

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR INDIAN RIVER COUNTY, FLORIDA
CASE NO.:
JUDGE JANET CROOM

INDIAN RIVER COUNTY, a political subdivision
of the State of Florida,

Plaintiff,

v.

BRIGHTLINE TRAINS, LLC and
FLORIDA EAST COAST RAILWAY, LLC,

Defendants.

COMPLAINT FOR DECLARATORY RELIEF

Plaintiff Indian River County, Florida (“Indian River County”) sues Brightline Trains, LLC (“Brightline”) and Florida East Coast Railway, LLC (“Florida East Coast Railway”), and states:

General Allegations

1. This suit seeks a declaration by this Court that neither Brightline nor Florida East Coast Railway has the right to charge Indian River County for the construction or maintenance of railway crossing improvements made necessary by Brightline’s construction of a “higher-speed” passenger railway that will send 32 trains per day running the length of the County at speeds of up to 110 mph. As such, it seeks relief valued in excess of \$10,000,000.00, exclusive of interest, costs and attorney’s fees.

2. This dispute concerns 21 “crossing agreements” by which Indian River County historically obtained a license for its residents to drive, walk or ride across a railroad corridor owned by Florida East Coast Railway. These 21 active crossing agreements vary depending on when the individual agreement was executed. Whether executed in the 1960’s or the 2000’s, they

generally provide that Florida East Coast Railway will construct and maintain the improvements necessary for Indian River County residents to safely use each crossing – such as crossing surfaces, warning lights, signals and gates – and that these construction and maintenance costs will be reimbursed by Indian River County.

3. In or about 2007, Florida East Coast Railway granted an easement to Brightline, then known as FDG ROW Passenger Holdings, LLC, giving it the right to use Florida East Coast Railway's railroad corridor including its tracks for a new higher-speed passenger rail service. To do so, however, Brightline now needs to (a) install a second track (a third in some places where two existing tracks are located); (b) improve the existing railroad track owned by Florida East Coast Railway; and (c) install significant safety improvements at the 21 railroad crossings in Indian River County to upgrade the current Class 4 track, permitting passenger rail speeds of 80 mph, to a Class 6 track, permitting passenger rail speeds of 110 mph.

4. Brightline has no corporate affiliation nor ownership in common with Florida East Coast Railway. Rather, Brightline traces its ownership to a Japanese hedge fund, known as SoftBank Group. For its part, Florida East Coast Railway now traces its ownership to Grupo Mexico, the largest miner in Mexico and third-largest copper producer in the world.

5. Although Brightline is not affiliated with Florida East Coast Railway – and most certainly is not a party to the crossing agreements – both Brightline and Florida East Coast Railway have taken the position that the 21 crossing agreements require Indian River County to fund the construction and/or maintenance of crossing improvements that are necessary only due to Brightline's higher-speed train, and not by any activities of Florida East Coast Railway. This lawsuit seeks a declaration by this Court that this is not at all the case.

Parties, Jurisdiction and Venue

6. Indian River County is a political subdivision of the state of Florida, and is party to the crossing agreements attached as Exhibits 1 through 21, as to which any missing attachments or pages are not in the possession of Indian River County, but are on information and belief in the possession of Florida East Coast Railway. This includes the October 5, 1966 agreement as to 43rd Avenue, as to which the County presently can locate only the resolution adopting it.

7. Florida East Coast Railway is a Florida LLC with its principal place of business in Jacksonville, Florida, and is also party and/or successor party to the crossing agreements attached as Exhibits 1 through 21.

8. Brightline is a Delaware LLC with its principal place of business in Miami-Dade County, Florida. Although not a party to the crossing agreements, it nonetheless seeks to benefit from them either directly or indirectly through Florida East Coast Railway.

9. Where this suit seeks declaratory relief as to crossing agreements concerning 21 railway crossings located in Indian River County, venue is proper under §47.011, Fla. Stat.

Factual Background

10. The Florida East Coast Railway dates back to December 31, 1885, when Henry Flagler purchased the Jacksonville, St. Augustine & Halifax River Railway to expedite materials and equipment to complete the construction of his three hotels in St. Augustine and renamed it as Florida East Coast Railway. Through the purchase of existing railways, purchases and grants of other real property from private landowners as well as enormous land grants from the State of Florida, Florida East Coast Railway obtained fee simple ownership of most of the real property comprising the “corridor” in which it historically has laid its tracks and operated its trains. Starting

from Jacksonville, the railway reached Daytona Beach in 1889, West Palm Beach in 1894 and Miami in 1896.

