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Before the
SURFACE TRANSPORTATION BOARD



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

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

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PETITION FOR RECONSIDERATION

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Due Date: September 22, 2003

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SURFACE TRANSPORTATION BOARD



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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), ^{2/} jointly submit this petition for reconsideration of the Board's September 2, 2003 decision in this proceeding. (Decision, 9/2/03).

The September 2 decision granted the petition, filed May 1, 2003, by Tongue River Railroad Company (TRRC), that a new entity, Tongue River Railroad Company, Inc. (TRRCInc.), be substituted for applicant TRRC. Over protestants' objections, and those of Northern Plains Resource Council, Inc. (Northern Plains), the Board found, (1) the corporate information furnished by TRRCInc. ^{3/} is

^{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 Drive, Kalispell, MT 59901.

^{3/} The Board reached beyond the TRRC/TRRCInc. petition, to the supplemental evidence, and verified statement, filed May 1, 2003, by TRRC.

sufficient to comply with the Board's regulations at 49 CFR § 1150.3; (2) the only change that will occur is the entity applying for construction/operating authority will be a corporation rather than a partnership, which will simplify matters, and (3) the substitution of parties will have no bearing on the Board's analysis of the application.

The Board should reconsider its September 2, 2003 decision, on the ground of material error. 49 CFR §1115.3(b)(2). The Board should deny substitution of parties in the absence of sufficient information concerning the substituted applicant.

I. THE INFORMATION FURNISHED IS NOT
SUFFICIENT FOR THE INSTANT PROCEEDING.

The Board's finding that information concerning TRRCInc., i.e., that all the common stock is owned by TRR Limited Partnership, a Montana Limited Partnership, and that none of the officers, directors, or major shareholders of TRRCInc. control any other regulated carrier, satisfies the Board's regulations for an application under 49 CFR 1150.3, is highly erroneous.^{4/} The error is patent on two principal grounds.

A. Board Regulations. The TRRC application, as supplemented, does not conform with the agency's regulations concerning ownership structure or affiliation with industries to be served by the line. Moreover, the identity of participants is not clear; for example, Railco, LLC was "established" in the stead of The Pittsb-

^{4/} The Board's decision also found that TRRCInc. furnished its certificate of incorporation, names of the board of directors and officers, and corporate resolution.

urg & Midway Coal Mining Co., yet Railco, LLC is not otherwise identified.

B. Needed Information. The Tongue River project has a history extending back over 20 years. The agency in its prior reports has considered information far beyond that concerned only with a "limited partnership." Such limited partnership information is insufficient--more complete data is necessary. Our reply to the instant petition, filed May 15, 2003, included excerpts from the Administrative Law Judge (ALJ) Initial Decision, served September 4, 1985.^{5/} The former ICC also found it necessary to include information beyond the "limited partnership." Tongue River RR Co.--Const. & Oper--Ashland-Decker, MT, 1 S.T.B. 809, 816-17 (1996).

Clearly, the record is deficient for failure to update the corporate structure and other affiliations, from that presented in the prior proceedings. This failure to update is particularly egregious inasmuch as the Board has permitted a "transfer" of the outstanding certificates to the new applicant TRRCInc.^{6/}

^{5/} Finance Docket No. 30186 & Sub-No. 1, Tongue River Railroad Company--Rail Construction and Operation--In Custer, Powder River, and Rosebud Counties, MT.

^{6/} We continue to maintain that the transfer of railroad certificates of public convenience and necessity is unauthorized by the noncarrier class exemption. The entire matter of trafficking in certificates was controversial in motor carrier regulation. Cf. United States v. Resler, 313 U.S. 57 (1941); Chemical-Leaman Tank Lines, Inc. v. United States, 251 F.Supp. 269 (E.D.Pa. 1965) (three-judge); A.L. Root Transportation, Inc. v. United States, 280 F.Supp. 152 (D.Vt. 1968) (three-judge); Monumental Tours, Inc. v. United States, 316 F.Supp. 663 (D.Md. 1970) (three-judge).

II. MORE THAN A CHANGE IN STRUCTURE
OF THE APPLICANT IS INVOLVED.

The Board is simply wrong in asserting that the only change which will take place is that the entity applying for construction/operation will be a corporation rather than a partnership.

It is clear there will be major changes. This is apparent from the 1985 proceeding, (UTU Reply, 5/15/03, App. 1), the 1996 decision, (1 S.T.B. at 816-17), and the 1998 proceeding, (TRRC Appl., 4/27/98, 8-9, V.S. Gustafson, 1-2, and TRRC Supp. Evid., 5/1/03, Gustafson, 1-2). There is the obvious unexplained creation of Railco, LLC, among other unknown entities and their ownership/affiliations. TRRC/TRRCInc. has not been candid in showing their affiliations. It should be simple and not a burden, for TRRCInc. to present a current chart of its affiliations, in the manner of the 1985 ALJ initial decision.

III. THE REAL IDENTITY OF THE APPLICANT IS
ALWAYS A KEY ELEMENT FOR CONSIDERATION
BY THE AGENCY IN LINE CONSTRUCTION/OPERATION.

The Board finds that the substitution of parties will have no bearing upon the Board's analysis of the construction/operation application. This is serious error, for the fitness and internal organization of an applicant have a strong bearing upon financial strength and ability to successfully carry out the project.

To a certain extent, the Board's reasoning may relate to its erroneous view that railroad construction/operation certificates may be transferred without regard to the public convenience and necessity, or to the ability of the acquiring party.

However, it is clear that the identity of an applicant and, in particular, its affiliations and obligations, are of critical importance in determining whether to award a construction and/or operation franchise. See: Finance Docket No. 33407, Dakota, Minnesota & Eastern Railroad Corporation Constriction into the Powder River Basin, decision served December 10, 1998, at 15-18; decision served January 30, 2002, at 32-37.

The September 2, 2003 decision errs in claiming the applicant is irrelevant to decision.

CONCLUSION

Upon reconsideration, the Board should deny substitution in the absence of full disclosure as required by the Board's rules for a anew application, and by prior precedent in these line construction proceedings.

Respectfully submitted,


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September 22, 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