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December 23, 2003

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The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K St., N.W.
Washington, D.C. 20423

RE: STB Finance Docket No. 34421, *HolRail LLC—Petition for Exemption from 49 U.S.C. § 10901 to Construct and Operate a Rail Line in Orangeburg and Dorchester Counties, South Carolina*

Dear Secretary Williams:

Enclosed please find the original and ten (10) copies of HolRail LLC's Reply to the Motion to Dismiss of CSX Transportation, Inc., for filing in the above referenced docket.

An extra copy of this filing is enclosed for stamping and return to our offices.

Should you have any questions regarding the foregoing, please do not hesitate to contact the undersigned.

Sincerely,

Michael H. Higgins

Jeffrey O. Moreno
Michael H. Higgins
David E. Benz
Counsel for HolRail LLC

BEFORE THE
SURFACE TRANSPORTATION BOARD

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STB FINANCE DOCKET NO. 34421



HOLRAIL LLC—
PETITION FOR EXEMPTION FROM 49 U.S.C. § 10901
TO CONSTRUCT AND OPERATE A RAIL LINE
IN ORANGEBURG AND DORCHESTER COUNTIES, SOUTH CAROLINA

HOLRAIL LLC'S REPLY TO THE MOTION TO DISMISS OF CSX
TRANSPORTATION, INC.

I. INTRODUCTION AND SUMMARY

CSX Transportation Inc.'s ("CSX") Motion to Dismiss ("Motion") HolRail LLC's ("HolRail") Petition for Exemption ("Petition") lacks merit. CSX's sole ground for dismissal—alleged insufficient information to determine if HolRail's proposed construction might physically interfere with or damage CSX's operations—is simply irrelevant to the Board's consideration of HolRail's Petition under 49 U.S.C. § 10502(a). STB precedent is clear that such operational issues should be raised, if, and when, HolRail files a crossing petition under 49 U.S.C. § 10901(d). Thus, CSX's argument for dismissal wrongly faults HolRail for its proper adherence to the statutorily defined sequence applicable to rail construction proceedings.

CSX's Motion alleges speculative harms that cannot occur upon STB approval of HolRail's Petition, if ever. Since the alleged injuries could result only from actual construction within CSX's right-of-way, such injuries cannot possibly arise unless and until HolRail obtains crossing authority from the Board, pursuant to a separate crossing proceeding conducted under 49 U.S.C. § 10901(d). The scope and purpose of that proceeding is to insure that construction

and operation of HolRail's preferred route will not significantly interfere with CSX's operations. Thus, CSX will have ample opportunity to raise its alleged concerns in that proceeding, which otherwise are irrelevant here.

Furthermore, CSX's entire Motion is premised on speculation and conjecture. CSX fails to cite any precedent or relevant statute in support of its legal position and provides no testimony or evidence to substantiate its predictions of dire consequences. Rather, CSX's Motion demonstrates the lengths to which CSX will go to stifle effective competition and to preserve its monopoly over Holcim (US) Inc.'s Holly Hill facility.

By contrast, HolRail's Petition addresses—and fully satisfies—the applicable statutory exemption standards at 49 U.S.C. § 10502(a). Thus, CSX's Motion should be denied and HolRail's Petition should be granted.

II. ARGUMENT

A. **CSX's Operational Concerns are Irrelevant to the Board's Consideration of HolRail's Petition under 49 U.S.C. § 10502(a).**

CSX inappropriately seeks dismissal of HolRail's Petition on the alleged grounds that construction of HolRail's preferred route might physically interfere with and damage CSX's rail operations. See Motion at 3, 4, and 6. However, operational considerations, like those raised by CSX, are irrelevant to the Board's determination under 49 U.S.C. § 10502(a). The Board expressly addressed this issue in STB Finance Docket Nos. 34060 and 34060 (Sub-No. 1), Midwest Generation LLC—Exemption from 49 U.S.C. 10901—For Construction in Will County, IL, etc., 2002 STB Lexis 178 (Served March 21, 2002) ("Midwest Generation"). In that decision, the Board rejected Illinois Central's ("IC") attempt to dismiss Midwest Generation's petition for exemption based on potential adverse effects upon IC's rail operations:

[T]his issue does not concern whether Midwest should be authorized to build a line from its facility to reach the lines of [Union Pacific Railroad]...but rather, whether that line may interfere with the operation of the crossed line—an issue for consideration under section 10901(d).

