



SURFACE TRANSPORTATION BOARD
Washington, DC 20423

#EO-1912
vjr

Office of Environmental Analysis

June 22, 2012

Charlene Dwin Vaughn, AICP
Assistant Director, FPLAS Section
Advisory Council on Historic Preservation
Office of Federal Agency Programs
1100 Pennsylvania Avenue, NW, Suite 803
Washington, DC 20004

Re: Docket No. FD 35631, Saratoga and North Creek Railway, LLC—Operation
Exemption—Tahawus Line

Dear Ms. Vaughn:

I have received your letter dated June 19, 2012, inquiring about the steps the Surface Transportation Board has taken to comply with the requirements of Section 106 and its implementing regulations. You note that you have been contacted by the Sierra Club, who emailed you about the above-referenced proceeding.

First, I would like to summarize the proceeding filed with the Board. On May 17, 2012, the Saratoga and North Creek Railway (Saratoga) filed a notice of exemption to operate as a common carrier railroad 30 miles of existing trackage known as the “Tahawus Line.” The notice filed by Saratoga would, in essence, authorize the substitution of one operator of a rail line for another. It would result in construction of no new rail line, no salvage activities, and no rail line abandonment. It would simply allow Saratoga, a common carrier, to operate trains over the existing Tahawus Line, which has been used for rail freight service in the past.¹

When Saratoga filed for an operation exemption, it stated that its transaction is exempt from the Board’s environmental reporting requirements because it planned on operating no more than one train per day, five days per week—well below the Board’s thresholds for environmental review (generally 3 or 8 trains per day depending on the air quality of the region). See 49 C.F.R. § 1105.6(c)(2)(i). Saratoga also asserted that the transaction is exempt from historic review under 49 C.F.R. § 1105.8(b)(1) because the action before the Board involves only a change in operators and further Board approval (including an environmental and historic review) would be required prior to any abandonment of the Tahawus Line.

¹ The rail line was constructed during World War II to move products from a mine needed for war material. Rail service continued over the Tahawus Line until the late 1980s.

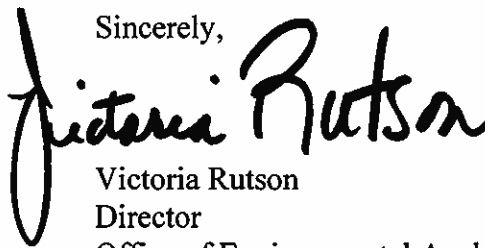
The Sierra Club filed a petition to reject Saratoga's notice of exemption on June 4, 2012 (attached). As relevant here, the Sierra Club argued that 13 miles of the 30 mile-long Tahawus Line are located on a National Historic Landmark, and that as such, an environmental and historic review should be required (Petition at 6). The petition provided no specifics on the potential impacts that could result. In particular, the petition failed to address the fact that the landmark at issue here was established in 1963, when there was active rail service on this trackage. Accordingly, there will be no change in use that was not understood and performed at the time this property was designated as a landmark.

The Board issued a decision on June 15, 2012 (attached) denying Sierra Club's petition to reject. As a result, Saratoga's authority to operate over the Tahawus Line became effective on June 16, 2012. In reaching its decision, the Board addressed the issues raised by Sierra Club's petition. Regarding Sierra Club's environmental and historic arguments, the Board concluded that Sierra Club had failed to demonstrate that an environmental or historic review by the Board was warranted in this case because the transaction only involves a change in operators on a rail line. The Board also noted that Saratoga's proposal has garnered strong support within the State, including the New York State Department of Environmental Conservation, the New York State Department of Transportation, the Honorable Charles Schumer, the Honorable Kirsten E. Gillibrand, and the Intercounty Legislative Committee of the Adirondacks, among others.

In sum, in response to Sierra Club's questions, the Board has determined that the undertaking—the substitution of one operator for another on the Tahawus Line—is exempt from historic review under the Board's environmental rules. It is the Board's opinion that this fulfills the agency's responsibilities under Section 106.

If you have any questions or require additional information regarding this proceeding, please do not hesitate to call me at (202) 245-0295.

Sincerely,

A handwritten signature in black ink, appearing to read "Victoria Rutson". The signature is fluid and cursive, with a large initial "V" and "R".

