



PAN AM RAILWAYS

1700 IRON HORSE PARK
NO. BILLERICA, MA 01862

LEGAL DEPARTMENT
(978) 663-1215



VIA UPS GROUND

245464

April 11, 2018

ENTERED

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

Office of Proceedings
April 13, 2018
Part of
Public Record

**Re: STB Docket No. AB-1256 – Boston and Maine Corporation &
Springfield Terminal Railway Company – Application for Adverse
Discontinuance of Operating Authority – Milford-Bennington
Railroad Company**

Dear Ms. Brown:

Enclosed for filing with the Board in the subject docket please find one original and ten copies of Boston and Maine Corporation's and Springfield Terminal Railway Company's Application for Adverse Discontinuance of Operating Authority. Also included herewith is a check for the appropriate filing fee made payable to the Board.

Should you have any questions in regard to this filing, please do not hesitate to contact the undersigned at (978) 663-1215. Thank you in advance for your assistance in this matter.

Very truly yours,

Robert B. Burns
Boston and Maine Corporation
Springfield Terminal Railway Company

Encls.

FILED
April 13, 2018
SURFACE
TRANSPORTATION BOARD

FEE RECEIVED
April 13, 2018
SURFACE
TRANSPORTATION BOARD

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

AB-1256

**BOSTON AND MAINE CORPORATION &
SPRINGFIELD TERMINAL RAILWAY COMPANY –
ADVERSE DISCONTINUANCE
OF OPERATING AUTHORITY -
MILFORD-BENNINGTON RAILROAD COMPANY, INC.**

**- APPLICATION FOR ADVERSE DISCONTINUANCE -
OF OPERATING AUTHORITY**



Applicants:

**BOSTON AND MAINE
CORPORATION &
SPRINGFIELD TERMINAL
RAILWAY**

Attorney for Applicants

**Robert B. Burns, Esq.
1700 Iron Horse Park
North Billerica, MA 01862
(978) 663-1029**

Dated: April 11, 2018

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**BOSTON AND MAINE CORPORATION &
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**- APPLICATION FOR ADVERSE DISCONTINUANCE -
OF OPERATING AUTHORITY**

Pursuant to the Board's decision served June 23, 2017, granting partial waivers of certain Board regulations in connection with filing a third-party or "adverse" discontinuance application, Boston and Maine Corporation ("B&M") and the Springfield Terminal Railway Company ("ST") (collectively "Pan Am" or "Applicants") hereby file this application pursuant to 49 U.S.C § 10903 and 49 C.F.R. Part 1152, Subpart C (referred to herein as "Application") to authorize discontinuance of operating authority held by Milford-Bennington Railroad Co., Inc. ("MBR") (over approximately 5.36 miles of rail line owned by B&M.¹ (Pan Am and MBR are collectively referred to as "Parties"). As demonstrated in this Application, the present and future public convenience and necessity as set forth at 49 U.S.C. § 10903(d) support Applicants' request for adverse discontinuance authority. Termination of MBR's long expired

¹ MBR currently operates over a portion of Pan Am's Hillsborough Branch. The Hillsborough Branch starts in Nashua, NH at milepost ("MP") 0.00 and ends in Wilton, NH at MP 16.36. The portion of the Hillsborough Branch that MBR maintains trackage rights over (but only operates over MP 13.00+/- to MP 16.36) is from Wilton (MP 16.36) to Milford (MP 11.0) (this portion will be referred to as the "Line"). See Milford-Bennington Railroad Co., Inc. – Trackage Rights Exemption -- Boston and Maine Corp. and Springfield Terminal Railway Co.; Exemption, FD 32103 (ICC served July 9, 1992).



trackage rights agreement and MBR's operating authority over Pan Am's tracks will not adversely impact any shipper because Pan Am intends to expand operation of the Line to provide service to the sole shipper currently served by MBR on the same terms and conditions or better. Pan Am is committed to operating safely; maintaining the line; and, offering competitive rail service to all interested shippers, as opposed to the practice of MBR to favor its only customer. Expanded operations by Pan Am will promote rural and community development within the region as a whole. In contrast, allowing MBR to continue to operate over the Line allows it to use the Board's jurisdiction to shield it from its financial obligations and its obligation to operate it in a safe manner.

I. BACKGROUND

B&M is a Class II railroad that owns rail lines in Maine, New Hampshire and Massachusetts. B&M in turn leases said rail lines to ST,² who is the actual operator. MBR is a Class III railroad operating over the Line. MBR also operates over a connecting line segment between Wilton and Bennington owned by the State of New Hampshire ("State of NH Line")³ pursuant to a modified certificate and an operating agreement with the State of New Hampshire Department of Transportation. The State of NH Line and Pan Am's Hillsborough Branch connect at Wilton.

In 1992, Pan Am and MBR voluntarily entered into a Trackage Rights Agreement ("TRA") as a settlement of MBR's feeder line application to acquire a portion of the Hillsborough Branch.⁴ The purpose of the TRA, which had initial term of twelve (12)

² Boston and Maine Corporation – Lease and Trackage Rights Exemption – Springfield Terminal Railway Co., FD 30993 (ICC served March 12, 1987).

³ Milford-Bennington Railroad Co., Inc., Modified Rail Certificate, FD 31701 (Sub-No. 1) (ICC served August 8, 1990).

⁴ See Milford-Bennington Railroad Company, Inc. – Feeder Line Acquisition – Boston and Maine Corp. Hillsborough Branch, FD 31701 (ICC served July 6, 1992).

years, was to facilitate movement of crushed or broken stone, sand, and/or gravel between an excavation site (quarry) owned by Granite State Concrete Company, Inc. ("Granite State"), located in Wilton, NH on the State of NH Line and a Granite State owned processing plant located on Pan Am's line in Milford, NH. MBR's rights on the Line are limited to allow service only to a single customer --Granite State, while Pan Am provides service to other shippers on the Line. Pan Am did not convey ownership in the Line nor its common carrier rights and obligations to MBR. The TRA is attached hereto as Exhibit 1. MBR transports no other commodities over the Line or the State of NH Line.

Despite the original term of the TRA expiring in 2004, MBR operations have continued over the Line. As explained herein, over the past 25+ years there has been myriad disputes between MBR and Pan Am relating to safety, the payment of invoices, and the condition of the Line. These disputes have caused the relationship between the Parties to significantly deteriorate and has resulted in litigation on multiple occasions. For example, in a recent trial between the Parties for MBR's failure to make trackage rights payments to Pan Am (from 2012 forward), a jury found in essence that there was no existing contract between the Parties and that MBR was unjustly enriched by using Pan Am's track without compensation.⁵ See Exhibit 2, Verdict Form – Boston & Maine, et al. v. Milford-Bennington Railroad, Inc. – Hillsborough Sup. Ct. – 226-2015-CV-348. Even though it has been determined by a jury that no contract exists and that MBR was unjustly enriched, Pan Am cannot evict MBR from the Line because the operating authority of MBR on the Line is subject to the exclusive jurisdiction of the Board and the

⁵ The jury verdict suggested, and the Court upheld and ordered that Pan Am be awarded \$71,893 in compensation with a set-off to MBR in the amount of \$19,720. The set off was for alleged repairs that MBR had done to the Line.

Board's jurisdiction must first be removed before Pan Am may exercise its lawful right to repossess its property.⁶

Consistent with the Parties' original agreement, whereby MBR agreed to terminate its operations upon expiration of the TRA, Pan Am has requested MBR to terminate peacefully its operations several times, especially given the contentious relationship, the ongoing litigation, and the expired TRA. MBR refuses to vacate the Line. Given MBR's refusal, Pan Am has also tried many times over the years to reach agreement on renewed terms, but MBR refuses to agree to reasonable terms and conditions. Knowing that it cannot be evicted without Board authorization, MBR has used that jurisdictional stick for its sole benefit by using the Line without making payments and doing so in a manner that is unsafe and does not provide Pan Am with the necessary revenues for proper maintenance. It has also sued Pan Am when Pan Am has attempted to enforce basic safety rules. Accordingly, Pan Am is left with no choice but to file this adverse discontinuance.⁷

II. INFORMATION REQUIRED BY 49 C.F.R. § 1152.22

Exact Name of Applicants and Applicants Status § 1152.22(a)(1)-(2):

⁶ Despite the TRA expiring on its own terms in 2004, the Parties continued to operate pursuant to it while attempting to negotiate a new agreement, which the Parties were unsuccessful at doing. It is telling that both Parties operated pursuant to the contract for eight years after it expired. Pan Am tried to negotiate a new contract in good faith, but encountered significant resistance from MBR. Perhaps MBR decided that it preferred operating for free and on whatever terms it saw fit rather than abide by a contract.

⁷ In March 2017, Pan Am filed a petition with the Board seeking exemption from several statutory provisions and waivers of certain Board regulations in connection with filing this "adverse" discontinuance application (referred to herein as "Petition"). On June 23, 2017, the Board served its decision on the Petition and granted in part and denied in part Pan Am's requested exemptions. This Application is prepared in accordance with the Board's June 23, 2017 decision.

The exact names of the applicants are Boston and Maine Corporation and Springfield Terminal Railway Company. Applicants are common carriers by railroad subject to 49 U.S.C. Subtitle IV, chapter 105.

Relief Sought § 1152.22(a)(3):

Applicants seek discontinuance of MBR's operating authority over the Line.

Map of the Subject Line § 1152.22(a)(4):

A map showing the location of the Line is attached as Exhibit 3.

System Diagram Map § 1152.22(a)(5):

Waived per Board's decision served June 23, 2017.

Detailed Statement of Reasons for Filing Application § 1152.22(a)(6):

As noted above, MBR's contract expired long ago. Despite its agreement to terminate its operations upon expiration of the TRA, it has refused to do so. Even worse, MBR has refused to pay for its operations over the Line, refused to abide by basic operating and safety rules, and has rejected all efforts to peacefully terminate its operating authority over the Line. MBR has proven itself to be financially irresponsible. Its actions are detrimentally impacting Applicants' ability to maintain the Line and ensure the safety of operations over the Line for all stakeholders

Termination of Board jurisdiction and MBR's operating authority over the Line will not adversely impact any shipper. Upon termination, Pan Am will simply expand operation over the Line to include the Granite State facility at Milford via connecting service with MBR. MBR will still serve Granite State's quarry located on the State of NH Line. It will originate the shipment and bring it to Wilton for interchange to Pan Am. Pan Am will terminate the shipment at the Granite State processing plant located on its Line. As discussed later (see later discussion on revenue and service plan), this service will actually improve safety and provide Pan Am with the ability to expand service in the

area to serve Granite State as well as other shippers. This will actually promote rural and community development within the region.

Expanded operations over the Line by Pan Am allows Pan Am to provide honest, cost-efficient, and reliable rail service to all stakeholders over the Line; avoids ongoing hostilities between Pan Am and MBR concerning use of the Line; and avoids further litigation to collect monies due to Pan Am for MBR's use of the Line and to enforce applicable safety rules. While the Parties could spend substantial sums of money having the Board establish new terms and conditions, Pan Am has no reason to believe that MBR would actually pay the new compensation, abide by any new terms and conditions or suddenly decide to act as a responsible tenant. Certainly the 25+ year history of their operations suggests that they would not. As such, and as is established in this Application, the present and future public convenience permits and supports granting an adverse discontinuance. There is simply no reason to continue the current untenable arrangement.

Representatives of Applicants § 1152.22(a)(7):

Any correspondence, comments, or protests relating to this Application should be sent to the following representatives of the Applicants:

Robert B. Burns, Esq., Corporate Counsel
Pan Am Railways

1700 Iron Horse Park
North Billerica, MA 01862
(978) 663-1029

Zip Codes § 1152.22(a)(8):

The Line traverses through United States Postal Service Zip Codes 03055 and 03086.

Condition of the Properties § 1152.22(b):

See Exhibit 4 – Verified Statement of Kenneth Duane - Proposed Pan Am
Operating Plan (“Exhibit 4 – Operating Plan”)

Service, Revenue, Cost, Rural and Community Data § 1152.22(c),(d), and (e)

Waived per Board’s decision served June 23, 2017.

Environmental Impact § 1152.22(f):

Waived per Board’s decision served June 23, 2017.

Passenger Service § 1152.22(g):

The Line does not host passenger service.

Additional information § 1152.22(h):

The Applicants will submit such additional information to support the application
if the Board deems it necessary.

Draft Federal Register Notice § 1152.22(i):

A draft federal register notice in the form approved by the Board is attached
hereto as Exhibit 5. A compact disk containing the federal register notice is being
supplied to the Board with the Application.

Verification § 1152.22(j):

A verification in the form prescribed by the Board is included with this filing.

III. THE PRESENT AND FUTURE PUBLIC CONVENIENCE AND NECESSITY PERMIT EXTINGUISHING MBR’S OPERATING AUTHORITY

Traditionally, discontinuances are initiated by railroads that own and operate, or
have Board recognized operating authority over, a particular rail line owned by another
entity. Traditional discontinuances, which are voluntarily invoked by rail carriers to
extinguish operating rights or a common carrier obligation over a specific rail line, are
different from adverse discontinuances in that for the later, a party other than the carrier

seeks to extinguish the current carrier's operating authority. In this proceeding, Pan Am is filing to extinguish MBR's operating rights for the reasons explained herein.

A. The Applicable Standard⁸

The statutory standard governing adverse discontinuance proceedings is whether the present or future public and convenience and necessity ("PC&N") requires or permits the proposed discontinuance.⁹ In applying the PC&N standard, the Board balances "the potential harm to affected shippers and communities against the present and future burden that continued operations would impose on the railroad and on interstate commerce." See Fore River, slip op. at *311. Similar to the situation in Fore River, in adverse discontinuance proceedings that essentially involve a change in operator over a rail line, as is basically the case here, the Board applies this standard by analyzing a number of factors that consider the relative burden on the operating carrier, the owning railroad, and the public as a whole, if adverse discontinuance authority was granted. While, the Board, like its predecessor, the ICC, has exclusive and plenary jurisdiction over abandonments and discontinuances to protect the public from an unnecessary discontinuance, cessation, interruption, or obstruction of rail service, the Board will not allow its jurisdiction to serve as a shield from the legitimate processes of state law where no overriding federal interest exists.¹⁰ As will be shown herein, in applying the balancing

⁸ Precedent of the Board and its predecessor the Interstate Commerce Commission ("ICC") establishes that a finding that the public convenience and necessity requires or permits abandonment or discontinuance enables line owners and others to seek further remedies to remove a carrier from a line. See Thompson v. Texas Mexican Ry. Co., 328 U.S. 134 (1946); Modern Handcraft, Inc. -- Aban., 363 I.C.C. 969 (1981) ("Modern Handcraft").

⁹ See, e.g., 49 U.S.C. § 10903(d); See, e.g., Fore River R.R. Corp. -- Discontinuance of Service Exemption -- Norfolk County, MA, AB-359, 8 I.C.C.2d 307, slip op. at *310-*311 (ICC served March 10, 1992) ("Fore River").

¹⁰ See Modern Handcraft, at *972 ("Where no overriding federal interest exists, we will not allow our jurisdiction to be used to shield a carrier from the legitimate processes of

test, there is no harm to the shipper or the communities. In fact, the communities will benefit from expanded Pan Am operation. Yet, continued operations by MBR does impose a burden on Pan Am.

B. Termination Of MBR's Long Expired TRA and MBR's Operating Authority Will Not Adversely Impact Any Shipper

One of the factors the Board considers in adverse discontinuances is the extent to which any shipper would be adversely impacted by terminating the current carrier's operating authority. In this proceeding, MBR only serves one shipper using the Line, Granite State, and that shipper would continue to receive rail service – as such Granite State would not be adversely impacted by the proposed discontinuance.

Presently, MBR provides Granite State an exclusive shuttle service involving a ten (10) car train to and from Granite State's quarry near Wilton, NH located on the State of NH Line, and Granite State's processing plant south of the quarry in Milford, NH, located on the Line. If the discontinuance is granted, going forward, Granite State will be served as a joint movement by MBR and Pan Am. MBR will serve the origin and Pan Am the destination. The interchange will be at Wilton.

