

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. AB 1261

ENTERED
Office of Proceedings
November 17, 2021
Part of
Public Record

**NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL
CONSERVATION – ADVERSE ABANDONMENT – SARATOGA AND
NORTH CREEK RAILWAY IN TOWN OF JOHNSBURG, NY**

BRIEF IN REPLY TO MOTION TO DISMISS

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State of New York
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Department of Environmental
Conservation*

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PRELIMINARY STATEMENT

The New York State Department of Environmental Conservation (DEC) sought authority to abandon the Tahawus Line in September 2018. Since then, Saratoga and North Creek Railway (SNCR) has tried and repeatedly failed to sell the inactive Line. SNCR sought bankruptcy protection in March 2020 and, by its trustee in bankruptcy (the Trustee), now belatedly moves to dismiss DEC's application.

The Trustee's motion is both procedurally improper and substantively infirm. Procedurally, the motion—filed in a case currently held in abeyance at the Trustee's request—is both far too late in derogation of the Board's rules and foreclosed by SNCR's prior, unexcused default in this proceeding. Worse, to the extent the Trustee intends the motion to serve as SNCR's opposition in chief to DEC's abandonment application, the Trustee's merits arguments are foreclosed by SNCR's prior, irrevocable consent to the relief sought in DEC's application. Even assuming the merits of the Trustee's motion are properly before the Board—and they are not—the motion still must fail for the simple reason that the Trustee offers only speculative evidence that the Line is or will be economically viable as a means for moving freight in interstate commerce. For these reasons and as set forth in detail below, the Trustee's motion should be denied.

ARGUMENT

POINT I

THE TRUSTEE’S MOTION IS PROCEDURALLY IMPROPER

The Trustee’s motion to dismiss is procedurally improper for at least two reasons: First, under the Board’s rules, the motion is untimely made. Second and independently, the motion is barred by SNCR’s prior default in this proceeding.

As an initial matter, the Trustee’s motion should be denied because the time to submit such a motion has long since passed. Under the Board’s rules of practice, “[a] party may file a reply or motion addressed to any pleading within [twenty] days after the pleading is filed.”¹ DEC filed its abandonment application on September 10, 2018. If SNCR wished to move to dismiss that application, it was required to do so by October 1, 2018—more than three years ago.² SNCR made no such motion and sought no enlargement of its time to do so.³ While SNCR’s March 2020 bankruptcy filing may allow the Trustee to step into the shoes of the corporation, it does not authorize him to rewind the clock in an ongoing administrative proceeding.

¹ 49 C.F.R. § 1104.13(a).

² Twenty days from September 10, 2018 was September 30, 2018—a Sunday. By virtue of the computation rule at 49 C.F.R. § 1104.7(a), any motion by SNCR was due no later than the following Monday, October 1, 2018.

³ See 49 C.F.R. § 1104.7(b).

Alternatively, the Trustee’s motion should be denied because SNCR long ago defaulted in this proceeding. After a series of (ultimately fruitless) stays designed to give SNCR space to negotiate a sale of the Line, the Board ordered SNCR to file its “entire opposition case” by September 30, 2019.⁴ SNCR—at all times during the pendency of this proceeding represented by competent counsel—failed to comply with the Board’s order or seek an enlargement of time to do so and makes no attempt in its motion papers to explain why this failure should be excused.⁵

POINT II

THE TRUSTEE FAILS TO REBUT DEC’S CASE FOR ABANDONMENT

To the extent the Board engages with the substance of the Trustee’s motion—and, for the reasons discussed above, it should not—the motion lacks merit. SNCR’s substantive arguments are barred by its prior, irrevocable consent to abandonment and, in any event, it fails to provide other than purely speculative evidence of a present or future public need for freight service over the Line.⁶

⁴ *New York State Department of Environmental Conservation – Adverse Abandonment – Saratoga and North Creek Railway in Town of Johnsburg, NY*, AB 1261 (STB served Aug. 29, 2019).

⁵ See 49 C.F.R. §§ 1104.7(b); 1152.25(d)(1), (5).

⁶ The Board should deny the Trustee’s motion for the additional reason that SNCR ignored DEC’s timely requests for discovery in this proceeding. If the Board is inclined to treat the instant motion as SNCR’s opposition case in chief, it should first provide DEC an opportunity to renew its discovery demands.

A. SNCR irrevocably consented to abandonment

First, the Trustee's motion should be denied for the simple reason that SNCR *irrevocably consented* to the relief requested in DEC's abandonment application.⁷ SNCR's irrevocable consent constituted a binding legal representation made to the federal regulator in the context of an ongoing proceeding. Representations matter in the law, and the Board should not countenance SNCR's brazen attempt to revoke its irrevocable consent because the Trustee now finds that consent inconvenient.

Doubtless recognizing SNCR's prior, irrevocable consent is fatal to the instant motion, the Trustee attempts to undermine the binding nature of that consent by claiming that a bankruptcy filing against SNCR's parent corporation somehow divested SNCR of the authority to manage its own affairs.⁸ This argument is incorrect. "It is a fundamental precept of corporate law that each corporation is a separate legal entity with its own debts and assets, even when such corporation is wholly owned by another corporate entity."⁹ The Trustee filed a voluntary bankruptcy petition on behalf of SNCR on March 30, 2020¹⁰—nearly six months *after* SNCR irrevocably consented to abandonment. While a group of creditors filed an involuntary bankruptcy petition against SNCR's

⁷ Joint letter from J. Tallent and D. Michaud, AB 1261 (filed Oct. 18, 2019).

⁸ See Brief at 6–7.

⁹ *Kreisler v. Goldberg*, 478 F.3d 209, 213 (4th Cir. 2007) (holding that the automatic stay does not extend to a wholly-owned nondebtor subsidiary).

¹⁰ See Brief at 1.

parent two days before SNCR consented to abandonment,¹¹ that petition had no effect on then-nondebtor SNCR’s ability to conduct its own affairs—which is of course why the Trustee represented to the Board in February 2020 that the automatic stay in the parent company’s bankruptcy *had no application* to SNCR.¹²

B. The Trustee provides no concrete evidence of a present or future need for freight service over the Line

Even assuming SNCR’s irrevocable consent is somehow non-binding, the Trustee still fails to factually rebut DEC’s well-supported economic case for abandonment.

As an initial matter, far from rebutting DEC’s initial showing, the Trustee’s own representations *support* abandonment here. As DEC described in its application, the Line was originally constructed as private industrial track to serve a titanium mine that ceased operations in 1982.¹³ The former mine owner last moved freight on the Line in 1989 and sold it to SNCR in 2011.¹⁴ Though it successfully obtained authority to operate over the Line as a common carrier,

¹¹ *See id.* at 3.

¹² *See* Letter from J. Salisbury, AB 1261 (filed Feb. 18, 2020) (“As of the date of this filing, only [SNCR’s parent corporation] is a debtor in bankruptcy. *SNCR is a separate legal entity*. Although SNCR is wholly owned by [the parent], SNCR and its assets are not property of [the parent] or property of [the parent’s] bankruptcy estate”) (emphasis added); *see also* Brief at 3.

¹³ *See* Abandonment Application at 2.

¹⁴ *See id.* at 2–3.

SNCR ultimately moved but a few carloads of freight.¹⁵ In 2017, having apparently failed in its bid to operate as a common carrier, SNCR began using the largely single-tracked Line as a storage facility for out-of-service tank cars.¹⁶ SNCR then attempted to sell the Line at least twice—both times unsuccessfully¹⁷—and has since filed for bankruptcy protection. Now, “[a]fter . . . a year of active marketing,” the Trustee represents that he has succeeded in drawing a bid only from Revolution Rail, the noncarrier rail bike company currently leasing approximately four miles of the thirty-mile Line.¹⁸ In other words, SNCR by its trustee has queried the market once again and, as before, the market has returned an unambiguous response: the Line is not economically viable as means for moving freight in interstate commerce.

