

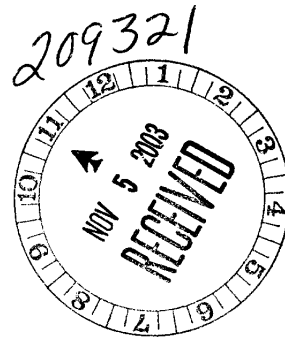
EXPEDITED ACTION REQUESTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 30186 (SUB-NO. 3)

**TONGUE RIVER RAILROAD COMPANY -- CONSTRUCTION AND
OPERATION -- WESTERN ALIGNMENT**

**MOTION OF TONGUE RIVER RAILROAD COMPANY, INC. FOR
PROTECTIVE ORDER**



**ENTERED
Office of Proceedings**

NOV 05 2003

**Part of
Public Record**

Betty Jo Christian
David H. Coburn
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
202 429-3000

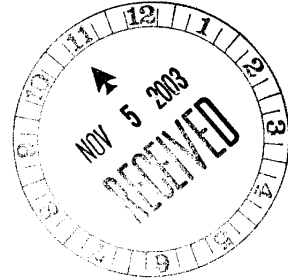
Attorneys for Applicant
Tongue River Railroad Company, Inc.

November 5, 2003

EXPEDITED ACTION REQUESTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 30186 (SUB-NO. 3)



**TONGUE RIVER RAILROAD COMPANY -- CONSTRUCTION AND
OPERATION -- WESTERN ALIGNMENT**

**MOTION OF TONGUE RIVER RAILROAD COMPANY, INC. FOR
PROTECTIVE ORDER**

Pursuant to the Board's rules at 49 CFR § 1114.21(c), Tongue River Railroad Company, Inc. ("TRRC") hereby files this Motion for Protective Order to quash the October 31, 2003 Notice for the deposition of TRRC's President, Mike Gustafson, filed by Northern Plains Resource Council ("NPRC"). That Notice, a copy of which is attached to this Motion, seeks Mr. Gustafson's deposition on November 11, 2003, only one day prior to the due date for NPRC's comments and evidence responsive to TRRC's May 1, 2003 Supplemental Evidence.¹

¹ Counsel for NPRC served its notice with a memorandum to parties of record advising of NPRC's intent to enter the deposition transcript into the record of this proceeding. That memorandum, and a letter from NPRC's counsel to TRRC's counsel advising of NPRC's willingness to accommodate Mr. Gustafson on a different date (which would have to be after November 11), are also attached.

TRRC respectfully urges that the Board grant this Motion and promptly quash the deposition Notice on the ground that the timing of the requested deposition cannot lead to the discovery of evidence that would be admissible in this proceeding under the governing procedural schedule established by the Board. NPRC could have sought a timely deposition of Mr. Gustafson beginning at any point after the filing of TRRC's May 1 Supplemental Evidence. However, it waited until the eleventh hour to serve its deposition notice -- one day prior to the deadline for its responsive evidence -- in an apparent effort to either delay that November 12 deadline or obtain a second bite at the apple through a further, unauthorized evidentiary filing at a later date. The Board should not sanction such an abuse of the discovery process. Since a deposition scheduled for November 11 (or later since Mr. Gustafson is not available on that date) is clearly not designed to produce evidence that would be useful for an evidentiary filing that NPRC would have to dispatch to the Board no later than that very day in order to meet the Board's November 12 deadline, the deposition is a pointless exercise that should not be allowed to proceed.

I. BACKGROUND

Pursuant to the Board's March 11, 2003 order allowing TRRC to supplement the record in this proceeding, TRRC submitted Supplemental Evidence on May 1, 2003. That evidence included the Verified Statement of its President, Mike Gustafson.

By order served July 7, 2003, the Board set the reply date for responsive comments or evidence as 40 days following the service by the Board of a new service list in this proceeding. That service list was served by the Board on October 3, 2003, thereby fixing November 12 as the due date for responsive comments and evidence. Thus, parties such as NPRC will have had over six months from the date that TRRC filed its Supplemental Evidence to prepare and submit their

response. This is more time than the 180 days that NPRC requested in its May 21, 2003 initial reply to TRRC's May 1 filing.

NPRC could have pursued any appropriate discovery with respect to TRRC's Supplemental Evidence at any time after May 1.² Although it has had over six months to do so, the only discovery it has served is its October 31 Notice seeking to depose Mr. Gustafson on November 11, which TRRC did not receive until November 3. As discussed further below, that Notice was served with a memorandum to the parties of record claiming -- incorrectly -- that NPRC has timed the deposition so that it could be "entered into the record in a timely fashion while the record is open," but that it will consider alternative dates if the parties will stipulate and the Board will agree to keep the record open. NPRC offers no reason or explanation as to why it needs Mr. Gustafson's testimony or why it waited so long to seek his deposition.

II. ARGUMENT

The Board's rules very clearly provide that discovery is appropriate when the information sought is "reasonably calculated to lead to the discovery of admissible evidence." 49 CFR § 1114.21(a)(2). The Board's rules also provide that, unless the Board orders otherwise, discovery materials, including depositions, should not be filed with the Board, but instead "should be appended to the appropriate pleading when used to support or to reply to a motion, or when used as an evidentiary submission." 49 CFR § 1114.21(f) (emphasis added). Further, the rules also make clear that deposition transcripts may be offered into evidence "upon the submission of statements under modified procedure" and subject to appropriate objections by other parties. 49 CFR § 1114.28. In short, discovery is appropriate when it might lead to admissible evidence and such admissible evidence adduced through discovery must be submitted

² TRRC would not have objected to a timely Notice of Deposition for Mr. Gustafson's testimony.

to the Board as part of an appropriate evidentiary submission. By contrast, a protective order is appropriate where discovery is not calculated to result in admissible evidence, where it will result in raising issues “untimely . . . to the proceeding” or where it will lead to “undue burden and expense.” 49 CFR § 1114.21(c).

Here, the conditions that could justify a deposition cannot be met with respect to the proposed November 11 deposition of TRRC’s President. The only evidentiary submission opportunity remaining for NPRC is a November 12 filing. There is no realistic prospect that the transcript from the noticed deposition (or that information adduced at that deposition) could be available in time for any NPRC November 12 filing, which it would need to dispatch from Montana (where NPRC and its counsel are located) no later than November 11.³ Thus, the proposed deposition would be an exercise in futility since it cannot lead to the production of evidence that could be incorporated into NPRC’s evidence or to the production of evidence in this proceeding that is otherwise timely, i.e., it will not result in evidence that could be admitted under the Board’s procedural schedule. The deposition will thus be no more than a wasteful burden of time and expense on TRRC and Mr. Gustafson, and for these reasons should not be allowed to go forward.

Perhaps recognizing that the deposition it seeks will not be of value for any timely evidentiary filing it is authorized to make, NPRC couples its deposition notice with a memorandum to the parties of record stating that it has scheduled the deposition so that it “will be completed and can be transcribed and entered into the record in timely fashion while the record is open.” NPRC further states in that memorandum that it will consider alternate

³ In fact, as noted above, Mr. Gustafson is not available on November 11 in any event and thus the deposition would have to be scheduled for some later date.

deposition dates “if the parties will stipulate and the Board will agree to keep the record open for the limited purpose of receiving the deposition of Mike Gustafson.”

NPRC’s memorandum overlooks the Board’s rules that require that deposition transcripts and other discovery materials be submitted to the Board only through “an appropriate pleading” or modified procedure statement⁴ and wrongly assumes that the record will remain open for further evidentiary filings by it after November 12. The only pleading that NPRC can file at this stage is responsive evidence and comments due on November 12. There are no further filing opportunities for it contemplated under the Board’s schedule. The record is closed for NPRC as of that date.⁵ To the extent that NPRC believes that it can take the deposition and simply submit the transcript at some later date, the Board’s rules make clear that it is mistaken.⁶ Further, to the extent that NPRC’s actions are a prelude to an effort by it to seek leave to extend the November 12 deadline or supplement any filing it may make on November 12, TRRC submits that there is no basis for granting any such extension or permission to supplement. Again, NPRC, which has been a party to this proceeding from the very beginning, had more than ample opportunity to seek discovery in a timely way following May 1. Instead of seeking a timely deposition, it slept on its rights for over six months. It cannot be allowed to rely on its own intransigence in failing to seek timely discovery as an excuse for further delay.

⁴ 49 CFR § 1114.21(f); 1114.28.

⁵ The only filing remaining after November 12 is TRRC’s reply to any responsive comments and evidence that may be filed that day, which is due on December 2, 2003.

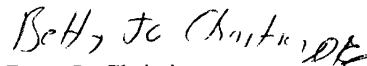
⁶ See STB Docket 41685, *CF Industries, Inc. v. Koch Pipeline Company, L.P.*, 2 STB 257, 1997 STB Lexis 107 at pages 20-21 (served May 14, 1997) (discovery materials “are not evidence, and the facts established through discovery become evidence only after being submitted by a party.”)

Finally, it bears note that the Board has previously held that a deposition notice is properly quashed when it comes too late relative to the procedural schedule in a contested proceeding. See STB Finance Docket No. 33877 (Sub No. !), *Illinois Railroad Company – Petition for Crossing Authority – In East Baton Rouge Parish, LA*, 2001 STB Lexis 887 (served Nov. 20, 2001) (quashing deposition notice served by KCS in part on the grounds that it was served months after KCS could have initiated discovery and at a time so late in the case as to require extension of the procedural schedule). A similar result should follow here.

CONCLUSION

For all of the above reasons, TRRC urges the Board to grant this Motion and quash the Notice of Deposition. Further, in view of the approach of the November 11 date on which the deposition of Mr. Gustafson has been sought, TRRC urges the Board to act on this Motion expeditiously, and if possible by no later than November 7. A copy of this Motion has been served by facsimile on counsel for NPRC.

Respectfully submitted,



Betty Jo Christian
David H. Coburn
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
202 429-3000

Attorneys for Applicant
Tongue River Railroad Company, Inc.

November 5, 2003

Jack R. Tuholske
Tuholske Law Office
P.O. Box 7548
Missoula MT 59807
406- 721-6986
Attorney for Northern Plains Resource Council Inc.

BEFORE THE SURFACE TRANSPORTATION BOARD
OF THE UNITED STATES OF AMERICA

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

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

NORTHERN PLAINS RESOURCE COUNCIL INC.'s

NOTICE OF DEPOSITION

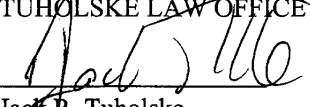
TO: Mike Gustafson, and his counsel of record

PLEASE TAKE NOTICE that beginning on November 11, 2003, at 10:00 a.m. and continuing until complete, at 2401 Montana Avenue, Billings, MT 59101, Northern Plains Resource Council, a Party of Record in the above-entitled action will take the deposition of Mike Gustafson, before an officer from Richard Mattson, Ltd Court Reporters, authorized by law to administer oaths. You are invited to attend and cross-examine. The deposition will inquire into matters contained in Mike

Gustafson's verified statement that was submitted to the Board as well as other supplemental evidence.

Dated this 31 day of October, 2003.

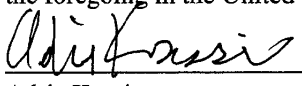
TUHOLSKE LAW OFFICE P.C.


Jack R. Tuholske

Attorney for Northern Plains

CERTIFICATE OF SERVICE

I hereby certify that on the 31 day of October, 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

TUHOLSKE LAW OFFICE, P.C.

Jack R. Tuholske
Sarah K. McMillan

234 East Pine Street, P.O. Box 7458,
Missoula, Montana 59807
Telephone: 406-721-6986 FAX 406-728-8445
tuholske@centric.net
mcmillan@centric.net

MEMORANDUM

TO: PARTIES to *Finance Docket No. 30186 (Sub-no. 3) Tongue River Railroad Company -- Rail Construction And Operation - in Rosebud And Big Horn Counties, Montana*

FROM: Jack Tuholske

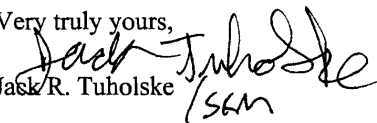
RE: Notice of Deposition of Mike Gustafson

DATED: October 30, 2003

Northern Plains has chosen November 11, 2003 for Mike Gustafson's deposition so that the deposition will be completed and can be transcribed and entered into the record in timely fashion while the record is open. Northern Plains will consider alternate dates if the parties will stipulate and the Board will agree to keep the record open for the limited purpose of receiving the deposition of Mike Gustafson.

Very truly yours,

Jack R. Tuholske



1/6/04

TUHOLSKE LAW OFFICE, P.C.*Jack R. Tuholske**Sarah K. McMillan*

234 East Pine Street, P.O. Box 7458,

Missoula, Montana 59807

Telephone: 406-721-6986 FAX 406-728-8445

tuholske@centric.net

mcmillan@centric.net

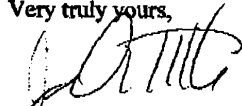
November 4, 2003

Betty Jo Christian
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., Nw
Washington, Dc 20036-1795

Dear Ms. Christian:

You should have now received a Notice of Deposition that I filed last Friday. I would be happy to arrange for the deposition at a time that is convenient to all parties, provided that the deposition can be submitted to the record in this case. Under the circumstances, I felt obliged to get the Notice out at this time. Please advise at your earliest convenience as to whether you can attend this Tuesday, and if not, what alternative date you would like to propose.

Very truly yours,



Jack R. Tuholske

JRT/ak

CERTIFICATE OF SERVICE

I hereby certify that I have this 5th day of November 2003 served a copy of the foregoing Motion for Protective Order by facsimile on counsel for Northern Plains Resource Council, Inc. and by first class mail on all other parties of record.

A handwritten signature in black ink, appearing to read "David H. Coburn", written over a horizontal line.

David H. Coburn