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CLIENT/MATTER NUMBER

037724-6401

May 19, 2004

HAND DELIVERED

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Mercury Building, #711
1925 K Street, N.W.
Washington, DC 20423-0001

210980



Re: Docket No. AB-400 (Sub-No. 4)
Petition of Lee County, Florida for Waiver of 49 C.F.R. § 1104.13(c) and Rebuttal

ENTERED
Office of Proceedings

MAY 20 2004

Part of
Public Record

Dear Secretary Williams:

Enclosed please find for filing the original and ten (10) copies of the above-referenced Petition for Waiver and Rebuttal.

Please time stamp the extra copies of this letter, Petition, and Rebuttal to indicate receipt, and return them to me in the stamped, self-addressed envelope provided for your convenience.

Very truly yours,

Robert P. vom Eigen

Enclosures: Petition for Waiver, Rebuttal and Diskette

cc: Joe Dettmar

BRUSSELS
CHICAGO
DENVER

DETROIT
JACKSONVILLE
LOS ANGELES
MADISON

MILWAUKEE
ORLANDO
SACRAMENTO
SAN DIEGO

SAN DIEGO/DEL MAR
SAN FRANCISCO
SILICON VALLEY
TALLAHASSEE

TAMPA
TOKYO
WASHINGTON, D.C.
WEST PALM BEACH

002.1202692.1

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC 20423

STB Docket No. AB-400 (Sub- No. 4)

SEMINOLE GULF RAILWAY, L.P.
ADVERSE ABANDONMENT
IN LEE COUNTY, FL

PETITION OF LEE COUNTY, FLORIDA
FOR WAIVER OF 49 C.F.R. § 1104.13(c)



ENTERED
Office of Proceedings

MAY 20 2004

Part of
Public Record

On May 13, 2004, Seminole Gulf Railway, L.P. ("SGLR") filed a Reply to a Petition for Waiver and Notice filed by Lee County, Florida ("Lee County") with respect to a portion of the Baker Spur line. In its Reply, SGLR makes numerous assertions and accusations. In order for the Board is to make an informed determination on the dispute...

it be afforded the opportunity to respond to SGLR's Reply waiver from the restriction in 49 C.F.R. § 1104.13(c) in order to clarify factual disputes and uncertainties created by SGLR

*update
computer AS
waiver
w/ rebuttal
attached*

John Turner
Assistant County Attorney
Lee County
P.O. Box 398
Fort Myers, FL 33902-0398

Tel: 239-335-2236

Dated: May 19, 2004

Washington, DC 20008
Tel: 202-672-5300

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC 20423

STB Docket No. AB-400 (Sub- No. 4)

SEMINOLE GULF RAILWAY, L.P.
ADVERSE ABANDONMENT
IN LEE COUNTY, FL

REBUTTAL OF LEE COUNTY, FLORIDA
TO SEMINOLE GULF RAILWAY'S REPLY



On May 13, 2004, Seminole Gulf Railway, L.P. ("SGLR") filed a reply to a Petition for Waiver and Notice filed by Lee County, Florida ("Lee County") with respect to a portion of the Baker Spur line. Many of SGLR's characterizations of fact are erroneous and many of the reasons SGLR opposes Lee County's Petition and Notice are based on erroneous interpretations of the governing regulations.

Factual Disputes¹

SGLR contends that the applicable line "has potential for continued, future service" because it believes that the relocation of the sole shipper is speculative and that Florida Power and Light ("FP&L") may in the future need to use the applicable line. Reply at 4. First, the sole shipper on the line, J.J. Taylor Distributors - Fort Myers/Naples, Inc. ("J.J. Taylor") has a lease

¹ Lee County recognizes that at this preliminary stage, unsworn factual representations by counsel carry little weight with the Board. However, Lee County wants to make clear that it will be contesting SGLR's representations with sworn statements filed at the time it files its application for abandonment.

that ends on January 5, 2005. J. J. Taylor is relocating its operations. Lee County has been told that site clearance is beginning this week for a new facility being constructed in Fort Myers, and that construction of this new facility will be completed within six months. The relocation should occur prior to the end of the year. Therefore, relocation of J.J. Taylor's facility is far from speculative.