The Trustee nevertheless argues for the Line’s economic viability by claiming that potential shippers plan to use it.¹⁹ This claim, where supported at all, amounts at best to mere conjecture. As set forth in detail in DEC’s application and as the Trustee appears to concede, the Line is capable of serving

¹⁵ *See id.* at 8.

¹⁶ *See id.* at 3.

¹⁷ *See, e.g.*, Letter from J. Heffner, AB 1261 (filed September 28, 2018); Letter from J. Tallent, AB 1261 (filed Oct. 16, 2018); Letter from R. Wimbish, AB 1261 (filed June 14, 2019) (OmniTRAX discontinuing negotiations with SNCR to purchase the Line after due diligence period).

¹⁸ *See* Brief at 4; *see also* *Revolution Rail Holding Company, LLC – Acquisition Exemption – Saratoga and North Creek Railway, LLC* (Exemption Decision), FD 36535, slip op. at 1–2 (STB served Sept. 10, 2021).

¹⁹ *See* Brief at 7–8.

only two potential shippers: Barton International and Mitchell Stone Products.²⁰ The Trustee’s unsubstantiated claim notwithstanding, there is no proof in this proceeding that Barton either opposes DEC’s application or wishes to use the Line for freight purposes in the future. And while the Trustee submits a cursory letter from Paul Mitchell, the owner of Mitchell Stone, that letter—unsworn and so, under the Board’s rules, devoid of evidentiary value²¹—merely speculates, without “mak[ing] any commitments,” that Mitchell “would evaluate marketing potential” “if freight rail service is restored.”²² Though he makes reference to a “significant market opportunity . . . that could only be served by rail,” Mr. Mitchell fails to describe in any way what that opportunity might be or whether “serv[ing it] by rail” would be economically viable—particularly in view of the Line’s interchange constraints.²³ In short, in response to DEC’s detailed showing that the Line is economically non-viable, the Trustee offers only untruths and unsubstantiated speculation (which, notably, DEC has been unable to test through the discovery process). As the Board has consistently held, unsupported speculation concerning possible future use is insufficient to defeat an application for third-party abandonment.²⁴

²⁰ See Abandonment Application at 9–10.

²¹ See 49 C.F.R. § 1104.4(b)(3).

²² Brief, exhibit 2.

²³ See Abandonment Application at 11.

²⁴ See, e.g., *Stewartstown Railroad Company – Adverse Abandonment – In York County, PA*, AB 1071, slip op. at 5–6 (STB served Nov. 16, 2012), *vacated pursuant to settlement by Stewartstown Railroad Company – Adverse Abandonment – In York*

The Trustee’s claim that SNCR “vehemently” opposes abandonment is irrelevant.²⁵ As noted above, SNCR failed to establish common carrier service over the Line, has repeatedly attempted to sell the Line and, now in bankruptcy, plans to vend it to a noncarrier rail bike company. Because SNCR itself has no intention of operating over the Line as a common carrier, its opposition to DEC’s abandonment application should have no bearing on the Board’s determination.

C. The public interest favors abandonment

The Trustee’s public interest arguments fare no better. The Trustee’s claim that the Line is more valuable as a “going concern” is unconvincing for at least two reasons.²⁶ First, to the extent the Trustee is insinuating that he can maximize value by selling the Line to a common carrier, it should go without saying that the Trustee’s proposed purchaser, rail bike company Revolution Rail, *is not a common carrier*. Indeed, the Board recently rejected a notice of exemption from Revolution Rail in part on the ground that Revolution “does not intend to restore the Line to active freight service.”²⁷

Second, to the extent the Trustee’s argument is that abandonment would

County, PA, AB 1071 (STB served Nov. 14, 2013); *Denver & Rio Grande Railway Historic Foundation – Adverse Abandonment – in Mineral County, CO*, AB 1014, slip op. at 8 (STB served May 23, 2008).

²⁵ Brief at 6.

²⁶ *Id.* at 9.

²⁷ Exemption Decision at 2.

hurt the Line's value, the facts are to the contrary. The Trustee represents that he has entered into an asset purchase agreement with Revolution Rail under which Revolution would purchase the Line for \$700,000.²⁸ DEC is aware, however, that the Trustee has received a proposal from the Open Space Institute (OSI), a land trust, under which OSI would buy the Line for *more than double* the amount of Revolution's bid.²⁹ While OSI proposes to railbank the line under the National Trail Systems Act, it would leave the tracks in place for at least three years "to facilitate reactivation or other rail use."³⁰ In other words, if OSI is the successful purchaser, the Line would be abandoned and railbanked; SNCR's creditors (including, among others, the New York State Olympic Regional Development Authority) would receive more money than in the proposed sale to Revolution; and the Line would ultimately remain part of the national rail network, subject to reactivation should freight service one day become consistent with the public convenience and necessity.³¹

²⁸ See Brief at 4.

²⁹ See Declaration of J. Tallent, Exhibit A.

³⁰ See *id.*

³¹ While the Trustee appears to believe that he is authorized to pick and choose among potential purchasers based on his understanding of the public interest, DEC observes that the Trustee elected *not* to proceed under the Bankruptcy Code's provisions for railroad bankruptcies when he filed SNCR's case. See Voluntary Petition, *In re Saratoga and North Creek Railway, LLC*, No. 20-12313, at 2 (Bankr. D. Colo. Apr. 20, 2020). Accordingly, 11 U.S.C. § 1165 does not apply in that case and the Trustee lacks legal authority to do anything other than maximize value for SNCR's creditors. See, e.g., *In re Merco Joint Venture, LLC*, No. 02-80588-288, 2002 WL 32063450, at *3 (Bankr. E.D.N.Y. July 19, 2002) ("Consideration of the public interest is not a statutory criterion for [plan] confirmation in non-railroad cases").

Noting that the Board is required to consider “whether the abandonment . . . will have a serious, adverse impact on rural and community development” under 49 U.S.C. § 10903(d), the Trustee further argues that opposition from the Town of Newcomb and the Essex County board of supervisors requires denial of DEC’s application.³² But the Town and the County oppose DEC’s application only on the ground that Mitchell Stone’s “potential” future need for rail service “could” generate additional tax revenue;³³ because Mitchell’s claims are, as discussed above, entirely speculative, Newcomb’s and Essex County’s derivative claims are doubly so.³⁴

In any case, the Trustee’s arguments ignore that the Line, if successfully railbanked, has the potential to serve as a significant economic driver in what is already a tourism-dependent region. In partnership with the New York State Department of Transportation, DEC is currently in the process of building a multi-use recreational trail on a thirty-mile section of railroad between Lake Placid and Tupper Lake in the Adirondack Park. Feasibility studies supporting the project forecast that the trail will attract, on average, some 245,000 non-local visitors annually and will generate approximately \$20,000,000 in annual

³² See Brief at 8.

³³ See *id.*, exhibit 3.

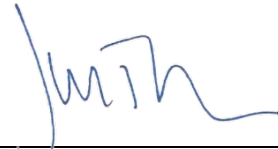
³⁴ In any case, as the record reflects, other concerned municipal entities *support* abandonment here. See Warren County Board of Supervisors Resolution No. 585, AB 1261 (filed Apr. 23, 2020); Letter from C. Braymer, AB 1261 (filed Oct. 2, 2019) (advocating for abandonment and railbanking).

spending.³⁵ As with the Lake Placid-to-Tupper Lake project, DEC believes that the Line, once railbanked, has the potential to provide an ecologically responsible means for public access to the beautiful High Peaks region of the Adirondack Park while generating significant revenue for North Creek and other nearby communities.³⁶

CONCLUSION

For the foregoing reasons, DEC respectfully requests that the Trustee's motion be denied and that DEC's application be granted or, in the alternative, that the Board authorize DEC to submit revised discovery requests and order that SNCR respond to such requests in a timely manner.

