

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION
ADVERSE ABANDONMENT
SARATOGA AND NORTH CREEK RAILWAY IN TOWN OF JOHNSBURG, N.Y.
300395

RESPONSE OF CHAPTER 11
TRUSTEE OF SAN LUIS & RIO
GRANDE RAILROAD TO DECISION
DATED DECEMBER 18, 2019 BY THE
SURFACE TRANSPORTATION BOARD

ENTERED
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Public Record

William A. Brandt, Jr., solely in his capacity as the chapter 11 trustee (the "Trustee") for the bankruptcy estate of the San Luis & Rio Grande Railroad, Inc. ("SLRG"), hereby files his response to the Decision of the Surface Transportation Board in the above-reference proceeding dated December 17, 2019. This response does not constitute a response by or on behalf of the Receiver, as defined below, or represent any position of the Receiver.

On September 12, 2019, as part of a loan default proceeding, SLRG was placed into receivership. See *Big Shoulders Capital LLC v. San Luis & Rio Grande R.R.*, Case No. 19-cv-06029 (N.D. Ill.). Novo Advisors was appointed as receiver (the "Receiver") in that proceeding. On October 18, 2019, the U.S. District Court for the Northern District of Illinois issued an order expanding the receivership to include certain SLRG affiliates and subsidiaries, including the Saratoga and North Creek Railroad ("SNCR"). *Big Shoulders Capital*, Case No. 19-cv-06029 (Oct. 18, 2019 Amended Receivership Order) (N.D. Ill.). In its Initial Report of Property and Known Liabilities, the receiver listed SNCR's track and roadbed as an asset. *Big Shoulders Capital*, Case No. 19-cv-06029 (Nov. 8, 2019 Initial Report, App. 2) (N.D. Ill.).

After SLRG was placed in receivership, several creditors filed an involuntary bankruptcy petition against SLRG in the U.S. Bankruptcy Court for the District of Colorado (the "Bankruptcy Court"). See *In re San Luis & Rio Grande R.R.*, Case No. 19-18905-TBM (Bankr. D. Colo.) (the "Bankruptcy Case").

Because SLRG is a "railroad" as that term is defined under the Bankruptcy Code, special provisions unique to railroad reorganizations apply to the Bankruptcy Case. Specifically, the Surface Transportation Board and the Department of Transportation have the absolute right to raise and appear on any issue in a railroad case. 11 U.S.C. § 1164. Further, a trustee must always be appointed in railroad reorganizations, and the Secretary of Transportation chooses and submits to the United States trustee a list of five persons who are qualified to serve as a trustee of a railroad. The Trustee was on the list submitted by the Secretary of Transportation. 11 U.S.C. § 1163. On December 30, 2019, the Trustee was appointed as chapter 11 trustee for the bankruptcy estate of SLRG in the Bankruptcy Case. In short, the Trustee was chosen by the Department of Transportation to operate SLRG due to his specific railroad experience and acumen.

The commencement of a bankruptcy case operates as an automatic stay against certain actions against the debtor and property of the debtor's bankruptcy estate. Such actions include,

but are not limited to, “the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case,” 11 U.S.C. § 363(a)(1), “the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case,” 11 U.S.C. § 362(a)(2), “any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate,” 11 U.S.C. § 362(a)(3), and “any act to create perfect, or enforce any lien against” property of the estate or property of the debtor.” 11 U.S.C. § 362(a)(4) and (5).

“By its terms, section 362 applies only to debtors, property of the debtor, or property of the estate, and does not apply to stay proceedings against non-debtors.” *Nevada Power Co. v. Calpine Corp. (In re Calpine Corp.)*, 365 B.R. 401, 408 (S.D.N.Y. 2007). “[N]ondebtors and their property are not protected by the § 362(a) stay.” *Gonzales v. IRS (In re Silver)*, 303 B.R. 849, 864 (B.A.P. 10th Cir. 2004); *Deem v. Baron*, 2017 U.S. Dist. LEXIS 93373, *4 (D. Utah June 15, 2007) (“Except in unusual circumstances, however, the stay does not apply to parties who have not filed bankruptcies.”).

As of the date of this filing, only SLRG is a debtor in bankruptcy. SNCR is a separate legal entity. Although SNCR is wholly owned by SLRG, SNCR and its assets are not property of SLRG or property of SLRG’s bankruptcy estate. Accordingly, the automatic stay imposed under 11 U.S.C. § 362(a) by the filing of SLRG’s bankruptcy case does not apply to SNCR. *See In re Pickel*, 487 B.R. 289, 294 (Bankr. D. N.M. 2013) (“In general, the automatic stay does not apply to assets of a debtor’s subsidiaries, even wholly-owned subsidiaries[.]”); *see also Ojiegbe v. Walter (In re Ojiegbe)*, 512 B.R. 513, 521 (Bankr. D. Md. 2014) (“assets that are held by a separate legal entity are not property of a debtor’s estate, even if the debtor owns all the stock or interest in the entity.”).

However, this analysis would change if SNCR files a petition for relief under the U.S. Bankruptcy Code, if an involuntary petition is filed against SNCR, or if the bankruptcy court or court of competent jurisdiction determines the stay applies to SNCR.

The Bankruptcy Court has authorized, but not directed, the Trustee to file a bankruptcy petition on behalf of SNCR. The Trustee is in discussions with the Surface Transportation Board and other interested parties regarding SNCR and is trying to determine if the interests of SNCR’s creditors and the public would be best served by the filing of a bankruptcy petition. The Trustee anticipates making a decision as to whether to file a bankruptcy petition on behalf of SNCR shortly.

The Trustee thus requests that the current abandonment proceeding be placed in abeyance for approximately 60 days to provide the Trustee with time to continue his discussions with the Surface Transportation Board and other parties in order to reach an informed decision related to this proceeding and the filing of a potential bankruptcy petition on behalf of SNCR.

If a bankruptcy petition is filed on behalf of SNCR, the Trustee would update this Response accordingly.

Dated: February 18, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of February, 2020, I caused a true and correct copy of the RESPONSE TO CHAPTER 11 TRUSTEE OF SAN LUIS & RIO GRANDE RAILROAD TO DECISION DATED DECEMBER 18, 2019 BY THE SURFACE TRANSPORTATION BOARD to be filed electronically with the Surface Transportation Board's E-Filing System and sent via First-Class mail to the following Parties of Record:

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