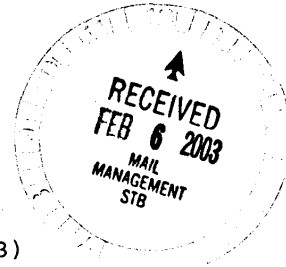


ORIGINAL

Before the
SURFACE TRANSPORTATION BOARD



207174

Finance Docket No. 30186 (Sub-No. 3)

TONGUE RIVER RAILROAD COMPANY
--CONSTRUCTION AND OPERATION-- */
IN ROSEBUD AND BIG HORN COUNTIES, MT

REPLY TO PETITION FOR LEAVE
TO FILE SUPPLEMENTAL EVIDENCE

ENTERED
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Union, General Committee of Adjust-
ment on The Burlington Northern and
Santa Fe Railway Company, and
Montana State Legislative Board.

Due Date: February 6, 2003

*/ The caption is that given by the Board for this proceeding,
which is at a variance with that claimed by the petitioners.

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Preliminary Statement

Protestants, United Transportation Union-General Committee of Adjustment (UTU/GO-386), ^{1/} and United Transportation Union-Montana State Legislative Board (UTU-MT), jointly submit this reply to the petition by Tongue River Railroad Company (TRRC), ^{2/} filed January 17, 2003, for leave to file supplemental evidence in this proceeding.

TRRC's petition asks that TRRC be authorized to file its proposed supplemental evidence, and that the Surface Transportation Board (Board) establish a schedule for the filing of respon-

^{1/} John D. Fitzgerald, General Chairman, United Transportation Union, with offices at 400 E. Evergreen Blvd., Vancouver, WA 98660.

^{2/} Protestants are confused as to the identity of TRRC, in light of Finance Docket No. 33644, Tongue River Railroad Company, Inc.-Acquisition and Operation Exemption-Tongue River Railroad Company, 63 Fed. Reg. 54186 (Oct. 8, 1998), pet. to revoke den. Nov. 9, 1998 (not printed) (served November 13, 1998). (TRRC Inc.). When the exemption became effective, TRRC Inc. was to replace TRRC. Apparently, TRRC Inc. did not exercise the exemption, although we are not sure.

sive supplemental evidence by other parties, and a reply (if necessary) by TRRC to such responsive evidence. (Petition 1, 5).

TRRC's petition is not accompanied by the proposed supplemental evidence; instead, TRRC lists five categories of proposed evidentiary matters, all of which are "transportation issues," and none are claimed to be "environmental issues." (Petition 1, 3-4). The supplemental evidence would be in addition to the Changed Circumstances Analysis that will be performed in the environmental process for all areas identified in the agency's February 3, 1999 Final Scope of Supplemental Action. (Petition 3).

TRRC's petition should be denied. TRRC tried this approach in 1998, and it was rejected by the Board in late March, 1998. Moreover, the petition does not conform to the Board's rules, and the relief requested would be prejudicial to these protestants.

Caption

The TRRC petition is not properly captioned. This reply bears the caption given by the Board from the commencement of this Sub-No. 3 proceeding, and subsequent thereto.^{3/} The TRRC's caption is that which has been utilized by the Board's Section of Environmental Analysis (SEA).

Background

The five "transportation" issues projected for further evidence go far beyond this Sub-No. 3 proceeding, involving a 17.3-

^{3/} See: "Notice of Construction and Operation Application and Adoption of Initial Procedural Schedule," served June 23, 1998, 63 Fed. Reg. 34212 (June 23, 1998); See also: "Notice to the Parties" (Service List), served July 29, 1998.

mile alternate route for part of TRRC's proposed rail line which would extend approximately 130 miles between Miles City and Decker, MT. A brief history of the TRRC project, filed 20 years ago on June 2, 1983, with the 89-mile Miles City-Ashland segment approved by decision in Finance Docket No. 30186 & Sub-No. 1 (served May 9, 1986),^{4/} and the 41-mile Ashland-Decker segment approved by decision in Finance Docket No. 30186 (Sub-No. 2) (served November 8, 1996), may be found in Tongue River RR Co.-Const. & Oper.-Ashland and Decker, MT, 1 S.T.B. 809 (1996). (TRRC II).^{5/}

Judicial review of the 1996 decision was instituted in the U.S. Court of Appeals for the Ninth Circuit.^{6/} Review has been stayed, when TRRC sought to reopen the Board's Sub-No. 2 proceeding and then, pending disposition of the instant Sub-No. 3 application, which had been filed April 27, 1998. The instant Sub-No. 3 proceeding embraces an alternative route for the westernmost 17.3-mile segment of the project.

