

SERVICE DATE – OCTOBER 11, 2012

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35631

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

Digest:¹ In this decision the Board denies an appeal of an earlier decision by the Board's Director of the Office of Proceedings denying a petition to reject a notice of exemption for Board authority to operate as a common carrier over a line of railroad that runs in part through the Adirondack State Forest Preserve in the State of New York. This decision does not affect the right of parties to pursue any state property law claims in state court.

Decided: October 9, 2012

In this decision, we find that the Director of the Office of Proceedings properly denied the Atlantic States Legal Foundation and the Adirondack Committee of the Atlantic Chapter of the Sierra Club's (ASLF/Sierra) petition to reject Saratoga and North Creek Railway, LLC's (Saratoga) notice of exemption filed in this proceeding to operate a line of railroad, and, accordingly, we deny ASLF/Sierra's appeal of that decision. As explained herein, there has been no showing of a need for an environmental or historic review of this transaction. Moreover, neither this decision nor the Director's decision in any way affects ASLF/Sierra's ability to pursue property claims regarding the line's right-of-way under New York State property law in an appropriate state court.

BACKGROUND

On October 25, 2011, in Docket No. FD 35559, Saratoga filed a notice of exemption pursuant to 49 C.F.R. § 1150.41 and 49 U.S.C. § 10902 to operate, as a line of freight railroad, approximately 29.71 miles of existing trackage, referred to as the Tahawus Line, previously owned by NL Industries, Inc. (NL Industries).² The Acting Director of the Office of Proceedings, in a decision served November 23, 2011, rejected the notice of exemption before it

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² Saratoga stated that the subject track had never been operated in common carrier service and that, therefore, Saratoga did not need any Board authority to acquire it.

became effective.³ Saratoga appealed that decision to the entire Board. In a decision served on May 14, 2012 (May decision), we found that while the Acting Director properly rejected the notice given the issues that were raised, subsequent filings had provided sufficient information to resolve those concerns, and therefore the railroad could file a new notice of exemption.⁴

Saratoga filed a notice of exemption in this docket on May 17, 2012, and the notice was served and published in the Federal Register on June 1, 2012. 77 Fed. Reg. 32,714-15. On June 4, 2012, ASLF/Sierra filed a petition to reject the notice of exemption. In a decision served on June 15, 2012 (June decision), the Director of the Office of Proceedings denied the petition to reject, explaining that: (1) ALSF/Sierra had failed to support its claim that the transaction required more scrutiny than could be provided under the notice of exemption process; (2) ALSF/Sierra had not shown that an environmental or historic review was warranted; and (3) the issues raised here regarding state property law were appropriate for a state court to address. ASLF/Sierra has appealed the June decision to the entire Board, arguing that its potential state law claims will be made moot by the granting of Saratoga's exemption and that the Director improperly concluded that Saratoga need not submit a historic report and undergo environmental and historic review under the Board's environmental rules and under the Section 106 process of the National Historic Preservation Act (NHPA), 16 U.S.C § 470f.

The Tahawus Line was constructed during World War II when the U.S. Government established a right-of-way through the Adirondack State Forest Preserve (Preserve) using its eminent domain power. The Federal government leased the Tahawus Line to NL Industries, and NL Industries used to it transport ilmenite ore from one of its mines.⁵

Originally, the easements created by the U.S. Government were set to expire 15 years after the end of the war; however, in 1962, the General Services Administration (GSA) conducted another eminent domain proceeding and extended the term of the easements until 2062. In 1963, the Preserve was designated as a National Historic Landmark (NHL). NL Industries continued shipping ore on the Tahawus Line until the 1980s; thereafter, it shipped minerals from the mine via truck. In 1989, the GSA auctioned the Tahawus Line, and NL Industries acquired it as private track. Saratoga purchased the Tahawus Line from NL Industries in June 2011.

³ Saratoga & N. Creek Ry.—Operation Exemption—Tahawus Line, FD 35559 (STB served Nov. 23, 2011).

⁴ Saratoga & N. Creek Ry.—Operation Exemption—Tahawus Line, FD 35559 (STB served May 14, 2012).

⁵ NL Industries contracted with the Delaware & Hudson Railroad, the predecessor to the Canadian Pacific Railway Company, to ship ore via the Tahawus Line.

DISCUSSION AND CONCLUSIONS

Under 49 C.F.R. § 1011.7(a)(2)(x)(A), the Board has delegated to the Director the authority to determine initially 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. Here, ASLF/Sierra argues that the Director erred, both legally and procedurally, in denying its petition to reject the notice of exemption and in declining to require an environmental and historic review.

ASLF/Sierra raises two issues on appeal. First, it claims that because 13 miles of the approximately 30-mile long Tahawus Line are located in a NHL, an environmental and historic review should be required under the National Environmental Policy Act (NEPA) and Section 106 of NHPA. Second, it argues that if the Board grants a common carrier license to Saratoga, such action would necessarily preempt any state-law property disputes.

