

SLOVER & LOFTUS LLP

ATTORNEYS AT LAW

1224 SEVENTEENTH STREET, N.W.
WASHINGTON, D.C. 20036-3003

WILLIAM L. SLOVER
C. MICHAEL LOFTUS
JOHN H. LE SEUR
KELVIN J. DOWD
ROBERT D. ROSENBERG
FRANK J. PERGOLIZZI
ANDREW B. KOLESAR III
PETER A. PFOHL
DANIEL M. JAFFE
KATHERINE F. WARING
BRADFORD J. KELLEY

TELEPHONE:
(202) 347-7170

FAX:
(202) 347-3619

WRITER'S E-MAIL:

February 8, 2017

OF COUNSEL
DONALD G. AVERY
CHRISTOPHER A. MILLS

242600

ENTERED
Office of Proceedings
February 8, 2017
Part of
Public Record

Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423-0001

Re: Docket No. AB 1253, The State of South Dakota Acting by and
Through Its Department of Transportation – Adverse Discontinuance of
Operating Authority – Napa-Platte Regional Railroad Authority

Dear Ms. Brown:

Enclosed for filing in the above-referenced docket please find (i) an
executed original (which contains a marked color page) and ten copies of the State of
South Dakota Acting by and Through Its Department of Transportation's ("State")
Petition for Waiver and Exemption; (ii) a check for the filing fee of \$2,000; (iii) an
executed original and ten copies of the State's Requests for Filing Fee Waivers; and (iv)
three CDs with PDF copies of the two filings.

Kindly date stamp the extra copy of this cover letter and the enclosed
pleadings and return them to the bearer of this letter. Thank you for your attention to this
matter.

Respectfully submitted,

John H. LeSeur
An Attorney for the State

FEE RECEIVED
February 8, 2017
SURFACE
TRANSPORTATION BOARD

cc: Certificate of Service List

FILED
February 8, 2017
SURFACE
TRANSPORTATION BOARD

	)	
STATE OF SOUTH DAKOTA ACTING BY AND	)	
THROUGH ITS DEPARTMENT OF	)	
TRANSPORTATION – ADVERSE	)	
DISCONTINUANCE OF OPERATING	)	Docket No. AB 1253
AUTHORITY – NAPPA-PLATTE	)	
REGIONAL RAILROAD AUTHORITY	)	
	)	

By: Karla L. Engle
Special Assistant Attorney General
South Dakota Department of
Transportation
700 E. Broadway Ave.
Pierre, SD 57501-2586
(605) 773-3262

John H. LeSeur
Daniel M. Jaffe
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Attorneys for the State of South Dakota
Acting by and Through Its Department
of Transportation

Dated: February 8, 2017

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STATE OF SOUTH DAKOTA ACTING BY AND	)	
THROUGH ITS DEPARTMENT OF	)	
TRANSPORTATION – ADVERSE	)	
DISCONTINUANCE OF OPERATING	)	Docket No. AB 1253
AUTHORITY – NAPPA-PLATTE	)	
REGIONAL RAILROAD AUTHORITY	)	
	)	

PETITION FOR WAIVER AND EXEMPTION

Pursuant to 49 C.F.R. §§ 1117.1, 1152.24(e)(5) and 49 U.S.C. § 10502(a), the State of South Dakota acting by and through its Department of Transportation (“State”) seeks waivers of specific Surface Transportation Board (“STB” or “Board”) regulations, and exemptions from specific statutory provisions, in connection with the third party “adverse” discontinuance application the State intends to file with the Board.

The State intends to ask the Board through this adverse discontinuance proceeding to terminate the regulatory authority held by Napa-Platte Regional Railroad Authority (“NPRRA”) to lease and operate over a State-owned rail line extending from Milepost (“MP”) 0.0, referred to as Napa Junction, in SD to MP 13.4+/- near Tabor, SD (“Napa-Tabor Line” or “Line”). A map of the Napa-Tabor Line is appended in Attachment 1. However, the Line itself will continue to be available for common carrier service.

I. BACKGROUND

1. The State owns the Napa-Tabor Line.¹ NPRRA obtained class exemption rights to lease and operate the Line in 2007.² At that time, NPRRA was leasing the Napa-Tabor Line from the State. NPRRA's last lease of the Napa-Tabor Line expired on September 20, 2015. NPRRA is a non-operating Class III carrier, and, since 2007, neither NPRRA, nor any other rail carrier, has provided common carrier service over the Napa-Tabor Line, but the Line has been used to store rail cars.

2. The State has requested that NPRRA seek a voluntary termination of its class exemption service rights over the Napa-Tabor Line. To date, NPRRA has refused to do so. Under governing STB precedent, the State must now file an adverse discontinuance application to obtain Board authority to terminate NPRRA's class exemption service rights,³ and the State plans on making this filing following the Board's decision responding to this Petition for Waiver and Exemption ("Waiver Petition").

¹ This Line, which is part of a longer line that runs from MP 0.0, referred to as Napa Junction, in SD to MP 83.3 near Platte, SD ("Napa-Platte Line"). The Napa-Platte Line was authorized for abandonment in 1980, but prior to being abandoned, was acquired by the State. *See Napa-Platte Reg'l R.R. Auth., Modified Certificate*, FD 35026, slip. op at 1-2 (STB served June 14, 2007).

