

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
TO PETITION FOR WAIVER AND EXEMPTION**

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Dated: May 13, 2004

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On May 3, 2003, Lee County, Florida ("Lee County") filed a petition seeking waivers of certain of the Board's abandonment regulations (the "Waiver Petition") in connection with an adverse abandonment action it proposes to file against Seminole Gulf Railway, L.P. ("SGLR") with respect to a segment of a branch line operated by SGLR. Although certain of the waivers requested relate to the notice of abandonment required under 49 CFR §1152.21, Lee County apparently filed a Notice without waiting for the Board's decision on its waiver requests.

SGLR currently is providing service over the line, and believes that the line has potential for continued, future service. Accordingly, SGLR intends to vigorously oppose the adverse abandonment request. Further, if Lee County is going to be permitted to proceed with this action, it should be granted only the most limited waivers that are appropriate to ensure that an adequate, complete evidentiary record is created, and that all potentially affected parties receive

notice. SGLR, in this Reply, addresses the specific waivers requested by Lee County.¹

Although SGLR would normally have twenty days to respond to a petition, Lee County asked for expedited consideration of its Waiver Petition, and SGLR agreed to file its response within ten days. However, SGLR as discussed more fully below, does not believe that there is any justification for generally expediting the Board's consideration of this unusual request for adverse abandonment of an active rail line.

Background

While a full factual background will be provided as part of its opposition, SGLR is presenting herein only a more limited background for the Board because SGLR believes that some context is necessary for the Board to review and rule on the requested waivers.

SGLR leases approximately 115 miles of rail lines from CSX Transportation, Inc. ("CSXT"), including a line known as the Baker Spur.² In ICC Docket Nos. AB-400 (Sub-Nos. 1X and 2X), SGLR abandoned a portion of the Baker Spur from engineering station 79 + 95 to the end of the line, a distance of 3.55 miles. SGLR did not abandon the 1.5 mile remainder of the Baker Spur because the line provides it with several sources of revenue, including freight revenue and license revenues for billboards located along the right of way.

Lee County now proposes to force SGLR to abandon an additional 4,260 feet of the

¹ SGLR notes that Lee County evidently filed an amended petition and notice on May 11, 2003, although it has not yet received a copy. The cover letter to the filing indicates that the amendments merely correct the end point of the proposed abandonment. SGLR has not yet had the opportunity to review the amended filing in detail. Assuming the only change is to the description, then this Reply should be fully applicable to the revised filing. SGLR does not object to the change in description.

² SGLR owns the tracks and other rail facilities and leases the underlying right of way from CSXT.

Baker Spur to a point just south of a crossing between the line and a Lee County highway (Alico Road). Lee County indicates that its purpose is to save the costs of improving the Alice Road crossing that would be required as a result of its planned widening of Alice Road.³ However, this STB action appears to have been brought in conjunction with, and to support, a pending lawsuit filed against SGLR in state court by private adjacent landowners who are asking the court to usurp the Board's jurisdiction over a portion of the Baker Spur.

SGLR understands that CSXT has only an easement interest in the land underlying the line. If this adverse abandonment were granted, SGLR's lease, and CSXT's rights in the land, would both terminate, and the property would revert back to the successor(s) of the original owner(s) which may or may not be the current landowners adjacent to the right of way. As proposed, the abandonment would leave SGLR with a stub of the Baker Spur less than one mile in length.

Lee County's description of the current service provided on the line is inaccurate and misleading. It is SGLR's understanding that the current shipper has only recently closed on land to build a new distribution center, and Lee County's estimate of when the shipper will relocate is speculative. Further, Lee County's filing fails to acknowledge that there is another active rail customer, Florida Power and Light ("FP&L") that has a facility located along the right of way that Lee County seeks to have abandoned.⁴ The most recent shipment to FP&L arrived

³ Significantly, Lee County is not saying that the presence of SGLR's rail line will prevent the project, only that it will be more costly. SGLR believes Lee County's purported cost savings are significantly overstated.

⁴ FP&L currently receives high and wide transformer shipments several times a year. The FP&L facility is located north of the Alico Road crossing where there is right of way available for unloading. However, at the current time, FP&L unloads its freight south of the

yesterday, May 12, 2004.

