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SERVICE DATE - LATE RELEASE JUNE 9, 2004

SURFACE TRANSPORTATION BOARD

DECISION

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

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

Decided: June 8, 2004

This decision grants in part exemption and waiver requests by Lee County, FL (Lee County or petitioner).

On May 3, 2004, Lee County filed: (1) a notice of intent to file an adverse application in which it would seek a finding that the present or future public convenience and necessity (PC&N) require or permit the abandonment of 4,260 feet of the Baker Spur in Lee County, operated by Seminole Gulf Railway, L.P. (SGLR); and (2) a petition asking for exemption from various statutory provisions governing rail line abandonments, and for waiver of several of the Board's related regulations, that would, if granted, facilitate filing of the application. SGLR filed a reply thereto on May 13, 2004, to which Lee County filed rebuttal on May 19, 2004. Lee County filed a supplemental waiver request on May 28, 2004.

BACKGROUND

The portion of the Baker Spur that Lee County seeks to have abandoned begins at the end of the Spur at engineering station 33+35+/-, which is approximately 400 feet southwest of where the line crosses Alico Road, approximately .9 of a mile east of U.S. Hwy. 41, and parallel to Alico Road station 76+00, continuing across Alico Road and then running parallel to and north of Alico Road for approximately 4,260 feet to the eastern terminus of the line at engineering station 79+95,<sup>1</sup> which is parallel to Alico Road station 122+60.

Lee County states that it is in the process of widening Alico Road, a heavily traveled thoroughfare between Interstate Hwy. 75 and U.S. Hwy. 41. This expansion project will require a new grade crossing where the Baker Spur crosses Alico Road. Lee County states that the cost of installing the required grade crossing would be approximately \$1 million, and the cost of

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<sup>1</sup> In a letter filed on May 11, 2004, petitioner stated that the eastern terminus of the line to be abandoned was engineering station 79+95, not 79+55 as originally indicated. It asked that its various filings be so corrected.

removing the grade crossing if the line were later abandoned would be approximately \$500,000. Petitioner seeks to avoid the expenditure of public funds to construct and remove this crossing. According to Lee County, the sole shipper on the line, J.J. Taylor Distributors Ft. Myers/Naples, Inc. (J.J. Taylor), is in the process of relocating its operations, at which point there will be no shippers requiring rail service on this line. Lee County states that it will request that the abandonment authority become effective only after J.J. Taylor has either departed its Alico Road facility or converted its operations so as not to require rail service. Petitioner states that it seeks the adverse abandonment of this portion of the Baker Spur because such abandonment would promote the present and future PC&N and avoid the unnecessary expenditure of \$1.5 million in taxpayer funds.

In reply, SGLR opposes several of the exemption and waiver requests. SGLR adds that it intends to vigorously oppose the adverse abandonment of the Baker Spur because it believes the line has potential for continued, future service. SGLR also urges the Board to reject Lee County's notice of intent to abandon.

#### DISCUSSION AND CONCLUSIONS

The Board (and its predecessor, the Interstate Commerce Commission) ordinarily would reject a notice of intent or an abandonment application that does not substantially conform to the requirements of 49 CFR 1152, Subpart C. However, in appropriate instances, the Board will waive inapplicable and unneeded provisions.<sup>2</sup> Petitioner has sought exemptions and/or waivers with respect to its notice of intent and application. They will be discussed in that order.

Notice of Intent. With respect to the notice of intent, Lee County seeks waiver of four provisions.

Lee County asks the Board to waive the requirements of 49 CFR 1152.21 to permit it to deviate from the prescribed form of notice as set forth in the regulations. Lee County states that, in view of its other waiver requests, the wording of the notice as prescribed in 49 CFR 1152.21 is inappropriate for use in these proceedings, and it has instead filed alternative language in an Attachment A. SGLR asks the Board to reject this notice and to require Lee County to file a revised notice. SGLR objects to much of the notice's contents, particularly its failure to serve several parties, its factual description of the line, and its omission of language relating to written comments and protests.

