

SERVICE DATE – MAY 14, 2012

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35559

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

Digest:<sup>1</sup> In this decision the Board denies a railroad’s appeal of an earlier decision by the Acting Director of the Office of Proceedings rejecting the railroad’s notice under the class exemption at 49 C.F.R. § 1150.41 for authority to operate as a common carrier over a private rail track in upstate New York. The Board finds that the Acting Director acted properly in rejecting the notice given the issues that were raised. However, subsequent filings have provided enough information to resolve the concerns that led to the Director’s decision. Thus, the railroad may now file a new notice of exemption for the operating authority it seeks.

Decided: May 10, 2012

Invoking the statutory authority of 49 U.S.C. § 10902 and the Board’s regulations at 49 C.F.R. § 1150.41, Saratoga and North Creek Railway, LLC (Saratoga), a Class III rail carrier, filed a verified notice of exemption under the expedited class exemption process at 49 C.F.R. § 1150.41-44, regulations designed for routine and non-controversial cases that ordinarily do not require extensive regulatory scrutiny. Saratoga sought authority to operate, as a line of railroad, approximately 29.71 miles of private track previously owned by NL Industries, Inc. (NL), which Saratoga refers to as the “Tahawus Line.”<sup>2</sup> The notice of exemption was served and published in the Federal Register on November 10, 2011. The Acting Director of the Office of Proceedings (Director), in a decision served November 23, 2011 (November Decision), rejected the notice of exemption before it became effective. Saratoga appeals that decision to the full Board.

In this decision, we find that the Director properly rejected Saratoga’s notice of exemption and, accordingly, we deny Saratoga’s appeal of that decision. Saratoga’s original notice, as well as its initial reply to a letter submitted by Protect the Adirondacks! (Protect), left

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<sup>1</sup> 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).

<sup>2</sup> Saratoga states that the subject track has never been operated in common carrier service and that, therefore, Saratoga does not need any Board authority to acquire it.

unanswered certain questions pertaining to the future use of the Tahawus Line and the need for freight service. The Director, unable to reconcile the concerns raised in the filings made to the Board before the exemption took effect, determined that the Board's class exemption procedures were an ill-suited process to resolve those questions, which would be necessary to provide the operating authority Saratoga sought. The November Decision did not decide whether common carrier operations on the Tahawus Line ultimately should be allowed. Rather, it held that use of the limited procedures afforded by the class exemption was not appropriate, given the information in the record at that time.

Subsequent filings have clarified the record. Saratoga's appeal, the reply of Protect, and the additional letters of concern and support have provided significant additional information regarding such issues as passenger rail service and the potential for serving shippers on the Tahawus Line. It is now clear that Saratoga has no present plan to pursue passenger rail service, and that there are shippers in need of freight rail service. Based on all of the information now available, we are satisfied that Saratoga's proposal would qualify for the class exemption. Therefore, Saratoga need not file a petition for individual exemption or a full application. Saratoga may file a new notice of exemption, including a new filing fee, for authority to pursue common carrier service on the Tahawus Line.

## BACKGROUND

The Tahawus Line is a 29.71-mile private track located in upstate New York. The U.S. Government, during World War II, used its eminent domain power to create a right-of-way for trackage traversing the Adirondack State Forest Preserve, in order to facilitate the transportation of ilmenite ore from a mine owned by NL. After construction was completed, the Federal government leased the trackage to NL. NL contracted with the Delaware & Hudson Railroad (D&H), the predecessor to the Canadian Pacific Railway Company (CP), to ship ore via the Tahawus Line. Following the end of World War II, NL continued to transport ilmenite ore from its mine over the Tahawus Line. The easements had been set to expire 15 years after the end of the war.<sup>3</sup> In 1962, however, the General Services Administration (GSA) instituted another eminent domain proceeding and extended the term of the easements for 100 years, until 2062. NL discontinued shipping its ore by rail in the 1980s, but continued to ship minerals from the mine via truck. In 1989, GSA auctioned the Tahawus Line, and NL acquired it as private track.

On October 25, 2011, Saratoga filed a notice of exemption to operate on the Tahawus Line as a common carrier. Saratoga cited an agreement with NL to acquire the Tahawus Line and initiate common carrier service over the trackage. Saratoga stated that it anticipated consummating the acquisition of the private track prior to the effective date of the notice, because the acquisition did not require Board authority. Saratoga indicated that the Tahawus

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<sup>3</sup> President Truman declared the end of World War II in 1952, so the easements were to expire in 1967.

