

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 30186

TONGUE RIVER RAILROAD COMPANY, INC. — RAIL CONSTRUCTION AND OPERATION — IN CUSTER, POWDER RIVER AND ROSEBUD COUNTIES, MONT.

Decided: August 27, 2013

Northern Plains Resource Council and Wally McCrae/Clint McCrae, d.b.a. the Rocker Six Cattle Company (collectively, NPRC Parties) and Tongue River Railroad Company, Inc. (TRRC) have submitted a number of filings and related motions not contemplated by the procedural schedule established for this proceeding. This decision accepts the various filings into the record, permits limited discovery, establishes due dates for any resulting filings, and imposes a protective order to safeguard confidential information. The parties are directed to abide by the revised procedural schedule and the protective order attached to the Appendix of this decision.

BACKGROUND

TRRC seeks a Board license under 49 U.S.C. § 10901 to construct and operate a rail line in southeast Montana. The purpose of the proposed line is to transport low sulfur sub-bituminous coal from a planned coal mine currently in the permitting process at Otter Creek, Mont., and any future mines that might be developed in the Otter Creek and Ashland, Mont., area. TRRC had filed a revised application for its construction authority on October 16, 2012, but, after a Board decision requesting additional information, TRRC modified the project in a December 17, 2012 supplemental application that superseded the October 16 revised application. As discussed in the supplemental application, TRRC has changed its preferred alignment for the new line to the 42-mile Colstrip Alignment, running between Colstrip, Mont., and Ashland/Otter Creek, which would connect to the north with an existing BNSF Railway Company (BNSF) line known as the Colstrip Subdivision.

In a January 4, 2013 decision, served on January 8, 2013, and published in the Federal Register on January 9, 2013, the Board accepted TRRC's supplemental application for consideration. The Board also explained how parties could file comments on the application. On January 7, 2013, the NPRC Parties jointly filed a petition asking that the Board reject TRRC's supplemental application. On January 25, 2013, the NPRC Parties submitted a petition asking that the Board reconsider its decision to accept the supplemental application. TRRC filed a reply to the January 7 petition on January 28, 2013, and a reply to the January 25 petition on February 14, 2013.

In a decision served on February 26, 2013, the Board denied the NPRC Parties' January 7 and January 25 petitions. That decision, in part, also dealt with the scope of comments on the transportation merits of the application. Because these comments would have been due only a few days later, the Board extended the procedural schedule to ensure that there was sufficient opportunity for interested persons to submit their filings. Based on this new schedule, on April 2, 2013, the Board received three comments on the transportation merits of the application, including one from the NPRC Parties.¹

On June 5, 2013, two days before TRRC filed its reply to the comments,² the NPRC Parties filed a petition asking the Board to revise the procedural schedule to allow for a six-month discovery period. Generally, they explain that the new expert evidence that TRRC would be submitting in reply to the comments on the transportation merits creates contested issues of fact that lie at the heart of whether the proposed line construction would be in the public interest. The NPRC Parties also claim that TRRC should have submitted this support for its arguments in the supplemental application rather than as part of a reply, so that the public would have an opportunity to comment on the evidence. With discovery, however, the NPRC Parties claim that they can test the credulity of TRRC's evidence. The NPRC Parties argue that no party would be prejudiced by the revised schedule because the environmental review process is ongoing.

TRRC filed a reply in opposition to the NPRC Parties' petition on June 25, 2013. TRRC argues that the NPRC Parties should have sought discovery after TRRC filed its supplemental application in December 2012. TRRC doubts that discovery would lead to any relevant evidence because Mr. Schwartz, the key witness TRRC provides on rebuttal, bases his analysis of the demand for coal in various markets on publically available data. TRRC also notes that the procedural schedule established by the Board does not call for additional filings and that the NPRC Parties have not asked for leave to provide the agency with a further submission. Finally, TRRC argues that the NPRC Parties have failed to state any reasons why a six-month discovery period is necessary or how they intend to use that period.

On July 2, 2013, the NPRC Parties filed a surreply to TRRC's June 7 filing and a motion asking that the Board accept the surreply into the record. Among other things, they argue that TRRC's supplemental application is incomplete because it fails to include a projection showing income derived from traffic over the first two years of the proposed service. As to discovery, the NPRC Parties argue that TRRC's June 7 filing underscores the need for discovery here, claiming

¹ Other comments were filed by the United Transportation Union, General Committee of Adjustment (UTU/GO-386), and jointly by Montana Environmental Information Center, National Wildlife Federation, and Sierra Club.