Victoria Rutson
Director
Office of Environmental Analysis

Enclosures

Cc: Charles C. Morrison
Najah Duvall-Gabriel

A joint letter from:

**ATLANTIC STATES LEGAL FOUNDATION
SIERRA CLUB, ATLANTIC CHAPTER, ADIRONDACK COMMITTEE**

June 1, 2012

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

ENTERED
Office of Proceedings
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Public Record

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Re: FD 35631, Saratoga and North Creek Railway, LLC – Operation Exemption – Tahawus Line

Dear Ms. Brown:

On behalf of the Atlantic States Legal Foundation and the Adirondack Committee of the Atlantic Chapter of the Sierra Club ("ASLF/Sierra"), this joint letter is a petition to the Surface Transportation Board ("STB") asking the Board to reject the Notice of Exemption ("NOE") (Docket Number FD 35631) filed on May 17, 2012 by the Saratoga and North Creek Railway, LLC ("Saratoga") to obtain common carrier status for the so-called Tahawus Line, a 30-mile long private industrial spur within Warren, Hamilton and Essex counties in the Adirondack Park in New York State, extending from North Creek to the site of the former mining hamlet of Tahawus of which there has long been no trace remaining. Nearly half (13 miles) of the right-of-way ("ROW") of the spur lies on a term easement on the State Forest Preserve, condemned by the federal government in 1962, and the other half (17 miles) lies on permanent easements on land owned by more than 20 private parties, condemned in 1942 by the federal government. The justification for this petition to reject is presented below.

The Sierra Club is the well-known national conservation organization that is based in San Francisco, CA. Its Atlantic Chapter covers New York State where there are 40,000 members, many of whom recreate in the six million-acre Adirondack Park. The Adirondack Committee, a statewide committee of the Atlantic Chapter, has addressed many Adirondack issues over the years but has advocated especially for the "forever wild" provision, Article 14, of the State Constitution which provides protection for the Adirondack Forest Preserve. It has recently addressed the violation of Article 14 of the State Constitution by the Tahawus rail spur that has occurred as a result of the continuing illegal occupation by Saratoga's rails of 13-miles of Adirondack State Forest Preserve (also see next paragraph).

ASLF is a not-for-profit corporation that was founded in 1982 for the purpose of providing technical, legal and organizing services for citizen groups, local governments and other entities for a variety of environmental issues, working throughout New York State, including the Adirondack Park, and elsewhere. ASLF is familiar with the history of the Tahawus private industrial rail spur and the Filings and Decisions under STB Docket Number FD 35559 and FD 35631. It has worked directly on this issue. For example, on March 26, 2012 ASLF sent a joint letter with the Adirondack Committee of the Atlantic Chapter of the Sierra Club ("Sierra") and Protect the Adirondacks! ("PROTECT") to the Honorable

Eric Schneiderman, Attorney General of the State of New York and Joe Martens, New York State Commissioner of Environmental Conservation, asking them to investigate and remove the illegal occupancy of State Forest Preserve land in the (former) ROW of the Tahawus Line by Saratoga's rails on the Tahawus rail spur. This letter is available from either the Department of Environmental Conservation ("DEC") or the Office of the Attorney General under the State Freedom of Information Act. More information about how to obtain documents under this law can be found online through the websites of these State agencies, each of which has a Freedom of Information Act officer for contact.

For convenience of reference in this letter, ASLF/ Sierra wishes to incorporate the record for the previous NOE (STB Docket Number FD-35559) for the Tahawus Line that was filed by Saratoga on October 25, 2011, against which PROTECT filed a protest letter on November 14, 2011 and STB issued a rejection decision on November 23, 2011, followed by Saratoga's appeal on December 5, 2011, PROTECT's reply of December 22, 2011 and the STB's final decision on May 14, 2012 stating that Saratoga's appeal was denied but that issues had been sufficiently clarified for STB to allow Saratoga to file a new NOE.

The controversial matter of Adirondack Forest Preserve violation by Saratoga, about which Atlantic/Sierra brings new information to bear in this letter, is ongoing and has not been addressed or resolved in State Court as recommended by the STB in its May 14, 2012 decision in case FD 35559

This controversy has been recognized as being a controversy by STB in its decisions, regardless of the fact that it is not within STB's jurisdiction to resolve it. Therefore, at the very least STB must require Saratoga to use a procedure other than a NOE because STB has stated repeatedly in its decisions in the FD 35559 proceeding that the NOE process is designed only for routine, non controversial projects.