The Board finds that Lee County's notice is in substantial compliance with the requirements of 49 CFR 1152.21, and it will be permitted to use the notice in Attachment A.

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<sup>2</sup> See Napa Valley Wine Train, Inc.—Adverse Abandonment—In Napa Valley, CA, STB Docket No. AB-582 (STB served Mar. 30, 2001), and cases cited therein.

Because petitioner states in its rebuttal that it has voluntarily served notice on a second shipper, Florida Power & Light (FP&L), and CSX Transportation, Inc. (CSXT) (which has an interest in the right-of-way), the Board need not rule on SGLR's request that Lee County be directed to do so. Petitioner must, however, provide FP&L and CSXT with all future filings. However, the Board directs Lee County to serve the Florida Department of Transportation with copies of this notice and all future filings in this proceeding.

Lee County requests a waiver from 49 CFR 1152.20(a)(3), which requires the applicant to post a copy of its notice of intent at each agency station and terminal on the line to be abandoned. Lee County states that it does not have access to the railroad's facilities. SGLR states that there are no stations located on the subject line, and it does not object to waiving this requirement. The waiver will be granted.

Lee County asks the Board to waive the requirements of 49 CFR 1152.20(a)(2)(xii), which requires service on the headquarters of all duly certified labor organizations that represent employees on the affected rail line. SGLR states that its employees are not represented and does not oppose this waiver. The waiver will be granted.

Lee County seeks waiver of section 1152.20(c), which requires the applicant to submit an environmental and historic report at least 20 days prior to filing an application. Lee County argues that no such documentation is necessary here as the proposed adverse abandonment will not result in significant changes in carrier operations. SGLR opposes this request. Despite this waiver request, on May 18, 2004, Lee County filed with the Board a "Combined Historical and Environmental Report." The waiver will therefore be denied as unnecessary.

Adverse Abandonment Application. With respect to its application, Lee County requests exemptions under 49 U.S.C. 10502 from four statutory provisions.

Lee County seeks an exemption from 49 U.S.C. 10903(a)(3)(B), which requires posting notice of the application in each terminal and station on each portion of a railroad line proposed to be abandoned. Lee County states that it does not have access to the railroad's facilities. SGLR states that there are no stations located on the subject line, and it does not object to waiving this requirement. The sought exemption will be granted.

Lee County requests an exemption from 49 U.S.C. 10903(c), which requires all rail carriers to maintain a system diagram map and to identify on that map rail lines planned for abandonment or discontinuance of service. Lee County states that it is unlikely that SGLR included this part of the Baker Spur on its system diagram maps, and Lee County has been unable to locate such a map. SGLR does not oppose exemption from this requirement. As is customary in adverse abandonment situations, an exemption from this provision will be granted.

Application of 49 U.S.C. 10903(a)(3)(B) and (c) to the proposed transaction is not necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. 10101. Rather, the exemptions will promote that policy by eliminating unnecessary procedures, and thus will expedite regulatory decisions [49 U.S.C. 10101(2)], foster sound economic conditions in transportation [49 U.S.C. 10101(5)], and encourage efficient management of railroads [49 U.S.C. 10101(9)]. Other aspects of the rail transportation policy will not be adversely affected.

Lee County also seeks exemption from the offer of financial assistance (OFA) requirements of 49 U.S.C. 10904 and the public use procedures of 49 U.S.C. 10905. Lee County argues that the public interest does not require retention of the Board's jurisdiction over the line after abandonment. SGLR does not oppose exemption from the OFA requirements, but does oppose exemption from the public use procedures. The Board need not resolve these matters at this time. These issues can be addressed, if relevant, in the final decision on the merits of the abandonment application.

With respect to the adverse abandonment application, Lee County seeks waiver of a number of regulatory requirements.

Lee County seeks waiver of the filing fee required for its adverse abandonment application under 49 CFR 1002.2(f)(21)(i). The Board's Secretary, the agency official delegated authority to rule on such requests, granted this filing fee waiver request in a letter to Assistant Lee County Attorney John Turner.

