

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

232506

**FD 35631**

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

ENTERED  
Office of Proceeding  
June 27, 2012  
Part of  
Public Record

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**SARATOGA AND NORTH CREEK RAILWAY, LLC's REPLY TO  
APPEAL OF SAMUEL H. SAGE AND CHARLES C. MORRISON**

Submitted By:

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Counsel for Petitioner

Dated: June 27, 2012

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**I.  
INTRODUCTION**

Pursuant to 49 CFR §1011.2(a)(7) and 49 CFR §1115.1(c) Saratoga and North Creek Railway, LLC (“Saratoga”) responds to the joint appeal by Samuel H. Sage and Charles C. Morrison (collectively “the Protestants”) to the decision issued on June 15, 2012, by Office of Proceedings Director Rachel Campbell. The Director had rightfully rejected Protestants’ petition to reject the Notice of Exemption (“NOE”) that Saratoga had filed with the Board in the above-captioned docket. Protestants’ allegations have not shown the sort of exceptional

circumstances required to correct a clear error of judgment or to prevent a manifest injustice as the Board's regulations on appeals require.

## II. BACKGROUND

On June 4, 2012, Protestants<sup>1</sup> filed the latest round in what seems to be never ending litigation to prevent Saratoga from initiating common carrier railroad operations over a segment of track that it acquired between North Creek and Newcomb, NY, known as the Tahawus Line (hereafter "the Line"). The Line had formerly been owned by NL Industries, Inc., and operated until 1989 as an exempt private railroad.<sup>2</sup> Initially, Saratoga had filed an NOE in FD 35559 for authority to commence common carrier operations over the Line. After the Acting Director of the Office of Proceedings had rejected that NOE, Saratoga appealed that decision to the Board. Although the Board upheld the Acting Director's decision, it concluded that Saratoga had provided sufficient information in support of its request that it had shown a need for the service. Accordingly, Saratoga filed a new NOE in the current docket in response to the Board's invitation.

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<sup>1</sup> Protestant Samuel H. Sage acting on behalf of the Atlantic States Legal Foundation, Inc., and Protestant Charles C. Morrison, acting on behalf of the Sierra Club, Atlantic Chapter, Adirondack Committee.

<sup>2</sup> Exempt from Board entry and exit jurisdiction under 49 U.S.C. §10906.

Protestants had asked the Board to reject the new NOE on several grounds. Among others, they asserted that because the NOE was very controversial, it was not suitable for processing under the expedited procedures applicable to NOE's under 49 CFR §1150.41. They claimed that the Line had been abandoned under New York law and that the provision of rail service would violate certain New York State laws including the State Constitution. Finally, they argued that the Board must review Saratoga's proposed service under the Board's environmental and historic preservation regulations.

On appeal Protestants narrow their attack to just two grounds: 1) a historic review is required to satisfy Section 106 of the National Historic Preservation Act and 2) that it is not "in the public interest" for Saratoga to become a common carrier. They included with their filing correspondence between the Board's Office of Environmental Analysis and the Advisory Council on Historic Preservation and a 2005 letter from the Economic Development Section of the New York State Department of Transportation. Significantly, Protestants did not cite and perhaps are even unaware of the showing required for an appeal of an employee decision under the Board's regulations.

III.  
ARGUMENT

The Board's regulations on appeals at 49 CFR §1011.2(a) (7) and 49 CFR §1115.1(c) provide:

“(a) The Board reserves to itself for consideration and disposition:

...

“[a]ll appeals of initial decisions issued by the Director of the Office of Proceedings under the authority delegated by §1011.7(b). Appeals must be filed within 10 days after service of the Director decision or publication of the notice, and replies must be filed within 10 days after the due date for appeals or any extension thereof.” 49 CFR §1011.2(a) (7).

Section 1115.1(c) adds,

“[a]ppeals from the decisions of employees acting under authority delegated to them by the Chairman of the Board pursuant to §1011.6 will be acted upon by the entire Board. Appeals must be filed within 10 days of the date of the action taken by the employee, and responses to appeals must be filed within 10 days thereafter. Such appeals are not favored; they will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice.”

Because Protestants' appeal does not demonstrate that the Director committed any error of judgment or show that any manifest injustice would occur as a result of that decision, the appeal must be denied. *Charles M. Sotelo-Petition for Declaratory Order-Line Relocation in Cochise County, AZ*, FD 34191, STB served Aug. 11, 2003. All that Protestants have submitted is a reiteration and distillation of the arguments previously advanced in their June 4 filing.

As best Saratoga can fathom, Protestants want the Board to conclude a historic review despite the fact that this transaction fails to meet the threshold for such action under the Board's environmental regulations at 49 CFR §1105.6(c)(2)(i) and is also exempt from historic review under the agency's regulations at 49 CFR §1105.8(b)(i). Protestants' rationale apparently is the fact that the Adirondack Forest Preservation was given a special status under the New York State Constitution and a 1963 designation as a National Historic Landmark by then United States Secretary of the Interior Udall. Protestants criticize the Board's decision to allow the Line to become a common carrier line of railroad by acknowledging the fact that this status would preempt New York law arguably depriving them of a state court remedy.

Saratoga offer several responses to these arguments. Protestants suggest at page 5 of their submission ("Saratoga's Notice of Exemption...makes a critical misstatement when it contends that no historic review under 49 CFR §1105.8(b) (i) is needed because this transaction involves only a change in operators and if the line is abandoned at some time in the future then STB approval will be required at that time..."). Saratoga has not misstated anything. Rather it merely cited to the Board's own regulations that have been the subject of several Board and court decisions. *See, e.g., Morristown & Erie Railway, Inc-Modified Rail Certificate*, FD

34054, slip op. at 4-5, STB served June 22, 2004, *aff'd sub nom., Town of Springfield, N.J. v. STB*, 412 F.3d 187 (D.C. Cir. 2005) and also *Mo. Cent. R.R. Co.—Acquis. & Oper. Exemption—Lines of Union Pac. R.R. Co.*, FD 33508, STB served Sept. 14, 1999, *aff'd sub nom., Lee's Summit, Mo. v. STB*, 231 F.3d 39 (D.C. Cir. 2000).<sup>3</sup> Moreover, the Board's environmental section was correct to view this transaction as a "change in operators." The former Delaware & Hudson Railroad ("the D&H") conducted operations over the Line and through the Preserve prior to and after its 1963 designation as an historic property. Thus railroad service in the Preserve can be seen as a "preexisting condition." While D&H ceased providing service around 1989, there is nothing "sacred" in that service suspension in terms of whether or not there has been a "change in operators."

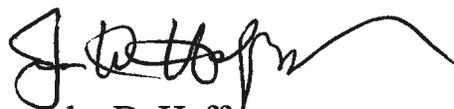
#### IV. CONCLUSION

Protestants' appeal should be denied insofar as they have not shown the sort of exceptional circumstances required to correct a clear error of judgment or to prevent a manifest injustice as the Board's regulations on appeals require.

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<sup>3</sup> Both cases held that there is no need for a Board environmental review of the restoration of a long abandoned service where the service levels do not reach the Board's environmental reporting threshold.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John D. Heffner", with a long, sweeping flourish extending to the right.

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Counsel for Petitioner

Dated: June 27, 2012

CERTIFICATE OF SERVICE

I, John D. Heffner, hereby certify that a copy of the foregoing Saratoga and North Creek Railway, LLC's Reply to the Appeal of Samuel H. Sage and Charles C. Morrison dated June 23, 2012, was sent by first-class to all parties of record in this proceeding.

  
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John D. Heffner

Dated: June 27, 2012