Id. at *19. The Board stated that it would consider operational issues in the crossing sub-docket, after its conditional grant of construction authority. Id. Similarly, CSX's proffered operational concerns should be raised in a future crossing proceeding. Such concerns are not relevant to this exemption proceeding and, therefore, do not justify dismissal of HolRail's Petition.

Additionally, a recent D.C. Circuit decision holds that construction authority must precede a grant of crossing authority. In Keokuk Junction Railway Co. v. STB, 292 F.3d 884, 886 (D.C. Cir. 2002), the D.C. Circuit stated that the former was a "condition precedent" for the latter. By raising operational considerations that are encompassed within 49 U.S.C. § 10901(d)(1)(A) and (B), CSX puts the cart before the horse and wrongly faults HolRail for not presenting its crossing case in its Petition for Exemption. See Midwest Generation, at n. 9.

By alleging that HolRail's construction could "physically damage or destroy the rail line of a competitor," CSX argues implicitly that HolRail's proposed project contravenes the Rail Transportation Policy ("RTP").¹ See Motion at 4. CSX, however, ignores the distinction between a construction exemption and a grant of crossing authority. Even after a construction exemption is granted, HolRail still must obtain crossing authority from the Board, under 49 U.S.C. § 10901(d), before it may construct its preferred route across CSX's right-of-way. Thus, CSX mischaracterizes HolRail's construction project as contrary to the RTP based on speculative harms that simply cannot occur as a consequence of the Board granting the Petition. In fact,

¹ CSX makes this argument expressly in its "Response" to HolRail's Petition for Exemption, which CSX filed contemporaneously with its Motion, on December 3, 2003. In a separate filing, HolRail has sought leave to reply to a discrete set of factual inaccuracies in CSX's Response.

HolRail's competition-enhancing build-out advances RTP sections 1, 2, 4, 7, 9, 12, and 15, as stated in the Petition.

The subsequent crossing proceeding, in turn, will preclude the speculative injuries that CSX alleges. The statute requires the Board to consider the impact of HolRail's proposed construction and operation upon the CSX line in order to ensure that HolRail's construction "does not unreasonably interfere with the operation of the crossed line" and that HolRail's operation "does not materially interfere with the operation of the crossed line." See 49 U.S.C. § 10901(d)(1)(A) and (B). In this proceeding, HolRail will present relevant evidence in a crossing petition and CSX will have an opportunity to respond. The crossing proceeding, therefore, is the appropriate place for CSX to raise its operational concerns.

B. CSX's Motion Improperly Refers to Informational Requirements that are Only Applicable in Non-Exempt Construction Applications Under 49 U.S.C. § 10901.

CSX wrongly urges dismissal of HolRail's Petition on the mistaken grounds that the Petition lacks certain allegedly necessary information. See Motion at 5. This argument, however, is a red herring because CSX improperly refers to the informational requirements at 49 C.F.R Part 1150, Subpart A, which pertain to non-exempt construction applications under 49 U.S.C. § 10901, the very same requirements from which HolRail has petitioned for an exemption.² Application of these more stringent requirements would defeat the purpose of the exemption statute, which Congress devised as a means to liberate transactions from unnecessary regulation. See STB Finance Docket Nos. 33609 and 33610, Norfolk Southern Railway Co.—Purchase Exemption—Union Pacific Railway Co. etc., 1999 STB Lexis 650 at *10-11 (Served Nov. 10, 1999) ("Congress directed us to use this exemption authority liberally and to adopt the

² See 49 C.F.R § 1150.1(a): "This subpart governs applications under 49 U.S.C. 10901 for a certificate of public convenience and necessity authorizing the construction, acquisition or operation of railroad lines." [emphasis added.]

policy of reviewing carrier transactions after the fact . . . Accordingly we have fashioned procedures that are swift and simple....”) [citations omitted; emphasis added.] Because CSX wrongly applies inapposite regulations, there is no merit to its request for dismissal on the basis of alleged evidentiary deficiencies.

