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210123

February 20, 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 (Sub-No. 1), *HolRail LLC—Petition for Crossing Authority Under 49 U.S.C. § 10901(d)-Holrail LLC's First Motion to Compel-Request For Entry Upon Land*

Dear Secretary Williams:

Please find enclosed for filing the original and ten (10) copies of HolRail LLC's First Motion To Compel-Request For Entry Upon Land in the above referenced docket. I have also enclosed a diskette containing the electronic version of the First Motion To Compel-Request For Entry Upon Land with exhibits in PDF 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 the undersigned.

Sincerely,

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

ENTERED
Office of Proceedings

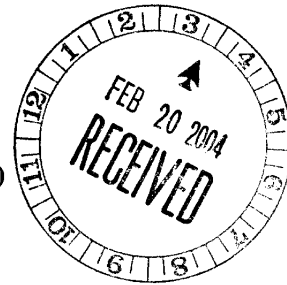
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Public Record

210123

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 34421 (Sub-No. 1)



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

**HOLRAIL LLC's FIRST MOTION TO COMPEL—
REQUEST FOR ENTRY UPON LAND**

**ENTERED
Office of Proceedings**

FEB 23 2003

**Part of
Public Record**

Pursuant to 49 C.F.R. § 1114.31(a), HolRail LLC ("HolRail"), hereby moves the Surface Transportation Board ("STB" or "Board") to compel CSX Transportation, Inc. ("CSX") to permit HolRail's representatives to enter upon an approximately two-mile section of CSX's property, in Orangeburg and Dorchester Counties, South Carolina, in order to conduct discovery in a manner consistent with 49 C.F.R. § 1114.30(a)(2). HolRail seeks to examine CSX's property to obtain information necessary for, and directly relevant to, a petition for crossing authority that HolRail is preparing to file pursuant to 49 U.S.C. § 10901(d).

I. BACKGROUND

This Motion to Compel ("Motion") is related to the petition HolRail filed on November 13, 2003 in STB Finance Docket No. 34421 for an exemption from the prior approval requirements of 49 U.S.C. § 10901 to construct and operate a rail line in Orangeburg and Dorchester Counties, South Carolina (the "Petition"). The primary purpose of HolRail's project is to establish intramodal rail competition at the Holly Hill cement facility, operated by HolRail's

corporate parent, Holcim (US) Inc. ("Holcim") Holly Hill is presently captive to CSX for rail service.

In its Petition, HolRail has requested exemption authority for two routes: the Preferred Route and an Alternate Route. The Preferred Route, as HolRail explained in its Petition, is approximately two miles long and would be constructed, in large part, across the length of CSX's existing right-of-way, and parallel to CSX's existing track.¹ A major reason why HolRail prefers this route is that the Alternative Route, on adjacent Holcim property, would require entirely new construction within an environmentally sensitive area, known as Four Hole Swamp. The swamp is a wetland located within South Carolina's Coastal Management Zone and any new construction immediately raises the specter of adverse environmental consequences. The construction of HolRail's Preferred Route longitudinally, over the length of CSX's right-of-way, would significantly reduce such adverse environmental impacts, which otherwise might prevent construction of the rail line altogether.

In order to maintain its monopoly over Holcim's Holly Hill facility, CSX has strenuously opposed HolRail's Petition for Exemption. CSX filed both a Motion to Dismiss and a Response to the Petition on December 3, 2003. In each of those filings, CSX speculated that HolRail's construction would physically damage the existing CSX line, and on that basis, asked the Board to deny or dismiss HolRail's Petition.² Consistent with its effort to deny competitive access to Holly Hill, CSX also stated that it would refuse to allow HolRail to cross its line.³ In a responsive pleading submitted on December 23, 2003, HolRail exposed CSX's failure to raise any issue relevant to the Board's consideration of HolRail's Petition under the standards of 49 U.S.C. § 10502(a), since the alleged harm to CSX could result only from actual construction

¹ See Petition at 6-7.

² See Motion to Dismiss at 1 and 4; Response at 3-7.

³ See Motion to Dismiss at 5.

within the CSX right-of-way, which could not occur unless and until HolRail obtained crossing authority pursuant to 49 U.S.C. § 10901(d).⁴ HolRail explained that a crossing proceeding would be the appropriate place for CSX to raise its operational concerns.⁵ HolRail's Petition and CSX's Motion to Dismiss remain pending before the Board.

Now that CSX has expressly refused HolRail consent to cross its property, HolRail is forced to prepare a crossing petition under § 10901(d). The issues raised in CSX's Motion to Dismiss and Response to HolRail's Petition, that were irrelevant under the § 10502(a) exemption standards, are relevant to the standards for a § 10901(d) crossing petition, because those issues pertain directly to the impact of HolRail's proposed construction upon the operation of CSX's existing line.

In order to gather information necessary for its crossing petition, HolRail served its First Discovery Requests on CSX on December 23, 2003, a copy of which is attached hereto as Exhibit A. HolRail's discovery, including interrogatories, requests for production, and a request to enter upon land, is reasonably calculated to elicit information and materials from CSX that are relevant to the statutory standards for crossings at 49 U.S.C. §§ 10901(d)(1)(A) and (B). CSX responded to HolRail's request to enter upon land by letter, dated January 12, 2003;⁶ it responded to HolRail's interrogatories and requests for production on January 21, 2003.⁷ Presently, HolRail and CSX are working to resolve disputes as to the interrogatories and document requests, and they have agreed to defer the deadline for filing a Motion to Compel.⁸

⁴ HolRail Reply to Motion to Dismiss at 2-5.

⁵ Id. at 5.

⁶ See Letter from L. Gitomer to J. Moreno, dated January 12, 2004 ("Jan. 12 Letter"), attached hereto as Exhibit B. Counsel for HolRail did not receive a copy of this letter until January 23, 2004, when counsel for CSX sent a copy by facsimile.

⁷ Because CSX's Responses and Objections to HolRail's interrogatories and document requests are not at issue in this motion to compel, HolRail has not attached a copy.

⁸ See Letter from J. Moreno to L. Gitomer, dated January 27, 2004 ("Jan 27 Letter") attached hereto as Exhibit C.