The parties to the instant Sub-No. 3 proceeding were listed after responses were received to the June 23, 1998 Notice,^{7/} by the service list issued thereafter on July 29, 1998. Submissions in accordance with the June 23, 1998 procedural schedule were completed November 2, 1998. The Board stated that it would not issue a decision whether the proposed construction meets the

^{4/} Review dismissed in Northern Plains Resource Council v. ICC, 817 F.2d 758 (9th Cir. 1987), cert. den. 484 U.S. 976.

^{5/} TRRC II is the same decision labeled TRRC II (not printed) in the Petition at pp. 1-2.

^{6/} Nos. 97-70037, 97-7009, and 97-70217. The cases involve Finance Docket No. 30186, Sub-No. 1, and Sub-No. 2.

^{7/} 63 Fed. Reg. 34212-14 (June 23, 1998).

statutory criteria in 49 U.S.C. 10901 prior to completion of the environmental review process. 63 Fed. Reg. at 34213:

"Our decision on the merits will follow completion of the environmental review process and we will address both transportation and environmental issues in that decision."

The environmental inquiry continued after the November, 1998 submissions. Numerous requests were made for local public hearings for all phases of the application. No action has been taken on the hearing requests.^{8/}

Numerous filings and motions concerning environmental matters were made during 1999, until TRRC on March 2, 2000, advised SEA to suspend work owing to the need for additional financial and project planning. (Petition 2).^{9/}

Almost three years passed, until TRRC and the Board's SEA Staff held a conference on December 19, 2002, where TRRC advised it now was prepared to complete the regulatory process, and where

^{8/} Much attention during the latter part of 1998 and into the Spring of 1999, was directed to whether the 3-year time limit for construction of the already-authorized portion of line would be removed. The Board removed the condition by decision served March 23, as corrected March 30, 1999.

^{9/} Protestants were not advised that TRRC had requested suspension of environmental analysis until revealed by STB Chairman Morgan, over a year later, on May 22, 2001. See: U.S. House, Congestion in the United States Transportation System, Hearings before Comm. on Trans. & Infrastructure (Hrg. 107-22) 102, 113 (2001).

TRRC requested that SEA resume its environmental review. (Petition
2). 10/

THE TRRC PETITION SHOULD BE DENIED FOR
FAILURE TO INCLUDE THE PROPOSED EVIDENCE.

TRRC's petition to introduce new evidence and for a procedural schedule should be denied. The instant TRRC petition tracks a prior 1998 attempt to establish a schedule in advance of introducing actual evidence. The Board denied the 1998 petition. The Board should follow its 1998 precedent here.

A. TRRC's 1998 Petition. TRRC on December 19, 1997 formally notified the Board of its intent to file an application for the "Western Alignment," which Notice of Intent was docketed as Finance Docket No. 30186 (Sub-No. 3). TRRC then sought, by petition filed March 1, 1998, to have the Board establish, in advance, a schedule to govern disposition of the forthcoming application.

