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Before the

SURFACE TRANSPORTATION BOARD

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

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

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ENVIRONMENTAL COMMENTS

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GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036

Attorney for United Transportation Union, General Committee of Adjustment on The Burlington Northern and Santa Fe Railway Company, and Montana State Legislative Board.

Due Date: December 6, 2004

Before the

SURFACE TRANSPORTATION BOARD

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

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

ENVIRONMENTAL COMMENTS

Preliminary Statement

Protestants, United Transportation Union-General Committee of Adjustment (UTU/GO-386),[1/] and United Transportation Union-Montana State Legislative Board (UTU-MT), jointly submit these comments in response to the Draft Supplemental Environmental Impact Statement (DSEIS), issued October 15, 2004, in this proceeding.

Protestants are opposed to this unnecessary, uneconomical, and environmentally unsound transportation project, which has been under consideration now for 25 years. The construction of an additional rail line in this area would not be in the best interest of the public, or of railroad employees.

1. Character of STB. The DSEIS would accord the Surface Transportation Board (STB) with judge-like status in determining

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1/ By John D. Fitzgerald, General Chairman, with offices at 400 East Evergreen Boulevard, Vancouver, WA 98660.

environmental matters as the "lead agency in this proceeding." (DSEIS, 1-1);

> The Board is an independent adjudicatory (fn.2, an adjudicatory body is one that acts as a judge, and settles matters judicially.) body that is administratively housed within the U.S. Department of Transportation (USDOT).

In actual fact, the STB has no such judge-like or Olympian status, and does not act here in an adjudicative role. In the instant proceeding the agency acts in a legislative capacity as an arm of the Congress under the Commerce Clause, and does not perform a judicial function. The STB, and its predecessor, the former Interstate Commerce Commission (ICC),[2/] have certain legislative and judicial functions, as with a number of other independent federal agencies. The distinction between legislative and judicial agency functions is largely between future and past actions. A standard textbook by a former ICC Examiner points to the differences. Shinn, Glen L., Reasonable Freight Rates, 6 (Traffic Service Corp., 1952):

> When the Commission prescribes reasonable rates or reasonable rate limits for the future, it performs a quasi legislative function; and when the Commission finds that the rates charged on past shipments were unreasonable and awards reparations against the railroads, it performs a quasi judicial function.

It appears that the U.S. Govt. Manual for a time neglected to even list the STB, a small agency; however, it appears that

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2/ The ICC was abolished in 1995, and discredited, following continued and widespread consumer and Congressional revolt, against perceived favoritism by the ICC for the motor carrier industry in rate matters. See: ICC Termination Act, 109 Stat. 803 (Dec. 29, 1995).

the STB became successful in being listed, with the Manual transmitting the agency's view of itself. See: U.S. Govt. Manual/2004-2005, 333 (Office of the Federal Register, 2004). Unfortunately, that view is not reality. The STB in passing upon the Tongue River railroad construction project is performing a legislative function, and the agency is to be dealt with accordingly.[3/]

2. Status of Review Proceedings. The DSEIS claims that Tongue River I and Tongue River II, are both administratively final, and that no judicial review proceeding is pending for Tongue River I. (DSEIS, 1-3, 1-8). In actual fact, admittedly the STB's SEA has undertaken a "limited reexamination" of the EIS in Tongue River I and Tongue River II. (DSEIS, 1-14). Further, the pending court proceedings involving Tongue River II, embrace aspects of earlier proceedings. See: Three-page attachment hereto. (Atta. A).

3. Presumption of Approval. The DSEIS states that due to ICC Termination Act of 1995, "there is now a presumption that rail construction is to be approved," citing the recently-decided DM&E court case. Mid States Coal. Progress v. STB, 345 F.3d 520, 552 (8th Cir. 2003). (DSEIS, 1-18). We understand the "presumption" claim was raised in the STB's court brief but not challenged. The term "presumption" can mean the burden of coming forth with evidence is upon opponents to the project, or it can

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3/ We add that the public hearings held November 16 and 17, 2004, were not conducted by either STB members appointed by the President and confirmed by the Senate, or from personnel appointed as Administrative Law Judges.

merely mean the burden of persuasion is with the opponents, such that the project will be approved if the evidence is evenly-balanced (50%-50%).

