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Jack R. Tuholske
Sarah K. McMillan
TUHOLSKE LAW OFFICE P.C.
Attorney at Law
P.O. Box 7548
Missoula MT 59807
406-721-6986
Attorneys for Northern Plains Resource Council Inc.



**BEFORE THE SURFACE TRANSPORTATION BOARD
OF THE UNITED STATES OF AMERICA**

ENTERED
Office of Proceedings

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

Part of
Public Record

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

**NORTHERN PLAINS' RESOURCE COUNCIL'S BRIEF IN OPPOSITION TO
MOTION FOR A PROTECTIVE ORDER**

This matter arises from the application of the Tongue River Railroad Company (TRR) to construct a new rail line in southeastern Montana. The instant case, part of the unsuccessful two-decades long effort to build this rail line, was filed in 1998 but lay dormant for years. TRR moved the proceedings ahead in the spring of 2003 by filing Supplemental Evidence allegedly showing fresh interest in the prospects for the rail line. The Surface Transportation Board (Board) then revised the service list,¹ triggering the response time for parties of record to file

¹The service list was published on October 3, 2003 triggering a 45 day comment period. The service list was again revised on October 24, though the Board did not extend the comment period for the additional parties. Contrary to the Board's November 10, 2003 Order, at least three of the parties that were not added to the Service list until October 24th have requested an extension of time to file comments. The Board has not acted on that request.

their comments. On October 31, 2003, Northern Plains served a notice of deposition for Mike Gustafson, the chief proponent of the TRR. Gustafson moved to quash the deposition. The Board denied the motion by a Decision issued November 10, 2003.

Gustafson failed to appear at the deposition on November 11, 2003, claiming that he could not attend, though he failed to file any sworn testimony explaining his inability to attend. Northern Plains was thus deprived of the option of using the deposition testimony in its supplemental comments, which were filed on November 12th as required. The deposition is now scheduled for November 19, 2003, and Northern Plains may file the testimony if it is relevant and useful to the Board's resolution of the issues at bar.

TRR has moved for a broad protective order, giving it the right to subjectively label certain information as "Confidential" or "Highly Confidential" and thereby limit its availability. The Protective Order sought by TRR would give Mr. Gustafson the right to designate any information he feels may be confidential and thereby restrict the public from access to the information. He alone could make that determination, without any standard to follow, and without an independent party to verify that the information is truly confidential. Northern Plains is a public interest non-profit with members throughout Montana that have an interest in these proceedings. Northern Plains should not be unduly restricted from communicating with its members about the TRR, Northern Plains opposes the motion for the reasons set forth below. Northern Plains recognizes that there may be a legitimate need to protect sensitive and valuable business information - for example projected shipping rate charges, or innovative rail service operations - through a protective order. However, TRR has proposed that it have *carte blanche* authority to protect any portion of the deposition that it desires, and keep the public from gaining

information that may be important to determine whether the public need and convenience is served by this rail line.

First, Northern Plains asks the Board to bear in mind that this is an application for new construction, which makes this proceeding fundamentally different from rate proceedings and similar cases involving on-going, competitive rail lines. Those proceedings involve two business entities, often already in direct competition, with the public generally not party to such proceedings. By contrast here the Board must determine whether granting the TRR's application is in the public necessity and convenience. 49 U.S.C. 10901. That determination must be made in the public interest. Keeping information from the public via a broad protective order will not promote the statutory objective of making a determination in the public interest for new construction.

Northern Plains notes that the Board grants protective orders related to financial information pertaining to on-going competitive railroads on trackage rights issues. *See e.g. 2003 STB LEXIS 477, UNION PACIFIC RAILROAD COMPANY--TRACAGE RIGHTS EXEMPTION--OMAHA PUBLIC POWER DISTRICT*, STB Finance Docket No. 34388, (Decision served August 14, 2003). The Board also routinely grants protective orders in rate cases. *2003 STB LEXIS 539, AEP TEXAS NORTH COMPANY v. THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY*, Docket No. 41191 (Sub-No. 1) (Decision served September 11, 2003) ("Good cause exists to grant the motion for protective order. The unrestricted disclosure of confidential, proprietary, or commercially sensitive material could cause serious competitive injury."). But rate and trackage cases are fundamentally different from the proceeding herein. They involve on-going competitive businesses that deserve to have their

proprietary business information shielded from its competitors.