Line connects at North Creek to another line where Saratoga has recently restored common carrier service. This line continues south to its terminus in Saratoga Springs, where Saratoga can interchange traffic with CP.

In the November Decision, the Director rejected Saratoga's notice of exemption. As previously noted, the November Decision correctly stated that notices of exemption are intended to be used for routine and non-controversial cases, and that in cases where issues arise that cannot be resolved within the limited procedures afforded under the class exemption process, the Board may reject the notice.

In its appeal of the Director's decision to the full Board, Saratoga argues that the November Decision reflects a clear error of judgment by the Director, because the rejection of its notice of exemption allegedly was based solely on the protest filed by Protect. Saratoga argues that Protect failed to cite any legal basis for rejecting the notice and did not meet its burden of proof. Furthermore, Saratoga claims that the November Decision does not address the Board's standards for rejection, was contrary to agency precedent, and cited as facts information contrary to the evidentiary record. In reply, Protect argues that the Director properly rejected the notice.

In addition, several other interested parties filed letters in response to Saratoga's appeal. NL submitted an additional letter of support on December 5, 2011. NL's letter clarifies the scope of its operations at its mine in the Town of Newcomb, and states that it is actively pursuing negotiations with Saratoga to divert its truck traffic to rail. NL also states that it has spent in excess of \$4 million on environmental site remediation required by the State of New York to complete its remedial obligations. NL also notes that its remediation actions have not limited the uses to which its property can be put.

The New York State Department of Environmental Conservation (NYSDEC) filed a letter on December 21, 2011, stating that the Tahawus Line traverses over 13 miles, and 220 acres, of state-owned and constitutionally protected Adirondack Forest Preserve, which is under its jurisdiction. NYSDEC noted that there remained many unresolved legal issues concerning the status of the Tahawus Line, the easement on which it is located, and the potential future use of the right-of-way. On March 19, 2012, however, NYSDEC and the New York State Department of Transportation (NYSDOT) filed a letter urging the Board to grant Saratoga's appeal and enclosed a copy of correspondence from Saratoga to NYSDEC dated March 8, 2012. NYSDEC and NYSDOT state that Saratoga's letter addresses their concerns regarding snowmobile use and trail use, as well as the economic and environmental impacts that would be associated with rail operations.<sup>4</sup>

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<sup>4</sup> Letters or resolutions of support for Saratoga's appeal were also filed by the Town of Newcomb, the North Country Chamber of Commerce, the Essex County Board of Supervisors, New York State Senator Elizabeth Little, New York State Assemblywoman Teresa R. Sayward, the Town of Queensbury, N.Y., the Hamilton County Board of Supervisors, the Town of Indian

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The Friends of the Upper Hudson Rail Trail (Upper Hudson) filed a letter on January 13, 2012, expressing concerns that the Tahawus Line would not be eligible for future use as a recreational trail under 16 U.S.C. § 1247(d). Upper Hudson neither supports nor opposes Saratoga's appeal. Upper Hudson is concerned that the right-of-way will revert to the underlying landowners in 2062, thus rendering abandonment of the Tahawus Line inevitable. It challenges the assertion in the November Decision that the Tahawus Line is now private track, asserting that the track was under the jurisdiction of the Board prior to Saratoga's purchase because it was constructed and owned by the Federal government, and was once operated upon by a common carrier (D&H), and used to move goods across state lines. Saratoga, on January 19, 2012, filed a request for leave to respond to Upper Hudson's comments. Saratoga states that the acquisition of the Tahawus Line is exempt from the Board's acquisition jurisdiction because it was private track owned by a shipper, even though a common carrier railroad once provided service over it. Furthermore, Saratoga states that the Tahawus Line cannot currently be considered for railbanking and interim trail use under 16 U.S.C. § 1247(d) because it has not been the subject of an abandonment proceeding before the Board. Finally, Saratoga states that, should its effort to obtain an operation exemption from the Board be successful, the Tahawus Line would become a regulated line of railroad subject the Board's jurisdiction, so that interim trail use could potentially occur if and when a future request for abandonment authority is sought.