The STB's "presumption" claim stems from a gratuitous statement made in its rulemaking proceeding involving connecting track, where the STB granted a class exemption for the construction of connecting track, but denied an exemption for all other construction projects. No public comments were solicited concerning the 1995 amendment to 49 U.S.C. §10901(c). Only the simple sentence appears, Class Exem. for the Construction of Connecting Track, 1 S.T.B. 75, 79 (1996):

> Thus, there is now a presumption that construction projects will be approved.

The STB in its final DM&E decision, said the "presumption" is merely that "construction proposals are to be given the benefit of the doubt..." (emphasis supp.), which would confirm a preponderance of the evidence test, rather than a more burdensome presumption. Dakota, Minnesota & Eastern Railroad Corporation Construction into the Powder River Basin, 32-33 n.81 (served Jan. 28, 2002).

4. Statutory Standard. We do not believe the revised 49 U.S.C. §10901(c), enacted in late-1995, is applicable to this proceeding. The 4-Mile Creek Alternative in Tongue River II was subject to the pre-1996 statutory provisions of §10901(c), by the savings clause of ICC Termination Act of 1995.(ICCTA).

Applicant concluded not to defend the STB's authorization, and sought reopening at the STB so as to file its Western Alignment, which would modify a portion of the line approved in Tongue

River II. The STB denied reopening, but assigned the modification a new docket number (Sub-No. 3), Tongue River III. Contrary to the DSEIS, this should not serve to remove a portion of the Tongue River II modification, (now Tongue River III), from the ICCTA savings clause.[4/] Thus, the current Tongue River III should be governed by the ICCTA pre-1966 savings clause in all respects, without the so-called "presumption" for approval.[5/]

5. STB Decision Following SEA Review. The DSEIS states the STB will issue a decision under 49 U.S.C. 10901, addressing both transportation and environmental issues,[6/] following SEA review of the DSEIS. Apparently, the FSEIS will be issued prior to the STB's decision. (DSEIS, 2, xx, 1-3/1-4).

The DSEIS appears to imply the STB will move directly from FSEIS to agency decision. We do not believe the STB's hands should be tied by premature statements by the SEA on this score.

We believe the STB should not preclude requests for further evidence or pleadings concerning so-called "transportation issues," following issuance of FSEIS, and prior to final STB decision on the statutory standards. For example, the STB on March 11, 2003, stated the record on transportation matters was

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4/ Of course, we have made this argument in earlier stages of this proceeding. For example, see: UTU Pet. for Reconsid., 3/31/03, 10-11.

5/ We have made this argument before. For example, see: UTU Pet. for Reconsid., 3/31/03, 10-11 & fn. 19-11.

6/ We consider the division of the case between "environmental" and "transportation" aspects of the project to be inappropriate, particularly since many of the same factors relate to both; for example, efficiency and economical operations are both environmental and transportation related.

completed on November 2, 1998, yet the record remains inconclusive with respect to The Burlington Northern and Santa Fe Railway Company (BNSF). (Decision, 3/11/03, 5 n.8).

6. Air Quality-DM&E Remand. We had anticipated issuance by the STB of its procedures to comply with the Court's remand in the DM&E case would be effected prior to the submission of environmental comments in the instant Tongue River III. Unfortunately, such guidance is not available. This requires commentors to guess at standards the agency may already have arrived at, yet has not released, for the instant Tongue River III proceeding..

7. Updated Train Movements. The DSEIS mentions railroad traffic movements and forecasts from TRRC, presented by TRRC in its "transportation-related" submission, but not that from railroad employees. (DSEIS, 2-4, 2-6, 4-139, 4-180). Accordingly, Attachment B hereto is the UTU's November 12, 2003 Supplemental Comments & Evidence in Opposition, consisting of cover plus 18 pages.

8. Overall View. The required environmental analysis should embrace the entire project--from Miles City to Decker--and not with each of the three components separately. Moreover, a necessary review must include the impacts upon the existing BNSF line from which traffic is to be diverted, for the proposed Tongue River construction primarily is for so-called "bridge" traffic, connecting two BNSF points, already adequately served by BNSF.