The Board denied the TRRC petition in Sub-No. 3, by decision served March 24, 1998, for the obvious reason that the scope of the transportation and environmental issues, and the schedule for issue resolution, cannot be determined until the application is

10/ We understand that objectors were neither notified nor invited to the Conference where, we are advised, Board Staff personnel outside SEA also were in attendance. While we appreciate the informal nature of the environmental review process, it is clear that non-environmental matters were discussed. The resulting instant January 17, 2003 Petition is directed primarily to transportation issues. The Board's counsel, later in December 2002, revised the format for its periodic status report to the reviewing court. Protestants were unaware of TRRC's private and ex parte approach to the Board in December 2002.

filed, and until interested parties have made their preliminary comments. (Decision, 3/24/98, 2-3):

"Because TRRC has not yet filed its application, we cannot determine the scope of the potential public interest issues at this point. Moreover, SEA has not received input from interested public agencies, businesses, and affected individuals on the potential environmental issues. Until SEA receives their input, the scope of the likely environmental issues cannot be fully identified. Thus, neither we nor any persons who might comment on a proposed procedural schedule are in a position at this point to assess whether TRRC's proposed procedural schedule would be compatible with the environmental and other issues that may be raised in this proceeding."

The above reasoning is fully applicable here. The TRRC petition raises broad and important "transportation" issues, and these transportation matters undoubtedly will spill over into "environmental" issues as, indeed, TRRC recognizes there will be a "Changed Circumstances Analysis" to be performed for the environmental process. (Petition 3).

The instant January 17, 2003 TRRC petition (Petition 3-4) indicates broad transportation issues, such as the impact on the TRRC project stemming from the Board's recent approval of entry into the Powder River Basin in Finance Docket No. 33407, Dakota, Minnesota & Eastern Railroad Corporation Construction into the Powder River Basin (served Jan. 30, 2002) (DM&E). Other major issues claimed in the January 17, 2003 petition embrace updates (if necessary) to tonnage forecasts, financial forecasts and estimated costs of construction, along with TRRC business structure, proposed financial structure and plan for raising the funds required for construction. (Petition 4).

The range of transportation issues posed by the TRRC petition is at the heart of the fitness, demand, and competition findings required for construction applications and Board analysis. Tongue River RR Co.-Const. & Oper.-Ashland-Decker, MT, 1 S.T.B. 809, 828-31 (1996).^{11/} Indeed, if an extensive TRRC evidentiary filing is made as indicated, such may also require or suggest a recall and reopening of the three dockets (Finance Docket No. 30186 and Sub-Nos. 2 & 3) now before the reviewing Court.^{12/}

TRRC's petition should be denied for failure to attach the proposed evidence. Any proposed schedule would be premature until preliminary responses to its proposed evidence are received.

In any Board order denying TRRC's January 17, 2003 petition, protestants believe it advisable for the Board to announce that if TRRC elects to file supplemental evidence in a future petition, Federal Register notice may be given and a fresh service list issued. The current service list was issued in mid-1998, and the most recent local hearings were conducted in mid-1992. Just as transportation and environmental issues may have changed, so too the needs and position of the public may have altered in the interim.

B. Board Rules. The TRRC petition to introduce evidence is not governed by any of the Board's specific rules of practice.

^{11/} We do not agree with the Board's handling of the governing statute in its decision. It will likely be one of the issues on judicial review.

^{12/} At the time SEA suspended work in early 2000, there were pending and undecided several petitions for relief as to various matters. See: Pet. for Reconsid. by City of Forsyth, MT, et al., filed October 28, 1999.

Accordingly, TRRC cites 49 CFR §1117.1, the provision designated, "Petitions (For Relief) Not Otherwise Covered." However, in administering such a catch-all provision, the Board obviously is guided by its practice for petitions to reopen for new evidence, in situations where interim or final action is involved. 49 CFR §1115.3, §1115.4.

Here, TRRC has not given the required detail and specificity for its proposed new evidence, as suggested by the Board's rules. The procedure heretofore in this Sub-No. 3 proceedings has been for the submission of written verified statements and exhibits. TRRC should have followed that path here.

CONCLUSION

TRRC's petition for leave to file supplemental evidence (and to establish a schedule) should be denied.

Respectfully submitted,


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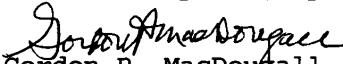
Attorney for United Transportation
Union, General Committee of Adjust-
ment on The Burlington Northern and
Santa Fe Railway Company, and
Montana State Legislative Board.

February 6, 2003

Certificate of Service

I hereby certify I have served a copy of the foregoing Reply upon all parties of record by first class mail postage-prepaid.

Washington DC


Gordon P. MacDougall