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March 10, 2006

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MAR 10 2006

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0001

Part of
Public Record



RE: Finance Docket Nos. 34421 and 34421 (Sub-No.1), *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 and HolRail LLC-Petition for Crossing Authority Under 49 U.S.C. §10901(D)*

Dear Secretary Williams:

Please find enclosed the original and ten (10) copies of HolRail LLC's Motion for Leave to File a Rebuttal to the Reply of CSX Transportation, Inc. to be filed in the above referenced proceeding. Also enclosed is a diskette with a copy of the filing in Word format.

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

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

Sincerely,

Jeffrey O. Moreno

Enclosures

cc: Louis E. Gitomer
Thomas W. Wilcox

215972



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NOS. 34421 AND 34421 (SUB-NO. 1)

**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—
PETITION FOR CROSSING AUTHORITY UNDER 49 U.S.C. § 10901(D)**

ENTERED
Office of Proceedings

MAR 10 2006

**HOLRAIL LLC'S
MOTION FOR LEAVE TO FILE A REBUTTAL TO THE REPLY OF
CSX TRANSPORTATION, INC.**

Part of
Public Record

HolRail LLC ("HolRail") hereby submits this "Motion for Leave to File a Rebuttal to the Reply of CSX Transportation, Inc." ("CSXT"). HolRail should be permitted to file a response in order to correct the record as to factual and procedural errors asserted by CSXT in its Reply. HolRail's Rebuttal is attached hereto as Attachment "A."

The Surface Transportation Board ("STB" or "Board") frequently permits a party to file a rebuttal in the interest of compiling a full and complete record. *See, Union Pacific Railroad Company – Abandonment Exemption – In Rio Grande and Mineral Counties, CO*, STB Docket No. AB-33, Sub-No. 132X (Served June 22, 2004) (accepting a rebuttal based on 49 CFR 1100.3, "to ensure a just determination of the issues presented"). *See also, San Pedro Railroad Operating Company, LLC – Abandonment Exemption – In Cochise County, AZ*, STB Docket No. AB-441, Sub. No. 4X (served July 28, 2005); *Keokuk Junction Railway Company – Feeder Line Acquisition – Line of Toledo, Peoria and Western Railway Corporation Between La Harpe and*

Hollis, IL, STB Finance Doc. No. 34335 (Served Feb. 7, 2005); *Vermont Railway, Inc. – Petition for Declaratory Order*, STB Finance Docket No. 34364 (Served Jan. 4, 2005).

I. A Rebuttal is Necessary to Ensure a Just Determination of the Issues Presented

Because of the inaccuracies and misrepresentations in CSXT's Reply, a rebuttal is necessary to ensure a just determination of the issues presented. Pursuant to 49 CFR 1100.3, the Board will construe its rules "liberally to ensure a just determination of the issues presented." *See, Union Pacific, supra*. There is no more compelling reason to permit a rebuttal under this standard than to rebut a reply that is replete with inaccuracies and misrepresentations, including:

A. CSXT Applied the Wrong Statutory Criteria:

Although HolRail has filed a Petition for Exemption, pursuant to 49 U.S.C. § 10502(a), CSXT has ignored the criteria in this statutory provision. Instead, CSXT has attempted to misdirect the Board by focusing on the statutory criteria underlying 49 U.S.C. § 10901(c). This is simply the wrong statutory criteria to be applied to a Petition for Exemption. To make matters worse, CSXT incorrectly applied the statutory criteria of Section 10901(c).

In order to ensure a just determination of the issue, HolRail should be permitted to reply to CSXT's assertions relating to Section 10901(c). Not only will HolRail be able to establish that CSXT applied the incorrect statutory criteria, but a rebuttal from HolRail will also show that CSXT's application of Section 10901(c) was incorrect and could result in an unjust determination of the issue. A complete analysis of the proper application of the statute is provided in HolRail's Rebuttal to the Reply of CSXT.

B. CSXT's Procedural Arguments are Without Truth or Merit:

CSXT accuses HolRail of reversing the process for approval of rail construction projects under Section 10901. CSXT claims that HolRail would have the Board approve the Preferred Route under Section 10901(d), rather than Sections 10901(c) or 10502(a). Furthermore, CSXT claims that a Crossing Petition may be filed only *after* the Board authorizes construction. These assertions are inaccurate. In its Rebuttal to CSXT's Reply, HolRail will clearly establish that it has followed the correct statutorily defined sequence applicable to a rail construction proceeding, which also is consistent with the Board's *October 20th Order* in this proceeding. Furthermore, HolRail will show in its Rebuttal that CSXT was incorrect when it asserted that the statute prohibits the filing of a crossing petition under 10901(d) until after the Board issues a final decision authorizing construction under 10901(c).

C. CSXT Grossly Misrepresented the Facts:

Without any foundation, CSXT wrongly contends that HolRail's plan would coerce either NS or CSXT to operate the proposed rail line. CSXT Reply at 33-34, 37. HolRail has proposed no such thing. It intends to operate the line itself. HolRail must be permitted to rebut this assertion in order to correct the record and ensure a just determination.

CSXT also contends that HolRail's environmental evidence should be disregarded as an impermissible attempt to confer crossing jurisdiction on the Board under 49 U.S.C. 10901(d). CSXT Reply at 28. But, HolRail never made such an argument. HolRail's Rebuttal will show that its environmental evidence was presented in support of its Petition for Exemption, not its Crossing Petition, and that CSXT's misrepresentation to the contrary is an attempt to marginalize this compelling evidence.

D. CSXT Ignored the Plain Language of Section 10901(d):

HolRail fully anticipated and refuted the majority of CSXT's Reply concerning the proper meaning of Section 10901(d). Thus, HolRail has not sought to respond to those arguments, which would merely entail repeating its previous evidence. However, CSXT's Reply does assert certain irrelevant arguments to divert the Board's attention. HolRail could not have reasonably anticipated the presentation of irrelevant arguments by CSXT. In order to show that CSXT's argument's are irrelevant, the Board should permit HolRail to submit a rebuttal to CSXT's Reply.

E. CSXT's Indemnification Concerns Are Procedurally Premature:

CSXT incorrectly argues that HolRail's Crossing Petition should be rejected because HolRail cannot indemnify and protect CSXT against harm that might be caused by interference to CSXT's line from operation of HolRail's Preferred Route. CSXT's argument is premature. The Board has long deferred compensation issues under Section 10901(d)(1)(C) until after it has granted crossing authority. It is necessary for HolRail to respond to CSXT's assertions about indemnification in order to clearly establish that the issue should not be considered at this stage of the proceedings. Otherwise, HolRail would be prejudiced for merely following the sequence that the Board itself has established for considering compensation issues in a crossing petition.