While FP&L has a transmission facility adjacent to a portion of the right of way at issue, it has never used any portion of the line for which abandonment authority is sought. It is Lee County's understanding that FP&L has used a portion of the Baker Spur that is west of the applicable portion to transload equipment, and then uses heavy trucks to transport the equipment to FP&L's facility. Apparently, SGLR concurs in this description of FP&L's current usage. Reply at 4-5 in footnote 4. While it is true that Alico Road will have a median, there will be a number of cuts in the median and stop lights to accommodate the heavy trucks that frequent the industrial area adjacent to the applicable line of railroad on the northern side of Alico Road. Therefore, FP&L's use of the adjacent segment of the Baker Spur line will be unaffected by the proposed abandonment.

SGLR overstates the income received by this portion of the Baker Spur when it says: "the line provides it [SGLR] with *several* sources of revenue, including freight revenue and license revenues for billboards located along the right of way." Reply at 3 (emphasis added). First, there is, as discussed below starting on page 8, only one shipper currently using the applicable portion of the Baker Spur, and that shipper is relocating its facility and will have no need for future rail service on this line. Second, the County is aware of only one billboard on the railroad's right of way, and the billboard is an advertisement for SGLR, so it is unclear what revenue the railroad is receiving for this advertisement.

SGLR also insinuates that Lee County's actions in this abandonment proceeding are somehow related to an ongoing private lawsuit involving landowners adjacent to the Baker Spur. This is nonsense. The County has brought this adverse abandonment proceeding because it has its own independent interest in seeing the Baker Spur abandoned – to save money on the Alico Road widening project. The adjacent property owners have their own reasons for bringing a private lawsuit against SGLR; there is no coordination among the County and these landowners, only a mutual desire to see the Baker Spur abandoned.

SGLR claims confusion about the description of approximate lengths of the railroad line to be abandoned. Reply at 7. The total portion of railroad line to be abandoned is approximately 4600 feet. 4,260 feet of the applicable line runs parallel to Alico Road on the northern side of the road and the approximately 400 feet remaining represents the portion that crosses Alico Road and extends to the south and west of Alico Road to approximately engineering station 33+35 +/-, which is parallel to Alico Road station 76+00. There does appear to be some question about the precise location of the engineering station 79+95 referred to as the western terminus of the prior abandonment proceeding in AB 400 (Sub. No. 2X) involving the Baker Spur line. Lee County seeks abandonment of the portion beginning at that point. SGLR has recently constructed unusable skeletal tracks to a point that may be part of the previously abandoned right of way in what appears to be an effort to impede the County's work on Alico Road. Lee County will seek to clarify the precise location of the abandonment and resolve the matter under state law.

Finally, SGLR claims that the \$1 million cost of constructing the new grade crossing protection across the expanded Alico Road is "significantly overstated." Reply at 4, footnote 3. In fact, the cost of this construction was provided to Lee County by SGLR, which would install the grade crossing protection if the abandonment were not granted. SGLR's estimate exceeds \$1

million; the precise amount SGLR stated that it would cost for the grade crossing to be completed is \$1,105,484.00. A copy of SGLR's fixed price proposal is attached as Exhibit A to this Rebuttal.

Form of Notice

SGLR contends that not all appropriate parties to the action were properly notified. Reply at 6. While Lee County is prepared to re-notice, if necessary, it feels that its notice was sufficient. FP&L is not a current shipper on the applicable portion of line - as the County understands it, FP&L has never used the portion of line in question, therefore Lee County was not required to notify them. Lee County has notified FP&L as a courtesy, but does not feel that this is required by the regulations as applied to the current factual situation. Additionally, SGLR claims that even though Lee County notified the governor of Florida, it should have notified the Florida Department of Transportation ("FDOT"), but the regulations do not require that FDOT, or any other state's equivalent agency, be served with notice. See 49 C.F.R. § 1152.20(a)(2). SGLR states that CSXT owns the right of way on which SGLR operates, and so therefore CSXT should be notified. Reply at 7. But CSXT does not own the underlying right of way, the adjoining property owners do. CSXT merely has an easement with a reversionary interest to the adjoining property owners. The public's interest is not harmed by the failure to disclose CSXT's interest in this proceeding, and recently Lee County contacted CSXT to notify them of this proceeding and has provided it with a copy of the Notice. Therefore, no prejudice resulted from CSXT's exclusion from the original service list, and starting immediately, CSXT will be served by Lee County as a party to the proceeding as per SGLR's request.

