

Meeting Date
August 19, 2014



AGENDA	
Section	New Business
Item No.	V B.1.

REVISED AGENDA REPORT
BREVARD COUNTY BOARD OF COUNTY COMMISSIONERS

SUBJECT:	Continuation of FECR/ All Aboard Florida Report and FECR/AAF request to execute letter agreement adding AAF as 3 rd Party Beneficiary
DEPT/OFFICE:	County Attorney

Requested Action:

1. Postpone consideration of FECR/AAF request to execute letter until September 16, 2014

Summary Explanation & Background:

This item was continued from the July 8, 2014 meeting to allow FEC time to meet with County personnel in order to present more information and the railroad's legal position. A meeting with the AAF and FEC attorneys was held. The FEC/AAF legal position is attached. Clearly the railroads do not agree with the County's position, yet no new information has been presented on the cost issues.

AAF has asked, in good faith, that the County provide additional time to analyze data from last month's inspection of all affected crossings in Brevard so the railroad can come up with data-supported cost projections.

However, the Board should note that since the July 8, 2014 meeting the estimate of cost increases to the County have increased from a projected de minimus (1%) increase to a 20% increase over the \$350,000-\$400,000 per year currently being paid out by the County.

Name:
Phone:

Clerk to the Board instruction:

Exhibits Attached: 1) FECR/AAF report [attached to previously submitted agenda item] ; 2) FECR/AAF proposed letter agreement with attachment

Contract /Agreement (If attached): Reviewed by County		Yes	<input type="checkbox"/>	No	<input type="checkbox"/>
County Manager's Office		Department : County Attorney			PR <input type="checkbox"/>
Stockton Whitten, County Manager					



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August 20, 2014

MEMORANDUM

TO: Scott Knox, County Attorney

RE: Item V.D.1., Continuation of FECR/All Aboard Florida Request to Execute Letter Until September 16, 2014

The Board of County Commissioners, in regular session on August 19, 2014, postponed consideration of FECR/All Aboard Florida request to execute letter until September 16, 2014.

Your continued cooperation is greatly appreciated.

Sincerely yours,

BOARD OF COUNTY COMMISSIONERS
SCOTT ELLIS, CLERK

Tammy Etheridge

Tammy Etheridge, Deputy Clerk

/ds

cc: County Manager

DM



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VIA EMAIL

July 31, 2014

Mr. Scott Knox
Brevard County Attorney
2725 Judge Fran Jamieson Way
Viero, FL 32940

RE: Rail Crossing Legal Analysis

Dear Mr. Knox:

As you know, I am the General Counsel for All Aboard Florida. I appreciate the opportunity to provide my views with respect to the "legal analysis" memo which you provided to the Brevard County Board on July 2, 2014.

As a predicate to my comments on the memo, I think it might be useful to share a little bit of my background. I have worked for or on behalf of railroads for the last 30 years. I was a regulatory attorney for the Chicago and North Western Transportation Company (now Union Pacific), during which time I participated in the drafting of the current State of Illinois crossing statutes as well as the implementing regulations administered by the Illinois Commerce Commission.

I left Chicago and North Western (CNW) to become a chief regulatory and commercial attorney for the Illinois Central Railroad (IC) and ultimately became its General Counsel.

After the Illinois Central merger with Canadian National (CN), I was responsible for CN's U.S. legal affairs for many years before becoming a private practitioner. CN, IC and the former CNW are (or in the case of CNW, were) among the top ten largest railroads in the U.S.

Throughout my career I have participated in a host of litigated proceedings involving rail crossing openings and closures in a multitude of midwestern and southern states.

I am concerned that you have received some uninformed factual and legal advice, which has caused you to develop an analysis fraught with misinformation and tenuous conclusions. I would like to assist you in correcting this misinformation.

