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Before the

SURFACE TRANSPORTATION BOARD



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SURFACE
TRANSPORTATION BOARD

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

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

APPEAL

FILED

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Union, General Committee of Adjust-
ment on The Burlington Northern and
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Montana State Legislative Board.

Due Date: September 2, 2003

Proceedings
SEP - 2 2003
Part of
Page

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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 Section of Environmental Analysis, by its Chief, Victoria Ruston (SEA), served August 22, 2003, 68 Fed. Reg. 50829-33 (Aug. 22, 2003). ^{3/}

The SEA's decision is titled, "Amended Final Scope of the Supplemental Environmental Impact Statement," and purportedly deals with environmental matters. However, the SEA's decision goes far beyond environmental matters, and pretends to speak for the Board concerning contested matters involving the public convenience and necessity, whether the Board should reopen prior

^{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.

^{3/} Unlike virtually every Board issuance of which we are aware, the instant SEA decision is undated; however, the Federal Register office indicates it was filed the previous day, August 21, 2003, at 8:45 AM.

proceedings on certain so-called "transportation" aspects, and the content of the service list.

The Board should reverse or vacate SEA's decision in certain respects, should recall the matter for handling by an individual Board member in lieu of SEA, and should deem parties in ancillary proceedings to be parties in the instant proceeding.

The Board should take the requested action. SEA's decision is exceptional, and early review is advisable to correct clear error of judgment and to prevent manifest injustice. Cf. 49 CFR 1011.6-(b).

ARGUMENT

I. SEA'S DECISION ERRS IN PRE-JUDGING THE BOARD'S DECISION IN THE CASE; AND IN ITS LEGAL ANALYSIS.

1. Presumption. SEA asserts for its statutory interpretation there is now a presumption that the Board will approve a rail construction application. (SEA 2 n.2):

"Thus, there is now a presumption that a rail construction proposal will be approved."

SEA expands upon the Board's March 11 and May 19, 2003 decisions, which set forth the Board's view of its legal analysis, but which did not include the presumption now adopted by SEA on behalf of the Board. (Decision, 3/11/03, 2-3 n.4; Decision, 5/19/03, 3-5). SEA errs in passing upon a statutory interpretation of 49 U.S.C. 10901, which is wrong in any event.^{4/}

^{4/} See: UTU Pet. for Reconsid., 3/31/03, 10-11 & nn.10, 11. The change in language in 49 U.S.C. 10901(c) concerning "public convenience and necessity" does not create a presumption that the Board will approve the instant application, particularly in the context of the on-going Tongue River proceedings for over 20 years since 1983.

2. Court Proceedings. SEA claims petitions for review of the 41-mile line approved in Tongue River II are pending in the Court of Appeals. (SEA 3, n.1). However, the court review embraces F.D. Nos. 30186, 30186 (Sub-No. 1), and 30186 (Sub-No. 2), which includes Tongue River I, not merely the 41-mile alternative in Tongue River II. The Board in its Tongue River II decision reopened the earlier dockets. Tongue River RR Co.-Const. & Oper.-Ashland-Decker, MT, 1 S.T.B. 809, 843-45 (1996).

3. Board Action on the Entire Line. The Board on July 7, 2003, issued its decision concerning procedures to be followed in this case. (The decision is on administrative review). Even though the opposition evidence is not yet due, SEA now has declared that the Board will not reopen and consider the entire authority for the line. (SEA, 5):

"...The Board does not believe it is necessary or appropriate to reopen and reconsider in their entirety the authority granted in Tongue river I and Tongue River II, both of which have long since become administratively final."

SEA has advised the public of what the action of the Board will be before receipt of opposition evidence, even though SEA recognizes the necessity to address significantly changed circumstances where what was done before is no longer adequate. (SEA, 3, 5).

II. SEA FAILS TO PROVIDE AN ADEQUATE SERVICE LIST
FOR NOTIFICATION AND PARTICIPATION BY THE PUBLIC.

SEA states that after completing its analysis for the instant line segment, along with those portions of Tongue River I and Tongue River II, the Board will then serve a draft SEIS on all

parties on the service list for Tongue River III, along with Federal Register notice. (SEA, 6):

"After completing their independent environmental analysis of the Western Alignment and those portions of Tongue River I and Tongue River II that need to be updated, SEA and the cooperating agencies will serve a Draft SEIS on all the names on the Board's service list for this proceeding and on appropriate Federal, state, and local agencies, and will publish notice of this document in the Federal Register."

The Board invited participation in Tongue River III, for new parties, by decision served July 7, 2003; however, the Board served its July 7 notice as well upon parties to Tongue River II without distinction as to the specific proceeding. Accordingly, it appears that some, perhaps many persons, likely believe they were already parties, and did not need to file an additional communique with the Board. Now, however, SEA would restrict service to Tongue River III names.

The public does not seem sophisticated concerning the differences between Tongue River I, Tongue River II, or Tongue River III. We suggest that SEA or the Board consider all parties to the two earlier proceedings be deemed parties to the instant Tongue Rive III, so that meaningful notification and participation may be ensured, and that manipulation of agency docket numbers not prove prejudicial.

III. THE PROCEEDING SHOULD BE RECALLED FROM
SEA FOR HANDLING BY THE ENTIRE BOARD.

The prejudgment of Board action, and other erroneous procedures and views taken by SEA, suggest that environmental matters be handled by a Board member in the first instance. This procedure for oversight by a Board member, rather than by initial staff

responsibility, has some precedent, e.g., Investigation of Railroad Rate Structure, 345 I.C.C. 1 (1973).

The public has been precluded from participation in important matters. For example, the December 19, 2002 meeting, twice mentioned by SEA (SEA, 1, 3), was attended by TRRC personnel, SEA members, and the Board's Office of General Counsel, without notice or participation by the public. Assignment to a Board member under all of the circumstances would be appropriate.

CONCLUSION

The Board should vacate SEA's decision insofar as it pre-judges certain Board actions and strays from its environmental tasks. The Board should correct the errors mentioned herein, and recall the proceeding for handling by an individual Board member.

Respectfully submitted,


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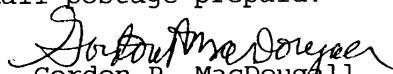
Attorney for United Transportation
Union, General Committee of Adjust-
ment on The Burlington Northern and
Santa Fe Railway Company, and
Montana State Legislative Board.

September 2, 2003

Certificate of Service

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

Washington DC


Gordon P. MacDougall