

34212
EB

SERVICE DATE – FEBRUARY 12, 2007

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34421

HOLRAIL LLC—CONSTRUCTION AND OPERATION EXEMPTION—
IN ORANGEBURG AND DORCHESTER COUNTIES, SC

STB Finance Docket No. 34421 (Sub-No. 1)

HOLRAIL LLC—
PETITION FOR CROSSING AUTHORITY UNDER 49 U.S.C. 10901(d)

Decided: February 9, 2007

In this decision, we deny the petition filed by HolRail, LLC (HolRail) for authority to cross a CSX Transportation, Inc. (CSXT) right-of-way pursuant to 49 U.S.C. 10901(d), because we conclude that HolRail's request does not come within the intended scope and purpose of that provision. Accordingly, we also deny HolRail's request for authority to construct and operate its proposed preferred route, as that route could not be built without the crossing authority.

BACKGROUND

HolRail filed a petition on November 13, 2003, seeking authority (through an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10901) to construct and operate approximately 2 miles of rail line in Orangeburg and Dorchester Counties, SC.

According to HolRail, its parent company, Holcim (US) Inc. (Holcim), manufactures a variety of cement and masonry products at its cement production facility at Holly Hill, SC. CSXT, currently the only rail carrier with direct access to the Holly Hill facility, provides Holcim with rail service for both its outgoing products and its inbound raw materials. HolRail claims that CSXT's service has been unreliable and its rates excessive, thereby negatively affecting Holcim's business. In addition, HolRail states that CSXT is not equipped to meet Holcim's future shipping needs, which will soon increase due to the Holly Hill facility's anticipated increased production. HolRail thus proposes to construct and operate an approximately 2-mile rail line from Holly Hill to connect with Norfolk Southern Railway Company (NSR).

In its petition for exemption, HolRail has proposed two potential routes for the build-out: a "preferred" route and an "alternate" route. The preferred route would run parallel to CSXT's track and would be constructed at least partially within the CSXT right-of-way for most of its length. The route would connect with NSR's line on land owned by a neighboring cement

factory. The alternate route would also run parallel to CSXT's line, but it would be constructed outside CSXT's right-of-way, on property already owned by Holcim.

CSXT filed a motion to dismiss HolRail's petition, arguing that HolRail's proposal was insufficiently developed to warrant Board consideration, and that the preferred route was necessarily predicated on an impermissible use of the crossing statute and would physically interfere with operation of the CSXT line. In addition, CSXT filed a motion to compel discovery, requesting that HolRail be required to provide additional details of its construction proposal. HolRail also filed two motions to compel discovery, seeking information from CSXT and access to CSXT's line to enable HolRail to better develop its proposal and related construction plans.

By decision served on February 11, 2004, the Board instituted a proceeding to consider the issues raised. In a subsequent decision served on October 20, 2004 (October 2004 Decision), the Board ruled on the various motions. The Board denied CSXT's motion to dismiss as premature, because the Board did not yet have a complete record on the details of HolRail's construction proposal and crossing petition. The Board granted HolRail's two motions to compel and granted in part CSXT's motion to compel, so that the record could be fully developed and the Board could properly assess the parties' arguments.

With respect to CSXT's motion to compel, the Board rejected HolRail's claim that the information sought by CSXT would only be relevant once HolRail filed its crossing petition. The Board stated that, because HolRail's construction petition was "inextricably bound up with the crossing issue . . . [the Board would] not approach this case in a piecemeal fashion, and [would] not rule on the exemption petition until all components of HolRail's proposal, including the anticipated crossing petition, are before [the Board]." October 2004 Decision at 3. Accordingly, the Board granted CSXT's motion to compel HolRail to provide information related to HolRail's construction and budgetary plans and carload projections for rail service over its proposed line.

HolRail filed its crossing petition, along with supplemental information concerning its construction plans, on September 9, 2005. After receiving two extensions, CSXT filed its reply to the crossing petition on February 24, 2006.

HolRail has now presented a more detailed plan for how it would construct its preferred route. The preferred route would start at an NSR connection at a neighboring cement factory, proceed northeasterly across that factory's property, proceed along the CSXT right-of-way, and then move onto Holcim's own property. Once on Holcim's land, the line would fan out into four yard tracks that Holcim would use to store and interchange its rail cars. The yard tracks would continue for about ¼ mile before converging back into a single track. The route would then veer back onto CSXT's right-of-way, where it would proceed parallel to CSXT's line, with a spacing of 30 feet between the track centers. The line would continue in this parallel formation for approximately 1.7 miles, with the line crossing over 3 new bridge structures that would be roughly parallel to CSXT's existing bridge structures. At the end of this distance, the line would

cross back onto Holcim's property and terminate at a tie-in with Holcim's existing industrial track at the Holly Hill facility.¹

PRELIMINARY ISSUES

Petition to Intervene as Amicus Curiae. On September 29, 2005, Ameren Energy Fuels and Services, Arkansas Electric Cooperative Corporation, and Dominion Resources (supporting shippers) filed a motion for leave to file a joint statement as amici curiae. The supporting shippers seek to reinforce points made by HolRail in its crossing petition.

