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February 24, 2006

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

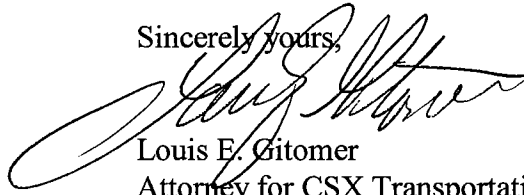
RE: Finance Docket No. 34421, *HolRail LLC-Petition for Exemption from 49 U.S.C. § 10901 to Construct and Operate a Rail Line in Orangeburg and Dorchester Counties, South Carolina*
Finance Docket No. 34421 (Sub-No. 1), *Petition for Crossing Authority Under 49 U.S.C. § 10901(d)*

Dear Secretary Williams:

Enclosed is the Reply of CSX Transportation, Inc. CSXT is efilng this Reply. Thank you for your assistance.

If you have any questions, call or email me.

Sincerely yours,



Louis E. Gitomer
Attorney for CSX Transportation, Inc.

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34421

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

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

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

REPLY OF CSX TRANSPORTATION, INC.

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Dated: February 24, 2006

BEFORE THE
SURFACE TRANSPORTATION BOARD

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HOLRAIL LLC–PETITION FOR EXEMPTION FROM 49 U.S.C. § 10901 TO CONSTRUCT
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Finance Docket No. 34421 (Sub-No. 1)

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

REPLY OF CSX TRANSPORTATION, INC.

CSX Transportation, Inc. (“CSXT”) opposes the attempt by HolRail LLC (“HolRail”), a wholly owned subsidiary of Holcim (US) Inc. (“Holcim”), to construct a new line of railroad along CSXT’s active rail property in Orangeburg and Dorchester Counties, SC between approximately CSXT mileposts 394 and 396 (the “Preferred Route”). The CSXT rail line that serves Holcim today traverses about 6,500 feet through the Four Hole Swamp on a narrow right-of-way. To the west of the CSXT line, South Carolina has built State Highway 453, about 20 feet west of the center-line of the rail line. On the east, the CSXT right-of-way extends only 40 feet from the center line of the track.

HolRail, under 49 U.S.C. § 10502 filed a Petition for Exemption from 49 U.S.C. § 10901 on November 13, 2003 (the “Petition”), as Supplemented on December 23, 2003 (the “First Supplement”), and as further Supplemented on September 9, 2005, as corrected on September

13, 2005 (the “Second Supplement”). CSXT also opposes the Petition for Crossing under 49 U.S.C. § 10901(d) filed by HolRail on September 9, 2005.¹

CSXT does not oppose the construction of track on Holcim’s property in Orangeburg and Dorchester Counties, SC, also between approximately CSXT mileposts 394 and 396 (the “Alternate Route”). CSXT does not oppose the exemption sought from approval of construction of the Alternate Route, because according to Petitioners, the Alternate Route would not encroach on CSXT’s property.²

SUMMARY

CSXT urges the Board to dismiss with prejudice or in the alternative deny Petitioners’ request to construct the Preferred Route.

(A) HolRail has not met the criteria of subsection 10901(c). HolRail has provided no evidence that it is financially fit. There is not a public demand for service, only a request to meet for an additional rail line to serve HolRail’s parent, Holcim, even though Holcim’s complaints concerning service have been rebutted by Mr. Engeliën. The Preferred Route will not enhance competition, but will harm CSXT.

(B) HolRail has misinterpreted the clear intent and meaning of subsection 10901(d) and not met the substantive or procedural requirements of that subsection. The clear language of subsection 10901(d), as informed by its most recent and specific legislative history, the plain definition of the words used, the Board’s past interpretation of the statute, and the common law on prescriptive easements and condemnation authority all support CSXT’s reading of subsection 10901(d) to only permit the crossing of a railroad’s property when the track is being crossed.

¹ HolRail and Holcim will jointly be referred to as “Petitioners.”

Subsection 10901(d) does not permit the longitudinal crossing of railroad property suggested by HolRail's tortured reading of subsection 10901(d). In creating this strained and overreaching theory, HolRail has misinterpreted subsection 10901(d) and the intention of Congress.

(C) HolRail's environmental arguments are contrary to Board precedent and should be given no weight in deciding whether the Board has jurisdiction to permit HolRail to construct track along CSXT's property.

(D) HolRail, as a limited liability corporation without a guarantee and indemnity from Holcim, cannot ensure it does not interfere with CSXT's operations and indemnify CSXT if it does. HolRail has provided no evidence of insurance or the financial ability to otherwise indemnify CSXT for any harm that might be caused as a result of construction or operation.

(E) Holcim could have constructed the Alternate Route as a spur track if Holcim was only interested in reaching the NS line at Giant. Holcim would have been able to avoid the regulatory process before the Board, including the Board's environmental review process, and attendant costs, if it had decided to build the Alternate Route on its own property as a spur track. Indeed, the Alternate Route probably could have been completed by now. Holcim's failure to follow the more efficient path raises questions as to its intentions.

(F) HolRail has not been forthright in the environmental process. HolRail discarded its proposed alternate west of the CSXT line on environmental grounds without permitting the Board to conduct an independent environmental assessment.

(G) HolRail does not have an operator for the track. NS, HolRail's potential operator for the Preferred Route has not appeared in this proceeding or agreed to operate the Preferred Route.

² The northern end of the proposed construction and the Line will be referred to as "Holly Hill" and the southern end will be referred to as "Giant."

HolRail may not have an operator, and it certainly has presented no operating plan other than having CSXT operate the Preferred Route on behalf of NS, which CSXT has no intention of doing.

(H) HolRail may be responsible for paying CSXT labor costs for the construction of the Preferred Route. As HolRail has structured the construction of the Preferred Route over CSXT's property with CSXT performing the operation, employees of CSXT will undoubtedly claim the right to perform the construction work on the Preferred Route under their collective bargaining agreements. HolRail must be responsible for resolving these claims and costs resulting there from, and protecting CSXT from any harm arising from HolRail's proposal. HolRail has not even demonstrated knowledge of this issue, much less an ability to resolve it.

(I) The procedural requirements of subsection 10901(d) are contrary to HolRail's proposal. Section 10901 creates a logical procedure for the construction of a crossing track. HolRail's Preferred Route is so far outside the jurisdiction conferred by subsection 10901(d) that it cannot follow the procedure of section 10901. This is just another indication that a longitudinal crossing is within the jurisdiction of the Board conferred by subsection 10901(d).

(J) HolRail has not met Chairman Buttrey's "heavy burden." HolRail has failed to demonstrate that subsection 10901(d) permits a longitudinal crossing as HolRail has claimed. Therefore, HolRail has not shown that the Preferred Route is anything but an unauthorized confiscatory taking. Not satisfied with confiscating CSXT's right-of-way, HolRail also seeks to confiscate CSXT's operations by attempting to force CSXT to be the railroad operating over the Preferred Route, purportedly on behalf of NS.

BACKGROUND

On November 13, 2003, HolRail filed a Petition for Exemption with the Board. HolRail sought an exemption under 49 U.S.C. §10502 from regulation under 49 U.S.C. §10901 in order to construct a rail line between Holcim's cement plant at Holly Hill, SC, and a connection with a line of railroad owned by the Norfolk Southern Railway Company ("NS") and operated by CSXT at or near a cement facility owned and operated by Giant Cement Company.³

HolRail sought to file the Petition pursuant to the Board's regulations at 49 C.F.R. §1121 (the "Exemption Rules"). Under the Exemption Rules, "a party filing a petition for exemption shall provide its case-in-chief along with its supporting evidence, workpapers, and related documents at the time it files its petition." Section 1121.13(a).

On December 3, 2003, CSXT filed a Motion to Dismiss the Petition and a Response to the Petition. An "Errata" to the Petition was filed by HolRail on December 5, 2003.⁴ HolRail filed a Reply to CSXT's Motion to Dismiss and a Request for Leave to File a reply and a reply to CSXT's Response on December 23, 2003. The parties engaged in discovery and filed Motions to Compel Discovery.