#### PRELIMINARY MATTER

On January 4, 2012, Protect filed a motion pursuant to 49 C.F.R. § 1011.2(a)(7) for leave to late file its reply to Saratoga's appeal of the November Decision. Protect filed its reply with the Board on December 27, 2011. As pointed out by Saratoga in a letter filed on December 22, 2011, the deadline for replies was December 15, 2011. In support of its motion, Protect states

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Lake, N.Y., and the Adirondack Park Local Government Review Board. Saratoga also submitted filings to inform the Board of local community support for Saratoga's proposed operations, including the Warren County Board of Supervisors, the North Country Regional Economic Council, letters and emails of support from individuals in the local community, the letter of support of Victoria Pratt Gerdino, President of EDC Warren County, the Town of Edinburg, N.Y., and the InterCounty Legislative Committee of the Adirondacks. On March 16, 2012, Saratoga filed a letter referencing a letter of support to be filed by United States Senator Kirsten E. Gillibrand and a joint letter of support to be filed by NYSDOT and NYSDEC. On March 26, 2012, the Board received the letter of support from Senator Gillibrand stating that Saratoga's request for authority is in keeping with New York's North Country Regional Economic Development Plan. On April 30, 2012, United States Senator Charles E. Schumer filed a letter of support stating that Saratoga's request to commence common carrier operations on the Tahawus Line would reduce unwanted truck traffic through New York's Adirondack Park and would support much needed economic development and jobs in the Adirondack Region.

that it contacted the Board's Office of Public Assistance, Governmental Affairs, and Compliance (OPAGAC) regarding the process for responding to Saratoga's appeal and was incorrectly informed that it had 20 days to file, rather than 10. Protect also states that its late filing did not prejudice Saratoga.

Good cause exists to grant the motion. Protect engaged in a good faith effort to comply with the Board's rules, and Saratoga is not prejudiced by the late filing of the reply. Protect's reply will be accepted and considered for the purposes of this decision.

### DISCUSSION AND CONCLUSIONS

Under 49 C.F.R. § 1011.7(a)(2)(x)(A), the Board has delegated to the Director the authority to initially determine whether to issue notices of exemption under 49 U.S.C. § 10502 for operation transactions under 49 U.S.C. § 10902. The Board has reserved for itself the consideration and disposition of all appeals of initial decisions issued by the Director. See 49 C.F.R. § 1011.2(a)(7). On appeal, the Board considers whether the Director properly rejected the notice of exemption. Under 49 C.F.R. § 1115.1, an appeal of the Director's decision is not favored and will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice. A successful appeal must satisfy one or more of the following criteria: (1) a necessary finding of fact is omitted, erroneous, or unsupported by the substantial evidence of record; (2) a necessary legal conclusion or finding is contrary to law, Board precedent, or policy; (3) an important question of law, policy, or discretion is involved which is without governing precedent; or (4) a prejudicial procedural error has occurred. See 49 C.F.R. § 1115.2(b)(2). Here, Saratoga argues that the Director materially erred in rejecting the notice of exemption.

The Board's class exemption procedures provide an expedited means of obtaining Board authority in certain classes of transactions involving routine matters. A notice that raises unresolved issues or questions that require considerable scrutiny may be rejected. Winamac S. Ry.—Trackage Rights Exemption—A. & R. Line, Inc., FD 35208, slip op. at 2 (STB served Jan. 9, 2009). The Board's class exemption procedures are not intended for use in matters that attract substantial controversy and local interest. Ne. Interchange Ry.—Lease & Operation Exemption—Line in Croton-on-Hudson, N.Y., FD 34734, slip op. at 4 (STB served Nov. 18, 2005); ABC & D Recycling, Inc.—Lease and Operation Exemption—A Line of Railroad in Ware, Mass., FD 35397 (STB served Jan. 20, 2011). Saratoga's notice of exemption and the information that was filed in response to it raised questions that required scrutiny beyond the short deadlines and limited procedures afforded by the Board's class exemption procedures. Therefore, the Board will affirm the Director's decision to reject it.