To implement this proposal, Pan Am has developed a proposed operating plan designed to ensure that the proposed change in operations would have no adverse impact

state law.”) See also, Chelsea Property owners – Aban. – Portion of the Consol. Rail Corp., 8 I.C.C.2d 773 (1992), aff'd sub nom. Consolidated Rail Corp. v. ICC, 29 F3d 706 (DC Cir 1994). See also, Cheatham County Rail Authority “Application and Petition” for Adverse Discontinuance, AB 379-X, 1992 ICC LEXIS 224, (ICC served Nov. 4, 1992) (“Cheatham County”); Jacksonville Port Authority- Adverse Discontinuance- in Duval County, FL, AB-469, 1996 STB LEXIS 200 (ICC served July 17, 1996) (“Jacksonville”); and Tacoma Eastern Ry. Co. – Adverse Discontinuance of Oper. Application –a Line of the City of Tacoma in Pierce, Thurston and Lewis Counties, WA, AB-548, 1998 STB LEXIS 790 (STB served Oct. 16, 1998) (“Tacoma”). In both of those cases, the Board granted adverse discontinuance where the owner of a rail line proposed to replace the operator after the latter's contractual or property right to operate over the line had expired or had been lawfully terminated and the operator refused to voluntarily give up its operating authority. Such is the case here.

on service offered to Granite State. See Exhibit 4 – Operating Plan at ¶ 4. To summarize briefly, under the new operating plan, MBR will load at Granite State’s quarry on the State of NH Line and then interchange its train at approximately MP 16.36 (Yard Limits in Wilton, NH) to Pan Am. Pan Am will then take the train to the processing plant, conduct the unloading operation, and then return the empty cars in interchange back to MBR. See Exhibit 4 – Operating Plan at ¶’s 4-5.

This service will be just as timely and as efficient as the existing service. For example, the proposed operating plan provides that Pan Am will provide service consistent with Granite State’s existing needs and, if demand warrants it, Pan Am is committed to providing service up to five days a week. See Exhibit 4 – Operating Plan at ¶ 5. Moreover, resumption of service by Pan Am will promote the public interest by providing for reliable and regular rail service to Granite State. Finally, Pan Am is aware of certain training requirements pursuant to Title 30 of the Code of Federal Regulations as promulgated under the Federal Mine Safety and Health Act of 1977. Pan Am crew personnel will have to undergo said training in order to access Granite State properties, but Pan Am is committed to working with Granite State and federal regulators to obtain any/all required certifications as needed thereunder.

Pan Am is aware that the Town of Wilton, NH filed a letter in this proceeding expressing concerns over Pan Am’s filing to discontinue MBR’s operating rights. The letter entered into the public record on May 23, 2017 expressed concerns that if the Application was granted, Granite State rail traffic would be diverted to trucks and such an action would have negative consequences for traffic, congestion, and road damage. The May 23, 2017 letter also indicated that the “availability of responsive and effective rail service is a key to our efforts to attract new business and encourage development opportunities.”

Pan Am wants to assure the Town of Wilton, NH that its concerns are misplaced. Pan Am wishes to partner with the community and is committed to providing long-term competitive rail service throughout the region.¹¹ More importantly, Granite State will not lose rail service over the Line. Quite the opposite, Granite State will continue to be served by MBR at origin and by Pan Am at destination. Pan Am has no intention of discontinuing service to Granite State and is fully willing to serve Granite State as part of a joint line movement with MBR. Alternatively, in the event that MBR cannot provide service, Pan Am is prepared to handle the movement from origin-destination if its existing trackage rights that it currently has over the State of NH Line can be amended to allow for that service.¹² See Exhibit 4 – Operating Plan at ¶ 6. - Plaintiff Depo p. 47; line 9.

Pan Am recognizes that Granite State has previously objected to MBR being evicted from the Line. Pan Am believes that Granite State either doesn't want to lose its sweetheart deal with MBR or simply misunderstands how post-discontinuance rail service would be provided. Granite State currently enjoys an exclusive arrangement with MBR, which also is to MBR's advantage, but, such an arrangement serves only private interests, not the public interest. MBR has made no real efforts in the past to increase

¹¹ Monadnock Paper Mills, Inc. ("Monadnock"), a potential shipper, also wrote a letter that was entered into the public record on May 22, 2017 expressing concerns that it had invested hundreds of thousands of dollars into maintaining the track to its paper mill. Despite its investment, Monadnock is not a current rail user; however, if Pan Am is allowed to serve Granite State in interchange with MBR, Pan Am is willing and ready to provide service to Monadnock as well pursuant to mutually agreeable terms. As it is now, there is no other rail traffic available so as to make Monadnock service economically feasible. This would change under the proposed new operating plan.

¹² As explained in the Operating Plan, Pan Am currently has overhead trackage rights over the State of NH Line to serve one shipper – Quinn Quarry. Pan Am does not utilize those rights right now because there is no business justifying Pan Am service. Plus, those rights do not allow Pan Am to serve Granite State. Upon a grant of discontinuance, if MBR will not serve Granite, Pan Am is more than willing to take steps to do so.

revenue or expand rail service to other potential customers because it would detract from MBR's service to Granite State.¹³ Should Granite State oppose the adverse discontinuance it is because of this exclusive "sweetheart deal" that benefits Granite State but serves to the detriment of other potential customers, Pan Am and the State of New Hampshire ("State").

Granite State may also misunderstand that rail service can continue at existing service levels and existing rates. While Granite State may be concerned that having two railroads provide service rather than one will have adverse impacts on its rate, it should not be. Pan Am proposes to minimize the effect on Granite State should the Board grant the Application and Granite State's traffic is handled as a split movement. Pan Am proposes that compensation be based on the current rate, which means the overall rate paid by Granite State would not change. Pan Am is willing to keep the same overall through rate that Granite State now enjoys; however, the rate would be divided between Pan Am and MBR based on pro-rata mileage.¹⁴ Assuming MBR does not raise rates for its portion of the move, the rate should stay the same. As such, the termination of MBR's long-expired trackage rights agreement and MBR's operating authority would not adversely impact any shipper because Pan Am intends to resume operation of the Line and provide service to the sole shipper currently served by MBR on the same terms and conditions or better.

¹³ Pan Am believes that the owner of Granite State may have some sort of financial interest in MBR's cars and equipment. This could explain MBR's and Granite State's opposition to Pan Am's request.

¹⁴ Alternatively, Pan Am and MBR could settle compensation using the Interline Settlement System if desired, or bill pursuant to Rule 11. Under such a scenario and unless and until economic conditions change, Pan Am commits to charging no more than what it would get in a mileage based pro-rata share of the current rate.

MBR has previously questioned Pan Am's commitment to providing service to Granite State. MBR suggested in its Reply of Milford Bennington Railroad Company, Inc. to Petition for Waiver ("Reply to Waiver") that "termination of MBR's trackage rights would require this short, shuttle-type movement to be interchanged by MBR to Pan Am for delivery, despite Pan Am's long-record of inattention, if not outright hostility, to such traffic." Reply to Waiver at 2. MBR is wrong. Pan Am is not hostile to such a joint-line shuttle type movement. In fact, that is precisely what Pan Am is proposing to do and at the same rate and service levels that Granite enjoys today. As such, analogous to similar facts involved in Jacksonville, since Pan Am is fully committed to providing service to all shippers, not just Granite State, the public interest supports the grant of the adverse discontinuance.

As the Board explained in Jacksonville, it considers "the relative burdens that continuation of service on the one hand, and cessation of service on the other, would have on the involved carrier, on the owner-lessor of the line, and the public." There is no burden placed on MBR or Granite State as a result of the discontinuance. MBR will continue to serve Granite State at origin and maintain and operate the State of New Hampshire's Line as it sees fit. Likewise, the burden on Pan Am would also be reduced because it could eliminate spending time, money, and resources litigating MBR's failure to abide by contractual terms and safety provisions and it would not have to spend money maintaining the Line when it is not compensated for that maintenance. Most important, the adverse discontinuance would pose no burden on Granite State, whom will continue to receive the same service that it does today, and will merely have to split payment for its current rate between two carriers.

C. Granting Adverse Discontinuance Will Improve Safety.

Substituting Pan Am for MBR for service on the Line will actually improve safety because MBR has a history of conducting unsafe actions on the Line. For instance, in 2003, Pan Am received word that the MBR was contemplating hosting passenger excursion trains on its property. In response, Pan Am implemented several safety measures to ensure safe freight and passenger operations on its property. One such measure was the installation of a derail device to prevent the heightened threat of both passenger and freight cars breaking free and inadvertently rolling onto Pan Am property. MBR's sole owner, Mr. Peter Leishman, at first agreed to install a derail but then removed the device without any notice to Pan Am. Once Pan Am discovered that the derail had been removed, Pan Am also imposed operating restrictions on MBR to further reduce the risk of an unexpected incident. Mr. Leishman also objected to the operating restrictions.

Rather than simply abiding by these basic safety rules and restrictions, MBR brought a complaint against Pan Am at the STB.¹⁵ MBR alleged that Pan Am's actions were unreasonable and violated MBR's common carrier rights and obligations. The STB rejected MBR's claims. The STB found that "the complainants have not shown that the measures taken by BM/ST [Pan Am] to address its concerns were necessarily unreasonable. Similarly, we cannot find on this record that BM/ST unreasonably interfered with M-B's ability to carry out its common carrier obligation to serve Granite State." See Granite State Concrete et al. vs. Boston and Maine Corp., et al., NOR 42083 (STB served September 24, 2004).

¹⁵ See Granite State Concrete et al. vs. Boston and Maine Corp., et al., NOR 42083 (STB served September 24, 2004).

While Pan Am did eventually change some of its practices and policies due to the STB's decision, in 2004, Pan Am discovered that MBR continued to refuse to abide by customary safety rules and practices and was performing certain actions that it claimed were necessary to maintain the Line without properly certified/qualified personnel or knowledge by Pan Am. See Exhibit 6 - Leishman Depo. at 15:8 et seq.¹⁶ These actions violated several safety rules. First, any person maintaining a railroad's track is required by FRA Track Safety Standards to be qualified by that railroad to perform such maintenance which, qualifications that Leishman has never obtained by Pan Am. See 49 C.F.R. §213.7. See Exhibit 6 - Leishman Depo at 16:10. Second, any person taking control of a line of railroad to perform maintenance is required to be qualified under that railroad's Roadway Worker Protection program, qualifications MBR has not obtained. See 49 C.F.R. §214.313(a). Third, in order to perform maintenance within yard limits – as is the case with this portion of the Hillsboro Branch – under the Northeast Operating Rules Advisory Committee ("NORAC") Rules that person would be required to obtain verbal permission from the Dispatcher to simply occupy the track, and would be required to obtain a written "Form D" from the Dispatcher to actually perform maintenance. See NORAC Rules 93, 132. Mr. Leishman has testified recently that he merely requests permission to occupy the track from the Dispatcher but nothing is issued in writing requesting to perform maintenance. See Exhibit 6A¹⁷ - Leishman Depo. at Pg. 57:9 et seq. . NORAC Rules, however, require that the permission by the Dispatcher must be in writing if the track is to be disturbed. NORAC Rule 132. Clearly, Mr. Leishman's pattern of conducting unsafe operations has continued.

¹⁶ Exhibit 6 is the Depo. of Peter R. Leishman, Nov. 11, 2003, Granite State, et al. v. Boston & Maine Corp., FD No. 34381.

¹⁷ Exhibit 6A is the Depo. of Peter R. Leishman, 11/14/2016 – Boston & Maine Corp. v. MBR, Hillsborough Sup. Ct., No. 226-2015-CV-00348 (NH).

The Board should also be aware that due to Mr. Leishman's unsafe operations and failure to abide by Pan Am's safety rules, Pan Am banned him the Line, which it had a right to do under the TRA. The incident that led to this action occurred in October of 2009. There, Peter Leishman and one of MBR's two full-time employees were at work on a moving train when it collided with a truck at a rail crossing. At the time of the accident, Leishman, who was serving as the train's conductor, was located in a "control car" at the train's leading end, and the locomotive was shoving the train from its trailing end. See Memorandum and Order - Milford Bennington Railroad Co., Inc. v. Pan Am Railways, et al., 10-cv-00264 – PB, Opinion No. 2011 DNH 206 and Appeal from District Court to 1st Circuit, No. 12-1031 (Exhibit 10). The train's engine could only be controlled by the engineer in the locomotive. Id. The train eventually collided with a truck at the crossing. Id. Pan Am conducted an investigation and hearing where it was determined that Leishman violated Safety Rules 138 (e) and 116 when "he was not properly stationed for the backward move through the crossing." Id. Pursuant to the TRA that the Parties were operating under, Pan Am barred Mr. Leishman from operating on the Line.

In 2010, MBR sued Pan Am for banning Mr. Leishman from the Line. MBR argued during litigation that Leishman, who was riding in the lead car of the train during the accident, was "stationed at the crossing" at the time of the accident. The Court rejected MBR's argument and instead concluded that an employee is not "stationed at the crossing" under Rule 138 (e) if he is on a moving train. Id. Accordingly, the court concluded that Pan Am was entitled to exclude Leishman from its tracks under the TRA because he had violated a Pan Am Safety Rule. Id.

Taken collectively, MBR's course of conduct demonstrates it has and will continue to ignore various safety, worker and operating rules. MBR violates safety

protocols whenever it sees fit and then proceeds to sue Pan Am whenever Pan Am seeks to enforce the safety rules or the TRA. Clearly substituting Pan Am service for MBR service of the Line will improve safety, not detract from it. Pan Am is fully committed to operating in a safe manner. MBR's conduct, on the other hand, shows a consistent disregard for those safety rules. As such, the public interest is best served by removing MBR from the Line and allowing Pan Am to resume service.

In summary, Mr. Leishman and MBR routinely evidence a disregard for basic safety rules and practices. Perhaps more importantly, however, when Pan Am attempts to enforce these measures, Mr. Leishman and MBR refuse and litigation usually follows. Nevertheless, to date the Board and the federal courts have agreed that Pan Am's actions with regard to safety have been proper. Terminating MBR's operations over the Line will eliminate MBR's unsafe operations and allow Pan Am to operate in a safe manner without litigation or risks of unauthorized personnel operating over the Line.

D. Granting Adverse Discontinuance Will Improve Pan Am's Ability To Maintain The Line

Not only would safety be improved if Pan Am were substituted for MBR, but maintenance should improve as well. Currently, under the TRA, Pan Am is responsible for maintenance. Yet, MBR has continued to refuse to make necessary payments for the use of the Line – payments that Pan Am uses to maintain the Line. Without the necessary revenue from MBR, Pan Am is forced to find other scarce funds to maintain the Line – even though it can't operate over it. This is clearly adversely impacting operations over the Line. Allowing Pan Am to restore service over the Line means that Pan Am will have both the economic and operational self-interest to maintain the Line – incentives that neither MBR nor Pan Am have today.

Pan Am is aware that the Town of Milford wrote a letter entered into the public record on May 31, 2017, in which it states MBR, “unlike Boston & Maine, maintains its track system to ensure the safe transportation of Goods.” The letter also claims that “the rail line under [Pan Am’s] control between Nashua and Milford” ... “has a maximum 5 mph speed limit given its horrendous condition.” Id. These statements are attempting to contrast the condition of the State of NH Line against the condition of the Hillsborough Branch. But what this statement ignores is that for the past 5+ years Granite State has paid MBR for its operations; and, such payments have allowed MBR to maintain the State of NH Line. Over the same time period, MBR has refused to compensate Pan Am, even when ordered to do so by court order (to date MBR has made no attempt to satisfy the Court’s Order to pay Pan Am). As such, granting the Application, and allowing Pan Am to be paid for traffic that transverses over the Line will generate revenues that could be used to properly maintain the Line. The current condition of the Line is directly attributable to MBR’s failure to compensate Pan Am for its use of the Line.

Pan Am has attempted to work with MBR to negotiate a new contract that would provide Pan Am with adequate revenues to maintain the Line, but MBR continues to stifle those efforts and continues to refuse to make the necessary trackage rights payments. This is not in dispute. But such unilateral decisions by MBR are significantly impairing PAS’s ability to maintain the Line, which in turn is burdening the public, Pan Am, and interstate commerce. As the Board recognized in Fore River, when an operator establishes a consistent pattern of failing to meet its obligations and investment in the rail line is significantly impaired, the operations become a burden on the public and impose a burden on interstate commerce. See Fore River, at *8-*9. In Tacoma, the Board granted an adverse discontinuance that would allow the owner of the rail line to replace the current operator, who failed to abide by contractual terms, with another carrier, in order

to afford the owner an opportunity to receive revenue from the operation of the line and generate a return on investment. See Tacoma at *17-*18. The same principles in those cases apply here. Pan Am should be given an opportunity to achieve revenues to both maintain and invest in the Line. It does not have that opportunity as long as MBR's service continues.¹⁸

E. Granting The Application Will Promote Rural And Community Development Within The Region

MBR will likely allege that granting the Application would be harmful to shippers in the region because Pan Am is not interested in providing service to shippers such as Granite State. Such assertions could not be farther from the truth. Over the past two decades, Pan Am, has established itself as a Class II railroad. It is continuously looking for opportunities to develop relationships with new business partners. Indeed, if it can enter into new revenue service for Granite State, Pan Am is hoping to offer service other shippers as well. Quinn Quarry, for example, who is located near Granite State's quarry, has expressed an interest in resuming Pan Am rail service,¹⁹ and Pan Am would also be interested in providing service to Monadnock Paper Mill also located in the area. In fact, this very proposal was outlined back in November, 2013 in Pan Am's "Proposal to the State of New Hampshire DOT" for the short-line operation of the Hillsborough Branch railroad line. See Exhibit 7 – Marketing Plan, 2013.