Discussion

SGLR acknowledges that the Board and its predecessor, the Interstate Commerce Commission ("ICC"), have in prior adverse abandonment or discontinuance proceedings granted waivers of particular regulatory requirements. However, in this case, where there is active service on the line, the Board should not rely on waivers granted in previous adverse discontinuance where only a change in operators was being sought. Thus, while some limited waivers might be appropriate here, others clearly are not. The Board should ensure that Lee County's application and notice fully and adequately advise the Board and all interested parties before it considers the drastic relief requested by Lee County.

1. Waiver of Filing Fees.

In determining whether to waive the filing fee, the Board should consider that this will be a contested proceeding. While the Board may exempt governmental agencies from its filing fee requirements, SGLR believes that this action is being taken for the benefit of private developers, and the Board should not waive the filing fee in this instance. Further, waiving the filing fee of \$16,300 certainly makes it easier for Lee County to proceed without considering the full costs of the relief it is requesting.

2. Notice of Intent.

The Waiver Petition indicates that Lee County is "*prepared to file and publish a notice of*

highway crossing and moves it by truck along the right of way to its facility under a private roadway agreement with SGLR. If the adverse abandonment were granted, and Lee County installs a divided highway as planned, FP&L may no longer be able to receive rail service from the Baker Spur (either north or south of the crossing).

the proposed adverse abandonment.” However, from the Board’s website, and the copies of documents served on counsel for SGLR, it appears that Lee County has already filed a “Notice of Adverse Abandonment” with the Board. (SGLR does not know whether the Notice has been published.) For the reasons set forth herein, SGLR does not believe the draft notice proposed by Lee County is appropriate. Lee County should be required to prepare a revised notice and to serve it in accordance after the Board rules on the Waiver Petition and this Reply.

The requirements of notice of an abandonment are set forth in detail in 49 CFR §§1152.20 and 1150.21. Section 1152.20 initially requires service by certified mail on the Board. Although Lee County’s cover letter to the Board indicates that it was sent by certified mail, it clearly was not since the receipt date at the Board is the same as the date of the letter. Further, the Notice filed with the Board does not reflect that it was sent to all of the proper parties - only one shipper is shown on the certificate of service, although as noted above, there is more than one shipper on the line; and the Florida Public Service Commission is shown on the certificate instead of Florida Department of Transportation (FDOT has jurisdiction over both the railroads and the crossings at issue). Further, in the case of an adverse abandonment, the Board should require that all railroads involved be served. Although two counsel for SGLR were served, neither CSXT nor its counsel is shown on the certificate of service.

With respect to the proposed form of notice itself, SGLR makes the following comments:

(a) The proposed date of filing of the application is not appropriate. The notice must be filed at least 15 days, but not more than 30 days before the filing of the application, and it must be fully published (for three consecutive weeks) during the 30 day period. 49 CFR §1152.20(b).

If the Board requires the filing of a revised notice as requested hereunder, satisfaction of these requirements will not be possible by the proposed June 1 filing date. Further, an environmental/historic report must be filed at least 20 days before the application. 49 CFR §1152.20(c). Since no report has yet been filed (or even likely prepared), there will be additional time before the application can be filed.

(b) The notice should reference that rail line (tracks, ties, etc.) is owned and operated by SGLR, but that the right of way is owned by CSXT and leased to SGLR.

(c) The reference to “4600 feet” of rail line in the third line is inconsistent with the reference to “4260 feet” in the ninth line.

(d) As noted above, SGLR believes there are inaccuracies in the factual description provided by Lee County as the basis for this action. Therefore, it objects to the statement of the reasons for the proposed abandonment as set forth in proposed notice.

(e) As discussed in Section 4 below, SGLR believes that the Board should not waive the requirements to give interested persons the opportunity to file public use or trail use requests. Lee County should be required to re-insert the language it omitted giving notice of these rights. (Language was omitted in several places.)

(f) While SGLR does not object to leaving out references to offer of financial assistance procedures, Lee County has also omitted (without explanation or justification) language that indicates that a commenting party or protestant may provide a statement of position and evidence regarding environmental impacts, impacts on rural and community development, provisions for protection of employees, suitability of the properties for other public purposes and prospective trail use. Lee County should be required to include such language in its notice.

(g) Without explanation or justification, Lee County modified the following language that appears in the Board's form of notice, and added requirements regarding service and verification:

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.

