

THE BOND BUYER

Federal appeals court appears to support validity of PABs for Virgin Trains USA

By

Brian Tumulty

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A three-judge federal appeals panel appeared ready Tuesday to dismiss a lawsuit challenging the use of tax-exempt private activity bonds for highway grade safety improvements in connection with passenger rail service of up to 110 mph between Miami and Orlando.

Indian River County is appealing a Dec. 24 summary judgment by U.S. District Judge Christopher Cooper dismissing its lawsuit against the U.S. Department of Transportation and Virgin Trains USA, also known as Brightline and All Aboard Florida (AAF).



Merrick Garland, chief judge of the U.S. Court of Appeals for the District of Columbia, asked the attorney for All Aboard Florida for a letter by the end of the day Tuesday listing every mention of higher speed trains in its application. **Bloomberg News**

Indian River County has been joined in the appeal by other plaintiffs that include Citizens Against Rail Expansion in Florida and Indian River County Emergency Services District.

Chief Justice Merrick Garland boiled down the arguments between All Aboard Florida and local groups opposed to the rail service as a question whether the Environmental Impact Statement took into account the speed of the proposed passenger service.

The judges appeared to reject the separate argument that passenger rail projects constitute an ineligible use of the PABs which are meant for highway use.

Judge Sri Srinivasan said that to make the project successful, it would include improvements at grade crossings.

“Are you seeking redress or simply to kill it?” Judge Harry Edwards asked attorney Philip Karmel of Bryon Cave, who is representing Indian River County and the other plaintiffs.

Edwards said he wanted to know if the plaintiffs were arguing that the conditions for awarding PABs were not properly met.

“This is not a surface transportation project,” Karmel said, adding that the parties are seeking a ruling in which the bond money “would be essentially refunded to investors.”

Edwards responded, “You are arguing under these circumstances there can be no private activity bonds.”

But there are some 350 highway projects along the rail line, said Joan Pepin, the Justice Department attorney who represented the U.S. Transportation Department.

“The grade crossings are a necessary part of this project,” she said.

The judges seemed more interested the separate issue of whether the speed of the passenger trains was properly factored into the approval of the project.

Lawyers representing All Aboard Florida and the U.S. Transportation Department said it was a consideration in the Federal Railroad Administration’s inspections of grade crossings.

Karmel, the plaintiffs attorney, said that wasn’t done until 2014 and there’s no evidence speed played a role in the approvals before then.

“They say it’s not there,” the chief judge told Eugene Stearns, the attorney for All Aboard Florida. “You argue it’s everywhere.”

The U.S. Department of Transportation has authorized three tranches of PABs for the project: \$600 million issued in 2017; \$1.15 billion issued in April which included a redemption of the 2017 PABs and \$950 million issued in June.

The USDOT authorizations are part of a larger \$15 billion allocation by Congress under an amendment to Section 142 of the Internal Revenue Code to add highway and freight transfer facilities to the types of privately developed and operated projects for which PABs may be issued. Approximately \$11.99 billion of the PABs were issued through July and another \$895 million have been allocated but not yet issued.

Garland requested a letter by the end of the day Tuesday from Stearns on behalf of All Aboard Florida documenting all mention of higher speed trains in the application requesting the PABs authorization from the U.S. Department of Transportation.



Eugene Stearns represented All Aboard Florida in oral arguments before the U.S. Court of Appeals for the District of Columbia, telling the three judge panel that safety at grade level is an important part of the passenger rail project. **Brian Tumulty, The Bond Buyer**

Garland's request appeared to be an effort to quickly resolve a central issue in the case.

Stearns told The Bond Buyer after the hearing the letter requested by Garland would be submitted by the end of the day without difficulty.

He expressed optimism the case would be dismissed.

"I feel we have very bright judges who are right on the issue and I didn't hear anything today that would cause me to change my mind," Stearns said.