

June 11, 2012

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BY E-FILING

Ms. Cynthia A. Brown
Chief, Office of Administration
Section of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings
June 11, 2012
Part of
Public Record

**RE: FD 35631, Saratoga And North Creek Railway, LLC-Operation
Exemption-Tahawus Line**

Dear Ms. Brown:

On behalf of Saratoga and North Creek Railway, LLC (“Saratoga”), I am e-filing the Reply of Saratoga to the Joint Letter submitted by Atlantic States Legal Foundation and the Sierra Club, Atlantic Chapter, Adirondack Committee, on June 4, 2012.

Sincerely yours,



John D. Heffner

Enclosure

cc: All parties of record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35631

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

**SARATOGA AND NORTH CREEK RAILWAY, LLC's
REPLY TO JOINT LETTER**

Submitted By:

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Dated: June 11, 2012

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35631

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**I.
INTRODUCTION**

On June 4, 2012, two parties, the Atlantic States Legal Foundation and the Sierra Club, Atlantic Chapter, Adirondack Committee¹ filed an eight page unverified² letter asking the Surface Transportation Board (“the Board”) to reject the verified Notice of Exemption (“NOE”) filed by Applicant Saratoga And North

¹ Hereafter “the Protestants”

² This document is cited as “Protestants’ letter.” Under Board regulations filings made by parties not represented by counsel or a Board-approved practitioner must be verified if they contain allegations of fact. 49 CFR §1104.4(b). Protestants’ letter identifies Mr. Sage who represents the Atlantic States Legal Foundation, Inc., as “President/Senior Scientist” and does not indicate whether Mr. Morrison, who represents the Atlantic Chapter, Adirondack Committee of the Sierra Club, is an attorney. Protestants’ letter at 8. Accordingly, the Board should view their statements with skepticism.

Creek Railway, LLC (“Saratoga”) in the above-captioned proceeding. The Board should reject Protestants’ comments out of hand as they represent a collateral attack on its prior ruling issued on May 14, 2012, in FD 35559³ finding that Saratoga and its supporting parties have now provided adequate information for the Board to determine that use of the class exemption to operate over the subject rail line would be appropriate. Moreover, they contain little or no additional information over what protestant Protect The Adirondacks! (“Protect”) had filed with the Board in that proceeding.

II.
BACKGROUND AND
STATEMENT OF FACTS

By now, the facts relating to this dispute are well known and shall only be repeated to the extent necessary for the Board’s understanding. This matter originally dates back to the Fall of 2011 when Saratoga, a class III short line railroad common carrier, filed an NOE with the Board to commence common carrier operations over a segment of what has historically been a privately owned railroad between North Creek and Newcomb, NY, known as the Tahawus Line.⁴ Saratoga advised the Board that it had purchased the Line from an on-line rail

³ Styled as Saratoga And North Creek Railway, LLC-Operation Exemption-Tahawus Line

⁴ Hereafter “the Line”

customer, NL Industries, Inc., and would provide common carrier freight service over it once authorized by the Board. In due course the Board published the NOE, Protest asked the Board to reject it, and the Board through its Acting Director issued a decision rejecting the notice on November 23, 2011. Subsequently, Saratoga appealed that decision and numerous parties including the State of New York,⁵ both United States Senators from New York, two New York Congressmen, and various state legislators, local government officials, economic development organizations, and area residents submitted written letters and resolutions of support. On May 14, 2012, the Board issued a decision⁶ denying Saratoga's appeal and upholding the Acting Director's Decision rejecting Saratoga's NOE in FD 35559 but specifically finding a public need for the railroad's common carrier service. Furthermore, the Board invited Saratoga to file a new NOE with the appropriate filing fee if it wishes to operate the Line as a common carrier.

After Saratoga resubmitted its NOE to operate the Line, Protestants filed their Joint Letter. Protestant Atlantic States Legal Foundation identifies itself as a not-for-profit corporation founded in 1982 for the purpose of providing technical, legal and organizing services for citizen groups, local governments and other

⁵ In the form of a joint letter of support from the New York State Departments of Transportation and Environmental Conservation

⁶ Cited as the "May 14 Decision"

entities for a variety of environmental issues working throughout New York State and elsewhere. Protestant Sierra Club, Atlantic Chapter, Adirondack Committee, is the division of that well-know national conservation group serving New York State. The Adirondack Committee has “advocated” for a provision in the New York State Constitution, the “forever wild” provision, which provides protection for the Adirondack Forest Preserve. Protestants’ letter at 1. Collectively, Protestants assert six major bases for the Board to reject the new NOE that Saratoga recently filed. Their assertions lack merit and should be rejected promptly.