² *See Napa-Platte Reg'l R.R. Auth. – Lease and Oper. Exempt. – Dakota Short Line Corp.*, FD 35025 (STB served May 31, 2007) (summarizing NPRRA's class exemption notice filed pursuant to 49 C.F.R. § 1150.31).

³ *See Cheatham Cnty. Rail Auth. "Appl. & Pet." For Adverse Discontinuance*, AB 379X, 1992 WL 322925, at *1-2 (ICC served Nov. 4, 1992) (holding that the proper procedure for a state agency to involuntarily remove the regulatory authority of an operator holding class exemption operating rights over a rail line that had previously been

3. The State is now leasing the Napa-Tabor Line to Dakota Southern Railroad Company (“DSRC”). At the State’s request, DSRC has obtained a modified certificate to provide common carrier service over the Napa-Tabor Line.⁴ Thus, this is not a case where service over a rail line will be discontinued. Instead, it is a case involving a change in operators holding common carrier service rights.

4. The State also owns the connecting rail line extending between MP 13.4 +/- near Tabor, SD and MP 54.5 near Ravinia, SD (“Tabor-Ravinia Line”). NPRRA’s lease of the Tabor-Ravinia Line has also expired and the State has instituted a proceeding asking the Board to issue a declaratory order terminating NPRRA’s modified certificate rights over the Tabor-Ravinia Line.⁵

II. WAIVER AND EXEMPTION REQUESTS

A. Waiver Requests

The Board’s regulations require that discontinuance applications conform to the requirements set forth at 49 C.F.R. Part 1152, Subpart C. However, the Board has

authorized for abandonment, but subsequently acquired by the state agency, was to file an adverse discontinuance application); *Lake Cnty. Or. – Adverse Discontinuance of Rail Serv. – Modoc Ry. & Land Co., LLC & Modoc N. R.R. Co.*, AB 1035 (STB served Nov. 17, 2009) (granting an adverse discontinuance application filed by a county to terminate a line operator’s regulatory authority to operate a line that had previously been abandoned and acquired by the county).

⁴ See *Dakota S. Ry. – Notice of Modified Certificate of Pub. Convenience & Necessity – Yankton, Bon Homme, & Charles Mix Cntys., S.D.*, FD 36086 (STB served Jan. 25, 2017).

⁵ See *State of S. Dakota Acting By and Through Its Dep’t of Transp. – Pet. For Declaratory Order*, FD 36096 (Filed Feb. 8, 2017).

routinely “waive[d] inapplicable and unneeded regulations” in adverse discontinuance cases and in adverse abandonment cases and has routinely “grant[ed] exemptions as appropriate from statutory provisions” in these cases.⁶ The State’s waiver and exemption requests conform to those previously granted by the Board.

1. System Diagram Map (“SDM”) Rules. The State requests the Board waive the following SDM-related rules: 49 C.F.R. § 1152.10-14⁷ and 49 C.F.R. § 1152.22(a)(5).⁸ These rules are intended to provide the public with advance notice in cases where service over the involved line is being discontinued. “[W]aiver of these SDM requirements is customary in adverse proceedings where the adverse discontinuance is intended to result only in a change in operators, as would be the case here.”⁹

⁶ See *Town of N. Judson, Ind. – Adverse Discontinuance of Serv. – in Laporte, Porter, & Starke Cntys., Ind.*, AB 1232, slip op. at 2 (STB served July 27, 2015) (“*North Judson*”); *accord Lackawaxen-Honesdale Shippers Ass’n – Adverse Discontinuance of Operating Auth. – in Wayne & Pike Cntys., Pa.*, AB 1110, slip op at 2 (STB served Jan. 23, 2014) (“*Lackawaxen*”); *Bos. & Me. Corp. – Adverse Discontinuance – New Eng. S. R.R.*, Docket No. AB32 (Sub-No. 100), slip op. at 2 (STB served Feb. 12, 2008) (“*Bos. & Me. Corp.*”).

⁷ These rules relate to filing, amending, and providing public notice of, a carrier’s SDM, and establish a two-month waiting period between the filing of an amendment to an SDM and the filing of an adverse discontinuance application involving the line subject to the SDM amendment.

⁸ This rule requires that applications for discontinuance include an attestation referencing the inclusion of the involved rail line on the carrier’s SDM or narrative, the date on which the line was first listed for discontinuance, and a copy of the line description that accompanies the carrier’s SDM.

⁹ *North Judson*, slip op. at 3. *Accord Lackawaxen*, slip op at 2-3; *Bos. & Me. Corp.*, slip op. at 2-3.

2. Line Attributes Rules. The State requests waivers of 49 C.F.R. § 1152.22(b), (c), (d), and (e). These regulations require an applicant seeking discontinuance authority to include in its application information regarding the condition of the involved rail properties, service performed, attributable revenue and cost data, and rural and community impact. This information is not necessary here because the State is proposing only a change in operators to respond to future service needs, not a discontinuance of service.¹⁰ In addition, the revenue and cost data requirements are intended to apply only in cases where a carrier seeks to discontinue their own operations on grounds that the operations burden interstate commerce.¹¹ Finally, this information is not relevant in a case where a line owner is proposing to terminate the operating authority of the former operator of its line due to the expiration of the lease agreement between the line owner and the operator.¹²

¹⁰ See, e.g., *North Judson*, slip op. at 3 (finding compliance with 49 C.F.R. § 1152.22(b), (c), (d), and (e) “unnecessary” in a case involving a change in operators); *Lackawaxen*, slip op. at 4 (same).

¹¹ See, e.g., *North Judson*, slip op. at 3 (compliance with 49 C.F.R. § 1152.22(b), (c), (d), and (e) applies only to carriers that propose to discontinue their own operations); *Lackawaxen*, slip op. at 3 (same).

¹² See *Lake Cnty. Or. – Adverse Discontinuance of Rail Serv. – Modoc Ry. & Land Co., LLC & Modoc N. R.R.*, AB 1035, slip op. at 4 (STB served June 15, 2009) (“*Lake Cnty. I*”) (finding compliance with 49 C.F.R. § 1152.22 (b)-(d) not “relevant” in a case where the line owner was terminating an operator’s lease due to the operator’s breach of the lease agreement).

3. Environmental and Historic Impacts. The State requests waivers of the environmental and historic reporting requirements set forth at 49 C.F.R. §§ 1152.20(c), 1105.7 and 1105.8, as well as any additional waivers or exemptions that may be necessary to confirm these reporting requirements are inapplicable in this proceeding. These reporting requirements should be waived because the proposed adverse discontinuance will not result in changes that exceed the thresholds set forth at 49 C.F.R. §§ 1105.7 and 1105.8¹³ and because the State has no intention of salvaging the Napa-Tabor Line.¹⁴

The State emphasizes that it is not seeking to abandon the Napa-Tabor Line. That Line is currently part of the national rail system and will remain part of the rail system following the termination of NPRRA's operating rights.¹⁵

4. Filing, Notice and Posting Requirements. The State requests that the Board partially waive the following filing, notice and posting requirements:

¹³ See *North Judson*, slip op. at 4 (“Because this proceeding is intended ultimately to result merely in a substitution of operators and would not result in operations that would exceed the thresholds in 49 C.F.R. § 1105.7 . . . it is appropriate to waive the need to prepare environmental documentation under 49 C.F.R. § 1105.6(c)(2)(ii)”); *accord Lackawaxen*, slip op. at 3 (same).

¹⁴ See *North Judson*, slip op. at 4 (where “[t]here is no evidence that the [line owner] intends to salvage or alter the Line or disrupt historic structures . . . the historic report requirements will . . . be waived for this proceeding under 49 C.F.R. § 1105.8(b)(1)”); *accord Lackawaxen*, slip op. at 3 (same).

¹⁵ See *Beaufort R.R. – Modified Rail Certificate*, FD 34943, slip op. at 6 (STB served Mar. 19, 2008) (“temporary discontinuance of service by the operator is not the same as abandonment by the line owner (in the present situation, the State).”). In addition, DSRC will continue to be available to provide common carrier service.

- The State seeks partial waiver of the filing and notice requirements of 49 C.F.R. § 1152.20(a)(1) and (2), and the time-filing requirements of 49 C.F.R. § 1152.20(b)(1). Specifically, the State requests this Waiver Petition be permitted to serve as the State’s notice of intent to seek adverse discontinuance of service as required under 49 C.F.R. § 1152.20 and that it be permitted to serve its Waiver Petition only on the following entities: NPRRA; BNSF Railway Company (“BNSF”), the connecting carrier at Napa Junction, in SD; DSRC, the carrier currently leasing the Napa-Tabor Line from the State; and Ralph Marquardt (an individual who has contacted the State to express an interest in obtaining rail service over the Napa-Tabor Line). The State submits that service of its Waiver Petition on these entities, combined with three weeks of newspaper publication and a Federal Register notice, satisfies procedural due process. The Board has consistently granted similar waiver requests in prior cases.¹⁶

- The State seeks a partial waiver of the notice requirements set forth at 49 C.F.R. § 1152.24(c). Specifically, the State requests that it be required to serve its

¹⁶ See, e.g., *North Judson*, slip op. at 4-5; *Lakawaxen*, slip op. at 3-4. The State notes that since it will be the applicant, there is no need to serve other State agencies and commissions. In addition, the State has determined, and hereby certifies, that no duly certified labor organizations represent employees on the Napa-Tabor Line. See also *Riverview Trenton R.R. – Adverse Abandonment – In Wayne Cnty. Mich.*, AB 1230, slip op. at 4 (STB served Apr. 10, 2015) (waiving requirement that labor organizations and the United States Railroad Retirement Board be served when “there are no known railroad employees who have worked on the Line”).

adverse discontinuance application on NPRRA, DSRC and BNSF. This request also conforms to Board precedent.¹⁷

- The State seeks a waiver of the notice and posting requirements set forth at 49 C.F.R. § 1152.20(a)(3). These station and terminal posting requirements were intended to apply in cases where “carriers [are] proposing to voluntarily discontinue service over their own lines,”¹⁸ which is not the case here. In addition, the State is unaware of any stations or terminals on the Napa-Tabor Line.

- The State seeks a limited waiver of the newspaper publication rule set forth at 49 C.F.R. § 1152.20(a)(4) and 49 C.F.R. § 1152.21. Specifically, the State requests that it be permitted to utilize the notice of intent form set forth in Attachment 2 in its newspaper publication notices. The Attachment 2 notice uses the form and substance of the notice of intent found at 49 C.F.R. § 1152.21 but removes material that is not necessary for this proceeding.¹⁹

- The State seeks a limited waiver to modify the draft Federal Register notice form, set forth at 49 C.F.R. § 1152.22(i), that an applicant must submit to the Board along with its adverse discontinuance application. Specifically, the State requests that it be permitted to utilize the draft Federal Register notice form set forth in Attachment 3. The

¹⁷ See *North Judson*, slip op. at 5 (granting similar relief); *Lackawaxen*, slip op. at 4 (same).

¹⁸ See *Lackawaxen*, slip op. at 4.

¹⁹ See, e.g., *Lake County I*, slip op. at 5 (approving case-specific notice of intent form).

Attachment 3 notice uses the form and substance of the draft Federal Register notice found at 49 C.F.R. § 1152.22(i), but removes material not necessary for this proceeding.²⁰

- The State seeks a waiver of the requirement that the notices it provides pursuant to 49 C.F.R. § 1152.21 and 49 C.F.R. § 1152.22(i) contain text referring to the mandatory imposition of labor protective conditions. “When issuing abandonment or discontinuance authority for rail lines that constitute the carrier’s entire system, the Board does not generally impose protection.”²¹ The Napa-Tabor Line is part of a non-banked rail line that runs from Napa, SD to Ravinia, SD²² and these connecting line segments “constitute[] [NPRRA’s] entire system.” *Id.* In addition, NPRRA is a regional railroad authority, not an operating common carrier; NPRRA has conducted no common

²⁰ See, e.g., *Lake County I*, slip op. at 5 (approving case-specific Federal Register form).

²¹ *Cerro Gordo Cnty., Iowa – Adverse Discontinuance – Iowa Traction R.R.*, AB 1063, slip op. at 4-5 n.9 (STB served Mar. 16, 2011) (citing *Northampton & Bath R.R. – Aban. Near Northampton & Bath Junction in Northampton Cnty., Pa.*, 354 I.C.C. 784, 785-86 (1978)). *Accord MCM Rail Servs. LLC, d/b/a Baltimore Indus. R.R. – Pet. for Discontinuance of Serv. Exemp. – in Balt. Cnty., Md.*, AB 1235X, slip op. at 2 (STB served Oct. 27, 2015). The Board recognizes two exceptions to this rule: “(1) a corporate affiliate . . . will continue substantially similar operations; or (2) a corporate parent will realize substantial financial benefits over and above relief from the burden of deficit operations by its subsidiary railroad.” *Miss. & Skuna Valley R.R. – Aban. Exemp. – In Yalobusha & Calhoun Cntys., Miss.*, AB 1089X, slip op. at 1 (STB served Nov. 7, 2011). Neither exception applies here because no corporate affiliate of NPRRA will continue operations over the Line; NPRRA has no corporate parent; NPRRA has not engaged in any common carrier operations over the line; and NPRRA has no railroad employees.

²² The State is seeking termination of NPRRA’s modified certificate rights over the Tabor-Ravinia Line segment in a separate proceeding.

carrier rail operations under its current operating authority; and NPRRA has no rail employees.

5. Offers of Financial Assistance (“OFA”). The State asks for a waiver of the regulations set forth at 49 C.F.R. § 1152.27. These regulations govern OFAs to continue rail service. Waiver of these regulations is clearly appropriate here. As the Board has explained, “if the Board were to permit the discontinuance of [a current operator’s] operations over the [involved] Line in . . . [an adverse discontinuance] proceeding, an OFA to subsidize [the current operator’s] continued operations would in effect nullify the Board’s decision.”²³ In addition, service over the line will continue to be available by an operating common carrier – DSRC. The availability of DSRC service “obviate[s] the need for the OFA process.”²⁴

6. Public Use/Trail Conditions. The State asks the Board to confirm that the State need not request a waiver of the Board’s public use regulations set forth at 49 C.F.R. § 1152.28 because “public use requirements do not apply to discontinuances.”²⁵ Similarly, the State asks the Board to confirm that the State need not seek a waiver of the

²³ *North Judson*, slip op. at 5, citing *Riverview Trenton R.R. – Adverse Aban. – In Wayne Cnty., Mich.*, AB 1230, slip op. at 6 (STB served Apr. 10, 2015).

²⁴ *Lackawaxen*, slip op. at 5; accord *Ind. Bus. R.R. – Adverse Discontinuance of Rail Service – Portion of Norfolk S. Ry. ’s Rockport Branch*, AB 1044, slip op. at 4 (STB served Nov. 30, 2009) (“In the event that [applicant] prevails in its adverse discontinuance application, [applicant] plans to resume service, so an OFA is not warranted.”)

²⁵ *North Judson*, slip op. at 5-6, citing *Ind. Bus. R.R. – Adverse Discontinuance of Rail Serv. – Portion of Norfolk S. Ry. ’s Rockport Branch*, AB-1044, slip op. at 4 (STB served Nov. 30, 2009).

Board's interim trail use and banking rules set forth at 49 C.F.R. § 1152.29 because these rules are inapplicable in a discontinuance case.²⁶

B. Exemption Requests

The State seeks exemptions from the following statutory provisions corresponding to the Board regulations cited above: 49 U.S.C. § 10903(c)(2) (SDMs); 49 U.S.C. § 10903(a)(3)(B) (Posting); and 49 U.S.C. § 10904 (OFAs).

The Board should grant these related exemptions because full compliance with Subtitle IV of Title 49 is not necessary here to carry out the rail transportation policy set forth in 49 U.S.C. § 10101. Instead, granting the requested exemptions would provide the State with a reasonable opportunity to demonstrate that there is no overriding public need for NPRRA's continued holding of common carrier operating rights over the Napa-Tabor Line.²⁷

In addition, granting the requested exemptions would eliminate unnecessary regulatory procedures, and as a consequence, promote the rail transportation policy set forth at 49 U.S.C. §§ 10101(2) (by expediting regulatory decisions), at 49 U.S.C. § 10101(5) (by fostering sound economic conditions in transportation), and at 49 U.S.C. §

²⁶ See *Lake Cnty. I*, slip op. at 5 (“Because the County is only seeking to force the discontinuance of service rather than force the abandonment of the line, we would not impose public use or trail conditions.”).

²⁷ *Accord North Judson*, slip op. at 6; *Lackawaxen*, slip op. at 5.

10101(9) (by encouraging honest and efficient management of railroads). Other aspects of the rail transportation policy will not be adversely affected.²⁸

Finally, application of the statutory provisions for which the State is seeking exemption is not necessary to protect shippers from an abuse of market power because there are no shippers currently using rail service over the Napa-Tabor Line and because rail service over the Napa-Tabor Line will continue to be available from DSRC.²⁹

Respectfully submitted,

By: Karla L. Engle
Special Assistant Attorney General
South Dakota Department of
Transportation
700 E. Broadway Ave.
Pierre, SD 57501-2586
(605) 773-3262

John H. LeSeur
Daniel M. Jaffe
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Attorneys for the State of South Dakota
Acting by and Through Its Department
of Transportation

Dated: February 8, 2017

²⁸ *Accord North Judson*, slip op. at 6; *Lackawaxen*, slip op. at 5.

²⁹ *Accord North Judson*, slip op. at 6; *Lackawaxen*, slip op. at 5.

VERIFICATION

I, Darin Bergquist, Secretary, State of South Dakota Department of Transportation, verify under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verification.

Executed on February 2nd, 2017.


Darin Bergquist
Secretary

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of February, 2017, I served copies of the foregoing Petition For Waiver and Exemption by United States First Class Mail, postage prepaid on:

Kenneth W. Cotton
Wipf & Cotton, L.L.C.
P.O. Box 370
Wagner, SD 57380-0370

Roger Berndt
30125 406th Ave.
Avon, SD 57315

John Hauck
41172 Haucks Ln.
Tyndall, SD 57066

Gary Beeson
39846 299th St.
Wagner, SD 57380

Dick Rysavy
421 Wilson Ave.
Dante, SD 57329

Jason Kokes
42628 307th St.
Tabor, SD 57063

Garry Moore
635 Augusta Cir.
Yankton, SD 57078

Allen Sinclair
1200 W. 21st St.
Yankton, SD 57078

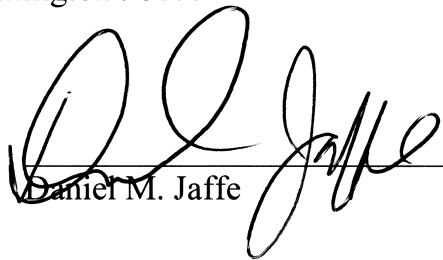
Gerald Harrington
29641 393rd Ave.
Wagner, SD 57380

John Harper
4307 E. Hwy. 50
Yankton, SD 57078

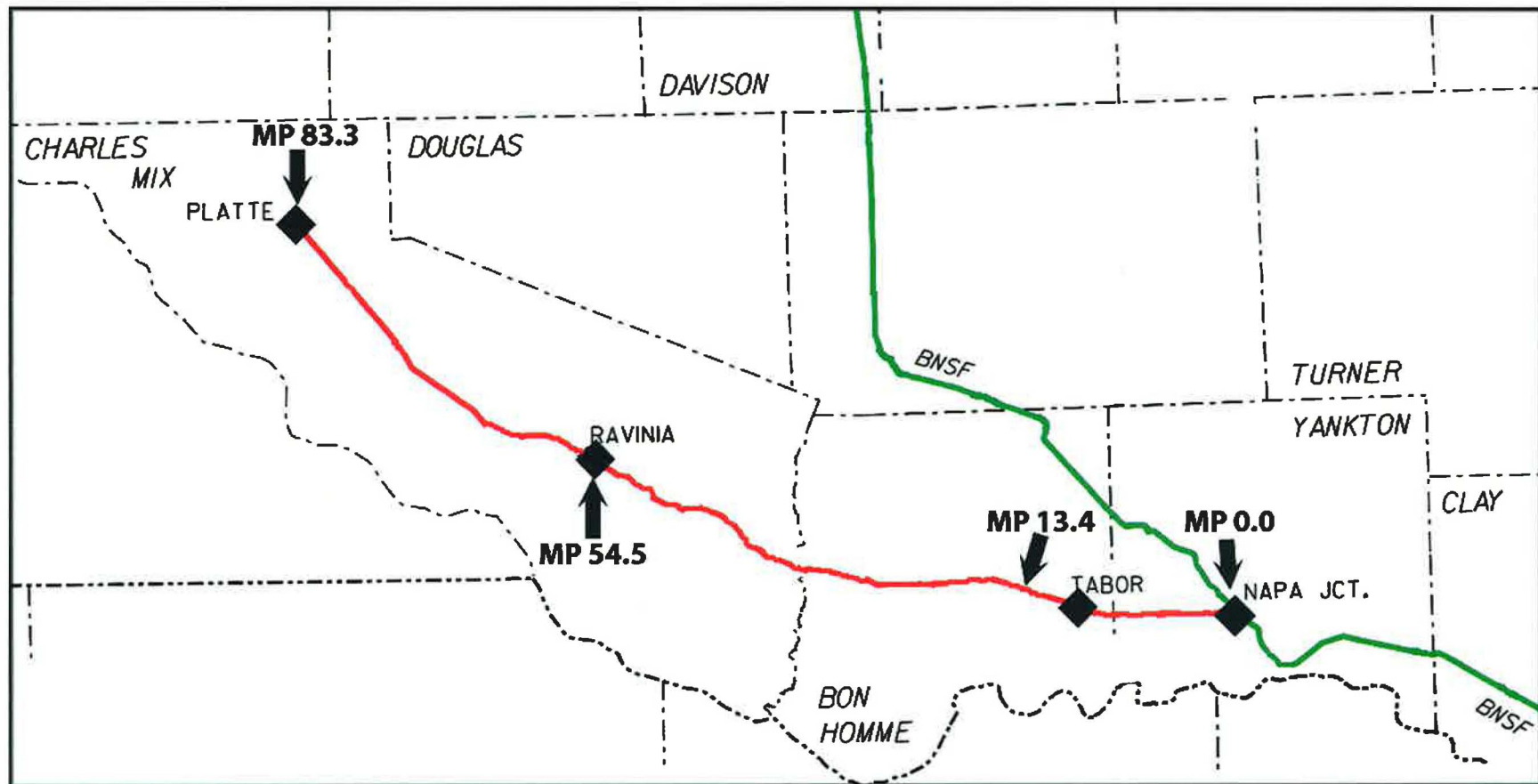
Ralph Marquardt
P.O. Box 1040
Yankton, SD 57078

Roger Nober
Executive Vice President, Law and Corporate Affairs
BNSF Railway Company
2650 Lou Menk Drive
Fort Worth, TX 76131-2830

Charles H. Montange
426 NW 162nd Street
Seattle, Washington 98177


Daniel M. Jaffe

ATTACHMENT 1



ATTACHMENT 2

Draft Notice of Intent

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC 20423

STB Docket No. AB-1253

STATE OF SOUTH DAKOTA ACTING BY AND
THROUGH ITS DEPARTMENT OF
TRANSPORTATION – ADVERSE
DISCONTINUANCE OF OPERATING AUTHORITY – NAPPA-PLATTE
REGIONAL RAILROAD AUTHORITY

**NOTICE OF INTENT TO FILE APPLICATION FOR ADVERSE
DISCONTINUANCE OF OPERATING AUTHORITY**

The State of South Dakota, acting by and through its Department of Transportation (“State”) gives notice that on or about _____, 2017, it intends to file with the Surface Transportation Board (“Board”), Washington, D.C. 20423, an application seeking permission for the adverse discontinuance of the rail service operating authority held by the Napa-Platte Regional Railroad Authority (“NPRRA”) over an approximately 13.4 mile rail line extending between Milepost 0.0 near Napa Jct., SD and Milepost 13.4 +/- near Tabor, SD (“Napa-Tabor Line”). The Napa-Tabor Line is situated in Yankton and Bon Homme Counties, South Dakota and traverses U.S. Postal Zip Codes 57508, 57078, and 57063. The Line does not have stations. The reason for the proposed discontinuance is that the State’s lease of the Napa-Tabor Line to NPRRA

has expired and NPRRA has refused to seek permission to discontinue its operating rights. The State now leases the Napa-Tabor Line to Dakota Southern Railway Company (“DSRC”). DSRC has obtained a modified certificate of public convenience and necessity to provide common carrier service over the Napa-Tabor Line.

There are no documents in the State’s possession that indicate that the Napa-Tabor Line contains federally granted rights-of-way. Any such documentation that might come into the State’s possession will be made available promptly to those requesting it.

The application, when filed, can be viewed following its filing on the Board’s website, www.stb.gov, or a copy can be secured from the State’s representatives, whose names and addresses appear below. The application will include the State’s entire case for discontinuance. Based on rulings made by the Board in its decision served in this proceeding on _____, this proposed discontinuance will not be subject to: offers of financial assistance under 49 U.S.C. § 10904 (49 C.F.R. § 1152.27 of the Board’s rules); requests for public use conditions under 49 U.S.C. § 10905 (49 C.F.R. § 1152.28 of the Board’s rules); requests for trail use conditions under 16 U.S.C. § 1247(d) (49 C.F.R. § 1152.29 of the Board’s rules); or imposition of labor protective conditions under 49 U.S.C. § 10903(b)(2).

Any interested person, after the application is filed, may file with the Board written comments concerning the proposed adverse discontinuance or protests to it. These filing are due 45 days from the date of filing of the application. Persons who may

oppose the discontinuance, but who do not wish to participate fully in the process by appearing at any oral hearings, or by submitting verified statements of witnesses containing detailed evidence, should file comments. Persons opposing the proposed discontinuance that do wish to participate actively and fully in the process should file a protest. Protests must contain that party's entire case in opposition including the following: (1) the protestant's name, address and business; (2) the protestant's interest in the proceeding, including a description of the protestant's use of the line or, if protestant does not use the line, information concerning the group or public interest it represents; (3) the protestant's specific reasons why it opposes the application including information regarding its reliance on the involved service; and (4) the protestant's rebuttal of material submitted in the application.

Written comments and protests will be considered by the Board in determining what disposition to make of the application. The commenting party or protestant may participate in the proceeding as its interests may appear.

If oral hearing is desired, the requester must make a request for an oral hearing and provide reasons why an oral hearing is necessary. Oral hearing requests must be filed with the Board no later than 10 days after the application is filed.

Those parties filing protests to the proposed discontinuance should be prepared to participate actively either in the oral hearing or through submission of their entire case in the form of verified statements and arguments at the time they file a protest.

Parties seeking information concerning the filing of protests should refer to 49 C.F.R. § 1152.25.

Written comments and protests should indicate the proceeding designation, STB Docket No. AB 1253 and must be filed with the Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, 395 E. Street, SW, Washington DC 20423-0001 no later than 45 days after the application is filed. Interested persons may file a written comment or protest with the Board to become a party to this discontinuance proceeding. A copy of each written comment or protest shall be served on the following representatives of the State: John H. LeSeur, Slover & Loftus LLP, 1224 17th Street, NW, Washington, DC 20036, (202) 347-7170 and Karla L. Engle, Special Assistant Attorney General, South Dakota Department of Transportation, 700 E. Broadway Ave., Pierre, SD 57501-2586, (605) 773-3262.

Written comments and protests may be sent to the Board either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should comply with the instruction found on the Board's www.stb.gov website, at the "E-FILING" link. Any person submitting a filing in the traditional paper format should send the original and 10 copies of the filing to the Board with a certificate of service. Except as otherwise set forth in 49 CFR Part 1152, every document filed with the Board must be served on all parties to this adverse discontinuance proceeding in accordance with 49 C.F.R. § 1104.12(a).

The Board's _____ decision waived compliance with its environmental and historic review regulations because the Board found that it was unlikely that the discontinuance would result in any environmental impacts or salvage. Accordingly, no environmental or historic assessment will be prepared in this proceeding.

Persons seeking further information concerning discontinuance procedures may contact the Board's Office of Public Assistance, Governmental Affairs and Compliance at (202) 245-0238 or refer to the full discontinuance regulations at 49 CFR part 1152. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339. Board decisions and notices are available on the Board's website at www.stb.gov.

ATTACHMENT 3

Draft Federal Register Notice

FR-_____

SURFACE TRANSPORTATION BOARD

[STB Docket No. AB-1253]

State of South Dakota Acting by and Through Its Department of Transportation –
Adverse Discontinuance of Operating Authority – Nappa-Platte Regional Railroad
Authority

On _____, the State of South Dakota, acting by and through its
Department of Transportation (“State”), filed an application under 49 U.S.C. § 10903
asking the Surface Transportation Board (“Board”) to authorize the third-party, or
“adverse,” discontinuance of operating authority held by the Napa-Platte Regional
Railroad Authority (“NPRRA”) on a line of railroad extending from railroad milepost
0.0 near Napa Jct., SD to milepost 13.4+/- near Tabor, SD (“Line”), a distance of
approximately 13.4 miles in the Counties of Yankton, SD and Bon Homme, SD. The
Line includes no stations and traverses through United States Postal Service ZIP codes
57058, 57078, and 57063.

According to the State, it owns the Line; its lease of the Line to NPRRA
has expired; it has requested NPRRA to obtain authorization from the Board to
discontinue the operating authority NPRRA obtained from the Board in 2007 to conduct

common carrier operations over the Line;¹ and NPRRA has refused to do so. The State also represents that NPRRA is a non-operating common carrier that has not provided any common carrier service over the Line since NPRRA obtained authority to do so in 2007; that the State now leases the Line to an operating common carrier – the Dakota Southern Railway Company (“DSRC”); and that, at the State’s request, the DSRC has obtained a modified certificate of public convenience and necessity that authorizes DSRC to provide common carrier service over the Line and to provide common carrier service over a connecting rail line segment owned by the State extending from milepost 13.4 +/- near Tabor, SD to milepost 54.5 near Ravinia, SD (“Connecting Line Segment”).² The State now seeks Board permission through an adverse discontinuance proceeding to terminate NPRRA’s regulatory authority to lease and operate the Line.

