

210278

BALL JANIK LLP

A T T O R N E Y S

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

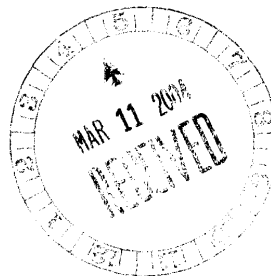
www.balljanik.com

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

lgitomer@dc.bjllp.com

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

March 11, 2004



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*

Dear Secretary Williams:

Enclosed are the original and 10 copies of a Response and Opposition to a First Motion to Compel Request for Entry upon Land and three discs with the file Response.

Please time and date stamp the additional copy of this letter and the Response, and return them to our messenger. Thank you for your assistance.

If you have any questions, call or email me.

Sincerely yours,

Louis E. Gitomer
Attorney for CSX Transportation, Inc.

ENTERED
Office of Proceedings

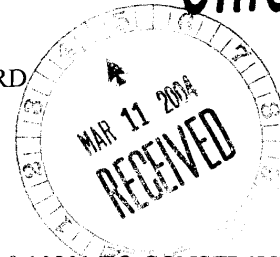
MAR 11 2004

Part of
Public Record

Enclosures

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

CSX TRANSPORTATION, INC.'S RESPONSE AND OPPOSITION TO HOLRAIL LLC'S
FIRST MOTION TO COMPEL -REQUEST FOR ENTRY UPON LAND

ENTERED
Office of Proceedings

MAR 11 2004

Part of
Public Record

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 11, 2004

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

CSX TRANSPORTATION, INC.'S RESPONSE AND OPPOSITION TO HOLRAIL LLC'S
FIRST MOTION TO COMPEL—REQUEST FOR ENTRY UPON LAND

CSX Transportation, Inc. ("CSXT") responds in opposition to HolRail LLC's First Motion to Compel—Request for Entry Upon Land (the "Entry Request"). In the Entry Request, HolRail LLC ("HolRail") has finally admitted that the crux of this proceeding is not crossing CSXT's track, but seeking the approval of the Surface Transportation Board (the "Board") in the unnecessary and involuntary expropriation of CSXT's property through the misapplication of 49 U.S.C. § 10901(d).

CSXT's position is that section 10901(d) is an extraordinary power granted to the Board to prevent railroads from blocking the crossing of their track by a newly constructed railroad line. CSXT strenuously urges the Board to reject HolRail's unique and incorrect interpretation of section 10901(d) that would permit the longitudinal use of a rail line without crossing track. Taken to its logical extreme, HolRail's proposition would permit the expropriation of every

railroad line in the United States for the construction of a parallel line, within the railroad's own right-of-way.

INTRODUCTION

On November 13, 2003, as corrected on December 5, 2003, HolRail filed a Verified Petition for Exemption from the pre-approval requirements of 49 U.S.C. § 10901 pursuant to 49 C.F.R. § 1121 (the "Petition"). HolRail seeks to construct a line of railroad between an unspecified location at its facility in Holly Hill, SC and an unspecified connection with the Norfolk Southern Railway Company ("NS") in the vicinity of a facility referred to by HolRail as Giant Cement. HolRail has stated that its preference is to build the line within the CSXT right-of-way (the "Preferred Line"); although CSXT was not made aware of this proposal until HolRail filed the Petition with the Board. CSXT has not agreed and will not agree to make its right-of-way available to HolRail to build a railroad line. HolRail has also stated that an alternative is to construct a line east of the CSXT right-of-way on the property of Holcim (US) Inc. ("Holcim"), HolRail's parent (the "Alternate Line").

Prior to filing the Petition, HolRail met with the staff of the Board's Section of Environmental Analysis ("SEA") on October 14, 2003, to discuss the construction project. On October 28, 2003, HolRail filed a letter with SEA requesting waiver of the six month prefiling notice required by 49 C.F.R. § 1105.10(a). The waiver was granted by letter dated November 18, 2003.

On December 3, 2003, CSXT filed a Response in opposition to the Petition, a Motion to Dismiss the Petition, and the First Discovery Request. CSXT limited the information sought

from HolRail in the First Discovery Request to the Preferred Line. CSXT only objected to the construction of the Preferred Line.

HolRail submitted its Responses and Objections on December 18, 2003. CSXT filed a Motion to Compel on January 9, 2004. On December 23, 2003, HolRail replied to the Motion to Dismiss and requested leave to, and did, respond to CSXT's Response.

On December 23, 2003, HolRail served its First Discovery Requests ("HolRail's First Discovery") on CSXT, which included the request to enter on CSXT's land for inspection. By letter dated January 12, 2004, which was hand delivered to the HolRail's counsel's office on that date, CSXT agreed to allow an inspection of its property subject to three conditions. See Exhibit B of the Entry Request.¹ The disagreement between CSXT and HolRail relates only to the third condition, which states "The inspection shall be limited to those segments of the CSXT track that HolRail proposes to cross and the immediately adjacent property."

Counsel for HolRail and CSXT engaged in a conference on January 23, 2004, in an effort to reduce the issues in dispute as to HolRail's First Discovery. On many issues counsel were successful. However, counsel were not successful in resolving the disagreement over CSXT's third condition to HolRail's request to enter and inspect CSXT's property. HolRail then filed the Entry Request.

THE ENTRY REQUEST IS REplete WITH FACTUAL MISSTATEMENTS

HolRail makes many misstatements in the Entry Request. Before responding to HolRail's errant argument, CSXT will address HolRail's misleading statements that form the basis for HolRail's argument.

HolRail claims that the cement manufacturer Holcim, located at Holly Hill, SC is captive to CSXT for rail service. ER at 2. Although CSXT is the only railroad serving Holcim at Holly Hill, Holcim is not captive to CSXT for transportation. Holcim ships more volume by truck than rail to and from the Holly Hill facility.

Although HolRail claims that its route over CSXT is only about two miles long (ER at 2), CSXT has determined that the new route will be nearly three miles long.

HolRail claims that it prefers the route over CSXT to the route over Holcim's property because construction of the Alternate Line on Holcim's property "would require entirely new construction within an environmentally sensitive area, known as Four Hole Swamp." ER at 2 and 11. By omission, HolRail intimates that these problems would not exist if the Preferred Line were built on CSXT's property. This is not necessarily true. Construction by HolRail of the Preferred Line will also require entirely new construction. CSXT does not intend to share its track with HolRail. CSXT's line also runs through Four Hole Swamp, the same environmentally sensitive area where HolRail could build the Alternate Line. HolRail has no basis (i.e. an environmental assessment or study) for its claim that the environmental impacts of building the Preferred Line are less than the effects of the Alternate Line. Indeed, CSXT is extremely concerned about the effect on its upstream line of the construction of a near-by (within 20-40 feet) parallel line on the flow of water and erosion of the support of CSXT's roadbed and structures. There are minimal, if any, environmental benefits in HolRail constructing its new line on CSXT's right-of-way instead of Holcim's.

¹ In referring to specific pages in the Entry Request, CSXT will cite to ER ____.

As noted before, CSXT does not have a monopoly at Holcim's Holly Hill facility. There is substantial truck competition. CSXT has strenuously attempted to protect its property from HolRail's expropriation in this proceeding, not prevent construction of the Alternate Line. If construction of the Alternate Line is as environmentally damaging as HolRail suggests, then HolRail has not proposed a realistic alternate in its Petition.

CSXT has asked the Board to dismiss HolRail's Petition due to the dearth of evidence presented by HolRail. HolRail has so lowered the bar, that it expects the Board to approve a construction request based on trumped up justifications² and a line drawn on an unscaled map.³

HolRail does provide a kernel of its true intent when it discusses competitive access (ER at 2). It is clear that HolRail is seeking competitive access through this bogus construction of the Preferred Line request in order to avoid the Board's requirements of the competitive access rules under 49 C.F.R. § 1144.

HolRail also finally admits that it is using circular reasoning to try to prevent CSXT from obtaining information and opposing the construction proposal. ER at 2-3. HolRail claims that CSXT cannot be harmed by HolRail's construction proposal because that will only occur after HolRail seeks authority to cross CSXT's line. HolRail asks the Board to exempt its construction proposal, even though the entire proposal is to be constructed on CSXT's right-of-way. But the Preferred Line construction is the exact same construction that HolRail sought in the Petition and

² In its response to CSXT's motion to compel discovery, HolRail refused to produce the background material for all of the rationale in the Petition justifying the construction as irrelevant. HolRail cannot have it both ways. Either its arguments in the petition are relevant and subject to discovery, or they are irrelevant and entitled to no weight or consideration.

that HolRail claims it will seek in the to be filed crossing petition. It appears that HolRail is trying to play the “old shell game” by hiding its construction proposal from challenge by CSXT under either its exemption or its purported crossing petition. CSXT is confident that the Board will see through HolRail’s charade.

ARGUMENT

A. CSXT’s Reading of 49 U.S.C. § 10901(d) is correct.

HolRail claims that the plain language of section 10901(d), the underlying purpose of the section, relevant crossing precedent, and environmental considerations legitimize HolRail’s proposed longitudinal crossing of CSXT’s line. HolRail is wrong.

Not only is HolRail wrong, but CSXT notes that environmental considerations play no role in the interpretation of section 10901(d). Moreover, there is no evidence of record that construction of the Preferred Line is more environmentally friendly than construction of the Alternate Line on Holcim’s land. Indeed, if Holcim were serious, it would construct the Alternate Line on its own right-of-way as a spur track in order to avoid the Board’s process, including the environmental review. At the same time, this approach would allow Holcim to take advantage of the preemption under Subtitle IV to limit state and local review and permitting requirements. CSXT is forced to conclude that HolRail and Holcim are not serious about constructing a new line, but have some other agenda, which they hope to advance in this proceeding.

³ CSXT notes that even for the Alternate Line, all that HolRail has submitted is a line drawn on an unscaled map. HolRail has obviously had access to the Holcim corridor for its alternative, but failed to even study it.

Section 10901(d) was enacted in section 221 of the Staggers Rail Act of 1980, Pub. L. No. 96-448 (1980). Section 10901(d) was replaced by new subsection 10901(d) in the ICC Termination Act of 1995, Pub. L. No. 104-88 (1995). In adopting the new section, the committee of conference retained “the House language as new section 10901”. H. Rept. 104-422 at 179 (1995). The House provision on crossing cases stated “Subsection (d) replaces former Section 10901(d), which empowers the agency to order one railroad whose tracks block the access of another railroad’s tracks to provide crossing arrangements.” *Id.* (Emphasis added.)

HolRail has failed to address this clear expression of Congressional intent. Instead, HolRail has constructed a Rube Goldberg analysis of section 10901(d) using definitions of the word “cross.” In its motion to dismiss, CSXT presented the Board with a different definition of the word “cross” to mean “intersect” and “not parallel.” When viewed in light of the legislative history of section 10901(d), it is the definition presented by CSXT which makes sense.

HolRail goes on to define the word “property.” HolRail’s analysis is an erroneous effort to expand the extraordinary power granted to the Board under section 10901(d).

CSXT contends that section 10901(d) is to provide relief where there is no alternative available, unlike the case here. Railroads consist of very long and narrow properties. Section 10901(d) is meant to prevent an existing railroad from prohibiting a newly constructed railroad track from crossing its own track. HolRail itself has demonstrated this in the crossing cases it has cited to support its erroneous position.

HolRail cites *Midwest Generating, LLC—Exemption from 49 U.S.C. 10901—for Construction in Will County, IL*, STB Finance Docket No. 34060 (STB served October 4, 2002)

(“*Midwest*”) for the proposition that the existence of an alternative route does not prevent a crossing request. HolRail is wrong. *Midwest* is distinguishable from the present proceeding in that the new track would cross the track of an existing railroad. *Id.* at 2. In addition, the track to be crossed was not in use, and future use was speculative at best. *Id.* at 5-6. Moreover, there was no additional support for the statement that there as an alternative. *Id.* Indeed, in *Midwest*, the Board never ruled on the issue of an alternate route.

The Burlington Northern and Santa Fe Railway Company (“BNSF”) was granted authority to cross the track of the Keokuk Junction Railway Company (“KJRY”). *The Burlington Northern and Santa Fe Railway Company—Petition for Declaration or Prescription of Crossing, Trackage, or Joint Use Rights*, STB Finance Docket No. 33740 (STB served May 13, 2003) (the “*BNSF Decision*”). The Board is well aware of the longstanding dispute between BNSF and KJRY that led to the *BNSF Decision*, where KJRY terminated BNSF’s 118 years of access to its Mooar Line by crossing KJRY. HolRail misrepresents the *BNSF Decision* when it states that “the Board applied the crossing statute to allow BNSF to operate longitudinally over a quarter mile section of line.” ER at 8. Throughout Sections II and III of the *BNSF Decision*, there are dozens of times when the Board specifically refers to the “track” that BNSF must cross. *Id.* at 12-16. Moreover, the longitudinal crossing referred to by HolRail was the use of KJRY’s track, not its adjacent right-of-way. *Id.* The Board states “Finally, we conclude that BNSF is entitled, under 49 U.S.C. 10901(d), to cross KJRY’s **track** in order to access the Mooar Line.” *Id.* at 16 (emphasis added). HolRail has misrepresented the holding of the *BNSF Decision*,

which fully supports CSXT's position that section 10901(d) involves the crossing of track, not the expropriation of CSXT's right-of-way.

HolRail also relies upon *Gateway Western Railway Company—Construction Exemption—St. Clair County, IL*, ICC Finance Docket No. 32158 (ICC served August 9, 1993) (“*Gateway*”). However, *Gateway* involved the construction of two diamond crossovers over the track of two separate railroads, not parallel to the track of a railroad.

HolRail next expands a decision to fit its improper interpretation. In *Kansas City Southern Railway Company—Construction and Operation—to Exxon Corporation's Plastics Plant near Baton Rouge and Baker, Louisiana*, STB Finance Docket No. 32547 (STB served June 12, 1995), the Interstate Commerce Commission (the “ICC”, the Board's predecessor) granted an exemption for the Kansas City Southern Railway Company (“KCS”) to construct 0.375 miles of track. No decision was made under section 10901(d). Hence, the ICC's discussion of section 10901(d) was merely dicta. Moreover, the crossing was a traditional crossing (although only of an easement), not a longitudinal “crossing” as proposed by HolRail.

HolRail next relies on two cases from the nineteenth century that predate regulations of railroad construction by the ICC or the Board and rely on specific state eminent domain laws. None of these laws apply under the Federal scheme in effect under ICCTA. Indeed, one case predates the creation of the ICC.

In *Southern Pacific Railroad Co. v. Southern California Railway Co.*, 111 Cal. 221 (Cal. 1896) (the “*SP Taking*”), the court adopted an exception to the general rule prohibiting the condemnation of land that had already been condemned for a public use. The exception was

based on the court finding “a more necessary public use.” *Id.* at 231. HolRail does not argue a more necessary public use in this proceeding, merely a more convenient and less costly private use, with no basis in fact in the record. *SP Taking* does not support HolRail’s position.

HolRail next relies on *North Carolina Railroad Co. v. Carolina Central Railway Co.*, 83 N.C. 489 (N.C. 1880) (the “*North Carolina Case*”), which denied an injunction to prevent the construction of a parallel railroad track. In the *North Carolina Case*, the Court allowed construction of a parallel line by one railroad in the right-of-way of the other based on specific legislation by the State chartering the two railroads, which explicitly granted them the use of the right-of-way. That is not the case here. Nor, has HolRail presented any evidence that it can construct and operate the parallel line without interfering with CSXT’s operations.

The ICC and Board have consistently used section 10901(d) to prevent one railroad from blocking the crossing of its track by another railroad. *See e.g. Louisville & Jefferson Co & CSX Const. & Oper. Jeff. KY*, 4 I.C.C.2d 749 (1988). HolRail has proposed an erroneous and unauthorized use of the extraordinary powers of section 10901(d) for the expropriation of CSXT’s property, without even proposing to cross CSXT’s track. CSXT strongly urges the Board to reject HolRail’s proposed interpretation of section 10901(d).

B. CSXT has agreed to permit entry in compliance with section 10901(d).

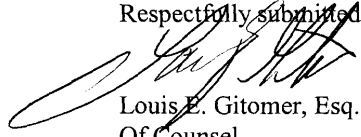
CSXT has agreed to permit HolRail to inspect CSXT’s property in accordance with the accepted interpretation of 49 U.S.C. § 10901(d). CSXT agrees that inspection of its property for construction of a crossing track is appropriate and attempted to expedite the process in the January 12, 2004 letter. CSXT does not object to legitimate discovery under the statute.

CONCLUSION

CSXT urges the Board to reject HolRail's interpretation of the reach of 49 U.S.C. § 10901(d) in HolRail's attempt to expropriate CSXT's rail property. For all the foregoing reasons, CSXT respectfully urges the Board to deny the Entry Request.

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

Respectfully submitted,



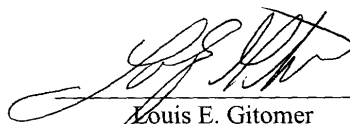
Louis E. Gitomer, Esq.
Of Counsel
BALL JANIK LLP
1455 F Street, N.W., Suite 225
Washington, DC 20005
(202) 638-3307

Attorneys for: CSX TRANSPORTATION,
INC.

Dated: March 11, 2004

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing document to be served by hand on all parties of record in STB Finance Docket No. 34421.



Louis E. Gitomer
March 11, 2004