However, CSX has refused to negotiate HolRail's request to enter upon land.⁹ Although the parties agreed to defer all motions to compel, including HolRail's request to enter upon land, HolRail has elected to move forward with a motion to compel on this specific request for entry upon land due to delays in the negotiations with CSX and because CSX's objection to this request is not within the scope of those negotiations.

CSX's refusal to permit HolRail to enter upon land is implicit in the third condition contained in the Jan. 12th Letter, which limits HolRail's inspection to "segments of the CSXT track that HolRail proposes to cross and the immediately adjacent property."¹⁰ At a discovery teleconference between the parties, CSX explained that, under this condition, it would allow an inspection only if HolRail's proposed construction physically intersects CSX track, because CSX views the crossing statute as applying only to physical crossings of track, as opposed to property. Once HolRail informed CSX that it intended to cross CSX's property, but not its physical track, CSX stated that this fact did not satisfy its third condition and, therefore, that CSX objected to HolRail's requested inspection. HolRail now submits this Motion to Compel.

II. ARGUMENT

A. CSX's Refusal to Allow HolRail to Enter its Property is Based on an Unduly Restrictive Reading of the Crossing Statute.

CSX's denial of HolRail's request to enter upon its property is predicated on a mistaken view that 49 U.S.C. § 10901(d) requires a physical crossing of track, as opposed to property. Under the mistaken impression that HolRail has wrongly invoked the crossing statute, CSX asserts that it need not submit to an inspection of its line. The plain language of the statute, the statute's underlying purpose, relevant crossing precedent, and environmental considerations legitimize HolRail's request for a longitudinal crossing over the length of CSX's right-of-way,

⁹ See Jan. 27 Letter (Ex. C) at 3, stating that "the parties appear to be at an impasse on this issue."

¹⁰ See Jan. 12 Letter (Ex. B) at 1.

contrary to CSX's unduly narrow interpretation of the statute. Accordingly, the Board should grant this Motion to Compel because CSX's legal objection is invalid.

1. The Plain Language of 49 U.S.C. § 10901(d) Encompasses Longitudinal Crossings.

The plain language of the crossing statute supports HolRail's interpretation of § 10901(d) that a crossing does not require a physical intersection of track, and is not limited to a transverse crossing over the width of a right-of-way. Since the statute does not limit the universe of potential crossings or contain the word "track," HolRail's application is hardly "tortured," as CSX claims.¹¹ On the contrary, the statute states as follows:

(d)(1) When a certificate has been issued by the Board under this section authorizing the construction or extension of a railroad line, no other rail carrier may block any construction or extension authorized by such certificate by refusing to permit the carrier to cross its property if –

(A) the construction does not unreasonably interfere with the operation of the crossed line;

(B) the operation does not materially interfere with the operation of the crossed line; and

(C) the owner of the crossing line compensates the owner of the crossed line.

49 U.S.C. § 10901(d). Thus, the operative terms are "cross," "property," and "line."

CSX is wrong to argue that the meaning of "cross," as contained in the statute, excludes a longitudinal crossing, as proposed by HolRail. "Cross" is not defined in Part A of Subchapter IV of Title 49. According to Webster's Third New International Dictionary (Unabridged) 540-41 (1976), "cross" means, among other things, "to lie or be situated across;" "to extend from one edge or corner of to the other;" "to extend across or over;" or "to go from one side of to the other." All of these meanings encompass both lateral (*i.e.* width) and longitudinal (*i.e.* length-

¹¹ Motion to Dismiss at 6.

wise) crossings, and thus capture HolRail's plan to construct its Preferred Route across the length of CSX's corridor. The new line "will lie or be situated across," "extend from one edge or corner of to the other [of]," "extend across or over," and "go from one side to the other [of]" CSX's rail corridor from a point at the Holly Hill facility to a point of interconnection with the Norfolk Southern Railway ("NSR") on the property of Giant Cement. Thus, "cross," as it appears in the statute without any limitation, prohibits a rail carrier from blocking any construction or extension of a rail line by refusing to permit another carrier to cross the width or length of its property.

The term "property" in § 10901(d)(1) also encompasses HolRail's petition to cross the length of CSX's corridor because the CSX land that HolRail desires to cross is within the plain meaning of "property." Again, Part A of Subchapter IV of Title 49 does not define "property." However, Black's Law Dictionary explains that "property" is "commonly used to denote everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal." Black's Law Dictionary 1382 (Revised 4th ed. 1968). Black's defines "real property," as "[l]and, and generally whatever is erected or growing upon or affixed to land." *Id.* at 1383. Here, HolRail seeks to construct the Preferred Route across CSX's land from a point at Holcim's facility to a point at Giant Cement's facility. Because "property" includes land, tracks, facilities, etc., singularly or together, a petition to cross CSX's land clearly falls within the scope of § 10901(d)(1) as a request for authority to cross "property" of another carrier.

HolRail's crossing also comports with 49 U.S.C. §§ 10901(d)(1)(A) – (C), which employ the term "crossed line." In the railroading context, the term "line" has a broader definition than "track," such that the term "crossed line" does not require an actual intersection of tracks, but

includes a crossing of land that is part of a “line.” For example, in the context of an abandonment proceeding, the Federal Court of Appeals for the Sixth Circuit stated, “it is evident that a rail line embraces more than just the track necessary for the provision of rail service” with regard to an OFA seller’s obligation to maintain the “status quo” as to property encompassed by the line. Railroad Ventures, Inc. v STB, 299 F.3d 523, 552-553 (6th Cir. 2002) [emphasis added]. The court cited In re Boston & Maine Corp., 596 F.2d 2, 6 (1st Cir. 1979), which noted that “a railroad line is not merely the service being provided, but the physical properties and interests belonging to the debtor that constitute the line.” Additionally, in Iowa Terminal Railroad Co. v. ICC, 853 F.2d 965, 972 (D.C. Cir. 1988), the court upheld the ICC’s decision to require conveyance of a 10 acre parcel of land as part of the sale of a to-be abandoned line for continued rail operations. Indeed, construing “line” broadly to include land is consistent with the statute’s use of the term “property.” Therefore, because “line” encompasses, inter alia, land, tracks, and facilities, HolRail’s petition, which seeks authority to cross over CSX’s land, falls under §§ 10901(d)(1)(A) – (C).