Pan Am wants to expand business on the Line and additionally desires to expand rail service on the connecting State of NH Line over which both Pan Am and MBR has

¹⁸ Presently, Pan Am maintains the Line pursuant to the TRA. MBR's refusal to pay unjustly enriches MBR at Pan Am's expense which results in Pan Am subsidizing MBR directly, and Granite State indirectly. Despite Pan Am's willingness to comply with its contractual obligations, MBR consistently avoids the same responsibility. Therefore, MBR's claims regarding issues such as maintenance ring hollow.

¹⁹ As noted in footnote 12, Pan Am maintains overhead trackage rights to serve Quinn Quarry on the State of NH Line.

operating rights. Such investment would benefit other potential customers as well as the State. MBR and Granite State should not be allowed to adversely affect such service because they do not wish to change their existing service arrangement with each other.

Given that Pan Am currently has direct interface with potential customers on the State of NH Line, it is in an excellent position to offer potential customers a competitive service option and address specific customer needs to coordinate the traffic to optimize inbound and outbound traffic, which would further reduce transit times for all. Therefore, MBR should not be allowed to operate on the Line merely because Granite State (only) enjoys the arrangement it has with MBR and when neither the State nor other potential customers benefit from such an exclusive “sweetheart deal.”

MBR will likely argue that Pan Am cannot be entrusted to be the sole operator of the Line. The Board should think carefully about any such assertions because MBR, not Pan Am, has an established record of disregarding contractual and safety interests established to promote the public interest. MBR simply wants to protect the sweetheart deal with Granite State that benefits Granite State and MBR but serves to the detriment of other potential customers, Pan Am and the State. Pan Am simply wants the opportunity to offer competitive rail service to all interested shippers on the Line, and this unlike the current operations conducted by MBR, will actually promote rural and community development within the region. As such, the Board should grant the Application because in these unique circumstances, the PC&N not only permits, but supports the proposed adverse discontinuance.

F. Granting The Application Is Both Equitable And Consistent With Precedent

MBR received the benefit of the arm’s length transaction a long time ago. The TRA expired long ago. Yet, rather than abiding by its contractual agreement to vacate the Line upon termination of the TRA, MBR refuses to leave. It ceased making any

enjoying the use of Pan Am's property--is more than sufficient to justify a grant of this adverse discontinuance request. See Modern Handcraft, at *972.

Indeed, other precedent also supports granting the Application. In Jacksonville, the issue was that the operating entity defaulted on its contractual obligation to pay rent first to the owning railroad, and then to the court registry per court order. The Board granted adverse discontinuance authority based on the tenant's violation of its contractual obligations to the owning rail carrier and the owning rail carrier's assurances that the public will continue to receive adequate rail service. As explained by the Board,

[the Board's] primary jurisdiction over the discontinuance of service deprives a landlord of customary recourse to the courts to secure its rights if they have been violated by a tenant operator. But when an owner charges that an operator has trespassed upon its rights and asks us to act so that the owner may avail itself of the customary procedures to secure redress, we must examine those assertions. If they are justified, we must take the action requested.

See Jacksonville, slip op. at *15-*16.

The situation here, while not exact, is more similar than it is different. Here, MBR has and continues to blatantly disregard Pan Am's rights by refusing to vacate the Line even though there is no agreement, using Pan Am's track without compensation, depriving Pan Am of revenues that are needed to maintain the Line, and operating in an unsafe manner. It has also used the jurisdiction of the Board to frustrate Pan Am's use of the courts. It flagrantly ignores safety rules and procedures. It makes no efforts to serve any other shippers other than Granite State.

As in Jacksonville, the Board must take action. If the Application is not granted, MBR would be emboldened to continue to: (a) violate safety protocols whenever it desires to (and as it has done in the past); (b) avoid paying for its use of the Line; and (c) frustrate efforts by Pan Am to provide service over the Line to other customers and shippers. If MBR is allowed to extort Pan Am in this manner, then any trackage rights

holder could simply utilize trackage rights to avoid abiding by any of its contractual obligations.²⁰

It is clear that the public convenience and necessity permit issuance of adverse discontinuance of the operating authority of MBR on the Line. There will be no cessation of rail service to customers on the Line. Pan Am is committed to operating safely; maintaining the line; and, offering competitive rail service to all interested shippers, not just favor one, as MBR does. Expanded operations by Pan Am will promote rural and community development within the region as a whole. The simple fact is that MBR will still retain Granite State's business at origin. Granite State's service and rates will not be adversely impacted by the discontinuance. The communities will not be harmed, and in fact will benefit from expanded Pan Am operations. In contrast, allowing MBR to continue to operate does burden Pan Am without any benefit.

Similarly, there is no overriding federal interest for continuing MBR's operations. MBR has a long history of ignoring its contractual obligations. Allowing MBR to continue to operate over the Line allows it to use the Board's jurisdiction to shield it from its financial obligations and its obligation to operate it in a safe manner. In similar situations, the Board has consistently found that the PC&N justifies granting the adverse discontinuance, especially when there is another carrier willing and able to provide service. Such a carrier exists – Pan Am.

²⁰ Such conduct is also completely at odds with the Board's decision in Cheatham County, where the Board found that denial of the adverse discontinuance authority would "amount to a finding that the railroad should be permitted to continue to operate over the objections of the owner of the line despite the railroad's contract default." Id. at 1992 ICC LEXIS 224, *16. Here that is exactly what MBR seeks to do.

IV. ADDITIONAL REQUIRED INFORMATION

NEWSPAPER PUBLICATION

The Newspaper Notice as required by 49 C.F.R. § 1152.20(a)(4) was published at least once during each of 3 consecutive weeks in a newspaper of general circulation in each county in which any part of the Line is located. See Attached Newspaper Notice Proof of Publication – Exhibit 8.

AFFIDAVIT OF COMPLIANCE

An Affidavit of Compliance with the filing and publication requirements of the Board's Decision served June 23, 2017 and 49 C.F.R. § 1152.20(a) is attached hereto as Exhibit 9.

CONCLUSION AND REQUESTED RELIEF

As explained herein, the Board should issue a decision finding that public convenience and necessity permit discontinuance of MBR's operating authority over the Line.

Respectfully Submitted,



Robert B. Burns
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April 11, 2018

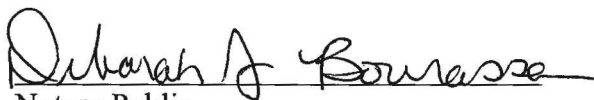
VERIFICATION

Commonwealth of Massachusetts
County of Middlesex, ss.

Robert B. Burns, Esq. makes oath and says that he is the legal counsel of the Boston and Maine Corporation and the Springfield Terminal Railway Company ("Applicants"); that he has been authorized by the Applicants to verify and file with the Surface Transportation Board the foregoing application in AB-1256; that he has examined all of the statements in the application as well as the exhibits attached thereto and made a part thereof; that he has knowledge of the facts relied upon in the application; and that all representations set forth therein are true and correct to the best of his knowledge, information, and belief.


Robert B. Burns

Subscribed and sworn to before me, Deborah J Bourassa in and for
the State and County above named, this 11 day of April, 2018.


Notary Public
My Commission Expires:



CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 11TH day of April, 2018, a copy of the Application for Adverse Discontinuance of Operating Authority was filed in the above-mentioned proceeding and was also served by first class mail, postage prepaid, upon the following:

Thomas J. Litwiler
Fletcher & Sippel LLC
29 North Wacker Drive
Suite 290
Chicago, IL 60606-2832

Hon. Christopher T. Sununu
Governor
State of New Hampshire
State House, Room 208-214
Concord, NH 03301- 4990

New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, NH 03301-2429

Bureau of Rail and Transit
New Hampshire Department of Transportation
John O. Morton Building
7 Hazen Drive
Concord, NH 03302

Granite State Concrete Company, Inc.
407 Elm Street
Milford, NH 03055


Robert B. Burns, Esq.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

AB-1256

**BOSTON AND MAINE CORPORATION &
SPRINGFIELD TERMINAL RAILWAY COMPANY –
ADVERSE DISCONTINUANCE
OF OPERATING AUTHORITY -
MILFORD-BENNINGTON RAILROAD COMPANY, INC.**

**- APPLICATION FOR ADVERSE DISCONTINUANCE -
OF OPERATING AUTHORITY**

EXHIBIT 1

TRACKAGE RIGHTS AGREEMENT

AGREEMENT

AGREEMENT, made as of this ^{22nd} day of June, 1992 by and among Milford-Bennington Railroad Company, Inc. ("MBR") and Boston and Maine Corporation ("B&M") and the Springfield Terminal Railway Company ("ST") (collectively "B&M/ST").

WHEREAS, B&M is the owner/lessor and ST is the current lessee of certain railroad trackage between Wilton and Milford, New Hampshire, and,

WHEREAS, the parties hereto desire to enter into an agreement to provide for the overhead movement of traffic between Wilton, New Hampshire and Milford, New Hampshire, and whereas MBR required access to Milford over B&M/ST tracks;

NOW, THEREFORE, in consideration of the promises, covenants and undertaking contained herein, the parties agree as follows;

1. Trackage Rights between Wilton and Milford. B&M/ST hereby grant MBR the non-exclusive right to operate MBR trains, locomotives, cars and equipment with MBR's own crews (the "Trackage Rights") over the B&M/ST's trackage which extends from the point of the junction with MBR and the B&M/ST at approximately milepost N-16.36 in Wilton, New Hampshire, to approximately milepost N-11.0 in Milford, New Hampshire (the "Trackage"), subject to the following terms and conditions:

(a) The Trackage Rights are overhead rights only and are solely for the purpose of permitting the movement of stone and gravel cars, each not more than 2000 cubic feet in volume, in ten car trains between Wilton and Granite State Concrete Company,

Inc. in Milford. MBR shall not move any other shipments or perform any local freight service whatsoever over the Trackage. B&M/ST's right to use the Trackage shall not be diminished by this Agreement. B&M/ST hereby retain the right to grant to other persons or entities rights of any nature in the Trackage. The Trackage Rights shall not confer on or vest in MBR any title or estate in the Trackage beyond that contemplated herein.

(b) MBR shall be solely responsible for and shall report and pay directly to the owner of all cars in MBR's trains on the Trackage all mileage, car hire and other charges accruing on such cars while on the Trackage.

(c) Additional connections to the Trackage which may be required by B&M/ST shall be constructed, maintained, repaired and renewed as follows:

(i) B&M/ST shall furnish all labor and materials and shall construct, maintain, repair and renew at B&M/ST's sole cost and expense such portions of the tracks located on the B&M/ST right-of-way which connect with the Trackage.

(d) From time to time, B&M/ST may, at B&M/ST's sole cost and expense, make such changes in, additions and betterments to and retirements from the Trackage as shall, in B&M/ST's sole judgment, be necessary or desirable for the economical or safe operation thereof or as shall be required by any law, rule, regulation, or ordinance promulgated by any governmental body having jurisdiction. Such additions and betterments shall become a part of the Trackage and such retirements (the "Retired Track")

shall, except as provided in sub-section (e) below, be excluded from the Trackage.

(e) If MBR determines that (i) changes in or additions and betterments to the Trackage, including changes in communications or signal facilities as they existed immediately prior to the date of this Agreement or (ii) continued use of any tracks which are proposed by B&M/ST to become Retired Track, are required to accommodate MBR's operations, beyond that required by B&M/ST to accommodate B&M/ST's operations over the Trackage, MBR shall pay for the construction of such additional or altered facilities, shall (subject to the notice and response requirements set forth below) be allowed the continued use of such otherwise Retired Track, and shall also pay for the annual expense of maintaining, repairing and renewing such additional or altered facilities and such Retired Track as MBR may, by written notice, elect to continue to use. B&M/ST shall provide MBR with ten (10) days notice of any planned retirements from the Trackage and MBR shall be required to notify B&M/ST, within said ten (10) day period, of any desire to continue the use of Retired Track. Notwithstanding the foregoing, B&M/ST shall have the right to approve or disapprove, in their exclusive discretion, any such addition or alteration prior to its construction, and such addition or alteration approved shall be constructed in such a manner as to minimize interference with B&M/ST's and MBR's operations over the Trackage.

(f) B&M/ST shall maintain, repair, and renew the Trackage at B&M/ST's own expense and with B&M/ST's own supervision and labor. B&M/ST shall perform routine and regular maintenance on the Trackage. It is the intent of B&M/ST to install welded rail between milepost N-11 and milepost N-16.36 within 5 years of the effective date of this agreement in order to eliminate existing webber type joint bars. The railroad will be maintained in compliance with Federal Railroad Administration Safety Standards.

However, B&M/ST do not guarantee the speed at which trains will be able to operate over the Trackage. MBR shall not by reason of failure or neglect on the part of B&M/ST to maintain, repair, or renew the Trackage, have or make any claim or demand against B&M/ST or B&M/ST's directors, officers, agents or employees for any injury to or death of any person or persons whomsoever, or for any damage to or loss or destruction of any property whatsoever, or for any damages of any nature suffered by MBR resulting from any such failure or neglect unless (i) MBR shall have notified B&M/ST, with confirmation in writing, of specific alleged defective conditions which MBR reasonably believes to constitute a breach of B&M/ST's maintenance obligation hereunder and (ii) B&M/ST shall have failed to remedy, dispute, or otherwise respond to said specific alleged defective conditions within seven (7) days after receipt of such notification. B&M/ST shall bear no responsibility for any loss or damage which may occur during the seven (7) day period.

(g) B&M/ST shall also perform, at the expense of MBR, such additional maintenance as MBR may request.

payments for the use of the Line. It continually ignores others terms and conditions of the TRA, it operates unsafely, and makes no efforts to provide service to other shippers. In addition, now, because a court has said there is no longer any contract governing MBR's operations, MBR has openly represented that it is not obligated to pay anything when there is no underlying agreement. See Exhibit 6A Leishman Depo p. 47: 9. MBR has made it abundantly clear that it is using the STB's jurisdiction as a shield to avoid its own contractual obligations and state law remedies allowing eviction when an agreement has expired. MBR also said that the only way it would terminate the use of the track is by Pan Am filing (and the STB granting) an adverse discontinuance. See Exhibit 6 - Leishman Depo p.38; line 18. Well, Pan Am is doing just that and asks the Board to not be a complicit partner in MBR's actions by allowing MBR to continue to operate over the Line.

Pan Am understands that the Board has the ability to set new terms and conditions, but an expensive proceeding to establish a new rate and conditions would not fix the problem. There is no need for an STB proceeding to establish a new rate or to establish other material terms and conditions when there is no guarantee that MBR would even abide by them. Certainly MBR's long history of ignoring its contractual obligations indicates that whatever new terms and conditions would be established, MBR would simply ignore them.

Unless and until the Board grants the Application to remove its jurisdiction, then that jurisdiction will continue to permit MBR to consciously avoid its obligations and to operate despite initial term of the TRA having expired. This patent unfairness—whereby MBR ignores its obligations to pay for the use of the Line solely because the Board has continuing jurisdiction over the operating authority of MBR while at the same time

(h) B&M/ST shall have exclusive control of the management, dispatching and operation of the Trackage. MBR shall comply with the provisions of the Federal Locomotive Inspection Act and the Federal Safety Appliance Act, as amended, and all other federal and state laws, regulations, and rules respecting the operation, condition, inspection, and safety of MBR's trains, locomotives, cars and equipment while such trains, locomotives, cars and equipment are operated over the Trackage. MBR shall indemnify, protect, defend, and save harmless B&M/ST and B&M/ST's directors, officers, agents, and employees from and against all fines, penalties, and liabilities imposed upon B&M/ST or B&M/ST's directors, officers, agents or employees under such laws, rules, and regulations by any public authority or court having jurisdiction, when attributable solely to the failure of MBR to comply with the provisions of this Section.

