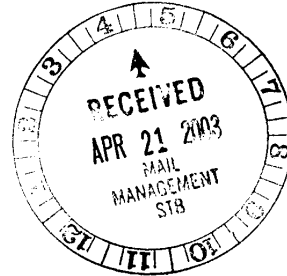


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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 30186 (SUB-NO. 3)



**TONGUE RIVER RAILROAD COMPANY -- CONSTRUCTION AND
OPERATION -- WESTERN ALIGNMENT**

**REPLY OF TONGUE RIVER RAILROAD COMPANY TO
PETITIONS FOR RECONSIDERATION**

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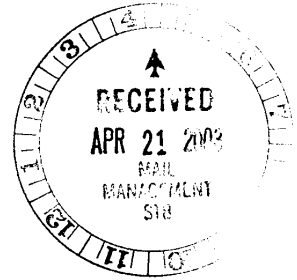
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April 21, 2003

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 30186 (SUB-NO. 3)



**TONGUE RIVER RAILROAD COMPANY -- CONSTRUCTION AND
OPERATION -- WESTERN ALIGNMENT**

**REPLY OF TONGUE RIVER RAILROAD COMPANY TO
PETITIONS FOR RECONSIDERATION**

Applicant Tongue River Railroad Company ("TRRC") hereby replies in opposition to the March 31, 2003 Petitions for Reconsideration filed by United Transportation Union¹ and the Northern Plains Resource Council ("NPRC").² Those Petitions seek reconsideration of the Board's March 11, 2003 Decision authorizing TRRC to submit supplemental evidence in support of its Application. TRRC intends to submit that evidence shortly.

Under the Board's rules at 49 C.F.R. § 1115.3, both Petitions appear to be petitions for reconsideration addressed to the discretion of the Board. Such petitions may be granted only upon a showing of new evidence, changed circumstances or material error. The UTU and NPRC Petitions do not even purport to meet any of these standards, and should be denied on that basis and for the reasons described below.

¹ United Transportation Union, General Committee of Adjustment on the Burlington Northern Santa Fe Railway Company, and Montana State Legislative Board

² The NPRC Petition is styled as a Petition for Rehearing.

I. UTU Petition

UTU argues that the March 11 Decision, a summary of which was published in the March 14, 2003 Federal Register at 68 Fed. Reg. 12400, failed to provide adequate notice to the public because it utilized a modified caption for this proceeding and did not expressly invite persons to submit a request to be placed on the service list of the proceeding. To the extent that claims such as this merit any response, TRRC notes that the caption used by the Board in its decision, and reflected in this TRRC filing, has been used by the Board since 1998. *See, e.g., Tongue River Railroad Company -- Construction and Operation -- Western Alignment* (served March 24, 1998).³ That caption is fully and accurately informative of the matter at issue in the proceeding, and any party with an interest in TRRC's proposal would not be misled by its use. Further, both the Board's decision, and the Federal Register summary of it, make clear that any interested party will have an opportunity to reply to the supplemental TRRC evidence.

In short, the Board issued a decision, and published a corresponding notice of the availability of that decision in the Federal Register, stating that this proceeding has been resumed and that it will issue a further decision to address the filing of replies to the forthcoming supplemental evidence. In these circumstances, there can be no serious question that due process notice requirements have been met and that interested persons should understand that they will have ample opportunity to participate.

³ The Board also used another caption for this proceeding in some of its 1998 decisions in the *TRRC III* proceeding, *Tongue River Railroad Company -- Construction and Operation -- In Rosebud and Bighorn Counties, MT.* which is the caption TRRC used when it filed its *TRRC III* application. However, all recent decisions have used the same caption used in the March 11 Decision.

UTU next bickers with the Board's description of the history of this proceeding, claiming that the Board did not properly describe the scope of the *TRRC II* proceeding,⁴ because (according to UTU) that proceeding involved not only the 41 mile Ashland-Decker segment, but also the 89 mile Miles City-Ashland segment. That is simply not correct. The Board's March 11 description of *TRRC II* as the proceeding in which the Board "approved TRRC's application to build a 41-mile line of railroad between Ashland and Decker, MT" is fully accurate. The fact that the Board also disposed of a petition to reopen *TRRC I*⁵ in the same 1996 decision in which it granted the *TRRC II* application does not render the Board's description of *TRRC II* confusing or inaccurate. See *TRRC II*, 1 STB at 840-843.

UTU takes issue with the statement in the Board's March 11 Decision that the evidentiary record in this proceeding previously closed on November 2, 1998 with the filing of reply evidence by TRRC. UTU is once again manufacturing an issue where none exists. Whether or not the record had closed in 1998 (TRRC agrees with the Board that it did), it has now been re-opened and UTU will have ample opportunity to reply to TRRC's supplemental evidence. Further, if the Board is asked to allow yet additional evidentiary submissions once the environmental phase of the case is completed -- which UTU may intend to request -- the Board will have ample opportunity to consider the propriety and timeliness of such requests if and when they are filed.

UTU takes issue with the March 11 Decision to the extent that it draws a distinction between the transportation (or merits) related aspects of the case and the environmental aspects,

⁴ *Tongue River Railroad Company -- Construction and Operation -- Ashland-Decker, MT*, 1 STB 809 (1996).

