

210492

BALL JANIK LLP

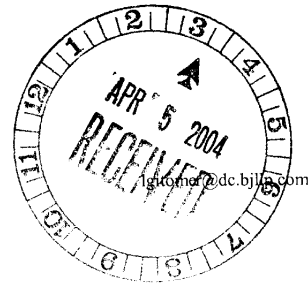
A T T O R N E Y S

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

www.balljanik.com

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

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



April 5, 2004

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

ENTERED
Office of Proceedings

APR 05 2004

Part of
Public Record

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), *HolRail LLC—Petition for Crossing Authority Under 49 U.S.C. § 10901(d)*

Dear Secretary Williams:

Enclosed are the original and 10 copies of a Response and Opposition to a Second Motion to Compel 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,

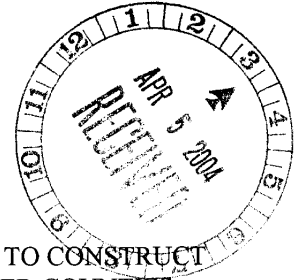
Louis E. Gitomer
Attorney for CSX Transportation, Inc.

Enclosures

ORIGINAL

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)

CSX TRANSPORTATION, INC.'S RESPONSE AND OPPOSITION TO HOLRAIL LLC'S
SECOND MOTION TO COMPEL

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

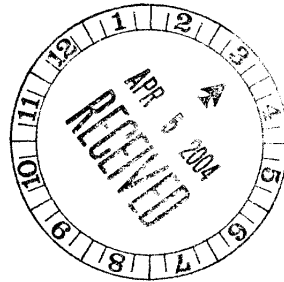
Louis E. Gitomer, Esq.
Of Counsel
BALL JANIK LLP
1455 F Street, N.W., Suite 225
Washington, DC 20005
(202) 638-3307

Attorneys for: CSX TRANSPORTATION,
INC.

Dated: April 5, 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

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

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

CSX TRANSPORTATION, INC.'S RESPONSE AND OPPOSITION TO HOLRAIL LLC'S
SECOND MOTION TO COMPEL

CSX Transportation, Inc. ("CSXT") responds in opposition to HolRail LLC's Second Motion to Compel (the "Second Motion"). In the Second Motion, HolRail seeks discovery of irrelevant information in a proceeding that does not exist and cannot commence without the grant of construction authority.

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. CSXT responded on January 21, 2004. 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. CSXT updated its responses on March 5, 2004. As a result, HolRail filed the Second Motion.

THE SECOND MOTION IS BASED ON FAULTY PREMISES

1. The Rational for the Preferred Route over the Alternate Route is flawed. HolRail states that it prefers constructing a new line of railroad over CSXT's right-of-way because "the Alternative Route, on adjacent Holcim property, would require entirely new construction within an environmentally sensitive area, known as Four Hole Swamp. The swamp is a wetland located within South Carolina's Coastal Management Zone and any new construction immediately raises potential adverse environmental consequences. The construction of HolRail's Preferred Route longitudinally, over the length of CSXT's right-of-way, would reduce such adverse environmental impacts, which otherwise might prevent construction of the rail line altogether." Second Motion at 2. An uninformed reading of HolRail's statement leads to many wrong conclusions.

However, when viewed along with all of the facts, HolRail's problems with the Alternate Route are the same as exist using HolRail's Preferred Route. Whether the new line is constructed on CSXT's property or Holcim's property, there will have to be entirely new construction. Second, HolRail's Preferred Route over CSXT also requires construction in environmentally sensitive Four Hole Swamp. Third, CSXT's right-of-way is also in South Carolina's Coastal Management Zone. Fourth, construction on CSXT's right-of-way also raises potential adverse environmental consequences. Fifth, there is no evidence that construction over

CSXT's right-of-way would reduce environmental impacts. And, sixth, HolRail gives no reason for not building on its parent's right-of-way that does not equally apply to the CSXT right-of-way. It may well be that construction on the Holcim right-of-way would reduce adverse environmental impacts.

2. CSXT does not have a monopoly to protect. HolRail next claims that CSXT is attempting to protect a monopoly with regard to service at Holcim's Holly Hill, SC facility. First, CSXT notes that it is not the sole provider of transportation service to Holcim's Holly Hill facility. More than half of the transportation to that facility is performed by truck. Second, CSXT has not opposed HolRail's alternate proposal to build the Alternate Route on Holcim's right-of-way. CSXT is merely seeking to protect its rights as a property owner from the expropriation of its land by HolRail and to prevent HolRail from damaging CSXT's physical facility. Finally, Holcim has many plants throughout the country, creating product and geographic competition for CSXT.

3. A request for crossing relief is premature. HolRail filed the Second Motion so that it can "prepare a crossing petition under 49 U.S.C. § 10901(d)." Second Motion at 2. CSXT contends that it is premature and unnecessary for HolRail to prepare and file a crossing petition. Crossing is only permitted "[w]hen a certificate has been issued by the Board." 49 U.S.C. § 10901(d)(1). CSXT contends that HolRail is premature in instituting discovery under a crossing petition when not only has no certificate been issued, but even an exemption has not been granted. "The related crossing petition in Finance Docket No. 34060 (Sub-No. 1) will not be considered until we reach a final decision on the construction exemption request." *Midwest*

Generation, LLC—Exemption from 49 U.S.C. 10901—for Construction in Will County, IL, STB Finance Docket No. 34060 (STB served March 21, 2002), at 1 (“*Midwest Generation*”). HolRail has cited *Midwest Generation* so frequently in these proceedings, that CSXT is surprised that HolRail is not aware of the cited holding and that HolRail is not willing to comport its actions to what it recognizes to be valid precedent.

HolRail’s unique approach, which is contrary to section 10901 as explained by CSXT in its Response and Opposition to HolRail LLC’S First Motion to Compel –Request for Entry Upon Land filed on March 11, 2004 (the “First Response”), has created the problem HolRail is facing that HolRail cannot be granted an exemption to construct its preferred route over CSXT’s right-of-way without the simultaneous grant of a crossing request. But the plain and clear language of section 10901(d) requires the grant of construction authority first, and then resolution of the crossing issue. HolRail cannot build any portion of its preferred route without crossing authority, but cannot seek crossing authority until its construction is authorized. HolRail could avoid this conundrum by making its Alternate Route its preferred route. Then HolRail could compete with CSXT without seeking to expropriate CSXT’s right-of-way. CSXT questions the propriety of a crossing petition in this proceeding where the request to the Board is at such a preliminary stage.

DISCOVERY IS NOT RELEVANT TO SECTION 10901(d) CROSSING RELIEF

HolRail admits that it will not cross CSXT’s track. HolRail seeks only to cross CSXT’s right-of-way “longitudinally.” Second Motion at 2. HolRail does not seek or need to cross CSXT’s track, and therefore section 10901(d) does not apply to the relief HolRail seeks. See First Response 7-13. HolRail claims that it will construct its new line parallel to CSXT’s line.

Unless HolRail is willing to concede that it anticipates the construction and operation of the Preferred Route will interfere with CSXT's operation of its line, at this time CSXT deems its operating information irrelevant. CSXT is not preventing HolRail from proceeding with its request for crossing authority. HolRail has created its own problem by seeking to do something that is not permitted under section 10901(d). Without more detail from HolRail, it is impossible for CSXT to stipulate that the construction will not effect crew assignments or shipper service.

HolRail cites *Midwest Generation* for the proposition that CSXT must produce discovery concerning carloads and service on the line. However, *Midwest Generation* is distinguishable in that there one track was crossing another track, while here HolRail does not seek to cross CSXT's track. As CSXT has consistently stated throughout this proceeding, once HolRail provides detail of its construction proposal, CSXT will be able to make a preliminary analysis of the impact on its operations. CSXT is not changing its view that the mere construction of HolRail's Preferred Route will damage CSXT's physical structure.

HOLRAIL CANNOT SHIFT ITS BURDEN OF PROOF TO CSXT

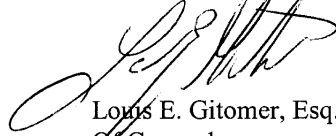
HolRail elected to follow the petition for exemption process under 49 CFR § 1121. HolRail has the burden under that process. HolRail's petition has not been granted, and so it is premature for HolRail to seek crossing authority, which CSXT has explained is not permitted under section 10901(d) within HolRail's factual context. First Response 7-13. HolRail must meet its burden in the construction proceeding before beginning the crossing proceeding. Since not even an environmental assessment has been issued to date in the construction proceeding, CSXT contends that the time is far from appropriate for HolRail to begin a crossing proceeding.

The burden of responding to discovery for a crossing proceeding should not be imposed upon CSXT until that proceeding is ripe to commence.

CONCLUSION

HolRail has proposed construction that is not permitted by section 10901(d). HolRail is now proposing to file an impermissible and premature request for crossing authority, instead of following the Board's precedent and procedures. CSXT opposes HolRail's attempt to misuse section 10901(d) and force CSXT to assume the burden of responding to premature discovery. CSXT respectfully requests that the Board deny the Second Motion.

Respectfully submitted,



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

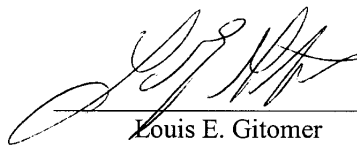
Paul R. Hitchcock, Esq.
Associate General Counsel
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202
(904) 359-1192

Attorneys for: CSX TRANSPORTATION,
INC.

Dated: April 5, 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.

A handwritten signature in black ink, appearing to read 'L. E. Gitomer', is written over a horizontal line.

Louis E. Gitomer
April 5, 2004