We will accept the joint statement, as it does not inappropriately expand the issues or prejudice either party to this proceeding. Moreover, because the issue before us here involves a matter of first impression regarding statutory interpretation and our determination could affect other shippers, it is appropriate for us to consider the views of the supporting shippers in reaching our decision. See City of Creede, CO—Petition for Declaratory Order, STB Finance Docket No. 34376, slip op. at 2-3 (STB served May 3, 2005) (City of Creede).

Supplemental Pleadings. On March 10, 2006, HolRail filed a motion for leave to file a rebuttal to CSXT's reply to the crossing petition in order to respond to what it views as a misapplication of the law and errors of fact in CSXT's reply. The supporting shippers also filed a letter on March 1, 2006, claiming that CSXT had mischaracterized a quote from their joint statement in its reply.

On March 30, 2006, CSXT filed a motion to strike HolRail's rebuttal and the supporting shippers' March 1, 2006 letter, or in the alternative, for leave to submit a response to those filings. CSXT argues that each of those filings constitutes an impermissible reply to a reply, that HolRail has not shown good cause for its rebuttal, and that the claims made by HolRail on rebuttal lack merit. CSXT denies that it mischaracterized the supporting shippers' joint statement.

On April 4, 2006, HolRail filed a motion to strike, or in the alternative, for leave to reply to CSXT's motion to strike. The supporting shippers also filed a letter urging the Board to deny CSXT's motion to strike.

We will accept HolRail's rebuttal, which does not present new arguments or evidence, but merely seeks to refute assertions made by CSXT in its reply. Although a reply to a reply is generally prohibited by 49 CFR 1104.13(c), the Board's rules are construed liberally to ensure a

¹ See HolRail's Petition for Crossing Authority Under 49 U.S.C. 10901(d), Verified Statement of Davis, Exhibit D, for a more detailed description of both the preferred and alternate routes and a map of both routes.

just determination of the issues presented.² Here, because the issues raised in this proceeding are matters of first impression, we find that HolRail's reply to the reply is warranted.

To ensure that CSXT has had an opportunity to respond, we will also accept its response to HolRail's rebuttal. Accordingly, HolRail's motion to strike CSXT's alternate motion for leave to submit a response will be denied. We will also deny HolRail's alternate motion for leave to reply to CSXT's response. HolRail has been given several opportunities to present its case and to challenge CSXT's claims. Moreover, HolRail's reply to CSXT's response goes to the weight the Board should accord the response rather than to its admissibility,³ and we are capable of deciding the weight to give CSXT's claims without an additional pleading. Finally, we will accept the supporting shippers' March 1, 2006 letter and CSXT's alternate motion for leave to file a response to this letter, to assure a complete record.

HolRail's Motion for Oral Argument. On August 31, 2006, HolRail filed a motion for oral argument. HolRail argues that an oral argument would be beneficial because of the important issues of first impression that are raised in this proceeding. We find that the record is sufficient for us to reach an informed decision based on the written submissions, given our interpretation of the crossing statute (which is discussed below). Thus, the request for oral argument will be denied.

DISCUSSION AND CONCLUSIONS

With the additional pleadings that the parties have provided, the Board is now in a position to evaluate the propriety of the crossing petition upon which the preferred route in this case is predicated. This crossing request is unprecedented in character and presents a significant issue of first impression regarding the intended nature and purpose of the crossing provision of the statute.

Under 49 U.S.C. 10901(d), an incumbent carrier cannot block the construction and operation of a Board-authorized rail line "by refusing to permit the carrier to cross its property if (A) the construction does not unreasonably interfere with the operation of the crossed line; (B) the operation does not materially interfere with the operation of the crossed line; and (C) the owner of the crossing line compensates the owner of the crossed line." This provision was added to the statute, without much discussion of the extent of the Board's authority to force one

² See Railroad Ventures, Inc.—Abandonment Exemption—Between Youngstown, OH, and Darlington, PA, in Mahoning and Columbiana Counties, OH, and Beaver County, PA, STB Docket No. AB-556 (Sub-No. 2X), slip op. at 1 (STB served July 30, 2003).

