

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.

Digest:<sup>1</sup> This decision dismisses the rail construction and operation proceeding without prejudice to the refiling of a request for Board authority at a later date.

Decided: April 22, 2016

For the reasons discussed below, the Board denies a petition filed by Tongue River Railroad Company, Inc. (TRRC), to hold this proceeding in abeyance and dismisses the proceeding without prejudice.

BACKGROUND

On October 16, 2012, TRRC filed an application for a Board license under 49 U.S.C. § 10901 for it to construct and for BNSF Railway Company to operate a rail line in southeast Montana.<sup>2</sup>

On November 25, 2015, TRRC filed a petition to hold the proceeding in abeyance.<sup>3</sup> According to TRRC, the proposed line's major shipper, Otter Creek Coal, LLC (Otter Creek Coal), a subsidiary of Arch Coal, Inc. (Arch), does not expect a final determination regarding the mine permit application it filed with the Montana Department of Environmental Quality (MDEQ) for another year or more. TRRC explains that until that application before the MDEQ is approved and the mine is developed, there will be no coal to transport on the proposed rail line and therefore no reason to construct it. TRRC therefore requests that this proceeding be held in abeyance pending a final decision by MDEQ on the Otter Creek Coal mine permit application

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> For a more detailed discussion of the procedural history in this matter, see the Board's February 26, 2013 and September 10, 2014 decisions in this docket.

<sup>3</sup> TRRC also petitioned the Board to suspend upcoming filing deadlines pertaining to discovery in light of its abeyance petition. The Board stayed those deadlines in a decision served on December 3, 2015, and made replies to the abeyance request due by December 15, 2015.

and judicial affirmance of any permit issuance.

TRRC claims that it has sought to minimize the time between when it believed the mine would be ready to begin production and when the rail line would be operational, because doing so would be optimal for TRRC, coal shippers, and the public. Accordingly, TRRC states that it filed its application with the Board believing that concurrent rail and mine permitting were needed. However, TRRC and Otter Creek Coal contend that there is now sufficient time to accommodate sequential permitting of the mine development and the proposed rail line construction due to delays in the mine permitting process and near-term coal market weakness. TRRC asserts that holding this proceeding in abeyance would avoid any further expenditure and potential waste of resources in the event the mine permit is further delayed or denied.

On December 11, 2015, Northern Plains Resource Council and Rocker Six Cattle Co. (collectively, NPRC) replied in opposition to TRRC's abeyance petition and filed a motion to deny and dismiss with prejudice TRRC's rail construction application. NPRC asserts that TRRC failed to disclose that Arch is having severe financial difficulties. NPRC claims that Arch's weak financial condition demonstrates that the demand for coal (and thus need for the proposed rail line) has greatly diminished and that TRRC may not have the financial ability to construct the line. According to NPRC, Arch's financial condition also indicates that Otter Creek Coal would not be able to open the mine even if it obtained a permit to do so.

NPRC further argues that the purpose of TRRC's abeyance petition is to delay the project because of weak coal market conditions and to avoid the disclosure of allegedly damaging documents as part of discovery. NPRC claims it would be prejudiced if TRRC desires to reactivate the rail project in the future because that would permit TRRC to "sweep away" the existing record, and NPRC will need to go through the process of opposing the proposed rail line once again.

Finally, NPRC asserts that, if the rail construction project is allowed to remain dormant indefinitely rather than dismissed with prejudice, there would be harm to the landowners NPRC represents, in that they would not be able to make improvements on their properties, due to the uncertainty of the project's status.<sup>4</sup>

On December 31, 2015, TRRC replied in opposition to NPRC's motion. Among other things, TRRC notes that: Arch is only one of three TRRC owners that could fund construction of the rail line; both the rail project and mine project will continue despite Arch's current financial condition; and the demand for coal will be sufficient in several years to warrant the opening of the Otter Creek Coal mine and, by extension, the rail line. TRRC claims that whether or not there is a sufficient demand for coal is an issue that should be decided when ruling on the merits of the case, which can only occur after the development of the record has been completed. TRRC further states that the record developed in this proceeding to date will remain intact, that

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<sup>4</sup> On January 6, 2016, Colstrip Alternative Landowners filed in support of NPRC's motion and submitted verified statements from affected landowners. On February 1, 2016, Mary Catherine Dunphy submitted a letter asking that the Board deny TRRC's application.

TRRC will complete discovery after the abeyance is lifted, and that NPRC will have the opportunity to respond to TRRC at that point. TRRC also argues that there is no legal basis for dismissal with prejudice. On January 15, 2016, TRRC filed a notice stating that Arch and Otter Creek Coal have now filed voluntary Chapter 11 bankruptcy petitions to reorganize, but that this does not affect the status of the mine permit or TRRC's rail construction application.

On March 10, 2016, TRRC filed a supplement to its petition. TRRC states that Otter Creek Coal intends to suspend for the time being its efforts to secure the mine permit from MDEQ. Despite this change, TRRC continues to ask that the Board hold this proceeding in abeyance though only until Otter Creek Coal reinstates the mine permit application proceeding (not until the mine permit has been issued). Specifically, TRRC proposes that, within seven days of reinstating the mine permit application proceeding, TRRC will inform the Board about its views regarding the timing of reinstating the rail construction proceeding.

In its March 15, 2016 reply, NPRC argues that Otter Creek Coal's decision to suspend action on its mine permit application illustrates why the proceeding seeking authority to construct and operate the rail line should be dismissed. On April 5, 2016, TRRC responded that dismissal with prejudice is not appropriate here. TRRC states that Arch still possesses a lease from the State of Montana for the coal tracts and that energy markets can change quickly.<sup>5</sup> NPRC responded on April 15, 2016, stating that over half the coal tracts are leased from Great Northern Properties Limited Partnership, and that that entity terminated the lease months ago.

#### DISCUSSION AND CONCLUSIONS

We will deny TRRC's request to hold this proceeding in abeyance and instead dismiss the proceeding without prejudice. At this time, there appears to be little prospect that Otter Creek Coal's mine permit will be secured in the foreseeable future. Otter Creek Coal and its parent, Arch, have both filed for bankruptcy, and Otter Creek Coal has suspended its application for an MDEQ mining permit indefinitely. While it is possible that Otter Creek Coal or another party could restart the mining permit application process in the future, it is unclear whether and when this might occur. Therefore, to keep this docket open would serve no purpose. In addition, NPRC requests that the Board dismiss with prejudice. We will deny this request. As the agency explained in Indiana & Ohio Railway—Construction & Operation—Butler, Warren, & Hamilton Counties, Ohio, 9 I.C.C.2d 783, 786-87 (1993), a party cannot be permanently precluded from reapplying for Board authority. Therefore, we will dismiss this long-running proceeding, but without prejudice to the refiling of a request for Board authority in the future.

#### It is ordered:

1. TRRC's motion asking that the Board accept its reply is granted, and the reply is accepted into the record.
2. TRRC's petition to hold the proceeding in abeyance is denied.

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<sup>5</sup> Also on April 5, TRRC filed a motion asking that the Board accept its April 5 reply. We will accept TRRC's reply in the interests of a complete record.

3. NPRC's motion to deny the application and dismiss the proceeding with prejudice is denied.

4. This proceeding is dismissed without prejudice to the refiling of a request for Board authority at a future date.

5. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.