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Charles M. Clusen, Lorraine M. Duvall, Robert A. Harrison • Co-Chairs

December 21, 2011

VIA OVERNIGHT COURRIER

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

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MANAGEMENT
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Re: FD – 35559-0, Saratoga and North Creek Railway LLC –
Operation Exemption – Tahawus Line (Industrial Spur)

Dear Ms. Brown:

On behalf of Protect the Adirondacks! Inc. I am filing this Reply to the Appeal dated December 2, 2011 by Saratoga and North Creek Railway, LLC (“SNCR”), of the STB’s Decision, dated November 23, 2011, in the above-captioned proceeding.

First, we wish to draw the Board’s attention to the letter to you dated December 15, 2011 from Robert K. Davies of the New York State Department of Environmental Conservation (“DEC”), which supports many of the points raised in our initial Protest letter dated November 14, 2011. DEC’s interest shows that there is indeed substantial controversy and local interest in this matter, and that an exemption is not appropriate.¹

Second, much of SNCR’s appeal is focused on allegations that Protect failed to properly cite certain STB precedents and rules, and to request certain relief, in our Protest. Regardless of whether or not that is true, STB appears to have the authority to reject a Notice of Exemption (“NOE”) on its own motion, so the exact content of the Protest does not limit the relief that may be granted. Nor would this mean that the STB erred in rejecting the NOE, or that it improperly shifted the burden of proof onto SNCR, as alleged by SNCR at Appeal page 15.

¹ SNCR falsely, and gratuitously, alleges in its Appeal (p. 14) that Protect’s motivation in filing its Protest is “NIMBY”. Protect is the successor in interest to the century-old Association for the Protection of the Adirondacks, Inc. and the 20 year-old Residents’ Committee to Protect the Adirondacks, Inc. Both predecessor organizations had, and the current organization has, at the core of their missions the enforcement of Article 14, Section 1 of the State Constitution, the well-known “forever wild” clause, and the protection of New York’s Forest Preserve from illegal development. See, e.g. Association for the Protection of the Adirondacks v. MacDonald, 253 N.Y. 234, 170 N.E. 902 (1930). The fact that DEC has now expressed similar concerns about the use of the public lands under its stewardship shows that Protect is acting on behalf of the interests of all New Yorkers, regardless of whose “backyard” may or may not be involved.

It was our intention in our Protest letter of November 14 to show that SNCR's NOE of October 25, 2011 involves a controversial matter such as has existed in other cases where the STB has rejected a NOE. This is the same remedy that STB decided to apply in this case on November 23. See ABC & D Recycling, Inc. January 19, 2011 (FD 35397). We believe that we fulfilled the requirement to describe the controversy in the present case and that it is not required, as SNCR alleges several times in its Appeal, that we submit detailed documentation of the facts of the controversy or supporting evidence about it.

The controversy we described concerns the allowable use and ownership of the 30-mile right-of-way of the abandoned Tahawus industrial spur, which crosses 13 miles of State-owned constitutionally protected "forever wild" Forest Preserve land on temporary easements. In its Appeal SNCR largely ignores the issues that are at the heart of the controversy.

The records of the federal court case of the early 1940s clearly show that the federal government took the right-of-way easements on the Forest Preserve by eminent domain over the State of New York's strong objections solely to meet the wartime emergency need for ilmenite, a strategic mineral. The State went to the U.S. Supreme Court in its attempt to have the appropriated right-of-way through the Forest Preserve returned at the end of the war, only to be thwarted by the federal government's establishment of a 15-year temporary easement on this State land, allegedly in order to amortize the \$3.0 million federal investment in constructing the rail spur by continuing to obtain revenue from leasing it to National Lead, Inc.

With the wartime emergency ending after WWII and ilmenite no longer being a strategic mineral, the federal lease of the temporary right-of-way easements and rails to National Lead, Inc. was made primarily for the commercial benefit of that company, but at the expense of the People of the State of New York who own the affected Forest Preserve land. When, in 1962, the General Services Administration ("GSA") tried to sell the temporary right-of-way easements to National Lead, the State objected successfully, whereupon GSA instituted a new eminent domain proceeding that extended the temporary easements for 100 years. The court records again refer, as justification for the new 100-year term, to extension of the original purpose of hauling ilmenite ore from Tahawus as a strategic mineral during the wartime emergency.

It is uncontested by SNCR that National Lead stopped mining ilmenite in its open pit mines at Tahawus in 1982 and that from then until 1989, when the last train left Tahawus, only crushed stone for road material was shipped by rail. This stone is waste rock from the pre-1982 ilmenite mining operation. In the 1990s, NL Industries, the Texas conglomerate that absorbed National Lead in the 1980s, started hauling modest amounts of magnetite iron ore from Tahawus by truck. This magnetite is a byproduct of the ilmenite ore processing before 1982. It was an impurity in the ilmenite ore.

In SNCR's Appeal, page 10, and in the letter submitted by NL Industries in support of the Appeal, there is reference to marketable "significant reserves of rock and magnetite" at the Tahawus site, the intended implication apparently being that this material is in the ground in a natural condition and in a limitless supply, requiring surface or underground mining, and that mining therefore has been continuous at Tahawus since 1940, never really having stopped in 1982. In fact, both the rock and the magnetite are left-over materials from ilmenite processing, lying on top of the ground.

The main point to be made about hauling either crushed stone or magnetite ore, or both, by rail from Tahawus to North Creek and beyond over the temporary right-of-way easements on the Forest Preserve, is that it is inconsistent with the purposes of the rail spur as that purpose was stated repeatedly in the court records of the eminent domain proceedings. (It was inconsistent in the 1982 to 1989 period, too, when NL Industries hauled crushed rock over this spur.) Only ilmenite ore was and is intended to be hauled from Tahawus over this rail spur – not crushed stone, not magnetite ore and certainly not tourists or other passengers.

In describing this controversy in our Protest letter of November 14, 2011 we stated that we believe that the right-of-way easements have been extinguished as a result of abandonment, disuse and the failure of NL Industries after 1982 when ilmenite mining and hauling ilmenite ore, a strategic mineral during wartime, stopped. The easements, therefore, have reverted to the underlying fee title owners, including the State of New York for the 13 miles of temporary easements on the Forest Preserve. The rails are now an illegal occupancy of this State land.

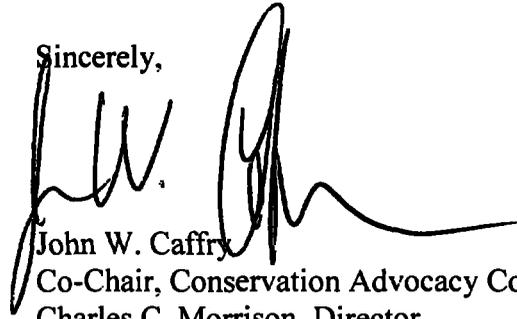
SNCR claimed in its Appeal that this spur was not abandoned in accordance with ICC rules. This may or may not be true, but as an industrial spur of the former Delaware and Hudson Railroad, it never qualified for abandonment under ICC rules. However, it was abandoned under the terms of its established purposes when National Lead stopped mining and hauling ilmenite ore in 1982. It was abandoned physically in 1989 when the last train went out. It was abandoned in December 1989 just after NL Industries bought the rails, other appurtenances and easements from GSA and then immediately sold it to the Essex County Industrial Development Agency for \$1.00 for tax shelter purposes. It was abandoned by virtue of NL Industries trying to sell its entire property of 11,400 acres to the State during the 1990s and, failing that because it could not be certified that the core of the property was not contaminated, it eventually sold all but 1,200 acres, including the land at Cheney Pond where ilmenite ore reserves are located, as was discovered (but never exploited) by test drilling in the 1980s.

In February, 2005, in preparation for a joint application to the State's Adirondack Park Agency to remove 23 miles of rails, including those on the Forest Preserve, NL Industries and the Open Space Institute obtained a letter from the State Department of Transportation that said that the spur was considered to be abandoned. The letter is in the Adirondack Park Agency file. In 2006, NL Industries demolished all of its mill buildings, leaving only a small wooden office building. In all of these ways, NL Industries indicated that it was not interested in ever using the rail spur again, and certainly not for the purpose of hauling ilmenite ore. It was "abandoned" in the generally accepted sense of that term.

Because disuse and abandonment of this rail spur have been continuous since 1982, both physically and in terms of its legally authorized use, we contend that the easements, with 50 years to go on the 100-year term, have reverted to the underlying owners. Regardless of whether it was abandoned under ICC rules, its abandonment caused it to cease to be a legal use of the State's land.

We believe that the STB's Decision of November 23, 2011 to reject SNCR's NOE as submitted on October 25, 2011 was soundly based and that it should be upheld by STB's Board against SNCR's present Appeal.

Sincerely,



John W. Caffry
Co-Chair, Conservation Advocacy Committee
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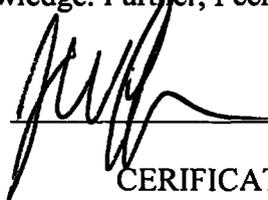
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VERIFICATION

I, John W. Caffry, as Co-Chair of the Conservation Advocacy Committee of Protect the Adirondacks! Inc. 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.

December 21, 2011



CERTIFICATION OF SERVICE

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

December 21, 2011