In this proceeding, HolRail contends that either (i) the portion of CSX’s right-of-way that HolRail intends to cross is a rail line and, therefore, subject to the Board’s § 10901(d) crossing authority, or (ii) that portion of CSX’s right-of-way is not a rail line and, therefore, should be subject to South Carolina’s eminent domain laws. CSX’s construction of § 10901(d), however, seeks to have the best of both worlds. CSX claims that its entire right-of-way is a rail line within the Board’s jurisdiction, which entitles it to federal preemption, but claims that only its physical track is a rail line for purposes of the Board’s § 10901(d) crossing authority. Hence, CSX asserts that § 10901(d) only permits a crossing of physical track. The statute provides no basis for such a distinction. If CSX’s entire right-of-way is a rail line for the purpose of STB jurisdiction, it

also must be a rail line within the scope of the STB's crossing authority, regardless whether the crossing is by width, length, diagonally, or otherwise. The crossing statute then requires the Board to determine only whether the proposed crossing, regardless of form, unreasonably or materially interferes with the operation of the crossed line. However, if rail line means anything less than the entire CSX right-of-way, any portion of the right-of-way that is not a rail line must be subject to South Carolina's eminent domain laws. Therefore, HolRail's proposed crossing must be within the scope of the Board's crossing authority under 49 U.S.C. § 10901(d).

2. Relevant Precedent Supports HolRail's Longitudinal Crossing.

CSX mistakenly contends that HolRail's construction of 49 U.S.C. § 10901(d) is "unprecedented." In fact, the Board and the ICC have applied the crossing statute in situations that involved one carrier crossing the line of another, longitudinally, and one carrier crossing another carrier's property but not its tracks. For example, in STB Finance Docket No. 33740, The Burlington Northern and Santa Fe Railway Co.—Petition for Declaration or Prescription of Crossing, Trackage, or Joint Use Rights, 2003 STB Lexis 244 (Served May 13, 2003) ("BNSF"), the Board applied the crossing statute to allow BNSF to operate longitudinally over a quarter mile section of line owned by the Keokuk Junction Railway Company. The Board stated that "the term 'crossing' must be viewed pragmatically" to encompass different scenarios. Id. at *32 [emphasis added]. Here, HolRail's proposed crossing, which involves parallel construction, is not nearly as intrusive as the crossing the Board approved in BNSF, which allowed actual operation over another carrier's tracks.

Similarly, in Finance Docket No. 32547, Kansas City Southern Ry.—Construction and Operation—to Exxon Corporation's Plastics Plant, 1995 ICC Lexis 138 (Served June 12, 1995) ("KCS"), the ICC granted an exemption to Kansas City Southern Railway ("KCS") from the

requirements of 49 U.S.C. § 10901 to build a .375 mile long rail line to industry track facilities of an Exxon plant. The ICC approved KCS's petition despite the fact that the line would cross an easement for rail service held by the Illinois Central Railroad Company ("IC"), which had not built a track along the easement. The ICC stated that "[i]f we approve this petition to permit KCS to build this line[,] KCS may avail itself of section 10901(d) to cross ICR's property, i.e., the easement. ICR's rights are protected by the requirement that any such application meet the standards of section 10901(d) and that ICR be compensated if the crossing is approved." Id. at *6-7 [emphasis added]. Clearly, the ICC believed that KCS could properly invoke the crossing statute to cross ICR's easement, despite the non-existence of a physical intersection of track. As such, KCS clearly supports HolRail's use of the crossing statute to traverse CSX's land, a crossing which also does not involve intersecting CSX's track.¹²

HolRail's initiative is also consistent with similar construction projects, dating back more than a century. For example, in Southern Pacific Railway Co. v. Southern California Railway Co., 111 Cal. 221 (Cal. 1896), the court permitted Southern Pacific Railway Co. ("SP") to employ eminent domain for the purpose of constructing a parallel rail line within Southern California Railway Co.'s ("SC") existing right-of-way. The court found that SP's appropriation was proper because its construction and use would not interfere with SC's operations and because SC could be compensated for the use—essentially the same findings now required by 49 U.S.C. § 10901(d). Id. at 231-232. Similarly, in North Carolina Railroad Co. v. Carolina Central Railway Co., 83 N.C. 489 (N.C. 1880), the court denied an injunction sought by the North Carolina Railroad Company ("NCR") to prevent the Carolina Central Railroad Company

¹² See ICC Finance Docket Nos. 32158 and 32158 (Sub-No. 1), Gateway Western Railway Company—Construction Exemption—St. Claire County, IL, etc., 1993 ICC Lexis 147 at *1 (Served July 28, 1993) ("GWRC also sought authority to cross property it jointly owns with [Southern Pacific Lines] on the north end of the line to be constructed under Finance Docket No. 32158. This assertedly does not involve the crossing of any track, and thus, would not interfere with any existing rail operations.")

(“CRC”) from acting under its appropriation power to construct a rail line within NCR’s existing right-of-way and parallel to its existing tracks, in order to reach a depot. In denying the injunction, the court found that construction and operation of the parallel line would not interfere with the incumbent’s operations. Id. at *10-11.

The foregoing STB, ICC, and state court precedents strongly support HolRail’s invocation of 49 U.S.C. § 10901(d) to obtain crossing authority from the Board for a longitudinal crossing of land across the length of CSX’s right-of-way.

3. HolRail’s Petition is Consistent with the Pro-Competitive Purpose of § 10901(d).

HolRail’s proposed application of the crossing statute is consistent with the pro-competitive purpose of § 10901(d). When Congress enacted this section as part of the Staggers Rail Act of 1980, the crossing provision was designed to facilitate competition-enhancing build-outs by preventing incumbents from blocking new construction. See H.R. Conf. Rep. No. 96-1430 (1980), reprinted in 1980 U.S.C.C.A.N. 4110, 4147. “The legislative history of section 10901(d) indicates that the provision is intended to permit easier railroad entry. The purpose of the statute is to provide a way to overcome the ability of existing carriers to block the construction of new rail lines by refusing to allow potential competitors to cross their existing lines.” ICC Finance Docket Nos. 32630 and 32630 (Sub-No. 1) Omaha Public Power District—Construction Exemption in Otoe County, NE, etc., 1995 ICC Lexis 297 at *4 (Served Nov. 30, 1995) (“OPPD”).¹³ In this proceedings, HolRail intends to petition for crossing authority in conjunction with its initiative to bring the benefits of rail-to-rail competition to Holcim’s Holly Hill facility. As a result of such competition, Holly Hill will enjoy better service at reasonable

¹³ See also Louisville & Jefferson County Riverport Authority and CSX Transportation, Inc.—Construction and Operation Exemption—In Jefferson County, KY, 4 I.C.C.2d 749, 755 (1988).

rates. Thus, HolRail's objective is consistent with the overarching purpose of 49 U.S.C. § 10901(d) and the Board's previous application of the statute in Midwest and OPPD.

The relief available under the crossing statute is particularly important to HolRail because, absent a grant of authority, HolRail would be forced to pursue the Alternate Route, which could raise serious environmental concerns. In its Petition for Exemption, HolRail has sought authority both for its Preferred Route and the Alternate Route, the latter roughly a few hundred feet to the east of the Preferred Route and CSX's existing line, on adjoining land owned by Holcim in Four Hole Swamp. A major reason for HolRail's selection of the Preferred Route is that any alternative on Holcim's adjoining property would require entirely new construction within Four Hole Swamp. The swamp, however, is a wetland located in South Carolina's Coastal Management Zone and any such construction and operation immediately raises the possibility of adverse environmental consequences.

HolRail believes that construction of its Preferred Route within CSX's right-of-way would significantly lessen environmental impacts, which otherwise might prevent construction altogether. For example, construction within CSX's right of way would significantly reduce the amount of native vegetation that would have to be cleared and would require less cutting and filling. In addition, HolRail's construction of bridges and culverts closer to CSX's existing line could better preserve the natural water flow within the swamp because it would avoid a "pooling" effect that might occur between rail lines a few hundred feet apart. If the Board simply denies HolRail the opportunity to present its crossing case, which it would do by denying this Motion, then HolRail could remain captive to CSX because environmental issues might render the Alternate Route unworkable. This is precisely what Congress sought to prevent by

enacting the crossing statute. Accordingly, the Board should not construe § 10901(d) to preclude HolRail's crossing petition as a matter of law.

The existence of a possible alternate route that does not cross CSX's property does not preclude relief under 49 U.S.C. § 10901(d). 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 585 at *10 (Served October 4, 2002), IC opposed Midwest's crossing petition on the grounds that "there [was] an alternate configuration that would eliminate the need to cross [IC's] track." Id. at *3. Rejecting IC's protest, the Board granted both construction and crossing authority for Midwest's proposed route. Id. at *13. Importantly, the Board noted that IC's alternative configuration raised environmental issues that Midwest's route avoided. Id. at *5. Here, by building within CSX's corridor, HolRail actively seeks to avoid environmental concerns that could arise from construction of the Alternate Route across Four Hole Swamp.

As the foregoing discussion demonstrates, the language of the crossing statute, the statute's underlying purpose, relevant crossing precedent, and environmental considerations confirm that the Board has the statutory authority to grant a HolRail petition for a longitudinal crossing of the CSX right-of-way in order to establish rail to rail competition at Holly Hill. Accordingly, the Board should reject CSX's erroneous legal objection to HolRail's request to enter upon land and grant this Motion to Compel.

B. HolRail's Request to Enter Upon Land is for Purposes Directly Relevant to Its Crossing Petition.

This motion to compel is well-founded because HolRail's request to enter upon land seeks information that is directly relevant to the crossing petition that HolRail is preparing. HolRail's request states as follows:

HolRail requests access to CSX's right-of-way and property between the Facility and Giant for inspection of the rail line, the land, CSX's rail operations, and other lawful purposes consistent with 49 C.F.R. § 1114.30(a)(2).

The purpose of the foregoing request is to allow HolRail's representatives to enter CSX's right-of-way (i) to examine the land, the width and length of the corridor, the track layout, the operational use of the line, and any bridges, culverts, and other structures; and (ii) to conduct studies of Four Hole Swamp, including soil stability, drainage, foliage, etc. The information HolRail will gather is directly relevant to the statutory standards contained at 49 U.S.C. § 10901(d)(1)(A) and (B), which require HolRail to address the impact of its proposed construction and operations upon CSX's rail operations.

Indeed, information as to soil stability and drainage within Four Hole Swamp is particularly relevant and necessary, since CSX has alleged (without supporting evidence) that HolRail's construction could undermine the foundation of its line due to soil instability. HolRail's request to enter upon CSX's property is intended, in part, to address this allegation, which CSX expressed in its Motion to Dismiss and its Response to HolRail's Petition for Exemption. In both filings, CSX complained loudly that HolRail's proposed construction could physically damage or destroy CSX's existing rail line.¹⁴ Specifically, CSX alleged:

Through Four Hole Swamp, CSXT's line is built on moist swamp land, conditions that render the subsurface considerably less stable than in drained areas. The track is largely on a road bed elevated above the prevailing grade of the swamp. Any disruption of the physical base supporting CSXT's track would disrupt operations and require very expensive repairs. Indeed, CSXT can foresee an instance where, as a result of HolRail's construction in CSXT's right-of-way, that the CSXT rail line is undermined and that the next train to use the CSXT track derails because of HolRail's construction activities.

¹⁴ Response at 4-6; Motion to Dismiss at 3-4.

Response at 4 [emphasis added].¹⁵ HolRail's Reply to the Motion to Dismiss demonstrated that CSX's purely speculative assertions about operational disruptions are irrelevant to HolRail's Petition for Exemption.¹⁶ However, HolRail acknowledged that operational considerations could be relevant to a HolRail crossing petition, pursuant to § 10901(d).

CSX is on record in this proceeding as stating that:

Given the inherent moist swamp land conditions, which render the subsurface considerably less stable than in drained areas, supporting CSXT's elevated road bed, HolRail must bear the burden of showing its proposals will not have the anticipated effect.

Response at 6 [emphasis added]. However, CSX cannot assert that HolRail bears this burden, while at the same time denying HolRail the very discovery it requires in order to carry that burden. Now that HolRail is preparing a crossing petition, it requires entry upon the CSX right-of-way in order to test the soil stability to determine if CSX's operations, in fact, would be adversely affected, and if so, whether there are engineering solutions to eliminate any potential harm. Indeed, CSX itself has not asserted that its operations would be affected, but only that they could be affected, by HolRail's construction. Thus, the discovery requested by HolRail is essential to address this CSX concern.