11. While passenger service was an important part of its operations in the early decades, the advent of commercial air travel and the automobile virtually eliminated the passenger rail market by the mid-20th century. With severe labor strife as the catalyst in 1963, Florida East Coast Railway discontinued passenger service altogether. In opposition to 1964 petitions by the Cities of Miami and St. Augustine to the Florida Public Utilities Commission to force the reinstatement of the service, Florida East Coast Railway argued among other things that there then was “a lack of public need for passenger service.” Only by a January 14, 1965 Order of the Public Utilities Commission, as affirmed by the Florida Supreme Court on July 14, 1965, did Florida East Coast Railway resume passenger service as it was then required by law to do.

12. Under this compulsion by the Florida Supreme Court, Florida East Coast Railway resumed passenger service between Jacksonville and North Miami. Following only the bare letter of the law, however, this service consisted of one (1) locomotive per day (except Sunday) and two (2) passenger cars. The train carried no baggage or mail, honored no inter-line tickets or passes, and the only food service was a box lunch (at Cocoa-Rockledge in 1966).

13. After a brief, three (3)-year period of resumed operations, Florida East Coast Railway finally discontinued all passenger service on July 31, 1968. For the next 40-plus years, Florida East Coast Railway operations were restricted to freight service only.

14. In 2007, Fortress Investment Group bought Florida East Coast Railway. On December 20, 2007, Florida East Coast Railway granted a passenger rail easement to FDG ROW Passenger Holdings, LLC, a separate subsidiary of Fortress Investment Group. This passenger service easement granted FDG ROW Passenger Holdings, LLC, the right to: (a) operate trains,

cars, locomotives and other rail equipment for the movement of passengers; (b) occupy and use stations, buildings, and other facilities; (c) install, place, construct, use, maintain, alter, repair, renew and replace rail, ties, ballast, other track material, structures, and/or improvements, including, without limitation, stations, which are reasonably necessary or desirable or legally required in connection with the passenger rail service; (d) construct contiguous or adjacent additional rail lines, bridges, and trackage and install necessary track connections; and (e) access the railroad corridor owned by Florida East Coast Railway in connection with the foregoing purposes.

15. On July 28, 2012, FDG ROW Passenger Holdings, LLC, changed its name to All Aboard Florida-Operations, LLC. Subsequently, in 2014, the easement was amended to change FDG ROW Passenger Holdings, LLC, to All Aboard Florida-Operations, LLC. The terms of the easement also changed, granting All Aboard Florida-Operations, LLC, the right to: (a) operate trains, cars, locomotives and other rail equipment for the movement of passengers; (b) install, place, construct, use, operate, alter, maintain, repair, renew and replace rail, ties, ballast, other track material, structures, signals and communications facilities and equipment, utilities, and/or improvements (including without limitation, stations, buildings, platforms, stairways, escalators, and elevators) that are reasonably necessary or desirable or legally required in connection with the passenger rail service; (c) construct contiguous or adjacent additional rail lines, bridges, and trackage and install necessary switches, crossovers and track connections; and (d) access the railroad corridor owned by Florida East Coast Railway in connection with the foregoing purposes.

16. In July of 2017, Grupo Mexico purchased Florida East Coast Railway from Fortress Investment Group.

17. In December of 2017, SoftBank Group acquired Fortress Investment Group, which still owned All Aboard Florida-Operations, LLC despite having sold off Florida East Coast Railway. On June 1, 2018, All Aboard Florida-Operations, LLC, changed its name to Brightline.

18. Currently, Indian River County has 21 separate crossing agreements with Florida East Coast Railway. Though not identical, each includes language which states Indian River County is responsible for some or all of the costs associated with Florida East Coast Railway constructing and maintaining legally-required or even discretionary crossing improvements.

19. Only one of the 21 operative crossing agreements was entered at a time Florida East Coast Railway provided significant passenger rail service, being the Highlands Avenue agreement in 1958. Five (5) more were entered during the three-year period Florida East Coast Railway was forced to provide once-per-day passenger rail service from July, 1965, to July, 1968. The remaining 16 agreements were entered into after passenger rail service was discontinued altogether in 1968.

The Current Dispute

20. Forty-four (44) years after passenger rail service was discontinued on Florida East Coast Railway's tracks altogether, it was announced in 2012 that a separate entity, now known as Brightline, would use Florida East Coast Railway's railroad corridor to operate a higher-speed passenger rail service between Miami and Orlando.

21. The use contemplated by Brightline as planned will ultimately consist of 32 trains running through Indian River County at speeds of up to 110 mph from one end to the other. Additions or changes to each of the crossings to safely accommodate this dramatic increase in train speed will need to be made in accordance with recommendations and requirements of the Federal Railway Administration ("FRA") and the Florida Department of Transportation ("FDOT"). All of

the additional safety improvements at the railroad crossings will be required because Brightline's higher-speed passenger rail project requires the Florida East Coast Railway corridor to upgrade from a Class 4 track permitting passenger rail at speeds up to 80 mph to a Class 6 track permitting speeds of up to 110 mph.