² In its June 7 filing, TRRC replies to arguments raised in opposition to its application and provides the statement of Seth Schwartz, its expert witness on the coal transportation markets. Mr. Schwartz responds to claims from the NPRC Parties on the issue of whether coal markets would be available for the coal to be hauled by the proposed line.

that the filing highlights several key factual disputes, as well as inconsistencies and deficiencies³ in TRRC's pleadings. The NPRC Parties also assert that discovery could bolster the record on Mr. Schwartz's arguments, the level of commitment to the project from TRRC's backers, and the mine owner's estimates of demand for the coal to be hauled by the proposed rail line.

On August 9, 2013, TRRC submitted a reply asking that the Board deny the NPRC Parties' motion for leave to file its surreply and to reject the surreply. Alternatively, TRRC requests that the Board accept its attached response. Included with the response is a verified statement from Scott Long, Senior Manager Regulatory Cost for BNSF, providing information on BNSF's traffic projections and explaining the assumptions and methodology used to generate a BNSF projected net income statement for the first two years of operation of the line, as well as an exhibit containing those projections (Rebuttal Exhibit G (BNSF)). To safeguard what TRRC asserts is highly confidential material in that exhibit, TRRC asks the Board to issue an order protecting its contents from disclosure.

As to discovery, TRRC again argues that the Board should deny NPRC's request to now conduct it. TRRC reiterates that NPRC had every opportunity to seek discovery months ago but did not do so and, in any event, contends that NPRC's lengthy and detailed April 2 comments belie the need for any discovery here.

DISCUSSION AND CONCLUSIONS

Discovery. This proceeding will require the Board to resolve a number of important and complex issues. Further evidence might assist the agency in rendering a decision. Therefore, the NPRC Parties' July 2 surreply and TRRC's August 9 response will be accepted into the record, and limited discovery and subsequent submissions will be allowed. Given that some of the evidence the NPRC Parties seek is publicly available and that these commenters have already submitted a response to TRRC's June 7 filing, the Board will provide a 90-day period for discovery rather than the 6-month period sought by the NPRC Parties. The NPRC Parties may file a reply by December 16, 2013 and TRRC may file a rebuttal by January 6, 2014.

Protective Order. As noted, TRRC has requested that the Board issue a protective order with respect to information contained in one of its exhibits showing BNSF's projected coal traffic revenues for the proposed line. TRRC claims that the disclosure of this proprietary financial data or other confidential material could have an adverse competitive impact on TRRC and/or BNSF.

Good cause exists to grant the motion for a protective order, which conforms to the Board's rules at 49 C.F.R. § 1104.14 governing protective orders to maintain the confidentiality of materials submitted to the Board. Unrestricted disclosure of confidential, proprietary, or commercially sensitive information and data could cause competitive injury to the parties.

³ Specifically, the NPRC Parties assert that TRRC has failed to demonstrate a public demand or need for its proposed service, failed to provide traffic projections required by agency rules at 49 C.F.R. 31150.6(d), and improperly introduced new evidence on reply.

Accordingly, the motion for projective order will be granted, and the confidential material contained in Rebuttal Exhibit G (BNSF), as well as any subsequently filed confidential information, will be subject to the Protective Order and Undertakings, as modified in the Appendix to this decision.⁴

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

It is ordered:

1. The parties' motions for leave to make filings not contemplated by the procedural schedule established for this proceeding are granted and the July 2 and August 9 filings are accepted into the record.
2. The NPRC Parties' request to amend the procedural schedule and conduct discovery is granted in part as discussed above.
3. The parties are directed to abide by the revised procedural schedule presented above.
4. The motion for a protective order is granted, and the Protective Order and Undertakings in the Appendix to this decision are adopted.
5. The confidential material contained in Rebuttal Exhibit G (BNSF), and any subsequently filed confidential information, will be kept under seal by the Board and not placed in the public docket or otherwise disclosed to the public, unless the appropriate attached Undertaking is executed and the terms of the Protective Order are followed, or unless otherwise ordered by the Board.
6. This decision is effective on its date of service.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

⁴ A proposed Protective Order and Undertakings were included with the motion.

APPENDIX

PROTECTIVE ORDER

1. For purposes of this Protective Order:

(a) “Confidential Documents” means documents and other tangible materials containing or reflecting Confidential Information.

(b) “Confidential Information” means traffic data (including but not limited to waybills, abstracts, study movement sheets, and any documents or computer tapes containing data derived from waybills, abstracts, study movement sheets, or other data bases, and cost work papers); the identification of shippers and receivers in conjunction with shipper-specific or other traffic data; the confidential terms of contracts with shippers, carriers and non-carriers or other proprietary agreements; confidential financial and cost data; divisions of rates, trackage rights compensation levels and other compensation between carriers; and other confidential or proprietary business or personal information.

(c) “Designated Material” means any documents designated or stamped as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” in accordance with paragraphs 3 or 4 of this Protective Order and any Confidential Information contained in such materials.