F. CSXT Improperly and Inaccurately Maligns HolRail's Motives:

In at least three of its arguments, CSXT attributes sinister, or ulterior, motives to HolRail. First, CSXT wrongly asserts that HolRail could construct the Alternate Route without STB authorization, and thus must be attempting to circumvent the competitive access regulations. Second, CSXT accuses HolRail of being withholding information in the environmental review process. Third, CSXT grossly misquotes the Intervenors and then attributes the misquote to HolRail. Although none of CSXT's arguments are relevant to the applicable standards by which

the Board evaluates exemption and crossing petitions, HolRail is compelled to correct the record in this proceeding, lest they prejudice the Board against HolRail's petitions.

II. CSXT Will Not Be Prejudiced by Permitting HolRail to Reply.

Permitting HolRail to submit a rebuttal to CSXT's Reply will not prejudice CSXT. HolRail's Rebuttal does not submit new evidence, but merely exposes and corrects CSXT's misrepresentations of HolRail's Supplemental Evidence and Crossing Petition and CSXT's incorrect, and in some cases patently absurd, legal analysis.¹ In fact, *not* permitting HolRail to respond to the unsupported assertions and misrepresentations made by CSXT would itself be prejudicial to HolRail.

CSXT has played a "shell game" with HolRail from the outset. In its first pleadings in this case, CSXT alleged that HolRail's construction would undermine CSXT's roadbed, causing its trains to derail in Four Hole Swamp. HolRail soundly refuted that claim in its Supplemental Evidence, as evidenced by the fact that CSXT's Reply no longer makes any reference to that previous argument. Instead, CSXT has tossed out brand new arguments and made grossly inaccurate factual assertions that HolRail could not reasonably have anticipated. These new arguments and assertions are equally baseless. Furthermore, they do not even require the submission of new evidence by HolRail to refute, just a proper analysis to expose their inaccuracies and poor logic. CSXT should not be allowed to continually invent new arguments, then attempt to suppress HolRail's right to reply, only to abandon those arguments when HolRail refutes them.

¹ See CSXT Reply at 17 (alleging competition is not in the public interest), 33 (accusing HolRail of not being forthright in the environmental process), 33-34 (alleging HolRail intends to coerce NS and CSX to operate its line); 35-36 (alleging the union may sue CSXT for the right to construct HolRail's line)

CSXT should be perfectly aware of the unfounded assertions made in its own Reply, and therefore, should have anticipated that HolRail would seek permission to respond to those assertions. In fact, CSXT's Reply does anticipate that HolRail would not let these false assertions go unchallenged. CSXT cannot be allowed to use the complexities of this case in an attempt to confuse the Board as to HolRail's evidence and argument and to raise new issues, and not expect HolRail to respond. Because HolRail's response is necessary to correct the inaccurate assertions made by CSXT, and HolRail can do so without the presentation of new evidence, there is no reason to believe that permitting HolRail to respond to CSXT's Reply would prejudice CSXT.

III. The Board Should Accept HolRail's Rebuttal Because this is a Complex Case of First Impression.

As CSXT notes in its Reply, Chairman Buttrey has indicated that this case is "anything but routine" and that HolRail "will have a heavy burden to convince" the Chairman that its petition is proper.² In addition, CSXT itself sought and obtained a six week extension of time to file its Reply (in addition to the four months that HolRail had agreed to provide CSXT) by noting the "issues of first impression and complex engineering" underlying HolRail's Petitions.³ *HolRail LLC—Construction and Operation Exemption—in Orangeburg and Dorchester Counties, SC*, STB Finance Docket No. 34421 (served Jan. 11, 2006).

These same complexities and the important issues they represent warrant acceptance of HolRail's Rebuttal. It is the very nature of this case, as one of first impressions and one where the petitioner bears a heavy burden, that justifies acceptance of HolRail's Rebuttal. There can be

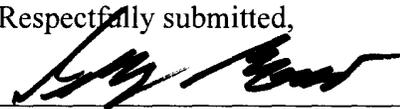
² *HolRail LLC – Construction and Operation Exemption – in Orangeburg and Dorchester Counties, SC*, STB Finance Docket No. 34421, at 5 (STB served Oct. 20, 2004 and corrected October 21, 2004).

³ Notably, CSXT presented no engineering evidence whatsoever in its Reply, despite asserting that as a basis for seeking an extension of time.

no more compelling reason for ensuring a "full and complete record" is established than that this case is one with such unique characteristics.

WHEREFORE, for each of the above reasons, and in order to ensure a just determination of the issues presented, HolRail requests that the Board accept the attached Rebuttal to CSXT's Reply.

Respectfully submitted,



Jeffrey O. Moreno
Lawrence W. Prange
THOMPSON HINE LLP
1920 N Street, N.W., Suite 800
Washington, D.C. 20036
(202) 331-8800

March 10, 2006

Attorneys for HolRail LLC

CERTIFICATE OF SERVICE

I hereby certify that this 10th day of March, 2006, I served a copy of the foregoing "Motion for Leave to File a Rebuttal to the Reply of CSX Transportation Inc.," including the attached "Rebuttal of HolRail LLC," by hand delivery upon counsel for CSX Transportation, Inc., at the following address:

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

and counsel for Intervenors, at the following address:

Thomas W. Wilcox
David E. Benz
Troutman Sanders
401 Ninth Street, N.W.
Suite 1000
Washington, D.C. 20009


Aimee L. DePew

ATTACHMENT A

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NOS. 34421 AND 34421 (Sub-No. 1)

**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—
PETITION FOR CROSSING AUTHORITY UNDER 49 U.S.C. § 10901(d)**

REBUTTAL OF HOLRAIL LLC

HolRail LLC ("HolRail") hereby submits this Rebuttal to the Reply of CSX Transportation, Inc. ("CSXT"), filed on February 24, 2006 ("CSXT Reply"). By a separate motion also filed today, HolRail requests that the Surface Transportation Board ("Board") accept this Rebuttal.

I. PROCEDURAL OVERVIEW AND SUMMARY.

This proceeding began on November 13, 2003, when HolRail filed a Petition for Exemption ("HolRail Petition"), under 49 U.S.C. § 10502(a), to construct approximately 2.3 miles of new rail over one of two alternative routes (a "Preferred" and "Alternate" Route) for the purpose of bringing competitive rail service to a cement production facility in Holly Hill, South Carolina operated by HolRail's corporate parent, Holcim (US) Inc. ("Holcim"). Because the Preferred Route would be constructed across 1.7 miles of CSXT right-of-way, HolRail also stated that it would be filing a Crossing Petition, pursuant to 49 U.S.C. § 10901(d), at a later date. CSXT moved to dismiss HolRail's petition as to the Preferred Route because CSXT contended that the Preferred Route was deficient and would cause substantial physical harm to CSXT's track.