The instant case is different. TRR is not an on-going concern and competes with no one. The Board should not reflexively grant the same type of protective order used in rate cases in the present case, given that TRR has made no showing that Gustafson may have to reveal trade secrets or valuable business information during the deposition.

Granting the broad protective order sought by TRR will infringe upon Northern Plains First Amendment rights of free speech, free association and right to petition for redress of grievances. Northern Plains is a non-profit, public-interest, membership organization. It has been involved in TRR proceedings for over two decades. One of Northern Plains' primary functions is to educate its members about matters of concern such as the TRR. The TRR will affect Northern Plains members in many ways - some face condemnation of their ranches, others have jobs that may be affected by the completion of the "Western Alignment" at issue here, still others oppose the railroad because they believe that it is a waste of resources and the societal costs outweigh the benefits. Northern Plains must be able to provide its members with timely information about the TRR so that its members can participate in the public process in an informed way.

A broad protective order sought by Mr. Gustafson will allow him to insulate his statements from the political process. This proceeding does not exist in a political vacuum. Gustafson has sought and received letters of support from political leaders in Montana that he has courted. See e.g. *Supplemental Evidence Appendix B* (letters from Governor Martz and Congressman Rehberg). Gustafson has been free to provide these political officials with whatever information he chooses. Neither Northern Plains, nor the Board has any control over

that flow of information Yet if the protective order is granted, Northern Plains will not be able to share **any** information that Gustafson deems confidential (again with no standard or control to measure his determination) with its members to allow them to influence the political process. The TRR is an issue of enormous political importance to Montana, especially in relationship to Montana's recently acquired state owned coal lands at Otter Creek. *See e.g. Gustafson Supplemental Declaration at p. 8* ("The Governor notes the importance of the Tongue River Railroad as an essential transportation feature necessary for the state to recognize the economic potential offered by the State's ownership of the Otter Creek coal assets."). The public is entitled to a robust debate on these issues, not a one-sided version of the facts. That debate will be smothered if the Board issues TRR's overly-broad protective order. Gustafson can simply designate any disagreeable statements as confidential, thereby precluding their dissemination.

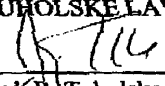
Gustafson makes many sweeping claims in his Supplemental Declaration about TRR's financial structure, (*Supplemental Declaration at p. 2*) its construction costs, tonnage and traffic projections (*Supplemental Declaration at pp. 3-4*) and the tracts of coal land recently acquired by the State of Montana at Otter Creek (*Supplemental Declaration at pp. 6-7*). Northern Plains fears that if the protective order is granted as requested, Gustafson will designate all of these areas of inquiry as "confidential" thereby preventing Northern Plains from telling its members about the sworn statements that Gustafson makes during his deposition. The chilling effect of limiting the flow of information to the public (again, without any actual showing that it may impact TRR's trade secrets or confidential business information) contravenes the First Amendment, in a proceeding that must by statute make a determination first and foremost in the public interest.

CONCLUSION AND REQUEST FOR RELIEF

The protective order sought by TRR should be denied without prejudice. TRR is entitled to seek a protective order for specific information revealed in Mr. Gustafson's deposition that it believes constitutes trade secrets or confidential business information. In the event that TRR believes specific confidential information is revealed TRR may seek a protective order from the Board.

Dated this 17 day of November, 2003.

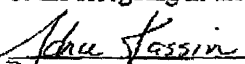
TUHOLSKE LAW OFFICE P.C.


Jack R. Tuholske

Attorney for Northern Plains

CERTIFICATE OF SERVICE

I hereby certify that on the 17 day of November, 2003, I deposited a true and correct copy of the foregoing in the United States mail, postage prepaid, to all parties of record.


Adria Kasson