All Aboard Florida and Florida East Coast Railroad anticipate double tracking the rail line through Brevard County. As a part of this project we propose to spend hundreds of thousands of dollars per crossing in order to upgrade the warning devices (bells and lights), gates and signal systems at each of the crossings in the County. This is money which the County and other municipalities in Brevard County would otherwise have been obligated to pay pursuant to the crossing maintenance agreements executed by the railroad and the County or the applicable municipalities. In so doing we will effectively extend the life cycle of the crossing mechanisms, thereby deferring certain maintenance costs that the County would have otherwise been obligated to pay. This significant fact is nowhere to be found in your memo.

The memo also incorrectly suggests that the per crossing maintenance costs will double. That is similarly incorrect.

Will the County's crossing and maintenance costs increase? The answer is likely "yes." Attached is a Florida Department of Transportation chart establishing the relatively minimal signal inspection increases for crossings in various configurations.

Will the County's crossing surface maintenance costs increase? The answer is also likely "yes." Crossing surface maintenance is largely a function of vehicular traffic over the crossing. The more vehicles – the more maintenance. The trains themselves run on the rails so they don't have a huge impact on the crossing surface. Certainly, we estimate that the addition of a second track in some crossings will add approximately 20%, on average, to the annual crossing maintenance cost, but again, that is largely a function of vehicular traffic.

In the face of this potential huge expenditure by the railroad of monies that the County would have otherwise been obligated to spend, coupled with the modest maintenance cost increases, all we have requested is that the County execute amendments to the existing crossing agreements which incorporate All Aboard Florida into the agreements and effectively memorialize the benefits to be received by the County.

The memo, which suggests that the County should reject the existing Agreements, condemn easements over the Florida East Coast rail line, and cease contributions to the maintenance of these crossings because these contributions allegedly benefit the railroad and not the county, plainly and simply misses the mark.

As you and I briefly discussed, Federal Highway Administration Regulations explicitly state that projects for grade crossing improvements "are deemed to be no ascertainable benefit to the railroads." 49 C.F.R. 646.210

Where Federal Highway Administration Funds are used for improvements at a crossing "there shall be no required railroad share of the costs." 23 U.S.C. 130(b); 49 C.F.R. 646.210(b).

Where Federal Highway Administration Funds are used for crossing improvements "a crossing agreement allocating maintenance responsibility is necessary." 49 C.F.R. 646.216

In this context, my preliminary research has determined that, since 1995, at least 8 of the 14 Brevard County crossings have been improved with these Federal Highway funds. Since that time, approximately 50 crossings in Brevard County have been improved with Federal Highway funds. Because many of the crossings in Brevard County were opened before 1995, I anticipate that further research will reveal that a substantially greater number of Brevard County crossings were the beneficiary of Federal Highway funds since the crossing improvement program was enacted in 1972. This funding program is one of the several fundamental bases for the maintenance agreements.

The memo also suggests that Article VII, Section 10 of the Florida Constitution prohibits the County from using its resources to "aid any corporation," as such resource can only be used for "County projects." However, as indicated above, federal law has determined that the crossing improvements are of no benefit to the railroads. Moreover, even for crossings where no federal funding was utilized, the maintenance agreements themselves constituted the consideration for the creation of the crossings, and those agreements continue to stand as the legal basis for existence of the crossings. Thus, the maintenance agreements formed the basis for the county and its citizenry obtaining the crossing

improvements, which would not otherwise have been funded by the federal government, the State of Florida, or both.

The memo suggests that Florida statute 335.141 "purports" to authorize maintenance contracts between municipalities and railroads. It doesn't "purport" to do that - it specifically reaffirms those maintenance agreements. And, Florida Constitution Article 1, Section 10, prohibits the legislature from interfering with pre-existing contractual obligations.

The memo mentions several eminent domain cases involving grade crossings, including an 1897 case focused on Illinois. However, what the memo omits is that all of these cases predated legislative enactments which invested the Departments of Transportation or Public Service Commissions in various states with the exclusive authority over the opening, closing, and overall administration of grade crossings. As an example, in 1972 the Florida Department of Transportation was granted "regulatory authority overall public railroad crossings in the State." Fla. Stat. Section 338.21 (3).

Consequently, the suggestion that any county or municipality can take unilateral action with respect to crossings, simply does not comport with applicable law. The crossing maintenance agreements at issue in the memo form the basis for the creation of, and continued operation of, the crossings encompassed by those agreements. Termination of those agreements presents risk and uncertainty with respect to the status of those crossings. We believe it is in the County's and the railroads' best interest to work together to improve the warning devices and other features of these crossings in a way which maximizes benefits and opportunities for all parties.

I look forward to discussing this matter with you further.

Very truly yours,



Myles L. Tobin*
General Counsel

**Member of the Illinois Bar only, and not a member of the Florida Bar*

**SCHEDULE OF ANNUAL COST OF AUTOMATIC
HIGHWAY GRADE CROSSING TRAFFIC CONTROL DEVICES**

STANDARD 2 QUADRANT SIGNAL INSTALLATIONS

Annual Maintenance Cost Exclusive of Installation

<u>CLASS</u>	<u>DESCRIPTION</u>	<u>COST*</u>
I	Flashing Signals – One Track	\$2,256.00
II	Flashing Signals – Multiple Tracks	\$2,985.00
III	Flashing Signals and Gates – One Track	\$3,402.00
IV	Flashing Signals and Gates – Multiple Tracks	\$4,272.00

3 OR 4 QUADRANT SIGNAL INSTALLATIONS

Annual Maintenance Cost of Installation

<u>CLASS</u>	<u>DESCRIPTION</u>	<u>COST*</u>
III	Flashing Signals and Gates – One Track	\$6,726.00
IV	Flashing Signals and Gates – Multiple Tracks	\$8,442.00

AUTHORITY: FLORIDA ADMINISTRATIVE RULE: 14-57.011
Public Railroad- Highway Grade Crossing Costs

F. A. RULE EFFECTIVE DATE: July 22, 1982

GENERAL AUTHORITY: 334.044, F. S.

SPECIFIC LAW IMPLEMENTED: 335.141, F. S.

*This schedule was effective July 1, 2011, and will be reviewed every 5 years and revised as appropriate based on the Consumer Price Index for all Urban Consumers published by the U.S. Department of Labor.

Location	MILEPOST	Street Name	AAR/DOT#	NUMBER TRACKS	SIDE TRACKS	LENGTH	TYPE	Agreement Holder	License Agreement	Last Rebuild
Cocoa	170+2981	Michigan Avenue	272092P	1	0	74	T	Brevard County	11/25/70	6/13/11
Cocoa	171+2728	Dixon Boulevard	272095K	1	0	74	T	Brevard County	3/5/91	6/21/04
Rockledge	177+4924	Barnes Boulevard	272108J	1	0	90	O	Brevard County	10/5/09	6/21/10
Bonaventure	179+742	Carver Street	272109R	1	0	34	T	Brevard County	3/15/88	4/16/12
Bonaventure	179+2096	Ansinn Road	272110K	1	0	24	T	Brevard County	1/25/66	2/13/06
Bonaventure	180+1465	Viera Boulevard	272976W	1	0	144	T	Brevard County	9/10/91	6/28/10
Pineda	182+3422	Suntree Boulevard	272115U	1	0	84	T	Brevard County	1/16/90	5/21/07
Pineda	184+2687	Pineda Causeway	272863R	1	0	90	O	Brevard County	12/16/08	4/24/09
Melbourne	189+3584	Aurora Road	272122E	1	0	104	T	Brevard County	8/20/91	4/16/07
Melbourne	190+3040	Sarno Road	272125A	1	0	64	T	Brevard County	12/14/82	4/5/05
Grant Valkaria	208+681	Senne Road	272154K	1	0	34	T	Brevard County	2/6/90	4/27/04
Micco	208+5229	Barefoot Boulevard	272155S	2	0	94	T	Brevard County	2/19/59	7/24/02
Micco	209+1239	Micco Road	272156Y	2	0	34	T	Brevard County	5/11/67	4/15/04
Micco	211+3210	Holly Street	272157F	1	0	24	T	Brevard County	3/4/65	5/25/04