¹ See Napa-Platte Reg’l R.R. Auth. – Lease and Oper. Exempt. –Dakota Short Line Corp., FD 35025 (STB served May 31, 2007).

² See Dakota S. Ry. Co. – Modified Certificate of Pub. Convenience and Necessity – Yankton, Bon Homme, and Charles Mix Counties, SD, FD 36086 (STB served Jan. 25, 2017). According to the State, its lease of the Connecting Line Segment to NPRRA has expired; the State has requested NPRRA to file a notice at the Board terminating the modified certificate operating rights NPRRA obtained to provide service over the Connecting Line Segment in Napa-Platte Reg’l R.R. Auth. – Modified Certificate, FD 35026 (STB served June 14, 2007); and NPRRA has refused to do so. The State has filed a declaratory order petition asking the Board to terminate NPRRA’s modified certificate operating rights over the Connecting Line Segment. See State of S. Dakota, Acting by and Through its Dep’t of Transp. – Pet. for Declaratory Order, FD No. 36096 (Filed Feb. 8, 2017). The Line and the Connecting Line Segment are segments of a single branch line the State acquired in 1980 extending between milepost 0.0 near Napa Jct., SD and milepost 83.3 near Platte, SD (“Napa-Platte Line”). The portion of Napa-Platte Line extending between milepost 54.5 near Ravinia, SD and milepost 83.3 near Platte, SD has been rail banked. See S.D. Ry. – Notice of Interim Trail Use & Termination of Modified Rail Certificate, FD 31874 (STB served July 17, 2007).

In a decision served in this proceeding on _____, 2017, the Board granted a petition filed by the State for exemptions from several statutory provisions and for waivers of certain Board regulations governing rail line discontinuances. Because the State has made arrangements with DSRC to provide common carrier service on the Line, all interested persons should be aware that this application is for adverse discontinuance and will not result in the abandonment of service over the Line. Therefore, as discussed in the Board's _____ decision, the Board has exempted this proceeding from the offer of financial assistance ("OFA") requirements at 49 U.S.C. § 10904 and waived its OFA regulations at 49 CFR § 1152.27, and the Board will not entertain requests for a public use condition under 49 U.S.C. § 10905 (49 CFR § 1152.28) or a trail use condition under 16 U.S.C. § 1247(d) (49 CFR § 1152.29).

All interested persons should also be aware that the Line, and the Connecting Line Segment, constitute NPRRA's entire rail system. Therefore, as discussed in the Board's _____ decision, the Board will not impose labor protective conditions in this proceeding if it grants the State's adverse discontinuance application in this proceeding to terminate NPRRA's operating rights over the Line and, as requested by the State in a companion proceeding,³ terminates NPRRA's regulatory authority to operate over the Connecting Line Segment.

³ See State of S. Dakota, Acting by and Through its Dep't of Transp. – Verified Pet. for Declaratory Order, FD No. 36096 (Filed Feb. 8, 2017).

The State represents that the Line does not contain federally granted rights-of-way. Any documentation in the State's possession will be made available promptly to those requesting it. The State's entire case in chief for adverse discontinuance was filed with the application.

Any interested person may file written comments concerning the proposed adverse discontinuance or protests (including protestant's entire opposition case) by _____ [45 days after the application is filed]. Persons who may oppose the proposed adverse discontinuance but who do not wish to participate fully in the process by submitting verified statements of witnesses containing detailed evidence should file comments. Persons opposing the proposed discontinuance that do wish to participate actively and fully in the process should file a protest, observing the filing, service, and content requirements of 49 CFR § 1152.25. The State's reply, if any, is due by _____ [60 days after the application is filed].

All filings in response to this notice must refer to Docket No. AB 1253 and must be sent to: (1) Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, 395 E Street, SW, Washington DC 20423-0001; (2) John H. LeSeur, Slover & Loftus LLP, 1224 17th Street, NW, Washington, DC 20036, (202) 347-7170; and (3) Karla L. Engle, Special Assistant Attorney General, South Dakota Department of Transportation, 700 E. Broadway Ave., Pierre, SD 57501-2586, (605) 773-3262.

Filings may be submitted either via the Board's e-filing format or in the traditional paper format. Any persons using e-filing should comply with the instructions found on the Board's website (<http://www.stb.gov>), at the "E-FILING" link. Any person submitting a filing in the traditional paper format should send the original and 10 copies of the filing to the Board with a certificate of service. Except as otherwise set forth in 49 CFR § 1152, every document filed with the Board must be served on all parties to this adverse discontinuance proceeding. 49 CFR § 1104.12(a).

The Board's _____ decision waived compliance with its environmental and historic review regulations because the Board found that it was unlikely that the discontinuance would result in any environmental impacts or salvage. Accordingly, no environmental or historic assessment will be prepared in this proceeding.

Persons seeking further information concerning discontinuance procedures may contact the Board's Office of Public Assistance, Governmental Affairs and Compliance at (202) 245-0238 or refer to the full discontinuance regulations at 49 CFR part 1152. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339.

Board decisions and notices are available on our website at <http://www.stb.gov>.

Decided: _____

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