

SERVICE DATE – AUGUST 21, 2023

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. FD 36697

THE STATE OF SOUTH DAKOTA ACTING BY AND THROUGH ITS
DEPARTMENT OF TRANSPORTATION—PETITION FOR DECLARATORY
ORDER

Digest:¹ The Board grants the State of South Dakota’s petition for an order declaring that Dakota Southern Railway’s operating rights over a segment of state-owned rail line are terminated. It also grants the State’s request for the issuance of a notice of interim trail use.

Decided: August 18, 2023

On April 18, 2023, the State of South Dakota (the State), acting by and through the South Dakota Department of Transportation, filed a petition seeking a declaratory order terminating the operating rights held by Dakota Southern Railway (DSRC) pursuant to a modified certificate of public convenience and necessity over a segment of State-owned rail line extending from milepost 20.9 at Tyndall, S.D., to milepost 54.5 at Ravinia, S.D. (the Tyndall-Ravinia Segment). The State concurrently filed a request for the issuance of a notice of interim trail use (NITU) under the National Trails System Act, 16 U.S.C. § 1247(d), for the Tyndall-Ravinia Segment.

The Tyndall-Ravinia Segment is part of the Napa-Platte Line (the Line), which once extended from milepost 0.0 at Napa Junction, S.D., to milepost 83.3 at Platte, S.D. The Line was authorized for abandonment in 1980, but the State acquired the Line prior to abandonment. Napa-Platte Reg’l Auth.—Modified Rail Certificate, FD 35026, slip op. at 1-2 (STB served June 14, 2007). In 2007, the State railbanked the end segment of the Line running from milepost 54.5 to milepost 83.3 before subsequently abandoning the right-of-way running from milepost 80.8 to milepost 83.3. See generally S.D. Ry.—Notice of Interim Trail Use & Termination of Modified Rail Certificate, FD 31874 (STB served July 17, 2007), clarified (STB served Mar. 4, 2022).

In 2016, the State leased to DSRC the remaining, non-railbanked portion of the Line, from milepost 0.0 at Napa Junction to milepost 54.5 at Ravinia. (Pet. 3.) The lease agreement required DSRC to obtain a modified rail certificate, which DSRC received in 2017. (Id.); Dakota S. Ry.—Modified Certificate of Pub. Convenience & Necessity—Yankton, Bon Homme, & Charles Mix Cntys., S.D., FD 36086, slip op. at 1 (STB served Jan. 25, 2017). The State and

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. See Pol’y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

DSRC amended the lease in 2018 and again in 2020. (Pet. 3-6.) The 2020 amendment reduced the length of the leased line to the segment between milepost 0.0 at Napa Junction and milepost 20.9 at Tyndall and called for DSRC to file a notice terminating its modified certificate over the Tyndall-Ravinia Segment, which no longer remained under the lease. (*Id.* at 4-6.) The State and DSRC agreed that the 2020 amendment would become effective once DSRC's modified certificate was terminated over the Tyndall-Ravinia Segment; however, despite signing the amendment, DSRC has not filed a notice of termination. (*Id.*)

In addition to its petition for declaratory order, the State requests that the Board issue a NITU over the Tyndall-Ravinia Segment, pursuant to 49 C.F.R. § 1152.29. To satisfy the requirements of 49 C.F.R. § 1152.29(a), the State has submitted a map and description of the right-of-way as well as a statement indicating its willingness to assume financial responsibility for managing the right-of-way and acknowledging that the right-of-way is subject to possible future reconstruction and reactivation for rail service. (Req., Exs. A (Map) & B (Statement).) The State has also submitted a resolution from the South Dakota State Railroad Board (SDRB) stating that the SDRB supports the State's request for a NITU and that it supports the State's effort to railbank the Tyndall-Ravinia Segment. (Pet., Ex. A (SDRB Resolution).)

DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 to issue a declaratory order to eliminate controversy or remove uncertainty in a matter related to the Board's subject matter jurisdiction. *See Bos. & Me. Corp. v. Town of Ayer*, 330 F.3d 12, 14 n.2 (1st Cir. 2003); *Delegation of Auth.—Declaratory Ord. Procs.*, 5 I.C.C. 2d 675 (1989).

