

BALL JANIK LLP

A T T O R N E Y S

1455 F STREET, NW, SUITE 225
WASHINGTON, D.C. 20005

www.balljanik.com

TELEPHONE 202-638-3307
FACSIMILE 202-783-6947

LOUIS E. GITOMER
Of COUNSEL
(202) 466-6532

lgitomer@dc.bjllp.com

March 30, 2006

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 700
Washington, D. C. 20423

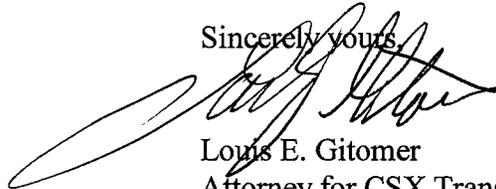
RE: Finance Docket No. 34421, *HolRail LLC-Petition for Exemption from 49 U.S.C. § 10901 to Construct and Operate a Rail Line in Orangeburg and Dorchester Counties, South Carolina*
Finance Docket No. 34421 (Sub-No. 1), *Petition for Crossing Authority Under 49 U.S.C. § 10901(d)*

Dear Secretary Williams:

Enclosed is a Motion of CSX Transportation, Inc. CSXT is efileing this Motion. Thank you for your assistance.

If you have any questions, call or email me.

Sincerely yours,



Louis E. Gitomer
Attorney for CSX Transportation, Inc.

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

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

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

CSX TRANSPORTATION, INC. MOTION TO STRIKE OR IN THE ALTERNATIVE REPLY

Paul R. Hitchcock, Esq.
Associate General Counsel
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202
(904) 359-1192

Louis E. Gitomer, Esq.
Of Counsel
BALL JANIK LLP
1455 F Street, N.W., Suite 225
Washington, DC 20005
(202) 638-3307

Attorneys for: CSX TRANSPORTATION,
INC.

Dated: March 30, 2006

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

CSX TRANSPORTATION, INC. MOTION TO STRIKE OR IN THE ALTERNATIVE REPLY

CSX Transportation, Inc. (“CSXT”) moves the Surface Transportation Board (the “Board”) to strike the Motion for Leave to File a Rebuttal to the Reply of CSX Transportation, Inc. (the “HolRail Motion”) and the Rebuttal filings made by HolRail LLC (“HolRail”) on March 10, 2006 (jointly referred to as the “HolRail Reply”), and the filing made by Ameren Energy Services, Arkansas Electric Cooperative Corporation, and Dominion Resources (the “Intervenors”) on March 1, 2006 (the “Intervenors Reply”). HolRail denominated its pleading as rebuttal even though it is clearly a prohibited reply to reply.

In the alternative, CSXT requests that the Board accept the response to the impermissible filings of HolRail and Intervenors. CSXT will address the requests by Intervenors and HolRail to submit a reply to a reply and the substance of their replies together.

As a general matter, both Interveners and HolRail have filed a reply to a reply, which is not permitted under 49 C.F.R. § 1104.13(c). CSXT contends that in order to comply with its rules, the Board must reject these inappropriate pleadings.

CSXT will not reiterate the background of this proceeding, except as necessary to respond to arguments made by HolRail and Interveners.

I. Interveners.

Interveners contend that the Board should accept the Interveners Reply because “of the mischaracterization and misquotation of their Joint Statement by CSX in its Reply.”¹ Interveners Reply at 1. Interveners are wrong.

CSXT accurately quoted the Joint Statement. Interveners merely point out to the Board the introductory language of the sentence, something which certainly does not require the filing of Interveners Reply. The introductory language does not change the meaning of the sentence or support the limited reading that Interveners now attempt to ascribe to the Joint Statement.

Interveners next basis for filing an impermissible reply to reply is that CSXT mischaracterized their Joint Statement. CSXT did not mischaracterize the Joint Statement. Based on the clear language of the Joint Statement, Interveners support the nearly unfettered longitudinal expropriation of a railroad’s right-of-way.² Interveners have not cited any clear language in the Joint Statement to the contrary. Interveners are merely trying to use Interveners Reply to soften their position, without modifying their clearly intent.