Lee County requests waiver of 49 CFR 1152.22(a)(4), which requires abandonment applications to include a system diagram map showing the exact location of the rail line to be abandoned. Consistent with the corresponding provision in 49 U.S.C. 10903(c), for which Lee County is being granted an exemption, this waiver will also be granted.

Lee County seeks waiver of the regulations at 49 CFR 1152.22(b)-(d), which require abandonment applications to include information regarding the present physical condition of the rail line, the service performed on the line, and revenue and cost data. Lee County asserts that it is without knowledge of the condition of the affected railroad lines, the service which heretofore has been rendered by SGLR on the line, and the revenue and cost data associated with this line. SGLR does not oppose these waivers. As is the case here, this information is generally not available to an adverse applicant. Application of the regulations at 49 CFR 1152.22(b)-(d) will be waived.

Lee County asks the Board to waive 49 CFR 1152.22(f), requiring an applicant to submit information regarding the environmental impact of the proposed abandonment. SGLR opposes this waiver. Because Lee County has already submitted an environmental report addressing the environmental impact of this project, this waiver will be denied as unnecessary.

Lee County requests a waiver of 49 CFR 1152.22(i), which requires the applicant to submit a draft Federal Register notice of its application to be published by the Board. Lee County states that, in view of its other waiver requests, the wording of the notice as prescribed in the regulation is inappropriate for use in this proceeding.<sup>3</sup> SGLR objects to the proposed modifications to the Federal Register notice, and argues that Lee County should be required to comply with the Board's requirements. The Board finds the draft notice to be in substantial compliance with 49 CFR 1152.22(i), and the waiver will therefore be granted. However, any revisions to the submitted notice that the Board deems necessary will appear in the notice to be served and published in the Federal Register by the Board.

Lee County also seeks waiver of 49 CFR 1152.27-29, the Board's procedures for OFAs, public use, and trail use. Lee County argues that the public interest does not require retention of the Board's jurisdiction over the line after abandonment. SGLR does not oppose waiver of the OFA requirements, but does oppose waiver of the public use and trail use procedures. As indicated earlier regarding the statutory provisions at 49 U.S.C. 10904 and 10905, it is not necessary for the Board to reach and resolve these issues at this time. The requested waivers can be addressed, if necessary, in a future decision.

Lee County also asks the Board to waive the requirements of 49 CFR 1105.7-.8, under which the applicant must submit to the Board environmental and historic reports. SGLR opposes these waivers. Because Lee County has subsequently filed an environmental and historic report, these waiver requests will be denied as unnecessary.

In its supplemental waiver request, Lee County seeks waiver of the Board's regulation at 49 CFR 1105.7(b), relating to the timing of service of the environmental and historic report on certain governmental agencies. Petitioner states that it served the appropriate agencies with the report on May 14, 2004. Petitioner states that it then re-served the applicable agencies via Federal Express on May 24, 2004, with the same report and a transmittal letter that tracked the wording suggested in the Appendix to 49 CFR 1105.11. Lee County seeks waiver of section 1105.7(b) because it plans to file its adverse abandonment application on June 10, 2004, which would be only 17 days after the agencies were re-served, rather than the 20 days required by this section. The environmental and historic report was initially served in a timely manner, i.e., at least 20 days prior to petitioner's anticipated filing date. Moreover, even if May 24, 2004, were considered the applicable service date, the agencies possessed the substance of the report in advance, and they were not prejudiced by receiving the proper transmittal letter only 17 days prior to the anticipated filing of the adverse abandonment application. For these reasons, the requested waiver will be granted.

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<sup>3</sup> In lieu thereof, petitioner has submitted substitute Federal Register language in an Attachment B.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Lee County's petition for exemption and waiver is granted to the extent specified in this decision.
2. This decision is effective on its service date.

By the Board, Chairman Nober, Commissioner Buttrey, and Commissioner Mulvey.

Vernon A. Williams  
Secretary