Also, SGLR expressed concern that the proposed date of filing of the application is inappropriate because of concerns over the requirement in 49 C.F.R. § 1152.20(b) regarding

publishing. Reply at 6. But this concern is unfounded because the notice is being fully published during three successive weeks in the *Fort Myers News-Press*, a local paper of general circulation, commencing on May 19, 2004 and extending until June 2, 2004.

Waiver Requests

SGLR argues in its Reply at 11 that the Board should not grant Lee County a waiver from the requirement under 49 C.F.R. §§ 1105.7-8 to produce an environmental and historic report in an application for abandonment. While Lee County still feels that these requirements are unnecessary in light of the length and age of the track in question, and the fact that rail service will be unaffected by the abandonment, it has already drafted the required report. Therefore, there is no need for the Board to address this issue because an environmental and historic report will be included in Lee County's application for adverse abandonment.

SGLR also expressed concerns about the ability of Lee County to prepare and serve an environmental and historic report in a timely manner. Reply at 7. A previously stated, Lee County has decided to comply fully with the provisions of the Board's environmental regulations, and has already prepared and served its environmental and historic report in compliance with 49 C.F.R. §§ 1105.7(b) and 1152.20(c). Additionally, since Lee County filed and served an amended notice on May 11, 2004, an application could be filed up until June 10, 2004 and still be within the required 30 days under 49 C.F.R. § 1152.20(b).

SGLR also contends that Lee County should not be permitted to alter the wording of the notices as given in 49 C.F.R. §§ 1152.21 and 1152.22 (i). This argument fails because it does not consider the unique circumstances of an adverse abandonment application, and in particular, the context of this adverse abandonment application. SGLR concedes that changes to the notice are permitted, but still summarily insists that Lee County's notices should conform, verbatim, to

the Board's form notices, but gives no reasons for such strict adherence. Reply at 8-9. That is because the changes Lee County has made to the form notice are not substantive; all the required information is included, and the notices are clear and not misleading.² Therefore, there are no reasons why the proposed notice should not be accepted by the Board. The *Federal Register* notice as proposed by Lee County should likewise be upheld by the Board for the same reasons stated for the form notice. Reply at 9.

Additionally, SGLR contends that "Lee County modified the following language that appears in the Board's form of notice, and added requirements regarding service and verification." SGLR contends that the language that was modified should have stated: "Written comments and protests will be considered by the Board in determining what disposition to make of the application. The commenting party or protestant may participate in the proceeding as its interests may appear." Reply at 8. A close reading of Lee County's Notice shows that we have included the aforementioned language, verbatim, in Lee County's Notice. See Lee County's Notice at 4 and 49 C.F.R. § 1152.21.

While SGLR does not oppose an exemption from the OFA conditions, it does contend that the abandonment should be subject to the public use and rail banking/interim trail use provisions as set forth in the Board's regulations. First, SGLR questioned Lee County's stated public interest in this proceeding because SGLR claims they were unable to locate any formal resolution approving the adverse abandonment application. Reply at 10, footnote 6. SGLR is

² For example, the regulations require that the notice include statements to the effect of: written comments should include the docket number; the original and 10 copies of comments or protests are to be filed with the Board and served upon the representative of the applicant, as well as all parties to the abandonment proceeding; and any written comments or protests should be filed within 45 days after the date applicants intends to file its application. All of this information, and all other required information, has been included in Lee County's proposed notices, and so therefore the proposed notices should be approved.

wrong. On April 20, 2004, the Lee County Board of County Commissioners granted the County Attorney authority to initiate the adverse abandonment application and to hire the undersigned attorneys to represent Lee County in this matter. Secondly, SGLR claims that a bike group has already expressed interest in exploring the possibility of using this land for trail use. It is unlikely that any legitimate bike group would be interested in a portion of land under a mile long, crossing three roads – including a six lane highway – and adjacent to an industrial area. Reply at 10. The portion of right of way in question would, if turned into a trail, be an isolated piece of trail because when the eastern 3.5 miles of the Baker Spur was abandoned, the underlying land was not converted to trail use and reverted back to the adjacent property owners. Additionally, the Alico Road project already includes bike and walking paths, therefore a trail running parallel and in close proximity to Alico Road would be a redundant and inefficient use of resources.

Effective Date and Impact of Order

SGLR is correct that “it is a serious matter when the Board considers a request to force a railroad to abandon an active rail line that has current and potential future business opportunities.” Reply at 12. However, at issue here is the abandonment of a line that will not be active on the effective date of the abandonment, and that has no foreseeable prospects for future business. As previously stated, Lee County is asking for an abandonment that would only become effective when the shipper ceases to need rail service. Therefore, Lee County is not seeking the abandonment of an active line. SGLR contends that the date of the current shipper’s lease is dependent on the construction of the new facility and finds this date speculative. However, Lee County has been told that the initial permits for the new facility have been issued and land is now being cleared for construction. Since the shipper expects the new facility to be

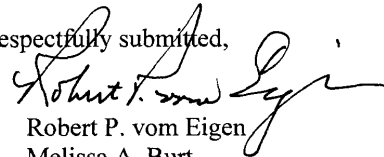
built in 6 months, it plans to vacate its Alico Road facility by January 5, 2005. Additionally, Lee County is not seeking the abandonment of a line with potential rail business opportunities. It is Lee County's understanding that all adjacent property owners support the abandonment, and none wish to continue receiving rail service. SGLR has tried to confuse the issue by referencing FP&L's use of the Baker Spur. But FP&L uses a section of the Baker Spur west of the portion to be abandoned, so its use of the spur will not be affected. Also, as stated above, Alico Road will have cuts in the median that allow even large trucks, such as those used by FP&L, to cross the road to its transformer facility. FP&L's use - both current and future - of the Baker Spur will not be adversely affected by this abandonment proceeding. Therefore, since there are no prospects for any other shippers on the applicable portion of railroad line, it is unreasonable to think there could be any future business opportunities and this factor should be given no weight by the Board.

In conclusion, the objections and concerns raised by SGLR are unfounded, and therefore the Board should grant the Petition for Waiver and approved the proposed Notice.

John Turner
Assistant County Attorney
Lee County
P.O. Box 398
Fort Myers, FL 33902-0398
Tel: 239-335-2236

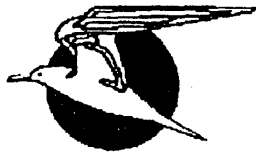
Dated: May 19, 2004

Respectfully submitted,



Robert P. vom Eigen
Melissa A. Burt
Foley & Lardner, LLP
Suite 500
3000 K Street, NW
Washington, DC 20008
Tel: 202-672-5300

EXHIBIT A
SGLR's Fixed Price Proposal
as submitted to Lee County, Florida



Seminole Gulf Railway LP

4110 Centerpointe Drive, Suite 207

Fort Myers, FL 33916

Phone: 239-275-6060 Fax: 239-275-0581

Proposal and Quote

FOR

LEE COUNTY GOVERNMENT

ALICO ROAD WIDENING PROJECT

REHABILITATION AND WIDENING OF ALICO ROAD CROSSING # 3 (BL 0.8). REHABILITATION OF ALICO CENTER ROAD CROSSING (BL 0.75) AND F.P. & L. CROSSING (BL 0.85)

INSTALLATION OF HIGHWAY GRADE CROSSING SURFACE AND SUB-STRUCTURE FOR ALICO # 3 CROSSING, ALICO CENTER ROAD CROSSING, AND F.P.&L. CROSSING.

INSTALLATION OF HIGHWAY GRADE CROSSING PROTECTION, AND AUTOMATIC WARNING DEVICES FOR ALICO # 3 CROSSING.

