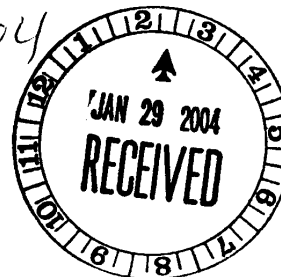


January 29, 2004

Via Hand Delivery

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



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

Dear Secretary Williams:

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

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

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

Sincerely,

A handwritten signature in cursive script, appearing to read 'Jeffrey O. Moreno'.

Jeffrey O. Moreno
Michael H. Higgins
Counsel for HolRail LLC

ENTERED
Office of Proceedings

JAN 29 2004

Part of
Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 34421

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



ENTERED
Office of Proceedings

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

JAN 29 2004

Part of
Public Record

HolRail LLC ("HolRail") hereby submits its Reply in opposition to the Motion to Compel Discovery Responses ("Motion") filed by CSX Transportation, Inc. ("CSX") on January 9, 2004. For the reasons set forth below, CSX's Motion should be denied in its entirety.

I. INTRODUCTION AND SUMMARY

CSX's Motion fails to make the required showing that the discovery requests at issue are relevant to the statutory criteria that are applicable to HolRail's Petition for Exemption to Construct and Operate a Rail Line ("Petition") pursuant to 49 U.S.C. § 10502(a). Instead of demonstrating that its requests relate to the statutory criteria, CSX proffers two illegitimate arguments for compelling responses from HolRail.

First, CSX wrongly claims that certain of its requests are relevant solely because they relate to statements made in HolRail's Petition. This argument is defective because relevance is defined by the statutory criteria for granting an exemption, not simply by whatever statements a party may make about a particular subject in its pleading.

Second, CSX wrongly claims that certain of its requests are proper because they relate to its conclusory allegation that HolRail's construction of the proposed line will disrupt, or even damage, its existing operations. This argument is defective because operating impacts are not germane to the statutory criteria under 49 U.S.C. § 10502(a), but rather to the Board's consideration of a crossing petition under 49 U.S.C. § 10901(d), which HolRail has not yet filed.¹

In short, CSX has not demonstrated the relevance of its discovery requests to HolRail's exemption petition. Because HolRail's objections are proper, the Board should deny CSX's Motion in its entirety.

II. ARGUMENT

A. **CSX Misconstrues The Meaning Of "Relevance" By Seeking To Compel HolRail to Respond To Discovery That Is Not Related To The Statutory Criteria For Exemptions At 49 U.S.C. § 10502(a).**

The touchstone inquiry for the Board is whether CSX's discovery requests are relevant to the statutory criteria that govern the Board's consideration of HolRail's exemption petition under 49 U.S.C. § 10502(a). The Board described this standard in STB Finance Docket Nos. 34060 and 34060 (Sub-No. 1), Midwest Generation LLC—Exemption from 49 U.S.C. 10901—For Construction in Will County, IL, etc., 2002 STB Lexis 178 at *7-8 (Served March 21, 2002) ("Midwest");

IC argues that its discovery on service issues should nonetheless be allowed because Midwest claims in its petition that IC's service has been inadequate. As explained below, however, inadequacy of existing service is not a necessary showing under the statutory

¹ In anticipation of filing a crossing petition, HolRail has served discovery upon CSX in order to obtain information that is necessary for HolRail to address the statutory standards for crossing petitions under 49 U.S.C. § 10901(d), and which also would address the issues that CSX inappropriately and prematurely has raised in this docket through its "Motion to Dismiss HolRail's Petition for Exemption" and its "First Discovery Requests to HolRail."

criteria for licensing of new lines. Accordingly, we will deny IC's motion to compel responses

See also, STB Finance Docket No. 33877, Illinois Central Railroad Co.—Construction and Operation Exemption—In East Baton Rouge Parish, LA, 2001 STB Lexis 683 at *6 (Served August 21, 2001) (“Illinois Central”) (affirming the Secretary's denial of a motion to compel because discovery requests concerning “public need” for rail service are irrelevant to issues raised in a construction exemption proceeding). Under the correct standard, none of CSX's discovery requests are proper.

1. Otherwise irrelevant information does not become discoverable simply because it relates to background statements contained in an exemption petition.

In the first section of its Motion, CSX wrongly argues that certain of its discovery requests are proper solely because they seek “to determine the basis of certain statements in HolRail's Petition.” Motion at 6. CSX has not even attempted to demonstrate the relevance of HolRail's statements to the statutory exemption criteria. Thus, on this flawed premise, CSX improperly seeks an order compelling HolRail to provide information about: (i) past and future truck and rail car volumes shipped from Holcim (US) Inc.'s (“Holcim”) Holly Hill cement facility (**Interrogatory (“Int.”) Nos. 3, 4, 5, 11, and 12**); (ii) HolRail's assessment of CSX's rail service to Holly Hill (**Int. Nos. 8 and 14; Document Request (“DR”) No. 7**); and (iii) Holcim's reevaluation of Holly Hill's transportation needs (**Int. No. 7**).

The Midwest decision is squarely on point and compels denial of CSX's Motion as to the foregoing discovery requests. The mere fact that Midwest's Petition for Exemption had alleged Illinois Central's service inadequacies did not make the basis of those allegations discoverable, since those allegations were not relevant to the statutory criteria. Midwest at *7. Similarly, CSX cannot justify its discovery requests solely on the basis that HolRail made certain statements in its Petition, since those statements pertain to matters that are not relevant to the statutory criteria.

Midwest is particularly instructive regarding CSX's attempt to compel responses to **Int. Nos. 8 and 14 and DR No. 7**. Those requests pertain to background statements that HolRail made about the inadequacy of CSX's current rail service to the Holly Hill facility in order to explain HolRail's reasons for constructing the new rail line. HolRail's reasons for constructing the new rail line, while providing helpful context for the Petition, are irrelevant to whether the Petition should be granted. Inadequate rail service is precisely the same subject matter that the Board, in Midwest, declared irrelevant to its analysis under 49 U.S.C. § 10502(a), despite similar claims by Midwest in its petition. Midwest at *7.

Midwest also establishes that CSX's **Int. Nos. 3, 4, 5, 11, and 12** are irrelevant. In that decision, the Board denied IC's attempt to compel discovery of car load data from Midwest in the lead (construction exemption) docket because such information was not germane to issues arising under 49 U.S.C. § 10502(a). Midwest at *7. However, because Midwest also had filed a crossing petition simultaneously with its exemption petition, the Board found that the same requests were relevant to the crossing petition sub-docket. Thus, the Board granted IC's motion, in part, but only for purpose of the crossing case. Id. at *7. Here, HolRail has sought only exemption authority to construct and operate the proposed line. It has not yet filed a crossing petition. Accordingly, because CSX's Int. Nos. 3, 4, 5, 11, and 12 manifestly relate to shipment volumes—matters that are ancillary to the Board's analysis of the Petition under 49 U.S.C. § 10502(a)—the Board must deny CSX's Motion as to those requests.

The Board also must deny CSX's Motion as to **Int. No. 7**, which seeks to elicit the factors that Holcim considered in reevaluating its transportation needs. Holcim's transportation needs are not one of the statutory criteria for a construction exemption. Furthermore, the answer to this question clearly would involve Holcim's forecasts of Holly Hill demand and production,

the facility's existing rail transportation service, and other internal business considerations—in other words, precisely the same issues that the Board has found irrelevant to analysis of a construction exemption petition under 49 U.S.C. § 10502(a). Illinois Central at *8.

In summary, Midwest precludes discovery on any matter that is not relevant to a necessary showing under the statutory criteria. CSX's **Int. Nos. 3, 4, 5, 7, 8, 11, 12, and 14, and DR No. 7** all seek information that is not a necessary showing under the relevant statutory criteria for a construction exemption and, thus, they are not relevant for purposes of discovery. CSX has made no attempt to demonstrate relevance other than to assert that these discovery requests relate to statements made by HolRail. However, Midwest unequivocally holds that otherwise irrelevant information does not become discoverable merely because it relates to background statements made in an exemption petition.

2. CSX's conclusory operational concerns are irrelevant to the statutory criteria for exemptions under 49 U.S.C. § 10502(a).

In the second section of its Motion, CSX wrongly argues that its unsupported assertions about possible damage to its rail line—allegedly arising from HolRail's construction of the proposed line—legitimize its discovery requests for information on HolRail's (i) corporate actions and budgeting (**Int. Nos. 16 and 17 and Request for Admission ("RFA") Nos. 3, 4, and 5**), and (ii) construction plans (**Int. Nos. 15; DR Nos. 3, 4, 5, 6, 8, and 9; and, RFA Nos. 1, 2, 6, 7, 8, 9, 11, and 12**). The former are not relevant at all, and the latter are relevant, if at all, only in a crossing petition, which HolRail has not yet filed.

CSX attempts to draw a very tenuous link between these discovery requests and the statutory criteria in 49 U.S.C. § 10502(a) by contending that the alleged physical effects of HolRail's proposed construction on CSX's existing line are contrary to the Rail Transportation Policy at 49 U.S.C. § 10101(1-5, 7-9 and 11). This argument, however, is the same argument

that CSX has made to support its Motion to Dismiss HolRail's Petition, filed on December 3, 2003, and it should be rejected for the same reasons presented in HolRail's opposition to CSX's Motion to Dismiss, filed on December 23, 2003.