The granting of approval by the STB of common carrier status for Saratoga on the Tahawus line prior to resolution of the aforesaid controversy, allowing Saratoga to begin common carrier operations on this private industrial spur and bringing it into the national railway system under federal jurisdiction will render resolution of the controversy moot, doing lasting harm to the Forest Preserve property rights of the People of the State of New York.

In its May 14, 2012 final decision in the case of Saratoga's previous NOE case (FD 35559), the STB determined that the real property issue (i.e, the alleged Forest Preserve violation by the Tahawus rail spur, including the abandonment, termination and reversion of the ROW easements on both State and private land) described by PROTECT in its November 14, 2011 protest letter is not within its jurisdiction to resolve and is best resolved in State court. Atlantic/Sierra agrees with this determination. However, the controversy clearly exists as the FD 35559 record shows and as STB has recognized in saying that it should be resolved in State court.

Although it is not within the STB's jurisdiction to resolve this controversy, that does not mean that the controversy should have no effect on the present proceeding. Under its regulations, the Board may act *sua sponte* in these NOE matters; it has great flexibility to do the right thing. The fact that the ongoing controversy exists means that the NOE process, one designed by the STB for routine, non-controversial projects, is no more a suitable process for Saratoga's purpose in the present NOE proceeding than it was in FD 35559. The STB has repeatedly pointed out in its decisions under FD 35559 that the NOE process

as authorized by U.S.C. 49 Section 10902 and 49 C.F.R. 1150.41 is intended only for non-controversial, routine projects - which the Tahawus Line and the current NOE filing of Saratoga clearly is not.

Further, as long as this controversy exists, unresolved in any forum, it creates a cloud on Saratoga's title to the real property known as the Tahawus Line. Under this circumstance, a common sense understanding of STB's rules requires that the STB cannot approve common carrier status for Saratoga on the Tahawus Line. Atlantic/Sierra believes that any approval action by the STB in granting common carrier status to Saratoga, which would make the Tahawus line part of the national railway system and subject to federal jurisdiction, prior to resolution of this controversy in State court or another suitable forum would severely prejudice, harm and make moot the longstanding interests of the People of the State of New York in removing the Article 14 violation of the State Constitution created by the federally established ROW easements and restoring the State Forest Preserve to its "wild forest" status or use as a non-motorized trail.

Summary of controversy. For the record in the present proceeding, as related in item 4 on page 2 of PROTECT's protest letter of November 11, 2011 (filed on November 14, 2011), the New York State Forest Preserve, created from public forest land by State law in 1885 in Catskill and Adirondack counties specified in the law, was given constitutional protection in 1894 whereby it is to remain "forever wild" and "cannot be leased, sold or exchanged" unless an exception is made by amending the constitution, a process purposefully made difficult. The 1964 national Wilderness Act, drafted primarily by Howard Zahnizer, a New Yorker, was born of the Forest Preserve experience. The Adirondack Forest Preserve constitutes the largest wilderness area east of the Mississippi River. No other state in the nation has protected its wilderness land constitutionally and to the extent that New York has protected its Forest Preserve. PROTECT's letter explains that the Forest Preserve comprises nearly half of the six million acre Adirondack Park, an area the size of the states of Massachusetts or Vermont with a roughly 50-50 mixture of the public Forest Preserve land and private land. PROTECT also concisely explained the role of the Adirondack Park Agency ("APA"), created in 1971 to oversee the State Land Master Plan for the Adirondack Forest Preserve and a State zoning plan for the private land.

In reiterating this information Atlantic/Sierra wants to emphasize the point that the constitutional "forever wild" provision of the State constitution, codified as Section 1 of Article 14, has been a bedrock principle of the conservation movement in New York for more than a century. Violations of Article 14 are taken most seriously by New Yorkers. There have been a number of major court cases about such violations, including the case in federal court from 1942 to 1946 that was initiated by the State of New York against the federal government to overturn the 15-year term easement for the ROW for the Tahawus spur on the Forest Preserve. The State pursued the matter through two appeals to the U. S. Supreme Court.

The history of the Tahawus rail spur is as Protect stated in its November 14, 2011 filing: the 1942 and 1962 eminent domain proceedings, the cessation of mining for ilmenite ore in 1982, the removal of all rolling stock from the spur by National Lead in 1989 and the purchase of the spur from the General Services Administration ("GSA") at auction by Kronos/NL Industries ("NL") in 1989 and other details. Atlantic/Sierra, however, wishes to add the following information to the record about the railway's abandonment and the termination and reversion of the easements to the fee title owners in the ROW, including the State of New York, which has a direct bearing on the present proceeding and was not really covered in Protect's filings in FD 35559.

