

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 36186 (Sub-No. 1)

TEXAS RAILWAY EXCHANGE LLC
– CONSTRUCTION AND OPERATION EXEMPTION –
GALVESTON COUNTY, TX – PETITION FOR ISSUANCE
OF A CROSSING ORDER PURSUANT TO 49 U.S.C. § 10901(D)

**UNION PACIFIC RAILROAD COMPANY’S REPLY
TO TEXAS RAILWAY EXCHANGE LLC’S PETITION FOR
INSTITUTION OF MODIFIED PROCEDURAL SCHEDULE**

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Union Pacific Railroad Company objects to the modified procedural schedule proposed for this proceeding by Texas Railways Exchange LLC (“TREX”). TREX’s proposed schedule is based on the schedule adopted in the *Superior* case, in which the railroad owning the line subject to the crossing petition did “not object to a crossing,” and the schedule did not contemplate any discovery. *See Chi. & N.W. Ry. – Constr. & Operation Exemption – City of Superior, Douglas County, WI – Pet. for Issuance of an Order Pursuant to 49 U.S.C. 10901(d)*, FD 32433 (Sub-No. 1), slip op. at 1 (ICC served Nov. 30, 1994).¹ At this time, Union Pacific objects to TREX’s proposed crossing. And Union Pacific plans to seek discovery relating to TREX’s crossing petition, which includes a 94-page “Operations Report.”² Furthermore, this is not a

¹ TREX attached the *Superior* scheduling decision to its petition as Attachment B. TREX also mentions the scheduling order in the *WFE* case, but that case involved an overpass, not an at-grade crossing, so there were no potential on-going operational issues, and the railroad owning the line being crossed did not object to the proposed schedule. *See WFE R.R. – Constr. & Operation Exemption – Choctaw & McCurtain Counties, OK – Pet. for Issuance of an Order Pursuant to 49 U.S.C. 10901(d)*, FD 32607 (Sub-No. 1) (ICC served May 5, 1995) (attached to TREX’s petition as Attachment A).

² Union Pacific has engaged in some discovery relating to TREX’s related line construction and operation petition, but TREX objected to several of Union Pacific’s request as “speculative and premature” because they appeared “to pertain to a possible future crossing petition.” And, of (continued...)

straightforward crossing case. TREX is apparently seeking authority not only to cross Union Pacific's lines, but also to build its track laterally within Union Pacific's right-of-way, using Union Pacific property for as much as 43% of the total route, according to TREX's calculations. See TREX Crossing Petition at 6 ("TIT's private loop track can be connected directly to BNSF's line only by crossing UP's secondary tracks and property.").³

Under the circumstances, the most appropriate, most analogous procedural schedule is the one the Board adopted in *HolRail, LLC – Petition for Crossing Authority Under 49 U.S.C. 10901(d)*, FD 34421 (Sub-No. 1) (STB served Oct. 6, 2005).⁴ In *HolRail*, as in this case, the petitioner proposed to construct new track laterally within another railroad's right-of way. In *HolRail*, as in this case, the petitioner filed a construction petition, was subject to some initial discovery, and then filed a crossing petition. See *id.*, slip op. at 1. After the petitioner filed the crossing petition, the parties agreed on a schedule that set strict timelines for any additional discovery and gave the other railroad time to incorporate any material obtained through discovery in its reply to the crossing petition. See *id.*, slip op. at 2.

Union Pacific therefore asks the Board to adopt the following schedule for the remainder of this proceeding, where "Day X" is the date the Board serves the scheduling order:

- (a) X+20 days Union Pacific's discovery requests are due.
- (b) X+27 days TREX's objection to Union Pacific's discovery request are due.
- (c) X+34 days Union Pacific's motion to compel is due.

course, Union Pacific has had no opportunity to conduct discovery regarding the material submitted in support of the crossing petition itself.

³ See also TREX Crossing Petition, Meadows Second VS at 1-2 & Table 1-1 (addressing length of proposed track construction and distances of proposed track segments on Union Pacific property.)

⁴ For the Board's convenience, we have attached a copy of this decision.

- (d) X+41 days TREX's reply to Union Pacific's motion to compel is due.
- (e) X+50 days TREX's discovery responses are due (if no dispute).
- (f) X+95 days Union Pacific's reply to TREX's February 22, 2019 filing is due.