ASLF/Sierra fails to show that an environmental review under NEPA is required here. NEPA does not apply because Saratoga's planned operations will not trigger the thresholds for a NEPA review under the Board's environmental rules (generally an increase of three or eight trains per day depending on the air quality of the region). See 49 C.F.R. § 1105.6(c)(2)(i). Historic review under NHPA also is not warranted. See id. § 1105.8(b)(1). As previously explained in the June decision, the transaction between NL Industries and Saratoga "is essentially a replacement of one operator for another."⁶ It would result in construction of no new line, no salvage activity, and no rail line abandonment. Rather, the Board here has allowed Saratoga, a common carrier, to operate over the existing Tahawus Line, which has been used in rail service in the past. Further, Board approval (including an environmental and historic review) would be required prior to any abandonment of the Tahawus Line. Moreover, ASLF/Sierra offers no explanation of how Saratoga's proposed use will harm the NHL nor how this use of the Tahawus Line differs from rail service that Saratoga currently runs through other parts of the Preserve. Therefore, even if this were an undertaking subject to Section 106, it is not evident that it would potentially cause any adverse effects on the NHL, or any other historic properties, and thus, no further action under NHPA is required. 36 C.F.R. § 800.3(a)(1).

As ASLF/Sierra has acknowledged, the Board's Office of Environmental Analysis (OEA) has exchanged correspondence regarding this transaction with the Advisory Council on Historic Preservation (ACHP), the federal agency that implements NHPA. In a letter to ACHP dated June 22, 2012, OEA explained that the notice filed by Saratoga would, in essence, authorize the substitution of one operator of a rail line for another and would not result in construction of any new rail line, salvage activities, or rail line abandonment.⁷ OEA further

⁶ June decision, slip op. at 2.

⁷ Appeal, Ex. 1 at 1.

explained that, while ASLF/Sierra had argued that an environmental and historic review should be required because 13 miles of the approximately 30 mile-long Tahawus Line are located on a NHL, ASLF/Sierra had provided no specifics on the potential impacts that could result.⁸ OEA noted that the landmark at issue here was established in 1963, when there was active rail service on this trackage. Accordingly, OEA stated, this transaction will not result in any change in use that was not understood and performed at the time this property was designated as a landmark.⁹ After reviewing OEA’s letter, ACHP agreed that “no further compliance is required” from the Board with respect to the NHPA.¹⁰

For all these reasons, we affirm that there is no need for an environmental or historic review in this case.

With respect to preemption, ASLF/Sierra appears to rely on the language of 49 U.S.C. § 10501(b), which states that the jurisdiction of the Board over the “regulation of rail transportation [is] exclusive and preempt[s] the remedies provided under Federal or State law.” However, “§ 10501(b) was meant to ‘clarify[] that the exclusivity is limited to remedies with respect to rail *regulation* – not state and Federal law generally.’” PCS Phosphate Co. v. Norfolk S. Corp., 559 F.2d 212, 219 (4th Cir. 2009) (quoting H.R. Conf. Rep. 104-422 at 167 (1995)) (emphasis added). Thus, as we previously stated in the May decision, “[t]he Board’s class exemption authority is . . . not dispositive of any litigation pertaining to state law property interests for a railroad right-of-way.”¹¹ Although the Board may issue Saratoga a license to operate as a common carrier, Saratoga must still have a valid property right under New York state law in order to initiate operations on the line. Allegheny Valley R.R.—Petition for Declaratory Order—William Fiore, FD 35388, slip op. at 4 n.4, (STB served Apr. 25, 2011) (“Proof of [property] ownership by AVRR cannot be inferred from our approval to acquire and operate the rail line . . . as property ownership rights are determined by state law”); MVC Transp.—Acquis. Exemption—P&LE Properties, FD 34462, slip op. at 6 (Sub-No. 1) (STB served Oct. 20, 2004) (“[T]he Board’s publication of the notice of exemption has not given MVC an ownership interest in the track assets superior to what it already might have had under Pennsylvania state law”). Therefore, to the extent ASLF/Sierra believes that Saratoga does not have an appropriate property right under New York State law to operate on the Tahawus Line, it may pursue such claims in an appropriate state court.

⁸ Id., Ex. 1 at 2.

⁹ Id.

¹⁰ ACHP Letter, July 13, 2012.

¹¹ May decision, slip op. at 7.

In sum, based on our review of the arguments set forth by ASLF/Sierra and our own review of the record, we affirm the Director's decision and deny the appeal.¹² Environmental or historic reporting or review is not required by statute or our regulations in this case, and this decision does not preempt any potential state property claim under New York law.

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 appeal is denied.
2. This decision is effective on its service date.

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

¹² Since this decision does not decide property rights issues, we decline to address here ALSF/Sierra's additional argument that the underlying easements permitting the government's use of eminent domain to create the Tahawus Line are unconstitutional. Appeal 4-5.