In fact, CSX appears simply to have failed to notice—or deliberately ignored—certain details that it wrongly alleges are missing from HolRail’s Petition. For example, (1) HolRail provided a map that clearly delineates its preferred and alternate routes and shows the approximate location of connections with the Norfolk Southern Railway Company (“NSR”) (See Petition at 6 and Ex. A, thereto); (2) HolRail indicated the length of the line as “approximately” two miles, which is appropriate because the exact end points have not been precisely determined (See Petition at 3); (3) HolRail stated that it does not currently have access over its neighbor’s property, but that it would pursue such access via “easement or other means” (Id. at 6);³ and (4) HolRail declared that the line will be a common carrier line, most likely operated and maintained by a third-party contractor (Id. at 7). Although CSX criticizes HolRail for not presenting additional information that is required in a non-exempt § 10901 construction application (e.g., traffic projection studies, schedule of operations, crew and rolling stock requirements, expected operating economies, financial information, and agreements with other railroads concerning operation, interchange of traffic, rate divisions, and trackage rights), CSX has not cited any precedent requiring such information in rail construction exemption petitions. Nor has CSX explained how any of this information is relevant to its concerns over physical interference with and damage to its line.

³ The implication that HolRail must own, or have access to, the property over which a new line is to be constructed prior to obtaining an exemption is absolutely wrong. See Nicholson v. Missouri Pac. R.R. Co., 366 I.C.C. 69, 71 (1982) (A railroad may not condemn property for new line construction by eminent domain until it first receives § 10901 construction authority.); Tampa Phosphate R. Co. v. Seaboard Coast Line R. Co., 418 F. 2d 387, 393 (5th Cir. 1969).

The Petition and attached map clearly describe and delineate a “preferred” route and an “alternate” route (and the reasons for each) in a level of detail that is consistent with construction exemption proceedings. Id. As such, CSX’s request to dismiss HolRail’s Petition on evidentiary grounds is unsupported.

C. Assuming, Arguendo, that CSX’s Informational Concerns are Proper, Dismissal of HolRail’s Petition is Inappropriate under the STB’s Exemption Regulations.

In addition to lacking merit, CSX’s request for outright dismissal is unwarranted because it is inconsistent with the STB’s regulations governing rail exemption proceedings. Even if CSX’s concerns over the sufficiency of HolRail’s evidence were relevant—which they are not—the proper remedy is not dismissal of the Petition. The Board’s regulations state:

If the impact of the proposed individual exemption cannot be ascertained from the information contained in the petition or accompanying submissions, or significant adverse impacts might occur if the proposed exemption were granted, the Board may, in its discretion:

- (i) Direct that additional information be filed; or
- (ii) Publish a notice in the Federal Register requesting public comments.

49 C.F.R. § 1121.4(c). Thus, assuming, arguendo, that CSX’s Motion raises a relevant issue, the proper course of action is one of the foregoing two options. CSX plainly overreaches by seeking outright dismissal.

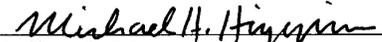
CSX’s Motion also should be denied to the extent it seeks to dismiss HolRail’s request for exemption authority for its proposed alternate route. CSX has not raised any concerns over the alternate route in its Motion and in fact has disavowed any such concern. See Response at 4 (“The proposed ‘route’ that concerns CSXT is the one that HolRail claims would ‘share’ the CSXT right-of-way with CSXT’s existing rail line....”). Because the alternate route does not

share the CSX right-of-way, there is no basis for CSX to seek dismissal of HolRail's Petition, as it applies to that route.

III. CONCLUSION

For the reasons stated above, CSX's Motion to Dismiss HolRail's Petition for Exemption is without merit. HolRail urges the Board to deny the Motion in its entirety and to grant HolRail's Petition.

Respectfully submitted,


Jeffrey O. Moreno, Esq.
Michael H. Higgins, Esq.
David E. Benz, Esq.
THOMPSON HINE LLP
1920 N Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 331-8800

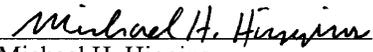
Counsel for HolRail LLC

December 23, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of December, 2003, I have served a copy of the foregoing HolRail LLC's Reply to the Motion to Dismiss of CSX Transportation, Inc., by hand delivery on the person listed below:

Louis E. Gitomer
BALL JANIK LLP
1455 F Street, N.W.
Suite 225
Washington, D.C. 20005


Michael H. Higgins