The proposed schedule would require each filing to be made approximately the same number of days after service of the initial scheduling order as the schedule adopted in *HolRail*.⁵ The *HolRail* schedule is plainly a more appropriate model here than the schedule adopted in *Superior*. Indeed, although TREX says the *Superior* case involved a “more complex and lengthy crossing . . . , with more affected traffic,” Petition for Procedural Schedule at 2-3, the issues in *Superior* were much less complex than here, in large part because the railroad being crossed in *Superior* did “not object to the crossing.” *Superior*, slip op. at 1.⁶ Moreover, TREX's proposed schedule does not appear to contemplate discovery. Union Pacific could not conduct discovery and prepare its reply within the 45-day reply period proposed by TREX. TREX needed 80 days to complete its response to Union Pacific's discovery regarding the construction petition, from December 4, 2018 (when Union Pacific served its discovery requests) to February 22, 2019 (when TREX provided notice that discovery was complete).⁷ A 45-day period to complete discovery and file a reply is simply not realistic.

Accordingly, Union Pacific respectfully requests that the Board adopt the proposed procedural schedule set out above.

⁵ Union Pacific's proposed schedule is actually slightly shorter than the schedule proposed in *HolRail*. The *HolRail* discovery requests were due 22 days after service of the scheduling order, and the reply to the crossing petition was due 99 days after service of the scheduling order.

⁶ TREX also refers to the relatively short procedural schedule established in *WFE*. See Petition for Procedural Schedule at 3. However, as noted above, *WFE* involved construction of an overpass, not an at-grade crossing. See note 1, *supra*.

⁷ Union Pacific does not make this statement as a criticism of TREX's response to our discovery. From Union Pacific's perspective, the parties worked effectively and cooperatively throughout the discovery process. The unavoidable fact is that discovery can take time.

Respectfully submitted,

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February 27, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February, 2019, I caused a copy of the foregoing document to be served by email on:

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/s/ Michael L. Rosenthal
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36315
SEC

SERVICE DATE – LATE RELEASE OCTOBER 6, 2005

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34421

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

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

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

Decided: October 6, 2005

By petition filed on November 13, 2003, HolRail, LLC (HolRail) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10901 for authority to construct and operate approximately 2 miles of rail line in Orangeburg and Dorchester Counties, SC. According to HolRail, this build-out line would connect with a line owned by Norfolk Southern Railway Company (NSR). HolRail proposes two potential routes for the build-out: a preferred route that would run parallel to track owned by CSX Transportation, Inc. (CSXT) and at least partially within CSXT's right-of-way (ROW) for most of its length, and an alternative route that, like its preferred route, would run parallel to CSXT's line, but would be constructed approximately 50 yards outside CSXT's ROW.

In a decision served on October 20, 2004, the Board stated that it would not approach this case in a piecemeal fashion by making any decisions, including conditional approval of HolRail's exemption petition, without a complete record. The Board therefore granted a motion to compel discovery filed by CSXT and two motions to compel discovery filed by HolRail so that HolRail could obtain information it needed to develop its proposal, and CSXT could obtain information to present its case, respectively.

On September 9, 2005, HolRail filed its petition for crossing, along with supplemental evidence in support of its petition for exemption. On October 3, 2005, CSXT filed a request, with which HolRail concurs, for the Board to adopt a procedural schedule to govern the remainder of this proceeding, or in the alternative, to grant CSXT an extension to file its reply to HolRail's crossing petition and supplemental information. CSXT states that HolRail and CSXT have agreed to the proposed schedule. The proposed procedural schedule will be adopted.

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

It is ordered:

1. The procedural schedule for the remainder of this proceeding is as follows:

October 28, 2005	CSXT's discovery requests are due.
November 4, 2005	HolRail's objections to CSXT discovery requests are due.
November 11, 2005	CSXT's motion to compel is due.
November 18, 2005	HolRail's reply to CSXT's motion to compel is due.
November 30, 2005	HolRail's discovery responses are due (if no dispute).
January 13, 2005	CSXT's reply to HolRail's September 9, 2005 filing is due.

2. This decision is effective on its date of service.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary