

ENTERED
Office of Proceedings
January 14, 2020
Part of
Public Record

BEFORE THE SURFACE TRANSPORTATION BOARD

STB Docket No. AB 1261

**NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION – ADVERSE
ABANDONMENT – SARATOGA AND NORTH CREEK RAILWAY IN TOWN OF JOHNSBURG, NY**

COMMENTS BY REVOLUTION RAIL

Revolution Rail Company (“RRC”) respectfully submits its comments in this proceeding regarding how it intends to proceed now that Saratoga and North Creek Railway (“SNCR”) is in receivership. RRC intends to request a certificate of interim trail use from the Surface Transportation Board and negotiate with the Receiver to reach a trail use agreement. The Receiver in the District Court proceeding discussed herein has stated to RRC that he is willing to negotiate a trail use agreement with RRC.

On September 10, 2018, the New York State Department of Environmental Conservation (“Department”) filed an application under 49 U.S.C. § 10903 requesting a third-party, or “adverse,” abandonment by the SNCR of approximately 29.71 miles of rail line between milepost NC 0.0 at North Creek, N.Y., and its terminus at milepost NC 29.71 near the former Tahawus Mine (“Line”).

At the Department’s request, the Board held the proceeding in abeyance in October 2018 to permit negotiations with a potential purchaser of the Line. By decision served on August 29, 2019, the proceeding was removed from abeyance at the Department’s request (after negotiations were discontinued) and a procedural schedule was set. Following that decision, the Board received several comments, including one from RRC. Also, in that decision,

the Board stated that any request for an interim trail use/railbanking condition under 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29 must be filed by September 30, 2019, and should address whether the issuance of a certificate of interim trail use in this case would be consistent with the grant of an adverse abandonment application.

On September 30, 2019, the Department requested that the Board issue a Certificate of Interim Trail Use or Abandonment (CITU) over the Line. On October 18, 2019, the Department filed a letter co-signed by SNCR stating that it had discussed the Department's CITU request with SNCR and that SNCR is willing to negotiate with the Department for trail use. The letter states that SNCR does not object to the Department's abandonment application and will participate on a voluntary basis. The letter further states that SNCR irrevocably represents that the public convenience and necessity favor abandonment of the Line.

Then, the Board became aware of an action pending in the U.S. District Court for the Northern District of Illinois ("District Court") in which, as part of a loan default proceeding, the San Luis & Rio Grande Railroad, Inc. ("SLRG"), was placed into receivership. See Big Shoulders Capital LLC v. San Luis & Rio Grande R.R., Case No. 19-cv-06029 (N.D. Ill.). On October 18, 2019, the District Court issued an order expanding the receivership to include certain SLRG affiliates and subsidiaries, including SNCR. Big Shoulders Capital, Case No. 19-cv-06029 (Oct. 18, 2019 Amended Receivership Order) (N.D. Ill.). The Amended Receivership Order authorized the receiver to take possession, custody and control of all receivership assets and enjoined all receivership parties from "commencing, prosecuting, continuing or enforcing any suit or proceeding against or affecting Receivership Parties or any part of the Receivership Assets." Id. at 8-9. In its Initial Report of Property and Known Liabilities, the receiver listed SNCR's track

and roadbed as an asset. Big Shoulders Capital, Case No. 19-cv-06029 (Nov. 8, 2019 Initial Report, App. 2) (N.D. Ill.). After SLRG was placed in receivership, several creditors filed an involuntary bankruptcy petition against SLRG in the U.S. Bankruptcy Court for the District of Colorado. In re San Luis & Rio Grande R.R., Case No. 19-18905-TBM (Bankr. D. Colo.) Both proceedings are still open and before the courts.

As a result, the Board directed SNCR to file a supplemental submission explaining whether and how the pending receivership and bankruptcy cases affect this proceeding, including the effect of any stays in those cases. SNCR was also directed to notify the receiver and the U.S. Trustee of this adverse abandonment proceeding by providing them a copy of this decision.

As noted, RRC had submitted comments concerning the adverse abandonment application in accordance with the STB's August 28, 2019 order. Prior to those comments, RRC had submitted a letter on August 15 that opposed the adverse abandonment application. However, in its subsequent comments, RRC took no position in this proceeding but strongly urged the Board to take its present situation into consideration when ruling on this matter. RRC explained that it provides a highly beneficial service to the area in northeastern New York on the rail line at issue here. This operation on this rail line is clearly in the public interest as discussed below.

RRC is a railbiking excursion company launched in July 2017 based in North Creek, NY. It has a contract in place with SNCR to operate over the rail line at issue here for the next two years. Railbiking involves pedaling specially designed vehicles on railroad tracks. Since the beginning of this unique operation, RRC's business has employed 22 people, paid out over

\$150,000 in wages, and generated over \$37,000 in federal and state tax revenue. RRC has made dozens of cash and in-kind donations to local and regional organizations and brought well over 35,000 people to North Creek to enjoy an accessible, affordable, and family friendly excursion while exploring a portion of the Adirondacks in a low-impact way.

RRC's operation is organized around respect for, and a desire to share, the experience of the Adirondack wilderness with everyone in a unique and low impact manner. Riding with RRC does not require specialized equipment, training, or a burdensome time commitment. RRC customers are an exceptionally diverse group of people, ranging in age from 4 weeks to 94 years old. In under three hours, they are able to explore a 3.5 mile stretch of the Hudson River and adjacent forest in New York's Adirondack Park.

RRC's operations have had a substantial positive impact on the immediate local community in and around Johnsbury, NY, as well as to the overall region, both through its immediate financial contribution and the multiplier effect of bringing many thousands of new tourists to the region.

RRC has had positive discussions with the Receiver, the Department, and SNCR regarding its contract to operate on the rail line and desire to continue to provide this valuable service to the community for many years to come. After these valuable discussions with these pertinent parties, RRC has determined that it also will file a request for an interim trail use/railbanking condition under 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29 and negotiate with the Receiver to reach a trail use agreement.¹ RRC believes that it must negotiate with the

¹ Because of the litigation in the District Court, RRC will negotiate with the Receiver, who now stands in the shoes of SNCR, regarding the trail use agreement. The Receiver would certainly have standing to engage in these discussions because of its interest in the court proceeding to serve the creditors. See Waterloo Railway Company –

Receiver, not SNCR, due to the litigation discussed herein and that trail use under these circumstances (receivership and adverse abandonment) is fully compliant with the clear language in 49 U.S.C. § 1247(d).

RRC recognizes that the September 30, 2019 date for filing this request has passed but believes it has good cause to file after this date as required under 49 C.F.R. § 1152.29(b)(3). First, the complaint regarding receivership in Case No. 19-cv-06029 in the Northern District of Illinois was filed on September 9, 2019, which meant it became unclear at that point with whom the proper party eventually would be for RRC to negotiate a trail use agreement. Moreover, RRC knew the Department intended to file a request for an interim trail use/railbanking condition and was content to work with the Department to arrive at a separate arrangement to operate the railbiking service over the pertinent track along the proposed trail. However, as the legal landscape became more complicated after the filing of this complaint in the District Court and subsequent decisions to include SNCR in the receivership in October, RRC felt compelled to take action on its own to request an interim trail use/railbanking condition.

As noted in the Department's abandonment application, the Line is situated entirely within New York State's six-million-acre Adirondack Park. Nearly the entirety of the Line lies within privately or publicly owned riverbank areas protected under New York's Wild, Scenic and Recreational Rivers System Act. The Department maintains extensive recreational facilities—principally hiking trails and related infrastructure—in the general vicinity of the Line.

Adverse Abandonment – Lines of Bangor and Aroostook Railroad Company and Van Buren Bridge Company in Aroostook, Maine et al, No. AB-279 (Sub-No. 3), slip op. at 4 (STB served May 3, 2004); Michael H. Meyer, Trustee v. North Coast Railroad Authority et al, No. FD 34337 (STB served July 27, 2005). Any agreement between these parties would be perfected at the STB after being approved in the District Court in the receivership proceeding.

Accordingly, the Line is well-suited for public recreational use. In the event the Board issues a certificate of interim trail use once requested, RRC will seek to negotiate an interim trail use agreement with the Receiver.

Interim trail use is wholly consistent with the granting of the Department's abandonment application. 16 U.S.C. § 1247(d) provides the guiding language in this regard:

The Secretary of Transportation, the Chairman of the Surface Transportation Board, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976 [45 U.S.C. 801 et seq.], shall encourage State and local agencies and private interests to establish appropriate trails using the provisions of such programs. Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes. If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.

As described in detail in the abandonment application, no freight has moved on the Line since the late 1980s and the likelihood that freight service will resume in the future is, for a number of reasons, unlikely at this time. In the event the Board grants the Department's application and authorizes abandonment of the Line, a trail use agreement between RRC and the Receiver would allow SNCR to avoid substantial maintenance and liability costs while permitting RRC to coordinate with the Department, the nearby municipalities, and other stakeholders to ensure the Line benefits the region in the future.

To establish interim trail use and rail banking under 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29 with respect to the right-of-way owned and operated by SNCR and now subject to receivership, RRC is willing to assume full responsibility for management of the right-of-way and for any legal liability arising out of the transfer or use of the right-of-way, and for the payment of any and all taxes that may be levied or assessed against the right-of-way. RRC acknowledges that use of the right-of-way is subject to RRC's compliance with the foregoing representations, and also subject to possible future reconstruction and reactivation of the right-of-way for rail service.

RRC intends to file its request for an interim trail use/railbanking condition at the STB in the next month after it engages in further discussions with the Receiver. However, it respectfully asks the Board to extend the September 30, 2019 deadline for the filing of this request in light of the case in the District Court and its impact on this proceeding. It also believes the Receiver appointed in the District Court case discussed herein is the appropriate party to negotiate with regarding a trail use agreement in the event the STB issues the interim trail use/railbanking condition. Moreover, the statutory language in § 1247(d) allows a trail use agreement here and in fact, encourages this result. RRC believes the Rails to Trails path is appropriate here and the best result for this Line. It will bring a beautiful trail to this community and keep the Line railbanked in the event the area is ever in need of rail service in the future exactly as Congress intended in 16 U.S.C. § 1247(d).

Respectfully submitted,

/s/ Daniel R. Elliott
Daniel Elliott PLLC
2000 Pennsylvania Avenue
Suite 7000
Washington, DC 20006
(703) 863-9670

Counsel for Revolution Rail

January 14, 2020

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Revolution Rail Comments was served on all parties of record in this proceeding by U.S. first class postage prepaid this day of January 14, 2020.

/s/ Robert Harte