¹ Interveners filed a Joint Statement on September 9, 2005 (the “Joint Statement”).

² The only limits on such use in Interveners Reply are the “incumbent railroad’s need for the unused part of the right-of-way and the need for ‘appropriate operational protections.’” Interveners Reply at 2.

Intervenors have not provided good cause for the acceptance of Intervenors Reply, and therefore CSXT respectfully requests that the Board deny Intervenors request to file an impermissible reply to reply. The non-specific language cited by Intervenors in the Joint Statement does not refute CSXT's interpretation of Intervenors position. Indeed, Intervenors Reply states that there are "a variety of additional factors to consider in evaluating whether a longitudinal crossing is appropriate," without adopting the limiting factors relied upon by HolRail. Intervenors "limitations" both seem to relate to operational protections, which are already provided for in 49 U.S.C. § 10901(d).

II. HolRail.

HolRail states that this proceeding is "one of first impression" and involves "complexities and important issues". Motion at 6. CSXT agrees, and for that reason believes that it was inappropriate for HolRail to file a Petition for Exemption instead of an application. However, HolRail has persisted in following the procedures it initiated. As such, the Board should hold HolRail to those procedures and deny the Motion and reject the "Rebuttal" as an improper reply to reply.

HolRail's argument for the Board to accept its impermissible reply to reply can be boiled down to two factors, HolRail disagrees with CSXT and this is a complex proceeding. HolRail fails to provide good cause for the Board to permit the filing of the Rebuttal. HolRail merely seeks to continue to argue the same issues that have been fully addressed by HolRail and CSXT.

It is obvious that CSXT and HolRail disagree over the legal and factual issues in this proceeding. The HolRail Reply is not necessary for the Board to recognize the diverse positions of the parties and is not good cause for accepting the HolRail Reply.

A. CSXT properly addressed the relevant statutory criteria.

HolRail states that CSXT applied the wrong statutory criteria by addressing the factors in 49 U.S.C. §10901(c) instead the factors in 49 U.S.C. §10502(a). Contrary to HolRail's strained logic in the Rebuttal, CSXT followed Board precedent in addressing the factors of the underlying statute. This is not an issue that requires an impermissible reply to reply.

HolRail states that:

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.

Rebuttal at 6. HolRail then ignores the substantive criteria that the Board has developed for making decisions in construction proceedings and fails to acknowledge the relation to the rail transportation policy.

In considering construction proceedings under 49 U.S.C. § 10901(c), the Board considers the financial fitness of the party proposing to construct a rail line, the public demand or need for the proposed service, whether the new competition will be in the public interest and not harmful to existing carriers/services. *Dakota, Minnesota & Eastern Railroad Corporation Construction into the Powder River Basin*, STB Finance Docket No. 33407, at 3 (STB served July 16, 1998); *Tongue River R.R.-- Rail Construction & Operation-- Ashland to Decker, Montana*, STB Finance Docket No. 30186 (Sub-No. 2), at 14 (STB served November 8, 1996).

Financial fitness relates to 49 U.S.C. § 10101(3, 4, 5, 6, and 11). Public demand relates to 49 U.S.C. § 10101(1, 3, 5, and 9). Competitive issues implicate 49 U.S.C. § 10101(1, 2, 4, 5,

6, 9, and 12). Therefore, contrary to HolRail's argument, the standard criteria considered under 49 U.S.C. § 10901(c) implicate many provisions of the rail transportation policy.

HolRail next erroneously argues that CSXT misapplied the three prong test of construction factors.

First HolRail dismisses the financial fitness test because it claims that the only party that could be harmed is HolRail's parent. With respect to the preferred route, CSXT disagrees with HolRail. HolRail's parent, Holcim (US) Inc. ("Holcim") is not the only party that could be harmed by HolRail's failure. CSXT owns the property on which HolRail proposes to construct the preferred route. A financial failure by HolRail will harm CSXT if it occurs while the preferred route is under construction or when the line is being operated. If HolRail does not complete construction or fails to fund the safeguards to CSXT's line that it has proposed, CSXT will be harmed. If HolRail stops operating, fails to carry sufficient insurance or fails to maintain the preferred route, CSXT will be harmed. HolRail has not submitted a scintilla of evidence of its financial fitness.