⁵ *Tongue River R.R. -- Rail Construction and Operation -- In Custer, Powder River and Rosebud Counties, MT*, Finance Docket No. 30186.

which are being reviewed on a separate track by SEA. UTU has no legitimate basis for raising an issue on this question. The Board has made clear that it will consider, through the environmental process, any environmental implications of the supplemental transportation evidence that TRRC adduces. *See Tongue River Railroad Co. -- Construction and Operation -- Western Alignment* (served March 26, 2003) at 3 (“information that TRRC will provide on the transportation issues in response to the Board’s decision of March 11, 2003, may require modifications to the final scoping notice for *Tongue River III* published on February 3, 1999”).

Further, the Board has obligations to consider the merits of an application for rail construction under the governing standards for such matters and it also has obligations under the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4331, *et seq.* to consider the environmental implications of such proposed rail construction projects. Its fulfillment of these obligations through a bi-furcated analytical procedure, in which SEA takes the lead in reviewing environmental issues followed by a final Board decision on the merits which takes into account SEA’s environmental analysis, is both fully consistent with the Board’s legal obligations and its long-standing practice. *See* 49 C.F.R. § 1105.10(f) (providing that the Board will decide what environmental conditions may be appropriate based on its assessment of the environmental record and its substantive responsibilities under the Interstate Commerce Act).

UTU next claims that the March 11 Decision errs by referencing the post-ICC Termination Act of 1995 (“ICCTA”) version of 49 U.S.C. § 10901(c) as the governing standard in this proceeding. Under that standard, the Board must issue a certificate authorizing rail construction “unless the Board finds that such activities are inconsistent with public convenience

and necessity.” UTU favors the pre-amended standard,⁶ and claims that this pre-amended standard applies by virtue of ICCTA’s savings clause (§ 204) since this proceeding (UTU says) was pending at the time of ICCTA’s enactment.⁷ That contention is patently wrong. TRRC filed its application in this proceeding in April 1998, roughly two years and four months *after* ICCTA came into effect, and *after* the current version of § 10901 became effective. The savings clause in ICCTA, governing the handling of cases pending before the ICC at the time of the statute’s enactment, is thus not applicable by its plain terms. The fact that this proceeding evolves out of a different and now-completed proceeding that was initiated pre-ICCTA does not change this result.⁸

In any event, the Board’s March 11 Decision does not represent the Board’s final decision in this proceeding, which will come after the close of the evidentiary record and the completion of the environmental review. The Board will thus have ample opportunity to further address the applicable standard to be applied in this proceeding.

II. NPRC Petition

NPRC adopts the UTU arguments, answered above, and also takes issue with what it claims is confusing “segmentation” of the TRRC project. There is no segmentation or cause for

⁶ Under the pre-amended version of ICCTA, the Interstate Commerce Commission was required to approve an application if it found that the present or future public convenience and necessity requires or permits the construction or acquisition and operation of the rail line.

⁷ Section 204(b) of ICCTA provides as relevant that the provisions of ICCTA do not apply “to proceedings or any application for license pending before the Interstate Commerce Commission at the time this Act takes effect, insofar as those functions are retained and transferred by this Act . . .”

⁸ UTU’s suggestion that there has been a “manipulation of docket numbers” so as to undermine its rights is far-fetched. The Board ruled in 1997 that TRRC should pursue its Western Alignment application by means of a new application, and that is precisely what TRRC has done. *See TRRC II* (served December 1, 1997).

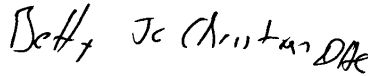
confusion here. The core facts are simple. TRRC filed an application to construct an 89 mile line, and the ICC approved that application in 1985. TRRC then filed an application to build a 41 mile extension, and the STB granted that application in 1996. The application currently before the Board concerns only a proposal to build the southernmost 17 miles of the 41 mile line along an alignment other than that approved in 1996. The notion that TRRC should now start from scratch -- apart from being a pointless exercise that would be wasteful of more time and resources for all interested entities and the Board -- would only advance NPRC's real goal, delay.

Further, the environmental aspects of the entire project, including the 89 mile line, are being updated as warranted by the passage of time. Thus, the Supplemental DEIS that will be issued in this case is intended to fully address the "stale analysis" claim that NPRC makes in its Petition. Finally, for the same reasons discussed above in connection with UTU, NPRC's similar argument that the Board is improperly separating its transportation and environmental analyses should be rejected. The Board is obligated by NEPA to consider the environmental analysis of TRRC's proposals when it issues its final decision in this proceeding.

CONCLUSION

For all of the above reasons, the Board should deny the Petitions filed by UTU and NPRC.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Betty Jo Christian".

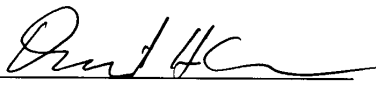
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Tongue River Railroad Company

April 21, 2003

CERTIFICATE OF SERVICE

I, David H. Coburn, hereby certify that on this 21st day of April, 2003, I have caused a copy of the foregoing Reply of Tongue River Railroad Company to Petitions for Reconsideration to be served by first-class mail, postage prepaid, on all parties of record in Finance Docket No. 30186 (Sub-No. 3).



David H. Coburn