Abandonment of the Tahawus rail spur, Termination and Reversion of the ROW Easements on the Tahawus Line and Implications Thereof

PROTECT, in its letter of November 14, 2011, did not go far enough in describing the abandonment of the entire 30-mile rail spur in 1989 for railway purposes as defined in State law and the subsequent termination and reversion of the easements under New York State common law on easements, for both the private land and the State Forest Preserve land. This has important implications for Saratoga's purchase of this rail spur from NL on November 4, 2011, the validity of its title to the railway, the legality of its occupation of State and private land in the ROW and its current pleadings before the STB for common carrier status.

As recognized by the STB in its FD 35559 decisions and by Saratoga in its filings, the Tahawus rail spur is not subject to federal jurisdiction, including STB's abandonment rules. Nor is it subject to 16 U.S.C. Section 1247(d) of the National Rails-to-Trails Act. It is in fact a private industrial rail spur and Saratoga has stated in its filings under FD 35559 that it does not really need common carrier status to actively operate the line, suggesting that it would not be a great hardship on Saratoga if it did not receive such status.

Not being subject to federal jurisdiction, the Tahawus spur nevertheless has been and is subject to State abandonment law and it is subject to the State's acquisition option for trail purposes, an option that NYSDOT recently waived for Saratoga (see Attachment A, letter of September 19, 2011 from Raymond F. Hessinger, Director, Freight and Passenger Rail Bureau, NYSDOT to Michael G. Sterthous, Whiteman Osterman and Hanna, One Commerce Plaza, Albany, NY 12260).

Two months before NL purchased at auction from GSA in 1989, NL removed all of the rolling stock from the entire spur, beginning 23 years of non-use. The Tahawus spur has been legally abandoned for at least 21 years under Section 18 of New York Transportation Law which states that if a railway is not used for railway purposes for more than two years it is considered to be abandoned (see criteria listed in Attachment A and Mr. Hessinger's statement that the Tahawus Line "has not been used for transportation purposes at least for the last decade"). This means that it was legally abandoned under Section 18 by the end of 1991. NYSDOT also has said that it is "deemed to be abandoned" under Section 18 (see Attachment B), in a letter of January 5, 2005 from Mike Young, Economic Development Section, NYSDOT to Joseph J. Martens, Open Space Institute, 307 Hamilton Street, Albany, NY 12210.

Also, under Section 18 if the owner at any time expresses intent to abandon it is tantamount to abandonment (see Attachment A criteria). PROTECT's statement in its protest letter to the STB of November 14, 2011 about the joint application on May 31, 2005 by NL and the Open Space Institute ("OSI") to remove the rails on the Essex County portion of the spur is fully documented in an extensive APA file (see Attachment C). For various reasons, this application was dropped at the end of 2005 as the records in APA file show, otherwise the controversy about the Forest Preserve would have ended at that time, with the rails being removed.

There is more State law on abandonment that applies to the Tahawus spur. APA's regulations, in 9NYCRR573.6(f), define abandonment as disuse of a land use for more than five years. A permit from APA is required for re-activation of an abandoned use. Given the continuing controversy over the

longstanding Forest Preserve violation associated with this rail spur, APA's issuance of such a permit would not seem to be legally feasible.

Under New York State common law on easements, if an easement is abandoned it ceases to exist and it is considered to be legally extinguished, or terminated, whereupon the partial interest in real property reverts to the fee title owner. In particular, a railroad easement terminates "...if the railroad abandons use of the property for railroad purposes or sells the property for non-railroad purposes. Upon termination of the easement, the original owners or their successors are entitled to take possession of the property." People v Helenski, 222 A.D.2d 788 (3d Dept. 1995) (internal citations omitted). See also Erie Lackawanna Ry. Co. v State, 38 A.D.2d 463, 464 (4th Dept. 1972).

The easements for the Tahawus rail spur have not existed for a long time and therefore the ROW itself does not exist. It remains only for the fee title owners, both the State and the private owners, of the land in the former ROW to assert their rights to ownership of the former easements.

