

# THE BOND BUYER

## County in Florida will terminate federal lawsuit against Virgin Trains USA

By

**Shelly Sigo**

Published

January 15 2020, 10:41am EST

After a nearly five-year run through the federal courts, a Florida county has decided to end its lawsuit challenging the U.S. Department of Transportation's award of private activity bonds to Virgin Trains USA, the country's only privately owned passenger rail system.

The Indian River County Commission voted 4-1 Tuesday not to pursue an en banc hearing before all 17 justices of the United States Court of Appeals for the District of Columbia.



Indian River County said Tuesday it won't continue to pursue a federal lawsuit against Virgin Trains, also known as Brightline. **Rich Saskal**

If the county had sought a new hearing it would have been an attempt to convince the court to overturn a Dec. 20 ruling by a three-judge panel that found the USDOT had properly determined that Virgin Trains, also known as Brightline and All Aboard Florida, was qualified to issue the tax exempt PABs.

“I believe that we have presented very good arguments and points” to the court, Indian River County Attorney Dylan Reingold told commissioners. “I think we were right and I’m disappointed in the outcome.”

Reingold said he believed the county had a slim change of prevailing further, either by getting a hearing before all appellate justices or getting a writ of certiorari from the U.S. Supreme Court to determine if the federal agencies involved in approving the PABs and environmental permits overstepped their authority.

Philip Karmel, a partner at Bryan Cave Leighton Paisner LLP who served as outside counsel, also recommended that the county not pursue the case further, Reingold said.

“This is not a white flag,” he said. “I believe at this point that our focus should be on safety and should be on costs.”

A Virgin Trains official didn’t immediately respond to a request for comment about Indian River County’s decision.

Reingold said the county should continue to focus on litigating the lawsuit filed in January 2019 in Duval County Circuit Court to determine who is liable for funding railroad crossing improvements needed for the private passenger train, and to support legislation that’s been filed in Tallahassee that would require new safety improvements. The Legislature’s 60-day session started Tuesday.

Since federal litigation over the project began, the USDOT has authorized three tranches of tax-exempt PABs. In 2017, the Florida Development Finance Corp. as the conduit issuer sold the first \$600 million on behalf of the train company to finance portions of its first phase from Miami to West Palm Beach.

Last year, FDFC issued \$1.75 billion of PABs in April to partly finance the second phase of its route from West Palm Beach to Orlando. The deal included refunding the \$600 million sold in 2017.

In June 2019, another \$950 million of bonds with a one-year maturity were issued. Virgin Trains should be back in the market this year to restructure the debt with long-term financing.

Officials with Virgin Trains have said the cost to build the West Palm Beach-to-Orlando segment is estimated at \$4 billion and service is expected to begin in 2022.

During Tuesday's meeting, County Commissioner Bob Solari — a stalwart proponent of fighting the passenger train over safety issues he believes Virgin Trains hasn't addressed — said he couldn't support moving ahead with the federal lawsuit given what the county's attorneys recommended.

"There are so many areas that we can fight [and] should fight," he said. "I'm not sure...this is one of them."

Those areas include the lawsuit Indian River County filed last year in Duval County. Judge Katie Dearing is being asked to decide if the passenger train can benefit from the county's 31 at-grade highway crossing agreements with Florida East Coast Railway. FECR, owned by Grupo Mexico, uses the tracks to transport freight.

Virgin Trains is owned by Florida East Coast Industries. FECI is owned by Fortress Investment Group LLC, which was sold to Japan's SoftBank Group Corp. in December 2017.

At issue in the county's complaint is who will pay for "substantial" safety improvements and upgrades to the tracks to support 32 daily passenger trains that will run at speeds up to 110 mph through Indian River County.

The county said it hasn't agreed to make any changes in its crossing agreements with FECR that would allow Virgin Trains/Brightline to use the tracks. Both Brightline and FECR are named in the suit.

"Pursuant to this board's direction the county attorney's office and outside counsel have filed a suit in state court to not allow Virgin Trains to piggyback off of our contracts that we have with Florida East Coast Railway and not allow them to pass their costs on to Indian River County and Indian River County taxpayers," Reingold said Tuesday. "I think that's a very important fight that we need to continue and we will continue in the next year."

The county will also continue to support bills filed by state Sen. Debbie Mayfield, a Republican whose district includes Indian River County, and Rep. Tyler Sirois, R-Merritt Island.

The legislation would enact the "Florida High-Speed Passenger Rail Safety Act" and is designed to close gaps between federal and state regulations governing higher-speed rail, by clarifying the Florida Department of Transportation's role in

overseeing passenger rail maintenance, safety, revitalization, and expansion issues.

Some people felt at Tuesday's commission meeting that Mayfield and Sirois may have an upward battle passing the legislation, known as Senate Bill 676 and House Bill 465. Neither measure has been scheduled for a committee hearing.



Florida's privately owned passenger train owners inked a deal with British billionaire Sir Richard Branson to rename the company Virgin Trains USA.

**Bloomberg News**

Indian River County, which has about 150,000 residents, has spent \$3.5 million on its federal litigation, which first started in 2015 in the U.S. District Court for the District of Columbia when Indian River and Martin County filed separate lawsuits contending the USDOT's bond allocation violated the National Environmental Policy Act.

Initially, U.S. District Judge Christopher Cooper agreed with that position, causing USDOT to withdraw a \$1.75 billion tax-exempt PAB allocation for what was then known as All Aboard Florida. Without a controversy to challenge, Cooper dismissed the suits.

The train company, which was eventually renamed Brightline, then received a smaller \$600 million PAB allocation to fund its project from Miami to West Palm Beach, a segment that wasn't controversial.

In 2017, Brightline received \$1.15 billion of PABs to finance its project from West Palm Beach to Orlando, a segment where the trains are to run through Indian River and Martin counties without stopping.

The new allocation led Indian River and Martin counties in February 2018 to file another federal lawsuit challenging the bonds. In November, Martin County [negotiated a settlement](#) and pulled out of the litigation, saying the deal it brokered with the train owners provided significant concessions, including safety and maritime benefits.

In November 2018, the train company also inked a branding deal with British billionaire Sir Richard Branson to [rename the company](#) Virgin Trains USA. Branson took a small stake in the company. Today, the trains still bear the Brightline logo, although rebranding is expected to be completed this year.

In December 2018, Judge Cooper [granted motions](#) for summary judgment sought by the USDOT and Virgin Trains/Brightline and dismissed Indian River's suit.

In February 2019, the Indian River County Commission voted to appeal Cooper's ruling, which is what led to December's unanimous three-judge ruling in favor of USDOT and Virgin Trains.

The county, the appellate court ruling said, failed to prove that Virgin Trains improperly benefited from federal funds allocated under Title 23, the federal code defining the projects eligible for credit assistance that USDOT used to determine that the passenger train project was qualified for PAB financing.

"We hold that DOT permissibly and reasonably determined that the project qualifies for tax-exempt PAB financing," the court's decision said. It also concluded that the environmental studies and permits for the project adhered to the requirements of NEPA.