³ See *Norfolk Southern Railway Company—Consolidation of Operations—CSX Transportation, Inc.*, ICC Finance Docket No. 32299 (ICC served November 26, 1993) (the "*Coordination Project*").

⁴ The Errata purported to correct a statement in the Petition that HolRail was considering a second alternate route west of CSXT's rail line. HolRail stated that "[t]he alternate route, which is the only other route under consideration, lies east of the preferred route...." As can be seen from the Second Supplement, at 17-19, and the accompanying Verified Statement of Mr. Stingo at 4-7, HolRail actually did consider an alternate route to the west of CSXT's line, but rejected it and thereby prevented the Board's Section of Environmental Analysis ("SEA") from analyzing that route. Concurrent with the filing of this Response, CSXT has filed a letter with SEA requesting SEA to revise the Notice of Availability of Final Scope of Study for the Environmental Impact Statement served on February 22, 2006, and also analyze the route west of CSXT's railroad in preparing its Draft Environmental Impact Statement.

During the discovery process, the Board instituted a proceeding to consider the issues raised.⁵ On October 13, 2004, the Board announced that on October 20, 2004, it would hold a public meeting to discuss the instant proceeding, among others.⁶ The Board held the meeting on October 20, 2004 and among other things, voted to deny CSXT's Motion to Dismiss as premature.

At that time, then Commissioner and now Chairman Buttrey read the following statement, with which Vice Chairman Mulvey concurred:

Nevertheless, I feel compelled to express concern about HolRail's proposal. HolRail presents its case as a fairly routine construction case that will likely include a crossing request under 49 U.S.C. 10901(d) at some later stage. Looking behind HolRail's filings, however, it is clear to me that this case is anything but routine. As a practical matter, it appears that the only way HolRail could build its preferred route is by "taking" CSXT's right-of-way for essentially the entire line that it wants to construct. While HolRail may wish to characterize that construction as a crossing, that interpretation appears to be a rather extraordinary concept. HolRail will have a heavy burden to convince me that this is a proper use of the construction and crossing provisions of the statute. Instead, HolRail's proposal appears to be tantamount to a confiscation that is beyond anything contemplated by section 10901.

The Board's served decision contained Commissioner Buttrey's comment.⁷ At the request of HolRail and CSXT, the Board later served a Protective Order to facilitate discovery.⁸

⁵ *HolRail LLC—Construction and Operation Exemption—in Orangeburg and Dorchester Counties, SC*, STB Finance Docket No. 34421 (STB served February 11, 2004).

⁶ *HolRail LLC—Construction and Operation Exemption—in Orangeburg and Dorchester Counties, SC*, STB Finance Docket No. 34421 (STB served October 13, 2004).

⁷ *HolRail LLC—Construction and Operation Exemption—in Orangeburg and Dorchester Counties, SC*, STB Finance Docket No. 34421 (STB served October 20, 2004 and corrected October 21, 2004).

⁸ *HolRail LLC—Construction and Operation Exemption—in Orangeburg and Dorchester Counties, SC*, STB Finance Docket No. 34421 (STB served November 15, 2004).

On June 21, 2004, the National Audubon Society submitted a comment stating that for environmental reasons it supported the Preferred Route instead of the Alternate Route.⁹ The National Industrial Transportation League filed a letter on July 2, 2004 supporting HolRail's proposed construction. Notably, NITL did not indicate a preferred route – nor agree with HolRail's interpretation of Section 10901(d).

SEA served a Notice of Intent to Prepare an Environmental Impact Statement; Notice of Initiation of the Scoping Process; Notice of Availability of Draft Scope of Study for the Environmental Impact Statement and Request for Comments.¹⁰

A letter was filed by the American Chemistry Council on August 24, 2004 in support of HolRail's construction proposal.

On September 9, 2005, as corrected on September 13, 2005, HolRail filed a Petition for Crossing Authority and Supplemental Evidence in Support of Petition for Exemption, which CSXT is referring to as the Second Supplement. Ameren Energy Fuels and Services, Arkansas Electric Cooperative Corp., and Dominion Resources ("Intervenors") filed a Motion to file a Joint Statement and the Joint Statement (the "Joint Statement") on September 9, 2005.

CSXT responds to HolRail and all of the statements filed in support of HolRail.

STATUTORY CRITERIA

HolRail has sought an exemption from the requirement that the construction it is seeking to undertake must be approved under 49 U.S.C. § 10901. In considering an exemption, the Board considers the criteria of the underlying statute.¹¹

⁹ CSXT contends that this letter should be part of the environmental comments and not part of the record on whether to exempt the construction.

¹⁰ *HolRail LLC–Construction and Operation Exemption–in Orangeburg and Dorchester Counties, SC*, STB Finance Docket No. 34421 (STB served July 29, 2005).

Section 10901 provides:

- (a) A person may—
 - (1) construct an extension to any of its railroad lines;
 - (2) construct an additional railroad line;
 - (3) provide transportation over, or by means of, an extended or additional railroad line; or
 - (4) in the case of a person other than a rail carrier, acquire a railroad line or acquire or operate an extended or additional railroad line,only if the Board issues a certificate authorizing such activity under subsection (c).

(c) The Board shall issue a certificate authorizing activities for which such authority is requested in an application filed under subsection (b) unless the Board finds that such activities are inconsistent with the public convenience and necessity. Such certificate may approve the application as filed, or with modifications, and may require compliance with conditions (other than labor protection conditions) the Board finds necessary in the public interest.

(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.

(2) If the parties are unable to agree on the terms of operation or the amount of payment for purposes of paragraph (1) of this subsection, either party may submit the matters in dispute to the Board for determination. The Board shall make a determination under this paragraph within 120 days after the dispute is submitted for determination.

Under section 10901 “a three-part test has evolved to evaluate whether a proposed construction is permissible: (1) is the applicant financially fit to undertake the construction and

¹¹ *Minnesota Comm. Ry. Inc. — Trackage Exempt. — BN RR. Co.*, 8 I.C.C.2d 31, 35-36 (1991).

provide service; (2) is there a public demand or need for the proposed service; and (3) will the new competition be in the public interest and not harmful to existing carriers/services?” *Dakota, Minnesota & Eastern Railroad Corporation Construction into the Powder River Basin*, STB Finance Docket No. 33407, at 3 (STB served July 16, 1998); *Tongue River R.R.-- Rail Construction & Operation-- Ashland to Decker, Montana*, STB Finance Docket No. 30186 (Sub-No. 2), at 14 (STB served November 8, 1996). These are the three criteria that the Board requires a party to meet before it will be granted authority or exemption to construct a rail line.

The Board has determined that it will not consider environmental issues when determining whether a construction project meets the criteria of section 10901. The Board has stated that “we will separately address environmental issues in a subsequent decision after completion of the EIS process.” *Dakota, Minnesota & Eastern Railroad Corporation Construction into the Powder River Basin*, STB Finance Docket No. 33407, at 4 (STB served May 7, 1998) (“*DM&E May*”). In this proceeding, HolRail’s claim that the Board should take jurisdiction over construction of the Preferred Route under subsection 10901(d) purely on environmental grounds ignores the Board’s precedent. *DM&E May* is particularly important since it is a clear statement of the precedent developed by the Board and consistently followed in every construction proceeding, which is contrary to HolRail’s rationale for concluding that the board has jurisdiction over the construction of the Preferred Route along CSXT’s rail line.

In addition to the substantive requirements of section 10901, the procedural requirements are important in this proceeding. Subsection (a) provides that a line of railroad can only be built if the Board approves the construction. Subsection (c) provides the criteria that the Board must apply before approving the construction of a new rail line. Only after the Board has approved the construction of a rail line will the Board exercise its extraordinary power under subsection

10901(d). Instead of following the statutorily mandated process, HolRail seeks to have the Board approve the construction of its Preferred Route pursuant to subsection (d), and fold the requirements of subsections 10901(a) and (c) into subsection 10901(d). CSXT is not rewriting subsection 10901(d), as HolRail argues, but HolRail is rewriting section 10901 in its entirety.

Finally, one other statutory provision sheds substantial light on this proceeding. Section 10906 provides:

Notwithstanding section 10901 and subchapter II of chapter 113 of this title, and without the approval of the Board, a rail carrier providing transportation subject to the jurisdiction of the Board under this part may enter into arrangements for the joint ownership or joint use of spur, industrial, team, switching, or side tracks. The Board does not have authority under this chapter over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.

Section 10906 is relevant to this proceeding because it, like the Interveners, reveal HolRail's true intent, to gain competitive access through the expropriation of CSXT's own right-of-way. Under section 10906, a spur track can be constructed without prior approval from the Board. Moreover, as the Board has frequently held, the typical environmental review process does not apply to the construction of a spur track. *The New York City Economic Development Corporation—Petition for Declaratory Order*, STB Finance Docket No. 34429 slip op. at (STB served July 15, 2004) (“NYCED”).

ARGUMENT

The issue in this proceeding is whether or not the Board will reinterpret subsection 10901(d) to permit the taking of a railroad's right-of-way for the construction of a parallel line along an active rail line, especially in this proceeding where the party seeking to build the line on and along CSXT's property has an alternative route over its own property. The basic provisions of subsection 10901(d) were enacted as part of the Staggers Act Rail Act of 1980, Pub. L. No.

96-448 (the “Staggers Act”) over 25 years ago, and up until this time, no one has attempted to foist on the Interstate Commerce Commission (the “ICC”) or the Board the interpretation that HolRail seeks, especially as clarified by the Intervenor.

CSXT does not oppose construction of the Alternate Route by HolRail.

CSXT **opposes** construction of the Preferred Route. With regard to the Preferred Route, CSXT contends that: (A) HolRail has not met the criteria of subsection 10901(c); (B) HolRail has misinterpreted the clear intent and meaning of subsection 10901(d) and not met the substantive or procedural requirements of that subsection; (C) HolRail’s environmental arguments are contrary to Board precedent and should be given no weight in deciding whether the Board has jurisdiction to permit HolRail to construct track along CSXT’s property under subsection 10901(d); (D) HolRail, as a limited liability corporation without a guarantee and indemnity from Holcim, cannot ensure it does not interfere with CSXT’s operations and indemnify CSXT if it does; (E) HolRail could have already constructed the Alternate Route as a spur track if Holcim was only interested in reaching the NS at Giant; (F) HolRail has not been forthright in the environmental process; (G) HolRail does not have an operator for the track; (H) HolRail may be responsible for paying CSXT labor costs for the construction of the Preferred Route; (I) The procedural requirements of subsection 10901(d) are contrary to HolRail’s proposal; and (J) HolRail has not met Chairman Buttrey’s “heavy burden.”

I. CSXT does not oppose the Construction of HolRail’s Alternate Route.

HolRail has requested an exemption to construct the Alternate Route over Holcim's property between the Holcim facility at Holly Hill, SC and the Giant Cement facility at Giant.¹² CSXT does not oppose this request.

CSXT does not want its lack of opposition to be taken as support for any construction outside of Holcim's property without the consent of any other property owner whose property HolRail must use. Nor should CSXT's lack of opposition to the Alternate Route construction even be thought of as supporting or even considering Mr. Schuchmann's outrageous operating plan which proposes that CSXT will operate the HolRail line on behalf of NS under an amended South Carolina Coordination Project.

II. CSXT opposes the construction of HolRail's Preferred Route.

HolRail seeks to build track along CSXT's railroad right-of-way between Holcim's Holly Hill facility and Giant. HolRail projects that it will build along about 1.7 miles of CSXT's rail line and within CSXT's right-of-way. HolRail proposes that CSXT operate over the Preferred Route on behalf of NS under an amendment to the South Carolina Coordination Project between CSXT and NS. CSXT opposes HolRail's proposal to build track along CSXT's rail line and CSXT's operation of the track.

A. HolRail has not met the criteria of subsection 10901(c).

"[U]nless the Board finds that [construction is] inconsistent with the public convenience and necessity [it] shall approve the construction of a rail line." 49 U.S.C. 10901(c). In evaluating the public convenience and necessity of a request by a party to build a new rail line,

¹² Holcim represents that it has the right to operate over Giant's property. CSXT has recently received inquiries from Giant that suggest Giant has different views and is defending those views in the Court of common Pleas, First Judicial Circuit, Case no. 2005-CP-18-1428, Holcim (US) Inc. v. Giant Cement Holding, Inc. and Giant Cement Company.

the Board considers the following three factors: “(1) is the applicant financially fit to undertake the construction and provide service; (2) is there a public demand or need for the proposed service; and (3) will the new competition be in the public interest and not harmful to existing carriers/services?” *Dakota, Minnesota & Eastern Railroad Corporation Construction into the Powder River Basin*, STB Finance Docket No. 33407, at 3 (STB served July 16, 1998); *Tongue River R.R.–Rail Construction & Operation–Ashland to Decker, Montana*, STB Finance Docket No. 30186 (Sub-No. 2), at 14 (STB served November 8, 1996).

1. HolRail has not demonstrated financial fitness.

There is no evidence in the record in this proceeding as to the financial fitness of HolRail.

First, there are no estimates as to the cost of constructing the track that HolRail proposes. There are also no costs of operation provided. Without costs of construction or operation, CSXT contends that the Board cannot conclude that HolRail is financially fit.

Second, there is no evidence that HolRail is anything but an empty shell limited liability corporation. HolRail has not submitted any balance sheets or income statements. Nor are there any agreements between HolRail and Holcim of record demonstrating Holcim’s financial commitment to HolRail. Moreover, there is no evidence that HolRail has either obtained insurance to protect CSXT from any mishap that would occur on HolRail’s track or that HolRail has a cash reserve to indemnify CSXT. Such events could include, but are not limited to a derailment, a construction miscalculation leading to damage to CSXT’s rail line, a spill of diesel fuel or other environmentally dangerous element, or labor protection. See Section II D below.

Third, HolRail is a limited liability corporation. As such, Holcim is protected from any liabilities that Holcim may incur.

In addition, HolRail is a separate corporate entity from Holcim. As the Board has recognized, without an agreement to the contrary, a parent corporation is separate from its subsidiary and not responsible for the subsidiary's obligations. At the same time, the Board has recognized that an independent subsidiary does not and cannot rely on its parent for financial assistance.

HolRail has not demonstrated that it has the financial resources to construct or operate the Preferred Route.

2. HolRail has not shown that there a public demand or need for the proposed service.

Holcim has made some very general statements that it requires additional rail service in Mr. Stingo's verified statement. The attached verified statement of Mr. Engelen questions Holcim's need for and ability to fund HolRail's proposed service.

CSXT serves the Holcim facility at Holly Hill today. In addition, CSXT serves about 13 other Holcim facilities throughout the eastern United States. CSXT values Holcim as a customer and has tried to accommodate Holcim's needs. As stated by Mr. Engelen, CSXT has recently proposed allowing Holcim to use private cars at Holly Hill, but has been told that Holcim does not have funds budgeted for private cars. CSXT always tries its best to provide equipment in useable condition, but does not always succeed. However, CSXT contends that it generally meets Holcim's requirements.

Mr. Engelen states that CSXT's fleet of over 700 cars, at peak demand, is dedicated to Holcim cement business, and has been in this service for decades. The fleet receives continual and extensive attention as mechanical issues arise, most notably with discharge gate defects through continued heavy use. CSXT instituted programs to repair and replace cars which fail

Holcim's inspection. Holcim has unrestricted ability to replace CSXT cars with its own privately owned/leased cars.

According to Mr. Engelen, service to Holly Hill, SC matches the rail production capability of the plant as close as possible. Not only does CSXT experience problems, but the Holcim plant experiences frequent breakdowns causing service interruptions and congestion of empty railcars on CSXT's lines as far away as Charleston, SC. This affects CSXT's ability to be more reliable. CSXT does also experience unforeseen events which can interrupt service. CSXT takes Holcim's requests for improvements seriously. Entire fleets of CSXT cement cars are relocated between Holcim's South Carolina and Alabama production facilities to compensate for Holcim production breakdowns. Regular communication exists between CSXT and Holcim to identify railcar issues and resolution. CSXT's Holcim account manager has received continual praise from Holcim for the serious attention given to Holcim.

CSXT contends that the needs of one shipper are not the same as the public demand required for the construction of a line of railroad. Indeed, as discussed in Section E below, it appears that Holcim is actually trying to build a spur track to serve only its facility instead of building a line of railroad. In the Supplement, HolRail states that "no where in its Petition, however, does HolRail propose to serve any other cement manufacturer." The Preferred Route is not intended to serve the needs of the public, but merely the needs of the Holcim facility at Holly Hill, SC.

3. The new competition will not be in the public interest and will be harmful to existing carriers/services.

HolRail has proposed building a track along CSXT's rail line and having CSXT operate over that track on behalf of NS. In essence, HolRail is seeking to have CSXT compete with itself.

CSXT has invested in the right-of-way between Giant and Holly Hill and in the track. CSXT also incurs costs in operating its trains. In order to cover those costs and earn a reasonable return on its investment, CSXT requires a certain level of traffic generating a certain level of revenue.

HolRail has not provided any information as to the cost of the track it proposes to build. However, CSXT believes that it would cost HolRail between \$4,000,000 and \$6,000,000 to build the Preferred Route. In addition, HolRail would have to pay (i) CSXT rent for the use of its property, (ii) the cost of operations, (iii) insurance costs, (iv) overhead costs, and (v) other costs. To cover these costs and earn a return, HolRail would need to generate substantial traffic over the two mile Preferred Route. Holcim has estimated at most that it would ship about 7,600 carloads in 2006 if the HolRail project is completed. Schuchmann at 2. It is CSXT's estimation that Holcim would divert all or a substantial portion of its traffic to HolRail, leaving CSXT without sufficient traffic to cover its costs and earn a return. In that event, which HolRail has not addressed, CSXT would have no choice but to seek to abandon its rail line. However, the abandonment would become problematic because HolRail's Preferred Route would then encroach on CSXT's rail line and prevent CSXT from receiving the full value of its property, if the Board even grants abandonment authority. *Norfolk Southern Railway Company—Abandonment—in Beaufort County, NC*, STB Docket No. AB-290 (Sub-No. 262) (STB served December 7, 2005). As a result of the CSXT abandonment, Holcim would again have only one railroad serving the Holly Hill cement plant. Hence after incurring substantial expenditures,

Holcim would be in the same position it is in today, receiving rail service from one railroad. The only difference is that Holcim's subsidiary HolRail would incur the costs for the maintenance of the route and operations.

CSXT contends that at a minimum the construction of HolRail's Preferred Route will be harmful to CSXT, the existing carrier serving Holcim.

4. HolRail has not met the criteria of subsection 10901(c).

As is demonstrated above, HolRail has not met the factors developed by the Board to determine whether a construction meets the criteria of subsection 10901(c). There is clearly no evidence that HolRail is financially fit. Holcim's need for service should not be confused with the public's need for rail service. The construction of the Preferred Route would most likely result in the termination of CSXT's service between Giant and Holly Hill. CSXT contends that the Board should deny HolRail's Petition with regard to the Preferred Route, as supplemented, because it has failed to carry its burden and meet the requirements of section 10901.

B. HolRail has misinterpreted the clear intent and meaning of subsection 10901(d) and not met the substantive or procedural requirements of that subsection.

HolRail's proposed Preferred Route does not even qualify for consideration under subsection 10901(d) because it has not meet the requirements of subsection 10901(c), as explained above, and because subsection 10901(d) does not apply to the construction of track along the right-of-way of a railroad. First, HolRail's proposed track does not cross CSXT; it runs along CSXT's property. Second, CSXT's Line does not "block" HolRail's construction. HolRail is free, as explained below, to build the Alternate Route on its own property.¹³

¹³ As explained in more detail below, Holcim could build the Alternate Route as a spur line outside of the Board's construction jurisdiction.

Subsection 10901(d) confers extraordinary powers upon the Board to require a railroad to make its property available to another party. But, HolRail grossly distorts the meaning of subsection 10901(d) when it claims the law permits the longitudinal crossing of the rail property. HolRail also reads out the procedural requirement of subsection 10901(d) that construction be approved or exempted before a crossing is permitted. CSXT disagrees with the substantive and procedural interpretation of subsection 10901(d) that HolRail has proposed.

Railroads operate over lengthy corridors. In many areas of the country, a new rail line cannot be constructed without intersecting with an existing railroad line. At the time of the Staggers Act, there was a question as to whether the ICC had the authority to order the construction of these new lines across the existing lines where they intersected. Because the answer was unclear, subsection 10901(d) was enacted to clarify the ICC's power to order a railroad to permit new construction to cross its rail line.

The ICC Termination Act of 1995 ("ICCTA") replaced former subsection 10901(d) with the current language of subsection 10901(d). The legislative history of the ICCTA is clear that the purpose of subsection 10901(d) is to grant the Board the power to require the crossing of track. "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." H. Rep. 104-311 at 101.

HolRail argues that the general pro-competitive language of the ICCTA requires a broader reading of the term "to cross" than the specific legislative history of subsection 10901(d). This is contrary to HolRail's other arguments that in statutory interpretation, the less specific must yield to the more specific language. There is nothing clearer or more specific than the use of the word "track" in the legislative history.

HolRail cites a number of secondary definitions of “to cross” in the Second Supplement. CSXT, however, believes that the first definition of cross as “intersect” from the 1975 Webster’s New Collegiate Dictionary (“WNCD”) is most appropriate. Intersect is defined as “to meet and cross at a point.” WNCD. HolRail is not proposing to have the Preferred Route cross CSXT’s track, it is proposing to have the Preferred Route run along (defined in WNCD as “in a line parallel with the length or direction of”) CSXT’s track.

It is clear that the legislative history and the plain language of subsection 10901(d) do not support HolRail’s argument that the Board has jurisdiction to grant HolRail the right to construct its track within CSXT’s right-of-way. Nor does any of the precedent supported by HolRail support its position. Indeed, prior precedent involving prescriptive easements supports CSXT’s argument that the Board does not have jurisdiction under subsection 10901(d) to permit HolRail to construct the Preferred Route.

By enacting 49 U.S.C. § 10901(d)(1), Congress granted the Board jurisdiction to require a railroad to allow a newly constructed rail line to “cross its property,” provided that certain conditions are met. In effect, Congress has granted an easement by statute. In addition to the clear definition of the term “to cross” described above, in the absence of a statutory definition of “cross” or “crossing,” the Board can also interpret the terms of Congress’ grant in a manner consistent with common law principles for construing the scope of an ambiguous or implied easement.

In *Smith v. Commissioners of Public Works*, 441 S.E.2d 331, 333 (S. C. App. 1994), the court interpreted the scope of one party’s express easement to cross the land of another party. The court interpreted the express easement in light of the principle that “a grant or reservation of an easement in general terms is **limited to a use which is reasonably necessary and convenient**

and as little burdensome to the servient estate as possible for the use contemplated.”

(emphasis added). *Hill v. Carolina Power & Light Co.*, 28 S.E.2d 545, 549 (S.C. 1944). Citing *Hill*, the court interpreted the crossing easement to provide the plaintiff only with “such access across [the defendant’s] property as is reasonably necessary to full enjoyment of” the plaintiff’s property. *Smith*, 441 S.E.2d at 336. Moreover, the court stated that “the general law is [that] the owner of the servient estate has the right, in the first instant [sic], to designate the location of an undesignated easement.” *Id.* at 337.

Smith’s limitation of the easement to reasonably necessary access points is consistent with the general principle for construing easements implied by necessity (*i.e.*, in order to provide for reasonable use of a landlocked parcel). “[W]here an easement is implied by necessity, its scope ‘must reflect the necessity which justifies the easement’s existence.’” *United Food & Commercial Workers Int’l Union Local 400 v. N.L.R.B.*, 222 F.3d 1030, 1037 (D.C. Cir. 2000) (citing 7 THOMPSON ON REAL PROPERTY 466 (1994)). *See also* 4 POWELL ON REAL PROPERTY § 34.13, at 34-148 (2005) (“The scope of the resultant easement embodies the best judgment of the court as to what is reasonably **essential** to the land’s use.”) (emphasis added). Narrow interpretations of easements implied by necessity exist because, where there is no express agreement, “courts will be careful in interpreting how far the use of such an easement may go.” *United Food*, 222 F.3d at 1037. In interpreting the scope of the word “cross” in 49 U.S.C. 10901(d)(1), the Board should recognize that encroachments on the property of another that are deemed necessary for public policy reasons have always been limited to those which satisfy the need—here, the need “to cross” a rail line—with the least possible burden to the property owner.

Courts also have explicitly recognized that longitudinal easements are not mere “crossings,” but rather impose a much more significant burden on the property owner. In *Town of Hempstead v. Gulf States Utilities Co.*, 206 S.W.2d 227, 229 (Tex. 1947), a Texas statute gave utilities the authority to erect power lines “over and across any public road.” The court interpreted the statute **not** to include the authority to run lines longitudinally along public rights of way:

The intention to limit the rights of these companies to extending their lines 'across' public ways and not longitudinally appears plain. It must be regarded as significant that long distance telephone and telegraph companies, which do have the right to erect their lines along and upon public ways, were given that right by the legislature in clear language. . . . If the lawmakers had meant to grant electric power corporations the right to place their 'poles, piers, abutments, wires and other fixtures' along and upon as well as across the public ways of this State, it stands to reason that they would have employed suitable and efficacious language to that end, just as had been done in [the statute giving telephone and telegraph companies that right].

Id. at 229-30. In *Town of Hempstead*, the concept of a crossing is clearly distinguished from the concept of a longitudinal easement. It supports the argument that Congress meant something distinct from a parallel run when it used the word "cross."

California courts have noted in several takings cases that “[t]he right to take longitudinally is very different from the mere right to cross,” with the former constituting a material impairment and thus entitling the owner to more than the nominal compensation due for a mere crossing. *City of Long Beach v. Pac. Elec. Railway Co.*, 283 P.2d 1036, 1038 (Cal. 1955). *See also Dep’t of Public Works v. Thompson*, 271 P.2d 507, 513 (Cal. 1954) (stating the same distinction between a longitudinal taking and a mere right to cross).

Consistent with the foregoing principles, CSXT urges the Board to narrowly interpret its jurisdiction to permit HolRail's to "cross" the property of CSXT. The crossing should burden only so much of CSXT's land as is reasonably necessary to achieve the purpose of the statute.

HolRail has cited two state proceedings for the principle that the Board has jurisdiction under subsection 10901(d) to require a longitudinal crossing that does not actually cross track. In *Southern Pacific Railway Company v. Southern California Railway Company*, 111 Cal. 221 (Cal. 1896), the Court permitted the Southern Pacific Railroad Company ("SP") to condemn a right-of-way down a public street that was owned by the Southern California Railway Company ("SC").¹⁴ HolRail has omitted the relevant facts to the extent that SC had built a rail spur in the road for the sole purpose of keeping SP from building a rail line. SC did not use the spur. Under the law today, the road would not have been a line of railroad, and hence there is no precedential value to this decision, except for a citation to a Massachusetts case that supports CSXT's argument that the board should construe its power under subsection 10901(d) narrowly. The Court stated:

In *Boston etc. R.R. Co. v. L. & L. R.R. Co.*, 124 Mass. 368, chief Justice Gray, now justice in the supreme court of the United States, said: "The general principle is well settled, and has been applied in a great variety of cases, that land already legally appropriated to a public use is not to be afterward taken for a like use, unless the intention of the legislature that it should be so taken has been manifested in express terms or by necessary implication."

Id. at 227-228.

HolRail next turns to *North Carolina Railroad Co. v. Carolina Central Railway Co.*, 83 N.C. 489 (N.C. 1880) ("*NCR v. CCR*") to support its proposition that the Board has jurisdiction under subsection 10901(d) to order CSXT to permit HolRail to longitudinally cross its property

¹⁴ In 1896, a public road was not paved and not intended for automobile traffic, but for horse and horse drawn traffic.

without crossing its track. The facts in *NCR v. CCR* are similar to the facts in *BNSF Crossing* (see below). The North Carolina Railroad Co. (“NC”) built and owned a rail line. The predecessors of the Carolina Central Railway Co. (“CCR”) agreed to jointly use the rail line with NC. CCR built facilities at the end of the line. As in *BNSF Crossing*, there was a falling out between NC and CCR, and NC terminated the agreement and sought to evict CCR from the rail line. CCR sought to condemn part of NC’s right-of-way that was in a 19th century street in Charlotte, NC to build a line for a few hundred feet under a clear expression of legislative intent. The court granted CCR the right to condemn that portion of the street because there was no other way to reach its expensive depot, NC could double track its facility on the east side of its track (CSXT would never be able to double track the Line if the Preferred Route were built), it was only over several hundred feet of right-of-way, and there was a clear expression of legislative intent. *Id.* Unlike NC v. CCR, in the instant proceeding, HolRail has the Alternate route to reach Holcim, CSXT will never be able to double track the Line if the Preferred Route is built, HolRail seeks access over at least 1.7 miles of CSXT’s property, and there is no clear expression of legislative intent.

HolRail relies on *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, 2004) (“*BNSF Crossing*”) for the proposition that the Board has jurisdiction to order a longitudinal crossing of a railroad line. Because of the weakness of its argument, HolRail never mentions the facts underlying *BNSF Crossing*, which clearly demonstrate that *BNSF Crossing* is not precedent for the Board’s jurisdiction to order a longitudinal crossing.

In *BNSF Crossing* the Board was presented with a dispute between the Burlington Northern and Santa Fe Railway Company (“BNSF”) and the Keokuk Junction Railway Company (“KJRY”). BNSF’s predecessors accessed shippers across KJRY’s predecessors line at a specific point beginning in 1881. As a result of flooding of the Mississippi River in 1993, BNSF and KJRY entered an agreement changing the crossing location. The “new crossover was constructed to allow BNSF trains to enter KJRY’s track at BN milepost 177.58 and move through seven switches over approximately one-quarter mile of KJRY trackage in order to enter BNSF’s Mooar Line. Whereas previously BNSF had crossed over KJRY property via a diamond-shaped crossover, under the 1995 crossing arrangement its trains were required to travel approximately 300 feet on KJRY’s main line and 1200 feet on a line connecting the KJRY main line and the Mooar Line.” *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 slip op. at 2 (STB served June 22, 2001). A dispute arose between BNSF and KJRY, which resulted in KJRY terminating BNSF’s use of its line to reach the shippers served by BNSF for over 100 years. BNSF sought relief from the Board to again access its shippers, and the Board, after substantial litigation, granted BNSF’s crossing request. The Board required KJRY to permit BNSF to cross its track, even though the crossing was not by a diamond or frog, but by a different configuration, in order to restore the track crossing that had existed since the late 1800’s. Although the board stated that the term crossing needed to be viewed “pragmatically” the Board was clearly referring to the crossing of track, as is evident from *BNSF Crossing* and the proceedings cited by the Board describing different types of track crossings. *Public Service Company of Colorado–Petition for Crossing Authority Under 49 U.S.C. 10901(d)*, STB Finance Docket No. 33862 (Sub-No. 1) (STB served Mar. 22, 2001) (a double turnout configuration,

rather than a diamond, to minimize interference with perpendicular traffic); *Dakota, Minnesota & Eastern Railroad Corporation and Cedar American Rail Holdings, Inc. – Control – Iowa, Chicago & Eastern Railroad Corporation*, STB Finance Docket No. 34178 (Sub-No. 1) (Union Pacific Railroad Company comments that a diamond crossing was replaced by a two-turnout configuration). Regardless of the type of crossing, the Board has limited its jurisdiction to a crossing of track.

HolRail cites *Kansas City Southern Railway Company–Construction and Operation Exemption–to Exxon Corporation’s Plastics Plant near Baton Rouge and Baker, Louisiana*, ICC Finance Docket No. 32547 (ICC served June 12, 1995) (“*KCS Construction*”) for the proposition that the Board has jurisdiction to permit the crossing of mere rail property. HolRail again misreads this proceeding. The paragraph cited by HolRail is merely dicta. Secondly, *KCS Construction* confirms that the ICC was concerned with crossing track where it said “Once we authorize construction and address any disputes that arise when construction projects cross existing tracks” *Id.* at 3. Not only does *KCS Construction* also restrict itself to track crossing, but it confirms the procedural requirements that CSXT is asserting that a construction project must be approved before crossing authority can be sought, which is contrary to the procedure that HolRail has urged here and the Board adopted.

The clear language of subsection 10901(d) and legislative history of subsection 10901(d) confirm that the Board’s jurisdiction is limited to instances where new construction needs to cross track. The Board’s interpretation of subsection 10901(d) confirms that it is intended to foster the crossing of track. The common law of easements and condemnation also support CSXT’s claim that the Board must interpret subsection 10901(d) narrowly. CSXT urges the board to reject HolRail’s contention that subsection 10901(d) permits the longitudinal crossing of

railroad property, and conclude that subsection 10901(d) permits the least disruptive crossing of track.

HolRail has not properly invoked either the substantive or procedural provisions of subsection 10901(d), and therefore CSXT respectfully requests the Board to dismiss the Crossing Petition with prejudice.

C. HolRail’s environmental arguments are contrary to Board precedent and should be given no weight in deciding whether the Board has jurisdiction to permit HolRail to construct track along CSXT’s property.

Throughout the Second Supplement, HolRail argues that the Board must permit the construction of the Preferred Route “in order to minimize potential harm to the environment.” Second Supplement at 2. “Because of the environmental consequences posed by constructing a rail line on Holcim-owned property, Holcim sought to explore other routes that would have fewer consequences.” Stingo VS at 5.

“The extent of, or intensity of debate over, a project’s environmental and safety issues, however, does not, by itself, confer jurisdiction on the Board. *Union Pacific Railroad Company—Petition for Declaratory Order—Rehabilitation of Missouri-Kansas-Texas Railroad Between Jude and Ogden Junction, TX*, STB Finance Docket No. 33611 (STB served August 21, 1998) at 7. Cf. *Nicholson v. I.C.C.*, 711 F.2d 364, 366 (D.C. Cir. 1983). Consistent with precedent, CSXT urges the Board to reject HolRail’s argument that jurisdiction under subsection 10901(d) is conferred on the Board because of the potential environmental impact of the construction of the Alternate Route.

D. HolRail, as a limited liability corporation without a guarantee and indemnity from Holcim, cannot ensure it does not interfere with CSXT's operations and indemnify CSXT if it does.

Subsection 10901(d)(1)(C) provides that "the owner of the crossing line compensates the owner of the crossed line." Compensation includes more than paying for the use of the property. It also includes being able to make the incumbent owner whole in the event that construction or operation by the newcomer interfere with the incumbents operations or damage the incumbents property.

CSXT has experience protecting itself from harm when it voluntarily admits a party to operate over its property. CSXT requires the party to obtain insurance, specifically: (1) Railroad Comprehensive Liability Insurance with a Combined Single Limit of not less than \$10,000,000.00 per occurrence, subject to a self-insured retention of \$100,000.00. Such insurance: (a) specifically names CSXT as an "additional insured" thereon; (b) includes a "severability of interests" provision; (c) provides for 30 calendar days notice to CSXT of any change in or cancellation of the policy; (d) provides Contractual Liability insurance specifically insuring all liability; and (e) provides Contractual Liability insurance specifically insuring all rolling stock and lading on the Line, regardless of cause, irrespective of the ownership thereof. The insurance is not deemed a limitation on liability, but shall be deemed to be additional security therefore, and (2) Physical Damage Property Insurance covering all risk of loss or damage to the Buildings, Line and motive power, irrespective of the ownership thereof with a combined single limit of not less than \$5,000,000.00 per occurrence subject to a self-insured retention of \$50,000.00. Such insurance names CSXT as loss payee, and provides for the replacement value of Buildings, the

Line and locomotives, regardless of ownership. The policy shall waive subrogation against CSXT.

HolRail has not presented any evidence that it has or can obtain this level of insurance coverage. Nor has HolRail provided any evidence that it can afford this or any insurance.

In addition, in voluntary leases, CSXT requires its lessee to indemnify CSXT for any loss or damage caused by lessee. CSXT expects either insurance or the lessee's proven financial assets to cover the indemnity. Here, HolRail has no insurance and has not provided any evidence to the board that it has any assets. CSXT urges the Board to keep in mind that HolRail, a limited liability corporation is the petitioner, and not its parent Holcim. This is important because Holcim has not guaranteed any of HolRail's liability or costs. There is no evidence of record that HolRail can reimburse CSXT for any interference with CSXT's operations or any damage to CSXT's property.

E. Holcim could have constructed the Alternate Route as a spur track if Holcim was only interested in reaching the NS line at Giant.

CSXT contends that if Holcim was only interested in reaching the NS line at Giant, then it could have built a line between Holly Hill and Giant as an unregulated spur track, avoiding the expense and need for this proceeding.

The track that HolRail is proposing to build meets the criteria for a spur track. A spur track is determined by "the length of the track, how many shippers will be served, whether it is stub-ended, whether it was built to invade another railroad's territory, whether the shipper is located at the end of the track (indicating that the sole purpose of the track is to reach that shipper's facility rather than a broader market), whether there is regularly scheduled service or not, who owns and maintains the track." *See, e.g., The New York City Economic Development*

Corporation— Petition for Declaratory Order, STB Finance Docket No. 34429 (STB served July 15, 2004) (“NYCED”); *ParkSierra Corp. — Lease & Operation Exemption — Southern Pacific Transp. Co.*, STB Finance Docket No. 34126, slip op. at 5 (STB served December 26, 2001); *Grand Trunk Western R.R. — Pet. for Declaratory Order — Spur, Industrial, Team, Switching or Side Tracks in Detroit, MI*, STB Finance Docket No. 33601, slip op. at 2 (STB served July 30, 1998); *Chicago SouthShore & South Bend Railroad — Petition for Declaratory Order — Status of Track at Hammond, IN*, STB Finance Docket No. 33522, slip op. at 6 (STB served December 17, 1998).

The track would be only about 2.3 miles long. The only shipper that would be served is Holcim. The track would be stub ended in that it would end at the Holcim facility at Holly Hill, where Holcim is the only shipper being served by the line. Service to Holcim will be on the schedule that Holcim will set. The track will be maintained by Holcim or its wholly owned subsidiary, HolRail. The line will not invade the territory served by CSXT. The line will be built between Giant and Holly Hill, but by the only shipper on that line, not a competitor of CSXT.

As a spur line, Holcim could have built the Alternate Route as excepted track under 49 U.S.C. § 10906, without seeking Board approval. Moreover, Holcim would not have had to comply with the Board’s environmental review process. As such:

Under 49 U.S.C. 10501(b)(2), as broadened by the ICCTA, The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, 807 (1995). The Board has exclusive jurisdiction over rail transportation, including “the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,” even though Board approval is not required by such activities. Section 10501(b) further provides that both “the jurisdiction of the Board over

transportation by rail carriers” and “the remedies provided under [49 U.S.C. 10101-11908] are exclusive and preempt the remedies provided under Federal or State law.” See *City of Auburn v. STB*, 154 F.3d 1025, 1029-31 (9th Cir. 1998), *cert. denied*, 527 U.S. 1022 (1999); *Friends of the Aquifer, et al.*, STB Finance Docket No. 33966, slip op. at 4 (STB served Aug. 15, 2001); *Borough of Riverdale–Petition for Declaratory Order–The New York Susquehanna and Western Railway Corporation*, STB Finance Docket No. 33466, slip op. at 5 (STB served Sept. 10, 1999). *NYCED* at 7-8.

... the Board’s jurisdiction precludes state environmental review, and the finding that this track is spur and switching track means that the Board will not perform a formal environmental review in this proceeding. *Id.*

If Holcim had only wanted additional service to its Holly Hill facility, it could have built a spur track on its own property and avoided the time and expense of this proceeding before the Board and the preparation of an Environmental Impact Statement in this proceeding. Because Holcim did not follow this logical, efficient and low cost approach, CSXT can only conclude that Holcim has a hidden agenda to use this proceeding as a means of avoiding the Board’s competitive access rules at 49 C.F.R. 1144.

HolRail claims that this proceeding is extraordinary because of the length of the line, the environmental impacts of building outside of CSXT’s right-of-way, and the lack of harm to CSXT’s operations. However, HolRail’s claim is belied by the Interveners statement that construction in the right-of-way of an existing railroad is “the only realistic means by which a rail customer can establish dual rail access at a solely-served facility.” Joint Statement at 7. The Interveners have removed the purported limiting circumstances suggested by HolRail and made clear that their goal is to use this proceeding to create a new precedent to permit any shipper to build a new line in the existing right-of-way of any railroad. CSXT contends that the Board should not sanction the use of subsection 10901(d) to permit the wholesale expropriation of

private property – all in the name of opening rail served facilities in this country to “dual rail access.” As explained above, that was never the intended use of subsection 10901(d). There are procedures in place for seeking dual rail access under 49 C.F.R. § 1144.

F. HolRail has not been forthright in the environmental process.

In the Petition, and Supplement, HolRail insisted that there were only two alternative routes available. However, in the Second Supplement, HolRail explains that it rejected a third route west of CSXT’s line because of safety and environmental concerns. In the notice of Scope served on February 22, 2006, SEA determined to evaluate the Preferred Route, the Alternate Route and the no-build option. By letter filed today, CSXT urges SEA to also investigate the third option studied and discarded by HolRail.

One of the main reasons HolRail gives for not offering its second alternate west of CSXT’s line is because of the many moves of cars from a yard that would have to be built west of CSXT’s line across Highway 453. HolRail should have proposed an alignment locating the yard east of CSXT’s line nearer to the Holcim plant and allowed SEA independently to evaluate this proposal as well the Preferred Route, the Alternate Route and the no-build options.

G. HolRail does not have an operator for the track.

The Petition filed by HolRail sought an exemption for HolRail to construct and operate the Preferred Route. In the Second Supplement the operator has now morphed into either NS through an amendment to the South Carolina Coordination Project or into CSXT operating “on behalf of NS” (Schuchmann VS at 10-11) under the South Carolina Coordination Project.¹⁵

¹⁵ See *Norfolk Southern Railway Company–Consolidation of Operations–CSX Transportation, Inc.*, ICC Finance Docket No. 32299 (ICC served November 26, 1993) (the “*Coordination Project*”).

There are several fatal flaws with HolRail's assumptions concerning operations over the Preferred Route. First, neither CSXT nor NS has sought authority to operate over the Preferred Route. Authority will be required under 49 U.S.C. 11232 for a railroad (CSXT or NS) to operate over the line of another railroad (HolRail). CSXT does not intend to seek authorization from the Board to operate over the Preferred Route.

CSXT and NS have not discussed amending the South Carolina Coordination Project agreements to permit NS to serve Holcim at Holly Hill, and CSXT does not intend to. Needless to say, no filing has been made with the Board to modify the South Carolina Coordination Project to accommodate HolRail's wishes.

HolRail has not even presented a draft agreement with NS, nor indicated that it has engaged in conversation with NS. There is no discussion of rates or routes either or the ability of NS to engage in anything other than a short haul to interchange to CSXT.

Finally, HolRail is wrong in its analysis that it is entitled to service by NS under the *Coordination Project*. See Second Supplement at 15. The *Coordination Project* approved a transaction between CSXT and NS over certain rail lines. The Preferred Route is not one of those lines. Neither NS nor CSXT has sought authority to operate over the Preferred Route, and neither has authority to operate over it. HolRail has not provided an operator of the Preferred Route.

If HolRail is to be the operator of the Preferred Route it has shown no capability to operate. There is no plan for hiring and training employees, there are no locomotives or cars. There is no plan for HolRail to operate over the Preferred Route. There is no interchange arrangement with CSXT and certainly no interchange agreement. HolRail has not demonstrated that it has complied with the AAR requirements for it to be registered as a railroad.

There is no railroad that is able to operate the Preferred Route. This demonstrates that HolRail is not serious about constructing and operating the Preferred Route or that HolRail does not have an operator and that a further regulatory proceeding will be necessary for HolRail to procure an operator.

H. HolRail may be responsible for paying CSXT labor costs for the construction of the Preferred Route.

HolRail proposes to construct the Preferred Route on CSXT's property. However, the union representing CSXT's track workers, the Brotherhood of Maintenance of Way Employees Division of the International Brotherhood of Teamsters Rail Conference ("BMWED") may claim that its members must construct this new line. The scope rule in the CSXT-BMWED collective bargaining agreement includes the "construction . . . of tracks . . . used in the operation of the carrier in the performance of common carrier service on property owned by the carrier."

Although the BMWED would not agree, CSXT does not believe that BMWED has the right to work merely because it is performed on property owned by CSXT. However, it is not clear from HolRail's filing whether CSXT would be considered in some manner to be providing common carrier service over the new track that HolRail would have constructed on CSXT property. In any event, there is a risk that BMWED will assert a claim to this new construction work. BMWED has been asserting that all new track construction on CSXT must be done by CSXT forces covered by BMWED's collective bargaining agreement. Indeed, CSXT is currently engaged in arbitrations with BMWED over claims that its agreement was violated when other employees were allowed to construct new tracks. While CSXT may have defenses against such a claim in this instance, CSXT should not have to bear the risks associated with such a claim. HolRail should be required and able to indemnify CSXT for the legal and other costs for

defending against BMWED claims in arbitration and/or court litigation. And, should BMWED prevail in an arbitration or litigation, HolRail must be able to indemnify CSXT for any losses or damages that it might be required to pay. In a worst case scenario, BMWED might strike or threaten to strike CSXT, forcing CSXT to seek injunctive relief. Again, HolRail should indemnify CSXT for any costs and losses that would result from labor strife over the construction of the new track.

As noted above, there is no evidence of record that HolRail has any financial ability to indemnify CSXT against risks that would be created by HolRail's planned new track.

I. The procedural requirements of subsection 10901(d) are contrary to HolRail's proposal.

Section 10901 creates a logical procedural scheme for parties to follow when they are seeking to construct a new line of railroad and may have to cross an existing railroad.

First, the proponent, in this case HolRail, must meet its burden of proof under the statute.¹⁶ After the Board has granted authority to construct the new rail line (whether through an application or exemption proceeding), the proponent then files a request for crossing authority, which the Board rules on.

HolRail did not follow that procedure in this proceeding. HolRail has no independent proposal to construct the Preferred Route. HolRail seeks to adversely seize longitudinal access along over 1.7 miles of CSXT's property to construct the Preferred Route. HolRail has not presented a proposal to the Board for authorization and then a crossing request. HolRail's entire proposal is a crossing request. This further demonstrates that the Board should narrowly

¹⁶ As CSXT has proven, HolRail has not met its burden.

construe subsection 10901(d) to avoid the procedural violations of section 10901 created by HolRail's proposal to construct the Preferred Route.

J. HolRail has not met Chairman Buttrey's "heavy burden."

CSXT agrees with Chairman Buttrey's statement that:

Looking behind HolRail's filings, however, it is clear to me that this case is anything but routine. As a practical matter, it appears that the only way HolRail could build its preferred route is by "taking" CSXT's right-of-way for essentially the entire line that it wants to construct. While HolRail may wish to characterize that construction as a crossing, that interpretation appears to be a rather extraordinary concept. HolRail will have a heavy burden to convince me that this is a proper use of the construction and crossing provisions of the statute. Instead, HolRail's proposal appears to be tantamount to a confiscation that is beyond anything contemplated by section 10901.

HolRail contends that it has met its "heavy burden." To the contrary, it is CSXT's position that HolRail has not met its burden under the statute just for authority to operate, much less the "heavy burden" stated by Chairman Buttrey for what is tantamount to a taking of CSXT's right-of-way. Not satisfied with seeking to confiscate CSXT's real estate for the construction of the Preferred Route, HolRail now seeks to confiscate CSXT's locomotives, cars, and crews to operate the Preferred Route. Not only is HolRail seeking to confiscate CSXT's trains, it is seeking to confiscate the trains of the NS.

As demonstrated above, HolRail has not even met the minimal burden of subsection 10901(c). HolRail is certainly not financially fit, there is no public demand for service, Holcim merely wants service to its own facility, and construction of the Preferred Route will harm CSXT.

CSXT has demonstrated that the specific language of subsection 10901(d) and its legislative history do not support HolRail's expansive reading of subsection 10901(d). In fact,

they specifically support the reasonable but limited reading urged by CSXT. The common law concerning easements and condemnation also support a limited reading of subsection 10901(d), as do the ICC's and Board's decisions addressing the issue. The ICC's and the Board's consistent interpretation of subsection 10901(d) supports CSXT's argument that the Board should construe its jurisdiction under subsection 10901(d) narrowly. Indeed, CSXT continues to contend that HolRail's proposal is nothing more than an attempt to misuse subsection 10901(d) to confiscate CSXT's rail line.

HolRail's argument that there are more environmental effects that would arise from the construction of the Alternate Route do not confer jurisdiction on the Board under subsection 10901(d). In addition, HolRail did not, and cannot, follow the procedure created by section 10901 to obtain crossing authority because its proposal is not what was envisioned by that statute.

HolRail has a viable alternative which would avoid the condemnation of CSXT's property by constructing the Alternate Route on its own property. Indeed, if Holcim only wanted access to NS at Giant, it could have already constructed the Alternate Route as a spur track.

HolRail has not met the "heavy burden" suggested by Chairman Buttrey. With the failure to prove its case and the readily available alternative, HolRail has not justified a broad reading of subsection 10901(d) that would justify confiscation.

III. HolRail should not be permitted to reply to this reply.

HolRail has sought to control the procedural posture of this proceeding since its inception. HolRail initiated this proceeding as a petition for exemption under 49 C.F.R. § 1121. HolRail failed to submit a case-in-chief, filed the First Supplement in response to CSXT's

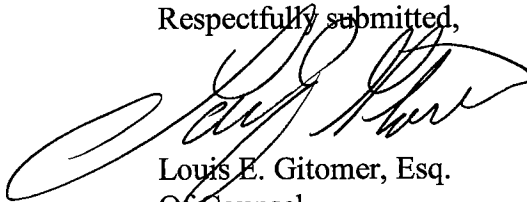
response, and has now filed the Second Supplement, without leave from the Board or the benefit of a procedural schedule. CSXT has now replied to HolRail.

Under the Board's rules, a reply-to-a-reply is not permitted. 49 C.F.R. § 1104.13(c). Hence, because of the manner in which HolRail prosecuted this proceeding, it is not entitled to submit a reply to this pleading. Moreover, all of the problems that CSXT has pointed out concerning HolRail's Petition, as supplemented, should have been addressed in HolRail's initial case-in-chief, or at the least in the Second Supplement. The Board should not permit the file a forth round of pleading containing evidence that was available to HolRail when it commenced this proceeding.

CONCLUSION

HolRail's Petition, as supplemented, does not meet the initial burden of proof under section 10901 and fails to demonstrate that the Board has jurisdiction to grant the relief sought under subsection 10901(d). CSXT respectfully requests the Board to dismiss the Crossing Petition with prejudice for lack of jurisdiction, or in the alternative to deny the Petition, as supplemented with regard to the Preferred Route.

Respectfully submitted,



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INC.

Dated: February 24, 2006

CERTIFICATE OF SERVICE

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

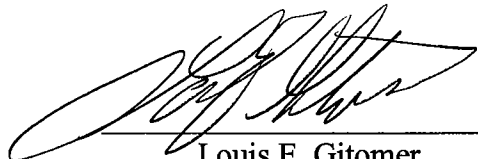
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Louis E. Gitomer
February 24, 2006

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34421

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

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

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

VERIFIED STATEMENT OF WENDELL ENGELIEN

I am Wendell Engelen, a Director of Sales and Marketing of the Emerging Markets Unit (“EMU”) for CSX Transportation, Inc. (“CSXT”) for 8 years. I have been employed in the railroad industry for 39 years. CSXT’s EMU markets transportation of Cement, Lime, Fly Ash and Slag. I deal directly with CSXT’s customers in these commodities, including Holcim (US) Inc. (“Holcim”).

CSXT values Holcim as a customer, and we have worked diligently over the years to respond to Holcim’s service needs and continue to do so. Based on my experience and discussions with Holcim’s representatives, including Mr. Stingo, I am submitting this verified statement in response to the Verified Statement of Mr. Stingo (“Stingo VS”), which was part of the filing made by HolRail LLC (“HolRail”) in the above-entitled proceeding.

CSXT does not plan to expand its rail line serving Holcim’s cement facility at Holly Hills, SC based on Holcim’s current level of traffic. As Mr. Stingo states, Holcim received and

shipped about 5,800 carloads in 2004. In 2005, Holcim increased shipments to about 6,400 carloads. If Holcim were to increase its volume to about 30,000 carloads per year based on Mr. Stingo's prediction (Stingo VS at 2-3), CSXT would certainly consider expanding its rail facility serving Holcim's Holly Hill cement facility and would want its current right-of-way to be available for that.

In serving Holcim at Holly Hill, CSXT competes with both trucks and Holcim's ability to meet its needs from its other 13 manufacturing facilities. In addition, Holcim's products compete with those of other cement manufacturers served by trucks and other railroads. Hence, CSXT is vitally interested in maintaining the business from Holly Hill so that it can earn a return on the assets (the line and trains) it has invested in to serve Holcim at Holly Hill.

Mr. Stingo's discussion of CSXT's position on the use of private cars by Holcim is outdated. In January, 2006, I met with representatives of Holcim and discussed the issue of the use of private cars. At this time, CSXT has agreed to allow Holcim to use private cars at Holly Hill without restriction. The prior year (2005), CSXT offered to allow private cars online at a level higher than the attrition rate of CSXT cement cars, but was told that Holcim did not have capital for that option.

Mr. Stingo then questions CSXT's ability to provide sufficient cars in acceptable condition. CSXT's fleet of over 700 cars, at peak demand, dedicated to Holcim cement business, has been in this service for decades. The fleet receives continual and extensive attention as mechanical issues arise, most notably with discharge gate defects through continued heavy use. CSXT instituted programs to repair and replace cars which fail Holcim's inspection. And, as noted, CSXT has agreed to permit Holcim to replace CSXT cars with both its own privately owned/leased cars and to expand its available rail capacity with private cars.

Service to Holly Hill, SC matches the rail production capability of the plant as close as possible. The plant experiences frequent breakdowns causing service interruptions and congestion of empty railcars on CSXT's lines as far away as Charleston, SC. This affects CSXT's ability to be more reliable. Like every other railroad and business, CSXT does also experience unforeseen events which can interrupt service.

CSXT takes Holcim's requests for improvements seriously. Significant fleets of CSXT cement cars are relocated between Holcim's South Carolina and Alabama production facilities to compensate for Holcim production breakdowns. Regular communication exists between CSXT and Holcim to identify railcar issues and resolution. CSXT's Holcim account manager has received continual praise from Holcim for the serious attention given to Holcim.

VERIFICATION

I, Wendell Engelen, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed February 23, 2006.


Wendell Engelen