(i) MBR in its use of the Trackage will comply in all respects with the operating rules and regulations of B&M/ST, and the movement of MBR's trains, locomotives, cars and equipment over the Trackage shall at all times be subject to the orders of the transportation officers of B&M/ST. MBR's trains shall not include locomotives, cars or equipment which exceed the width, height, weight or other restrictions or capacities of the Trackage as published in the Railway Line Clearances, and no train shall contain locomotives, cars or equipment which require speed restrictions or other movement restrictions below the authorized freight speeds as provided by B&M/ST's operating rules and regulations without the prior written consent of B&M/ST,

which consent shall not be unreasonably withheld. MBR shall indemnify, protect, defend, and save harmless B&M/ST and B&M/ST's directors, officers, agents and employees from and against all liabilities when attributable to the failure of MBR to comply with the provisions of this Section.

(j) MBR shall make such arrangements with B&M/ST as may be required to have all of MBR's employees who shall operate MBR's trains, locomotives, cars and equipment over the Trackage qualified for operation thereover, and MBR shall reimburse B&M/ST for any cost incurred by B&M/ST in connection with the qualification of such employees of MBR, as well as the cost of pilots furnished by B&M/ST, until such time as such MBR employees are deemed by the appropriate examining officer of B&M/ST, in his exclusive discretion, to be properly qualified for operation over the Trackage as herein contemplated.

(k) In the event B&M/ST conduct an investigation or hearing concerning the violation of any operating rule or practice of B&M/ST by any employee or employees of MBR, MBR shall be notified in advance of any such investigation or hearing. Such investigation or hearing shall be conducted by B&M/ST, and may be attended by any official designated by MBR and shall be conducted in accordance with the collective bargaining agreements, if any, that pertain to said employee or employees.

(l) B&M/ST shall have the right to exclude from the Trackage any employee of MBR determined by B&M/ST, as a result of such investigation or hearing described above, to have violated B&M/ST's rules, regulations, orders, practices or instructions.

MBR shall release, indemnify, defend, and save harmless B&M/ST and B&M/ST's directors, officers, agents, and employees from and against any and all claims and expenses resulting from such exclusion.

(m) The trains, locomotives, cars and equipment of B&M/ST and MBR shall be operated and dispatched over the Trackage or any portion thereof without prejudice or partiality to any party to this Agreement and in such manner as will afford the most economical and efficient manner of movement of all traffic.

(n) If by reason of any mechanical failure or for any other cause not resulting from the accident or derailment, any train, locomotive, car or equipment of, or in the account of, MBR becomes stalled or unable to proceed under its own power, or fails to maintain the speed required by B&M/ST on the Trackage, or if in an emergency crippled or otherwise defective cars are set out of a MBR train on the Trackage (collectively, the "Interference"), and MBR is unable to remedy said Interference within a reasonable time, the B&M/ST shall have the option to furnish motive power or such other assistance as may be necessary to haul, help, or push such train, locomotive, cars or equipment, or to properly move the disabled equipment off the Trackage, or otherwise clear the Interference, and MBR shall reimburse B&M/ST for the cost of rendering any such assistance.

(o) If it becomes necessary to make repairs to or adjust or transfer the lading of such crippled or defective cars in order to move them off the Trackage, and MBR is unable to make such repairs, adjustments or transfers within a reasonable period of

time, then such work shall be done by B&M/ST and MBR shall reimburse B&M/ST for the cost thereof.

(p) MBR shall release, indemnify, defend, protect and save harmless B&M/ST and B&M/ST's directors, officers agents and employees from and against any and all claims expenses arising out of the movement of the traffic contemplated herein, the Trackage Rights or this Agreement as a result of the collective bargaining agreements between B&M/ST and their respective labor organizations, or incurred as a result of any labor protection obligations imposed by the Interstate Commerce Commission. Notwithstanding the foregoing, B&M/ST reserve their right to take such steps as are reasonably necessary to terminate this Agreement in the event that claims or labor protection obligations are created hereby which are beyond MBR's financial capacity to bear under its indemnification obligation.

2. Compensation.

(a) MBR agrees to pay B&M/ST for the trackage rights covered by this agreement \$5.00 per car, loaded or empty.

(b) MBR agrees that said Base Charge will be applicable to all cars, loaded and unloaded, moved by MBR over the Trackage Rights during the term of this Agreement.

(c) The "Base Charge" will be subject to revision as specified in paragraph (d) of this section.

(d) All payments to be made by MBR under this Agreement (including the Base Charge) shall be adjusted effective July 1 of each year beginning July 1, 1993, for price level changes as reflected in the Annual Indices of Charge Out Prices (1977 = 100)

series RCR, included in "Railroad Recovery Index" and supplements thereto, issued by the Association of American Railroads. The final "Material Prices, Wage Rates, and Supplements Combined (excl. fuel)" index for the Eastern District shall be used. The price level charges shall be based on the relationship of the most recent annual indices to the previous comparable annual indices. The first adjustment shall be based on the comparison of final figure for calendar 1992 to the final figure for calendar 1991.

3. Term and Termination. This Agreement shall take effect as of the date first set forth above and shall continue in full force and effect for a term of twelve (12) years; provided, however, that this Agreement may be terminated (i) at any time upon the mutual agreement of the parties or (ii) by B&M/ST upon 30 days prior written notice to MBR in the event of a breach by MBR of any of its covenants under this Agreement which breach shall not have been remedied within fifteen (15) days of notice of said breach by B&M/ST to MBR. Termination of this Agreement shall not relieve, release or excuse either party from any liability which either party may have incurred or any obligation which may have accrued under any provision of this Agreement prior to the effective date of termination.

4. Clearing of Derailments and Wrecks. In the event of any derailment or wreck of any train, locomotive, car or equipment of, or in the account of, MBR on the Trackage, B&M/ST shall, at MBR's expense, clear and repair the Trackage to allow for the passage of other trains within a reasonable time. B&M/ST

shall perform any re-railing, wrecking or wrecking train service as may be required in connection with such derailment or wreck.

5. Release and Indemnification.

(a) MBR hereby agrees to release, indemnify, defend, protect and hold B&M/ST, Guilford Transportation Industries, Inc. and their officers, agents, representatives and employees harmless from and against any and all liability, cost or expense (including expenses incurred by B&M/ST in clearing wrecks and derailments and repairing trackage as described in Section 4, above) which relate to or arise out of any loss of, damage to, or destruction of any property whatsoever, or any injury to or death of any person or persons whomsoever, when such liability, cost or expense arises out of or is in any way connected with the operation of trains, locomotives, cars or equipment of, or in the account of, MBR, either solely or in conjunction with trains, locomotives, cars or equipment of, or in the account of B&M/ST.

(b) B&M/ST hereby agree to release, indemnify, defend, protect and hold MBR and its officers, agents, representatives and employees harmless from and against any and all liability, costs or expense which relate to or arise out of any loss of, damage to, or destruction of any property whatsoever, or any injury to or death of any person or persons whomsoever, when such liability, cost or expense arise solely out of the operation of trains, locomotives, cars of, equipment of, or in the account of, B&M/ST, or any other party to whom B&M/ST might grant Trackage Rights, haulage rights or other rights.

(c) In every case of death or injury suffered by an employee of either MBR or B&M/ST, when compensation to such employee or employee's dependents is required to be paid under any workmen's compensation, occupational disease, employer's liability or other law, and either of said parties, under the provisions of this Agreement, is required to pay such compensation, if such compensation is required to be paid in installments over a period of time, such party shall not be released from paying such future installments by reason of the expiration or other termination of the Agreement prior to any of the respective dates upon which any such future installments are to be paid.

6. Payment of Bills by MBR. All payments called for under this Agreement shall be made by MBR to B&M/ST within thirty (30) days of the receipt of the bills therefor by check made payable to the order of "Boston and Maine Corporation". No payments shall be withheld because of any dispute as to the correctness of items on the bills rendered. Any discrepancies reconciled between the parties shall be adjusted in the accounts of the subsequent month. The records of each party relating to the subject of this Agreement shall be open at all reasonable times to inspection by the other party. Bills rendered pursuant to the provisions of this Agreement shall include direct labor and material costs, together with the surcharges, overhead percentages and equipment rentals in effect at the time any work is performed by B&M/ST.

7. Land Sale.

(a) Prior to B&M's offering of part or all of the Trackage and associated right-of-way, which would result in a break in the continuity of the right-of-way, for sale to a third party, B&M shall offer the entire right-of-way to MBR. The offer shall be upon the terms and conditions set forth in the purchase and sale agreement attached hereto and incorporated herein as Exhibit "A".

The purchase price shall be determined by the B&M at the time of the offer in accordance with its appraisal of the right-of-way. MBR shall have 30 days from receipt of B&M's offer to accept the offer, after which time the offer will be deemed to have been rejected. MBR shall signify acceptance by signing the purchase and sale agreement, in the form attached hereto, which shall accompany B&M's offer. Milford shall return the purchase and sale agreement and a deposit in the amount of 10% of the purchase price as stated in the offer to B&M within said 30 day period. In the event Milford accepts B&M's offer, the closing shall take place 90 days after the date on which Milford received B&M's offer. If said date falls on a day when the Hillsborough County Registry of Deeds is closed, the closing shall take place on the next day during which it is open.

8. General Provisions.

(a) No Waiver. Waiver of any provision of this Agreement, in whole or in part, in any one instance shall not constitute a waiver of any other provision in the same instance, nor any waiver of the same provision in another instance, but each provision shall continue in full force and effect with respect to any other then existing or subsequent breach.

(b) Notice. Any notice required or permitted under this Agreement shall be given in writing to the parties at their respective addresses specified at the end hereof, or at such other address for a party as that party may specify by notice as provided herein, by (i) (A) delivery in hand or by postage prepaid, United States first class mail or (B) registered or certified mail, return receipt required, or Federal Express or other form of expedited mail that provided for delivery to the sender of a signed receipt, or (iii) telegram or telefacsimile transmission. Notice so sent shall be effective upon receipt.

(c) Integration. This Agreement constitutes the entire agreement of the parties with respect to its subject matter, superseding all prior oral and written communications, proposals, negotiations, representations, understandings, courses of dealing, agreements, contracts and the like between the parties in such respect.

(d) Miscellaneous. The Agreement: (i) may be executed in any number of counterparts, each of which when executed by all parties to this Agreement shall be deemed to be an original, and all of which counterparts together shall constitute one and the same instrument; (ii) may be amended, modified, or terminated, and any right under this Agreement may be waived in whole or in part, only by a writing signed by all parties; (iii) contains headings only for convenience, which headings do not form part of and shall not be used in construction of this Agreement; and (iv) except as to indemnification, is not intended to inure to the benefit of any party not a party to this Agreement.

(e) Force Majeure. No party to this Agreement shall be responsible to the others for delays or errors in its performance or other breach under this Agreement occurring by reason of circumstances beyond its control, including acts of civil or military authority, national emergencies, fire, major mechanical breakdown, labor disputes, flood or catastrophe, acts of God, insurrection, war, riots, delays of suppliers, or failure of transportation, communication or power supply.

(f) Trains, Locomotives, Cars or Equipment. As used in this Agreement, whenever reference is made to the trains, locomotives, cars or equipment of, or in the account of, one of the parties hereto, such expression means the trains, locomotives, cars and equipment in the possession of or operated by one of the parties and includes such trains, locomotives, cars and equipment which are owned by, leased to, or in the account of such party. Whenever such trains, locomotives, cars or equipment are owned or leased by one party to this Agreement and are in the possession or account of, or under the control of the other party to this Agreement, such trains, locomotives, cars and equipment shall be considered those of the other party.

(g) Assignment. This Agreement shall bind and inure to the benefit of the parties and their respective legal representatives, successors and assigns. MBR hereby acknowledges and agrees that B&M and ST shall have the right to assign any and all of B&M and ST's rights and obligations under this Agreement to any affiliate of B&M or ST, or to any other person or entity without MBR's consent. MBR may, with the prior written consent

of B&M/ST, which consent shall not be unreasonably withheld, assign its rights and obligations under this Agreement to an affiliate of MBR, provided that said affiliate shall be a suitably capitalized and financially acceptable substitute for MBR. MBR may not otherwise assign its rights and obligations under this Agreement without the prior written consent of B&M/ST which consent may be withheld for any reason or for no reason.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as a sealed instrument as of the date first set forth above by their duly authorized representatives.

BOSTON AND MAINE CORPORATION

By: Sydney B. Culliford
Sydney B. Culliford
Vice President-Transportation
Iron Horse Park
North Billerica, MA 01862

SPRINGFIELD TERMINAL RAILWAY
COMPANY

By: Sydney B. Culliford
Sydney B. Culliford
Vice President-Transportation
Iron Horse Park
North Billerica, MA 01862

MILFORD-BENNINGTON RAILROAD
COMPANY, INC.

By: Peter R. Leischman
Peter R. Leischman
President
62 Elm Street
Milford, NH 03055

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

AB-1256

**BOSTON AND MAINE CORPORATION &
SPRINGFIELD TERMINAL RAILWAY COMPANY –
ADVERSE DISCONTINUANCE
OF OPERATING AUTHORITY -
MILFORD-BENNINGTON RAILROAD COMPANY, INC.**

**- APPLICATION FOR ADVERSE DISCONTINUANCE -
OF OPERATING AUTHORITY**

EXHIBIT 2

JURY VERDICT

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

SUPERIOR COURT
226-2015-CV-348

BOSTON & MAINE CORPORATION
AND SPRINGFIELD TERMINAL RAILWAY COMPANY

v.

MILFORD-BENNINGTON RAILROAD CO., INC.

VERDICT FORM

1. Do you find that the plaintiffs have proven by a preponderance of the evidence that the defendant breached the trackage rights agreement dated June 22, 1992?

Yes _____ No X

2. If "Yes" to Question #1 above, what are the damages that the plaintiffs are entitled to recover?

(Please write the amount in words, not numbers)

If your answer to Question #1 is "Yes", after you answer Question #2, your deliberations are done and the foreperson should sign and date the Verdict Form.

3. If your answer to Question #1 is "No", do you find that the plaintiffs have proven the existence of an implied contract for the time period of 2012-2016 by a preponderance of the evidence?

Yes _____ No X

4. If your answer to Question #3 is "Yes", do you find that the plaintiffs have proven by a preponderance of the evidence that the defendant breached the implied contract for the time period of 2012-2016?

Yes _____ No _____

5. If your answer to Question #4 is "Yes", what damages are the plaintiffs entitled to recover for the breach of the implied contract?

(Please write the amount in words, not numbers).

If your answer to Questions #3 and 4 above are "Yes", after you answer Question #5, your deliberations are done and the foreperson should sign and date the Verdict Form.

6. If your answer to Question #1 and Question #3 above are "No", do you find that the plaintiffs have proven their unjust enrichment claim by a preponderance of the evidence?

Yes _____ ☒ _____ No _____

7. If "Yes" to Question #6 above, what damages are the plaintiffs entitled to recover on the unjust enrichment claim?

Seventy-one thousand, eight hundred ninety-three and $\frac{60}{100}$
(Please write the amount in words, not numbers).

8. Do you find that the defendant has proven by a preponderance of the evidence its right to recoupment or offset on the unjust enrichment claim?

Yes _____ ☒ _____ No _____

9. If "Yes" to Question #8, what damage is the defendant entitled to for recoupment or offset?

Nineteen thousand seven hundred twenty-nine and $\frac{81}{100}$
(Please write the amount in words, not numbers).

2/27/2017
Date

Cory Barry
Foreperson

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

AB-1256

**BOSTON AND MAINE CORPORATION &
SPRINGFIELD TERMINAL RAILWAY COMPANY –
ADVERSE DISCONTINUANCE
OF OPERATING AUTHORITY -
MILFORD-BENNINGTON RAILROAD COMPANY, INC.**

**- APPLICATION FOR ADVERSE DISCONTINUANCE -
OF OPERATING AUTHORITY**

EXHIBIT 3

MAP

Abandonment Plan Hillsborough Branch

End of Abandonment
Station 814+565.4
Milepost 16.36

Beginning of Abandonment
Station 531+52.2
Milepost 11.00

Contour Interval
10 feet

Pan Am Railways

Office of the Vice President - Engineering
Proposed Abandonment & Discontinuance
Of Track between M.P. 11.00 and M.P. 16.36
Hillsborough Branch
Milford & Wilton, NH
Valuation Section 17, Maps 11 to 16
June 30, 2017 Scale: 1" = 3,000'

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

AB-1256

**BOSTON AND MAINE CORPORATION &
SPRINGFIELD TERMINAL RAILWAY COMPANY –
ADVERSE DISCONTINUANCE
OF OPERATING AUTHORITY -
MILFORD-BENNINGTON RAILROAD COMPANY, INC.**

**- APPLICATION FOR ADVERSE DISCONTINUANCE -
OF OPERATING AUTHORITY**

EXHIBIT 4

**VERIFIED STATEMENT OF KENNETH DUANE - PROPOSED PAN AM
OPERATING PLAN**

**Exhibit 4 – Verified Statement of KENNETH DUANE - Proposed Pan Am
Operating Plan (“Exhibit 4 – Operating Plan”)**

My name is Kenneth Duane. I have served as General Manager of Transportation, for Boston and Maine Corporation (“B&M”) and the Springfield Terminal Railway Company (“ST”) (collectively “Pan Am” or “Applicants”), since 2016. In my current position I am responsible for the oversight of transportation operations. Pan Am is a Class II regional carrier that operates over approximately 450 miles of track in Massachusetts, Maine and New Hampshire. In my official capacity as GM, I was tasked with developing an operating plan to provide service over Pan Am’s rail line²¹ to Granite State Concrete Company, Inc. (“Granite State”) and other shippers within the region served by Pan Am.

Condition of the Properties § 1152.22(b):

See Preliminary Construction Cost Estimate attached hereto.

Presently, Milford-Bennington Railroad Co., Inc. (“MBR”)²² provides Granite State an exclusive shuttle service involving a ten (10) car train to and from Granite State’s quarry in Wilton, NH and Granite State’s processing plant south of the quarry in Milford, NH. MBR currently transits from the Granite State quarry located in Wilton using a connecting line segment between Wilton and Bennington owned by the State of

²¹ MBR currently operates over a portion of B&M’s Hillsborough Branch. The Hillsborough Branch starts in Nashua, NH at milepost (“MP”) 0.00 and ends in Wilton, NH at MP 16.36. The portion of the Hillsborough Branch that MBR maintains trackage rights over (but only operates over MP 13.00+/- to MP 16.36) is from Wilton (MP 16.36) to Milford (MP 11.0) (this portion will be referred to as the “Line”). See Milford-Bennington Railroad Co., Inc. – Trackage Rights Exemption -- Boston and Maine Corp. and Springfield Terminal Railway Co.; Exemption, FD 32103 (ICC served July 9, 1992).

²² Pan Am and MBR are collectively referred to as (“Parties”).

New Hampshire ("State of NH Line") that MBR has the right to operate over. After a short move of approximately 3.0 miles, the State of NH Line connects with the Line at approximately MP 16.36 (Yard Limits in Wilton, NH). As MBR approaches the Line, it requests clearance to enter the Line. Depending on the status of the Line at the time of MBR's request determines when MBR will be granted authority to traverse to the Granite State processing plant located on the Line in Milford. Upon reaching the processing plant, the cars are unloaded and MBR shoves back up to the quarry.

As discussed in more detail below, MBR will still serve the quarry in Wilton in the same manner it does today. However, instead of being allowed to use the Line to reach the processing plant in Milford, MBR will interchange its train at approximately MP 16.36 (Yard Limits in Wilton, NH) and Pan Am will then take the train to the processing plant, conduct the unloading operation, and then return the empty cars in interchange back to MBR. This interchange with MBR will not adversely affect service or service times to Granite State, and Pan Am believes the service will actually be better.

This operating plan provides for Pan Am for service when reasonably necessary based on demand up to five days a week with the use of one Pan Am locomotive. A locomotive will stage at the runaround, in Wilton, NH for Pan Am's crew. The crew will make two round trips or more, if reasonably supported by demand, in a day. Pursuant to the operating plan, MBR will bring the loads south down to approximately MP 16.36 (Yard Limits in Wilton, NH), cut the engine away and use the runaround at Wilton in order to clear up for Pan Am to tie onto the train. Pan Am will then take the train south to the Granite State processing plant in Milford, NH and will wait for it to be unloaded. After unloading, Pam Am will then take the empty train north back to Wilton, where it will then cut away their engine and use the runaround in order for the MBR to tie onto the train and continue north to Pike Industries. The train will consist of 10 cars and one (1)

shoving platform. The shoving platform will be needed in order for Pan Am to shove north from Granite State back to at approximately MP 16.36 (Yard Limits in Wilton, NH), which consists of approximately three miles over several grade crossings. The MBR will be only permitted to come south one train length past the runaround track in Wilton. Likewise, Pan Am will be only permitted to go north one train length past the Wilton, NH Station sign. Both Pan Am and MBR shall communicate what times the interchanges will happen so both Parties can schedule and not unnecessarily delay the switching. The Parties shall each traverse the other's property "for interchange purposes only" and not pursuant to trackage rights.

It is important to note that in the event that MBR for any reason was unable to serve the Granite State quarry, Pan Am would also be able to provide service to Granite State's quarry as well because Pan Am maintains overhead trackage rights northerly on the State of NH Line up to one of its potential customers, Quinn Quarry,²³ which is adjacent to Granite State's quarry. In the event Pan Am starts serving Quinn Quarry (and perhaps other customers), Pan Am expects to use two Pan Am Locomotives that will be staged at Leighton A. White, Inc. ("Leighton, Inc.") located at 50 Quinn Drive, Wilton, NH [off RT 31]. The crew will stage 10-12 cars to be loaded on the runaround, with the engines staged on the other runaround track. Once loaded, the crew will take the cars south towards Nashua Yard and would be able to pick up another 10 cars at the Granite State quarry and continue south towards Granite State in Milford, NH. Once in Milford, Pan Am can deliver ten (10) loaded cars into the Granite State Industry Track where Granite State will unload said cars. Pan Am will then continue south and deliver the remainder of the cars from Leighton, Inc. to Nashua Yard where they will be sent to

²³ Quinn Quarry has recently shown interest in Pan Am rail service upon its resolution of their present quarry lease with a third-party.

various locations. The following day Pan Am will operate north back to Milford, NH and shall pick up the empty cars from Granite State, with an engine on both ends of the cars [push/pull], continue north to Granite State's quarry, and shove the cars into the quarry for another loading. Once loaded, the train shall operate south again, spot loads at Granite State in Milford where they will be unloaded.

Should Pan Am begin serving Quinn Quarry, it would have even more of an inducement for Pan Am to commit assets to a Wilton interchange. This would benefit other shippers and the State of New Hampshire ("State") alike by developing and offering comprehensive competitive rail service options in the region. Additionally, more assets being committed in the region will potentially provide opportunities for the development of rail trans-load sites on the State of NH Line -- thereby providing more benefit to the State and other shippers not directly located on the State of NH Line with rail access.

VERIFICATION

Commonwealth of Massachusetts
Middlesex County, ss.

I, Kenneth Duane, being duly sworn according to law, hereby depose and state that I am authorized to make this Verification, that I have read the foregoing document, and that I know the facts asserted therein are true and accurate as stated, to the best of my knowledge, information and belief.


Kenneth Duane

PAN AM RAILWAYS

PRELIMINARY CONSTRUCTION COST ESTIMATE

Hillsborough Branch - Class 1 upgrade - MPI 11 to MPI 16.36

PROJECT: Rehabilitate the Hillsborough Branch to Class 1 standards between mileposts 11 and 16.36

PRELIMINARY CONSTRUCTION COST ESTIMATE

Rehabilitate Hillsborough Branch to Class 1 track condition between MPI 11 and MPI 16.36

The scope of work includes replacing 750 ties/mile, replacing (100) 85lb rails and (200) joint bars, spreading 200 tons/mile of ballast and resurfacing and replacing 8 culverts.

Description	UNIT	QUANTITY	UNIT PRICE	TOTAL
1-1 Replace 4,000 crossties (750 per mile)	EA	4,000	\$100.00	\$400,000.00
1-2 Replace 39 ft 85 lb rails	EA	100	\$1,000.00	\$100,000.00
1-3 Replace 85 lb joint bars	EA	200	\$250.00	\$50,000.00
1-4 Ballast (200 tons/mi) and surfacing	TM	5.36	\$20,000.00	\$107,200.00
1-5 Replace culvert (60 LF, 24" diameter)	EA	8	\$30,000.00	\$240,000.00
			PROJECT TOTAL:	\$897,200.00

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

AB-1256

**BOSTON AND MAINE CORPORATION &
SPRINGFIELD TERMINAL RAILWAY COMPANY –
ADVERSE DISCONTINUANCE
OF OPERATING AUTHORITY -
MILFORD-BENNINGTON RAILROAD COMPANY, INC.**

**- APPLICATION FOR ADVERSE DISCONTINUANCE -
OF OPERATING AUTHORITY**

EXHIBIT 5

DRAFT FEDERAL REGISTER NOTICE

Notice of Application for Adverse Discontinuance of Operating Authority

On April 11th, 2018, Boston and Maine Corporation ("B&M") and the Springfield Terminal Railway Company ("ST") (collectively "Pan Am" or "Applicants") filed with the Surface Transportation Board, Washington, D.C. 20423, an application for adverse discontinuance of Milford-Bennington Railroad Co., Inc. ("MBR")'s operating authority over a line of railroad known as the Hillsborough Branch extending from railroad milepost 11.00 to milepost 16.36, a distance of approximately 5.36 miles, in Hillsborough County, in southern New Hampshire. The line includes the stations of 531+52.2 (MP 11.00) to 814+565.4 (MP 16.36) and traverses through United States Postal Service ZIP Codes 03055 and 03086. Applicant seeks the proposed adverse discontinuance to extinguish operating authority currently held by MBR and to resume operations over the Line, which is owned by the Applicants.

The line does not contain federally granted rights-of-way. Any documentation in the railroad's possession will be made available promptly to those requesting it. The Applicants' entire case for adverse discontinuance (case in chief) was filed with the application. This line was not required to be on the system diagram map, as the Board granted a waiver from this requirement in a decision served June 23, 2017.

The interest of railroad employees will be protected by Oregon Short Line R. Co.-Abandonment-Goshen, 360 I.C.C. 91 (1979).

Any interested person may file with the Surface Transportation Board written comments concerning the proposed adverse discontinuance or protests (including the protestant's entire opposition case), within 45 days after the application is filed. Because this a discontinuance and rail service will continue, the line will not be salvaged, nor is it suitable for other public use, including interim trail use.

Persons who may oppose the adverse discontinuance but who do not wish to participate fully in the process by appearing at any oral hearings or by submitting verified statements of witnesses, containing detailed evidence should file comments. Persons opposing the proposed adverse discontinuance that do wish to participate actively and fully in the process should file a protest. Offers of financial assistance ("OFA") will not be accepted, as the Board waived the OFA requirement of 49 C.F.R. § 1152.27 in a decision served June 23, 2017. In addition, a commenting party or protestant may provide: recommended provisions for protection of the interests of employees.

Parties seeking information concerning the filing of protests should refer to § 1152.25. Written comments and protests, must indicate the proceeding designation AB-1256 and should be filed with the Chief, Section of Administration, Office of Proceedings, Surface Transportation Board (Board), Washington, DC 20423-0001, no later than 45 days after the date Applicants intend to file its application. Interested persons may file a written comment or protest with the Board to become a party to this adverse discontinuance proceeding. A copy of each written comment or protest shall be served upon the representative of the Applicants (Robert B. Burns, Esq., Boston and Maine Corporation ("B&M") and the Springfield Terminal Railway Company ("ST"), 1700 Iron Horse Park,

North Billerica, MA 01862). The original and 10 copies of all comments or protests shall be filed with the Board with a certificate of service. Except as otherwise set forth in part 1152, every document filed with the Board must be served on all parties to the adverse discontinuance proceeding. 49 C.F.R. § 1104.12(a).

The line sought to be discontinued will not be available for subsidy or sale for continued rail use, because upon grant of adverse discontinuance authority Pan Am would be responsible for providing rail service over the line, obviating the need for the OFA process.

Persons seeking further information concerning adverse discontinuance procedures may contact the Surface Transportation Board or refer to the full discontinuance regulations at 49 CFR part 1152. Questions concerning environmental issues may be directed to the Board's Section of Environmental Analysis. However, because the purpose of this discontinuance is for continued rail service, the Board granted a waiver of its environmental and historic reporting requirements in a decision served June 23, 2017.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

AB-1256

**BOSTON AND MAINE CORPORATION &
SPRINGFIELD TERMINAL RAILWAY COMPANY –
ADVERSE DISCONTINUANCE
OF OPERATING AUTHORITY -
MILFORD-BENNINGTON RAILROAD COMPANY, INC.**

**- APPLICATION FOR ADVERSE DISCONTINUANCE -
OF OPERATING AUTHORITY**

EXHIBIT 6

EXCERPTS FROM PLAINTIFF DEPOSITION

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BEFORE THE
SURFACE TRANSPORTATION BOARD
FINANCE DOCKET NO. 34381

GRANITE STATE CONCRETE COMPANY, INC., and
MILFORD BENNINGTON RAILROAD COMPANY, INC.

vs.

BOSTON AND MAINE CORPORATION and
SPRINGFIELD TERMINAL RAILWAY COMPANY

DEPOSITION OF PETER R. LEISHMAN, taken
pursuant to Notice on behalf of Boston and
Maine Corporation and Springfield Terminal
Railway Company, before Simonne J. Elwood,
R.P.R. and a Notary Public in and for the
Commonwealth of Massachusetts, at the office of
Guilford Rail System, Iron Horse Park, North
Billerica, Massachusetts, commencing on
Tuesday, November 11, 2003 at 10:02 a.m.

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APPEARANCES:

JAMES E. HOWARD, ESQ.
JAMES E. HOWARD LLC
ONE THOMPSON SQUARE - SUITE 201
CHARLESTOWN, MA 02129
REPRESENTS GRANITE STATE CONCRETE
COMPANY, INC., and MILFORD BENNINGTON
RAILROAD COMPANY, INC.

ROBERT B. CULLIFORD, ESQ.
CORPORATE COUNSEL
GUILFORD RAIL SYSTEM
IRON HORSE PARK
NORTH BILLERICA, MA 01862-1692
REPRESENTS BOSTON AND MAINE CORPORATION
and SPRINGFIELD TERMINAL RAILWAY
COMPANY

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DEPONENT DIRECT REDIRECT CROSS RECROSS

PETER R. LEISHMAN

By Mr. Culliford 5 --

By Mr. Howard 122 --

EXHIBITS

EXHIBIT NO. DESCRIPTION PAGE NO.

1 Letter - 6/27/03 to Melvin F. 6
Clemens from James E. Howard with
Attachments

2 Letter - 7/2/03 to Melvin F. 49
Clemens from James E. Howard with
Attachments

3 Springfield Terminal Railway 55
Supplemental Bulletin Order
No. 3-012B in Effect 1500
Thursday, December 12, 2002

4 Letter - 9/22/03 to Warren 86
Bostwick, General Manager from
Peter R. Leishman with
Attachment

5 Responses and Objections of 98
Granite State Concrete Co., Inc.
and Milford-Bennington Railroad Co.,
Inc. to "First Discovery Requests
of the Boston and Maine Corporation
and the Springfield Terminal Railway
Company to Granite State Concrete
Co., Inc. and Milford-Bennington
Railroad Co., Inc."

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CONTINUED

EXHIBIT NO. DESCRIPTION PAGE NO.

6 Letter - 7/16/03 to Mr. Peter 106
R. Leishman from E.R. Towle

7 Milford-Bennington Railroad Co., 118
Inc. - Financial Statement
Profit & Loss - August 1, 2001
July 31, 2002 - FY02

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1 statement, you discuss the three miles of
 2 track -- of Guilford track over which
 3 Milford-Bennington operates, and you
 4 characterize that as accepted track.
 5 Do you know if the classification of
 6 that track by Guilford as accepted is in
 7 violation of any FRA track safety standards
 8 or other regulations?
 9 A Is in violation?
 10 Q Yes.
 11 A Well, there are very few restrictions placed
 12 on accepted track.
 13 Q That's not the question. Is it in violation
 14 of any federal track safety standards?
 15 A I haven't seen their latest track inspection
 16 report, so I don't know.
 17 Q No, no, no. My question is: The
 18 classification as a whole, not the individual
 19 conditions on the line, is the classification
 20 as a whole --
 21 A Is the classification calling it accepted
 22 track in violation? I assume not.
 23 Q Okay. Do you know what the maximum speed is

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1 on accepted track?
 2 A Ten miles an hour.
 3 Q Do you know what the maximum accepted speed
 4 is on Class 1 track?
 5 A 15 for passenger, 10 for freight.
 6 Q Now, you mentioned passenger for Class 1
 7 track. You didn't mention that for accepted
 8 track. Do you not know what the speed is, or
 9 is --
 10 A Well, occupied-passenger equipment is
 11 prohibited on accepted track.
 12 Q Very well. All right. This is the fax page,
 13 No. 6, the beginning of the first full
 14 paragraph, the second sentence, you say, "The
 15 three miles utilized by Milford-Bennington
 16 are designated as excepted (sic) track and
 17 two of the three miles are restricted to 5
 18 miles per hour." And I'm sorry. Just prior
 19 to that, you say, the Guilford-owned track is
 20 essentially in deplorable condition.
 21 A That would be my opinion at the time that
 22 this was written.
 23 Q Pardon me?

