price basis with Indonesian and Australian thermal coal in China, South Korea, or Japan (RFP No. 4); power plants that limit or reject coal from the PRB due to its sodium content (RFP No. 16); and limits on the marketability of PRB coal due to its sodium content (RFP No. 17). TRRC argues that its owners' internal documents related to these issues are "of limited relevance with respect to the coal market issues in this case" because the Tongue River Railroad

⁴ It is unclear how TRRC defines "PRB coal generally." The only possibilities are Montana PRB coal, Wyoming PRB coal, or both. If the answer is "both," then "PRB coal generally" necessarily includes Wyoming PRB coal. Consequently, it is difficult to understand exactly what information TRRC and its owners are withholding.

will not transport Wyoming PRB coal. TRRC Reply at 21. These arguments are meritless. With regard to RFP Nos. 16 and 17, limitations on the demand for PRB coal based on its sodium content do not change based on whether the coal is sourced from Wyoming or Montana. Similarly, power plants would not limit or reject high sodium coal from the PRB differently based on its state of origin.⁵

Notably, TRRC is unwilling to provide information on “PRB coal generally” in response to RFP Nos. 4, 16, and 17. TRRC fails to explain why “PRB coal generally” is relevant to domestic or international demand for PRB coal (RFP No. 1) but not “the ability of PRB coal, including Otter Creek coal, to compete on a delivered price basis with Indonesian and Australian thermal coal in China, South Korea, and Japan.” (RFP No. 4). The Board should require TRRC and its owners to produce the requested documents, given Wyoming PRB coal’s relevance to important issues in this proceeding.

D. TRRC Cannot Insulate High-Level Arch Coal Employees That Have Responsibilities Relating to the Otter Creek Mine and Tongue River Railroad.

TRRC states that it searched for responsive documents in the files of “individual employees or departments likely to have responsive information.” TRRC Reply at 14 (citing *Entergy Servs., Inc.*, STB Docket No. 42104, 2008 WL 2091414, at *4 (served May 19, 2008)). However, TRRC limited its search to those Arch Coal employees “who it believed were likely to have responsive information due to the fact that they . . . supplied information [to counsel] for use in connection with the TRRC project.” TRRC Reply at 14. Thus, TRRC never searched the

⁵ TRRC claims it produced documents in response to RFP Nos. 4, 16, and 17. However, the word “sodium” appears in only four documents produced during discovery. These are: a publicly available document prepared for XCEL Energy by the John T. Boyd Company titled “The Powder River Basin Coal Resource and Cost Study” (TRR-000001); a publicly available report titled “The ‘Economics’ of the Proposed Otter Creek Coal Mine: A Critique of One-Sided Economic Analysis” by Power Consulting, Inc. (TRR-005154); and two other documents of unknown origin about the geology of Otter Creek coal (TRR-006323 and 006325). TRRC and its owners cannot limit their discovery responses based on meritless objections to hide important information relevant here.

files of high-level Arch Coal employees “likely to have responsive information” merely because those employees did not work directly with counsel.

This inadequate approach to document production is consistent with TRRC and its owners’ incomplete and evasive answers to interrogatories 3-10, which seek the identify of employees with responsibilities for the Otter Creek mine and Tongue River Railroad. *See* Northern Plains’ Motion to Compel App. C at TRRC Ans. to Interrog. 3-10. Complete and non-evasive answers to these interrogatories would have identified other high-ranking executives at Arch Coal who are “likely to have responsive information.” *Entergy Servs., Inc.*, STB Docket No. 42104, 2008 WL 2091414, at *4. This is why Northern Plains is not merely “quibbling” about the answers as TRRC’s Reply suggests. *See* TRRC Reply at 24.

To illustrate, TRRC did not identify Ken Cochran, a high-ranking employee of Arch Coal, as having responsibilities related to the mine and railroad.⁶ Arch Coal publicly identified Mr. Cochran in 2011 as “group president with responsibility for Thunder Basin Coal Company, the Arch Western Bituminous Group, Arch of Wyoming and *the Otter Creek development*.” Jun. 15, 2011 Arch Coal Press Release (emphasis added), *available at* <http://news.archcoal.com/phoenix.zhtml?c=107109&p=irol-newsArticle&ID=1574130&highlight=>. In August 2012, Arch Coal promoted Mr. Cochran to Senior Vice President of Operations for Arch Coal with responsibility for “all of the company’s mining operations and new development projects.” Aug. 8, 2012 Arch Coal Press Release, *available at* <http://news.archcoal.com/phoenix.zhtml?c=107109&p=irol-newsArticle&ID=1723721&highlight=>. Mr. Cochran joined “Arch’s senior officer team, which has broad responsibility for strategy development, policy formation and capital allocation.” *Id.*

⁶ TRRC still has a duty to provide complete and non-evasive responses to interrogatories even though Northern Plains identified this individual.

Moreover, Mr. Cochran is a TRRC Director. *See* TRRC Reply at Ex. 2. TRRC searched the files of another TRRC Director, Stephan Branscum of BNSF; however, it did not search Mr. Cochran’s files. *See* TRRC Reply at 7, Ex. 2. Consequently, TRRC cannot claim that it did not “believe” this employee was “likely to have responsive information.” *See* TRRC Reply at 14.

Just because TRRC claims “no one has yet been assigned” various responsibilities related to Otter Creek coal, does not mean no one is responsible for these matters—someone is responsible. *See e.g.* Reply at 18 n.24, 25. Arch Coal has vested those responsibilities in Mr. Cochran and potentially other high-level Arch Coal employees.⁷ This is yet another example of TRRC and its owners’ selective, incomplete, and evasive response to Northern Plains’ discovery.

E. TRRC Mischaracterizes the Relevance of the Otter Creek Mine to This Proceeding.

Northern Plains is not asking for more than what TRRC has made relevant to this proceeding by proposing to build a railroad line that serves the Otter Creek mine. Several times, TRRC explains that “[t]his proceeding involves a rail construction application, not a mine permit application.” TRRC Reply at 16. TRRC further explains by adding “[t]he proposal to develop the Otter Creek mine is not under review by the Board.” TRRC Reply at 16. TRRC is correct that this proceeding concerns the issuance of a Board certificate to construct, operate, and maintain a railroad. However, TRRC contradicts itself within its Reply as to the relevance of the Otter Creek mine. TRRC earlier states: “The Tongue River rail line will be built *if . . . there will be a demand for Otter Creek coal in the coming years.*” TRRC Reply at 11 (emphasis added). This

⁷ While TRRC and its owners refuse to identify anyone with relevant responsibilities at Arch Coal and BNSF, they are entirely willing to provide information about employees to prevent disclosure of damaging information. TRRC submitted with its Reply another self-serving verified statement from Mr. Blumenfeld to ward off potential discovery of Arch employees with likely responsibility for assessing demand for PRB coal, including Otter Creek coal. Blumenfeld V.S. at 2.

statement clearly shows that the Otter Creek mine is highly relevant to the TRR line. TRRC claims the proposed rail line will serve *only one mine*: the Otter Creek mine. Thus, the possibility that the Otter Creek mine may not be built is of great import to discovery and the issuance of a construction certificate.

Further, TRRC evades answering, in Interrogatory No. 42, whether Arch Coal considered the possibility of selling the Otter Creek mine.⁸ This is another example of Arch Coal's selective use of the TRRC corporate form to shield relevant information from these proceedings. Mr. Blumenfeld is willing to state under oath that this information "is not within *TRRC's* knowledge" and that "*TRRC . . . is not aware of any documents or communications relating to the possibility of selling the Otter Creek mine.*" Northern Plains' Motion to Compel App. C at TRRC Ans. to Interrog. No. 42 (emphasis added). This stands in contrast to Mr. Blumenfeld's Verified Statement contained in TRRC's Reply. In this verification, Mr. Blumenfeld states "*Arch Coal has not taken specific actions to identify those potential customers.*" Blumenfeld V.S. at 2 (emphasis added). Mr. Blumenfeld is willing to verify that Arch Coal has taken no specific action to find customers for Otter Creek coal, but is unwilling to acknowledge whether the sale of the mine is an alternate possibility. TRRC makes the same excuse it used for denying Northern Plains' request for any information related to the Otter Creek mine—that this is a rail construction application, not a mine permit application. For reasons already discussed, this argument is unpersuasive. Whether or not Arch Coal has considered selling the Otter Creek mine is indicative of Arch Coal's confidence in the financial viability of the project.

⁸ TRRC claims in its Reply that it objected to Interrogatory No. 42 on burden grounds. TRRC Reply at 24. However, it only objected on grounds of relevance in its interrogatory answers. TRRC Ans. to Interrog. No. 42.

CONCLUSION

For the reasons stated above and in the Motion to Compel, Northern Plains respectfully requests the Board issue an order compelling TRRC and its owners' to provide complete and non-evasive answers to discovery.

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I certify that the foregoing has been served by U.S. mail on all parties of record this 19th day of February, 2014.

A handwritten signature in blue ink is written over a horizontal line. The signature is stylized and appears to be "T. H. [unclear]".