

Before the
SURFACE TRANSPORTATION BOARD

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

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

**REPLY OF SEMINOLE GULF RAILWAY, L.P.
TO CORRECTED REPLY BY LEE COUNTY, FL**

Eric M. Hocky
Gollatz, Griffin & Ewing, P.C.
Four Penn Center
Suite 200
1600 John F. Kennedy Blvd.
Philadelphia, PA 19103-2808
(215) 563-9400
emhocky@ggelaw.com

Attorneys for Seminole Gulf
Railway, L.P.

Dated: September 28, 2004

Before the
SURFACE TRANSPORTATION BOARD

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

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

**REBUTTAL OF SEMINOLE GULF RAILWAY, L.P.
TO CORRECTED REPLY BY LEE COUNTY, FL**

On September 17, 2004, Lee County, Florida (“Lee County” or “County”) filed a Corrected Reply to the Protest filed by Seminole Gulf Railway, L.P. (“SGLR”) opposing the County’s attempt to force the abandonment of an active line of SGLR’s rail line.¹ SGLR is filing this Reply to respond solely to the prejudicial and unwarranted allegations for impeachment set forth in Section 5 of the County’s Reply, and which were raised for the first time in County’s Reply.² Since SGLR has not had a previous opportunity to rebut these new allegations, it believes this Rebuttal should be permitted.³

In Section 5 of County’s Reply and the attached verified statement of J. Turner, the County references both a “criminal information” and a plea agreement entered into by SGLR in an attempt to impeach the testimony presented by SGLR witnesses, and to imply that the

¹ The original Reply was filed on August 30, 2004.

² To the extent this pleading includes any factual assertions, such assertions are subject to the attached verification.

³ To the extent necessary, SGLR requests that the Board grant a waiver of its regulations at 49 C.F.R. §1104.13 to allow this filing.

credibility of such testimony should be questioned.

Lee County argues that the prior conviction of SGLR may be used to impeach the Company's credibility and that of its employees who have provided Verified Statements in this proceeding. While it is true that corporate convictions may be used to impeach a corporation's credibility in later proceedings, such use is not without limitation. First, it is clear that the criminal information, being solely a list of charges, is not admissible for impeachment purposes. The County has clearly included the information only for its prejudicial effects - to insinuate that the issues were broader than the limited end result, and to imply that individuals were involved despite their not being parties to the ultimate plea agreement. (Indeed, the official copy of the information attached to Mr. Turner's verified statement redacts the identity of the individuals to avoid just such an implication.)

Even the use of a conviction for impeachment is limited by its relevance to the matter (Fed. R. Evid. 401 & 402), and evidence of a conviction should be excluded, even if relevant, if its probative value is "substantially outweighed" by the possibility of "unfair prejudice." *Hickson Corp. v. Norfolk Southern Railway*, 227 F. Supp. 2d 903, 906 (citing Fed. R. Evid. 403). The County's overstated implications of SGLR's plea again show its attempt to unfairly prejudice the Board's consideration. SGLR did plead guilty to a single felony in order to resolve the proceedings involving Florida Department of Transportation ("FDOT"). As part of the plea, SGLR returned unanticipated project savings and advances for government-delayed projects, with interest, and paid certain investigation costs. Significantly, no fine was imposed. Further,

the three year probationary period and has now expired.⁴

Additionally, there is a limit imposed on the use of a corporate conviction for the purpose of impeaching the testimony of an employee. The Third Circuit Court of Appeals has held that a corporation's criminal conviction may be used to impeach an employee's credibility only when the "witness actually participated in the criminal conduct." *Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 523 (3rd Cir. 1997). Thus, it is not proper to "argue that an employee's credibility is properly brought into questions by the mere fact that he or she is presently employed by a corporation that in some unrelated manner was guilty of dishonest acts, no matter how egregious those acts may have been." *Id.* at 524. In this situation, only SGLR pleaded guilty, and no individuals were convicted. The County has not demonstrated that any of the individual witnesses actually participated in the conduct covered by the plea agreement.

⁴ The County also implies that SGLR was not allowed to do crossing work for FDOT as a result of the plea. However, that is not the case. The plea provided that work could only be done by SGLR if both SGLR and FDOT mutually agreed. Indeed, SGLR continued to do work on FDOT highway crossings during the probationary period, and continues to contract with FDOT for future crossing work.

For all these reasons, SGLR believes that the County has not properly sought to impeach the testimony presented by SGLR's witnesses, and the Board should consider their testimony as if no such allegations had been made.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Eric M. Hocky", is written over a horizontal line.

Eric M. Hocky
Gollatz, Griffin & Ewing, P.C.
Four Penn Center
Suite 200
1600 John F. Kennedy Blvd.
Philadelphia, PA 19103-2808
(215) 563-9400
emhocky@ggelaw.com

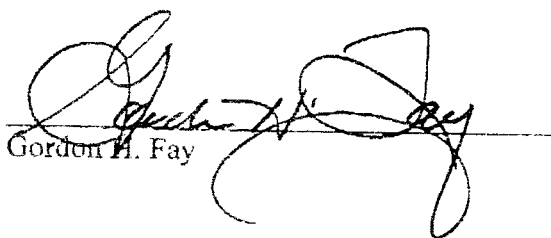
Attorneys for Seminole Gulf
Railway, L.P.

Dated: September 28, 2004

VERIFICATION

I, Gordon H. Fay, verify under penalty of perjury that the foregoing is true and correct.
Further, I certify that I am qualified and authorized to file this verified statement on behalf of
Seminole Gulf Railway, L.P. in Seminole Gulf Railway, L.P. - Adverse Abandonment - In Lee
County, FL, STB Docket No. AB-400 (Sub-No. 4).

Executed on September 27, 2004.


Gordon H. Fay

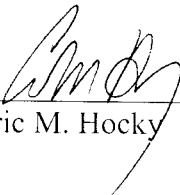
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply was served on the following persons by electronic delivery:

Robert P. vom Eigen
Melissa A. Burt
Foley & Lardner, LLP
Suite 500
3000 K Street, NW
Washington, DC 20007-5143
rvomf@ent.foley.com

Peter Shudtz
Vice President - Regulatory Affairs and Washington Counsel
CSX Corporation
Suite 560
National Place
1331 Pennsylvania Avenue, N.W.
Washington, DC 20004
Peter.Shudtz@csx.com

Keith T. Borman
General Counsel
American Short Line and
Regional Railroad Association
50 F Street, N.W.
Suite 7020
Washington, D.C. 20001-1536
kborman@asf-ra.org



Eric M. Hocky

Dated: September 28, 2004