³ See CSX Transportation, Inc.—Abandonment Exemption—in LaPorte, Porter, and Starke Counties, IN, STB Docket No. AB-55 (Sub-No. 643X), slip op. at 3 (STB served Apr. 30, 2004).

railroad to allow a second to cross its property, by section 221(b) of the Staggers Rail Act of 1980.⁴

After carefully reviewing the statute, the legislative history, and the pleadings, we do not believe that HolRail's proposal comes within the intended purpose and scope of section 10901(d). As the plain language of the statute makes clear, Congress' purpose was to remove an incumbent carrier's ability to obstruct or prevent the construction and operation of a new rail line by unreasonably refusing to provide the sort of reasonable accommodations that have long been common in the railroad industry and which enable the constructing carrier to intrude slightly upon the incumbent's property to connect segments of the proposed new line that would otherwise be separated, so long as there is no undue interference with the incumbent's ability to use its line and the incumbent is compensated. In our view, in enacting the crossing statute, Congress contemplated the sort of modest access that has been common in the rail industry, which consists of criss-crossing private rail networks.⁵ We do not believe that Congress envisioned or meant to mandate arrangements of the sort presented here, where the proponent of a new line seeks to use section 10901(d) as a substitute for obtaining its own right-of-way for a significant amount of the property that it would need.

Indeed, Congress never indicated that the crossing statute should be applied without limits. There is no indication that by enacting the crossing statute Congress meant to provide a means by which a new carrier could avail itself of a significant portion of an incumbent carrier's right-of-way in lieu of obtaining its own right-of-way, regardless of the difficulties it would otherwise face. Had Congress meant to provide for a new competitor to access the private property of an incumbent rail carrier to that degree, it presumably would have discussed such a significant change. There was no such discussion. Accordingly, we conclude that HolRail's

⁴ See H.R. Rep. No. 1430, 96th Cong., 2d Sess. 115-16 (1980); H.R. Rep. No. 1035, 96th Cong., 2d Sess. 66-67 (1980). The House Report (H.R. Rep. No. 1035, 96th Cong., 2d Sess. 67 (1980)) explains:

Where a rail carrier has been issued a certificate of public convenience and necessity by the Commission and where the construction or extension of that line would cross another carrier, it is unclear whether the second railroad could block the construction by refusing to let the first railroad cross its property. The prevailing opinion is that, where the Commission has issued a certificate of public convenience and necessity, another regulated rail carrier cannot block construction. However, the issue has not been clearly settled. Thus, section 304 provides that, when a railroad has been issued a certificate of public convenience and necessity no other railroad may block construction by refusing to let the first railroad cross its property, provided that the construction and operation do not materially interfere with the operation of the second railroad and the owner of the crossing line compensates the owner of the crossed line. If the railroads cannot agree on the terms of compensation, the Commission may establish the compensation.

⁵ See the legislative history cited above and H.R. Rep. No. 104-422, 104th Cong., 1st Sess. 179 (1995).

attempt to essentially take CSXT's right-of-way for its own is tantamount to a confiscation, not a "crossing" within the purview of section 10901(d).

HolRail relies on The Burlington Northern and Santa Fe Railway Co.—Petition for Declaration or Prescription of Crossing, Trackage, or Joint Use Rights, STB Finance Docket No. 33740 (STB served May 13, 2003) (Keokuk Junction), where the Board authorized a crossing proposal of The Burlington Northern and Santa Fe Railway Company, now BNSF Railway Company (BNSF), under section 10901(d), that included shared use of a ¼-mile section of line owned by Keokuk Junction Railway Company (KJRY). As HolRail notes, the Board observed that "the term 'crossing' must be viewed pragmatically to encompass different scenarios." Keokuk Junction, slip op. at 15. The Board's statement, however, was addressed to the need for flexibility on matters of crossing configuration. Id. As the Board explained (id. at 16), in that case BNSF was not seeking to use KJRY's property to attract new customers or reach new markets, but only to continue to access its own shippers on its own line after a track realignment that necessitated a change in what had been a longstanding crossing. In other words, in that case the Board acted to prevent the interruption of a continuous movement from main-line right-of-way to main-line right-of-way. Here, in contrast, the purported "crossing" would comprise essentially all of HolRail's line.

At a certain point, however, a crossing will cease to be a crossing within the meaning of the crossing statute and will instead become an issue of operational trackage rights or simply an appropriation of another carrier's right-of-way. The facts and circumstances of each case must be taken into account to determine when a proposed crossing would become so extensive a use of an incumbent's right-of-way that it is not a mere crossing within the meaning of the statute. The salient factors we have considered in making that determination in this case include: what portion of the constructing carrier's line would be located within the incumbent's right-of-way; the distance for which the constructing carrier's line would rely on the incumbent's right-of-way; and whether the proposed line unreasonably intrudes into the incumbent's right-of-way.

