

Before the
SURFACE TRANSPORTATION BOARD

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

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

**COMMENTS OF
THE AMERICAN SHORT LINE
AND REGIONAL RAILROAD ASSOCIATION
IN OPPOSITION TO APPLICATION
FOR ADVERSE ABANDONMENT**

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August 9, 2004

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On June 16, 2004, Lee County, Florida (the “County”) filed an application for an adverse abandonment of approximately 4,500 feet of the Baker Spur, an active line of railroad operated by Seminole Gulf Railway, L.P. (“Seminole Gulf”). Pursuant to 49 C.F.R. 1152.25(a), the American Short Line and Regional Railroad Association (“ASLRRA”) hereby files these comments in opposition to the application for adverse abandonment.

**THE ASLRRA’S INTEREST
IN THIS PROCEEDING**

The ASLRRA is a national trade association headquartered in Washington, D.C., which represents the interests of America’s over 500 short line and regional railroads. Short line and regional railroads today operate many of the secondary routes and branch lines spun off by Class I railroads. Collectively, the ASLRRA’s members operate almost 29% of the nation’s railroad mileage and represent approximately 9% of the rail

industry's revenues. Many rural portions of this country depend exclusively on short line and regional railroads for their rail service needs. In addition, ASLRRA members also fill a vital transportation function providing local rail service for small shippers and by operating alternative routings for bridge traffic. Both in legislative matters before the Congress and in regulatory and legal proceedings before the Board, other federal agencies and in the courts, the ASLRRA advocates enlightened public policies which promote a strong regional and short line rail component for the national transportation infrastructure.

BACKGROUND

While it is not the intent of ASLRRA to base its comments on facts which may be disputed, this much is clear and from the pleadings of the parties, uncontested: Lee County has been planning to widen Alico Road from a two-lane highway to a six-lane divided highway for several years. This past spring, the County learned that one of the two active shippers on the line at issue was planning to move to a new location. Based on this news and the apparent intent of some of the adjacent landowners to disavow any use of the rail line, the County decided to apply for adverse abandonment of the portion of the Baker Spur that includes the Alico Road crossing so that it may avoid the cost of installing a new, expanded crossing. Florida Power and Light, a public utility remains a shipper on the line, and Seminole Gulf has detailed its plans for other rail related uses for the line in question in its pleadings.

COMMENT

This "adverse abandonment" proceeding involves an issue of grave concern to the short line and regional railroad industry. It presents the question of whether as a matter

of policy the Surface Transportation Board should grant an adverse abandonment petition for a line in active use by the operating railroad for the benefit of the shipping public on the line.

“Adverse abandonment” is one of two subcategories of proceedings generally known as “adverse termination” cases. Adverse *abandonments* typically involve a request by some interested party – usually but not always a local government – which has another use for a right of way, which is out of service. See, Chelsea Property Owners-Aband. – The Consol. R. Corp. 8 I.C.C.2d 773 (1992). In that case the line in question had been out of service for ten years, and in granting the petition for adverse abandonment the ICC found the railroad’s plans for the line to be unrealistic and impractical.

The other subcategory of proceedings, “adverse *discontinuances*,” arise when the owner of the right of way wishes to evict an unsatisfactory railroad operator from use of the right of way in order to substitute a new railroad company who offers the promise of better service on the line. See, Tacoma Eastern Railway Company – Adverse Discontinuance of Operations Application – a Line of City of Tacoma, in Pierce, Thurston, and Lewis Counties, WA (STB Docket No. AB-548, slip op. served Oct. 16, 1998). Shippers and local governments sometimes support “adverse discontinuance” petitions when poor service compels them to seek a better alternative to the current railroad.

Traditionally it has been virtually axiomatic that adverse abandonment petitions have been granted only in situations where the rail line in question has been out of service for a number of years. The Board itself has publicly acknowledged this history. In its decision in Salt Lake City Corporation – Adverse Abandonment – In Salt Lake City, UT

(slip op. served March 8, 2002) it expressly noted “neither the Board, nor the Interstate Commerce Commission before it, has ever granted an adverse abandonment when the carrier was operating over the line.” Id. At 7. Recently, the Board departed from that consistent practice in granting an adverse abandonment against the New York Cross Harbor Railroad. However, the United States Circuit Court of Appeals for the District of Columbia has reversed and remanded that decision for reconsideration by the Board. New York Cross Harbor Railroad v Surface Transportation Board et al 2004 WL 1554234, July 13, 2004. The Court of Appeals placed great significance on the long and consistent precedent the Board and its predecessor has built in not granting adverse abandonments over active rail lines. While it acknowledged that the Board may deviate from its precedent in the face of changed circumstances, the court (citing Greater Boston Television Corp. v FCC, 444 F.2d 841, 852 (D.C. Cir. 1970)) noted that an “agency must supply ‘reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored’”. Id. at 5. Further, that reasoned analysis must carefully consider and balance four interests: (1) the railroad, (2) the owner and/or the public, (3) the shippers, and (4) interstate commerce and the rail system in general. Id.

The pending case before the Board presents a situation in which the Seminole Gulf continues to this day to operate over the line. While it acknowledges that it will lose a shipper, another remains, and in the short time since it learned of the impending loss, it has clearly demonstrated its desire, efforts and reasoned expectation to attract new shippers to the line. In addition it has presented its immediate and realistic opportunities to use of the right of way for other rail related purposes such as team tracks and interline car storage. Lee County asks the Board to determine that although the line is currently

active, there is no potential for continued operations after the departing shipper stops using the line, but the Board and its predecessor, the ICC, have always given carriers the opportunity to demonstrate reasonable steps to attract traffic. In this way, the current proceeding presents a situation much like that in Western Stock Show Association – Abandonment Exemption – Denver, CO, 1 S.T.B. 113 (1996) of a rail carrier (a) actively providing rail service to shippers and (b) taking reasonable steps to attract traffic. In that decision the Board noted its usual practice of denying adverse abandonment requests where those factors are present. See also New York Cross Harbor, supra; Salt Lake City Corporation, supra.

The Seminole Gulf Railroad has also asserted that service to the remaining active shipper on the line, Florida Power and Light (FPL), will be adversely affected by the adverse abandonment of a portion of the right of way. Since FPL is a public utility, this harm extends directly to the general public as well. Thus, if the Board finds in this case that service to FPL will be adversely affected, then this alone should be sufficient to deny the adverse abandonment request.

With regard to the interests of Lee County, it is significant that no public project or alternate use for the right of way is being impeded by the continued operation of rail service on the line. The County merely wishes to avoid the cost of installing a new enlarged crossing where it already has existing crossing rights, and it is not proposing any other public use for the right-of-way. In other words, the county sees a quick and easy way to save some money simply by asking the Board to eliminate another piece of the national rail infrastructure at the expense of shippers, the public served by the remaining shippers, the railroad and all the shippers in the future who may benefit from the

continued operation of this line. Clearly, there is no overriding public need for this abandonment.

Short line railroads, such as the Seminole Gulf and other members of ASLRRA, are locally based and have the knowledge of the local economy and the flexibility to develop rail opportunities that may have not been imaginable in the past. Indeed, in buying low-density rail lines from Class I railroads, they rely on these abilities to grow and succeed. Thus, so long as Seminole Gulf is making good faith reasonable efforts to develop rail uses for the line, it should be given the opportunity to preserve rail service opportunities.

The ASLRRA strongly believes that adverse abandonment requests such as the one now before the Board present a serious threat to the long-term viability of the national rail infrastructure. They particularly threaten short lines for whom these seemingly small and insignificant pieces of rail line are much more critical to their economic and operational viability than to vast and powerful Class I national railroads. If approved, adverse abandonments like this one will slowly but surely chip away small chunks and pieces of the national rail infrastructure to the detriment of future generations of shippers whose rail transportation needs, though unimagined today, must nevertheless be protected today if they are to be accommodated in the future. Taken alone, small adverse abandonment requests may seem insignificant, but like drops of water they can collectively marginalize the national rail infrastructure and cause short line businesses to disappear entirely, even though the necessity of a strong rail system for the future becomes clearer every day.

CONCLUSION

In conclusion, the ASLRRA joins with Seminole Gulf Railroad in opposing Lee County, Florida's application for an adverse abandonment and requests that the application be denied. The ASLRRA appreciates and wishes to thank the Board for the opportunity to present its views on this important issue.

Respectfully submitted,

A handwritten signature in black ink that reads "Keith T. Borman". The signature is written in a cursive, flowing style.

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August 9, 2004

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comments was served on the following persons by electronic mail this date:

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A handwritten signature in cursive script that reads "Keith T. Borman". The signature is written in dark ink and is positioned above a horizontal line.

KEITH T. BORMAN

August 9, 2004