

September 29, 2004

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

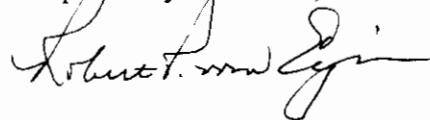
Re: Docket No. AB-400 (Sub-No. 4)
Seminole Gulf Railway, L.P. - Adverse Abandonment -
in Lee County, Florida
Motion of Lee County, Florida to Strike Seminole Gulf Railway L.P.'s
Reply or in the Alternative for Leave to File a Surrebuttal

Dear Secretary Williams:

Please find attached Lee County's Motion to Strike Seminole Gulf Railway, L.P.'s Reply or in the Alternative, for Leave to file a Surrebuttal. Lee County's filing is in response to the Reply SGLR filed on September 28, 2004.

Since this filing does not change the substance or scope of previous submissions, no parties will be prejudiced by this filing and it should be accepted by the Board.

Respectively submitted,



Robert P. vom Eigen

Enclosures: Motion of Lee County, Florida to Strike Seminole Gulf Railway L.P.'s Reply or in the Alternative for Leave to File a Surrebuttal

cc: All persons shown on the Certificate of Service

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

MOTION OF LEE COUNTY, FLORIDA
TO STRIKE
SEMINOLE GULF RAILWAY, LP'S REPLY
OR IN THE ALTERNATIVE
FOR LEAVE TO FILE A
SURREBUTTAL

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

Tel: 239-335-2236

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

Dated: September 29, 2004

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SURFACE TRANSPORTATION BOARD
WASHINGTON, DC 20423

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SURREBUTTAL

On June 16, 2004, Lee County, Florida ("Lee County" or "the County") filed an application for adverse abandonment of a portion of the Baker Spur line ("Application" or "Lee-10") with the Surface Transportation Board ("the Board"). Subsequently, on August 9, 2004, Seminole Gulf Railway, LP ("SGLR") filed a Protest in opposition to Lee County's Application. On August 30, 2004, Lee County filed a Reply to SGLR's opposition ("the Reply") and included various supporting documents and statements.¹ On September 28, 2004, four weeks after Lee County filed its Reply, SGLR filed a Reply to protest Lee County's inclusion of a criminal

¹ Lee County filed a corrected version of its reply on September 17, 2004 to make minor typographical and grammatical corrections as well as insert a few omitted references. However, the substance of the Reply, and indeed the portion of the Reply at issue here, remain unchanged from the Reply filed on August 30, 2004.

information and plea agreement in the County's August 30th Reply. Lee County requests that the Board strike SGLR's Reply as improper under 49 C.F.R. § 1104.13(c) or, in the alternative, to grant Lee County leave to file a Surrebuttal to SGLR's Reply.

SGLR'S Reply Should be Stricken from the Record

The Board's regulations clearly prohibit a party from filing a reply to a reply. 49 C.F.R. § 1104.13(c) ("A reply to a reply is not permitted."). Lee County filed a Reply to SGLR's Protest, and now SGLR wishes to file what it alternates calling a "Rebuttal" or a "Reply"² to Lee County's Reply. It is inconsequential whether SGLR labels its motion as a Rebuttal or as a Reply because it was filed in response to Lee County's Reply, which makes it an impermissible reply to a reply.

Additionally, it is important to note that SGLR waited four weeks to file its Reply, leaving the Board only a week to consider this motion before a decision is due.³ Not only does this deprive the Board of sufficient time to consider the motion and render a decision, but it also deprives Lee County of an adequate amount of time to respond to SGLR's Reply. SGLR is aware of the County's request for its Application to be heard on an expedited schedule because of the monetary damage the County will suffer if delays occur on the Alico Road widening project. Given the lengthy time it took SGLR to file its Reply and the proximity to the due date for decision, it is apparent that SGLR was motivated by a desire to delay these proceedings to the

² On page one of SGLR's filing, it refers to its filing as a Reply, but on page two it refers to the filing as a Rebuttal. For consistency we have decided to refer to SGLR's filing as a reply, which is how it was referenced on the Board's website.

³ According to 49 C.F.R. § 1152.26(a), the due date for a decision on the merits in an abandonment application proceeding is 110 days after the application is filed. According to Lee County's calculations, October 4, 2004 is 110 days after June 16, 2004, which is the day Lee County filed its Application.