In this case, HolRail's preferred route cannot be deemed a permissible "crossing" within the meaning of the crossing statute. First, a significant portion of HolRail's preferred route—1.7 miles of the 2.3 miles of the proposed line, or 74% of the line—would be situated within the CSXT right-of-way. That percentage is far greater than for any other crossing that the Board has ever approved or that likely currently exists in the national rail system. Second, the 1.7-mile length of HolRail's proposed crossing would exceed the length of other crossings that the Board has approved or seen in the rail industry. Third, HolRail's proposed crossing would unreasonably intrude onto CSXT's property based on all the facts of this case. Unlike the situation in Keokuk Junction, here, HolRail's proposed crossing would essentially be its proposed line, rather than a secondary or incidental segment of its proposed line. Therefore, based on our analysis of all of the factors outlined above, we find that HolRail's proposed route cannot be considered a crossing within the meaning of section 10901(d).

HolRail asserts that its proposed crossing would advance the rail transportation policy of 49 U.S.C. 10101, a position echoed by the supporting shippers in their amicus joint statement. In addition, HolRail argues that its proposed crossing should be approved because construction of its preferred route would result in less harm to the environment than the alternate route.

Specifically, it notes that the preferred route would impact only 7 acres of land, while the alternate route would impact 27 acres.⁶ Moreover, HolRail claims that the alternate route would create an “island effect” between the CSXT line and the alternate route, negatively impacting the wildlife and hydrology of the swamp. However, none of these arguments regarding the desirability of one route over another provides a sufficient basis for an appropriation of CSXT’s property.

Because we find that HolRail’s proposal does not constitute a crossing within the meaning of section 10901(d), we need not address its claim that it has satisfied its burden under City of Lincoln—Petition for Declaratory Order, STB Finance Docket No. 34425 (STB served Aug. 11, 2004), aff’d, City of Lincoln v. STB, 414 F.3d 858 (8th Cir. 2005) (City of Lincoln), and City of Creede. We note, however, that those two cases addressed the burden on the party seeking to take property out of the national rail transportation network (to show that the entire right-of-way is not and will not be needed for rail purposes),⁷ not to reapportion its use within that network.

We shall, however, address CSXT’s argument that the crossing statute applies only to intersecting track and not to an intrusion onto an incumbent carrier’s right-of-way for a purpose other than to cross the incumbent carrier’s track. We believe that CSXT’s reading of that section is unduly narrow. As HolRail points out, the statute uses the words “line” and “property,” not “track.”⁸ The term “line” is a broader term than “track.” See Railroad Ventures, Inc. v. STB, 299 F.3d 523, 552-553 (6th Cir. 2002) (“it is evident that a rail line embraces more than just the track necessary for the provision of rail service.”). Moreover, section 10901(d) has been used to authorize a crossing over a right-of-way that did not have any track. See Kansas City S. Ry. Co.—Construction and Operation Exemption—To Exxon Corp.’s Plastics Plant Near Baton Rouge and Baker, LA, Finance Docket No. 32547 (ICC served June 12, 1995).

Because we find that HolRail’s crossing petition is an inappropriate use of the crossing statute, for the reasons discussed above, its petition for exemption authority to construct its preferred route, which depends upon that crossing authority, is rendered moot and will not be considered further. As a result, this proceeding will henceforth be limited to HolRail’s request for authority to construct the alternate route, on the assumption that HolRail wishes to pursue that alternate route. As stated in the October 2004 Decision (at 2-3), we will address the merits of that request after the Board’s Section of Environmental Analysis has completed its environmental review.

⁶ The environmental review process, which began in 2004, is ongoing.

⁷ See City of Creede, slip op. at 6 (quoting City of Lincoln).

⁸ H.R. Rep. No. 104-422, 104th Cong., 1st Sess. 179 (1995), does provide that section 10901(d) “empowers the agency to order one railroad whose tracks block the access of another railroad’s tracks to provide crossing arrangements.” But Congress did not amend the statutory language that is relevant here in 1995, and nothing in the 1995 legislative history or the 1980 legislative history cited above suggests that Congress intended the crossing provision to apply only to “track.”

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

It is ordered:

1. The motion filed by the supporting shippers for leave to file a joint statement as amici curiae is granted.
2. HolRail's motion for leave to file a rebuttal to CSXT's reply is granted.
3. The supporting shippers' March 1, 2006 letter in reply to CSXT's reply is accepted for filing.
4. CSXT's motion to strike HolRail's rebuttal and the supporting shippers' letter is denied. CSXT's alternative motion for leave to file a response to HolRail's rebuttal and the supporting shippers' March 1, 2006 letter is granted.
5. HolRail's motion to strike, or in the alternative, reply to CSXT's response is denied.
6. HolRail's motion for oral argument is denied.
7. HolRail's petition for crossing authority is denied, and the proceeding in STB Finance Docket No. 34421 (Sub-No. 1) is discontinued.
8. The portion of HolRail's petition for exemption authority that pertains to its proposed preferred route is denied as moot.
9. This decision is effective March 14, 2007.

By the Board, Chairman Nottingham, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary