

Before the
SURFACE TRANSPORTATION BOARD



Finance Docket No. 30186 (Sub-No. 3)
TONGUE RIVER RAILROAD CO.-CONSTRUCTION
AND OPERATION-WESTERN ALIGNMENT

APPEAL

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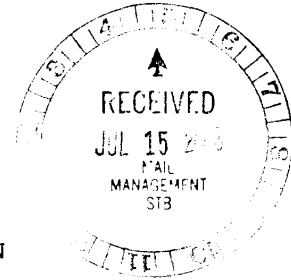
SURFACE
TRANSPORTATION BOARD

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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: July 17, 2003

Before the
SURFACE TRANSPORTATION BOARD



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

TONGUE RIVER RAILROAD CO.-CONSTRUCTION
AND OPERATION-WESTERN ALIGNMENT

APPEAL

Protestants, United Transportation Union-General Committee of Adjustment (UTU/GO-386), ^{1/} and United Transportation Union-Montana State Legislative Board (UTU-MT), ^{2/} jointly submit this appeal from the decision of the Board's Secretary, dated June 27, 2003 (served July 7). 68 Fed. Reg. 40331-32. (July 7, 2003).

The July 7 decision provides that persons desiring to become parties to the proceeding, or to change their address, file a Notice of Intent, or change in address, by July 17; after such notice of intent is given, the new party will be entitled to be served with copies of all filings made by parties subsequent to May 1, 2003.

The July 7 decision notes applicant, Tongue River Railroad Company (TRRC), is proposed to be substituted by a new applicant, Tongue River Railroad Company, Inc., which request for substitution is pending.

1/ By John D. Fitzgerald, General Chairman, with offices at 400 E. Evergreen Blvd., Vancouver, WA 98660.

2/ By Francis G. Marceau, Director, with offices at 98 Sussex Dr., Kalispell, MT 59901.

The July 7 decision establishes a schedule of procedural dates, to commence with the Board's issuance of a service list following the July 17, 2003 submission of notice of intent and changes of addresses.

ARGUMENT

The Board should revise the Secretary's July 7 decision. The decision is exceptional, marks a clear departure from the procedures previously established in this proceeding, and serves to constitute prejudice for parties. The July 7 decision amounts to a clear error of judgment. 49 CFR 1011.6.

1. Service of Application and Supplement. The July 7 decision does not require TRRC to furnish new parties with a copy of the original application or the supplemental evidence filed May 1, 2003. This is in sharp contract with the Board's regulations that require a copy of the application to be furnished to parties upon request. 49 CFR 1150.10(b). Here, the July 7 order directs service by TRRC of its pleadings filed after its May 1, 2003 supplemental evidence.

The July 7 decision errs in mentioning only post-May 1, 2003 filings. The Board should correct the Secretary's order to require that TRRC furnish a copy of its original application filed April 27, 1998, reply filed November 2, 1998, and supplemental evidence filed May 1, 2003, to any new party upon request. A new party should have access to the key TRRC filings in the proceeding.^{3/}

2. Identity of Applicant. The July 7 decision would commence the procedural schedule while the identity of the real applicant remains undetermined. The petition for substitution remains outstanding. See:

^{3/} The original application was captioned differently. Tongue River Rail Road Company-Construction and Operation-in Rosebud and Big Horn Counties, MT. See: Service list served July 29, 1998.

Decision, p. 2 n.3. Existing and new parties would respond to the application as supplemented in the context of the new applicant. Clearly, more than a mere name change is involved. The interconnecting entities may have an important bearing on the outcome of the application.

The July 7 decision errs in postponing the issue of the true applicant; the latter should be determined prior to the expiration date for filing notices of intent or changed addresses, and prior to the running of the 40-day period for the filing of reply comments or evidence. The identity of the applicant should first be made known.

CONCLUSION

The Board should grant this appeal, and revise the Secretary's July 7 decision and procedural schedule accordingly.

Respectfully submitted,


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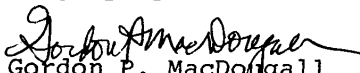
Attorney for United Transportation
Union, General Committee of Adjust-
ment on The Burlington Northern and
Santa Fe Railway Company, and
Montana State Legislative Board.

July 15, 2003

Certificate of Service

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

Washington DC


Gordon P. MacDougall