County's detriment. SGLR's last ditch effort to delay the Board's decision should not be permitted.

However, if the Board accepts SGLR's Reply for consideration, Lee County should be granted the opportunity to file a Surrebuttal in response to SGLR's Reply. The County's Surrebuttal follows.

The Board May and Should Consider SGLR's Prior Felony Conviction In Evaluating the Credibility of SGLR's Evidence and Testimony in This Proceeding; SGLR Has Made No Adequate Showing to The Contrary.

SGLR concedes, as it must, that a corporate conviction may be used to impeach the corporation's credibility in later proceedings. SGLR Reply at 3; *see also* Lee County's Reply at 14-15 and authorities cited. In the face of this concession, SGLR nevertheless makes three arguments why its prior conviction should not be considered by the Board in assessing SGLR's credibility in this proceeding. As demonstrated below, SGLR's arguments lack merit and should be rejected.

1. SGLR complains that Lee County seeks to prejudice these proceedings by including in its Reply the criminal information that led to SGLR's guilty plea:

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.)

SGLR Reply at 3 (emphasis added). SGLR's argument suffers from numerous flaws. First, in order for the Board to understand and appreciate the significance of SGLR's guilty plea, the Board must have access to the underlying criminal information. The plea agreement and orders attached to Mr. Turner's verified statement do not disclose the context of the felony conviction,

and it is only the criminal information that discloses that the conviction relates to a grade crossing project in Lee County. So it was necessary and appropriate for Lee County to include the criminal information (a public document) in the record of this proceeding. Second, since Lee County has cited only SGLR's guilty plea to one felony count of grand theft, SGLR's assertion that Lee County insinuates otherwise is plainly baseless. More importantly, SGLR makes no showing of prejudice in any event. Finally, there is no dispute that, at the time of SGLR's guilty plea, Gordon Fay was the president and principal owner of SGLR. As such, SGLR's felony conviction is admissible to impeach his testimony here. *See* Lee County Reply at 15 and authorities cited; *see also* discussion below addressing SGLR's third argument.⁴

2. SGLR next makes the argument that evidence of a felony conviction for impeachment purposes should be excluded, even if relevant, if its probative value is "substantially outweighed" by the possibility of "unfair prejudice." SGLR Reply at 3 (citing *Hickson Corp. v. Norfolk Southern Railway*, 227 F. Supp. 2d 903, 906 (E.D. Tenn. 2002)). At the outset, it is noteworthy that the court in *Hickson* concluded that Rule 609 of the Federal Rules of Evidence "*allows the use of a corporation's felony conviction to impeach the*

⁴ SGLR's comment about the alleged redactions of "the identity of the individuals" in the "official copy" of the Criminal Information, and the reasons for such alleged redactions, raises more questions than it answers. In the first place, Lee County is unaware of any authorized practice or procedure permitting or providing for the redaction of a criminal information in the Florida Circuit Court system as SGLR asserts. While it is true that the identity of "Defendant A" is obliterated in many places in the copy of the criminal information that Lee County obtained for inclusion with its Reply, it is unclear when, how or why these marks were made on the document. In any event, the identity of "Defendant A" is disclosed on page 11 of the information as "Gordon H. Fay," and the names of certain other individuals are not obliterated. *See* Count One of the information. So, SGLR's argument that the redactions were meant to protect individuals named in the information from any implication that they "were involved" likewise lacks basis.

corporation's vicarious testimony.” 227 F. Supp. 2d at 907 (emphasis added).⁵ In addition, SGLR makes no showing of prejudice other than its baseless argument that Lee County has “overstated” the implications of SGLR’s guilty plea. See SGLR Reply at 3. As noted above, Lee County has not overstated anything of the sort.⁶

3. SGLR’s third argument is that there are limits on the use of a corporate conviction for the purpose of impeaching the testimony of an employee, SGLR Reply at 4 (citing *Walden v. Georgia-Pacific Corp.* 126 F.3d 506 (3d Cir. 1997)), and that, in this case, the use of SGLR’s felony conviction to impeach the testimony of any individual witness who has provided evidence on SGLR’s behalf is improper. Here again, SGLR misses the point. First, evidence of SGLR’s felony conviction is proper to impeach the credibility of SGLR’s evidence and testimony submitted to the Board in this proceeding, as SGLR concedes.⁷ Because SGLR chose to rely on testimony of its employees, the credibility of those employees’ testimony may be impeached by SGLR’s felony conviction. See, e.g., *Hickson*, 227 F. Supp. 2d at 907; *Stone v. C. R. Baird, Inc.*, 2003 WL 22902564, *1-3 (S.D.N.Y.). When SGLR decided to prognosticate about future traffic

⁵ It is also noteworthy that, in so holding, the *Hickson* court, distinguished the Third Circuit’s decision in *Walden v. Georgia-Pacific Corp.* 126 F.3d 506 (3d Cir. 1997) upon which SGLR relies for its third argument discussed below.

⁶ SGLR inexplicably seeks to add information describing the composition of its repayments to FDOT, asserting that no fine was imposed, and stating that the “three year probationary period and [sic] has now expired.” See SGLR Reply at 3-4. Even if these assertions are true, they have no bearing on the fact that SGLR was convicted of a felony and they provide no basis for this Board to decline to consider SGLR’s felony conviction in evaluation SGLR’s credibility in this proceeding.

⁷ For instance, judgment and integrity are crucial to projections of future traffic growth on the Subject Line, particularly when those projections deviate from the prior history and current prospects of rail operations on the Baker Spur, as were recounted in Lee County’s Reply and the verified statements attached to the Reply. Moreover, testimony on grade crossing expenses by SGLR witnesses in this proceeding involve the very subject of the count to which SGLR pleaded guilty.

growth and the cost of grade crossing protections through the verified statements of its employees, the credibility of its employees became relevant. To adequately weigh the credibility of those witnesses, it is important for the Board to consider prior convictions, especially those that are directly related to the issue at hand, namely costs of grade crossing protections and predictions of future growth. Second, in the case of Gordon Fay, there is an additional basis on which his testimony may be impeached. As noted above, at the time of the acts giving rise the criminal charges set forth in the criminal information, Gordon Fay was the president and principal owner of SGLR – a position that he continues to hold today. In addition, Gordon Fay is identified as “Defendant A” in the criminal information. As such, SGLR’s felony conviction is admissible to impeach Gordon Fay’s testimony. *See Lee County Reply at 15 and authorities cited.*

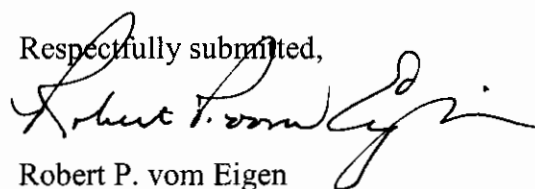
For all of these reasons, the Board should not credit any of SGLR’s arguments against considering its felony conviction in this proceeding. To the contrary, the Board may and should consider SGLR’s felony conviction in evaluating the credibility of the evidence and testimony submitted by SGLR in opposition to Lee County’s Application for Adverse Abandonment.

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

Tel: 239-335-2236

Dated: September 29, 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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the MOTION OF LEE COUNTY, FLORIDA TO STRIKE SEMINOLE GULF RAILWAY, LP'S REPLY OR IN THE ALTERNATIVE FOR LEAVE TO FILE A SURREBUTTAL was served electronically and by overnight courier on the 29th day of September 2004, on the following:

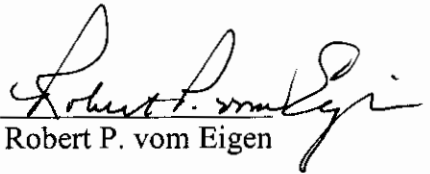
Peter Shudtz
Vice President - Federal Regulation
CSX Corporation
Suite 560
National Place
1331 Pennsylvania Avenue, N.W.
Washington, D. C. 20004
Peter_Shudtz@csx.com

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
emhocky@ggelaw.com

Keith T. Borman
General Counsel
American Short Line and Regional Railroad
50 F Street, N.W.
Suite 7020
Washington, D.C. 20001-1537
kborman@aslrra.org

The undersigned hereby certifies that a copy of the MOTION OF LEE COUNTY, FLORIDA TO STRIKE SEMINOLE GULF RAILWAY, LP'S REPLY OR IN THE ALTERNATIVE FOR LEAVE TO FILE A SURREBUTTAL was served by U.S. mail on the 29th day of September 2004, on the following:

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


Robert P. vom Eigen