Saratoga challenges the Director's decision on four grounds. First, Saratoga argues that the November Decision reflects a clear error of judgment in that Protect's protest letter did not request or cite a legal basis or rejection, and that Protect did not meet its burden of proof. Second, Saratoga argues that the November Decision did not address the Board's standard for

rejection. Third, Saratoga argues that the November Decision was contrary to Board precedent. Finally, Saratoga argues that the November Decision did not accurately reflect the evidence of record. In particular, Saratoga argues that the Director misinterpreted statements in the record concerning passenger service. Each of Saratoga's arguments lacks merit.

First, the Director did not commit material error by treating Protect's protest letter as a petition to reject. Although Protect's letter was not styled as a petition to reject, the protest letter brought serious issues regarding the proposal to the Board's attention. Even if no petition to reject is filed, the Board may, in the public interest, act sua sponte to reject a notice of exemption. See Borealis Infrastructure Mgmt., Inc., Sole Trustee of the Borealis Transp. Infrastructure Trust—Acquis. Exemption—Detroit River Tunnel Co., FD 33984, et al. (STB served Dec. 19, 2001). While the Director accepted Protect's letter and considered the assertions contained therein, the Director did not shift the burden of proof to Saratoga. Rather, Protect's protest letter, in combination with the factual inconsistencies in Saratoga's filings, reasonably led to a determination that the notice of exemption should be rejected.

Second, the November Decision addressed the standards for rejection, and the Director properly applied them. In determining whether to reject a notice, the Board considers whether the notice raises substantial controversy or substantial factual and legal issues. S. San Luis Valley R.R.—Acquis. & Operation Exemption—Iowa Pac. Holdings, LLC, FD 35586, et al. (STB served Feb. 10, 2012) (based on unresolved issues regarding prior acquisitions of the rail line, the Board rejected a notice of exemption, without any opposition or petitions to reject). Saratoga argues that there is nothing controversial about its proposal, but the Director's concerns regarding passenger service and whether the exemption sought was really for freight rail service were reasonable based on the information available at that time. Saratoga argues that its reply to the protest letter answered any concerns that might have been triggered by Protect. However, Saratoga's statements in the record concerning passenger service available to the Director at the time of the November Decision were not consistent. Because of these unresolved issues and the limited time afforded by the class exemption regulations, the Director properly rejected the notice.

Third, the November Decision is consistent with Board precedent. Saratoga cites to acquisition cases with greater opposition from shippers, state and local agencies, and environmental groups, which were approved by the Board and its predecessor, the Interstate Commerce Commission, to bolster its argument that the Director erred in rejecting its notice based on the lone protest of Protect.<sup>5</sup> Each transaction requires the Director to make a fact-specific determination based on the evidence available in the record. Moreover, as stated above, the Board may reject a notice sua sponte, and could reject a notice of exemption without any opposition from shippers, government agencies, or environmental groups, so long as doing so would be in the public interest.

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<sup>5</sup> Saratoga Appeal at 12-13.

Finally, the Director properly evaluated the evidence regarding Saratoga's intentions to provide passenger service in deciding to reject the notice of exemption. Saratoga now explains that the comments in the Verified Statement of Stephen Gregory regarding passenger service referred to a different line, not the Tahawus Line. But the statement of Mr. Gregory at the time did not clearly identify the line on which Saratoga intended to provide passenger service. Saratoga also asserts that a statement by NL regarding passenger service on the Tahawus Line, referred to in the November Decision, was speculative and did not bind Saratoga. NL's statement, in addition to Protect's assertions regarding passenger service, demonstrate that the Director did not err in concluding that the record contained conflicting statements. In short, in rejecting the notice of exemption the Director evaluated the limited information available and correctly determined that the class exemption procedures were insufficient to address the concerns regarding potential freight rail and passenger operations.

While we find that, in the November Decision, the Director properly determined that Saratoga's notice of exemption presented issues that could not be adequately decided under the limited class exemption procedures, Saratoga and others have now provided adequate information for the Board to determine that use of the class exemption to operate over the Tahawus Line would be appropriate. Although Protect and Upper Hudson are free to continue to oppose this transaction, we will permit Saratoga to file a new notice of exemption. Protect raises arguments related to state property law that are not within the Board's jurisdiction, but instead are appropriate for a state court to address. See Allegheny Valley R.R. Co.—Petition for Declaratory Order—William Fiore, FD 35388, slip op. at 3 (STB served Apr. 25, 2011). The Board's class exemption authority is permissive, and is, therefore, not dispositive of any litigation pertaining to state law property interests for a railroad right-of-way. Protect has proffered neither additional evidence pertaining to any plans for Saratoga to operate passenger service, nor given the Board any reason to doubt the currently-expressed interest of Saratoga in serving NL or Barton Mines, once it is able to commence common carrier operations on the Tahawus Line.