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), the Board granted the Illinois Central Railroad Company's motion to compel Midwest Generation, LLC to respond to certain discovery requests "relating to the potential for [Midwest's] proposed new track to interfere with future operations" because they "[were] relevant to Midwest's crossing petition in the Sub-No. 1 docket." Because the

¹⁵ See also, Motion to Dismiss at 3-4.

¹⁶ HolRail Reply to Motion to Dismiss at 3-4.

information that HolRail seeks to discover by entering upon CSX's property is directly relevant to the standards HolRail must satisfy in its crossing application, its request under 49 C.F.R. § 1114.31(a) is proper. See STB Docket No. 42056, Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Co., 2001 STB Lexis 125 at *15-16 (February 9, 2001) ("TMPA") (compelling the defendant in a rail rate case to allow the complainant to enter onto its property to study fuel consumption because such information was relevant to complainant's case).

The Board must balance "the burden [on] and potential disruption" of CSX's rail operations with HolRail's "need for the information and the possibility of obtaining it through other means." TMPA at *9. See STB Finance Docket No. 32802, Philadelphia Belt Line Railroad Co. v. Consolidated Rail Corp., etc., 1996 STB Lexis 65 (Served March 1, 1996). Here, HolRail's need for the information that it will gain from its inspection outweighs what, at most, would be a minimal burden imposed on CSX.

First, HolRail cannot obtain the detailed structural, environmental, geological, and operational information by means other than an on-site inspection, and such information is critical to preparing a crossing petition that meets the standards of 49 U.S.C. § 10901(d). As stated above, HolRail must be allowed to obtain information about soil stability and drainage to address charges CSX already has made about the consequences of building an adjacent rail line.

Second, CSX's willingness to allow HolRail to enter its property, as shown in the Jan. 12 Letter, indicates that either CSX perceives a negligible burden, or it believes appropriate arrangements can be made to minimize impacts. HolRail, in turn, hereby commits that it will work with CSX to minimize, if not eliminate, any burden that its inspection might impose on what appears to be a lightly traveled branch line. Thus, the burden imposed by inspection is

slight, while HolRail's need for relevant information is substantial.¹⁷ Accordingly, HolRail's Motion to Compel is justified. See TMPA at *15-16.

C. CSX Has Not Raised Any Other Objections And May Not Do So Now.

It is apparent from CSX's Jan. 12th Letter and its Responses and Objections (which, in relevant part, simply refer to the letter) that CSX's sole basis for refusing to allow HolRail to enter upon its land is its erroneous legal interpretation of the crossing statute that HolRail conclusively refutes in the foregoing section of this motion to compel. Under hornbook law, CSX has waived any other available objections by failing to raise them in its initial response, when required to do so by law. 7 Moore's Federal Practice, § 34.13[2][a] (3d. ed. 2003). "When a party fails to object timely to interrogatories, production requests, or other discovery efforts, objections thereto are waived." In re United States, 864 F.2d 1153, 1156 (5th Cir. 1989). See Richmark v. Timber Falling Consultants, 959 F.2d 1468, 1473 (9th Cir. 1992) ("It is well established that a failure to object to discovery requests within the time required constitutes a waiver of any objection"); Maloney v. Universalcom, Inc., 2001 U.S. Dist. Lexis 122, at *3-4 (E.D. La. Jan. 3. 2001) (citing cases). Thus, CSX has lost its opportunity to raise any additional objections.

III. CONCLUSION

CSX's objection to HolRail's entry upon its right-of-way is based solely on an unduly narrow construction of 49 U.S.C. § 10901(d). HolRail does not believe that the entire width of the CSX right-of-way is necessary to provide rail service over the existing CSX track; nor does HolRail believe that its proposed construction and operation of a parallel track within a portion of the CSX right-of-way will unreasonably or materially interfere with CSX's operations.

¹⁷ In addition, allowing HolRail to conduct its own inspection and analysis of CSX's line could reduce CSX's discovery burden by allowing HolRail to obtain information through inspection rather than through extensive written discovery of CSX.

Nevertheless, HolRail requires discovery of CSX in order to prove these facts. Because HolRail must enter upon the CSX right-of-way to obtain information relevant and necessary to the standards set forth in § 10901(d), the Board should grant HolRail's Motion to Compel and order CSX to permit HolRail to enter upon the CSX right-of-way pursuant to 49 C.F.R. § 1114.30(a)(2).

Respectfully submitted,



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Washington, D.C. 20036
(202) 331-8800

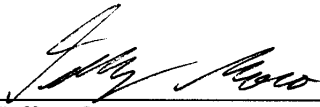
Counsel for HolRail LLC

February 20, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of February, 2004, I served a copy of HolRail's First Motion to Compel by hand delivery on counsel for CSX Transportation, Inc., at the following address:

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



Jeffrey O. Moreno

EXHIBIT A

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 34421 (Sub-No. 1)

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

**HOLRAIL LLC'S FIRST SET OF DISCOVERY REQUESTS
TO CSX TRANSPORTATION, INC.**

HolRail LLC ("HolRail"), through its counsel, hereby submits its First Set of Discovery Requests ("Requests") to CSXT Transportation, Inc. ("CSX"), pursuant to 49 C.F.R. §§ 1121.2 and 1114.21. These Requests contain Interrogatories, Requests for the Production of Documents, and a Request for Entry Upon Land for Inspection and Other Purposes.

HolRail asks that CSX furnish its responses and copies of responsive documents to the offices of Thompson Hine LLP, 1920 N Street, N.W., Suite 800, Washington, D.C. 20036, within fifteen (15) days from the date hereof. HolRail is prepared to cooperate with CSX to facilitate the expeditious and efficient production of responsive information and documents with minimum practicable burden. CSX should contact counsel for HolRail with any questions regarding these Requests.

These Requests are subject to the following Definitions and Instructions.

DEFINITIONS

1. "HolRail" means HolRail LLC.
2. "Holcim" means Holcim (US) Inc.

3. "Holly Hill" means Holly Hill, SC.
4. "Harleyville" means Harleyville, SC
5. "CSX" means CSX Transportation, Inc., its present or former employees, agents, counsel, officers, directors, managers, advisors, consultants, divisions, departments, and subsidiaries, or any of them, and all other persons acting (or who have acted) on its behalf.
6. "Facility" means the cement manufacturing plant owned and operated by Holcim, located at Holly Hill, SC in Orangeburg County.
7. "NSR" means the Norfolk Southern Railway Company.
8. "Giant" means the cement manufacturing plant operated by Giant Cement Company, Inc., located at Harleyville, SC, in Dorchester County.
9. "Four Hole Swamp" refers to the area of swamp land located, in whole or in part, within Orangeburg and Dorchester counties, SC, depicted on Exhibit A to HolRail's petition for exemption, filed November 13, 2003.
10. "Communication" means the transmittal or exchange of information of any kind in oral, written or electronic form, including e-mail.
11. "Describe" when used in relation to a communication means to identify the participants, the date or time period when the communication took place, the location of the participants at the time of the communication and a detailed summary of the content of the communications.
12. "Document" means all writings or other compilations of information, whether generated by hand, mechanical or electronic means, including, without limitation, photographs, lists, memoranda, reports, studies, notes, letters, e-mails, phone

logs, contracts, workpapers, maps, tape recordings, computer tapes, computer programs, computer printouts, computer models, statistical or financial statements, graphs, charts, sketches, note charts, plans, drawings, minutes or records of meetings, expressions or statements or policy, brochures, pamphlets, advertisements, tables, circulars, press releases, drafts, revisions of drafts, invoices, receipts, telecopies, telegrams, newsletters, notations, books, affidavits, statements, speeches, summaries, opinions, analyses, projections, evaluations, statistical records, proposals, outlines, any electronic or mechanical records or representations (including physical things such as, but not limited to, computer disks), and all other materials of any tangible medium or expression, in CSX's current or prior possession, custody or control. Further, the term "document" includes:

- (a) Both basic records and summaries of such records (including computer runs);
- (b) Both original versions and copies that differ in any respect from original versions; and
- (c) Both documents in the possession of CSX and documents in the possession of consultants, counsel, or any other person that has assisted CSX.

13. "Identify,"

- (a) when referring to a person, means to give, to the extent known, the person's full name, present or last known address, employment position, job description, phone number, and the present or last known place of employment;
- (b) when referring to a corporation, partnership, company or other business entity, means to state the name of the entity and the address and telephone number of its principal place of business;
- (c) when referring to a document, means to give, to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of the document;

(iv) author(s), addressee(s) or recipient(s); and (v) its present location and custodian.

14. "Including" means including without limitation.

15. "Person" means natural persons, corporations, institutions, partnerships, firms, joint ventures, associations, political subdivisions or other legal entities, as the case may be.

16. "Possession, custody, or control" refers to and includes documents actually within the possession, custody or control of CSX, and refers to and includes documents prepared by, obtained, or placed in the possession, custody, or control of any person within the scope of his or her duties or relationship to CSX; and further refers to and includes documents having been placed in the temporary possession, custody, or control of any third party by CSX. Documents are deemed to be in the possession, custody, or control of CSX if CSX has the right to secure the document, or a copy thereof from another person or entity, whether public or private, having such actual physical possession, custody, or control thereof.

17. "Provide" (except where the word is used with respect to providing service or equipment) means to supply a complete narrative response.

18. "Produce" means to make available to the undersigned for copying and viewing.

19. "Refers to" or "referring to" mean making a statement about, discussing, describing, reflecting, dealing with, consisting of, constituting, comprising, or in any way concerning, in whole or in part, the subject.

20. “Related”, “related to”, or “relating to” mean making a statement about, discussing, describing, reflecting, dealing with, consisting of, constituting, comprising, or in any way concerning, in whole or in part, the subject.

INSTRUCTIONS

1. Each paragraph below shall operate and be construed independently.

Unless otherwise indicated, no paragraph limits the scope of any other paragraph.

2. Each Interrogatory should be responded to separately and fully in writing, unless it is objected to, in which event the reasons for objection should be stated.

3. Unless otherwise specified, all uses of the conjunctive include the disjunctive and vice versa, and words in the singular include the plural and vice versa.

4. Unless otherwise specified, these requests cover calendar years 2000 to the date of response.

5. If any information or document is withheld on the ground that it is privileged or otherwise not discoverable:

- (a) Identify the nature of the information or document;
- (b) Identify the subject matter of the information or document, i.e., briefly describe the contents of the document;
- (c) Identify the author and all addressees or recipients of the document and indicate whether any of those individuals are attorneys;
- (d) Identify the date of the document; and
- (e) State the nature of the claim that the information or document is privileged.

6. If the production of any requested document is withheld for claimed grounds other than privilege or attorney work product, state with specificity the basis for such withholding.

7. If any document called for by any Request for the Production is not available or accessible, CSX should provide sufficient explanation of the reasons, as well as an identification of the unavailable or inaccessible document(s).

8. If any document or information called for by these Requests is available in computerized format, produce the document or information in that format, along with a description of the software utilized, instruction books, and all other material necessary to translate the documents or information from computerized to hard copy format.

9. If CSX knows or later learns that its response to any request is incorrect, it should correct that response.

10. Subject to Instruction 12, all documents should be produced or made available for inspection in the form in which they are retained by CSX in its usual course of business, unless otherwise agreed by HolRail.

11. These Requests are continuing in nature, and CSX should supplement its responses if it becomes aware of additional responsive information or documents subsequent to its initial response to these requests.

12. The produced documents should be organized or numbered in such a manner that HolRail may readily determine which documents are being produced in response to each specific request. If no document is produced in response to any specific request, please so indicate in the response.

13. The Requests for the Production of Documents contained herein apply to all documents within the possession, custody, or control of CSX.

INTERROGATORIES

1. Identify each CSX train or crew assignment that regularly uses any portion of the line segment between Pregnall and Vance, SC.
2. Identify each train or crew assignment of any other rail carrier that regularly uses any portion of the line segment between Pregnall and Vance, SC.
3. With respect to each train or crew assignment identified in the two preceding Interrogatories, provide the following information:
 - (a) crew reporting time;
 - (b) crew reporting location;
 - (c) crew off-duty location;
 - (d) what days of the week each crew works;
 - (e) typical total time on duty per shift;
 - (f) crew working limits, indicating whether a one-way trip or a round-trip (turn) is made;
 - (g) principal duties;
 - (h) number and type of locomotives typically used;
 - (i) locomotive layover location;
 - (j) number of cars handled per day;
 - (k) customers served and service frequency;
 - (l) daily loads and empties spotted at each customer; and
 - (m) location, frequency and volume of interchange performed.
4. How many carloads were handled each year on the line segment between Pregnall and Vance, SC in the last three full years for which data is available?
5. How many days per week does each rail service customer on the line segment between Pregnall and Vance, SC receive service and how many cars are spotted to each customer per week?
6. On the portion of the CSX line between Giant and the Facility, has CSX experienced washouts, areas of track sloughing off or unusual amounts of track settlement requiring: (a) smoothing or surfacing of track; (b) slow orders or (c) taking the

track out of service? If yes, describe the cause of the problem and the method of remediation, and indicate the corresponding dates.

7. If beavers, soil boring animals, or other pests cause any problems for CSX's operations over the portion of its line between Giant and the Facility, then explain how CSX controls, remedies, or eliminates the problem.

8. Describe how CSX accomplishes brushcutting, clearing, and weed control on the portion of the CSX line between Giant and the Facility.

9. Provide dates of latest Program (Capital) work including, but not limited to: rail, T&S, surfacing, undercutting, rail grinding and scope of work for the portion of CSX's line between Giant and the Facility.

10. Identify the CSX employee most knowledgeable about soil conditions along the portion of the CSX line between Giant and the Facility, or within Four Hole Swamp and explain in detail the basis for his or her knowledge.

11. Identify any studies or analyses that CSX has performed regarding soil conditions along the portion of the CSX line between Giant and the Facility, or within Four Hole Swamp.

12. Identify any third-party contractor that CSX has retained, engaged or hired to perform or provide maintenance work, construction, or repairs along the portion of the CSX line between Giant and the Facility.

REQUESTS FOR THE PRODUCTION OF DOCUMENTS

1. Produce all documents relating to CSX's responses to HolRail's Interrogatories.

2. Produce a copy of the latest timetable covering the line segment between Pregnall and Vance, SC.

3. Produce the latest track chart covering the area between Pregnall and Vance, SC.

4. Produce all documents relating to curve information not contained within, or obtainable from, the track chart furnished in response to Document Request no. 3.

5. Produce copies of the latest bridge and/or culvert inspection reports for all such structures along the CSX line between Giant and the Facility. Bridge and culvert information should include:

- (a) condition;
- (b) latest inspection date;
- (c) type of construction material;
- (d) drainage structure width and length (include opening size);
- (e) load rating (if available);
- (f) recent replacement or repairs to structures; and
- (g) recommended remedial action and necessary repairs (if any).

7. Produce all documents related to the design and location of all bridges and culverts along the CSX line between Giant and the Facility, including engineering or architectural drawings.

8. Produce all documents relating to slope stabilization for rail operations along the CSX line between Giant and Holly Hill (non-emergency).

9. Produce the most recent version of right-of-way maps for the line segment between Pregnall and Vance, SC.

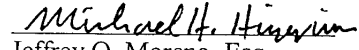
10. Provide copies of latest track geometry car findings covering the line segment between Pregnall and Vance, SC.

11. Produce all track inspection reports covering the line segment between Pregnall and Vance, SC for the last two years.
11. Produce all documents referring to soil conditions along the CSX line between Giant and the Facility, or within Four Hole Swamp.
12. Produce a map, or maps, of the CSX line between Giant and the Facility that depict(s): (a) the rails, ties, tracks, switches, sensors, bridges, culverts, fences, subsurface utilities, or any other structures that CSX uses or has constructed, or (b) any combination of the foregoing.
13. Produce all documents prepared by or for CSX since January 1, 1999 that refer or relate to any plans to add to, or improve upon the rail infrastructure between Pregnall and Vance, SC.

**REQUEST FOR ENTRY UPON LAND
FOR INSPECTION AND OTHER PURPOSES**

1. HolRail requests access to CSX's right-of-way and property between the Facility and Giant for inspection of the rail line, the land, CSX's rail operations, and other lawful purposes consistent with 49 C.F.R. § 1114.30(a)(2).

Respectfully submitted,


Jeffrey O. Moreno, Esq.
Michael H. Higgins, Esq.
THOMPSON HINE, LLP
1920 N Street, N.W. Suite 800
Washington, D.C. 20036
(202) 331-8800 (telephone)
(202) 331-8330 (fax)

Counsel for HolRail, LLC

December 23, 2003

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing First Set of Discovery Requests to CSX Transportation, Inc. were served by hand delivery on December 23, 2003 upon the following:

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

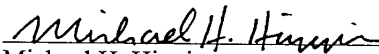

Michael H. Higgins

EXHIBIT B

BALL JANIK LLP
ATTORNEYS

1455 F St., N.W., Suite 225
WASHINGTON, D.C. 20005-1004

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

TELECOPY TRANSMISSION FORM

Date January 23, 2004
Send To: Jeff Moreno 331-8330
From: Lou Gitomer 202-466-6532
email lgitomer@bjllp.com
Number of pages transmitted (including cover sheet): 2

COMMENTS:

CONFIDENTIALITY NOTICE

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BALL JANIK LLP

A T T O R N E Y S

LOUIS E. GITOMER
OF COUNSEL
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TELEPHONE 202-638-3307
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January 12, 2004

lgitomer@dc.bjllp.com

Jeffery O. Moreno, Esq.
Thompson Hine LLP
1920 N Street, N.W.
Washington, D.C. 20036-1600

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*

Dear Jeff:

In HolRail LLC's First Set of Discovery Requests to CSX Transportation, Inc., "HolRail requests access to CSX's right-of-way and property between the Facility and Giant for inspection of the rail line, the land, and CSX's rail operations, and other lawful purposes consistent with 49 C.F.R. § 1114.30(a)(2)."

CSX Transportation, Inc. ("CSXT") is willing to grant HolRail LLC's ("HolRail") inspection request upon the following conditions:

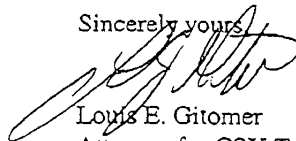
1. HolRail and every individual taking part in the inspection will at least 48 hours in advance of the inspection execute appropriate liability releases to be provided by CSXT.
2. The inspection shall occur at a date and time to be mutually agreed upon by CSXT and HolRail.
3. The inspection shall be limited to those segments of the CSXT track that HolRail proposes to cross and the immediately adjacent property.