Dated: November 17, 2021
Albany, New York



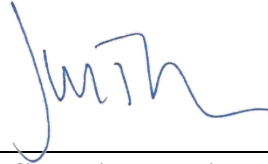
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³⁵ See Rails-to-Trails Conservancy, *The Adirondack Rail Trail Lake Placid to Old Forge Stage One: Lake Placid to Tupper Lake Trail Development Plan* at 54, available at http://www.thearta.org/Lake%20Placid%20to%20Tupper%20Lake%20Trail%20Development_Final.pdf (last accessed Nov. 15, 2021).

³⁶ See Abandonment Application at 17–18.

CERTIFICATE OF SERVICE

Pursuant to 49 C.F.R. § 1104.12(a), I certify that on November 17, 2021, I caused a copy of this Brief in Reply to Motion to Dismiss to be served either by electronic or first class mail on SNCR and all parties of record in this proceeding.



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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. AB 1261

**NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL
CONSERVATION – ADVERSE ABANDONMENT – SARATOGA AND
NORTH CREEK RAILWAY IN TOWN OF JOHNSBURG, NY**

DECLARATION OF JOSHUA M. TALLENT

Pursuant to 28 U.S.C. § 1746, I, Joshua M. Tallent, under penalty of perjury, declare that the following is true and correct:

1. I am an Assistant Attorney General in the New York State Office of the Attorney General, Environmental Protection Bureau. I am over eighteen years of age and am an attorney in good standing admitted to practice law in the State of New York.

2. My office represents the New York State Department of Environmental Conservation (DEC), the applicant in the above-captioned matter. I am familiar with the papers filed and the proceedings had in this matter, and I make this declaration based on my personal knowledge, my review of relevant documents, and information gained in the course of my representation of DEC.

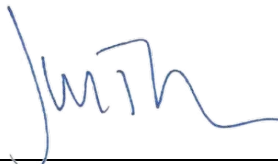
3. I submit this declaration in support of DEC's application for third-party abandonment and in opposition to the bankruptcy trustee's amended motion to dismiss filed October 5, 2021.

4. On November 2, 2021, DEC submitted a supplemental objection to the Trustee's disclosure statement in the Saratoga and North Creek Railway bankruptcy case in the District of Colorado. DEC's supplemental objection with its exhibit is attached hereto and made a part hereof as **Exhibit A**.

5. As noted in the supplemental objection, not-for-profit land trust the Open Space Institute (OSI) made a proposal to the Trustee under which it would buy the Tahawus Line for \$1.5 million and, ultimately, railbank it.

6. Correspondence from OSI to the Trustee detailing the terms of OSI's proposal is attached to DEC's supplemental objection as Exhibit 1.

DATED: November 17, 2021
Albany, New York



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EXHIBIT A

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

In re:

SAN LUIS & RIO GRANDE RAILROAD, INC.,

Debtor.

Lead Bankruptcy Case No. 19-18905
Chapter 11

In re:

SARATOGA AND NORTH CREEK
RAILWAY, LLC.,

Debtor.

Bankruptcy Case No. 20-12313
Chapter 11

Declaration of Nicholas Buttino

Pursuant to 28 U.S.C. § 1746, I, Nicholas Buttino declare under penalty of perjury that the foregoing is true and correct:

1. I am an assistant attorney general employed by the New York State Department of Law. In that capacity I represent the State of New York, the New York State Department of Environmental Conservation, and the New York State Olympic Regional Development Authority.

