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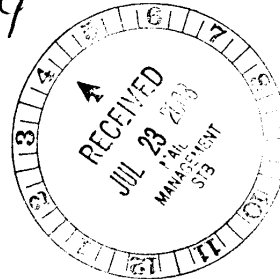
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208494



July 23, 2003

Via Messenger

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 711
Washington, DC 20423-0001

ENTERED
Office of Proceedings

JUL 23 2003

Part of
Public Record

**Re: Finance Docket No. 30186 (Sub-No. 3)
Tongue River Railroad Company -- Rail Construction and
Operation -- Western Alignment**

Dear Secretary Williams:

Enclosed for filing please find an original and 10 copies of the Reply to Appeal of the Secretary's Decision.

Respectfully,

A handwritten signature in cursive script, appearing to read 'David H. Coburn'.

David H. Coburn
Attorney for Tongue River Railroad
Company

DHC:dj
Enclosures

001

WASHINGTON

PHOENIX

LOS ANGELES

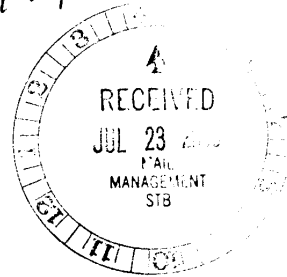
LONDON

BRUSSELS

208494

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 30186 (Sub-No. 3)



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

REPLY TO APPEAL OF THE SECRETARY'S DECISION

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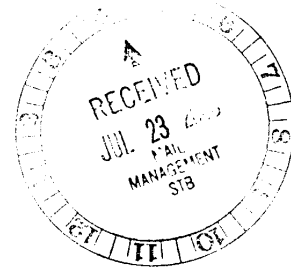
Attorneys for Tongue River
Railroad Company

July 23, 2003

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 30186 (Sub-No. 3)

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



REPLY TO APPEAL OF THE SECRETARY'S DECISION

The parties opposed to the Tongue River Railroad Company ("TRRC") have chosen to appeal a simple July 7, 2003 procedural order that allows persons to become parties of record and sets a schedule for, among other things, responding to TRRC's supplemental evidence. These parties should not be able to delay the date by which they must respond to TRRC's supplemental evidence through the artifice of their meritless appeal. The Board should thus promptly dispose of their appeal and issue the new service list contemplated by the July 7 decision so that the clock may start running on the schedule set forth in that decision.

I. BACKGROUND

On July 7, the Board served a decision by the Secretary establishing a new procedural schedule for the above-docketed proceeding.¹ In that decision, the Secretary allowed anyone interested in becoming a Party of Record (POR) to file a notice of intent to participate by July

¹ Tongue River R.R. Co. - Construction and Operation - Western Alignment, STB Finance Docket No. 30186 (Sub-No. 3) (served Jul. 7, 2003).

17, 2003, required current PORs to serve copies of all pleadings filed since May 1, 2003 on new PORs within 5 days of the issuance of an updated service list in this proceeding and allowed all PORs 40 days from the issuance of the updated service list to file evidence and comments responsive to the supplemental evidence that applicant TRRC filed with the Board on May 1, 2003.² The Board's decision was published in the Federal Register on the same day it was served. 68 Fed. Reg. 40331 (July 7, 2003).

On July 15, 2003, the United Transportation Union-General Committee of Adjustment and United Transportation Union-Montana State Legislative Board ("UTU") jointly filed an appeal ("UTU Appeal") of the Secretary's ruling pursuant to 49 C.F.R. § 1011.6. In that appeal, the UTU argued that the Board erred in requiring that new PORs be served only with copies of all pleadings served after May 1, 2003.³ Additionally, UTU argued that prior to the beginning of the deadline for new persons to become parties of record and the 40 day deadline for the filing of responsive evidence, the Board should decide TRRC's petition to substitute Tongue River Railroad Company, Inc. ("TRRC, Inc.") as the applicant in this proceeding.⁴

Subsequently, on July 17, 2003, the Northern Plains Resource Council, Inc. ("NPRC") filed a pleading in support of UTU's appeal ("NPRC Response"). In that filing, NPRC stated that a minimum of 30 days (rather than the 10 days allowed in the July 7 decision) should be given for persons to evidence their intent to become parties of record in this proceeding.⁵

² Id. at 2.

³ UTU Appeal at 3.

⁴ Id. at 4.

⁵ NPRC Response at 2.

II. ARGUMENT

As the Board's regulations state "[a]ppeals are not favored and will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice."⁶ UTU and NPRC have not made such a showing here.

First, parties should not be entitled to have the 40 day response period tolled until the Board issues its decision on TRRC's petition for substitution of TRRC, Inc. as the applicant. The Board's decision in that matter, and the corporate form of the applicant, have no bearing on the May 1 Supplemental Evidence filed by TRRC in this proceeding.⁷ The 40 day response period for existing PORs should begin immediately upon the service of a decision on the UTU and NPRC filings or the issuance of a new service list, whichever is served sooner. Existing POR's, such as UTU and NPRC, will thus have had well over four months to fashion their reply to the TRRC Supplemental Evidence if a decision that starts the 40 day response period is served within the next week, as TRRC urges. This is certainly ample time for such parties to prepare a reply.

Second, with respect to NPRC's contention that a minimum of 30 days from the Secretary's decision should be given for interested persons, not currently PORs, to join the

⁶ 49 C.F.R. § 1011.6(b).

⁷ Petition for Substitution of Parties, at 2 (filed May 1, 2003) ("This substitution will not result in any substantive change to the Application or to any of the transportation or environmental issues associated with this docket."); see also Tongue River Railroad Company, Inc. -- Acquisition and Operation Exemption -- Tongue River Railroad Company, Finance Docket No. 33644, at 5 (served Oct. 8, 1998) ("the change of TRRC's ownership from a partnership to a corporation has nothing whatsoever to do with any issue decided by the ICC and the Board in the prior application proceedings or the presently pending Western Alignment proceeding.").

proceeding as PORs, TRRC notes that several persons have, within the 10 day time limit fixed by the July 7 decision, indicated their interest in becoming PORs. Nonetheless, TRRC would not object if the Board were to include in its service list persons who, up until the date that that service list is issued, may likewise express an interest in becoming a POR. At this point, 16 days have passed since the issuance of the July 7 decision. This is ample time for persons to write a simple letter to the Board asking to become a party of record.⁸ TRRC further notes that there is nothing to prevent a person, even at a later time, from petitioning to intervene as a party of record. *See* 49 CFR § 1112.4.

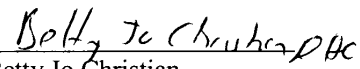
Finally, TRRC believes that UTU misreads the Secretary's decision in stating that it only required service of pleadings filed *after* May 1, 2003. TRRC interprets the decision to mean that PORs were to serve all pleadings filed *on or after* May 1, 2003 (i.e. including TRRC's Supplemental Evidence) on new PORs. Further, TRRC does not object to serving its application and initial evidentiary filing on new PORs upon request (consistent with 49 CFR § 1150.10(b)), and represents that it will do so if requested.

⁸ There is no merit to NPRC's suggestion that the Board publicize in local newspapers the opportunity to participate in the "merits" phase of this proceeding. The Board's decision was not only available on its website, but also was printed in the Federal Register.

III. CONCLUSION

TRRC respectfully requests that the Board deny the relief requested by UTU and NPRC and promptly dispose of this appeal and issue a new service list in this proceeding.

Respectfully submitted,

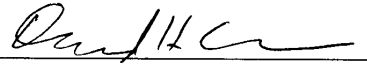

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Attorneys for Tongue River
Railroad Company

July 23, 2003

CERTIFICATE OF SERVICE

I, David H. Coburn, hereby certify that on this 23rd day of July, 2003, I have caused a copy of the foregoing "Reply to Appeal of the Secretary's Decision" to be served by first-class mail, postage prepaid, on all parties of record in Finance Docket No. 30186 (Sub-No. 3).

A handwritten signature in dark ink, appearing to read "David H. Coburn", is written over a horizontal line.

David H. Coburn