

SOUTH DAKOTA STATE RAILROAD BOARD MEETING MINUTES
September 16, 2020 at 11:00 a.m. CDT

BECKER-HANSEN BUILDING / DOT COMMISSION ROOM
700 EAST BROADWAY AVENUE, PIERRE, SOUTH DAKOTA

MEMBERS PRESENT: Jerry Cope, Chairman
Steve Scharnweber, Secretary
Greg Carmon, Member
Jack Nelson, Member
Gary Doering, Member

MEMBERS PRESENT
VIA CONFERENCE CALL: Jeff Burket, Vice-chairman
Jon Kirby, Member

DOT STAFF PRESENT: Darin Bergquist, Joel Jundt, Karla Engle, and Kari Kroll

DOT STAFF PRESENT
VIA CONFERENCE CALL: Bonnie Olson, Misty Siedschlaw, and Perry Griffith

OTHERS PRESENT: Dick Huff; Alex Huff; Toby Morris; Dan Kippley – Ellis & Eastern Company; Rick Webb – WATCO Companies (WATCO); and Rick Vallery – SD Governor’s Office of Economic Development (SDGOED)

OTHERS PRESENT
VIA CONFERENCE CALL: Dan Rolfes – City of Akron; Jerry Vest – Genesee & Wyoming, Inc (G&W); Angela Stauffer – Patriot Rail; Dennis Moore – Moore Building; Amy Kenobbie; and John LeSuer

Chairman Jerry Cope called the meeting of the South Dakota State Railroad Board (the “Board”) to order at 11:04 a.m. CDT. A roll call was taken, and a quorum was determined.

Cope opened the floor to the Board members to disclose potential conflicts of interest and to present requests for waivers pursuant to the South Dakota Codified Law (SDCL) chapter 3 – 23.

Vice-chairman Burket and Cope both noted they would be recusing themselves during the discussion and any potential action on the *Consideration of Sale of State-Owned Mitchell to Rapid City* agenda item based on potential conflicts of interest disclosed previously.

Cope asked for a motion to approve the Board meeting minutes for August 19, 2020.

Secretary Bergquist offered clarification of the WATCO proposal for purchase of the MRC Line and addressed a revision to the draft minutes. Bergquist explained that the \$50 per car surcharge is addressed in the lease and sublease for operation of the MRC Line and will no longer be charged if the sale proposal with WATCO is pursued, because the lease and sublease will be extinguished as part of the sale. Bergquist also confirmed that the down payment to be made by WATCO will be \$5,000,000 and not “up to” \$5,000,000 as reflected in the draft minutes.

Cope asked for a motion to correct the August 19, 2020, minutes to remove the words “up to” in the second line of the section discussing WATCO’s proposal.

A MOTION WAS MADE by Carmon and seconded by Nelson to amend the August 19, 2020, Board minutes to delete the reference to “up to” in the second line of the paragraph on page 3 of the meeting minutes that discussed the WATCO proposal. All present voted aye by roll call vote. The motion carried.

Cope asked for a motion to approve the minutes as amended.

A MOTION WAS MADE by Nelson and seconded by Scharnweber to approve the August 19, 2020, Board minutes as amended. All present voted aye by roll call vote. The motion carried.

Cope opened the floor to public input.

Dan Kippley of Ellis & Eastern Company asked the Department of Transportation (the “Department”) for an update on the Ellis & Eastern Special Transportation Circumstances (STC) grant agreement. Deputy Secretary Joel Jundt shared that the Department is currently working on the draft of the agreement and is working with the consultant to update the statement of work.

Secretary Bergquist indicated he had nothing to share for the Secretary’s Report.

Chairman Cope and Vice-chairman Burket recused themselves from the discussion of the proposed sale of the state-owned MRC rail line due to potential conflicts of interest that have been previously disclosed. Chairman Cope turned the meeting over to Board Secretary Steve Scharnweber and Cope excused himself from the table and sat in the audience.

Rick Webb of WATCO presented to the Board the following two additional pieces of information in regard to WATCO’s current proposal to buy the state-owned MRC rail line from Mitchell to Rapid City:

1. Burlington Northern Santa Fe rail line (“BNSF”) consent to the sale: based on WATCO’s legal department’s review there are no concerns about BNSF consent if the Board decides to move forward with the sale.
2. Structure of the transaction: Webb described the structure of the transaction based on the Surface Transportation Board (“STB”) process stating that WATCO will form a new short line Class III railroad to operate the MRC rail line. WATCO will own substantial controlling interest and be the majority holder and Dakota Southern Railway Company (“Dakota Southern”) would be a minority holder. Dakota Southern has agreed to give up its sublease rights, operating rights, and any first right of refusal. The \$50 per car surcharge currently applied to the MRC Line would go away if the lease and sublease are terminated.

