

SERVICE DATE - OCTOBER 21, 2004

SURFACE TRANSPORTATION BOARD

DECISION

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

TONGUE RIVER RAILROAD COMPANY, INC.–CONSTRUCTION
AND OPERATION–WESTERN ALIGNMENT

Decided: October 20, 2004

By petition jointly filed on September 22, 2003, in this sub-numbered proceeding (Tongue River III), the United Transportation Union-General Committee of Adjustment and the United Transportation Union-Montana State Legislative Board (UTU-GCA/MT or petitioners) asked the Board to reconsider its decision served September 2, 2003. In that decision, the Board granted a petition jointly filed by Tongue River Railroad Company (TRRC Partnership) and Tongue River Railroad Company, Inc. (TRRC Inc.) asking the Board to substitute TRRC Inc. for TRRC Partnership as the applicant for authority to construct and operate the so-called Western Alignment rail line between Ashland and Decker, MT. UTU-GCA/MT's petition will be denied.

BACKGROUND

An extensive description of the background of this proceeding is set forth in two prior Board decisions,¹ and it need not be repeated in detail. It is sufficient to note that TRRC Partnership was previously authorized to construct 89 miles of rail line between Miles City and Ashland, MT,² and to construct a contiguous 41-mile line from Ashland to Decker, MT.³ The Tongue River III proceeding now before the Board involves a request originally filed by TRRC Partnership for authority to construct and operate a 17.3-mile rail line over an alternate route (the Western Alignment) to the route the Board previously approved (the Four Mile Creek Alternative) in Tongue River II for the southernmost portion of the Ashland to Decker line.

¹ See the decisions served on March 11, 2003, and May 19, 2003, in this sub-numbered proceeding.

² See Tongue River R.R.–Construction and Operation–In Custer, Powder River and Rosebud Counties, MT, Finance Docket No. 30186 (ICC served Sept. 4, 1985), modified (ICC served May 9, 1986) (Tongue River I).

³ See Tongue River Railroad Company–Rail Construction and Operation–Ashland to Decker, Montana, Finance Docket No. 30186 (Sub-No. 2) (STB served Nov. 8, 1996) (Tongue River II).

TRRC Partnership filed the Tongue River III application on April 27, 1998. Some four months later TRRC Inc. filed a notice of exemption under 49 CFR 1150.31 from the provisions of 49 U.S.C. 10901 to acquire TRRC Partnership's transportation assets.⁴ The notice of exemption was served and published in the Federal Register (63 FR 54186) on October 8, 1998.⁵ Pursuant to that exemption, on January 1, 1999, TRRC Inc. acquired the transportation assets of TRRC Partnership, which consisted of the permits previously issued by the Interstate Commerce Commission and Board for the construction and operation of a new rail line between Miles City and Decker, MT.

On May 1, 2003, TRRC Partnership and TRRC Inc. jointly filed a petition asking the Board to substitute TRRC Inc. for TRRC Partnership as the applicant in the Tongue River III proceeding.⁶ The Board granted the petition in a decision served September 2, 2003. UTU-GCA/MT filed the instant petition for reconsideration of that decision on September 22, 2003, and TRRC Inc. replied on October 10, 2003.

DISCUSSION AND CONCLUSIONS

UTU-GCA/MT asks the Board to reconsider its decision to substitute TRRC Inc. for TRRC Partnership in this proceeding, primarily alleging that there is insufficient data in the record to satisfy the Board's regulations (49 CFR 1150.1 et seq.). Petitioner, in many respects, is merely reiterating arguments the Board considered and rejected in the September 2, 2003 decision under appeal here, and the Board has previously determined that the information presently before it complies with the Board's regulations. Nothing in UTU-GCA/MT's reconsideration petition convinces us otherwise.

⁴ Tongue River Railroad Company, Inc.—Acq. and Op. Exemption—Tongue River Railroad Company, STB Finance Docket No. 33644, filed September 18, 1998 (Acq. and Op. Ex.). The purpose of this transaction was to convert the entity that will construct and operate the Tongue River Railroad from a partnership to a corporation, thereby facilitating certain transactions that will need to be undertaken to exercise the construction and operation authority previously granted in Tongue River I and Tongue River II.

⁵ In the instant petition, UTU-GCA/MT maintains that the prior transfer of TRRC Partnership's railroad certificates could not be properly authorized by the Board under the noncarrier class exemption rules. This issue was already fully addressed when the Board denied petitions to reject, revoke, and stay the notice of exemption in a decision served November 13, 1998, in Acq. and Op. Ex.

⁶ Pursuant to a Board order served March 11, 2003, authorizing it to do so, TRRC Partnership at the same time filed supplemental, updated evidence in support of the Tongue River III construction application.

UTU-GCA/MT claims that there is insufficient data concerning TRRC Inc.'s ownership structure and affiliation with industries to be served by the line. The petitioner also argues that the Board lacks sufficient information concerning Railco, LLC (Railco), a general partner of the entity that controls both TRRC Partnership and TRRC Inc.