Both CSX's Motion to Dismiss and its Motion to Compel allege the same speculative harm that, even if true, cannot occur as a consequence of STB approval of HolRail's Petition. Since the alleged harm could result only from actual construction of the rail line within CSX's right-of-way, such harm cannot possibly arise unless and until HolRail obtains crossing authority from the Board, pursuant to a separate crossing proceeding conducted under 49 U.S.C.

§ 10901(d). Thus, HolRail's requested exemption does not adversely implicate any of the rail transportation policies that CSX cites. CSX's discovery requests, therefore, would be relevant, if at all, only in response to HolRail's crossing petition, after that petition has been filed. CSX will have ample opportunity to obtain discovery of HolRail in that proceeding and to present its operational concerns to the Board.

CSX ignores the Board's holding in Midwest by impermissibly seeking discovery on operating impacts in an exemption proceeding under 49 U.S.C. § 10502(a). CSX states that the purpose of these requests is "to discover how HolRail's proposed construction of its Preferred Line will affect CSX's existing operations." Motion at 8. But, in Midwest at *19, the Board held that potential adverse effects upon rail operations are irrelevant in the context of a rail construction exemption proceeding, but would be considered in a subsequent crossing petition:

[T]his issue does not concern whether Midwest should be authorized to build a line from its facility to reach the lines of [Union Pacific Railroad]—the determination under 10901(a)-(c)—but rather, whether that line may interfere with the operation of the crossed line—an issue for consideration under section 10901(d). Congress has made it clear in the statute that the subsection (d) analysis is to be conducted after we have completed our analysis under subsections (a)-(c).

This holding is consistent with the Board's resolution of a discovery dispute on the same issue earlier in the decision:

The specific discovery requests relating to the potential for the proposed new track to interfere with future IC operations are relevant to Midwest's crossing petition in the Sub-No. 1 docket. Accordingly, as to that docket, we will grant [the requests at issue].

Id. at *7 [emphasis added]. In this proceeding, HolRail has sought only exemption authority to construct and operate a new line of rail. Thus, the Board should deny CSX's Motion as to **Int. No. 15; DR Nos. 3, 4, 5, 6, 8, and 9; and, RFA Nos. 1, 2, 6, 7, 8, 9, 11, and 12** because those requests are based upon operational concerns that are irrelevant to the Board's consideration of HolRail's Petition under 49 U.S.C. § 10502(a).

In addition to the above, CSX attempts to justify its requests for information related to HolRail's corporate approvals and budgeting for the rail construction project on baseless conjecture about the bona fides of HolRail's proposed construction. CSX makes no demonstration as to how those requests are remotely relevant to the statutory criteria of 49 U.S.C. § 10502(a). A similar discovery request was denied in STB Finance Docket No. 33877, Illinois Central Railroad Co.—Construction and Operation Exemption—In East Baton Rouge Parish, LA, 2001 STB Lexis 510 at *6 (Served May 24, 2001), where the petitioner was asked to produce minutes of Board of Director meetings at which the construction project was discussed. Accordingly, with respect to **Int. Nos. 16 and 17 and RFA Nos. 3, 4, and 5**, CSX's Motion should be denied.

B. CSX's Motion Impedes the Efficient Handling of HolRail's Petition By Reversing The Statutory Order of Rail Construction Cases.

As a matter of orderly administration of this proceeding, the Board should not compel HolRail to respond to the discovery that CSX has propounded. As demonstrated above, some of

CSX's discovery requests may be relevant to HolRail's crossing petition, once it has been filed. Indeed, HolRail acknowledged this possibility in General Objection No. 1 to CSX's discovery requests. HolRail, in fact, currently is engaged in preparing a crossing petition. However, in order to present a petition that will meet the statutory standards of 10901(d) and address CSX's concerns, HolRail must engage in discovery of CSX, which HolRail already has initiated. It makes little sense for the Board to order HolRail to produce information that it is still in the process of developing, and will eventually present, in support of a crossing petition. Indeed, HolRail's crossing petition likely would provide much of the information covered by CSX's discovery requests. Once it reviews HolRail's petition, CSX then would be able to narrowly tailor subsequent discovery requests to address any areas where it believed additional, or supporting, information was necessary in order for it to respond. At this stage, however, CSX has posed improper and premature requests that reverse the statutory order of rail construction proceedings. See Midwest at *19.

III. CONCLUSION

For the reasons stated above, CSX's Motion to Compel is without merit. HolRail urges the Board to deny the Motion in its entirety.

Respectfully submitted,



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January 29, 2004

Counsel for HolRail LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of January, 2004, I have served a copy of HolRail LLC's Reply to the Motion to Compel of CSX Transportation, Inc., by hand delivery on the person listed below:

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Jeffrey O. Moreno