HolRail claims that Holcim requires only the service that HolRail can provide. CSXT will only note that CSXT already provides service to Holcim, and despite HolRail's arguments, if Holcim required service as desperately as HolRail contends, then Holcim could have built the alternate route as a spur track.³

³ HolRail makes the unsupported assumption that CSXT has only "implemented recent service improvements ... *after* HolRail demonstrated its serious intent to pursue the proposed rail construction." Rebuttal at 10. First, HolRail is wrong. CSXT works with its customers to improve rail service where possible and reasonable. Second, this sentence suggests HolRail's true intent in instituting this proceeding, maybe an attempt to misuse the regulatory process as a tool in its negotiations with CSXT.

CSXT does not oppose the construction of the alternate route and will compete with HolRail's operation of that route, if it is ever built. However, CSXT does not agree that the involuntary expropriation of CSXT's right-of-way by HolRail will not harm CSXT, particularly if HolRail does not have the financial ability to construct, operate and maintain the alternate route, while at the same time protecting CSXT from any liability caused by HolRail. HolRail has not demonstrated any financial ability in this proceeding. Construction of the preferred route will encumber CSXT's asset and prevent CSXT from obtaining fair market value for its property if it abandons or seeks to sell the line.

B. CSXT has properly set forth the procedural arguments.

Throughout this proceeding HolRail has presented the Board with HolRail's misinterpretation of CSXT's position and then responded to the arguments that HolRail would have liked CSXT to have made.

HolRail conveniently ignores the overriding fact that it cannot construct its preferred route without involuntarily expropriating CSXT's property. The preferred route is within and along CSXT's right-of-way. CSXT's position throughout this proceeding has been consistent and in accord with the statute. This is the crux of the disagreement between CSXT and HolRail that the Board, and perhaps the Courts will have to resolve.

CSXT sees a symbiotic relationship between section 10901(c) and section 10901(d). If a party receives authority to construct a rail line under section 10901(c) (however that may be done) and the path of that rail line is blocked by another rail line, then, the Board can authorize the crossing (but not the longitudinal expropriation of the line) of the existing rail line under section 10901(d). CSXT disagrees with HolRail that a longitudinal portion of existing railroad's

property can be involuntarily expropriated and used to construct a rail line on that property parallel to the existing rail line under the limited provisions of section 10901(d).

CSXT reminds the Board that HolRail is seeking to seize CSXT's property, not just for a "crossing," as that word is normally used, but for the forced acquisition of the longitudinal right-of-way. CSXT contends that HolRail has misinterpreted sections 10901(c) and 10901(d) and attempted to collapse them.⁴

HolRail claims that CSXT is wrong in its argument as to the interaction of the procedural requirements under section 10901(c) and 10901(d). HolRail merely misunderstands CSXT's position. It is CSXT's position that a crossing cannot be granted until a construction certificate has been issued. Since a construction certificate cannot be issued by the Board in this proceeding for the preferred route independent of the crossing, it is CSXT's position that the Board cannot permit construction that results from the involuntary longitudinal expropriation of a railroad's property along that right-of-way, instead of merely crossing the right-of-way.

C. Environmental evidence cannot confer jurisdiction on the Board.

HolRail contends that the preferred route has less environmental harm than the alternate route. That issue is for the Section of Environmental Analysis to determine in the Environmental Impact Statement process. The Board has stated that "we will separately address environmental issues in a subsequent decision after completion of the EIS process." *Dakota, Minnesota & Eastern Railroad Corporation Construction into the Powder River Basin*, STB Finance Docket

⁴ CSXT notes that nearly any engineering problem can be solved if sufficient funds are available. In this proceeding, HolRail has developed a plan, which may or may not work. However, HolRail has not told the Board how much its plan will cost. Moreover, HolRail has not even provided the Board with a scintilla of evidence that it has the funds available to construct the line proposed by its consultants. As Mr. Engeliien's unrebutted verified statement points out, neither Holcim nor HolRail have the funds readily available for the proposed construction.

No. 33407, at 4 (STB served May 7, 1998). The environmental impacts of the construction cannot confer jurisdiction on the Board where it does not otherwise have jurisdiction. “The extent of, or intensity of debate over, a project’s environmental and safety issues, however, does not, by itself, confer jurisdiction on the Board. *Union Pacific Railroad Company–Petition for Declaratory Order–Rehabilitation of Missouri-Kansas-Texas Railroad Between Jude and Ogden Junction, TX*, STB Finance Docket No. 33611 (STB served August 21, 1998) at 7. Cf. *Nicholson v. I.C.C.*, 711 F.2d 364, 366 (D.C. Cir. 1983).

HolRail seeks to separate its construction exemption from the crossing petition despite acknowledging the correctness of the Board’s holding that “HolRail’s entire case ... is inextricably bound up with the crossing issue.” Rebuttal at 13. It is disingenuous for HolRail to claim that it is only prosecuting the petition and not the crossing issue when HolRail admits they are “inextricably bound.”

D. HolRail continues to misinterpret section 10901(d).

In its Reply, CSXT clearly stated its position as to the proper interpretation of section 10901(d) supported by the statute, legislative history, case law, and prior case law concerning the forced grant of easements by common law courts predating Federal regulation of railroad construction. Instead of addressing the substance of CSXT’s arguments, HolRail provides one definition of the term “prescriptive easement” and based solely on the definition, but not an analysis of the case precedent, claims that the precedent is irrelevant. The precedent relied upon by CSXT in its Reply are instructive as to the limits to the Board’s power under section 10901(d).

E. CSXT's indemnification concerns are appropriate.

HolRail again shows its sensitivity to the issue of its financial fitness by arguing that its ability to indemnify CSXT for any harm must be deferred until the Board determines the compensation that HolRail must pay to CSXT, if the crossing is granted. Not only does HolRail's financial ability to indemnify CSXT go to the compensation to be paid to CSXT, but also to the financial fitness of HolRail, which has not been shown.⁵

F. HolRail's Rebuttal confirms that it has not planned for operations.

Were CSXT or NS not to operate over HolRail, HolRail has not provided any plans as to its ability to operate. CSXT has not insisted that HolRail hire crews and obtain cars or take any other steps necessary for its operation. But the Board and CSXT are entitled to know HolRail's plans for such operations. HolRail also needs to address the costs it expects to incur. As the Board well knows, locomotives and freight cars are expensive and HolRail has failed to demonstrate any financial ability.

Had HolRail filed an application, or provided the information required by an application at 49 C.F.R. § 1150.5, HolRail would have provided

an operating plan, including traffic projection studies; a schedule of the operations; information about the crews to be used and where employees will be obtained; the rolling stock requirements and where it will be obtained; information about the operating experience and record of the proposed operator unless it is an operating railroad; any significant change in patterns of service; any associated discontinuance or abandonments; and expected operating economies.

HolRail has not provided any of this information.

⁵ It should be noted that HolRail states that "Holcim is willing to guarantee HolRail's potential liability to CSXT." Rebuttal at 18. However, the Rebuttal was not filed by or on behalf of Holcim, and statements made by HolRail on behalf of Holcim should be given no weight.

G. CSXT has merely noted that it may face a claim from labor.

HolRail attacks CSXT's concern about potential labor claims and costs, even though earlier in the Rebuttal it claimed that all compensation issues are premature. CSXT contends that HolRail cannot have it both ways. This issue is not a red herring as HolRail claims, but a potential cost for CSXT. Not only does it involve the compensation from HolRail if the crossing request is granted, but it also implicates HolRail's financial fitness, which has not been demonstrated. CSXT is not conceding that its labor union has the right to construct the preferred route, but it is a potential cost that must be addressed by HolRail.

H. CSXT has not maligned HolRail's motives.

HolRail is seeking to expropriate a valuable asset of CSXT without CSXT's consent through a unique and incorrect interpretation of section 10901(d).

Holcim could construct the alternate route as a spur. Now, in the "Rebuttal," HolRail claims that it must build the line as a common carrier so that it can condemn the property of its neighbor and competitor, Giant Cement, because Giant Cement is not willing to voluntarily allow HolRail to construct a rail line across its property. HolRail does not explain why Giant Cement rejected HolRail's request. Moreover, HolRail could construct merely the portion of the alternate route over Giant Cement as a common carrier and the remainder as a spur track.

HolRail claims that it never asserted that there were only two alternative routes available and that CSXT did not cite to any HolRail pleadings. In the "errata" that Holrail filed with the Board on December 5, 2003, HolRail stated "The alternate route, which is the only other route under consideration, lies to the East of the preferred route..." The "errata" is also where HolRail changed the description of an alternate route "West" of CSXT's line to "East." Clearly, HolRail did consider another route, which it did not publicly reveal until its September 9, 2005 filing.

Finally, HolRail contends that CSXT grossly misquoted Interveners and misrepresented the extent that Interveners believed that section 10901(d) should apply in all situations. CSXT has responded to that argument in responding to Interveners. CSXT is concerned that HolRail's misinterpretation of section 10901(d) could be expanded to apply in any situation and lead to the involuntary expropriation of other property of CSXT and other railroads.

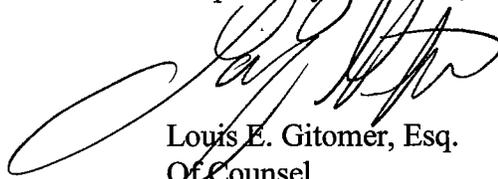
CONCLUSION

HolRail has sought to control the procedural posture of this proceeding since its inception. HolRail initiated this proceeding as a petition for exemption under 49 C.F.R. § 1121. HolRail failed to submit a case-in-chief, and has filed supplements at times of its choosing, including the latest HolRail Reply.

Under the Board's rules, a reply-to-a-reply is not permitted. 49 C.F.R. § 1104.13(c). CSXT respectfully requests the Board to deny the Motion filed by HolRail and reject the Rebuttal. CSXT also respectfully requests the Board to deny Interveners Reply and reject it. In the alternative, CSXT respectfully requests the Board to accept its response to the Interveners Reply and HolRail Reply.

CSXT respectfully requests the Board to dismiss the Crossing Petition with prejudice for lack of jurisdiction, or in the alternative to deny the Exemption Petition, as supplemented with regard to the Preferred Route.

Respectfully submitted,



Louis E. Gitomer, Esq.
Of Counsel
BALL JANIK LLP
1455 F Street, N.W., Suite 225
Washington, DC 20005
(202) 638-3307

Paul R. Hitchcock, Esq.
Associate General Counsel
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202
(904) 359-1192

Attorneys for: CSX TRANSPORTATION,
INC.

Dated: March 30, 2006

CERTIFICATE OF SERVICE

I hereby certify that I have caused this Motion to be served by first class mail, postage pre-paid on the following parties of record to this proceeding.

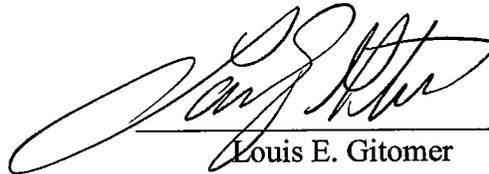
Jeffrey O. Moreno
Thompson Hine LLP
1920 N Street, NW, Suite 800
Washington, DC 20036-1600

Norman Brunswig,
Francis Beidler Forst Audubon Ctr. & Sanctuary Road
336 Sanctuary Road
Harleyville, SC 29448

Thomas E Schick
American Chemistry Council
1300 Wilson Boulevard
Arlington, VA 22209

David E. Benz
Troutman Sanders LLP
401 9th St., NW, Suite 1000
Washington, DC 20004

John B. Ficker
1700 North Monroe Street, Suite 1900
Arlington, VA 22209-1904



Louis E. Gitomer
March 30, 2006