Bergquist indicated that the Department has had its legal counsel review the BNSF documents as well and the Department sees no significant obstacles to moving forward with the potential sale if the Board so chooses.

Member Jack Nelson asked about the tracking rights on BNSF and about operation speed/ track maintenance. Webb responded that the new railroad company’s Class III standing would result in automatic consent from the BNSF for the purchase of the MRC Line. He also shared that WATCO is committed to properly maintaining the MRC Line according to current agreements/commitments.

Scharnweber opened the floor to public input.

Dick Huff addressed the Board, expressing his concerns about selling the MRC rail line to WATCO. Huff provided a handout to the Board members regarding a letter sent by Rick Winkel to Secretary Chao of the US Department of Transportation regarding withdrawal of Clearwater County, Idaho’s pursuit of FY17 TIGER grant funds. Huff also discussed past actions by Dakota Southern regarding possible HAZMAT on the line which potentially occurred in 2017. Huff recommends the Department terminate the sublease agreement with Dakota Southern and lease, rather than sell, to WATCO.

Bergquist responded to Huff with the Department’s stance on his concerns and recommendation. Bergquist asked the Board to consider the sale proposal from WATCO, rather than a lease arrangement.

Webb indicated that WATCO is only interested in pursuing a purchase of the MRC Line, not a lease.

Huff followed up with a request to relay his information to the Governor.

Bergquist responded that he will follow the same procedure he does for every meeting and that would be to present an email to the Governor laying out what happened at the Board meeting, what concerns there were, and what decisions were made.

Jerry Cope asked the Board, as a shipper on the MRC rail line, for clarification about the current \$50 per car surcharge on the rail line. The Department explained that the surcharge is a part of

the lease and sublease and if the lease and sublease are terminated as part of a sale, there is no further obligation to collect the \$50 per car surcharge.

Bergquist presented to the Board the procedural steps necessary to take action.

Scharnweber asked for any further comment from members of the public regarding the potential sale of the line.

With no further public comments or Board questions, Scharnweber asked for a motion on the updated proposal.

A MOTION WAS MADE by Doering and seconded by Nelson to authorize the Department to negotiate a final agreement for sale of the MRC rail line based on the most recent WATCO proposal. All present voted aye by roll call vote, except Cope and Burket who had abstained. The motion carried.

Cope resumed duties as Chair of the meeting.

Jundt presented to the Board consideration of excess property sales on the Sioux Valley rail line in Akron, Iowa to the City of Akron. On May 20, 2020, the Board approved the sale of leased property #1518 to the Lessee, City of Akron. The City of Akron is requesting approval to purchase additional non-leased property abutting the leased area.

A MOTION WAS MADE by Carmon and seconded by Nelson to authorize the Secretary or his designee to execute all the documents necessary to sell the additional state-owned railroad property identified by the City of Akron, subject to conditions and limitations deemed appropriate by the Department based on its due diligence. All present voted aye by roll call vote. The motion carried.

Jundt presented to the Board consideration of excess property sales to lease holder Moore Building Center in Murdo, SD.

A MOTION WAS MADE by Scharnweber and seconded by Doering to authorize the Secretary or his designee to execute all documents necessary to sell the state-owned railroad property currently identified as lease #1459 to Moore Building Center subject to conditions and limitations deemed appropriate by the Department based on its due diligence. All present voted aye by roll call vote. The motion carried.

Jundt presented to the Board consideration of excess property sales on the MRC rail line in Oacoma, SD to Terry Kenobbie. On August 19, 2020, the Board approved the sale of leased

property #1591 to the Lessee, Terry Kenobbie. Terry Kenobbie is requesting approval to purchase additional non-leased property abutting the lease area.

A MOTION WAS MADE by Carmon and seconded by Scharnweber to authorize the Secretary or his designee to execute all the documents necessary to sell the additional state-owned railroad property identified by the Terry Kenobbie, subject to conditions and limitations deemed appropriate by the Department based on its due diligence. All present voted aye by roll call vote. The motion carried.

Cope asked for a motion for the Board to enter into Executive Session.

A MOTION WAS MADE by Doering and seconded by Nelson to enter into executive session pursuant to SDCL 1-25-2(3) for the purpose of consulting with legal counsel or reviewing communications from legal counsel about proposed or pending litigation or contractual matters. All present voted aye by roll call vote. The motion carried.

Executive session began at 12:07 p.m.

Cope called the meeting back into session at 12:50 p.m., with Scharnweber, Carmon, Nelson and Doering present.

With no other business to come before the Board, Cope adjourned the meeting at 12:51 p.m.