Lee County should be required to include the Board's standard language.

(h) Without explanation or justification, Lee County omitted the following language that appears in the Board's form of notice:

Written comments and protests, including all requests for public use and trail use conditions, should indicate the proceeding designation STB No. AB ---- (Sub-No. ----) and must be filed with the Secretary, Surface Transportation Board, Washington, DC 20423, no later than (insert the date 45 days after the date applicant intends to file its application). Interested persons may file a written comment or protest with the Board to become a party to this abandonment (or discontinuance) proceeding. A copy of each written comment or protest shall be served upon the representative of the applicant (insert name, address, and phone number). The original and 10 copies of all comments or protests shall be filed with the Board with a certificate of service. Except as otherwise set forth in part 1152, each document filed with the Board must be served on all parties to the abandonment proceeding. 49 CFR 1104.12(a).

Lee County should be required to include the Board's standard language.

SGLR does not object to Lee County's requested waiver of the requirements that notice be posted at each of the railroad's stations (there are none on the subject line), or that notice be served on the headquarters of labor organizations representing employees on the subject line (SGLR's employees are not represented). Waiver Petition at 6. As discussed more fully below, SGLR does object to Lee County's requested waiver of the requirement that an environmental/historic report be filed at least 20 days before the notice is filed.

While changes to the required form of notice are permitted to be consistent with the

waivers ultimately granted, Lee County should otherwise be required to follow the prescribed text as closely as possible. East St. Louis Junction Railroad Company - Adverse Abandonment - In St. Clair County, IL, STB Docket No. AB-838 (served June 30, 2003).

3. Content of Application.

SGLR does not oppose the requested waiver from the system diagram map requirements. Waiver Petition at 6. Further, although it believes that Lee County could easily determine the condition of the line, at least visually, SGLR does not oppose the requested waiver from the requirements that the application include the information described in 49 CFR §§1152.22(b) - (d).⁵

As discussed more fully below, SGLR does oppose the requested waiver from the environmental disclosure requirements of 49 CFR §1152.22(f). Waiver Petition at 7. Further, SGLR objects to the changes Lee County proposes for the Federal Register notice required under 49 CFR §1152.22(i). Waiver Petition at 7 and Exhibit B. Lee County's proposed modifications to the Federal Register notice track its proposed notice of adverse abandonment, and therefore suffer from the same flaws raised above. Additionally, the language tracks the notice of adverse abandonment requirements (Section 1152.21) and not the Federal Register notice requirements (Section 1152.22(i) of the Board's regulations which are somewhat different. No reason or justification is given for departing from the Board's requirements, and Lee County should be required to comply with those requirements.

⁵ SGLR is not stating that such information is irrelevant to the Board's ultimate determination of the issues in this proceeding.

4. Public Use, Trails and OFA Conditions.

If the adverse abandonment were to be granted over SGLR's opposition, SGLR would not oppose an exemption from the OFA conditions set forth in 49 CFR §1152.27. Waiver Petition at 7. SGLR recognizes that if the Board were to find the public convenience and necessity require abandonment, it would be inappropriate for another operator to acquire the line.

However, there is no reason why the proposed abandonment should not be subject to public use and rail banking / interim trail use under the Board's regulations at 49 CFR §§1152.28 and 1152.29. Just because Lee County has initiated this proceeding does not mean that there would not be other public interest in the line.⁶ In fact, Lee County's only stated interest is in its use of the Alico Road highway crossing. Indeed, one of Lee County's commissioners recently initiated discussions with SGLR and a bike group about the possibility of creating trails along the remaining portions of the Baker Spur, and other SGLR lines. Further, adherence to these procedures would not frustrate Lee County's goals, but could allow for the salvage of the rail line and removal of the rail/highway crossing, although some modifications to allow for trail use might be required.

The Board has previously held that public use and trail use procedures involve post-abandonment activities that can be addressed in the decision on the merits of the application. See East St. Louis Junction Railroad, supra; Napa Valley Wine Train, Inc. - Adverse Abandonment -

⁶ Even the "public interest" represented by Lee County in this case is not as clear as the Waiver Petition would have the Board believe. SGLR is not aware of any formal resolution by the Lee County Commissioners approving the initiation of this proceeding, or the taking of SGLR's leasehold interest that will result if the proceeding is successful. On the other hand, the widening of the existing highway crossing, the cost of which forms the crux of Lee County's argument for forcing the abandonment of the rail line, has been approved by the Lee County commissioners.

In Napa Valley, CA, STB Docket No. AB-582 (served March 30, 2001).

5. Waiver of environmental and historical reporting requirements.

Lee County claims that no environmental or historical documentation should be required because there will not be any active traffic on the line at the time it proposes that the abandonment be effective. Lee County further relies on the Board's limited exemption found in 49 CFR §1105.6(b)(7)(2) [sic] to support its request for waiver. Waiver Petition at 8 (presumably referring to Section 1105.6(c)(2)).

However, lack of traffic, even it were the case, is not a reason to exempt Lee County from the environmental and historic requirements. Under the National Environmental Policy Act and related acts, the Board is generally required in all cases involving Board action to review the environmental and historic impacts of the proposed transaction. Under the Board's regulations, it looks not only at the effects of the action on rail traffic, but also the effects of salvage, rerouting of traffic and other community impacts. The Board performs this review in all abandonment cases, even in those under its two year out of service exemption regulations. See 49 CFR §§1152.20(c), 1152.50(d)(4) (requiring certification of service of the environmental and historic report), 1105.6(b)(2), and 1105.8(a).

The regulations cited by Lee County do not apply to abandonments, but apply only to leases and other acquisitions for continued service. See 49 CFR §1105.6(c)(2)(i). SGLR is only aware of the Board granting exemptions from the environmental and historic reporting requirements in abandonment / discontinuance cases where an adverse discontinuance was being sought for the purpose of substituting a new operator on existing tracks for continued rail service. This is the scenario in the case cited by Lee County, and is acknowledged by Lee County. See

citation and parenthetical at Waiver Petition at 8; Salt Lake City Railroad Company, Inc. - Adverse Abandonment - Line of Utah Transit Authority in Salt Lake City, UT, STB Docket No. AB-520 (served August 24, 1999). Compare Napa Valley Wine Train, supra (denying waiver where line relocation for continued service was proposed); CSX Corporation and CSX Transportation - Adverse Abandonment Exemption - Consolidated National Railways and Grand Trunk Western, STB Docket No. AB-31 (Sub- No. 38) (served March 2, 2001). Further, even when the line was constructed within the last 50 years, the Board generally requires consultation with the State Historic Preservation Officer to ensure that no historic properties will be affected by the proposed abandonment. Lee County gives no justification for why it cannot comply with these requirements.

As an alternative, Lee County proposes not to consult with the agencies necessary to evaluate the abandonment, but only to provide its limited studies with respect to the Alico Road highway crossing (only 200 feet of the over 4,000 proposed to be abandoned). Such information will not give notice to the agencies the Board has decided must be consulted, nor will it address any effects or impacts as a result of the abandonment or salvage of the line.

Based on all of the foregoing, compliance with the Board's environmental and historic requirements should not be waived.

6. Expedited Consideration.

As noted above, SGLR has expedited its reply to the Waiver Petition as requested by Lee County. However, it does not agree that the proceeding itself should be expedited. 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. If the issues to be raised in this

proceeding will impact on the construction schedule for Lee County then the County can only blame itself. The Alico Road improvements, and the crossing of the Baker Spur have been in the planning stages since at least the late 1990's (over five years). Further, although Lee County indicates it is in a rush to have this matter determined, it is not seeking the abandonment to be effective until after January 5, 2005, when it asserts the building lease of the one current shipper it has identified will have expired. (As noted previously, SGLR believes that date is dependent on the construction of a new facility, and is therefore speculative). The Board should not grant the waivers requested solely to accommodate an exigent time frame created by Lee County.

Conclusion

For the foregoing reasons, SGLR requests that the Board enter an order limiting the waivers requested. Further, notwithstanding any waivers that are granted the Board should make clear in its order that Lee County still has the burden of supporting its case demonstrating that the public convenience and necessity require this abandonment with sufficient relevant evidence.

Salt Lake City Railroad, supra.

Respectfully submitted,



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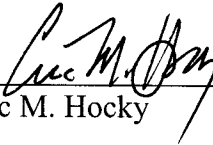
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Dated: May 13, 2004

CERTIFICATE OF SERVICE

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

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Dated: May 13, 2004