In sum, the Tahawus rail spur has been abandoned for many years under State law as has been acknowledged by NL, OSI and NYSDOT in recent years, well before Saratoga made its purchase of the line on November 4, 2011. With abandonment, the easements terminated and reverted to the fee title owners of the ROW. With the easements already gone, Saratoga purchased only the rails on November 4. Thus, Saratoga's title is badly flawed. And if Saratoga truly does not own the ROW easements, as the STB has said must be determined in State Court, how can the STB entertain a petition from Saratoga, in any type of proceeding, to become a common carrier on the Tahawus rail spur?

Further, in the absence of the former ROW easements, Saratoga is without any right to have its rails on the State Forest Preserve land or the private land. Saratoga's rails are occupying the land in the former ROW illegally. It remains for the NYS Department of Environmental Conservation ("DEC") and the NYS Attorney General to address this clear violation of Article 14 of the State constitution by requiring Saratoga to remove the rails. Atlantic/Sierra is willing to support an approvable plan for rail removal with the APA, if and when Saratoga applies to APA for a permit for that purpose.

Under FD 35559, DEC's initial letter to STB dated December 15, 2011 (filed on December 21, 2011) stated that there are "many unresolved issues" concerning the Forest Preserve as it relates to the Tahawus railway. DEC, as the custodian of the Forest Preserve under State law, has yet to address these issues. In its joint letter with NYSDOT to the STB, filed on March 19, 2012, in which both agencies advocated that the STB grant Saratoga's NOE, DEC avoided any reference to the Forest Preserve and the "unresolved issues" mentioned in its initial letter, addressing only the possibilities of having a snowmobile trail during the winter when trains would not be running. DEC still has a completely wide open opportunity, in concert with the Attorney General, to perform its custodial and constitutional duties responsibly by acting to remove the illegal occupancy of the Forest Preserve that has been created by Saratoga's rails.

The Adirondack Forest Preserve, including that land owned in fee by the State of New York which underlies the 13 miles of the former ROW on the Tahawus rail spur, is a National Historic Landmark on the National Register of Historic Places, established by National Historic Preservation Act of 1966 as Amended. Responsiveness to this federal law requires an Environmental Assessment under the

provisions of the National Environmental Policy Act ("NEPA") and a historic report under 49 C.F.R. 11.05.8(a).

The Adirondack Forest Preserve, including the land owned in fee title in the former ROW of the Tahawus rail spur, constituting nearly half the length of this 30-mile spur, is a National Historic Landmark ("NHL") on the National Register of Historic Places under the National Historic Preservation Act of 1966 as Amended ("NHPA"). The fact that this particular NHL would be significantly impacted by renewed operation of the Tahawus spur after 23 years of abandonment and termination and reversion of the easements under State law is a significant threshold that must trigger a NEPA review. That Saratoga in its NOE of May 17, 2012 has focused only on the threshold for train traffic, stating that there will be no more than one train a day for five days during each week and that this minimal traffic impact is below all operational thresholds for such review, has no relevance to impacts on the NHL. As already discussed in this letter it is the sanctioning by the STB of the start of operations as a common carrier in itself, regardless of the level of traffic, that is at issue.

Under Section 1105.6 (d) pertaining to NEPA, the Board has considerable flexibility in interpreting its regulations in situations which they do not adequately cover. It may "... reclassify or modify these requirements for individual proceedings. For actions that generally require no environmental documentation the Board may decide that a particular action has the potential for significant environmental impacts and that, therefore, the applicant should provide an environmental report and either an EA or an EIS should be prepared."

Atlantic/Sierra believes that under Section 1105.8(a) a historic report is required contrary to Saratoga's assertion that Section 1105.8(b)(1) provides an exception for historic review. A sale, lease or transfer only provides an exception "... if rail operations will continue." In the case of the Tahawus spur, the operations were discontinued in 1989 and, in fact, NYSDOT has repeatedly stated that the line has been considered to be abandoned under Section 18 of State Transportation Law in that there have been no rail operations in all of those years. Board approval for service abandonment, also referenced by Saratoga, obviously is not an issue since everyone agrees that the Tahawus line has never been under federal jurisdiction; federal ownership and leasing to NL, with contracting of operations to the D and H, in the 1942 to 1989 period, was all as a private industrial spur.

Atlantic/Sierra strongly urges the STB to ask its staff to consult with staff at the federal Advisory Council on Historic Preservation and the National Park Service on how to best meet the full intent and requirements of federal law in this particular situation where renewed operation after 23 years of abandonment under State Transportation Law, resulting in termination and reversion of the easements under State common law and illegal occupancy of the Forest Preserve by Saratoga's rails, would seem to disregard federal as well as State law. The State Historic Preservation Office also plays a role in resolving these matters. Names, addresses and phone numbers for these entities are shown below.

Jobs at Tahawus Unlikely

Notwithstanding the ongoing "controversy" described above, if Saratoga were to operate the Tahawus Line it does not appear that more than a handful of jobs could be created at Tahawus, including those of operating the one-a-day train anticipated by Saratoga for part of the year. (In the DEC-NYSDOT letter

of March 19, 2012 to the STB -see FD 35559- it is stated that the train would not operate during the winter when the ROW would be used by snowmobiles)

Crushed waste rock and magnetite iron ore are both left-over byproducts of the pre-1982 ilmenite mining. The waste rock is simply the excavated bedrock that surrounded the ilmenite ore in the open pits next to the Hudson River where the mining took place. It was excavated along with the ilmenite ore. It is lying in big "chunks" on the surface of NL's remaining industrial property, near the pits and in the vicinity of the former mill buildings that were demolished in 2006 by NL. These piles of waste rock are what give the property its bizarre and raw look of a moonscape.

A few trainloads of crushed rock were taken out in the late 1980s, used for road fill material, but that ended when the railroad was abandoned in 1989. Few, if any, truckloads of crushed rock have been removed from the property in recent years as it is a very low value product, too expensive to transport by truck. It is also a product that is too commonly available throughout the state to warrant establishing a major industrial crushing operation at the foot of the Adirondack Forest Preserve High Peaks Wilderness Area where it would significantly violate the spirit and intent of the surrounding wilderness and violate the State constitution by allowing transport by common carrier over the Forest Preserve.

Since the 1990s, NL has been selling somewhat higher value (than the crushed stone) magnetite ore from the "tailings piles" or stock piles around the site of the former mill buildings, now demolished, moving it to market by truck. These piles are frozen solid even in the summer and the surface of the piles take awhile to thaw out sufficiently to be able to scrape some ore off the surface to get a truck load. The magnetite ore in these piles was mined prior to 1982 and it was an impurity that had to be separated from the ilmenite ore. In a support letter for Saratoga dated November 21, 2011, under FD 35559, NL stated that there were only a "few years" worth of this magnetite ore left, presumably in truckloads at the present rate of removal. NL also stated in that letter that over the past four years this operation was averaging about \$100,000 a year – a very small amount, whether gross or net, in the course of events considering the costs of renting a loader and crusher and a couple of trucks and paying the salaries and fringe benefits for a couple of employees.

Then there is the question about whether NL really wants to go into the stone crushing business in a big way. NL is part of a Texas conglomerate owned by billionaire Harold Simmons. Mining and processing ilmenite ore is a major part of the business of the company, worldwide. The entire *modus operandi* of NL since 1989 has been to divest itself of the Tahawus property and rail line. There is no real basis for the current hype about job possibilities at Tahawus. In addition to the constraints just noted, according to its own estimates in its filing, it would cost Saratoga up to \$5.0 million to get the Tahawus rail spur in condition for heavy duty use. It would seem that it would be some time before anything could happen by way of job creation at Tahawus, under the best of circumstances.

Last, it should be noted that Saratoga has provided misleading and exaggerated information to suit its own purposes on page 5 of its NOE where in the first paragraph it refers to "... for the purpose of operating the entire Tahawus Line [emphasis added] between Newcomb on the north and Saratoga Springs on the south, etc." The Tahawus Line, as a privately owned industrial spur built by the federal government in 1942, ran only as far south as North Creek (not Saratoga Springs) where it joined the main line of the former D & H Railroad (now the CP). In the second paragraph on page 5, Saratoga states that the Tahawus spur was constructed in the "... early part of the 20th Century to transport

minerals being mined in northern New York State." In fact, it was constructed in 1942 after the federal government condemned 13 miles of State Forest Preserve land and 17 miles of private land for the ROW and, as shown in the court orders for the eminent domain case, it was constructed only for the singular purposes of the wartime emergency of WWII and to haul the "strategic material" (ilmenite, an ore of titanium dioxide) from one isolated and specific location – NL's mine at Tahawus, not from mines all over Northern New York.

We appreciate this opportunity to petition the STB to reject Saratoga's NOE. Ten copies of this letter and its Attachments are enclosed.