(d) “Proceedings” means those proceedings before the Surface Transportation Board (Board) concerning the transaction in Docket No. FD 30186 and any related proceedings before the Board, and any judicial review proceedings arising from Docket No. FD 30186 or from any related proceedings before the Board.

2. Confidential Information shall be provided to any party only pursuant to this Protective Order and only upon execution and delivery to TRRC of the applicable Undertaking, forms of which are attached as Exhibits A and B to this Protective Order. Confidential Information shall be used solely for the purpose of the Proceedings, and not for any other business, commercial, or competitive purpose.

3. If any party to these Proceedings determines that any part of a document it submits, discovery request it propounds, or a discovery response it produces, transcript of a deposition or hearing in which it participates, or pleading or other paper to be submitted, filed, or served in these Proceedings contains Confidential Information or consists of Confidential Documents, then that party may designate and stamp such Confidential Information and Confidential Documents as “CONFIDENTIAL.” Any information or documents designated or stamped as “CONFIDENTIAL” shall be handled as provided for hereinafter.

4. If any party to these Proceedings determines that any part of a document it submits, discovery request it propounds, or a discovery response it produces, or a transcript of a deposition or hearing in which it participates, or pleading or other paper to be submitted, filed, or served in these Proceedings contains shipper-specific rate or cost data; division of rates, trackage rights compensation levels, other compensation between carriers; or other competitively

sensitive or proprietary agreements or information, then that party may designate and stamp such Confidential Information as “HIGHLY CONFIDENTIAL.” Any information or documents so designated or stamped shall be handled as provided hereinafter, except that no prohibition in any subsequent paragraph is applicable to an exchange of information pursuant to paragraphs 3 and 4 of this Protective Order.

5. Information and documents designated or stamped as “CONFIDENTIAL” may not be disclosed in any way, directly or indirectly, or to any person or entity except to an employee, counsel, consultant, or agent of a party to these Proceedings, or an employee of such counsel, consultant, or agent, who, before receiving access to such information or documents, has been given and has read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality Undertaking substantially in the form set forth at Exhibit A to this Protective Order.

6. Information and documents designated or stamped as “HIGHLY CONFIDENTIAL” may not be disclosed in any way, directly or indirectly, to any employee of a party to these Proceedings, or to any other person or entity except to an outside counsel or outside consultant to a party to these Proceedings, or to an employee of such outside counsel or outside consultant, who, before receiving access to such information or documents, has been given and has read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality Undertaking substantially in the form set forth at Exhibit B to this Protective Order.

7. All parties must file simultaneously a public version of any Highly Confidential or Confidential submission filed with the Board, whether the submission is designated as a Highly Confidential Version or Confidential Version. When filing a Highly Confidential Version, the filing party does not need to file a Confidential Version with the Board, but must make available (simultaneously with the party's submission to the Board of its Highly Confidential Version) a Confidential Version reviewable by any other party's in-house counsel. The Confidential Version may be served on other parties in electronic format only. In lieu of preparing a Confidential Version, the filing party may (simultaneously with the party's submission to the Board of its Highly Confidential Version) make available to outside counsel for any other party a list of all “highly confidential” information that must be redacted from its Highly Confidential Version prior to review by in-house personnel, and outside counsel for any other party must then redact that material from the Highly Confidential Version before permitting any clients to review the submission.

8. Any party to these Proceedings may challenge the designation by any other party of information or documents as “CONFIDENTIAL” or as “HIGHLY CONFIDENTIAL” by filing a motion with the Board or with an administrative law judge or other officer to whom authority has been lawfully delegated by the Board to adjudicate such challenges.

9. Designated Material may not be used for any purposes, including without limitation any business, commercial or competitive purposes, other than the preparation and presentation of evidence and argument in Docket No. FD 30186, any related proceedings before the Board, and/or any judicial review proceedings in connection with Docket No. FD 30186 and/or with any related proceedings.

10. Any party who receives Designated Material in discovery shall destroy such materials and any notes or documents reflecting such materials (other than file copies of pleadings or other documents filed with the Board and retained by outside counsel for a party to these Proceedings) at the earlier of: (1) such time as the party receiving the materials withdraws from these Proceedings; or (2) the completion of these Proceedings, including any petitions for reconsideration, appeals or remands.

11. No party may include Designated Material in any pleading, brief, discovery request or response, or other document submitted to the Board, unless the pleading or other document is submitted under seal, in a package clearly marked on the outside as “Confidential Materials Subject to Protective Order.” *See* 49 C.F.R. § 1104.14. All pleadings and other documents so submitted shall be kept confidential by the Board and shall not be placed in the public docket in these Proceedings except by order of the Board or of an administrative law judge or other officer in the exercise of authority lawfully delegated by the Board.

