



Friends of the Upper Hudson Rail Trail, Inc.

January 10, 2012

Cynthia A. Brown
Surface Transportation Board
395 E. Street, S.W.
Washington, D.C. 20423-0001

re: Docket FD 35559 - Saratoga and North Creek Railway, LLC - Operation Exemption - Tahawus Line

Dear Ms. Brown:

The Friends of the Upper Hudson Rail Trail is a 501(c)(3) corporation advocating for the conversion of the Tahawus rail corridor to a multipurpose recreational trail under the Rail Banking Act. We were in discussions with NL Industries to acquire the corridor before SNCR began operations to the south.

We want to make sure you are aware of our activities, and provide our own view of the legal status of the corridor. More than anything, we hope the Board's decisions - and the records behind those decisions - will preserve its ability to issue a Rail Banking Order under Section 8(d) of the National Trails System Act. As you know, this allows an abandoned corridor to be preserved for future railroad use, and permits use as a trail in the interim. Without this ability, the corridor - when it is formally abandoned - will revert to the underlying owners.

Regarding this last statement, abandonment is inevitable: the portion on state land is based on a temporary right of way ending in 2062. Given the special nature of this corridor, the mandated restoration may be very expensive, greatly exceeding salvage value. A wise railroad operator will seek to avoid restoration costs well before that time. Indeed, if not for this risk of restoration expenses, NL Industries would have abandoned the corridor in 2005. This is why NL attempted to transfer title to a trail group in 2005 (Open Space Institute), and why they were interested in transferring the corridor to the Friends of the Upper Hudson Rail Trail.

We fear that the future opportunity to rail bank this corridor might be lost inadvertently if not considered during your decision-making process. In particular, if the assertion in Footnote 2 of SNCR's exemption request were to stand without objection, it might hinder the issuance of a Rail Banking Order in the future. If,

that is, SNCR fails to establish STB jurisdiction by virtue of its future operations on the corridor.

As you may perceive at this point, we face a rather complex and uncertain situation in choosing sides in the present dispute. It might be best if we aided SNCR in their efforts, since it might remove any doubt about STB jurisdiction. We might instead attempt to aid SNCR's opponents; naturally, we were not pleased that SNCR disrupted our plans. However, if their opponents are successful, STB jurisdiction might be left in doubt; worse, the corridor might be judged exempt, explicitly or implicitly, eliminating the protections offered by federal rail banking procedures and judicial precedents.

In view of this situation, we neither support nor oppose SNCR's request. However, we do wish to challenge the assertion in Footnote 2, that the corridor was exempt from STB jurisdiction as SNCR purchased it. While the corridor has an unusual provenance and history, we believe that if the totality of the relevant factors is considered, it is clearly non-exempt.

1. The railroad was constructed and owned by the federal government throughout its operating history. It is at least questionable, if not disingenuous, to assert that a federal railroad corridor is outside the jurisdiction of a federal railroad authority.
2. Throughout most of its operating history, the corridor was operated by a common carrier railroad, D&H. Freight was hauled to the mine (supplies, reagents, fuel), and ore was removed. Most of this material was transported across state lines.
3. If this corridor were not so remotely located, D&H would have sought and found additional customers. That is, the apparently dedicated use of the corridor was a consequence of its location, not any restrictions as to its use. (It is well-established that once condemned for a particular purpose, government-acquired property can be used for other purposes.) Indeed, Barton Mines explored the possibility of shipping material from their Hudson River Plant with D&H, and would have done so except for collective bargaining issues. More recently, Barton Mines has opposed our trail efforts in order to maintain a rail transport option. These facts directly contradict the assertion in Footnote 2 regarding the "holding out" of public service.
4. Regarding the corridor as an industrial spur is incorrect: the particular industrial concern in question - NL Industries - did not build, own, or operate this railroad during its years of mining operations.
5. Everyone we have talked to about the legal nature of this corridor - people familiar with the relevant facts and laws - has told us that it should be regarded as non-exempt. This includes Andrea Ferster, general counsel of Rails-to-Trails

Conservancy, and also Todd Cecil, VP for Real Estate, Iowa-Pacific Holdings (parent of SNCR).

Again, we are not seeking to influence your resolution of the matter in question, except to preserve the Board's ability to issue a Rail Banking Order when the corridor is eventually abandoned. We believe this is highly desirable so that the public - who funded the creation of this valuable resource - may fully benefit from it. We also believe that it is actually in the long-term interest of the parties interested in the present dispute, though it may not suit their near-term objectives.

Sincerely yours,

Dr. Curtiss M. Austin, President

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