Sincerely,

Samuel H. Sage

Samuel H. Sage, President/ Senior Scientist
ATLANTIC STATES LEGAL FOUNDATION, INC.
658 West Onondaga Street, Syracuse, N.Y., 13204-3711 (offices)
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Charles C. Morrison

Charles C. Morrison, Project Coordinator
SIERRA CLUB, ATLANTIC CHAPTER, ADIRONDACK COMMITTEE
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Phone: 518-583-2212

Attachments

cc:

Edwin E. Ellis, President
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Attorney General, State of New York
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Ruth Pierpont
Deputy Commissioner for Historic Preservation
And State Historic Preservation Officer
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Najah Duvall-Gabriel
Advisory Council on Historic Preservation
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William Bolger
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National Park Service – NE Regional Office
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Philadelphia, PA 19106
215-597-1578

National Park Service
National Historic Landmarks Program (Org. 2280)
1849 C Street NW
Washington DC 20240
202-354-2216

VERIFICATION

I, Charles C. Morrison, Project Coordinator for the Adirondack Committee of the Atlantic Chapter of the Sierra Club declare under penalty of perjury that the foregoing is true and correct, to the best of my knowledge. Further, I certify that I am qualified and authorized to file this pleading.

June 1, 2012

Charles C. Morrison

CERTIFICATION OF SERVICE

I hereby certify that I have served all parties of record in this proceeding with this document by United States Priority Express mail.

June 1, 2012

Charles C. Morrison

42466
DO

SERVICE DATE – JUNE 15, 2012

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35631

SARATOGA AND NORTH CREEK RAILWAY, LLC– OPERATION EXEMPTION–TAHAWUS LINE

Decided: June 14, 2012

This decision denies the petition of the Atlantic States Legal Foundation and the Adirondack Committee of the Atlantic Chapter of the Sierra Club (ASLF/Sierra) to reject the notice of exemption filed in this proceeding.

BACKGROUND

On May 17, 2012, Saratoga and North Creek Railway, LLC (Saratoga), a Class III rail carrier, filed a verified notice of exemption under 49 U.S.C. § 10902 and 49 C.F.R. § 1150.41 to operate, as a line of railroad, approximately 29.71 miles of private track owned by NL Industries, Inc. (NL). Saratoga refers to the private track as the “Tahawus Line.” The track runs between its existing connection with Saratoga at North Creek, N.Y., and its terminus at Newcomb, N.Y. The exemption is scheduled to become effective on June 16, 2012.

Saratoga previously filed a notice of exemption in Saratoga & North Creek Railway–Operation Exemption–Tahawus Line, FD 35559 (STB served Nov. 10, 2011), to operate the Tahawus Line. Protect the Adirondacks! Inc. (Protect), a non-profit organization, filed a petition to reject the notice, questioning, among other things, Saratoga’s claim that it will provide common carrier rail service. In a decision served on November 23, 2011, the Acting Director of the Office of Proceedings rejected the notice before it became effective. Saratoga appealed the Acting Director’s decision to the full Board. In a decision served on May 14, 2012 (May 2012 Decision), the Board denied Saratoga’s appeal. However, because subsequent filings had provided sufficient evidence to resolve the concerns regarding freight rail service that led to the initial rejection decision, the Board concluded that Saratoga could file a new notice of exemption for authority to pursue common carrier service on the Tahawus Line. In this docket, Saratoga filed its new notice of exemption to operate the Tahawus Line. In its notice, Saratoga explained that it planned to operate no more than 1 train per day, 5 days a week, which would be well under the Board’s thresholds for environmental review (generally 3 or 8 trains per day depending on the air quality of the region). See 49 C.F.R. § 1105.6(c)(2)(i). Further, Saratoga contended that the transaction is exempt from historic review under 49 C.F.R. § 1105.8(b)(1) because the transaction involves only a change in operators and Board approval (including an environmental and historic review) would be required prior to any abandonment.

On June 4, 2012, ASLF/Sierra filed a petition to reject Saratoga's new notice of exemption. ASLF/Sierra argues that 13 miles of the Tahawus Line are in the Adirondack State Forest Preserve (Forest Preserve), which they claim is protected as public forest land under Section 1, Article 14 of the Constitution of New York. ASLF/Sierra also argues that, under New York law, the Tahawus Line has been abandoned due to non-use. While ASLF/Sierra acknowledges that issues related to the alleged Forest Preserve and other state law matters are best resolved in state court, ASLF/Sierra claims that the Board should require Saratoga to use a procedure that would allow more scrutiny than a notice of exemption.