2. I am over 18 years of age.

3. On October 29, 2021, New York submitted an objection to the trustee's September 30, 2021 Disclosure Statement.

4. Since that time, it has come to my attention that, on October 29, 2021, the Open Space Institute¹ proposed to the bankruptcy trustee that it replace Revolution Rail as the stalking horse bidder. In doing so, the Open Space Institute offered a term sheet with a bid of \$1.5 million for the Tahawus line with a plan to railbank the line. I attach a copy of the email with the proposed bid as **Exhibit 1**.

5. The proposed bid by the Open Space Institute further supports the statements made in ¶¶ 27, 41 of New York's October 29, 2021 objection, which indicate that there are other uses for the Tahawus line that the trustee has not considered, and those uses may maximize value for creditors.

6. Upon information and belief, on November 1, 2021, the trustee rejected the Open Space Institute's proposed bid.

7. The State of New York again objects to the application of 11 U.S.C. § 1165 and urges the Court to require the trustee to address the possibility of a higher bid for a railroad use in the disclosure statement.

¹ The Open Space Institute is a non-profit organization devoted to helping preserve land, and has protected over 151,000 acres in New York. Open Space Institute, About, <https://www.openspaceinstitute.org/about> (last visited Nov. 2, 2021).

8. Accordingly, New York requests that the Court deny approval of the Disclosure Statement.

DATED: Nov. 2, 2021

HON. LETITIA JAMES

Attorney General of the State of New York

By: s/ Nicholas C. Buttino

Nicholas C. Buttino
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Exhibit 1: Oct. 29, 2021 Email

From: Hocky, Eric M. <ehocky@clarkhill.com>
Sent: Friday, October 29, 2021 4:03 PM
To: Jennifer Salisbury <jsalisbury@markuswilliams.com>
Cc: Bob Anderberg <randenberg@osiny.org>; Jeffrey LeJava <jlejava@osiny.org>; Schreiber, Scott N. <sschreiber@clarkhill.com>
Subject: RE: continuing our call

Scott is driving and unable to respond so I am going to try to fill in. As I understand Scott outlined, the major points of OSI's proposed offer are:

- Purchase price of \$1.5 million
- Acquisition would be for interim trail use and railbanking under the National Trails Act, 16 USC 1247(d) and associated STB regulations
 - Trustee/SNCR would withdraw its objections to the adverse abandonment at the STB
 - Upon authorization of the abandonment by the STB, OSI would petition for a notice of interim trail use
 - Trustee/SNCR would agree to negotiate an interim trail use and rail banking agreement
- OSI would commit to leaving the rail line in place (no salvage) for at least 3 years – to facilitate reactivation or other rail use
- OSI would consider extending Rev Rail's rail bike lease for an additional 2 years – to facilitate Trustee's dealings with Rev Rail in connection with any changes in bidders
- \$250,000 deposit; refundable if the agreement does not receive all necessary approvals / conditions to closing not met / a higher and better offer is selected
- No bid protection; no breakup fee

When Scott gets to his destination, he can add anything that I omitted, or correct anything I have misstated.

As I believe Scott mentioned, we are willing to use the Rev Rail APA as a base, although there will be need to be some changes to account for the change to the proposed acquisition for interim trail use and railbanking as opposed to acquisition as a common carrier. In order to facilitate a timely turn of the APA, we would appreciate if you provide a Word version of the APA. Thank you.

Eric

Eric M. Hocky

Attorney at Law

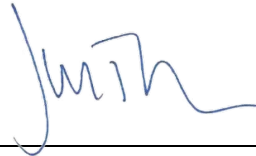
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CERTIFICATE OF SERVICE

Pursuant to 49 C.F.R. § 1104.12(a), I certify that on November 17, 2021, I caused a copy of the foregoing Declaration of Joshua M. Tallent with its accompanying exhibit to be served either by electronic or first class mail on SNCR and all parties of record in this proceeding.



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