Vol. 1 - 15

1 A That would be my opinion, yes.
 2 Q Your opinion. Are you qualified pursuant to
 3 the FRA track safety standards to inspect
 4 and/or maintain Guilford's tracks?
 5 A Guilford's track? I'm certainly a recognized
 6 track expert. I can determine what's Class 1
 7 accepted or deplorable.
 8 Q The question is: Are you qualified pursuant
 9 to the 49CFR 213.5 or 213.7 to inspect and
 10 maintain Guilford's track?
 11 MR. HOWARD: Objection. Can we find
 12 out whether he's familiar with those
 13 regulations that you're referring to?
 14 MR. CULLIFORD: Yes.
 15 Q Are you familiar with the track safety
 16 standards in general?
 17 A 213 I am.
 18 Q Are you familiar with the requirements of
 19 49CFR Section 213.5?
 20 A I would like to look at .5 before I --
 21 Q (Indicating)
 22 A (Reviewing document) I'm glad I got this.
 23 It's about two pages of different things.

Vol. 1 - 16

1 (Reviewing document)
 2 Well, since this Section C says the
 3 owner of the track didn't assign the
 4 responsibility of the track to another
 5 person, perhaps my answer would be no.
 6 Q You are qualified or are not qualified?
 7 A Not, no.
 8 Q You're not qualified?
 9 A Right.
 10 Q Can you read Section 213.7 as well?
 11 A (Reviewing document) The answer to most of
 12 that, I guess, would be no as well.
 13 Q Okay. To the best of your knowledge, how
 14 many derailments have occurred involving
 15 Milford-Bennington trains on the
 16 Guilford-owned track in the last five years?
 17 A In the last five years, probably one.
 18 Q Was that a significant derailment?
 19 A It was with Guilford ballast cars putting
 20 them on a siding at Wilton which we wound up
 21 paying a substantial amount of money to get a
 22 crane and so forth. Yeah, it was a
 23 substantial derailment in my opinion. It

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1 the requested information.)
 2 A I'm not aware of it, no.
 3 Q You're not aware that it authorizes you?
 4 A Right.
 5 Q Okay. This is the same question that's
 6 separate and apart: Are you qualified,
 7 pursuant to Guilford's roadway worker track
 8 maintenance program to perform work on
 9 Guilford's track?
 10 A I haven't taken a test if there's one that is
 11 required. So I'm not aware that I'm -- if
 12 there is such a requirement that I'm
 13 qualified.
 14 Q Have you taken it?
 15 A If there is, I haven't taken a test, no.
 16 Q So, to the best of your knowledge, you're not
 17 qualified?
 18 A To Guilford's, right.
 19 Q Do you consider performing maintenance on a
 20 railroad's track when you're not qualified
 21 under that railroad's roadway worker
 22 protection regulation rules to be a safe
 23 practice?

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1 A If we control a track, I would say yes.
 2 Q Are you familiar with the NORAC Operating
 3 Rules?
 4 A I believe so.
 5 Q Is Milford-Bennington a member of the NORAC
 6 Operating Rules?
 7 A Yes, we are.
 8 Q Are you familiar with Rule 133 of the NORAC
 9 Operating Rules?
 10 A I think I am, but I'd like to look at it
 11 first.
 12 Q Okay. I can arrange that.
 13 MR. HOWARD: 133 did you say?
 14 MR. CULLIFORD: Yes.
 15 A I'm sorry. I thought you said 130.
 16 (Reviewing document) I guess I'm waiting for
 17 a question now.
 18 Q When you were maintaining Guilford's track,
 19 did you ever get Form D authority from the
 20 dispatcher?
 21 A There's no Form D required on that section of
 22 track.
 23 Q What authority is required?

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1 A Verbal permission.
 2 Q For exclusive use of the track?
 3 A That's just changed. Prior to that, there
 4 was just verbal permission from the
 5 dispatcher to occupy the track which two
 6 trains or a maintenance crew could, in fact,
 7 occupy the --
 8 Q Okay. But for exclusive use of the track?
 9 A There's no Form D required from 13 to 16.36
 10 even presently under this new bulletin order.
 11 Q Okay. Are you familiar with --
 12 MR. HOWARD: I'm just going to -- I
 13 think this will help. If you both will wait
 14 until the answer is finished and the question
 15 is finished because the stenographer is
 16 having a difficult time getting everything
 17 down.
 18 Q Are you familiar with NORAC Rule 140?
 19 A I think I'll look at it, though. Yep.
 20 Q Now, when you were maintaining Guilford's
 21 track, were you following the requirements of
 22 that rule?
 23 A Again, there's no Form D required to occupy

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1 that section of the Hillsboro branch.
 2 Q Does Rule 140 require a Form D?
 3 A Dispatcher must issue a Form D, Line 13. I
 4 still -- see, file time still would not be
 5 required as we control the track when we had
 6 our train on the track. Nobody could enter
 7 that space unless they talked to the crew at
 8 Milford.
 9 So I don't see where file time would
 10 be required because we already control the
 11 track. We're filling the track with,
 12 technically, our train, and nobody can come
 13 into those limits.
 14 Q You were authorized to be on the track to
 15 operate your trains?
 16 A Right.
 17 Q When and how did you get authorization to
 18 maintain Guilford's track?
 19 A We control the track. I went out there with
 20 one of my employees, and we made simple
 21 repairs while we controlled the track.
 22 Q Are you classifying installing hundreds of
 23 ties, installing rails and installing gauge

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1 rods as simple repairs?
 2 A Over almost 12 years, yeah.
 3 Q Installing a tie is a simple repair?
 4 A To me. I do it by myself.
 5 Q Okay. If we could talk sort of history of
 6 recent events briefly.
 7 In your verified statement, you assert
 8 that approximately eight weeks ago, eight
 9 weeks before the date of this document, I'm
 10 assuming, employees from Springfield Terminal
 11 Railway insisted that a permanent derail
 12 device be installed on track operated by
 13 Milford-Bennington. Was there -- Did
 14 Guilford deliver to you a derail device prior
 15 to this date?
 16 A Yes, December 12th, a portable derail.
 17 Q Was that derail installed?
 18 A It's simply put on the track. It was clamped
 19 onto the track on the 12th of December.
 20 Q Is clamped on the track installed?
 21 A I would assume so. Installed is -- Yeah, I
 22 would call it installed.
 23 Q Let me try a different word. Was it

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1 operational?
 2 A It was operational.
 3 Q Okay. So from December 12th through, I
 4 assume, approximately eight weeks before the
 5 date of this was around April, late April, is
 6 that --
 7 A We began operations on April 2nd, I believe.
 8 It was removed at that time when the
 9 passenger cars were moved to Pike's siding
 10 for storage.
 11 Q During that period from December 12th to --
 12 A There was no operation.
 13 Q Was there a derail? Was the temporary derail
 14 installed and operational during that period?
 15 A Yes. It was in front of the Bud cars.
 16 Q The temporary derail that was delivered by
 17 Guilford --
 18 A Yep.
 19 Q -- on December 12th?
 20 A Right.
 21 Q Where were the Bud cars?
 22 A They were stored on our main line in Wilton
 23 where the interchange point is with Guilford

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1 at Howard Street.
 2 Q So, essentially, about Milepost 16.38 or so?
 3 A Roughly, yeah.
 4 Q Okay. Is that the only protective device
 5 that was used, the Bud cars?
 6 A No.
 7 Q What else was --
 8 A There were two skates under the cars. There
 9 are four hand brakes which are all applied on
 10 the cars, and the track is level there.
 11 Q Okay. When this temporary derail was
 12 installed, did you notify the State of New
 13 Hampshire?
 14 A I believe I did. I said it was temporary
 15 device because of Guilford's concerns about
 16 the passenger cars perhaps rolling onto their
 17 track.
 18 Q And what was -- Who from New Hampshire did
 19 you talk to?
 20 A I would assume just about everybody up there
 21 because it became a concern. Kit Morgan;
 22 John Robinson, a track safety inspector; and
 23 Billy Boudreau (phonetic).

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1 Q Okay. And it became a concern in what sense?
 2 A That nobody from Guilford had contacted the
 3 state about this perceived need to put a
 4 derail on the state's property.
 5 Q Guilford doesn't lease this property from the
 6 state, do they?
 7 A No, they don't.
 8 Q Milford-Bennington does?
 9 A That's correct.
 10 Q Are you familiar with the operating agreement
 11 between Milford-Bennington and the State of
 12 New Hampshire?
 13 A I believe I am.
 14 Q And we're going -- I'm going to hold off on
 15 that question for a little bit.
 16 At that time, when the State of New
 17 Hampshire expressed concern about the
 18 temporary derail, did you communicate that
 19 concern to anyone from Guilford?
 20 A I did that day that I met with the
 21 individual, Andy Zompa, that the state had
 22 already -- I told them -- I believe I
 23 received a call from Erwin Towle, and Andy,

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

AB-1256

**BOSTON AND MAINE CORPORATION &
SPRINGFIELD TERMINAL RAILWAY COMPANY –
ADVERSE DISCONTINUANCE
OF OPERATING AUTHORITY -
MILFORD-BENNINGTON RAILROAD COMPANY, INC.**

**- APPLICATION FOR ADVERSE DISCONTINUANCE -
OF OPERATING AUTHORITY**

EXHIBIT 6A

EXCERPTS FROM PLAINTIFF DEPOSITION

In The Matter Of:
Boston and Maine Corporation, et al. v.
Milford-Bennington Railroad Co., Inc.

Peter Russell Leishman
November 14, 2016

Kimberly A. Smith, CSR, CRR, RDR
163 Shore Drive
Salem, NH 03079
(603) 458-6634
KASmith64@gmail.com

Page 1	Page 3
1 STATE OF NEW HAMPSHIRE 2 HILLSBOROUGH, SS. SUPERIOR COURT 3 Southern District No. 226-2015-CV-00348 4 ----- X 5 BOSTON AND MAINE CORPORATION and 6 SPRINGFIELD TERMINAL RAILWAY COMPANY, 7 Plaintiffs, 8 v. 9 MILFORD-BENNINGTON RAILROAD CO., INC., 10 Defendant. 11 ----- X 12 VOLUME I Pages 1-115 13 14 DEPOSITION OF PETER RUSSELL LEISHMAN 15 Monday, November 14, 2016, 1:02 p.m. 16 Cook, Little, Rosenblatt & Manson, PLLC 17 1000 Elm Street 18 Manchester, New Hampshire 03101 19 20 21 22 --- Reporter: Kimberly A. Smith, CSR, CRR, RDR --- 23 Realtime Systems Administrator	1 I N D E X 2 3 WITNESS: Peter Russell Leishman 4 5 EXAMINATION: Page 6 By Ms. Mahan 5 7 8 EXHIBITS FOR IDENTIFICATION: 9 Burns Description Page 10 Exhibit 4 Previously marked 18 11 12 Leishman Description Page 13 Exhibit 37 MBR accounting records 40 14 (BM000163 - BM000286) 15 Exhibit 38 MBR inspection and repair 72 16 reports 17 (MBR000345 - MBR000373) 18 Exhibit 39 FRA inspection report with 80 19 attached MBR inspection and 20 repair reports 21 (MBR000374 - MBR000385) 22 23
Page 2	Page 4
1 APPEARANCES: 2 3 COOK, LITTLE, ROSENBLATT & MANSON, PLLC 4 By: Kathleen M. Mahan, Esq. 5 1000 Elm Street, 20th Floor 6 Manchester, NH 03101 7 (603) 621-7100 8 k.mahan@clrm.com 9 10 for the Plaintiffs; 11 12 McLANE MIDDLETON, P.A. 13 By: Dianne E. Ricardo, Esq. 14 City Hall Plaza 15 900 Elm Street 16 Post Office Box 326 17 Manchester, NH 03105 18 (603) 625-6464 19 dianne.ricardo@mclane.com 20 21 for the Defendant. 22 23 1 STIPULATIONS 2 3 It is agreed that the deposition shall be taken 4 in the first instance in stenotype and, when 5 transcribed, may be used for all purposes for which 6 depositions are competent under New Hampshire 7 practice. 8 9 Notice, filing, caption, and all other 10 formalities are waived. All objections except as to 11 form are reserved and may be taken in court at the 12 time of trial. 13 14 It is further agreed that if the deposition is 15 not signed within thirty (30) days after submission 16 to counsel, or prior to the commencement of trial, 17 whichever first occurs, the signature of the 18 deponent is waived. 19 20 21 22 23	1 EXHIBITS FOR IDENTIFICATION: (continued) 2 Leishman Description Page 3 Exhibit 40 7/31/09 letter: Leishman/ 92 4 Barker (NH DOT) 5 (MBR000110 - MBR000111) 6 Exhibit 41 12/1/09 letter: Leishman/ 95 7 Barker (NH DOT) with 8 attachments 9 (MBR000120 - MBR000122) 10 Exhibit 42 Repair supplies invoices 99 11 (MBR000460 - MBR000463) 12 Exhibit 43 Repair supplies invoices 103 13 (MBR000464 - MBR000489) 14 15 16 17 18 19 20 21 22 23 Original exhibits returned to Ms. Mahan

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1 Q. But you had previously communicated with
2 Ms. Breen when there had been some sort of mistake?
3 Either they had charged too much or too little or
4 something along those lines. I think you had just
5 testified to that; is that correct?
6 A. Yes. On the telephone primarily, yes.
7 Q. But you had not taken any action of that
8 nature, meaning you have not contacted Ms. Breen or
9 anyone else regarding the numbers for carloads since
10 2012 to the present?
11 A. 2013. Because I did send something to
12 Linda Breen in '12, but not '13.
13 Q. Regarding carloads?
14 A. No, as far as the dispute about the billing,
15 but nothing from '13 on.
16 Q. So the 2012 email to Ms. Breen was about
17 the dispute. Was there an indication in that email
18 that there was a problem with the number of loads --
19 number of cars that were being identified on the
20 invoice?
21 A. No.
22 Q. So we have the number of cars plus -- or
23 I'm sorry -- multiplied by the applicable rate.

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1 And this one -- we're still looking at BM000165 --
2 the rate is \$9.73 per car to get to a total; is that
3 correct?
4 A. Yes.
5 Q. And the portion that you dispute is, in this
6 particular example, \$9.73 per car; is that correct?
7 A. Yes. That was in 2012, yes.
8 Q. And that is because your position is that
9 the agreement expired in 2004 and thus this rate is
10 not applicable?
11 A. That's correct.
12 Q. And you have suggested in your testimony
13 that you dispute it because you don't believe you
14 should even be receiving invoices; is that correct?
15 A. Well, that would be correct. Unless we
16 have a new contract.
17 Q. So is it your position that you're using
18 the track for free?
19 A. Oh, far from free. We have had to maintain
20 that track since I think the earliest record that
21 Pan Am has produced or we have produced, 1996.
22 Q. Well, let me put it a -- You haven't paid
23 anything since 2012 --

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1 A. '13.
2 Q. So you paid less than the full amount that
3 was billed in 2012?
4 A. Right.
5 Q. Beginning in 2013, you did not pay any
6 amount toward any invoice that you received for your
7 use of the track?
8 A. That's correct.
9 Q. And you feel that you do not have to pay
10 anything because the agreement, in your view, has
11 expired?
12 A. That's correct.
13 Q. Do you dispute that at least some amount is
14 owed --
15 MS. RICARDO: Objection.
16 BY MS. MAHAN:
17 Q. -- for your use?
18 MS. RICARDO: Objection.
19 THE WITNESS: I don't. I don't think
20 anything is owed.
21 BY MS. MAHAN:
22 Q. Why do you think nothing is owed?
23 A. Well, first of all, we've more than offset --

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1 the track is right now restricted to 5 miles an
2 hour, and it has been probably for the last 10
3 years. When we had a dispute in 2003 with Pan Am
4 over track conditions and the location of a derail,
5 there were assurances made and documented that the
6 track would be maintained to at least 10 miles an
7 hour.
8 The track has been allowed to deteriorate
9 to a condition of 5 miles an hour, taking my crew
10 more than a half an hour to go less than three
11 miles. So we have had to undertake the necessary
12 track work as ordered by our insurance carrier in
13 order to even get insurance to use that track
14 because it's in such disrepair.
15 And I think we've provided that material
16 from the insurance carrier.
17 Q. If you look at Exhibit 4, please, can you
18 tell me where in there it states that it will be
19 maintained to 10 miles an hour.
20 A. Sure. So if you go to, again, page 4 in
21 the underlying language there with (f) where it's
22 underlined --
23 Q. Yes.

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1 that \$70,000, you don't know how much was material
2 and how much was labor?
3 A. Not specifically, no.
4 Q. Before now, have you ever -- or before this
5 lawsuit, have you ever made a claim to be reimbursed
6 for any amounts for materials or labor by Pan Am?
7 A. Not -- Yes, not by Pan Am, but the State.
8 Q. The State, okay.
9 Were you keeping B&M informed as to what
10 you were doing with this maintenance work?
11 A. There were a number of ST/B&M officials
12 that actually caught us, if you will, working on the
13 tracks. So they were well aware of it. And we were
14 never like advised not to. But as far as
15 specifically sending a letter down or -- no.
16 Q. So when you say "caught us," who caught you?
17 A. The vice president of engineering.
18 Q. Who was that?
19 A. John Steiniger.
20 Q. When was this?
21 A. Probably 10 years ago.
22 Q. Has it happened more than once that you
23 were caught doing maintenance?

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1 A. Yes. The track crews have, you know, caught
2 us out there. Or we've worked with the track crews.
3 I mean, that's been well documented that we provided
4 materials and worked with them on the track.
5 Q. When you said you've never advised Boston
6 and Maine or Pan Am through letters, are you saying
7 that you haven't provided notice when you're going
8 to be out there doing maintenance?
9 MS. RICARDO: Objection.
10 THE WITNESS: We maintain control of the
11 track. So we're not like working out there in the
12 blind. I guess I'll try to explain --
13 BY MS. MAHAN:
14 Q. In the --
15 A. I see the stunned look. In other words,
16 when we run a train over, we have to get permission
17 from their dispatchers so we're the only one on the
18 track at the time.
19 Q. One follow-up question. Dispatcher being a
20 dispatcher from Pan Am?
21 A. Pan Am, yes.
22 Q. So Pan Am would at least know who's on the
23 track --

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1 A. Right.
2 Q. -- when, for how long?
3 A. Right.
4 Q. Okay. Continue, I'm sorry.
5 A. So that's it. And we're occupying the
6 track. So it's like we're not going to get run over
7 by a train or something.
8 Q. So in providing notice, are you telling
9 Boston and Maine or the dispatcher that you're out
10 there doing maintenance or just that you're on the
11 track?
12 A. Just on the track.
13 Q. So you're not saying we're working on this
14 particular problem or . . .
15 A. No.
16 Q. You're just on the track?
17 A. Right.
18 Q. And you agree with me that the disputed
19 track, that three miles that you're operating on,
20 that's the excepted track?
21 A. Right.
22 Q. And you're not really concerned about the
23 other -- the remaining portion of the track that

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1 you're not operating on pursuant to the agreement?
2 A. You know, as a matter of fact, during our
3 negotiations, I saw no need for that additional
4 several miles because it used to be -- well, still
5 to Milepost 11, we don't go beyond Milepost 13.4.
6 So I took that out of the proposal. I mean, it --
7 so I am not concerned, no.
8 Q. And it's not part of this litigation
9 because you haven't used that portion of the track?
10 A. Yes. We've only used it occasionally
11 for . . .
12 Q. Do you contest that it is within B&M's
13 rights -- or Pan Am's rights to have the disputed
14 track as an excepted track?
15 A. Oh, definitely.
16 Q. Is that just under FRA standards or because
17 of the agreement?
18 A. Well, the agreement, because it's expired,
19 I guess they're not obligated to do anything. And
20 apparently, you know, since -- and they haven't done
21 anything since the agreement has been terminated, so
22 I guess I couldn't hold their feet to the fire since
23 it's terminated.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

AB-1256

**BOSTON AND MAINE CORPORATION &
SPRINGFIELD TERMINAL RAILWAY COMPANY –
ADVERSE DISCONTINUANCE
OF OPERATING AUTHORITY -
MILFORD-BENNINGTON RAILROAD COMPANY, INC.**

**- APPLICATION FOR ADVERSE DISCONTINUANCE -
OF OPERATING AUTHORITY**

EXHIBIT 7

PAN AM MARKETING PLAN - 2013

**PROPOSAL
TO THE
NEW HAMPSHIRE
DEPARTMENT OF TRANSPORTATION

SHORT LINE OPERATION OF THE
HILLSBORO BRANCH RAILROAD LINE**

**SUBMITTED BY
SPRINGFIELD TERMINAL RAILROAD COMPANY
1700 IRON HORSE PARK
NORTH BILLERICA, MA 01862**

November 21, 2013

Section 3 – Business & Marketing Plan

A) Business & Marketing Plan

Given the limited customer base on the Wilton-Bennington rail corridor, Pan Am's marketing efforts would revolve around growing the business with not only the existing customer Granite State but working with the Monadnock Paper Mill and Pike Industries who both currently operate on the line but do not use rail service. In addition, we feel there are other opportunities to add business by the development of bulk transload facilities.

Pan Am has met with Granite State but at this time we have not resolved any of our previous issues. However, should we be awarded the right to operate the line, we will continue to meet with them in an effort to resolve the issues and present them with a plan going forward by using our connecting partners and contacts to assist them in growing their business.

The Monadnock Paper Mill has been a fixture in this area since the early 1800's. It currently receives all inbound materials by truck. Materials are shipped by rail to other locations and then transloaded and moved to the mill. It uses an estimated 500 carloads of material annually. We believe we can offer the mill rail service for these materials by developing a service plan with our connecting partners which would improve their shipping costs and ultimately their production costs.

There are areas along the ROW on the line which would be ideal locations for transload facilities for bulk commodities. Pan Am has had success developing several of these locations across our system and we believe the addition of locations in this area of New England would be welcome by many of our current customers.

B) Proposed Cost & Revenue Structure

Included in this submittal is **Exhibit D** which illustrates expected revenues and expenses for the operation of the Line. Based on the previously shipped volumes ST has estimated 2,400 carloads per year or 300 per month. This budget assumes a 34 week season running from April through November.

This is only a one year outlook however, with expense costs rising an average of 3% per year it is assumed revenue would also be increased by that amount; therefore the Net Income would remain flat across the period of the operating agreement. This current budget assumes only the expenses and revenues expected from servicing the current customer.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

AB-1256

**BOSTON AND MAINE CORPORATION &
SPRINGFIELD TERMINAL RAILWAY COMPANY –
ADVERSE DISCONTINUANCE
OF OPERATING AUTHORITY -
MILFORD-BENNINGTON RAILROAD COMPANY, INC.**

**- APPLICATION FOR ADVERSE DISCONTINUANCE -
OF OPERATING AUTHORITY**

EXHIBIT 8

NEWSPAPER NOTICE PROOF OF PUBLICATION

UNION LEADER CORPORATION

P O BOX 9513
MANCHESTER, NH 03108

0000114992
LEGAL PREPAID ACCOUNTS
EMAIL: rburns@panam.com

I hereby certify that the legal notice: (0002345570) DISCONTIN OPERATING AUTHORITY
was published in the New Hampshire Union Leader

On:
03/02/2018, 03/09/2018, 03/16/2018.

Kelly McCross
Kelly McCross
3/16/18

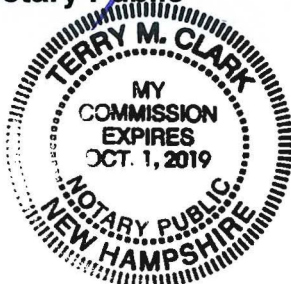
State of New Hampshire
Hillsborough County

Subscribed and sworn to before me this

16th day of Mar 2018

Terry M. Clark

Notary Public



AB 1256

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MORTGAGEE'S NOTICE

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NOTICE

your right to know!

Read them in
New Hampshire Union Leader
and
New Hampshire Sunday News
and online at
www.unionleader.com

AB-1256

Thomas J. Litwiler (*MBR Counsel*)
Fletcher & Sippel LLC
29 North Wacker Drive
Suite 290
Chicago, IL 60606-2832

Granite State Concrete Company, Inc.
407 Elm Street
Milford, NH 03055

Bureau of Rail and Transit
New Hampshire Department of Transportation
John O. Morton Building
7 Hazen Drive
Concord, NH 03302

Monadnock Paper Mills, Inc.
Attn: Richard G. Verney
Chairman and Chief Executive Officer
117 Antrim Road
Bennington, NH 03442-4205

Town of Wilton
Board of Selectmen
42 Main Street
P.O. Box 83
Wilton, NH 03086

Town of Milford
Board of Selectmen
1 Union Square
Milford, NH 03055-4240

U.S. Railroad Retirement Board
408 Atlantic Avenue, Rm. 441
Boston, MA 02110-3349

HQ of Labor Organizations (Not Applicable)

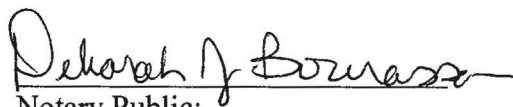
§ 1152.20(a)(4) – Newspaper Publication. A Notice of Intent (attached hereto as Exhibit 8) was published once per week for three consecutive weeks in a newspaper generally circulated in the counties as follows:

<u>Newspaper</u>	<u>Counties</u>	<u>Dates Published</u>
<u>New Hampshire Union Leader</u>	Hillsborough & Merrimack	March 2, 9 & 16, 2018

Dated this 11TH day of April, 2018.


Robert B. Burns, Esq.

Subscribed and sworn to before this Notary Public on this 11 day of April, 2018.


Notary Public:
My Commission Expires:

[Seal]



CERTIFICATE OF SERVICE

Thomas J. Litwiler
Fletcher & Sippel LLC
29 North Wacker Drive
Suite 290
Chicago, IL 60606-2832

Hon. Christopher T. Sununu
Governor
State of New Hampshire
State House, Room 208-214
Concord, NH 03301- 4990

New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, NH 03301-2429

Bureau of Rail and Transit
New Hampshire Department of Transportation
John O. Morton Building
7 Hazen Drive
Concord, NH 03302

Granite State Concrete Company, Inc.
407 Elm Street
Milford, NH 03055

Dated this 11th day of April, 2018.



Robert B. Burns, Esq.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

AB-1256

**BOSTON AND MAINE CORPORATION &
SPRINGFIELD TERMINAL RAILWAY COMPANY –
ADVERSE DISCONTINUANCE
OF OPERATING AUTHORITY -
MILFORD-BENNINGTON RAILROAD COMPANY, INC.**

**- APPLICATION FOR ADVERSE DISCONTINUANCE -
OF OPERATING AUTHORITY**

EXHIBIT 10

**MEMORANDUM AND ORDER – MILFORD BENNINGTON RAILROAD CO.,
INC. v. PAN AM RAILWAYS, ET AL., 10-cv-00264 – PB, OPINION NO. 2011
DNH 206 & APPEAL FROM DISTRICT COURT TO 1ST CIRCUIT, NO. 12-1031**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Milford-Bennington Railroad Co., Inc.
& Peter Leishman

v.

Case No. 10-cv-00264-PB
Opinion No. 2011 DNH 206

Pan Am Railways, Inc., et al.

MEMORANDUM AND ORDER

Milford-Bennington Railroad Co., Inc. ("MBR") alleges that Pan Am Railways, Inc. ("Pan Am") violated its implied contractual duty of good faith and fair dealing when it excluded MBR's employee, Peter Leishman, from operating on its tracks. Pan Am has filed a motion for summary judgment, and for the reasons set forth below, I grant that motion.

I. BACKGROUND

A. The Trackage Rights Agreement

On June 2, 1992, MBR entered into a Trackage Rights Agreement ("TRA") with the predecessors of Pan Am, securing for itself the right to operate its trains over an approximately three-mile stretch of track now owned by Pan Am. The TRA enabled MBR to haul stone from the quarry of its single customer, Granite State Concrete, to a processing plant in

Milford. Although by its terms the TRA expired in June 2004, both parties agree that its provisions continue to govern their relationship.

The TRA requires MBR to comply with all federal and state rules and regulations, as well as the operating rules and regulations of Pan Am. Two provisions govern potential rules violations. The first pertains to investigations and hearings:

In the event [Pan Am] conduct[s] an investigation or hearing concerning the violation of any operating rule or practice of [Pan Am] by any employee or employees of MBR, MBR shall be notified in advance of any such investigation or hearing. Such investigation or hearing shall be conducted by [Pan Am], and may be attended by any official designated by MBR and shall be conducted in accordance with the collective bargaining agreements, if any, that pertain to said employee or employees.

[TRA § 1, ¶ k, Doc. No. 57-3.]

The second provision pertains to the consequences of a violation:

[Pan Am] shall have the right to exclude from the Trackage any employee of MBR determined by [Pan Am], as a result of such investigation or hearing described above, to have violated [Pan Am]'s rules, regulations, orders, practices or instructions.

[Id. § 1, ¶ 1.]

B. The Accident

On October 22, 2009, Peter Leishman, the founder of MBR and one of MBR's two full-time employees, was at work on a moving train when it collided with a truck at a rail crossing. At the time of the accident, Leishman, who was serving as the train's conductor, was located in a "control car" at the train's leading end, and the locomotive was pushing the train from its trailing end. Transcript of July 1, 2001 Hearing at 4-9, 42-43, Doc. No. 54. Although the control car was equipped with breaks, lights, bells, horns, and a whistle, the train's engine could be controlled only by an employee stationed in the locomotive.

Shortly after the accident, a Pan Am investigator filled out a Federal Railroad Administration form titled "Initial Rail Equipment Accident/Incident Record." The report states that the primary cause of the accident was the truck's failure to stop at the crossing in violation of traffic laws. FRA Initial Rail Equipment Accident/Incident Record, Doc. No. 60-17; FRA Guide for Preparing Accident/Incident Reports at 11, Doc. No. 60-18. The report did not suggest that Leishman had violated any safety rules.

C. Pan Am's Hearings

Pan Am mailed a notice to Leishman on November 4, 2009, informing him that it would hold a hearing on November 10 "to develop the facts" of his involvement with the collision. Doc. No. 57-4. Leishman states that he received the letter on November 6, and requested that the hearing be rescheduled so that his counsel could attend. Declaration of Peter Leishman ¶ 6, Doc. No. 60-2. Pan Am refused to reschedule the hearing, however, and Leishman did not attend.

Pan Am did not immediately announce the results of its investigation into Leishman's role in the accident. Nevertheless, when Leishman attempted to engage in the first train run of the season on March 17, 2010, a Pan Am dispatcher refused him access to its tracks, citing "company policy" as the reason. Id. ¶ 9. Leishman contacted Bob Burns, counsel for Pan Am, who suggested meeting to discuss a new TRA. Id. On March 19, Leishman discussed that possibility with Pan Am representatives. Id. On April 8, Burns wrote a letter to Leishman proposing the terms of a new agreement. Burns Letter, Doc. No. 60-20. Leishman states that he called Burns on April 9 to reject the offer, explaining that the minimum car volume of

Pan Am's proposal was too high. Declaration of Peter Leishman ¶ 10, Doc. No. 60-2.

The same day Leishman rejected the offer, Pan Am sent a letter informing him of the resolution of its accident inquiry. The letter explained that based on evidence adduced at the November 10 hearing, Pan Am had concluded that Leishman "was not properly stationed for the backward move through the crossing." See Pan Am Letter at 1, Doc. No. 57-5. Leishman had thereby violated NORAC¹ Rules 116 and 138(e), which, as discussed in more detail infra, establish certain safety requirements for trains that are being operated from other than the leading end. See id. Accordingly, Pan Am invoked its authority under the TRA and decided to bar Leishman from operating on its tracks. Id. at 2.