22. At this point, it is uncertain whether Brightline or Florida East Coast Railway will actually be performing the work of adding to or changing the crossings to accommodate the higher-speed passenger rail. What is clearer, however, is that both Brightline and Florida East Coast Railway have taken the position that the costs incurred by or on behalf of Brightline to construct and maintain crossing improvements required by the higher-speed passenger rail will be shifted to Indian River County in accordance with the terms of the 21 crossing agreements.

23. In April, 2018 testimony before the United States House of Representatives, for example, the President and COO of Brightline stated that "we" have long-standing agreements with local governments in place by which these construction and maintenance costs would be reimbursed in exchange for placing roads across "our railroad," as follows:

***Our** right of way predates . . . the communities through which **we** travel. Correspondingly, there are decades-old agreements between each municipality up and down the corridor, as each community asked if they could put a road across **our** railroad.*

Testimony of Patrick Goddard, President and COO of [Brightline] before the U.S. House Oversight and Government Reform Committee, Subcommittee on Government Operations, April 19, 2018. (Emphasis added).

24. Similarly, in February of 2017, Florida East Coast Railway testified before the Florida House of Representatives to the effect that the incremental increases in maintenance costs due to Brightline's higher-speed rail will be passed through to local governments under their respective crossing agreements because "the Railroad was here first."

25. Indian River County takes the position that to the extent Brightline incurs construction or maintenance costs in upgrading crossings to accommodate its higher-speed rail, it has no right to pass them through to Indian River County because Brightline, a separately owned company, is not a party to any of the crossing agreements with Florida East Coast Railway, and therefore has no rights thereunder as a third party beneficiary or otherwise.

26. Indian River County also takes the position that to the extent Florida East Coast Railway incurs construction or maintenance costs in upgrading crossings to accommodate Brightline's higher-speed rail, it has no right to pass them through to Indian River County because to allow it would violate the County's reasonable commercial expectations and Florida East Coast Railway's implied contractual duties of reasonableness, good faith and fair dealing.

27. The second phase of Brightline's higher-speed rail is expected to begin service in 2022. Construction of the improvements necessary to accommodate the system is imminent in Indian River County. Given the foregoing, there is a bona fide, actual, present and practical need for the declaration by this Court, based upon a present, ascertained or ascertainable state of facts, that neither Brightline nor Florida East Coast Railway has the right under the crossing agreements to pass through to Indian River County any part of the construction and maintenance costs made necessary by Brightline's higher-speed rail, let alone all of those costs.

28. All parties interested in the subject matter are before the court, and the relief sought herein is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity.

29. All conditions precedent to this action have been performed, waived or excused.

Count 1 – Declaratory Relief as to Brightline

30. Reallege Paragraphs 1 through 29.

31. As an entity owned wholly separately from Florida East Coast Railway, Brightline is no more a party to the crossing agreements than Amtrak or Tri-Rail would be, and like those entities has no legal rights under them.

32. None of the crossing agreements express any intent by Indian River County or Florida East Coast Railway to benefit Brightline in any way, let alone a clear or manifest intent by both parties to provide a direct and substantial benefit to Brightline as required by Florida law before Brightline may enjoy any third party beneficiary status under the agreements. Indeed, when the crossing agreements were executed, Brightline did not even exist.

33. Tellingly, it has only been by securing amendments to crossing agreements with other local and county governments that Brightline has acquired any legal status in respect of those crossing agreements or standing to enforce them in its own right. Absent such an amendment to the 21 crossing agreements with Indian River County, which has been proposed to the County but rejected, Brightline should have no rights under the crossing agreements as a party, third party beneficiary, or otherwise.

WHEREFORE Indian River County requests this Court to enter judgment declaring that Brightline has no right to a direct or indirect reimbursement by Indian River County for the construction or maintenance costs incurred by it or on its behalf for improvements at Indian River County crossings made necessary by the construction of its higher-speed rail, for supplemental relief necessary to effectuate such declaration, for the award of costs in this action, and for such other and further relief as the Court deems just and proper.

Count 2 – Declaratory Relief as to Florida East Coast Railway

34. Reallege Paragraphs 1 through 29.

35. A covenant of good faith and fair dealing is implied in Florida contracts such as the crossing agreements. Even where a contracting party has a right it is entitled to exercise in its “sole discretion,” this implied duty of good faith acts to protect the contracting parties’ reasonable commercial expectations. If no reasonable party in the position of the party wielding discretionary power would exercise it in the way the contracting party has, there is likely a violation of this covenant.