To the extent Upper Hudson is concerned about interim trail use, the Tahawus Line is currently private trackage, and, therefore, not eligible for trail use under 16 U.S.C. § 1247(d). Although Upper Hudson challenges Saratoga's assertion that the Tahawus Line was non-jurisdictional private trackage when it was sold to NL, there is no evidence in the record that anyone received authority from the Board's predecessor, the Interstate Commerce Commission (ICC), to operate over the Tahawus Line as a common carrier. The U.S. Government may own a rail line without operating it as a common carrier. See Camp Lejeune R.R. Co.—Aban. Exemption—In Onslow Co., N.C., AB 290 (209X) (STB served Feb. 2, 2001). Furthermore, the owner of a private track may arrange for a contractor to conduct operations over the track to serve the owner, so that there is no "holding out" to serve other shippers. Such operations are not subject to the Board's jurisdiction. See B. Willis, C.P.A., Inc.—Petition for Declaratory Order, FD 34103, slip op. at 2-3 (STB served Oct. 3, 2001). Finally, a common carrier operating over private track would not fall under § 10901 (formerly 49 U.S.C. § 1(18)) with respect to

those operations, so long as it does not perform common carrier service on the private track. See New York Central R. Co. v. Southern Ry. Co., 226 F.Supp. 463, 471 (ND Ill., ED, 1964), aff'd 338 F.2d 667 (7th Cir. 1964), cert. denied 380 U.S. 914 (1965).

Saratoga has purchased the Tahawus Line from NL. Should Saratoga acquire the authority to operate the Tahawus Line as a common carrier pursuant to its new notice of exemption, and exercise that authority, then the Tahawus Line will become a part of the national rail network. Later, should Saratoga, at some point in the future, seek to abandon the Tahawus Line, then it would need authority from the Board to do so. At that point, the Board's rules pertaining to railbanking and interim trail use would apply, and interested parties, like Upper Hudson, could seek a trail condition and potentially enter into negotiations with Saratoga under 16 U.S.C. § 1247(d) and the Board's implementing regulations.

Finally, it has been suggested that, prior to authorizing Saratoga to operate over the Tahawus Line, an environmental review under the National Environmental Policy Act (NEPA) would be required. On the other hand, Saratoga has contended that an environmental review is not necessary here. Based on the information that is currently available, we do not expect that a NEPA review would be warranted if a new notice of exemption is filed. Under the Board's environmental rules, requests for new operational authority on a rail line typically are excluded from NEPA review unless they trigger certain thresholds (generally an increase of 3 or 8 trains per day depending on whether the area is in attainment under the Clean Air Act). See 49 C.F.R. §§ 1105.6(c)(2)(i), 1105.7(e)(4), and (5); see also Mo. Cent. R.R. Co.—Acquis. & Oper. Exemption—Lines of Union Pac. R.R. Co., FD 35508, et al., aff'd Lee's Summit, Mo. v. STB, 231 F.3d 39 (D.C. Cir. 2000). Here, Saratoga asserted in its notice of exemption that the operating changes will not exceed these thresholds, but failed to provide information on the number of trains that it plans to operate on the Tahawus Line for the foreseeable future. Given that environmental concerns have been raised about this proposal, Saratoga should specify the number of trains that it plans to operate in any new notice of exemption it files.

In sum, Saratoga has not persuaded us that the Director's decision involved material error. However, Saratoga's evidence submitted on appeal and the other information that has been provided has clarified the concerns initially raised by the Director in the November Decision. Therefore, if Saratoga wishes to seek operation authority from the Board with respect to the Tahawus Line, it may file a new notice of exemption under a new docket number with the appropriate filing fee. Saratoga's notice also should specify the number of trains that it plans to operate on the Tahawus Line for the reasonably foreseeable future.

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

It is ordered:

1. Saratoga's appeal is denied.

2. Protect's motion for leave to late file its reply is granted.
3. Saratoga's request for leave to respond to the comments of Upper Hudson is granted.
4. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman.