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BEFORE THE SURFACE TRANSPORTATION BOARD
OF THE UNITED STATES OF AMERICA

209337

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

TONGUE RIVER RAILROAD COMPANY -- RAIL CONSTRUCTION
AND OPERATION - IN ROSEBUD AND BIG HORN COUNTIES, MONTANA

**NORTHERN PLAINS RESOURCE COUNCIL INC.'S
BRIEF IN OPPOSITION TO TONGUE RIVER RAILROAD'S MOTION FOR
PROTECTIVE ORDER**

Northern Plains has filed a Notice of Deposition for Mike T. Gustafson, the long-time head of the various business entities that have sought to build the Tongue River Railroad (TRR) for the last twenty three years. Northern Plains seeks to depose Mr. Gustafson regarding matters contained in his declaration and associated supplemental evidence filed in May, 2003. The supplemental evidence addresses coal tonnage forecasts, the financial structure of the rail line, power demand and other matters that go to the heart of the Surface Transportation Board's (Board's) consideration of the statutory criteria at 49 U.S.C. 10901 to

grant or deny the application. TRR seeks to quash the notice and deny Northern Plains and the Board the opportunity to consider Gustafson's testimony.¹ TRR admits that the deposition information is likely relevant; thus the only question for the Board to decide is whether the deposition is timely and therefore prejudicial. It is not.

TRR's *Motion to Quash* misses the mark for two reasons. First, TRR has failed to *demonstrate that it will be prejudiced* by this deposition. TRR itself acknowledges that this deposition is indeed relevant because it admits that it would not have objected to the deposition it had been noticed earlier. So relevance is not grounds for quashing the notice. This case has been on-going for five years. The Board has *determined* that it will not decide the issue of whether the proposed rail line meets the *statutory criteria until after the Environmental Impact Statement is completed*; that process is just in the *scoping stage*. This proceeding will be on-going for many months or years, and will not be delayed by taking a single deposition. Second, TRR confuses the issue of whether the deposition is *ultimately admissible to the record*, with the issue of whether Mr. Gustafson should be *deposed at all*. TRR argues that the deposition is not timely, coming one day before Northern Plains' reply to TRR's *supplemental evidence* is due. The deposition notice dated October 31, 2003 is timely because the *final determination* of all parties of record was not made until October 24, 2003. *Whether or not* the transcript of the deposition is admitted into evidence, now, at a later date, or even at all, is not now before the Board. It will be Northern Plains' burden, to submit the deposition into evidence if it indeed chooses to do so. But just because TRR may have grounds to object to

¹TRR filed its Motion on November 5. On the copy faxed to Northern Plains, no indication was provided that it served the Motion on the other parties of record.

the admissibility of the deposition in the future, does not mean the deposition cannot proceed under the liberal rules of discovery embodied in our civil justice system and adopted by the Board.

ARGUMENT

A. Northern Plains' Notice of Deposition is Not Untimely.

TRR makes much ado about the fact that this deposition is set for November 11, 2003, and that Northern Plains' response to the supplemental evidence is due November 12, 2003. TRR argues that the deposition should have been taken months ago since its supplemental evidence was filed in May, 2003. Motion to Quash at Pgs. 2-3. TRR argues that Northern Plains has had six months to take the deposition. That assertion is incorrect.

Northern Plains could not have properly noticed this deposition until October 24, 2003, as that is the date that the Board finally determined the proper parties of record in this case. See Order of October 24, 2003. The preliminary determination of the parties of record did not even occur until October 3rd. It is axiomatic, under the Rules of Civil Procedure, and adopted in material part by the Board, that all parties must be given notice and the opportunity to participate in a deposition. See Fed. R. Civ Proc. 30(b)(1) ("A party desiring to take the deposition...shall give reasonable notice to every other party in the action." See also 49 C.F.R. 1114.22(b)(1) ("A party requesting to take a deposition...should notify all parties to the proceedings...").

Northern Plains filed its Notice of Deposition on October 31, 2003. The Notice was sent via overnight courier to Mr. Gustafson's attorneys. Serving said notice of deposition

seven days after the service list for parties of record in this case became final cannot be construed as an untimely filing. Northern Plains would have violated the Rules of Civil Procedure and the Board's rules had it served the Notice before the list of parties was finalized. That did not occur initially until October 3, 2003, when the service list was first published, and was not finalized until October 24, 2003. For Northern Plains to have noticed the deposition prior to the final determination of the parties in this case, would have prejudiced those persons who were not officially listed as parties of record, but later desired to participate in the proceedings. That is precisely the result Northern Plains desired to avoid. Had the deposition occurred during the summer of 2003, TRR could have objected to its admissibility that all parties were not given the opportunity to participate in the proceedings.

B. Tongue River Railroad Will Not be Prejudiced by the Deposition.

TRR fails to provide convincing evidence that it would be prejudiced by a sole deposition. Mr. Gustafson has been at the center of TRR since its inception. His second declaration, that he filed as Supplemental Evidence, is rife with sweeping generalizations. The Board and the public are entitled to understand the basis for his statements. Taking a deposition cannot be prejudicial on its face, given that it is provided for by the Board's rules. 49 C.F.R. 1114.22 ("The testimony of any person, including a party, may be taken by deposition upon oral examination."). Nor can the deposition be considered prejudicial to TRR because it is irrelevant. TRR states that it would "not objected to a timely Notice of Deposition for Mr. Gustafson's testimony." TRR Motion to Quash at p. 3 n 2.

Thus the only real issue here is whether TRR is prejudiced because the deposition is

untimely. As explained above, Northern Plains believes that to take a valid deposition wherein all parties could attend, a final designation of the parties of record had to occur, and that did not happen until October, 24th 2003.² The Notice was filed 7 days later.

Because a final decision on the merits is not expected for months, or years, no delay will occur from the deposition. TRR itself further delayed these proceedings for two years on its own accord. No hearing or oral argument is pending. In fact a draft EIS has not even been prepared. TRR itself delayed the proceedings by filing its supplemental evidence in the first place. Northern Plains has not asked for an extension of the November 12, 2003 comment deadline. Taking Mr. Gustafson's deposition will delay nothing.

These distinguish the case relied upon by TRR. In Illinois Central et al, Finance Docket 33877 Sub-No. 1, the Board quashed a deposition notice. However the party serving the notice could not reasonably assert that it did not possess the very knowledge that it sought to gain through discovery. Id., 2001 STB Lexis 887 at * 5-6. (Decision served November 20, 2001). Here by contrast Northern Plains has no access to the information contained in Gustafson's declaration. Examining the statements in the Gustafson declaration, the Board will see that he makes numerous statements regarding the demand for this railroad and its financial health (despite the fact that he has not built the segments already permitted for 20 years) that can only be tested through discovery. Further, in that case the Board found prejudicial delay in the schedule because "we anticipate concluding the environmental review process in the near future and issuing a final decision in the construction case." Id. *6. Here the environmental

²The amended service list should have prompted a new 45 day comment period on the supplemental evidence.

review is many, many months from completion. This deposition cannot possibly delay or prejudice TRR. The plain text of the Board's discovery rules permit the deposition to occur.

C. Whether the Deposition is ultimately admitted into Evidence is Not Now Before the Board.

TRR argues at length that the deposition cannot possibly be admitted into evidence. Therefore, the deposition should not occur. However the admissibility of the deposition is not now before the Board, and thus that question does not warrant resolution at this time.

First, Northern Plains disagrees with the proposition that the deposition can never be admitted into evidence. As TRR well knows, any party can seek to add supplemental evidence at any time. TRR itself filed a number of documents as supplemental evidence, triggering this very dispute. The Board's rules acknowledge the concept of supplemental evidence, even after a hearing. See 49 C.F.R. 1113.13; 1117.1.

Whether Northern Plains seeks to introduce the transcript into evidence is of no consequence at the present time. Northern Plains may use the testimony in-house to verify the comments that it has already prepare. The testimony may raise new issues to be addressed in its comments on the supplemental evidence. Northern Plains may decide that the deposition doesn't add anything to the record. Or, Northern Plains may seek to add the deposition to the record. If Northern Plains does submit the deposition into evidence, TRR will have every opportunity to object, and present whatever arguments it desires. Those arguments are currently premature and should not control the Board's determination on the motion to quash.

C. The Memorandum filed with the Notice was a Courtesy to Counsel.

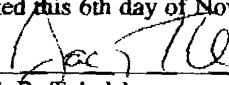
TRR suggests that a Memorandum that accompanied the Notice constitutes some type

of admission that the deposition is improper, or that Northern Plains has sinister motives in seeking discovery. Motion to Quash at pp. 4-5. The Memorandum was simply a routine courtesy to counsel inviting an alternative, more convenient date if the parties would stipulate that a change in the notice would not prejudice use of the deposition. The undersigned usually provides the same in all civil depositions, recognizing that travel schedules in other matters may necessitate rescheduling the deposition. TRR's attempt to use it to discredit Northern Plains motive for seeking the deposition is incorrect.

CONCLUSION

Based on the foregoing, Northern Plains requests that the Motion to Quash be denied, and that Mr. Gustafson appear in Billings Montana on November 11, 2003.³

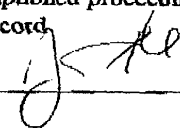
Dated this 6th day of November, 2003.



Jack R. Fuholske
Attorney for Northern Plains Resource Council Inc.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was mailed to all parties of record in the above-captioned proceeding via first class mail on November 6, 2003, and faxed to TRR's counsel of record.



"TRR claims that Mr. Gustafson is "not available." No verified statement or even a simple explanation is provided to support such a statement, and Northern Plains will not reschedule the deposition based on counsel's unsubstantiated assertion.

Northern Plains' Reply to Petition