

SERVICE DATE – LATE RELEASE MAY 31, 2017

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1253

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

Digest:¹ This decision waives certain requirements that normally must be satisfied when filing discontinuance and abandonment applications, but would be unnecessary, difficult, or impossible for the State of South Dakota to comply with when it files an application for adverse discontinuance.

Decided: May 30, 2017

In a petition filed on February 8, 2017, the State of South Dakota acting by and through its Department of Transportation (the State) seeks waiver of certain Board regulations and exemption from related statutory provisions in connection with its planned filing of a third-party, or “adverse,” discontinuance application. The State intends to ask that the Board terminate the regulatory authority held by Napa-Platte Regional Railroad Authority (NPRRA), a Class III carrier, to lease and operate over a State-owned rail line extending from milepost (MP) 0.0, referred to as Napa Junction, in South Dakota to MP 13.4+/- near Tabor, S.D. (Napa-Tabor Line). The waiver and exemption petition is unopposed. As discussed below, the Board will grant the State’s petition.

BACKGROUND

The Napa-Tabor Line is part of a longer line that runs from MP 0.0 to MP 83.3 near Platte, S.D. (Napa-Platte Line). The Napa-Platte Line was authorized for abandonment in 1980, but prior to being abandoned, was acquired by the State in 1981. See Ogilvie—Aban.—in S.D., Iowa, & Neb., AB 7 (Sub-No. 88) (ICC served May 14, 1980); see also Napa-Platte Reg’l R.R. Auth.—Modified Rail Certificate, FD 35026 (STB served June 14, 2007).

In 2007, NPRRA obtained Board authority to lease and operate the Napa-Tabor Line. See Napa-Platte Reg’l R.R. Auth.—Lease & Operation Exemption—Dakota Short Line Corp., FD 35025 (STB served May 31, 2007). NPRRA’s last lease from the State expired on September 20, 2015. According to the State, neither NPRRA, nor any other rail carrier, has

¹ 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).

provided common carrier service over the Napa-Tabor Line since 2007. The State claims that it has requested that NPRRA seek a voluntary termination of its lease and operating authority over the Napa-Tabor Line, but NPRRA has refused to do so.

The State is now leasing the Napa-Tabor Line to Dakota Southern Railway Company (DSRC), which obtained a modified certificate to provide common carrier service over a portion of the Napa-Platte Line, including the Napa-Tabor Line. See Dakota S. Ry.—Notice of Modified Certificate of Pub. Convenience & Necessity—Yankton, Bon Homme, & Charles Mix Ctys., S.D., FD 36086 (STB served Jan. 25, 2017).

DISCUSSION AND CONCLUSIONS

The discontinuance of rail service by common carriers is governed by 49 U.S.C. § 10903 et seq., and the Board’s regulations governing discontinuance applications are found at 49 C.F.R. part 1152 subparts B & C. In appropriate circumstances, however, such as the filing of a third-party, or adverse, discontinuance application, the Board may waive inapplicable and unneeded regulations and grant exemptions from statutory provisions.²

System Diagram Map. The State seeks exemption from 49 U.S.C. § 10903(c)(2), which requires carriers to maintain a system diagram map (SDM) and to identify on that map rail lines planned for abandonment or discontinuance of service. The State also seeks waiver of 49 C.F.R. §§ 1152.10-14, which govern filing and amending (and providing notice to the public) of a carrier’s SDM, and establishes a two-month waiting period between the filing of SDM amendments and a corresponding discontinuance application. In addition, the State seeks waiver of 49 C.F.R. § 1152.22(a)(5), which requires reference to the inclusion of the rail line subject to the discontinuance request on the carrier’s SDM or narrative, the date on which the line was first listed there for abandonment or discontinuance, and a copy of the line description that accompanies the carrier’s map. In support, the State notes that waiver of the SDM regulations is customary in adverse proceedings where the adverse discontinuance is intended to result only in a change in operators. (Pet. 4 (citing Town of N. Judson, Ind.—Adverse Discontinuance—in LaPorte, Porter, & Starke Ctys., Ind., AB 1232, slip op. at 3 (STB served July 27, 2015)).) The State also argues that an exemption is appropriate because it is not necessary to carry out the rail transportation policy (RTP) at 49 U.S.C. § 10101.

The Board will waive 49 C.F.R. §§ 1152.10-14 and 49 C.F.R. § 1152.22(a)(5) and, as explained in the exemption analysis below, exempt the State from the requirements of 49 U.S.C. § 10903(c)(2). As the State correctly notes, waiver and exemption of the SDM requirements are customary in adverse discontinuance proceedings where, as here, it would result only in a change of operators. See, e.g., Lackawaxen-Honesdale Shippers Ass’n, AB 1110, slip op. at 2-3. The

² See Riverview Trenton R.R.—Adverse Aban.—in Wayne Cty., Mich., AB 1230 (STB served Apr. 10, 2015); Lackawaxen-Honesdale Shippers Ass’n—Adverse Discontinuance of Operating Auth.—in Wayne & Pike Ctys., Pa., AB 1110 (STB served Jan. 23, 2014).

Board also notes that applicants in adverse discontinuance or abandonment proceedings generally do not have access to the SDM. See Paulsboro Ref. Co.—Adverse Aban.—in Gloucester Cty., N.J., AB 1095 (Sub-No. 1), slip op. at 3 (STB served July 26, 2012).

Line Attributes. The State seeks a waiver of 49 C.F.R. § 1152.22(b)-(e), which require that discontinuance and abandonment applications include information regarding the condition of properties, service performed, attributable revenue and cost data, and rural and community impact. The State argues that this information is not necessary because the State is proposing only a change in operators. See Town of N. Judson, AB 1232, slip op. at 3; Lackawaxen-Honesdale Shippers Ass’n, AB 1110, slip op. at 4. The State also argues that the revenue and cost data requirements are intended to apply only in cases where a carrier seeks to discontinue its own operations on grounds that the operations burden interstate commerce. Finally, the State argues that 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. See Lake Cty., Or.—Adverse Discontinuance of Rail Serv.—Modoc Ry. & Land Co & Modoc N. R.R., AB 1035, slip op. at 4 (STB served June 15, 2009).

The State is correct that the information required by 49 C.F.R. § 1152.22(b)-(e) is unnecessary here. See Lackawaxen-Honesdale Shippers Ass’n, AB 1110, slip op. at 3. The Board also notes that this information is typically not available to an adverse discontinuance applicant. See Norfolk S. Ry.—Adverse Aban.—St. Joseph Cty., Ind., AB 290 (Sub-No. 286), slip op. at 5 (STB served Oct. 26, 2006). The Board therefore will grant the State’s request for waiver of these regulatory requirements.

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 that may be necessary to confirm these reporting requirements are inapplicable in this proceeding. The State argues that 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 1105.8 and because the State has no intention of salvaging the Napa-Tabor Line.

The Board agrees that waiver of these requirements is appropriate here, and will waive 49 C.F.R. §§ 1152.20(c), 1105.7, and 1105.8. See Town of N. Judson, AB 1232, slip op. at 4; Lackawaxen-Honesdale Shippers Ass’n, AB 1110, slip op. at 3.

Notice of Intent. The State requests that its petition for waiver and exemption 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. The Board finds that service of the current petition is sufficient notice of the forthcoming application, and therefore will waive the requirements of 49 C.F.R. § 1152.20(a)(1) and 49 C.F.R. § 1152.20(b)(1). See Town of N. Judson, AB 1232, slip

op. at 4-5; Riverview Trenton R.R., AB 1230, slip op. at 4; Lackawaxen-Honesdale Shippers Ass'n, AB 1110, slip op. at 3-4.

The State also seeks waiver of the requirement to serve the notice of intent on all parties listed in 49 C.F.R. § 1152.20(a)(2). Specifically, the State asks that it be permitted to serve its petition only on the following entities: NPRRA; BNSF Railway Company (BNSF), which is the connecting carrier at Napa Junction.; DSRC, which is 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 argues that service of its petition on these entities, combined with three weeks of newspaper publication and a Federal Register notice, satisfies procedural due process. The State also argues that there is no need to serve the notice of intent on other State agencies and commissions. In addition, the State certifies that no duly certified labor organizations represent employees on the Napa-Tabor Line. The Board will grant the requested waiver of 49 C.F.R. § 1152.20(a)(2) to allow the State to serve its petition (as its notice of intent) on a reduced service list.

Service of the Application. The State seeks a partial waiver of 49 C.F.R. § 1152.24(c), which requires the applicant to serve the application on the Governor, the Public Service Commission (or equivalent agency), and the designated state agency of each state in which the line is situated. The State requests that it be required to serve its adverse discontinuance application only on NPRRA, DSRC, and BNSF. The Board finds the State's request that the Board waive service on the Governor and state agencies to be reasonable given that it is the State, by and through its Department of Transportation, that has submitted this petition. Therefore, the Board will grant the partial waiver of 49 C.F.R. § 1152.24(c).

Posting at Agency Stations and Terminals. The State seeks a waiver of the notice and posting at agency stations and terminals requirements set forth at 49 C.F.R. § 1152.20(a)(3) and exemption from the statutory provision at 49 U.S.C. § 10903(a)(3)(B). The State argues that the station and terminal posting requirements were intended to apply in cases where "carriers [are] proposing to voluntarily discontinue service over their own lines," which is not the case here. (Pet. 8 (citing Lackawaxen-Honesdale Shippers Ass'n, AB 1110, slip op. at 4).) The State also indicates that it is unaware of any stations or terminals on the Napa-Tabor Line. With respect to 49 U.S.C. § 10903(a)(3)(B), the State argues that an exemption is appropriate because it is not necessary to carry out the RTP at 49 U.S.C. § 10101. In these circumstances, where the applicant is seeking adverse discontinuance and is unaware of any stations or terminals, a waiver is appropriate. See Lackawaxen-Honesdale Shippers Ass'n, AB 1110, slip op. at 4; see also Hartwell First United Methodist Church—Adverse Aban. & Discontinuance—Hartwell R.R. & Great Walton R.R., in Hart Cty., Ga., AB 1242, slip op. at 4. The waiver will therefore be granted and, as explained below, the exemption will likewise be granted.

Newspaper Publication. The State seeks a limited waiver of the newspaper publication regulations set forth at 49 C.F.R. § 1152.20(a)(4) and 49 C.F.R. § 1152.21. The State requests that it be permitted to use the notice of intent form set forth in Attachment 2 of its waiver request

for purposes of its newspaper publication notices. The State argues that 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. The Board finds that the State's substitute notice is in substantial compliance with the requirements of 49 C.F.R. § 1152.21 and that the proposed changes are reasonable in the context of the State's forthcoming application. See Paulsboro Ref. Co.—Adverse Aban.—in Gloucester Cty., N.J., AB 1095 (Sub-No. 1), slip op. at 3 (STB served July 26, 2012). The Board will therefore grant the State's waiver request.

Federal Register Notice. 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 of its petition. The State argues that the substitute 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. The Board finds that the substitute notice is in substantial compliance with the requirements of 49 C.F.R. § 1152.22(i). The Board will therefore grant the State's request. See Lake Cty., AB 1035, slip op. at 5.

Labor Protection Text. 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. The State argues that “[w]hen issuing abandonment or discontinuance authority for rail lines that constitute the carrier's entire system, the Board does not generally impose protection.” Cerro Gordo Cty., 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 Cty., Pa., 354 I.C.C. 784, 785-86 (1978)). The State says that the Napa-Tabor Line is part of a non-railbanked line that runs from Napa to Ravinia, S.D., and that these connecting line segments “constitute[] [NPRRA's] entire system.” Id. The State also says that NPRRA is a regional railroad authority, not an operating common carrier; that NPRRA has conducted no common carrier rail operations under its current operating authority; and that NPRRA has no rail employees.

The Board will grant the State's request to waive 49 C.F.R. § 1152.21 and § 1152.22(i) to the extent that the notices required by those regulations include text referring to the mandatory imposition of labor protective conditions. The State is seeking termination of NPRRA's modified certificate rights over the Tabor-Ravinia Line segment in a separate proceeding,³ see State of South Dakota—Pet. For Declaratory Order, FD 36096, which is currently pending. Through these two proceedings, the State is seeking to terminate NPRRA's operating rights over

³ The segment between Ravinia, S.D. (MP 54.5) and Platte, S.D. (MP 83.3) was rail-banked by the State in 2007. See S.D. Ry.—Notice of Interim Trail Use & Termination of Modified Rail Certificate, FD 31874 (STB served July 17, 2007).

the entire Napa-Platte Line, which appears to be the entirety of NPRRA's system.⁴ Given the nearly identical facts in the two proceedings, and given that NPRRA has chosen not to become involved in either proceeding, it is appropriate for the Board to consider the two separate proceedings together when determining whether the State is seeking discontinuance of NPRRA's authority over the entire system. Accordingly, requiring the State to reference labor protective conditions in the notices it provides pursuant to 49 C.F.R. § 1152.21 and § 1152.22(i) would serve no purpose.

Offers of Financial Assistance. The State asks for an exemption from 49 U.S.C. § 10904 and a waiver of the corresponding regulations set forth at 49 C.F.R. § 1152.27, which govern offers of financial assistance (OFAs) to continue rail service. The State argues that, if the Board were to permit the adverse discontinuance, an OFA to subsidize would in effect nullify the Board's decision. (Pet. 10 (citing Town of N. Judson, AB 1232, slip op. at 5).) The State also argues that common carrier service will continue to be available, which obviates the need for the OFA process. The State also argues that the OFA statutory provisions are not necessary to carry out the RTP at 49 U.S.C. § 10101. The Board agrees that an OFA to subsidize a current operator would nullify a Board decision granting adverse discontinuance. See Town of N. Judson, AB 1232, slip op. at 5; Lackawaxen-Honesdale Shippers Ass'n, AB 1110, slip op. at 5. The Board will therefore waive the regulations set forth at 49 C.F.R. § 1152.27 and, as explained below, grant an exemption from the requirements of 49 U.S.C. § 10904.⁵

Public Use. 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. The Board confirms that this request is unnecessary. See Town of N. Judson, AB 1232, slip op. at 5-6.

Trail Use. The State asks the Board to confirm that the State need not seek a waiver of the Board's interim trail use and rail banking rules set forth at 49 C.F.R. § 1152.29 because these rules are inapplicable in a discontinuance case. The Board confirms that this request is unnecessary. See Lake Cty., AB 1035, slip op. at 5.

⁴ Indeed, a single modified certificate provided operating authority for the entire Napa-Platte Line to NPRRA at one time; however, a carrier subsequently filed a notice of exemption under 49 C.F.R. § 1150.41 to operate over the Napa-Tabor Line. See S.D. Ry. Modified Rail Certificate, FD 31874 (ICC served May 22, 1991); Dakota Short Line, Inc.—Lease Exemption—S.D., FD 34043 (STB served June 7, 2001). Thus, separate proceedings are necessary now because the regulations authorizing operations on the Tabor-Ravinia Line are different from those authorizing regulations on the Napa-Tabor Line.

⁵ The State also requests a waiver of the filing fees for this petition and its forthcoming application. The Board's Chief, Section of Administration, Office of Proceedings, the agency official delegated authority to rule on filing fee waiver requests under 49 C.F.R. § 1002.2(e), granted waiver of the filing fees for this petition on February 23, 2017. The Section of Administration Chief will rule on the fee waiver request for the application after it has been filed.

Exemption Analysis under 49 U.S.C. § 10502. As indicated, the State seeks, and the Board will grant, exemption from the following statutory provisions corresponding to the Board regulations previously discussed: 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 will grant these exemptions because the application of these provisions of the Interstate Commerce Act is not necessary to carry out the RTP of 49 U.S.C. § 10101. Rather, these exemptions would provide the State with a reasonable opportunity to make its case that there is no overriding present or future public need for NPRRA to have common carrier operating rights over the Napa-Tabor Line. Exemptions would promote the RTP by eliminating unnecessary procedures and thus expediting the Board's decision in this case (§ 10101(2)) and foster sound economic conditions in transportation (§ 10101(9)). Other aspects of the RTP would not be adversely affected. Additionally, application of the statutory provisions from which we are granting exemptions is not necessary to protect shippers from an abuse of market power as NPRRA is not currently providing service to any shippers on the line.

It is ordered:

1. The petition for waivers and exemptions is granted as discussed above.
2. This decision is effective on its date of service.

By the Board, Board Members Begeman, Elliott, and Miller.