These arguments are groundless. Information as to TRRC Partnership's organizational structure and affiliations with industries to be served by the line was provided in the original application filed in the Tongue River III proceeding. This information was updated in TRRC Partnership's supplemental May 1, 2003 filing, which also included information about the ownership structure of closely related TRRC Inc. Because TRRC Partnership and TRRC Inc. are under the same ownership umbrella, the Board has information concerning TRRC Inc.'s affiliation with industries to be served by the line by virtue of having this information from TRRC Partnership. The Board continues to believe that the information currently in the record concerning TRRC Inc. is adequate for the agency's regulatory purposes.

Further, petitioners have not explained why the involvement of Railco requires additional information from TRRC Inc. Even if more information were provided about Railco, it is hard to imagine how the data would be useful to this proceeding. Railco is not the applicant here; it is merely replacing the Pittsburgh and Midway Coal Mining Co. as a general partner in the overall ownership structure of TRRC Inc. The replacement of an entity so far-removed from the actual applicant is unlikely to have any bearing on the Board's ultimate decision on the construction of the proposed route. Nor will it have any impact upon the substitution of parties at issue in the decision under appeal here. The changes at the general partnership level took place prior to the substitution-of-parties request, did not require regulatory approval, and were not germane to the substitution request or to the Board's prior approval of the transfer of assets from TRRC Partnership to TRRC Inc. Additional information regarding Railco does not appear to be necessary.

UTU-GCA/MT has not demonstrated with any specificity why the Board would need the further information petitioner believes is lacking here. However, should UTU-GCA/MT provide the Board with a specific list of the information that the Board's rules require an applicant to submit but that is lacking here, the Board will consider requiring the submission of that information. Furthermore, if UTU-GCA/MT can show that the involvement of Railco affects the Board's consideration of the construction of the proposed alternate route, we can require any necessary additional information when needed.

UTU-GCA/MT also disputes any notion that the only change that will take place between TRRC Inc.'s current corporate structure and the ownership and structure of TRRC Partnership as set forth in Tongue River I in 1986 is that the entity applying for authority will be a corporation rather than a partnership. However, contrary to petitioners' suggestion, the Board did not state that the only change that would take place was the substitution of a corporation for a partnership. Rather, what the Board stated on page 3 of the September 2 decision is that "[t]he only change

that will take place if the petition at issue is granted is that the entity applying for the construction and operating authority over the Western Alignment will be a corporation rather than a partnership” (emphasis added). The Board was not commenting on the evolution of the Tongue River entities over the last 18 years. Rather, it was merely recognizing the limited scope of the petition for substitution filed by TRRC Partnership and TRRC Inc.

Finally, UTU-GCA/MT disputes the Board’s statement that the substitution of parties has no bearing on the analysis of the Tongue River III application. According to petitioners, the applicant’s financial fitness⁷ is affected by whether the entity is organized as a corporation or a partnership. This argument lacks merit. A Board finding that a carrier is “financially fit” basically turns on whether the carrier has sufficient funds to service its debt, to construct the line, and to sustain operations. See Tongue River II, slip. op at 14. Whether the carrier is organized as a partnership or a corporation has little or no bearing on determining if the applicant has sufficient funds. Furthermore, the Tongue River III application sets out data about the financing of the project, and the May 1, 2003 supplemental submission includes updated income and cash flow data. UTU-GCA/MT has pointed to nothing in these submissions that suggests that the applicant’s business organization has any impact whatsoever on these financial data or applicant’s financial fitness.

Although we are denying UTU-GCA/MT’s petition here, it would nonetheless be helpful, due to the complexities of this case, for TRRC Inc. to provide to the Board a current chart diagramming the entities which control the applicant. TRRC Inc. should also submit a chart laying out the relationship, if any, between TRRC Inc. and its controlling entities with industries to be served by the line. Requiring the submission of these charts will help clarify an extensive record that now spans many years, and is consistent with a prior decision served in this proceeding on March 11, 2003. There, the Board ordered that TRRC Partnership file supplemental, updated information in support of the Tongue River III construction application because that application had lain fallow for an extended period.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

⁷ Under 49 U.S.C. 10901, the Board must issue a certificate authorizing rail construction if the proposed line will not be inconsistent with public convenience and necessity. The transportation issues that are raised in rail entry cases include: (1) whether the applicant is fit, financially and otherwise, to undertake the construction and provide rail service; (2) whether there is a public demand or need for the service; and (3) whether the competition would be harmful to existing carriers. See Tongue River Railroad Co.–Construction and Operation–Western Alignment, STB Finance Docket No. 30186 (Sub-No. 3) (STB served Mar. 11, 2003).

It is ordered:

1. The petition for reconsideration filed by UTU-GCA/MT is denied.
2. TRRC Inc. is ordered to submit the information described above.
3. This decision is effective on its service date.

By the Board, Chairman Nober, Vice Chairman Mulvey, and Commissioner Buttrey.

Vernon A. Williams
Secretary