III. ARGUMENT

1. Saratoga's filing should be rejected on the grounds that it is "controversial."

The Protestants have not cited, let alone established, any basis for rejection of Saratoga’s NOE other than it is controversial with Protestants and Protect. As a general matter, a party seeking rejection of an NOE has the burden of demonstrating that the notice contains false or misleading information, or that regulation is necessary to carry out the rail transportation policy of 49 U.S.C. §10101. See 49 CFR §1150.42(c); 49 U.S.C. §10502(d); *cf.*, General Railway Corporation d/b/a Iowa Northwestern Railroad Corporation—Operation

Exemption–Line of Dickinson Osceola Railroad Association, FD 34867, slip op., STB served June 15, 2007. This standard is essentially the same for either a rejection or a revocation. General Railway, *supra* at 4. Furthermore, information submitted in an NOE must be *materially false or misleading* to warrant a rejection.

San Francisco Bay Railroad-Mare Island-Operation Exemption –California Northern Railroad, FD 35304, slip op. at 3, STB served Dec. 6, 2010. The standard for determining whether to revoke an exemption is the same as that governing the applicant’s eligibility to claim an exemption in the first place, i.e., the need for regulation. Minnesota Comm. Ry., Inc.–Trackage Exempt.–BN RR. Co., 8 I.C.C.2d 31, 35 (1991).

Where appropriate, the Board can revoke a notice of exemption to review the bona fides of a transaction to protect the integrity of its processes. However, the party seeking revocation must provide reasonable, specific concerns to demonstrate that revocation of the exemption is warranted. See I&M Rail Link LLC–Acquisition and Operation Exemption–Certain lines of Soo Line Railroad Company d/b/a Canadian Pacific Railway, FD 33326 et al., slip op. at 7, 9, STB served Apr. 2, 1997, *aff’d sub nom.*, City of Ottumwa v. STB, 153 F.3d 879 (8th Cir. 1998). Protestants have not cited any materially false or misleading information, any abuse or misuse of Board acquisition and operation procedures, or

need for regulation. They have not argued or shown that Saratoga fails to meet the standards for an exemption under 49 U.S.C. §10502.

2. Saratoga's initiation of common carrier operations is a "controversial matter" requiring applicants seek authority other than through an NOE.

Protestants not only reiterate Protect's assertion in FD 35559 that Saratoga's service is a "controversial" matter requiring the Board to, in its words, "use a procedure other than a (sic) NOE." They claim that they will bring "new information to bear in this letter that is ongoing and has not been addressed or resolved in State Court as recommended by the Board in the May 14 Decision." Protestants' letter at 2. Although not totally clear, Saratoga believes that Protestants' "new information" is its argument that the need to keep the right of way constituting the Line is protected under the New York State Constitution. Id. at 3. Alternatively, this "new matter reference" might be to Protestants' claim that the Line was abandoned under New York law. Id. at 4-5.

In fact, the Acting Director's decision had rejected Saratoga's earlier NOE because it found that the NOE's expedited procedures did not afford sufficient time to evaluate Saratoga's proposal and the NOE contained insufficient or contradictory information. Id. at 5. As the May 14 Decision stated,

“[T]he original notice left 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 [emphasis supplied]. 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.” May 14 Decision at 1-2.

The decision added:

“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.” Id. at 2.

Nothing would be gained by requiring Saratoga to file an individual petition or a formal application. The only result would be to increase Saratoga's legal and filing fees and delay commencement of service with no corresponding public benefit. In all likelihood, the Protestants will be satisfied with nothing short of a flat denial of any petition or application for authority. Moreover, what is "controversial" here are real estate title disputes outside the Board's jurisdiction and competence to decide and which the agency has said must be decided by a New York State court.⁷ The Board would be exceeding its authority if it attempted to resolve some of Protestants' concerns.

3. A Board decision granting Saratoga operating authority would violate the New York State Constitution's "protections;" would prejudice the "People of the State of New York."

⁷ Id. at 7 citing Allegheny Valley R.R. Co.—Petition for Declaratory Order—William Fiore, FD 35388, slip op. at 3, STB served Apr. 25, 2011.

Protestants want the Board to believe that granting Saratoga the right to provide a freight rail service no more than once per day, five days per week at its peak, would somehow do “lasting harm to the Forest Preserve property rights of the People of the State of New York.” Protestants’ at 2. But the representatives of “the People of the State of New York” have spoken and overwhelmingly in favor of rail service. The record in FD 35559 contains numerous expressions of support by elected officials, New York State and local government agencies, economic development organizations, and ordinary citizens.

Regarding Protestants’ “constitutional argument,” this is a matter of New York state law that might have been appropriate for resolution in the State courts as the Board has advised. *Cf.*, May 14 Decision at 7. Once Saratoga consummates this transaction, the preemption provisions of the ICC Termination Act at 49 U.S.C. §10501(b) preclude the application of State laws including the New York State Constitution to the start up or provision of rail line over the Line.⁸

4. The Tahawus Line was "abandoned" many years ago under NY State law.

⁸ Section 10501 states as relevant that “the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law [emphasis supplied].

Protestants devote a substantial portion of their letter to urging that the Line was abandoned years ago under New York law and that title to the right of way reverts to the fee title owner. Protestants' letter at 4-5. But that argument is besides the point as the State waived its rights under Section 18 of the New York Transportation Law. *See* letter from the State of New York attached as Exhibit A to Protestants' letter. Again, once the Line is subject to the Board's jurisdiction as a line of railroad, §10501(b) preempts the provisions of the New York State Constitution. Regarding any title disputes, they are matters for resolution in State Court. *See*, footnote 6, at page 9, *supra*.

5. The STB must undertake an environmental and historic review and must consult with agencies concerned with those issues.

Protestants next ask the Board to subject Saratoga's service proposal to scrutiny under the Board's environmental and historic preservation procedures applicable in certain situations to lines of railroad subject to the agency's licensing jurisdiction. But they misinterpret agency law as to when the Board must review railroad entry proposals under those regulations. 49 CFR §1105 *et al.* The Board has previously considered and addressed that issue in cases involving the restoration of service on lines that have long been abandoned. *See*, 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) cited in the May
14 Decision at 8. Saratoga does not foresee a situation where the potential on-line
traffic could result in a service frequency exceeding the threshold established by
the Board's regulations.

6. Insufficient traffic exists to justify the service; restoration would entail
substantial costs.

Lastly, the Protestants have as much as conceded the traffic potential for the
Line is insufficient to trigger the Board's environmental and historic review
regulations by questioning the amount of traffic that NL Industries, Inc., and any
future customers might ship. Protestants' letter at 7. Protestants' assertions run
counter to both the Board's own conclusions in the May 14 Decision⁹ and
Saratoga's assessment of the Line's traffic potential. As a matter of historical
perspective for the Protestants, in enacting the Staggers Act amendments to the
Interstate Commerce Act and the ICC Termination Act, Congress desired to let the
market place instead of the government decide the need for new rail service.
Saratoga and NL Industries, Inc., have made that decision and are willing to make

⁹ At 2 and 7

investments based upon their sound business judgment. In any event, the Protestants' estimate as to the cost and wisdom of track rehabilitation¹⁰ is unsubstantiated conjecture.

IV. CONCLUSION

Protestants has shown no basis for rejecting Saratoga's NOE submitted in the above-captioned proceeding. They do not assert, let alone prove, that Saratoga has submitted any *materially* false or misleading information to the Board, that Saratoga has in any way misused Board procedures, or that its operation proposal requires regulation or fails to satisfy the exemption standards of 49 U.S.C. §10502. Plain and simple, Protestants' filing is both a collateral attack on the May 14 Decision and another attempt to permanently prevent Saratoga from initiating a rail service for which the Board has found a demonstrated need in that decision.

¹⁰ Estimated at \$5 million. *See*, Protestants' letter at 7.

Respectfully submitted,

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

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Dated: June 11, 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 Joint Letter from the Atlantic States Legal Foundation and the Sierra Club, Atlantic Chapter Adirondack Committee dated June 1, 2012, was sent by first-class to parties of record in this proceeding.



John D. Heffner

Dated: June 11, 2012