Please indicate acceptance of these terms by countersigning an extra copy of this letter and returning it to the undersigned, as well as suggesting some dates and times for the inspection.

If you have any questions, please call or email me.

Jeffrey O. Moreno
Attorney for HolRail LLC

Sincerely yours,



Louis E. Gitomer
Attorney for CSX Transportation, Inc.

EXHIBIT C

January 27, 2004

By Fax

Louis E. Gitomer
Ball Janik LLP
1455 F Street, NW
Suite 225
Washington, DC 20005

RE: Finance Docket No. 34421 (Sub-No. 1), *Holrail LLC -- Petition for Crossing Authority*
Under 49 U.S.C. 10901(d)

Dear Lou:

This letter summarizes our teleconference yesterday to discuss the responses and objections of CSX Transportation, Inc. ("CSX") to the First Set of Discovery Requests by HolRail LLC ("HolRail"). In our conversation, I explained the rationale behind several of the HolRail requests to which CSX has objected and I narrowed the scope of other requests. Based upon our discussions, you have agreed to consult with your client about providing responses to some additional requests. A point-by-point summary of our discussion is presented below.

General Objection No. 5

To the extent that CSX is withholding responsive documents based upon this objection, you have agreed to provide a list of such documents, or to state that none exist.

General Objection No. 9

This objection relates primarily to those HolRail discovery requests that define their geographic scope in terms of the CSX line segment between Pregnall and Vance. HolRail has agreed to narrow the scope of those requests in two different ways. First, on those requests that relate to engineering of the CSX line (Document Request Nos. 3-5, 7, and 10-11), HolRail agrees to narrow the scope to the CSX line between the following two points: (a) one-half mile north of the current CSX switch connection into the Holcim cement plant, and (b) one half mile south of the right-of-way division between CSX and Norfolk Southern at the Giant cement plant.¹ Second, on those requests that relate to operations over the CSX line (Int. No. 1-5 and Document Request Nos. 2, 9 and 13), HolRail agrees to the same scope as the engineering requests, less the one-half mile extension. Additional refinements are discussed for individual discovery requests, below.

¹ This letter more specifically identifies the two points than I was able to provide in our teleconference.

January 27, 2004

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Interrogatory Nos. 1-3

These requests are an attempt to understand CSX's operation, with respect to crew assignments, so that HolRail may determine any potential impact upon CSX operations, in order to satisfy the requirements of 49 U.S.C. § 10901(d). HolRail is willing to drop these interrogatories if CSX is willing to stipulate that HolRail's proposed crossing of CSX's right-of-way will not impact crew assignments.

Interrogatory No. 4

This request inquires about the carloads handled by CSX, so that HolRail can determine the effect of its proposed crossing on CSX operations.

Interrogatory No. 5

This request inquires about the frequency of CSX service to its customers, so that HolRail can determine the effect of its proposed crossing on CSX operations. HolRail has agreed to limit this request to nearby shippers whose traffic traverses the CSX line between the Holcim and Giant cement plants.

Document Request No. 2

This request asks for CSX's timetables, which show stations, speed limits, special operating instructions, switches, distances, etc. This information pertains to operational issues and are relevant to HolRail's assessment of the impact of its proposed crossing on CSX operations.

Document Request Nos. 3-4

These requests ask for track chart and curve information in order to identify the culverts, bridges, switches and other infrastructure on the existing CSX line. This information will enable HolRail to line up its culverts and bridges with CSX's infrastructure to avoid any adverse effects on water flow, to mirror CSX track to avoid impacts on its substructure, and to mirror CSX curves to avoid crowding the CSX line. This information is similar to the information that CSX has agreed to produce in response to Interrogatory No. 9.

Document Request Nos. 5 & 7

These requests ask for bridge and culvert inspection reports and bridge design and location information. These are relevant to the condition of the bridges and will influence the type of bridges that HolRail would use in order to minimize any effects on the CSX line. For example, a

January 27, 2004

Page 3

track inspection report would reveal a plugged culvert that CSX has allowed to remain plugged for a long time. Since a plugged culvert affects water flow, HolRail would want to account for this in its design.

Document Request No. 9

CSX's right-of-way maps are needed in order to identify precisely what parts of the CSX right-of-way HolRail will need to cross.

Document Request Nos. 10 and 11

These requests ask for track geometry reports and track inspection reports. This information will enable HolRail to identify any weak areas of structure that may exist on the CSX line, such as an undersized culvert, so that HolRail's construction will not affect the CSX line. Such information also will reveal any history of problem areas so that HolRail will know if additional engineering is required on its proposed line in order to avoid an impact on the CSX line. In the alternative, in lieu of producing the requested information, HolRail would accept a CSX statement that there are no engineering defects in the line segment between the Giant and Holcim cement plants.

Document Request No. 13

This request is relevant to the extent that HolRail's proposed crossing might interfere with any CSX plans to add or improve its infrastructure between the Giant and Holcim cement plants. In addition, any CSX plans to add or improve infrastructure on this line segment, such as double track, could contradict CSX's own arguments in opposition to HolRail's construction.

Request for Entry Upon Land

Pursuant to a letter from you dated January 12, 2004, CSX has agreed to HolRail's request to enter onto the CSX right-of-way for inspection, subject to three conditions. Based upon our conversation, I understand CSX's third condition to require that HolRail physically cross CSX track, not just the right-of-way, and that the inspection would be limited only to that area immediately adjacent to the physical crossing of track. HolRail disagrees with this limitation and, in any event, would require access to a greater portion of CSX's property to perform soil stability analyses to address CSX's concern that HolRail's proposed crossing of CSX's right-of-way would undermine the existing CSX infrastructure. The parties appear to be at an impasse on this issue.

* * *

January 27, 2004
Page 4

Under the Board's discovery regulations, HolRail's deadline to file a motion to compel discovery of CSX is Monday, February 2, 2004. In order to facilitate our negotiation of these discovery disputes, however, we have agreed that a motion to compel will not be due until ten days after CSX responds to this letter, informing HolRail of CSX's decision whether to respond to any additional discovery requests as explained and/or narrowed herein.

Sincerely,



Jeffrey O. Moreno