The Board has special rules for operations over rail lines that have been approved for abandonment and acquired (through purchase or lease) by a state. 49 C.F.R. pt. 1150 subpart C; *see also Common Carrier Status of States, State Agencies & Instrumentalities, & Pol. Subdivisions*, 363 I.C.C. 132 (1980), *aff'd sub nom. Simmons v. ICC*, 697 F.2d 326 (D.C. Cir. 1982). The acquisition of a line approved for abandonment is exempted from the Board's jurisdiction; however, an operator that contracts with the state to provide service over the line incurs a common carrier obligation. 49 C.F.R. § 1150.22. These operators are exempted from the statutory requirements governing the start-up and termination of operations found at 49 U.S.C. §§ 10901 and 10903, but they must apply to the Board for a modified certificate of public convenience and necessity. *Id.* Such operators may terminate service over the line for which they hold the modified certificate after providing 60 days' notice, which must be filed with the state, the Board, and all persons that have used the line within the six months preceding the date of the notice. 49 C.F.R. § 1150.24.

The Tyndall-Ravinia Segment is part of a common carrier rail line that had been authorized for abandonment in 1980 under 49 U.S.C. § 10903, acquired by the State, and then served by an operator holding a modified certificate of public convenience and necessity. (Pet. 2-3.) Cessation of operations under a modified certificate does not require Board approval—as noted, an operator may terminate its service with a 60-day notice to the State, the Board, and shippers. 49 C.F.R. § 1150.24. However, the Board has previously found that where an operator declines to file the 60-day notice, the state may petition the Board for a declaratory order to terminate an operator's rights under the modified certificate. *State of S.D. Acting by*

and Through Its Dep't of Transp.—Pet. for Declaratory Ord., FD 36096, slip op. at 3 (STB served June 14, 2017).

The Board will grant the State's request for a declaratory order. Although the Board's regulations only provide a 60-day termination mechanism for the operator, the regulations state that the duration of service to be provided by the operator under a modified certificate "may be determined in the contract between the State and the operator." 49 C.F.R. § 1150.24. DSRC signed the 2020 amendment terminating the lease of the Tyndall-Ravinia segment, and it has not opposed the State's petition for a declaratory order to terminate its operating rights over the Tyndall-Ravinia Segment. Additionally, because there has been no common carrier service over the Tyndall-Ravinia Segment since 2007, granting the proposed termination will not result in any adverse impact on shippers or the community.² (Pet. 13.) Accordingly, the Board concludes that DSRC's operating rights over the Tyndall-Ravinia Segment are terminated.

The Board also has jurisdiction to issue a NITU in a proceeding to terminate operations under a modified certificate, provided that the owner of the line is willing to enter negotiations for trail use. See Wis. & Calumet R.R.—Notice of Interim Trail Use and Termination of Modified Certificate, FD 31340, slip op. at 2 (STB served Apr. 24, 2023). Here, because abandonment has never been consummated and because the State's request for a NITU complies with the requirements in 49 C.F.R. § 1152.29, a NITU will be issued for the Tyndall-Ravinia Segment. Because the State is both the owner of the Tyndall-Ravinia Segment and the trail sponsor, the negotiations that normally take place to reach a trail use agreement as contemplated under 49 C.F.R. § 1152.29 may not be needed. However, to fulfill the purpose of "ensur[ing] that the agency and the public have accurate information on the status of property where a [NITU] has been issued," Nat'l Trails Sys. Act & R.R. Rights-of-Way, EP 702, slip op. at 9 (STB served Feb. 16, 2011), if the State implements trail use/railbanking on the Tyndall-Ravinia Segment (or a portion thereof) prior to the expiration of the one-year NITU period prescribed below, the State shall notify the Board within ten days that it has done so. See 49 C.F.R. § 1152.29(d)(2), (h). Such notice shall include all the other information otherwise required under 49 C.F.R. § 1152.29(h). Use of the right-of-way for trail purposes is subject to future restoration for railroad purposes. See 49 C.F.R. § 1152.29(d)(2).

It is ordered:

1. The petition for declaratory order is granted; DSRC's modified certificate of public convenience and necessity is terminated with respect to the Tyndall-Ravinia Segment.
2. The request for a NITU under 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29 is accepted.
3. If an interim trail use/railbanking agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for: (i) managing the right-of-way; (ii) any legal liability arising out of the transfer or use of the right-of-way (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential

² Because the State is a party and there have been no shippers on the line in the last six months, no additional notice is necessary.

liability), and (iii) the payment of any and all taxes that may be levied or assessed against the right-of-way.

4. Interim trail use/railbanking is subject to future restoration of rail service and to the trail sponsor's continuing to meet its responsibilities for the right-of-way described in paragraph 3 above.

5. If the State implements trail use by one year from service, the State shall jointly notify the Board within 10 days that it has done so. See 49 C.F.R. § 1152.29(d)(2), (h).

6. If interim trail use is implemented, and subsequently the user intends to terminate trail use, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

7. This decision is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, Schultz.