Respectfully submitted,

GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036

Attorney for United Transportation Union, General Committee of Adjustment on The Burlington Northern and Santa Fe Railway Company, and Montana State Legislative Board.

December 6, 2004

FOR DISTRICT OF COLUMBIA CIRCUIT
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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CITCUIT

UNITED TRANSPORTATION UNION-GENERAL COMMITTEE OF ADJUSTMENT (GO-386), and UNITED TRANSPORTATION UNION-MONTANA STATE LEGISLATIVE BOARD,

Petitioners,

vs.

SURFACE TRANSPORTATION BOARD and UNITED STATES OF AMERICA,

Respondents.

No. 97-1011

PETITION FOR REVIEW

Petitioners, United Transportation Union-General Committee of Adjustment (GO-386), and United Transportation Union-Montana State Legislative Board, hereby petition the Court for review of the decision of the Surface Transportation Board in its Finance Docket No. 30186 (Sub-No. 2), Tongue River Railroad Co.--Rail Construction and Operation--Ashland to Decker, Montana, dated October 28, 1996 (served November 8, 1996), reconsid. den. December 20, 1996 (served December 31, 1996).*/

GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington, DC 20036

January 7, 1997

Attorney for Petitioners

*/ Embraces also Finance Docket No. 30186, Tongue River R.R.--Rail Construction and Operation--In Custer, Powder River and Rosebud Counties, Montana, and Finance Docket No. 30186 (Sub-No. 1), Tongue River Railroad Company--Issuance of Securities.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

97-70037

NORTHERN PLAINS RESOURCE COUNCIL, INC. a Montana Non-Profit Corporation, PETITIONER, vs. SURFACE TRANSPORTATION BOARD and the UNITED STATES OF AMERICA, RESPONDENTS.	)	No.

PETITION FOR REVIEW

Petitioner Northern Plains Resource Council, Inc. hereby petitions the Court for review of the decision of the Surface Transportation Board in its Finance Docket No. 30186 (Sub-2). Tongue River Railroad Co, -- Rail Construction and Operation -- Ashland to Decker Montana, dated October 28, 1996 and served November 8, 1996, and reconsideration denied December 20, 1996 and served December 31.[1]

Dated this 6th day of January, 1997.

Jack R. Tuholske
Petitioner's Attorney
P.O. Box 7458
Missoula, MT 59807
406 721 6986

[1]Embraces also Finance Docket No. 30186, Tongue River R.R. Rail Construction and Operation -- In Custer, Powder River and Rosebud Counties, Montana, and Finance Docket No. 30186 (Sub. No. 1), Tongue River Railroad Company -- Issuance of Securities.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIVE ACTION, INC. a Montana Non-Profit Corporation, Petitioner, v. SURFACE TRANSPORTATION BOARD and the UNITED STATES OF AMERICA, Respondents.	)))))))))))	No. 97-70099

PETITION FOR REVIEW

Petitioner Native Action, Inc. hereby petitions the Court for review of the decision of the Surface Transportation Board in its Finance Docket No. 30186 (Sub-No. 2), Tongue River Railroad Co. – Rail Construction and Operation – Ashland to Decker Montana, dated October 28, 1996 and served November 8, 1996, and reconsideration denied December 20, 1996 and served December 31, 1996.[1]

DATED this 27th day of January, 1997

SMITH & GUENTHER, P.C.

By: Patrick L. Smith

Patrick L. Smith
815 E. Front Street, Suite 3
Missoula, MT 59801
Telephone: (406) 721-1070
Attorney for Petitioner

[1]Embraces also Finance Docket No. 30186, Tongue River R.R.--Rail Construction and Operation--In Custer, Powder River and Rosebud Counties, Montana, and Finance Docket No. 30186 (Sub-No. 1), Tongue River Railroad Company--Issuance of Securities.

Before the

SURFACE TRANSPORTATION BOARD

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

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

SUPPLEMENTAL COMMENTS & EVIDENCE IN OPPOSITION

GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036

Attorney for United Transportation Union, General Committee of Adjustment on The Burlington Northern and Santa Fe Railway Company, and Montana State Legislative Board.

Due Date: November 12, 2003

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*/ Oral hearing is requested.

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Before the

SURFACE TRANSPORTATION BOARD

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

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

SUPPLEMENTAL COMMENTS & EVIDENCE IN OPPOSITION

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 these supplemental comments and evidence in opposition to the application, filed April 27, 1998, by Tongue River Railroad Company, Inc. (TRRC),[3/] to construct and operate a 17.3-mile line of railroad, as an alternative routing for the "Four Mile Creek Alternative" approved in late-1996 by the Board in Tongue River RR Co.--Const. & Oper.--Ashland-Decker, MT, 1 S.T.B. 809 (1996)(1996 Decision).

1/ By John D. Fitzgerald, General Chairman, with offices at 400 E. Evergreen Boulevard, Vancouver, WA 98660.

2/ By Francis G. Marceau, Director, with offices at 98 Sussex, Kalispell, MT 59901.

3/ The application was originally filed by Tongue River Railroad Company (TRRC), with substitution of TRRC Inc. authorized by decision served September 2, 2003. The caption was changed by the Board, on the March 11, 2003, from Tongue River Railway Company--Construction and Operation--In Rosebud and Big Horn Counties, MT. 63 Fed. Reg. 34212. (June 23, 1998).

This supplement is filed pursuant to the Board's decision served July 7, 2003, as implemented by notice served October 3, 2003, as amended October 24, 2003.

The Board should assign the proceeding for oral hearing in the field, perhaps simultaneously with hearing on the forthcoming environmental analysis.

Ultimately, the TRRC application should be denied.

Background

1. The "Four Mile Creek Alternative" had been imposed by the Board in 1996 Decision in lieu of TRRC's original application for the southernmost portion of the proposed line between Ashland and Decker, MT. (1996 Decision). However, still being dissatisfied with the STB's "Four Mile Creek Alterative," TRRC on April 27, 1998, filed a new substitute application over a still different route, subsequently termed, "Western Alignment."[4/]

2. These protestants filed comments on June 1, 1998. 49 CFR 1150.10(g). Subsequently, in response to STB notice served June 23, 1998, 63 Fed. Reg. 34212, these protestants on September 16, 1998, filed "Comments in Opposition," including request for oral hearing.

3. The STB's June 23, 1998 decision establishing a procedural schedule, stated that it was for issues involving whether the

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4/ The instant "Western Alignment" initially was sought in a July 1997 petition to reopen 1996 Decision, subsequent to the filing in early 1997 of petitions to review 1996 Decision before the U.S. Court of Appeals for the 9th Circuit. (Nos. 97-70037, et al.). However, the Board directed a new filing fee and docket number--the instant F.D. No. 30186 (Sub-No.3).

application meets the statutory criteria of 49 U.S.C. §10901, but a decision on such issues would not be issued prior to completion of the environmental review process. The decision on the merits would follow completion of the environmental review process, and would address both transportation and environmental issues in that decision. (Decision, 6/23/98, 3; 63 Fed. Reg. at 34213).[5/]

4. The STB on July 10, 1998, instituted environmental review of the April 27, 1998 application, new environmental proceeding to run concurrently with that previously initiated on June 23, 1998. The STB invited public comments, with reply by TRRC. (Decision, 7/10/98; 63 Fed. Reg. 37442-45).

5. The STB on March 30, 1999, removed the condition in 1996 Decision that construction of the line between Miles City and Ashland be completed within three years from November 8, 1996.

6. The proceedings remained under advisement at the STB until January 17, 2003. On that day TRRC filed a petition seeking to file supplemental evidence. TRRC stated that some three years earlier, on March 2, 2000, it had advised STB's Section of Environmental Analysis (SEA) to suspend work until certain issues, unrelated to the environmental review, were resolved. On December 19, 2002, TRRC met with SEA Staff (and other STB personnel), and

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5/ The Board's procedure differs from that taken in the DM&E case, where the Board first sought to determine the public convenience and necessity under §10901, prior to conducting the environmental review, described in Mid States Coal Progress v. Surface Transp. Bd., 345 F.3d 520, 533 (8th Cir. 2003). However, here the Board in its March 11, 2003 decision, attempted to convert the instant procedure, established June 23, 1998, into the DM&E format described in Mid States Coal Progress, supra. Protestants vigorously objected to the proposed change. See: Pet. for Reconsid., 3/31/03). The STB's action is inconclusive. (Decision, 5/19/03). The proposed change comes too late, and would be prejudicial to objectors.

requested SEA to resume its environmental review. (Petition, 1/17/03, 2). Upon inquiry, the March 2, 2000 and December 19, 2002 communications between TRRC and SEA were said to have been oral.

7. Protestants were surprised by TRRC's January 17, 2003 filing, and were unaware that the STB in March, 2000, had suspended work on the TRRC application. Indeed, the STB's Chairman, Linda Morgan, on September 13, 2000, had stated the agency was working on the case.[6/] The first official word of the suspension to reach protestants was on May 22, 2001.[7/] Protestants can only speculate as to the reasons motivating TRRC for suspension of work by SEA, and/or for resumption of work by SEA.[8/]

8. The Board on March 11, 2003, granted TRRC's petition for submission of supplemental evidence. TRRC filed its supplemental evidence on May 1, 2003. However, TRRC on the same day petitioned to substitute Tongue River Railroad Company, Inc., an entirely different entity, in the stead of applicant TRRC. The Board granted the substitution on September 2, 2003,[9/] and the Board on October 3, 2003, issued its decision requiring responses to the

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6/ This advise was given during a luncheon address in Washington, DC before the American Bar Assn.'s Section of Admin. Law & Procedure-Transp. Committee.

7/ See: U.S. House, Congestion in the United States Transportation System, Hearings before Comm. on Transp. & Infrastructure (Hrg. 107-22) 102, 113 (2001).

8/ There were no meaningful changes in STB membership, other than the December 3, 2002 announcement that a different member had replaced Chairman Morgan. (STB Release No. 02-51).

9/ Petition for Reconsideration filed Sept. 22, 2003, pending.

supplemental evidence on November 12, 2003.10/

ARGUMENT

I. THERE HAVE BEEN IMPORTANT CHANGES SINCE THE EVIDENTIARY RECORD OF 1998.

The verified statement of Terry L. Ungricht, and the supplemental verified statement of John D. Fitzgerald, indicate there have been important changes in railroad operations since 1998.

1. Train movement. There has been an increase in coal train movement from Wyoming and Montana origins over the Huntley-Forsyth-Miles City line. In 1998, the movement was an average of 4 loaded and 4 empty coal trains daily between Sheridan and Forsyth, with two merchandise trains daily in each direction over the Huntley to Miles City route. Although the non-coal train movement is virtually unchanged, the coal train movement has risen to a daily average of 7 loaded and empty trains. (Supp. V.S. Fitzgerald; V.S. Ungricht; V.S. Kraemer, 2-3; R.V.S. Kraemer, 4-6).

The proposed diversion of 7 coal trains in each direction from the present Huntley-Forsyth-Miles City route in favor of TRRC routing would impair the viability of the former Northern Pacific line. Moreover, the large amount of bridge traffic undercuts the TRRC financial presentation. The economic issue is not primarily whether the Western Alignment is more viable than the Four-Mile

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10/ TRRC,Inc. was created in 1998 as a substitute for TRRC, but applicant inexplicably waited until after submitting its supplemental evidence in May 2003, before effectuating the change in the application. Cf. Finance Docket No. 33644, Tongue River Railroad Company, Inc.-Acquisition and Operation Exemption-Tongue River Railroad Company, 63 Fed. Reg. 54186 (Oct. 8, 1998), Pet. to Revoke den. Nov. 13, 1998.

Creek Alternative, but whether it is advisable that BNSF maintain two routes, primarily or exclusively, for this overhead coal business. In short, whether the cost of some additional mileage over the Northern Pacific route is more than offset by the additional capital cost in movement over a route to be newly constructed almost exclusively or solely for the overhead business..

2. Coal Origins. TRRC has revised the origins of its tonnage projections. The prospective coal movement is now predominately from Wyoming and Montana origins in the Decker/Spring Creek area already served by BNSF. Clearly, as indicated by UTU's Fitzgerald, the TRRC proposal is virtually all for a bridge movement. (Supp. V.S. Fitzgerald).

The origin revisions, arguably, might make some sense if the primary goal is for BNSF to be more competitive with the proposed DM&E line into Wyoming. However, a pivotal issue where the railroad construction would be for bridge movement, with BNSF to have two routes between Decker and Miles City, is not whether the new route would be financially viable standing on its own. Rather, the public interest--including the interest of railroad employees--depends on the revenue and expenses for both routes taken together, unless abandonment or downgrading for one is contemplated. Here, BNSF had failed its burden of proof.

II. THE APPLICATION REMAINS INCOMPLETE IN A NUMBER OF OTHER IMPORTANT RESPECTS.

The application remains incomplete. Protestants pointed to a number of deficiencies in their September 16, 1998 filing. (Com-

ments, 9/16/98, 5-8).11/ Further deficiencies have become apparent. In addition to the failure of an adequate financial showing, of increasing importance is the substantial increase in coal train bridge movement moving via Sheridan-Huntley-Forsyth-Miles City. There remain other matters as well.

1. TRRC, Inc. The STB on September 2, 2003, permitted TRRC Inc. to substitute for TRRC, but this was well after TRRC's evidence had been submitted May 1, 2003. The matter of the substitution is on reconsideration, as the STB acknowledged in its decision served November 10, 2003. (Decision, 11/10/03, 1). There are significant questions involved in the substitution, for which protestants have been unable to secure sufficient information. The nature of the applicant is an important element in any construction project, yet the STB has adopted procedures which have prevented meaningful inquiry.

2. Participation by Ranchers. The STB has severely limited the participation--and thus has restricted comments and evidence--by ranchers and others who were only first made parties to the supplemental proceedings on October 24, 2003. The failure to designate some parties of record until October 24, 2003 was STB

11/ There continues to be a lack of information concerning the anticipated agreement between TRRC and BNSF--of special importance to BNSF employees. BNSF is now funding TRRC's expenses before federal and state regulatory agencies. (Supp. Gustafson, 9). The STB, itself, should make the TRRC/BNSF agency funding agreement of public record.

staff error.12/ The October 3, 2003 notice listed 21 parties, with an additional 17 parties not named until October 24, 2003.13/ Such a lack of timely notice clearly has tainted the entire proceeding, and is also prejudicial to these UTU protestants, for railroad employees acquire information from railroad customers and the public.

Many of the excluded ranchers had been parties of record earlier, and were shown on the July 29, 1998 service list, but had been removed and not included on the October 3, 2003 list.14/

3. Participation by OCPS. The STB/ICC's Office of consumer or public services (variously named at various times) until recently participated in the TRRC proceedings, providing assistance to members of the public unaccustomed to the agency's procedures. Indeed, such STB/ICC staff assistance was offered at the public hearings held in 1992 at Lame Deer, Forsyth, Miles City, MT, and Sheridan, WY. The withdrawal of agency assistance has served to restrict public imput.15/

12/ The STB, without public notice, in mid-2002, appears to have abolished its Office of the Secretary, with key personnel now under its Office of Proceedings. In placing important procedural matters with those dealing with the merits, the agency may have compromised the function of an independent Secretary.

13/ Two of the original 21 parties, shown in the October 3 list, subsequently were deleted in the October 24 list.

14/ Several of the ranchers requested an extension in time owing to their late-listing. The STB on November 10, 2003, said no requests had been made for an extension of the November 12, 2003 deadline. (Decision, 11/10/03, 1). Yet the STB Staff and public were advised by the STB of the extension request on November 10, 2003. (ID 209365).

15/ We have raised a number of procedural points in our filings made during 2003, which are incorporated herein.

III. THE PROCEEDING SHOULD BE ASSIGNED FOR PUBLIC HEARINGS.

The STB should assign the proceeding for public hearings in the involved area. The most recent hearings were in 1992, over a decade ago. The hearings could serve the dual purpose of providing testimony on the merits, as well as to bring forth comments on the proposed environmental analysis.

Facts are in controversy, particularly with respect to the prospect for rail transportation of coal produced in the Ashland area, such as at Otter Creek.

Public hearing is particularly warranted in view of the STB Staff action in summarily removing ranchers and others from the service list, and then restoring them only on October 24, 2003, hardly a sufficient period of time within which to submit updated or original cements/evidence in advance of the November 12, 2003 deadline.