RELOCATION OF EXISTING HIGHWAY GRADE CROSSING WARNING PROTECTION FROM ALICO # 3 CROSSING TO ALICO CENTER ROAD CROSSING

REMOVAL AND REPLACEMENT OF NECESSARY TRACK AND ROADBED TO FACILITATE INSTALLATION OF 2 BOX CULVERTS

UNDER THE TERMS OF THIS PROPOSAL, SEMINOLE GULF RAILWAY SHALL FURNISH ALL RAIL RELATED MATERIAL, LABOR, AND EQUIPMENT FOR THE ABOVE-MENTIONED PORTIONS OF THE ALICO ROAD WIDENING PROJECT. SEMINOLE GULF RAILWAY SHALL ALSO FURNISH ALL RAIL RELATED SIGNAL, HIGHWAY GRADE CROSSING, AND TRACK SURFACE, ENGINEERING AND DESIGN. LEE COUNTY SHALL FURNISH AND INSTALL ALL PIPELINE AND DRAINAGE MATERIAL, M.O.T. AND ROADWAY SURFACE INSTALLATION TO SGLR AND AREMA SPECIFICATIONS ON RAILROAD PROPERTY. THE COUNTY SHALL ALSO FURNISH ALL OTHER ROADWAY RELATED CONSTRUCTION, DRAINAGE AND APPURTANCES.

PROPOSAL AND QUOTE

LEE COUNTY ALICO ROAD WIDENING PROJECT

TERMS OF PROPOSAL:

Seminole Gulf Railway shall provide all Rail related Labor, Equipment, Material, Engineering and Design for the following:

PHASE 1:

Open sidetrack at Schwab Switch for storage of Railroad surfacing machines and equipment. Stage Railroad construction material and equipment near the construction site at or near Alico road Crossing # 3.

Commence construction on one half of new Alico Road Crossing on North side of existing roadway. Install sub-surface, align, surface track, and install new highway grade crossing surface. Surface and align track to the north and east through the existing F.P.& L. Crossing to facilitate the transition into the new Alico # 3 Crossing. This will require the removal, replacement and resurfacing of the existing F.P.& L. Crossing.

Removal and replacement of the track, Railroad road bed and switch at the J.J. Taylor siding to allow Lee County's contractor to install 2 box culverts at that location.

END OF PHASE 1.

PHASE 2:

After Lee County closes the existing Alico Road, Railroad will commence construction of the new Alico Road Crossing on south side. The existing roadway through the railroad crossing will be removed. Railroad will install subsurface, install new track and Highway Grade Crossing surface, and surface and align track to the south and west through the existing Alico Center Road Crossing to facilitate the transition into the new Alico # 3 Crossing. This will require the removal, replacement and resurfacing of the existing Alico Center Road Crossing.

Railroad will remove existing highway grade Crossing warning devices at Alico # 3 Crossing and relocate them to Alico Center Road Crossing. Railroad will install new Highway Grade Crossing Warning Devices at the new Alico # 3 Crossing. All Signals will be tested and placed in service.

END OF PHASE 2.

The installation of the box culvert as mentioned above (see phase 1) shall be governed by the terms of this proposal.

The installation widening and construction of Alico # 3 Highway Grade Crossing as provided for in this proposal shall be governed by the terms of the Agreement dated September 14, 1988 where applicable.

The County's responsibilities within the right-of-way of the Railroad, during phase 1 and phase 2 as mentioned above shall include, but are not limited to: all maintenance of traffic, road closures and openings, poured concrete Crossing surface interfacing as required, road paving, marking, berms, medians, curbs, gutters, sidewalks, curb cuts, etc. County shall also provide all drainage and landscaping outside of the Railroad Crossing area as needed. The County shall supply labor, equipment and materials including necessary fill material for the installation of the two culverts under the J. J. Taylor siding. The County shall furnish a certified Law Enforcement Officer to protect Railroad employees while road closures are in effect.

The Railroad's responsibilities include supervision and inspection of all work performed within the Railroad right-of-way, and is limited to Railroad related construction with the exception of actual Highway Grade Crossing surface installations. The Railroad shall also be responsible for the removal and replacement of the track structure, switch and Railroad roadbed to allow for the County's contractor to install the two culverts under the J. J. Taylor siding.

All work performed within the right-of-way of the Railroad shall be performed under the direct supervision of a qualified Railroad Inspector. All methods and materials of construction for any work performed within the right-of-way of the Railroad shall be approved by the Seminole Gulf Railway Vice President of Construction and Maintenance and meet "Association of American Railroads" standards and shall comply with "American Railway Engineering and Maintenance-of-Way Association" (AREMA) standards. Work performed by others such as paving and poured concrete crossing interface installation shall meet or exceed manufacturer's specifications for its intended purpose.

