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September 22, 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

SEP 22 2003

Part of
Public Record

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

Dear Secretary Williams:

Enclosed for filing please find an original and 10 copies of the Reply of Tongue River Railroad Company, Inc. to Appeal of Amended Scoping Notice.

Respectfully,

David H. Coburn
Attorney for Tongue River Railroad
Company, Inc.

Enclosures

WASHINGTON

PHOENIX

LOS ANGELES

LONDON

BRUSSELS

**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, INC. TO APPEAL OF
AMENDED SCOPING NOTICE**

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Attorneys for Applicant
Tongue River Railroad Company, Inc.

September 22, 2003

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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



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

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**REPLY OF TONGUE RIVER RAILROAD COMPANY, INC. TO APPEAL OF
AMENDED SCOPING NOTICE**

Applicant Tongue River Railroad Company, Inc. ("TRR") hereby replies to the September 2, 2003 appeal filed by United Transportation Union-General Committee of Adjustment and United Transportation Union -- Montana State Legislative Board (jointly, "UTU").¹ That appeal challenges certain aspects of the August 22, 2003 Notice served by the Board's Section of Environmental Analysis ("SEA") amending the scope of the Draft Supplemental Environmental Impact Statement ("SEIS") that SEA is preparing in this proceeding. That final Amended Scoping Notice ("August 22 Scoping Notice") revises in certain respects a prior Scoping Notice issued by SEA on February 3, 1999. The August 22 Scoping Notice was issued in response to SEA's March 26, 2003 request for public comments on whether any changes to the scope of the Draft SEIS might be appropriate following the hiatus in this proceeding. Several parties submitted comments that are addressed in the August 22

¹ By decision served in this proceeding ("Tongue River III") on September 2, 2003, the Board granted a petition to substitute Tongue River Railroad Company, Inc. as the applicant in this proceeding.

Scoping Notice. It bears noting that UTU was not among the parties that submitted comments on the scoping issue, and that it has not otherwise participated in the environmental process in this proceeding.

In fact, UTU's "appeal" raises a variety of issues, none of which has anything to do with the substance of the August 22 Scoping Notice or the environmental issues that are being reviewed in this proceeding. As will be shown below, nothing in the UTU filing suggests any basis on which to revise the scope of the Draft SEIS or otherwise modify the August 22 Scoping Notice.²

I. The August 22 Scoping Notice is Not an Appealable Decision

To the extent that it cites any authority, UTU purports to rely on 49 CFR 1011.6(b) as a basis for its appeal of SEA's August 22 Scoping Notice. That section of the Board's regulations does not apply to this matter. Section 1011.6 addresses specific delegations of authority by the Board's Chairman to specific named entities at the Board. SEA's authority to issue scoping notices, or otherwise to address environmental matters, is *not* among the delegated authorities under that section and thus UTU's appeal does not fall under section 1011.6.

Further, the August 22 Scoping Notice arises from an informal environmental process and is interlocutory in nature -- it merely defines the scope of what will be studied in a Draft SEIS on which UTU will be free to comment. Thus, it is not an appealable decision under the

² A Council on Environmental Quality guidance document observes as follows concerning the scoping process: "Scoping is intended to insure that problems are identified early and properly studied, that issues of little significance do not consume time and effort, that the draft EIS is thorough and balanced, and that delays occasioned by an inadequate draft EIS are avoided. The scoping process should identify the public and agency concerns; clearly define the environmental issues and alternatives to be examined in the EIS including the elimination of nonsignificant issues" 48 Fed. Reg. 34263 (July 28, 1983). SEA's August 22 Scoping Notice serves exactly this purpose and should not be disturbed.

Board's Part 1115 appellate rules, which expressly exclude informal matters and interlocutory orders from the scope of those decisions subject to appeal. *See* section 1115.1(a).

Should the Board nonetheless decide to entertain UTU's appeal under Part 1105 of its rules, it should find the appeal to be without merit for the reasons discussed next.

II. The Scoping Notice Does Not Pre-Judge Board Action

UTU alleges that the August 22 Scoping Notice pre-judges Board actions on the merits of this case. That is not correct. The August 22 Scoping Notice is not a Board decision on the merits of this proceeding, and does not purport to be such.

UTU specifically complains that the scoping notice reflects pre-judgment by stating in a footnote at page 2 of the Notice that 49 U.S.C. § 10901(c), as amended by the ICC Termination Act of 1995, creates a presumption that a rail construction project will be approved. By its plain terms, this statute now provides that new rail construction will be authorized "unless the Board finds that the activities are inconsistent with the public convenience and necessity." Such language unquestionably creates a rebuttable presumption favoring approval of rail construction applications, as the Board has previously found. See Class Exemption for the Construction of Connecting Track, 1 S.T.B. 75, 79 (1996) ("there is now a presumption that construction projects will be approved.") SEA thus did not err or pre-judge any issues in so stating in a footnote to its discussion of the background of this proceeding. Moreover, UTU's gripe with SEA's footnote appears to be related to UTU's argument, which that party has raised with the Board previously, that the current version of section 10901(c) somehow does not apply to this proceeding. The Board has already rejected that argument. See Tongue River III (served May 19, 2003) at 5 (noting that the Tongue River III application was filed in 1998, after the current version of

section 10901(c) was already in effect, and thus that section 10901(c) does apply to this proceeding.)