CONCLUSION

The Board should assign the proceeding for public hearing. The application should be denied.

Respectfully submitted,

GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036

Attorney for United Transportation Union, General Committee of Adjustmen on The Burlington Northern and Santa Fe Railway Company, and Montana State Legislative Board.

November 12, 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

F.D. No. 30186 (Sub-No. 3)

VERIFIED STATEMENT
OF TERRY L. UNGRICHT

My name is Terry L. Ungricht. I reside in Sheridan, WY. I am employed by The Burlington Northern an Santa Fe Railway Company (BNSF) as a conductor. I have 24 years seniority with BNSF. I am the same person of same name who was restored to the service list as a party of record by the Surface Transportation Board (STB) in its notice served October 24, 2003. I am fully familiar with train operations in the involved area proposed to be served by the Tongue River Railroad Company (TRRC).

I am a member of the United Transportation Union (UTU), and have served as UTU's Wyoming State Legislative Director since May 2002. For the past ten years, I have been the Legislative Representative for UTU's Local 951, based at Sheridan, WY. The UTU has approximately 800 members in Wyoming, and approximately 90 at Sheridan. I have been requested by our General Chairman, R.S. Knutson, to update information since the 1998 submissions in this proceeding.

I am opposed to the proposed TRRC construction. It would have an adverse impact on UTU members, as well as upon BNSF employees in other crafts. There are approximately 200 railroad employees in the Sheridan area. I believe the coal fields are adequately served by the established BNSF and Union Pacific Railroad Company (UP) lines. Moreover, I do not look with favor upon the proposal of Dakota, Minnesota & Eastern Railroad (DM&E) to build into the Wyoming area.

BNSF currently is averaging approximately 7 loaded and empty coal trains daily between Huntley and Forsyth. There presently is an average of approximately 2 non-coal trains in each direction over this line, subject to seasonal fluctuations, particularly with respect to grain movements.

Sheridan currently has 12 two-man crews operating coal trains between Sheridan, WY and Forsyth, MT, for a total of 24 employees. All of these positions would be eliminated when traffic is rerouted over the TRRC. BNSF also maintains a short turn pool that delivers empty coal train sets and brings the loaded sets out of the Decker and Spring Creek mines. This pool currently has 5 two-man crews, for a total of 10 employees. I also anticipate another job loss for the Sheridan helper pool. This helper pool is operated engineer-only, currently with 9 turns, such that I anticipate about one-half of these jobs would be eliminated, for 4.5 jobs.

To the above total of 38.5 employees (enginemen and trainmen), there would be a loss of extra board employment, for another 11.5 jobs eliminated. Thus, I project a loss of 46 jobs, merely for enginemen and trainmen, if the TRRC project comes into being. I have not calculated the loss for maintenance, car repair, and other non-operating support positions.

The above figures could be lower if BNSF operates over the TRRC line, by contract or otherwise, with Sheridan-based crews. In addition, these figures do not take into consideration job loss at Forsyth, MT, which the TRRC would by-pass completely.

VERIFICATION

Under the penalties of perjury, I affirm the foregoing statement is true and correct as stated.

Terry L Ungricht
TERRY L. UNGRICHT

Dated at
Sheridan, WY
November 9, 2003

F.D. No. 30186 (Sub-No. 3)

SUPPLEMENTAL VERIFIED
STATEMENT OF JOHN D. FITZGERALD

My name is John D. Fitzgerald, with offices at 400 East Evergreen Boulevard, Vancouver, WA 98660. I submitted a verified statement five years ago, dated September 12, 1998, which was included in the September 16, 1998 submission in opposition to the application by Tongue River Railroad Company (TRRC) to construct and operate the so-called "Western Alignment." I continue to serve as General Chairman for United Transportation Union-General Committee of Adjustment (UTU/GO-386).

I have reviewed the supplemental evidence of Tongue River Railroad Company (TRRC), filed May 1, 2003, as well as the earlier reply comments filed by TRRC on November 2, 1998. This additional information does not bolster the TRRC project, and does not lessen my opposition.