12. No party may include Designated Material in any pleading, brief, discovery request or response, or other document submitted to any forum other than this Board in these Proceedings unless: (1) the pleading or other document is submitted under seal in accordance with a protective order that requires the pleading or other document to be kept confidential by that tribunal and not be placed in the public docket in the proceeding; or (2) the pleading or other document is submitted in a sealed package clearly marked, “Confidential Materials Subject to Request for Protective Order,” and is accompanied by a motion to that tribunal requesting issuance of a protective order that would require the pleading or other document be kept confidential and not be placed in the public docket in the proceeding, and requesting that, if the motion for protective order is not issued by that tribunal, the pleading or other document be returned to the filing party.

13. No party may present or otherwise use any Designated Material at a Board hearing in these Proceedings, unless that party has previously submitted, under seal, all proposed exhibits and other documents containing or reflecting such Designated Material to the Board, to an administrative law judge or to another officer to whom relevant authority has been lawfully delegated by the Board, and has accompanied such submission with a written request that the Board, administrative law judge or other officer: (a) restrict attendance at the hearing during any discussion of such Designated Material; and (b) restrict access to any portion of the record or briefs reflecting discussion of such Designated Material in accordance with this Protective Order.

14. If any party intends to use any Designated Material in the course of any deposition in these Proceedings, that party shall so advise counsel for the party producing the Designated Material, counsel for the deponent, and all other counsel attending the deposition. Attendance at any portion of the deposition at which any Designated Material is used or discussed shall be restricted to persons who may review that material under the terms of this Protective Order. All portions of deposition transcripts or exhibits that consist of, refer to, or otherwise disclose Designated Material shall be filed under seal and be otherwise handled as provided in paragraph 11 of this Protective Order.

15. To the extent that materials reflecting Confidential Information are produced by a party in these Proceedings, and are held and/or used by the receiving person in compliance with this Protective Order, such production, disclosure, holding, and use of the materials and of the data that the materials contain are deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. §§ 11323 or 11904, or of any other relevant provision of the ICC Termination Act of 1995.

16. All parties must comply with all of the provisions of this Protective Order unless the Board or an administrative law judge or other officer exercising authority lawfully delegated by the Board determines that good cause has been shown warranting suspension of any of the provisions herein.

17. Nothing in this Protective Order restricts the right of any party to disclose voluntarily any Confidential Information originated by that party, or to disclose voluntarily any Confidential Documents originated by that party, if such Confidential Information or Confidential Documents do not contain or reflect any Confidential Information originated by any other party.

Exhibit A

UNDERTAKING – CONFIDENTIAL MATERIAL

I, _____ have read the Protective Order served on August 27, 2013, governing the production and use of Confidential Information and Confidential Documents concerning Docket No. FD 30186, understand the same, and agree to be bound by its terms. I agree not to use or to permit the use of any Confidential Information or Confidential Documents obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in Docket No. FD 30186, any related proceedings before the Surface Transportation Board (Board), and/or any judicial review proceedings in connection with Docket No. FD 30186 and/or with any related proceedings. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed Undertakings in the form hereof, and that, at the conclusion of this proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting materials designated or stamped as “CONFIDENTIAL,” other than file copies, kept by outside counsel, of pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that Applicants or other parties producing Confidential Information or Confidential Documents shall be entitled to specific performance and injunctive and/or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Signed: _____

Affiliation: _____

Dated: _____

Exhibit B

UNDERTAKING – HIGHLY CONFIDENTIAL MATERIAL

I, _____ am outside [counsel][consultant] for _____, for whom I am acting in this proceeding. I have read the Protective Order served on August 27, 2013, governing the production and use of Confidential Information and Confidential Documents concerning Docket No. FD 30186, understand the same, and agree to be bound by its terms. I agree not to use or to permit the use of any Confidential Information or Confidential Documents obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in Docket No. FD 30186, any related proceedings before the Surface Transportation Board (Board), or any judicial review proceedings in connection with Docket No. FD 30186 and/or with any related proceedings. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed Highly Confidential Undertakings in the form hereof.

I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any information or documents designated or stamped as “HIGHLY CONFIDENTIAL,” that I will take all necessary steps to ensure that said information or documents be kept on a confidential basis by any outside counsel or outside consultants working with me, that under no circumstances will I permit access to said materials or information by employees of my client or its subsidiaries, affiliates, or owners, and that, at the conclusion of this proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting information or documents designated or stamped as “HIGHLY CONFIDENTIAL,” other than file copies kept by outside counsel of pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that Applicants or other parties producing Confidential Information or Confidential Documents shall be entitled to specific performance and injunctive and/or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Signed: _____

OUTSIDE [COUNSEL] [CONSULTANT]

Dated: _____