In a decision served on October 20, 2004 ("*October 20th Decision*"), the STB denied CSXT's motion to dismiss, noting that CSXT had refused HolRail the discovery that it required in order to develop the construction and operating details of the Preferred Route. The Board granted HolRail's motions to compel discovery of CSXT and directed HolRail to supplement its Petition for Exemption with this additional information. The Board also directed HolRail to submit its crossing petition at the same time because "HolRail's entire case...is inextricably bound up with the crossing issue." *Id.* at 3.

In response to the *October 20th Decision*, HolRail submitted a consolidated filing, containing both its "Crossing Petition" and its "Supplemental Evidence in Support of Petition for Exemption" (collectively referred to as "HolRail Supp. Evid.") on September 9, 2005. CSXT replied on February 24, 2006.

CSXT's Reply contains numerous errors of substantive and procedural law and misrepresentations of facts. In the final analysis, CSXT has applied the wrong legal standards to inaccurate facts, and thus has failed to refute HolRail's evidence in support of its Petition for Exemption and its Crossing Petition.

First, CSXT applies the wrong statutory criteria for evaluating petitions for exemption. Specifically, CSXT completely ignores the applicable criteria for exemptions at 49 U.S.C. § 10502(a), and instead attempts to apply the same criteria used for non-exempt construction projects under 49 U.S.C. § 10901(c). Furthermore, in applying the non-exempt criteria, CSXT ignores the relevant precedent in an attempt to apply its overly restrictive interpretation.

CSXT's procedural arguments also are without merit. CSXT wrongly accuses HolRail of trying to obtain approval of its exemption petition under the criteria for crossing petitions at 49 U.S.C. § 10901(d). HolRail, however, has never used the Section 10901(d) criteria to support its

Petition for Exemption, but rather, has responded to CSXT's use of those criteria in opposition to HolRail's Petition. CSXT also wrongly asserts that the statute forbids the filing of a crossing petition under Section 10901(d) until after the Board issues a final decision authorizing construction of the project under Section 10901(c), or an exemption under Section 10502(a).

CSXT misrepresents HolRail's environmental evidence as an attempt to confer jurisdiction on the Board under Section 10901(d). That argument completely ignores the fact that HolRail's environmental evidence was presented in support of its Petition for Exemption under Section 10502(a), not the Crossing Petition. Because CSXT is unable to refute HolRail's evidence that the Preferred Route has substantially fewer environmental impacts than the Alternate Route, it has attempted to marginalize that evidence on specious procedural grounds.

CSXT continues to ignore the plain language of Section 10901(d) to argue that the Board lacks jurisdiction over HolRail's Crossing Petition. But the plain language prohibits CSXT from refusing HolRail permission to cross its property once the Board has authorized such construction under Section 10901(c), or granted an exemption under Section 10502(a). This is all the jurisdiction the Board requires.

CSXT's indemnification concerns are premature. Those concerns relate to compensation for the crossing under 49 U.S.C. § 10901(d)(1)(C), which the Board addresses only after it orders a crossing and the parties cannot agree on compensation after they have had an opportunity to negotiate. HolRail fully intends to compensate CSXT fairly, which would provide CSXT with many of the protections that it claims to require from any third-party who enters its property.

CSXT wrongly describes HolRail's operating plan as coercing either NS or CSXT to operate HolRail's proposed line, even though HolRail has never made any such proposal. HolRail always has declared its intent to operate the line itself, or through a third party

contractor, in interchange with either NS or CSXT, as appropriate, under the "South Carolina Coordination Project," also known as the *Carolinas Plan*.

CSXT makes a specious and illogical argument that the Brotherhood of Maintenance of Way Employees might claim a right to construct the Preferred Route under their collective bargaining agreement with CSXT. But, the HolRail project does not fall within the scope of the collective bargaining agreement text quoted by CSXT. Furthermore, it would defy logic for the union to bring a lawsuit or arbitration against CSXT when such action would have no bearing on HolRail, the entity authorized to perform the construction.

Finally, CSXT impugns HolRail's motives through various distortions and misstatements of fact. Although CSXT's claims are irrelevant to the proper legal standards, they are prejudicial to HolRail, and thus HolRail is compelled to correct the record.

II. CSXT HAS APPLIED THE WRONG STATUTORY CRITERIA.

CSXT has made two fundamental errors in its identification and application of the relevant statutory criteria for approval of HolRail's Petition for Exemption. First, CSXT has completely ignored the criteria for granting an exemption under 49 U.S.C. § 10502(a), and instead has focused *solely* upon the criteria of the underlying statute, 49 U.S.C. § 10901(c). Second, CSXT has compounded its error by incorrectly applying the criteria of Section 10901(c).

A. CSXT Ignores the Section 10502(a) Criteria for Exemption Petitions.

Although HolRail has filed a Petition for Exemption, pursuant to 49 U.S.C. § 10502(a), CSXT has ignored the criteria in this statutory provision. Section 10502(a) states that the Board *shall* exempt a transaction whenever it finds that the application in whole or in part of Title 49 U.S.C., Subtitle IV, Part A:

(1) is not necessary to carry out the transportation policy of section 10101 of this title; and

- (2) either—
 - (A) the transaction or service is of limited scope; or
 - (B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.

Other than a brief acknowledgement, on page 3 of its Reply, that HolRail filed a Petition for Exemption under Section 10502, at no point thereafter does CSXT even cite to Section 10502, much less attempt to address its criteria.

Instead, CSXT has focused solely on the criteria underlying Section 10901(c). Specifically, CSXT focuses upon the following three-part test that the Board has applied to evaluate whether a proposed construction should be approved under the "public convenience and necessity" standard in Section 10901(c): "(1) is the applicant financially fit to undertake the construction and provide service; (2) is there a public demand or need for the proposed service; and (3) will the new competition be in the public interest and not harmful to existing carriers/services?" *Dakota, Minn. & Eastern R.R. Construction into the Powder River Basin*, 3 S.T.B. 847, 863 (1998) ("DM&E"); *Tongue River R.R. Co.—Const. & Oper.—Ashland to Decker, MT*, 1 S.T.B. 809, 826 (1996 ("Tongue River")). According to CSXT, "[t]hese are the three criteria that the Board *requires* a party to meet before it will be granted authority *or* exemption to construct a rail line." CSXT Reply at 11 [emphasis added]. CSXT is wrong.

The Board does not require a party to meet this three-part test before it will grant an *exemption* to construct a rail line. That would defeat the very purpose of an exemption. In essence, CSXT would treat HolRail's Petition for Exemption *from* Section 10901 as an application for construction authority *under* Section 10901, and thus attempt to hold HolRail to the very standards from which it has sought an exemption. This is not supported by the statute or precedent.

CSXT's erroneous application of the three-part test to HolRail's Petition for Exemption is based upon an incorrect reading of *Minnesota Comm. Ry. Inc.—Trackage Exempt.—BN RR Co.*, 8 I.C.C. 2d 31, 35-36 (1991). CSXT Reply at 9 and note 11. In discussing the criteria for granting an exemption, the ICC quoted the following passage from *Indiana R.R. Co.—Petition for Exemption—Acquisition and Operation—Line Between Sullivan, IN and Browns IL*, 6 I.C.C. 2d 1004, 1006-07 (1990):

In determining whether regulation of a transaction proposed for exemption under § 10505 [now codified at § 10502] is necessary to carry out the RTP, our analysis generally focuses on the criteria relating to the underlying statute from which exemption is sought. We need not extend our analysis beyond what we would address in an application proceeding itself...Section 10505 provides a shortcut analysis to see if regulation...is necessary. If [the underlying statute] does not require review of particular issues, neither does the § 10505 process.

CSXT has construed the emphasized text to mean that a Petition for Exemption must comply with the three part test underlying Section 10901(c). But this passage quite clearly is not so broad.

The ICC's reference to the underlying statutory criteria merely limits the elements of the rail transportation policy that must be considered under the first prong of the exemption criteria, at Section 10502(a)(1). If the underlying statutory criteria do not implicate a particular rail transportation policy, then that policy need not be considered under Section 10502(a)(1). Thus, in determining whether application of Section 10901(c) is necessary to carry out the rail transportation policy, the Board will consider whether compliance with each of the three factors that define the "public convenience and necessity" requirement of Section 10901(c) is necessary to carry out the rail transportation policies implicated by those factors. This passage does not

hold, as CSXT seems to believe, that compliance with the underlying statutory criteria itself is required to obtain an exemption.

Because CSXT has erroneously concluded that an exemption petition must satisfy the same statutory criteria that would apply to a full-blown construction application, it has completely overlooked the correct criteria in Section 10502(a). Thus, CSXT fails to consider whether application of Section 10901(c) is necessary to carry out the rail transportation policy at 49 U.S.C. § 10101; whether the transaction is of limited scope; or whether the application of Section 10901(c) is needed to protect shippers from abuse of market power. In other words, CSXT has utterly failed to address the proper criteria, and thus has failed to refute HolRail's evidence in support of its Petition for Exemption.

B. CSXT Has Incorrectly Applied the Statutory Criteria of Section 10901(c).

CSXT compounds its initial error by incorrectly applying the criteria underlying Section 10901(c). Section 10901(c) declares that "The Board *shall* issue a certificate authorizing activities for which such authority is requested in an application filed under subsection (b) *unless* the Board finds that such activities are *inconsistent* with the public convenience and necessity." [emphasis added] The Board historically has defined the "public convenience and necessity" by the following three part test:

(1) is the applicant financially fit to undertake the construction and provide service; (2) is there a public demand or need for the proposed service; and (3) will the new competition be in the public interest and not harmful to existing carriers/services?

DM&E, 3 S.T.B. at 863; *TongueRiver*, 1 S.T.B. at 826. In applying this test to determine the public convenience and necessity, the interests of shippers are accorded substantial importance. *DM&E* at 863. Furthermore, the public convenience and necessity standard has become *less* restrictive over the years as a result of the pro-competitive policies reflected in the Staggers Act

and ICCTA. *Norfolk Southern Corp.—Construction and Operation—In Indiana County, PA*, STB Finance Docket No. 33928, slip op. at 6 (served May 16, 2003) ("*Norfolk*"). See also HolRail Supp. Evid. at 20-21.

CSXT, however, applies the public convenience and necessity standard to HolRail's proposed construction in a manner that is inconsistent with precedent and with Section 10901(c) itself. This error is in addition to CSXT's failure to recognize that the role of the three-part test in an exemption proceeding is to determine, under Section 10502(a)(1), whether the regulatory requirements behind the public convenience and necessity are needed to carry out the rail transportation policy. That error was addressed in the preceding section.

1. A showing of financial fitness is not necessary to carry out the rail transportation policy.

CSXT mistakenly contends that HolRail must demonstrate that it is financially fit to construct and operate its proposed rail line. The proper question under an exemption petition, however, is whether a demonstration of financial fitness by HolRail is necessary to carry out the rail transportation policy. That question, in turn, must be asked in the context of the underlying objective of the financial fitness test.

The purpose of the financial fitness test is to "protect existing shippers from a carrier's proposed actions that could have an adverse impact on the carrier's ability to continue to serve those shippers without detriment to either services or rates." *DM&E*, 3 S.T.B. at 863; *Tongue River*, 1 S.T.B. at 829. In *Tongue River*, the STB concluded that financial fitness was not a major concern because, since the carrier currently served no rail shippers and was not an operating railroad, no shipper would lose rail service if the carrier were to fail financially. Rather, shippers simply would return to using their current carrier. *Id.* HolRail is in precisely the same position. Moreover, the only shipper that will be served directly by HolRail is HolRail's

parent, Holcim. Therefore, the underlying purpose of the financial fitness test would not be served by requiring HolRail to demonstrate financial fitness.

CSXT has not demonstrated that a showing of financial fitness by HolRail is necessary in light of the underlying purpose of this test. Therefore, CSXT has failed to show that HolRail should not be granted an exemption to construct its Preferred Route.¹ Furthermore, CSXT's lack of opposition to HolRail's Alternate Route belies any claim that CSXT makes as to HolRail's financial fitness to construct the Preferred Route.

2. CSXT has not carried its burden to show there is no public demand for HolRail's Preferred Route.

CSXT posits an incorrect and overly demanding standard for showing public demand or need for HolRail's proposed rail line. According to the STB:

Under the current law, rail construction is presumed to be in the public interest. As such, the burden is on opponents to establish that a proposal is inconsistent with the public interest because there is no public demand or need for the construction, thus shifting the burden back to proponents.

Norfolk at 7. Indeed, the STB has stated that there no longer is *any* required showing at all of public demand or need in either an exemption proceeding or a full-blown application:

Neither under the exemption criteria of section 10502 nor under the prior approval requirements of section 10901 is there a requirement of a showing of public need for the facilities proposed to be constructed.

Illinois Central R.R. Co.—Construction and Operation Exemption—In East Baton Rouge Parish, LA, STB Finance Docket No. 33877, 2001 STB LEXIS 510, *4-5 (served May 25, 2001).

Accord, Midwest Generation LLC—Exemption from 49 U.S.C. 10901—For Construction in Will County, IL, STB Finance Docket No. 34060, slip op. at 4-5 (served March 21, 2002)

¹ CSXT also questions whether HolRail has either insurance or cash reserves sufficient to indemnify CSXT from any mishap that might occur on HolRail's track and affect CSXT. While HolRail acknowledges this concern, this is a matter within the scope of 49 U.S.C. § 10901(d)(1)(C), which HolRail addresses in greater detail in Part VI, *infra*.

("inadequacy of existing service is not a necessary showing under the statutory criteria for licensing of new rail lines.")

To the extent any showing of public demand still is required, HolRail has established a public demand for its proposed line through the Verified Statement of Looman Stingo, the Senior Vice President, Logistics for Holcim, the only shipper on the proposed rail line. Although CSXT has submitted the Verified Statement of Wendell Engalien in response to Mr. Stingo, nothing has changed the fact that Holcim still has a need and demand for the HolRail line. If anything, Mr. Engalien's statement emphasizes the public need, since CSXT only implemented the recent service improvements described by Mr. Engalien *after* HolRail demonstrated its serious intent to pursue the proposed rail construction. Thus, it took a realistic threat of imminent competition from HolRail to get CSXT to be more responsive to Holcim's transportation needs. Once that competition becomes real, perhaps CSXT will respond to the remainder of Holcim's needs. If CSXT will not, HolRail will and the public need will be satisfied.

As the Board ultimately concluded in *Tongue River* at 830, "if there is a lack of public demand for the proposed line, it will not be built." Thus, the question of public demand is a fact that will speak for itself in whether or not the line is constructed. It is not a factor that can be used to deny construction under the Board's current definition of the public convenience and necessity. If this factor is not relevant to a full-blown application under Section 10901(c), it is even less relevant to an exemption petition under Section 10502(a). Furthermore, CSXT's lack of opposition to HolRail's Alternate Route belies any claim that CSXT makes as to the public need or demand for the Preferred Route.

3. The creation of competition is fully consistent with the public interest and the rail transportation policy.

CSXT's argument against the public interest of HolRail's proposed construction is a red herring. Essentially, CSXT's argument boils down to speculation that it may have to abandon the portion of its line that is in competition with HolRail (*i.e.* the 2-mile segment between Giant and Holly Hill). CSXT Reply at 18. But, this argument long ago was rejected as a basis for denying new rail construction projects.

The creation of competition through new rail construction is a goal that the STB has determined to be "fully consistent with the public interest and the RTP." *San Jacinto Rail Limited Construction Exemption and The Burlington Northern and Santa Fe Ry. Co. Operation Exemption--Build-Out to the Bayport Loop Near Houston, Harris County, TX*, STB Finance Docket No. 34079, slip op. at 6 (served Aug. 28, 2002). The permissive licensing policy of Section 10901(c) "establishes a clear presumption in favor of rail construction proposals and conforms to the broader congressional policies to promote 'effective competition among rail carriers' and to 'reduce regulatory barriers to entry into...the industry.' 49 U.S.C. 10101(4), (7)." *Id.*, note 12. Thus, competition cannot be used to argue that HolRail's construction project is contrary to the public interest.

Furthermore, even if CSXT did abandon its line between Giant and Holly Hill, no shipper would lose CSXT as a carrier. CSXT still would serve Holly Hill from the north and Giant from the south. The only change would be that CSXT no longer would serve these locations from *both* directions. If necessary, however, HolRail could bridge that gap. Also, since there are no shippers along the two mile length of CSXT's track that would parallel HolRail, no shipper would lose CSXT service. Finally, CSXT's argument that the Preferred Route would

competitively harm it is particularly disingenuous, since CSXT has not opposed HolRail's Alternate Route, which would have the same competitive consequences as the Preferred Route.

III. CSXT'S PROCEDURAL ARGUMENTS ARE WITHOUT TRUTH OR MERIT.

CSXT accuses HolRail of reversing the process for approval of rail construction projects under Section 10901. Although CSXT's argument is confusing, there seem to be two key points, neither of which has any merit.

A. CSXT Wrongly Accuses HolRail of Rewriting Section 10901.

CSXT's first point is somewhat obtuse and highly ironic. CSXT seems to claim that HolRail would have the Board approve the Preferred Route under Section 10901(d), rather than Sections 10901(c) or 10502(a). CSXT Reply at 11-12. HolRail has made no such argument.

HolRail has presented substantial evidence at pages 21-28 and 31-33 of its Supplemental Evidence that are completely unrelated to Section 10901(d). HolRail, however, has openly acknowledged that *some* of its Section 10502(a) arguments, at pages 28-31, also are relevant to Section 10901(d), but that is because CSXT itself raised those arguments in opposition to the Petition for Exemption. HolRail Supp. Evid. at 35-36. HolRail's evidence, at pages 28-31, simply responds to CSXT's arguments.

Lest the Board forget, it was HolRail, in opposition to CSXT's Motion to Dismiss, who charged that CSXT was reversing "the statutorily defined sequence applicable to rail construction proceedings" by raising crossing issues under Section 10901(d) to attack HolRail's Petition for Exemption to construct the Preferred Route under Section 10502(a). HolRail Reply to Motion to Dismiss at 2 (filed Dec. 23, 2003). Specifically, CSXT alleged that the Preferred Route was contrary to the rail transportation policies because its construction would undermine the stability of CSXT's roadbed. Response of CSXT at 4 (filed Dec. 3, 2003). In other words,

CSXT asserted that construction of the Preferred Route would "unreasonably interfere with the operation of the crossed line," a factor that also is relevant to crossing petitions. *See* 49 U.S.C. § 10901(d)(1)(A). Thus, it was CSXT, not HolRail, who created the overlap between the criteria for Section 10901(d) and 10502(a). It is perverse for CSXT to criticize HolRail for responding to CSXT's arguments, which raised Section 10901(d) issues in the context of Section 10502(a).

Furthermore, in its *October 20th Decision*, at page 3, the Board itself agreed with CSXT that "HolRail's entire case...is inextricably bound up with the crossing issue," and therefore held that it would not "rule on the exemption petition until all components of HolRail's proposal, including the anticipated crossing petition, are before us." In its Supplemental Evidence and Crossing Petition, HolRail responded accordingly.

At no time has HolRail ever shied away from the exemption criteria of Section 10502(a). In fact, it is CSXT who makes no mention of, or presents any evidence addressing, the Section 10502(a) exemption criteria in its February 24th Reply. HolRail has never used the criteria in Section 10901(d) to support its Petition for Exemption. Rather, it has responded to CSXT's use of those criteria in opposition to HolRail's Petition.

B. CSXT Incorrectly Contends that a Crossing Petition May Only Be Filed After the Board Authorizes Construction.

CSXT seems to believe that the statute forbids the filing of a Crossing Petition under 10901(d) until *after* the Board issues a final decision authorizing construction under 10901(c) or an exemption under 10502(a). CSXT Reply at 36. The Board, however, has never recognized or imposed such a prohibition. Indeed, petitioners routinely file crossing petitions before receiving final construction approval.

Midwest Generation, LLC—Exemption from 49 U.S.C. 10901—For Construction in Will County, IL; Midwest Generation, LLC, Petition for Line Crossing Authority Under 49 U.S.C.

10901(d), STB Finance Docket Nos. 34060 and 34060 (Sub-No. 1), 2002 STB Lexis 585 (served Oct. 4, 2002), is a clear example of this fact. The decision states that Midwest filed its crossing petition on June 19, 2001, nine months *before* the STB issued its decision granting the petition for exemption on March 21, 2002, and ten months *before* completion of the environmental assessment on April 12, 2002.

Section 10901(d) simply precludes the Board from granting a crossing petition unless and until it authorizes the construction. A petitioner is free to file its crossing petition prior to a Board decision authorizing the construction if it so desires, and the Board is free to issue both decisions simultaneously, as it did in *Midwest Generation*. In this case, the Board ordered HolRail to file its crossing petition *before* it would issue a decision authorizing the construction exemption. Thus, the sequence of HolRail's filings is entirely consistent with Board precedent and complies with the Board's *October 20th Order* in this docket.

IV. BECAUSE IT CANNOT REFUTE HOLRAIL'S ENVIRONMENTAL EVIDENCE, CSXT ATTEMPTS TO MARGINALIZE ITS RELEVANCE.

CSXT has not submitted a single shred of evidence to refute HolRail's evidence that the Preferred Route has substantially fewer environmental impacts than the Alternate Route. Because it is unable to contravene HolRail's environmental evidence, CSXT attempts to marginalize its relevance by incorrectly attributing that evidence to HoRail's Crossing Petition, as opposed to its Petition for Exemption.

HolRail presented its environmental evidence in Part IV.A.1, at pages 22-26, of its Supplemental Evidence, which addresses the first prong of the exemption criteria at 49 U.S.C. § 10502(a)(1). That discussion details how the Board, by authorizing construction of the least environmentally detrimental route, would promote the rail transportation policy "to reduce

regulatory barriers to entry into and exit from the industry," 49 U.S.C. § 10101(7), by mitigating the ability of the environmental laws to act as a regulatory barrier to entry.

CSXT, however, ignores that discussion, just as it has ignored the Section 10502 exemption criteria altogether. Rather, CSXT attempts to confuse matters by urging the Board "to reject HolRail's argument that jurisdiction under subsection 10901(d) is conferred on the Board because of the potential environmental impact of the construction of the Alternate Route." CSXT Reply at 28. But, HolRail has never linked the Board's Section 10901(d) jurisdiction to HolRail's environmental arguments and CSXT does not cite to such an argument anywhere in HolRail's Crossing Petition.

As explained at pages 39-40 of HolRail's Crossing Petition, Section 10901(d) itself clearly defines the Board's jurisdiction. The Board's crossing jurisdiction arises when it has issued a certificate under Section 10901(c), or an exemption under Section 10502(a), "authorizing the construction or extension of a railroad line." 49 U.S.C. § 10901(d)(1). HolRail's environmental evidence is relevant to whether the Board should grant a certificate under Section 10901(c) or an exemption under Section 10502(a), not to the Board's jurisdiction under Section 10901(d).

V. CSXT IGNORES THE PLAIN LANGUAGE OF SECTION 10901(d).

CSXT contends that the Preferred Route does not qualify for consideration by the Board under the crossing statute, at 49 U.S.C. § 10901(d). In order to reach this conclusion, however, CSXT has ignored the plain language of the statute, which prohibits CSXT from refusing HolRail permission to cross its "property" once the Board has authorized such construction under Section 10901(c) or granted an exemption under Section 10502(a). Thus, if the Board grants

HolRail's Petition for Exemption, HolRail is entitled to an order from the Board under Section 10901(d), provided HolRail satisfies the requirements of that section.

HolRail, at pages 39-51 of its Supplemental Evidence and Crossing Petition, fully anticipated and refuted virtually all of CSXT's legal arguments, and CSXT has not responded convincingly. Thus, there is no need to repeat those arguments here. This section briefly responds to two new arguments presented by CSXT.

First, CSXT claims that its "Line" does not block HolRail's construction because HolRail is free to build the Alternate Route on its own property. CSXT Reply at 19. This is another incorrect reading of the plain language of the statute by CSXT. According to Section 10901(d), CSXT may not block "authorized" construction. Thus, the existence of another route is irrelevant. If the Board authorizes HolRail to construct the Preferred Route, Section 10901(d) is applicable. The Board rejected CSXT's position in *Midwest Generation, LLC—Exemption from 49 U.S.C. 10901—For Construction in Will County, IL; Midwest Generation, LLC, Petition for Line Crossing Authority Under 49 U.S.C. 10901(d)*, STB Finance Docket Nos. 34060 and 34060 (Sub-No. 1), 2002 STB Lexis 585 (served Oct. 4, 2002), when it granted the crossing petition despite the existence of an alternate route that would not need to cross another carrier's line.

Second, CSXT engages in a lengthy but irrelevant discussion of prescriptive easements. CSXT Reply at 21-22. CSXT tries to equate Section 10901(d) to a grant of a prescriptive easement by statute. But, the shoe simply does not fit. A prescriptive easement "is acquired by a use, open and notorious, adverse and continuous for the statutory period." Black's Law Dictionary 616 (Abridged 5th ed. 1983). Section 10901(d) bears no resemblance to a prescriptive easement. It empowers the STB to affirmatively grant an easement under specified

conditions. When the STB exercises its power, it does so explicitly, not by prescription. Thus, CSXT's discussion of common law cases on prescriptive easements is inapposite.

VI. CSXT'S INDEMNIFICATION CONCERNS ARE PROCEDURALLY PREMATURE.

CSXT incorrectly argues that HolRail's Crossing Petition should be rejected because HolRail cannot indemnify and protect CSXT against harm that might be caused by interference to CSXT's line from operation of HolRail's Preferred Route. Specifically, CSXT cites to 49 U.S.C. § 10901(d)(1)(C), which requires HolRail to compensate CSXT for the crossing. CSXT asserts that "[c]ompensation includes more than paying for the use of the property [but] also includes being able to make the incumbent owner whole in the event that construction or operation by the newcomer interfere with the incumbents [sic] operations or damage the incumbents [sic] property." CSXT Reply at 29.

CSXT's argument is premature. The Board has long deferred compensation issues under Section 10901(d)(1)(C) until after it has granted crossing authority. In *Louisville & Jefferson County Riverport Authority and CSX Transportation, Inc.—Construction and Operation Exemption—In Jefferson County, KY; Louisville & Jefferson County Riverport Authority—Petition Under 49 U.S.C. 10901(d)*, 4 I.C.C. 2d 749, 755 (1988), the ICC observed that:

A final requirement of § 10901(d) is that the owner of the crossed line be compensated. The statute envisions a two-step process: the Commission orders the crossing, and after an opportunity to negotiate, if the parties cannot agree, the Commission may set the amount of compensation.

This process encompasses all compensation terms, including insurance and indemnification provisions like those CSXT asserts are necessary for HolRail's crossing. *Omaha Public Power Dist.—Construction Exemption—in Otoe County, NE; Omaha Public Power Dist.—Petition Under 49 U.S.C. 10901(d)*, Finance Docket Nos. 32630 and 32630 (Sub-No. 1), 1995 ICC

LEXIS 297 (served Nov. 30, 1995) ("BN's insurance and indemnity concerns...are in the nature of subsidiary matters to be negotiated subsequent to our authorization of the crossing.").

HolRail previously has expressed its willingness to compensate CSXT for its crossing over CSXT's property, in accordance with Section 10901(d)(1)(C). HolRail Supp. Evid. at 3. HolRail is willing to negotiate with CSXT on the basis of any of the protective measures that CSXT has identified on pages 29-30 of its Reply. In addition, Holcim is willing to guarantee HolRail's potential liability to CSXT under these measures. Thus, it is HolRail's belief and hope that it could negotiate mutually acceptable compensation terms with CSXT, without resorting to the Board to resolve that matter.

VII. CSXT HAS GROSSLY MISREPRESENTED HOLRAIL'S OPERATING PLAN.

In an outrageous misrepresentation of HolRail's operating plan, CSXT contends that HolRail's plan would coerce either NS or CSXT to operate the proposed rail line. CSXT Reply at 33-34, 37. HolRail has proposed no such thing. It intends to operate the line itself.

CSXT, as the agent of NS under the *Carolinas Plan*,² which CSXT refers to as the "South Carolina Coordination Project," would be required to interchange traffic with HolRail. For that purpose, HolRail would construct a yard at the southern end of its proposed rail line. CSXT's obligation would be merely to interchange cars with HolRail by spotting the cars on the interchange tracks. From that point, HolRail itself would transport all railcars over the approximately two mile length of its line. HolRail Supp. Evid., Schuchmann V.S. at 11-12.

There is no need for CSXT and NS to amend the *Carolinas Plan* to interchange traffic with HolRail. As a common carrier, CSXT clearly has the obligation to interchange traffic with another common carrier. *See*, 49 U.S.C. 10742. *See also*, *Ohio Valley Railroad Company* –

² Finance Docket No. 32299, *Norfolk Southern Ry. Co. – Consolidation of Operations – CSX Transportation, Inc.*, 1993 ICC Lexis 241 (served Nov. 26, 1993) (the "*Carolinas Plan*").

Petition to Restore Switch Connection and Other Relief, STB Finance Doc. No. 34608 (Served Feb. 23, 2005)("the removal of a switch which constitutes the only connection between a common carrier and the rest of the national rail system violates the *duty to interchange* under 49 U.S.C. 10742 ...")(emphasis added). The *Carolinas Plan* does not, nor could it, alter that fact. Moreover, as set forth in greater detail at pages 14-15 of HolRail's Supplemental Evidence, the ICC approved the *Carolinas Plan* based upon the representations of CSXT and NS that "no prospective customers will be denied service," "there will be no change in the competitive balance," and "[o]ptions currently available to shippers will neither increase nor decrease." *Id.* at *5-6. CSXT's refusal to interchange traffic with HolRail clearly would contravene those representations that were so critical to gaining ICC approval of the *Carolinas Plan*.

Finally, CSXT asserts that, if HolRail is to be the operator, it has failed to comply with several alleged prerequisites to obtaining a petition for exemption. These include hiring and training employees, acquiring locomotives and cars, obtaining interchange agreements, and complying with AAR requirements for registration as a railroad. CSXT Reply at 34. But, CSXT does not cite to any precedent that requires HolRail to take these actions *before* it may obtain a Petition for Exemption. Nor does CSXT explain why, or in some cases how, HolRail would, or even could, take these actions *before* obtaining an exemption from the Board that would allow HolRail to become a common carrier railroad. Indeed, CSXT itself has indicated outright hostility to entering into an interchange agreement with HolRail, which precludes HolRail from satisfying at least one of the alleged prerequisites. HolRail will have ample time to address these matters after obtaining an exemption and prior to completing construction of the project.

Moreover, the whole purpose of an exemption is to free a transaction of any regulatory requirements that otherwise might apply, if the application of such requirements is not necessary

to carry out the rail transportation policy. CSXT has not demonstrated why any of these actions are necessary to carry out the rail transportation policy, whereas HolRail has shown that they are not necessary.

VIII. CSXT HAS NOT DEMONSTRATED HOW HOLRAIL COULD BE RESPONSIBLE FOR PAYING CSXT LABOR COSTS FOR THE CONSTRUCTION OF THE PREFERRED ROUTE.

CSXT asserts that the Brotherhood of Maintenance of Way Employees Division of the International Brotherhood of Teamsters Rail Conference ("BMWED") may claim that its members must construct the Preferred Route because their collective bargaining agreement with CSXT includes the "construction...of tracks...used in the operation of the carrier in the performance of common carrier service on property owned by the carrier." CSXT Reply at 35. Thus, CSXT feigns concern that it could be required to defend a lawsuit by BMWED. This is a red herring.

CSXT has not even placed the collective bargaining agreement into evidence in order to allow HolRail, or the Board, to evaluate the merits of its claim. Nevertheless, even based solely on the language quoted by CSXT, it is clear that CSXT has created a hypothetical non-issue that has no basis in reality.

First, CSXT bases its assertion on a misrepresentation, which HolRail has refuted in Part VII, *supra*, that HolRail expects CSXT to operate HolRail's line. *Id.* HolRail has no expectation that CSXT would be the operator of the proposed rail line. At most, CSXT would operate over the interchange tracks, which HolRail would construct almost entirely on property owned by Holcim, to interchange cars between CSXT and HolRail. Therefore, the construction of the Preferred Route on CSXT property would not implicate the collective bargaining language that CSXT has quoted.

Second, even if CSXT were to operate over any portion of HolRail track constructed on CSXT's property, a lawsuit or arbitration by BMWED against CSXT could not possibly grant BMWED the right to construct the Preferred Route. HolRail is the only entity that would have authorization from the STB to construct the Preferred Route. CSXT would not have any right to select the construction workers, nor would it have any right to compel HolRail to select particular construction workers. Neither a court nor an arbitrator can order CSXT to do what CSXT has no authority to do. Therefore, if BMWED were to assert a right to construct the Preferred Route, it would have to assert that right directly against HolRail in order to obtain any relief. Since HolRail is not a party to CSXT's collective bargaining agreement, neither a court nor an arbitrator would have the authority to compel HolRail to honor that agreement. It would defy logic for BMWED to bring a lawsuit or arbitration against CSXT when such action would have no bearing upon HolRail, the entity authorized to perform the construction.

Thus, there is no foundation for CSXT's argument. This is just the latest in "fantastic" claims raised by CSXT to discourage the Board from granting HolRail an exemption to construct the Preferred Route.

IX. CSXT IMPROPERLY AND INACCURATELY MALIGNS HOLRAIL'S MOTIVES.

In at least three of its arguments, CSXT attributes sinister, or ulterior, motives to HolRail. Although none of CSXT's arguments are relevant to the applicable criteria by which the Board evaluates exemption and crossing petitions, HolRail is compelled to correct the record in this proceeding, lest they prejudice the Board against HolRail's petitions.

A. Contrary To CSXT's Assertion, Holcim Could Not Have Constructed The Alternate Route As A Spur Track.

CSXT contends that Holcim must have undisclosed ulterior motives because, "if Holcim was only interested in reaching the NS line at Giant, then it could have built a line between Holly Hill and Giant as an unregulated spur track, avoiding the expense and need for this proceeding." CSXT Reply at 30. That, however, is not true.

In order to complete the connection to NS, HolRail must cross property owned by Giant Cement at the southern end of the proposed construction. Although HolRail was hopeful that it could negotiate an agreement with Giant, that has not proven to be the case.³ Therefore, HolRail may have to condemn an easement across the Giant property as a common carrier railroad under South Carolina law. In order to do so, however, HolRail must first obtain common carrier authority from the STB, whether it ultimately is for construction of the Preferred or the Alternate Route. *See Nicholson et al. v. Missouri Pac. R.R. Co.*, 366 I.C.C. 69 (1982) (Condemnation of right-of-way to construct a rail line is construction which triggers the approval requirements of 10901). *See also, Tampa Phosphate R. Co. v. Seaboard Coast Line R. Co.*, 418 F. 2d 387, 393 (5th Cir. 1969).

Furthermore, as HolRail has represented throughout this proceeding, it desires to construct its rail line over the least environmentally detrimental route. That is the Preferred Route, which does require HolRail to obtain common carrier authority.

³ CSXT incorrectly asserts that "Holcim represents that it has the right to operate over Giant's property." CSXT Reply at 14, note 12. This is another fabrication by CSXT. HolRail specifically stated that it was in negotiations with Giant over access to Giant's property. HolRail Supp. Evid. at 12.

B. CSXT Has Maligned Holrail's Participation In The Environmental Review Process

CSXT has cast aspersions upon HolRail's participation in the environmental review process. Specifically, CSXT states, "In the Petition, and Supplement, HolRail *insisted* that there were only two alternative routes available." CSXT Reply at 33 [emphasis added]. HolRail never made any such representation and CSXT does not cite to any in HolRail's pleadings. HolRail has sought approval for two alternative routes, not because they are the only conceivable routes, but because they are the two routes that made the most sense from an engineering, operating, economic, and environmental perspective.

Although CSXT insinuates that HolRail withheld information about alternative routes from the Board, it was in fact HolRail who volunteered that it had considered and rejected a third route. Indeed, the Section on Environmental Analysis ("SEA") has been aware of, and discussed, this third alternative with HolRail, since very early in this proceeding. When SEA elected not to include this third route in its Final Scope of Study for the Environmental Impact Statement, it did so with full and complete disclosure by HolRail.

C. CSXT Inaccurately Characterizes the Motives of the Intervenors and Then Improperly Attributes those Motives to HolRail.

From the outset of this proceeding, HolRail has emphasized the extraordinary and unusual facts surrounding this particular project that justify construction of the Preferred Route across CSXT's property. Specifically, the limited scope of the project and the special environmental concerns surrounding it enable the Board to authorize construction of the Preferred Route without establishing precedent that would require the Board to grant the right to construct new rail lines across any and every rail corridor to anyone who makes such a request.

Rather, this precedent would be limited to similar unusual facts involving projects of similar limited scope.

CSXT, however, improperly and inaccurately asserts that HolRail's claim is belied by the Joint Statement of Intervenors, filed on September 29, 2005. CSXT Reply at 32-33. First, and most importantly, CSXT has grossly misquoted the Intervenors. As the Intervenors, themselves, have explained in a March 1, 2006 letter to the Board, CSXT deliberately has quoted their Joint Statement out of context. When those quotes are placed back into their proper context, it is quite clear that the Intervenors agree with HolRail's claim that its proposed crossing is only appropriate in limited circumstances. Second, CSXT does not explain how any statement by an Intervenor can or should be attributable to HolRail or otherwise contravenes the truth of HolRail's claims.

WHEREFORE, for the foregoing reasons, HoRail requests that the Board grant its Petition for Exemption and its Crossing Petition.

Respectfully submitted,



Jeffrey O. Moreno
Lawrence W. Prange
THOMPSON HINE LLP
1920 N Street, N.W., Suite 800
Washington, D.C. 20036
(202) 331-8800

Attorneys for HolRail LLC

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