1. I continue to consider the Tongue River Railroad Company, or Tongue River Railroad Company, Inc., as a scam for The Burlington Northern and Santa Fe Railway Company (BNSF). I note from the April 25, 2003 statement of Mike T. Gustafson, President of TRRC, that BNSF is providing funds to TRRC for expenses incurred in this application proceeding. (Supp. Gustafson, 9). This revelation comes as no surprise to me, for TRRC's counsel has appeared for BNSF in numerous adversary proceedings involving UTU/GO-386. My organization over the years has become well acquainted with TRRC counsel as BNSF counsel. The instant proceeding is the rule, not the exception.

2. TRRC has revised its coal tonnage projections for the proposed TRRC line between Miles City and Decker/Spring Creek. The initial projection of 26.4 million tons for the year 2009, the first operating year, now has been revised upward to 32.1 million tons, but the projection for Ashland area mines has been reduced from 1.0 million tons of this amount to a mere 300,000 tons. The major change in the haulage projection is to substantially reduce the coal business from the Decker/Spring Creek area estimated to move over TRRC, and to substantially increase the diversion of Wyoming coal from present BNSF routing via Huntley-Forsyth-Miles City, in favor of rerouting via TRRC. Thus, the Decker/Spring Creek tonnage would drop from 20.4 million tons estimated in the 1998 testimony, to a lesser 15.3 million tons in the 2003 testimony, even though total traffic would increase to 32.1 million tons. On the other hand, Wyoming coal would increase from 5.0 tons in the 1998 testimony, to 16.6 million tons in the 2003 testimony. I have taken these figures from the Application, p. 14, and Supp. Morey Tonnage Forecast.

3. It is clear to me that the TRRC application primarily is for diverting BNSF Wyoming coal business, rather than for serving mines located in the Decker/Spring Creek area. Whereas the 1998 application projected Decker/Spring Creek coal originating tonnage moving over TRRC at 20.4 million tons (year 1), 21.4 million tons (year 2), and 22.4 million tons (year 3), the current revision projects declining Decker/Spring Creek coal tonnage of 15.3 million tons (year 1), 11.5 million tons (year 2), and 9.8 million tons (year 3). On the other hand, for Wyoming coal, the 1998 application projected Wyoming coal moving over TRRC at a

steady 5.0 million tons for each of the initial three years, whereas the 2003 revision is for a much greater 16.6 million tons of Wyoming coal in year 1, and 16.8 million tons in year 2, dropping to 12.3 million tons when Ashland area tonnage in the amount of 4.8 million tons is claimed for mines not yet in existence.

4. Approval of the Tongue River project would impair the viability of BNSF operations over the route between Huntley and Miles City, as I indicated in my 1998 verified statement. In 1998, the four trains in each direction over the Sheridan-Forsyth-Miles City line, slated for transfer to a TRRC routing, constituted approximately two-thirds of the entire movement on the line. Indications are that the diversion now would be even greater, based upon the 2003 TRRC evidence which I have recited above. In addition, as an example, 7 loaded coal trains operated daily over the former Northern Pacific line in January 2001, rather than the 4 trains mentioned by BNSF in the 1998 testimony, according to a widely-accepted industry source. Frailey, Fred W., The Empire of BNSF, published in Trains, June 2001. It is my understanding that the present daily movement approximates 7 loaded and empty coal trains over this trackage.

5. The projected construction of the DM&E line into the Wyoming PRB, should it become a reality, would add to the adverse impact upon BNSF employees. Although I understand the STB's approval of the DM&E project was remanded by the reviewing court on October 2, 2003, the diversion of significant Wyoming PRB coal tonnage from BNSF augments the potential for harm to BNSF personnel.

6. The proposed construction of the TRRC line and diversion of BNSF traffic from existing BNSF routing, would adversely affect BNSF train and engine crews. The impact will be at Sheridan, WY, and Glendive, Forsyth, and Great Falls, MT, and other locations.

7. I incorporate my September 12, 1998 verified statement, except as modified herein for revised data. If the project is nevertheless approved, despite the considerable opposition, the Board should at the minimum impose the standard employee protective provisions.

VERIFICATION

Under the penalties of perjury, I affirm the foregoing statement is true and correct as stated.

JOHN D. FITZGERALD

Dated at
Vancouver WA
November 12, 2003