In addition to its arguments based on New York law, ASLF/Sierra argues that an environmental and historic review should be required. ASLF/Sierra notes that 13 miles of the Tahawus Line is a National Historic Landmark and claims that renewed operations on the Tahawus Line would result in unspecified environmental impacts. Lastly, ASLF/Sierra argues that it is unlikely that operation of the Tahawus Line will result in the creation of many jobs.

On June 11, 2012, Saratoga replied in opposition to ASLF/Sierra's petition to reject. Saratoga argues that ASLF/Sierra's petition does not cite to any materially false or misleading information in the notice, point to any misuse of the Board's procedures, or demonstrate that increased Board scrutiny of the transaction is necessary. Saratoga explains that all of ASLF/Sierra's arguments regarding New York state law are appropriate for state courts to address. Saratoga states that it has made a business judgment that sufficient traffic exists to justify the new rail service and is willing to make the necessary investments based on that decision. Finally, Saratoga contends that ASLF/Sierra has failed to show that an environmental or historic review by the Board is needed here.

DISCUSSION AND CONCLUSIONS

ASLF/Sierra's request that the Board reject Saratoga's notice of exemption will be denied. ASLF/Sierra has not shown that Saratoga's notice contains false or misleading information that would warrant rejection under 49 C.F.R. § 1150.42(c). Furthermore, ASLF/Sierra has presented no issues within the Board's jurisdiction that warrant the use of the Board's petition for exemption or application process. Nor has ASLF/Sierra demonstrated that the Board needs more time to address the issues raised here before the exemption takes effect.

The primary issues raised here relate to claims regarding the Forest Preserve and other state property law issues that, as the Board stated in the May 2012 Decision, are not within the Board's jurisdiction and are appropriate for a state court to address. See Allegheny Valley R.R.–Petition for Declaratory Order–William Fiore, FD 35388 (STB served Apr. 25, 2011); Lackawanna Cnty. R.R. Auth.–Acquis. Exemption–F&L Realty, FD 33905 (STB served Oct. 22, 2001). The operating authority Saratoga will receive under the class exemption is permissive, and is not determinative of any underlying state law property claims for this railroad right-of-way. Thus, rejection of Saratoga's notice is not necessary to address these issues.

Saratoga correctly notes that ASLF/Sierra has failed to show that insufficient traffic exists to justify the planned rail service. As Saratoga states, it has made a business decision to make the necessary investment to provide this common carrier rail service, and ASLF/Sierra has not supported its suggestion that this decision requires more scrutiny by the Board than can be provided under the streamlined notice of exemption process. ASLF/Sierra also fails to support its claims that Saratoga should be required to submit environmental and historic reports and that this transaction requires environmental and historic review by the Board. Saratoga states in its notice of exemption that it anticipates operating a single roundtrip over the Tahawus Line up to 5 days per week. Thus, Saratoga's planned operations will not trigger the thresholds for an environmental review under the National Environmental Policy Act (NEPA) in 49 C.F.R. § 1105.6(c)(2)(i). Nor has ASLF/Sierra presented any specific evidence of potentially significant environmental impacts regarding this transaction that would warrant reclassifying this proposal as one that requires a NEPA review under 49 C.F.R. § 1105.6(d). ASLF/Sierra also ignores that the New York State Department of Environmental Conservation and the New York State Department of Transportation (as well as other state or local agencies and government entities) have indicated that they support Saratoga's proposal and that Saratoga has addressed prior concerns that those agencies had regarding the economic and environmental impacts that would be associated with these rail operations. See May 2012 Decision at 3 & n. 4.

Nor has ALSF/Sierra shown that an historic review by the Board is required here. See 49 C.F.R. § 1105.8(b)(1). This transaction is essentially a replacement of one operator for another. There is no indication that Saratoga has any plans to dispose of or alter properties subject to the Board's jurisdiction that are 50 years old or older. Also, should Saratoga initiate common carrier operations, the Tahawus Line would become part of the national rail network, and Saratoga would subsequently need Board authority prior to abandoning it, which would trigger environmental and historic reporting followed by an appropriate environmental and historic review at that point.

For these reasons, ASLF/Sierra's petition to reject Saratoga's notice of exemption will be denied.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. ASLF/Sierra's petition to reject the notice of exemption is denied.
2. The decision is effective on the date of service.

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