36. With respect to the reasonable commercial expectations of Indian River County, at the time the first of the crossing agreements at issue was entered in December, 1965, Florida East Coast Railway had only just recommenced passenger service after a five-year hiatus. Even that service was implemented by order of the Florida Supreme Court, and consisted of only one (1) train per day (except Sunday) running between Jacksonville and Miami. Passenger rail service was discontinued altogether on July 31, 1968, and for the next 40-plus years Florida East Coast Railway used its tracks in Indian River County strictly for freight rail purposes.

37. The number of freight trains passing through Indian River County varies from day to day, but the maximum permitted speed of the freight trains is 60 mph because Florida East Coast Railway’s corridor is a Class 4 track. According to the Final Environmental Impact Statement issued by the FRA in 2015, the average speed of Florida East Coast Railway’s freight trains is actually far lower, only 28.5 mph. (Table 4.1.2-4; page 4-15).

38. With the advent of Brightline, 32 additional trains each day, traveling at up to 110 mph, will burden every crossing in Indian River County. Substantial improvements, including safety improvements at the railroad crossings which are recommended or required by FRA and/or FDOT, will need to be installed solely as a result of Brightline’s higher-speed passenger service.

39. Given the initial discontinuance of passenger rail service in 1963, and Florida East Coast Railway's steadfast opposition to reinstating it, fighting it all the way to the Florida Supreme Court and then permanently discontinuing it in 1968 for the next 44 years, Indian River County's reasonable commercial expectations in entering the crossing agreements could not have included the obligation to reimburse Florida East Coast Railway, or any other entity, for expenses due to passenger rail service of any kind, let alone higher-speed rail service being provided by a separately owned company.

40. Crossing improvements due to higher-speed rail are not improvements for the benefit of Florida East Coast Railway, a subsidiary of Grupo Mexico. They are for the benefit of Brightline, a subsidiary of the Japanese hedge fund, SoftBank Group. Even if the construction and maintenance costs are "incurred" in some form or fashion by Florida East Coast Railway, no reasonable contracting party in the position of Florida East Coast Railway would construct or maintain improvements made necessary by the operation of a higher-speed passenger rail line, because it has no such rail line. As such, any "discretion" it exercises in constructing or maintaining improvements to crossings in Indian River County that are associated with higher-speed rail is in truth not its "discretion," but that of Brightline, which is a complete stranger to the crossing agreements in this case.

WHEREFORE Indian River County requests this Court to enter judgment declaring that Florida East Coast Railway has no right to reimbursement from Indian River County for the construction or maintenance costs incurred by it or on its behalf for improvements at Indian River County crossings made necessary by the construction of Brightline's higher-speed rail, for all supplemental relief necessary to effectuate such declaration, for the award of costs in this action, and for such other and further relief as the Court deems just and proper.

Dated this 16 day of January, 2019.

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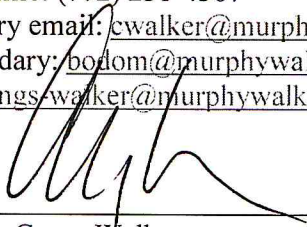
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EXHIBIT INDEX - INDIAN RIVER COUNTY RAILROAD CROSSING AGREEMENTS

1.	Highland Drive/SW 20th Place (MP 232 + 4523')	01/17/1958
2.	77th Street/Hobart Road (MP 220 + 3689')	12/08/1965
3.	1st Street SW (MP 230 + 731')	12/08/1965
4.	45th Street/Gifford (MP 224 + 4945')	12/08/1965
5.	49th Street/Gifford (MP 224 + 2199')	12/08/1965
6.	43rd Street/Gifford	10/05/1966
7.	99th Street/Vickers Road (MP 217 + 3226')	11/26/1975
8.	8th Street (MP 229 + 983')	07/18/1984
9.	12th Street (MP 228 + 3483')	05/08/1985
10.	Oslo Road (MP 231 + 1640')	04/07/1992
11.	41st Street/Gifford (MP 225 + 2418')	06/07/1994
12.	County Road 512 – Eastbound (MP 215 + 315')	12/19/1995
13.	County Road 512 – Westbound (MP 214 + 4375')	12/19/1995
14.	Roseland Road (MP 212 + 2991')	05/23/2000
15.	4th Street (MP 229 + 3982')	06/24/2003
16.	Old Dixie Highway (MP 216 + 20')	07/06/2004
17.	85th Street/ W Wabasso Road (MP 219 + 3059')	03/02/2005
18.	65th Street/South Winter Beach Road (MP 222 + 1704')	03/29/2005
19.	69th Street/North Winter Beach Road (MP 221 + 4212')	03/29/2005
20.	16th Street (MP 228 + 118')	02/22/2006
21.	53rd Street/Wabasso Road (MP 223 + 4730')	10/09/2008