PROPOSAL PRICING

ALICO ROAD WIDENING PROJECT

*Please note that the fixed pricing presented in this proposal is valid until
March 9, 2004*

*Lee County Purchase Order must be received on or before the above-
mentioned date for this Proposal and Quote to remain valid*

CULVERT INSTALLATION WORK	\$ 108,207.00 Fixed Price	Railroad to remove and replace track and roadbed to facilitate Culvert installation
CROSSING SURFACE WORK	\$ 795,970.00 Fixed Price	Installation of Highway Grade Crossing Surface, Subsurface, and Rail Elements. At Alico # 3, Alico Center Road and F.P.&L. Crossings (384 Ft. Crossing Surface)
SIGNAL INSTALLATION AND RELOCATION	\$ 201,307.00 Fixed Price	Installation of Signals on Alico # 3 and Relocation of existing Signals to Alico Center Road

PHONE: 239-275-6060 FAX: 239-0581

PROJECT MANAGER: G. Bruce Fay, V.P. Construction & Maintenance

CONTACT PERSON: Harry E. Neeves, V.P. Engineering and Real Estate

PAYMENT SCHEDULE

Culvert Installation Work:

Total: \$ 108,207.00

50% (\$ 54,103.50) Due upon issuance of purchase order by Lee County
25% (\$ 27,051.75) Due upon commencement of culvert work
25% (\$ 27,051.75) Due upon completion of culvert work

Crossing Surface Installation Work:

Total: \$ 795,970.00

50% (\$ 397,985.00) Due upon issuance of purchase order by Lee County
25% (\$ 198,992.50) Due upon commencement of Crossing surface work
25% (\$ 198,992.50) Due upon completion of Crossing surface work

Signal Installation and Relocation Work:

Total: \$ 201,307.00

50% (\$ 100,653.50) Due upon issuance of purchase order by Lee County
25% (\$ 50,326.75) Due upon commencement of Crossing signal work
25% (\$ 50,326.75) Due upon completion of Crossing signal work

TOTAL PROJECT COST: \$1,105,484.00

PROJECT COMMENCEMENT SCHEDULE

RAILROAD WORK SHALL COMMENCE UPON ARRIVAL OF TRACK RELATED MATERIAL, AND IN SUCH A WAY AS TO INTERFACE WITH LEE COUNTY'S CONSTRUCTION SCHEDULE. NORMAL LEAD TIME FOR SUCH MATERIAL IS 90 DAYS.

ALL RAIL RELATED MATERIAL AND SIGNAL MATERIAL SHALL BE ORDERED UPON RECEIPT OF PURCHASE ORDER AND INITIAL PAYMENT AS STATED ABOVE. (See: "PAYMENT SCHEDULE")

Proposal & Quote

Accepted By: _____
For Lee County

Date: _____ 20 _____


For: Seminole Gulf Railway LP

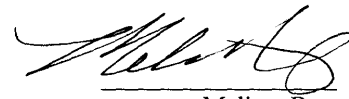
CERTIFICATE OF SERVICE
OF THE
PETITION FOR WAIVER AND REBUTTAL OF LEE COUNTY, FLORIDA

The undersigned hereby certifies that a copy of the PETITION FOR WAIVER AND REBUTTAL OF LEE COUNTY, FLORIDA, in Docket No. AB-400 (Sub. No. 4) was served by first class mail, postage pre-paid on the 19th day of May 2004, on the following:

Peter Shudtz
Vice President - Federal Regulation
CSX Corporation
Suite 560
National Place
1331 Pennsylvania Avenue, N.W.
Washington, D, C. 20004

Joseph C. Fuller
Attorney for Seminole Gulf Railway, L.P.
PO Box 61407
Fort Myers, FL 33906

Eric M. Hocky
Attorneys for Seminole Gulf Railway, L.P.
Gollatz, Griffin & Ewing, P.C.
Four Penn Center, Suite 200
1600 John F. Kennedy Blvd.
Philadelphia, PA 19103-2808


Melissa Burt