UTU claims that the August 22 Scoping Notice incorrectly reports in another footnote at page 2 of the Notice that petitions for review of the STB's Tongue River II decision are pending in the Ninth Circuit. According to UTU, the Tongue River II decision reopened Tongue River I and therefore Tongue River I is also pending on judicial review. UTU overlooks the fact that the appeal of the Tongue River I decision was dismissed by the Ninth Circuit long ago. See Northern Plains Resource Council v. ICC, 817 F.2d 758 (9th Cir.), *cert denied* 484 US 976 (1987). In any event, the statement in the August 22 Scoping Notice that Tongue River II has been appealed was unquestionably correct.

UTU next takes issue with a statement at page 5 of the August 22 Scoping Notice that, "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." UTU claims that this statement prejudices the Board's review of evidence that may be submitted in opposition to TRR's May 1, 2003 supplemental evidence. That supplemental evidence, however, addresses only the application filed in Tongue River III. The Board has neither reopened the evidentiary records in the prior Tongue River dockets, nor signaled any intention to do so. Moreover, the statement in the August 22 Scoping Notice tracks a similar expression by SEA in its February 3, 1999 Scoping Notice at page 2 ("the Board does not intend to reopen the merits of the authority granted in these proceedings," referring to Tongue River I and Tongue River II.) UTU did not challenge that prior statement.

III. There is no Defect in SEA's Plan to Serve the Draft SEIS

UTU argues that SEA should serve a copy of its Draft SEIS on parties to Tongue River II, as well as Tongue River III. TRR believes that the Board, through the July 7, 2003 decision issued by its Secretary, allowing interested persons not now parties of record in Tongue River III to become parties of record, has provided for appropriate updating of the Tongue River III service list. Indeed, by providing an open-ended opportunity for interested persons to become parties of record, the Board's July 7 decision did exactly what UTU requested (at page 3) in its May 14, 2003 Preliminary Response to Supplemental Evidence.

Further, TRR is confident that, consistent with its practice, SEA will be vigilant in ensuring widespread distribution of the Draft SEIS to all persons who have expressed a continued interest in this proceeding, regardless of whether they are identified as parties of record on the Tongue River III service list. In addition, the August 22 Scoping Notice reports at page 6 that a notice of the availability of the Draft SEIS will be published in the Federal Register.

TRR urges the Board to issue the updated service list contemplated by the Secretary's July 7 decision. Doing so will trigger the clock for the filing of any evidence responsive to the May 1 supplemental evidence filed by the applicant in this proceeding. At this stage, any parties wishing to file responses to the supplemental evidence have had more than ample time, over four and one-half months, to prepare such evidence.³

³ The Board should also move forward to dispose of the meritless July 15, 2003 appeal that UTU filed, and in which the Northern Plains Resource Council joined, to the Secretary's July 7 decision. A reply in opposition to that appeal was filed on July 23.

IV. The Environmental Aspect of This Proceeding Should Not be “Recalled” From SEA

Reflecting its general hostility to the appropriately informal nature of the environmental review process, UTU urges that the environmental process “be handled by a Board member in the first instance.” In support of this odd and unprecedented proposition, UTU points to the alleged deficiencies in the August 22 Scoping Notice, which as shown above are in fact not deficiencies at all. UTU also alleges that the public has been precluded from participating in important matters, citing a December 19, 2002 meeting attended by TRRC and SEA personnel. However, UTU has shown no basis on which it or other members of the public were entitled to attend this meeting on environmental matters. Open communications between an applicant and SEA’s staff concerning environmental matters are essential for the NEPA process to work efficiently toward the issuance of a draft environmental document, on which UTU and others will have a full opportunity to comment. Moreover, UTU’s proposal would confuse the merits side of this proceeding with the environmental side, undermining the appropriately bifurcated nature of Board’s processes and overlooking that the Board remains the final decisionmaker with respect to both the merits and environmental issues in the proceeding. See Tongue River III, served May 19, 2003 at 4-5 (discussing the bifurcated process.)⁴

⁴ The one case that UTU cites in support of its proposition that a Board member may assume control over environmental matters in lieu of the Board’s environmental staff does not stand for that proposition. See Investigation of Railroad Rate Structure, 345 I.C.C. 1 (1973), which concerned a rate proceeding in which a single Commissioner was appointed to issue initial and status reports. That case, it bears noting, was decided prior to the enactment of rail regulatory reform legislation (i.e., the 4R Act and the Staggers Act), as well as prior to the adoption of the Board’s current rules at 49 C.F.R. Part 1105 establishing procedures for implementing environmental laws and delegating initial responsibility for such implementation to the Board’s staff.

CONCLUSION

For all of the above reasons, UTU's Appeal should be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David H. Coburn", with a long horizontal flourish extending to the right.

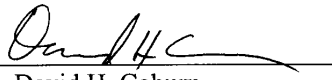
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Attorneys for Applicant
Tongue River Railroad Company, Inc.

September 22, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of September, 2003, I have caused a copy of the foregoing "Reply of Tongue River Railroad Company, Inc. to Appeal of Amended Scoping Notice" 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