On April 14, Thomas Brugman, a section chief of the Surface Transportation Board, sent an email to Pan Am expressing concern about the interrupted rail service to Granite State Concrete and Pan Am's possible denial of due process to MBR and Leishman in its safety investigation. Thomas Brugman Email, Doc. No. 60-22. By a letter dated April 28, Pan Am informed Leishman that it

¹ The acronym is short for Northeast Operating Rules Advisory Committee. [Explain why Rule 138(e) is deemed to be a Pan Am safety rule.)

would hold a supplemental hearing "to further develop the facts" of his involvement with the collision. Notice of Supplemental Investigation at 1, Doc. No. 57-7. The hearing was scheduled for the morning of May 7, but Leishman did not receive the letter until late afternoon on May 6. Corey Lynch Letter at 2, Doc. No. 60-23. He was nevertheless able to attend with counsel. At this second hearing, Leishman complained of the lack of procedural guidelines for the hearing, the hearing officer's refusal to receive into evidence a written statement, and his own lack of opportunity to review newly provided information. Following this hearing, Pan Am again concluded that Leishman had violated safety rules and should be excluded from the tracks.

D. The Litigation

In June 2010, MBR brought suit in Merrimack County Superior Court. Although MBR's initial complaint was less than a model of clarity, it became clear during the course of the litigation that it was claiming that Pan Am had acted improperly in invoking its power under the TRA to exclude Leishman from its tracks because: (1) Leishman had not violated any safety rules; (2) Pan Am had failed to provide Leishman with the process he

was due under the TRA; and (3) Pan Am breached the implied duty of good faith and fair dealing it owed MBR under the TRA by imposing an unreasonably harsh penalty on Leishman for his alleged violation of safety rules. Transcript of July 1, 2001 Hearing at 13, Doc. No. 54. On July 6, defendants removed the matter to federal court. On September 29, the suit was stayed when the parties agreed that Pan Am would hold a third hearing.

The hearing took place on October 29, 2010. Leishman was permitted to introduce evidence and examine witnesses, although MBR complains that the hearing officers cut off lines of questioning and did not accept certain evidence. On December 7, Pan Am issued its decision and concluded yet again that Leishman would be barred from its tracks because he had violated Rule 138(e).

On July 1, 2011, I conducted a hearing to construe the NORAC rules and to interpret relevant provisions of the TRA. NORAC Rule 138(e) is titled "Trains Operated from Other Than the Leading End at a Highway Crossing," and reads:

Trains being operated from other than the leading end must not enter a highway crossing at grade until on-ground warning is provided by a crew member or other qualified employee, except when it is visually determined that:

1. Crossing gates are in the fully lowered position, and are not known to be malfunctioning, or
2. A designated and qualified employee is stationed at the crossing and has the ability to communicate with trains, or
3. At highway and private crossings equipped only with flashing lights or X-bucks, it is clearly seen that no traffic is approaching or stopped at the crossing, and the leading end of the movement over the crossing does not exceed 15 miles per hour.

[Pan Am Bulletin Order, Doc. No. 57-6].

MBR conceded at the hearing that its train was not being operated from the "leading end" when the accident occurred. Transcript of July 1, 2001 Hearing at 44-45, Doc. No. 54. It also agreed that no MBR employee had provided an "on-ground warning." Instead, it argued that Leishman had complied with Rule 138(e) because Leishman, who was riding in the lead car of the train during the accident, was "stationed at the crossing" at the time of the accident.

I rejected MBR's reading of the TRA and instead concluded that an employee is not "stationed at the crossing" under Rule 138(e) if he is on a moving train. Id. at 64. Accordingly, I concluded that Pan Am was entitled to exclude Leishman from its tracks under the TRA because he had violated a Pan Am safety rule. Id. At the same time, I determined that Pan Am had

provided MBR with the process it was due under the TRA. Id. at 97. Thus, the only claim that remains unresolved after the July 1, 2011 hearing is MBR's good faith and fair dealing claim. Pan Am now challenges that claim in a motion for summary judgment.

II. STANDARD OF REVIEW

A summary judgment motion should be granted when the record reveals "no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The evidence submitted in support of the motion must be considered in the light most favorable to the nonmoving party, drawing all reasonable inferences in its favor. See Navarro v. Pfizer Corp., 261 F.3d 90, 94 (1st Cir. 2001).

A party seeking summary judgment must first identify the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The burden then shifts to the nonmoving party to "produce evidence on which a reasonable finder of fact, under the appropriate proof burden, could base a verdict for it; if that party cannot produce such evidence, the motion must be granted." Ayala-Gerena v. Bristol Myers-Squibb

Co., 95 F.3d 86, 94 (1st Cir. 1996); see Celotex, 477 U.S. at 323.

III. ANALYSIS

MBR alleges that Pan Am breached its obligation of good faith and fair dealing by imposing an excessive penalty for Leishman's safety violation. It also suggests that Pan Am failed to act in good faith because it excluded Leishman from the track to obtain an advantage in negotiations over an extension of the TRA rather than to redress a legitimate safety concern.

Every New Hampshire contract includes an implied covenant that requires the parties to act in good faith in their dealings with each other. Richard v. Good Luck Trailer Court, Inc., 157 N.H. 65, 70 (2008). This duty of good faith and fair dealing takes several forms that can be grouped into three general categories, "the first dealing with conduct in contract formation; the second addressing termination of at-will employment contracts; and the third dealing with the limitation of discretion in contractual performance." Great Lakes Aircraft Co. v. City of Claremont, 135 N.H. 270, 293 (1992). MBR's claim falls into the third of these three categories.

The New Hampshire Supreme Court has explained that contractual discretion can be exercised in a way that violates the duty of good faith and fair dealing only if "a promise [is] subject to such a degree of discretion that its practical benefit could seemingly be withheld." Centronics Corp. v. Genicom Corp., 132 N.H. 133, 144 (1989) (Souter, J.). A leading treatise further explains that

[discretion] arises whenever a legal directive or contract term is indeterminate because it fails to identify a single specific action that is legally permitted, prohibited, or required under the circumstances. When expressly agreed contract terms leave a party with discretion, one party might act in performance of the contract, believing the act to be allowed while the other believes that act to be disallowed. In the ensuing dispute, no resolution may be possible based solely on the agreed contract terms.

[Steven J. Burton & Eric G. Andersen, Contractual Good Faith, § 2.3.2.1 at 45 (1995).]

Although the implied duty of good faith and fair dealing can limit a party's discretion in certain circumstances, the duty does not abrogate the principle that "[p]arties generally are bound by the terms of an agreement freely and openly entered into, and courts cannot make better agreements than the parties themselves have entered into or rewrite contracts merely because they might operate harshly or inequitably." Mills v. Nashua

Fed. Sav. & Loan Ass'n, 121 N.H. 722, 726 (1981). Stated differently, "courts may not use the duty of good faith and fair dealing as a basis for rewriting a contract's plain terms." Marker Volk USA, Inc. v. Outdoor Outlet, LLC, No. 10-C-0466, 2011 WL 2173797, at *4 (E.D. Wis. June 2, 2011) (applying New Hampshire law). Accordingly, the duty of good faith and fair dealing ordinarily does not come into play in disputes between commercial actors if the underlying contract plainly spells out both the rights and duties of the parties and the consequences that will follow from a breach of a specified right.

A survey of the New Hampshire Supreme Court's decisions on the subject demonstrates that the court will not find a breach of the duty of good faith and fair dealing merely because a party has invoked a specific, limited right that is expressly granted by an enforceable contract.² E.g., Olbres v. Hampton Coop. Bank, 142 N.H. 227, 232-33 (1997) (party did not have to

² I have not incorporated into my analysis the bright line rule set out by the court in Hobin v. Coldwell Banker Residential Affiliates, Inc., which held that the duty of good faith and fair dealing limits discretion in contract performance only if the contract would otherwise be rendered illusory and unenforceable for lack of adequate consideration. 144 N.H. 626, 630-31 (2000). The court was applying California law in Hobin and it has not relied on the reasoning of that decision in subsequent cases governed by New Hampshire law.

refrain from setting off bank account funds against loan balance where contract expressly granted that right without limitation); Centronics, 132 N.H. at 144-45 (party had no duty to approve early payment of uncontested portion of escrow funds where contract expressly governed the timing of the payment); accord Marker Volkl, 2011 WL 2173797, at *12-13 (applying New Hampshire law, and holding that duty of good faith and fair dealing did not override express contractual right to terminate at will). The present case is indistinguishable from this well-established body of precedent.

The express language of the TRA granted Pan Am a limited right in a clearly defined circumstance: Pan Am "shall have the right to exclude . . . any employee of MBR determined . . . to have violated" an applicable rule or regulation. The right is not premised on a discretionary determination,³ but on a clear standard -- violation of an enumerated rule -- that is subject to empirical demonstration. Pan Am's option to invoke that

³ This would be a different case if Pan Am's accrual of the right to exclude was based on, for example, a unilateral determination by Pan Am that an employee was "operating trains in a dangerous manner." With that as the operative language, the duty of good faith and fair dealing may have required Pan Am to interpret the undefined standard in a manner that would not frustrate the purpose of the contract.

right against a rule-violating employee was part of its bargained-for consideration, and nothing about Pan Am's exercise of discretion exceeded the bounds of precisely what was contemplated by the parties. Thus, Pan Am's decision was not one where, "in the absence of some good faith limitation," it would have "authority to deprive [the other party] indefinitely of a portion of the agreed consideration." Centronics, 132 N.H. at 145. MBR simply had not contracted for the right to have any employee -- regardless of a serious violation of train-safety rules -- utilize Pan Am's trackage over Pan Am's objection. MBR cannot complain, therefore, of any discretionary action by Pan Am by which it was divested of its expected benefits under the contract.

My decision is reinforced by assessing the apparent purpose of the exclusion provision. It gives Pan Am a specific recourse (i.e., exclusion of offending employee) against MBR in the event of a particular detrimental action (i.e., rule infraction showing unsafe operation of trains). The threat of that recourse serves as an incentive for MBR not to engage in the detrimental conduct. To limit Pan Am's recourse in this

situation would be to infringe on the incentive scheme agreed upon by both parties.

MBR could have negotiated for a different scheme, such as a progressive discipline regime or a neutral arbiter to make exclusion decisions. It did not, however, and it presumably received consideration in return. MBR now asks this court to relieve it from the harshness of the bargain that it freely struck. I decline to do so. To intervene and deprive Pan Am of its contractual right would be an unwarranted judicial interference with the ability of parties to contract. As the New Hampshire Supreme Court has admonished, "courts cannot make better agreements than the parties themselves have entered into or rewrite contracts merely because they might operate harshly or inequitably." Mills, 121 N.H. at 726.⁴

⁴ MBR also argues that Pan Am breached its duty of good faith and fair dealing by failing to accord Leishman sufficient process in its hearings, thereby denying him the ability to meaningfully contest whether he was in violation of the safety rule at issue. The argument is untenable in light of my prior ruling, wherein I construed Rule 138(e) and determined that, according to the undisputed facts, Leishman was not in compliance. In any event, the record demonstrates that Pan Am provided far more process than expressly required by the agreement. Whereas the TRA does not even obligate Pan Am to conduct a hearing before exercising its right to exclude, see TRA ¶ 1, Doc. No. 12-3, Pan Am's third hearing, for which Leishman concedes he was provided timely notice, provided a forum for Leishman and his attorney to put on

IV. CONCLUSION

I do not condone Pan Am's conduct in this case. While there is a reason to doubt Pan Am's claim that it invoked its right to exclude Leishman from its tracks solely because of public safety concerns, the contract plainly gives it the right to act as it did, regardless of its motive for doing so. Under the circumstances, MBR cannot rely on the duty of good faith and fair dealing to restore a right that it bargained away by agreeing to the TRA.

For the foregoing reasons, I grant Pan Am's motion for summary judgment (Doc. No. 57). The clerk is directed to enter judgment accordingly and to close the case.

SO ORDERED.

/s/Paul Barbadoro
Paul Barbadoro
United States District Judge

December 16, 2011

cc: Craig S. Donais, Esq.
Christopher H.M. Carter, Esq.
Michael J. Connolly, Esq.
Seth Michael Pasakarnis, Esq.

a full defense, including the opportunity to introduce relevant evidence and examine witnesses.

United States Court of Appeals For the First Circuit

No. 12-1031

MILFORD-BENNINGTON RAILROAD CO., INC.,

Plaintiff, Appellant,

PETER LEISHMAN,

Plaintiff,

v.

PAN AM RAILWAYS, INC.; BOSTON AND MAINE CORPORATION;
SPRINGFIELD TERMINAL RAILWAY COMPANY,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW HAMPSHIRE

[Hon. Paul J. Barbadoro, U.S. District Judge]

Before

Howard, Ripple* and Selya
Circuit Judges.

Adam Francois Watkins, with whom Watkins, Bradley & Chen LLP,
Craig S. Donais and Donais Law Offices, PLLC were on brief, for
appellant.

Michael J. Connolly, with whom Kelley A. Jordan-Price and
Hinckley, Allen & Snyder LLP were on brief, for appellees.

*Of the Seventh Circuit, sitting by designation.

September 25, 2012

HOWARD, Circuit Judge. Milford-Bennington Railroad Company, Inc. ("MBR") appeals an award of summary judgment to Pan Am Railways, Inc.; Boston and Maine Corporation; and Springfield Terminal Railway Company (collectively, "Pan Am") in a dispute arising from Pan Am's actions under a contract to provide MBR with access to Pan Am's railroad tracks. The district court held that Pan Am did not breach its duty of good faith and fair dealing when it exercised its contractual right to exclude an MBR employee from its trackage for violating a safety rule. We affirm.

I. Background

Plaintiff-Appellant MBR hauled stone by rail for its only customer, Granite State Concrete. Because MBR does not own the necessary trackage, it entered into a contract with Pan Am that permits MBR to operate trains on Pan Am's trackage (the "Agreement"). The Agreement requires MBR to follow Pan Am's rules, which include the Operating Rules of the Northeast Operating Rules Advisory Committee ("NORAC"). If Pan Am determines that an MBR employee has violated its rules, it "shall have the right to exclude [the employee] from the Trackage."

On October 22, 2009, MBR employees Peter Leishman and David Raymond were operating a train on Pan Am's trackage. At the leading end of the train, Leishman operated a control car, which is a caboose modified with safety features including a horn, an emergency brake, and lights. Behind the control car were ten

hopper cars filled with crushed stone. At the trailing end, Raymond operated a locomotive, which pushed the train from behind. As the train approached a highway crossing, a tractor trailer truck crossed the tracks. Leishman activated the emergency brake, but the train collided with the truck, derailing the control car and one of the hopper cars.

In response to the accident, Pan Am sent Leishman a letter notifying him of an investigative hearing scheduled for November 10, 2009. The letter was dated November 4, and Leishman states that he received it on November 6. Leishman requested a postponement due to his injuries from the collision and so that his counsel could attend the hearing, but Pan Am went forward as scheduled without Leishman or his counsel present. Because no employee of MBR was stationed at the crossing at the time of the accident, Pan Am determined that Leishman had violated NORAC Rule 138(e), "Trains Operating from Other Than The Leading End at a Highway Crossing," which provides:

Trains being operated from other than the leading end must not enter a highway crossing at grade until on-ground warning is provided by a crew member or other qualified employee, except when it is visually determined that:

. . . .

2. A designated and qualified employee is stationed at the crossing and has the ability to communicate with trains

Pan Am did not immediately disclose its determination to Leishman.

When Leishman attempted to return to work on March 17, 2010, a Pan Am dispatcher refused him access to the tracks due to "company policy." Leishman contacted Pan Am's general counsel Robert Burns, who asked Leishman for a meeting to discuss signing a new trackage-rights agreement. Leishman and Burns met on March 19, and on April 8, Burns proposed the terms of a new agreement. The next day, Leishman rejected the proposal. That same day, Pan Am sent Leishman a letter stating that, at the time of the accident, he was "not properly stationed for the backward move through the crossing" and that "it would be the safest course to prevent you personally from operating on [Pan Am] property in the future pursuant to [the Agreement]."

On April 14, Thomas Brugman of the Surface Transportation Board emailed Pan Am to express his concerns regarding the effect of Pan Am's decision on Granite State Concrete and the potential appearance that Pan Am had not given sufficient process to Leishman and MBR. Pan Am then scheduled a supplemental investigative hearing, which Leishman attended. Pan Am again concluded that Leishman had violated its rules.

MBR and Leishman filed a petition in June 2010 against Pan Am in New Hampshire Superior Court. The petition did not lay out specific causes of action, but it sought to enjoin Pan Am from excluding Leishman from its trackage, as well as compensatory damages "in excess of \$50,000." In July 2010, Pan Am removed the

case to the United States District Court for the District of New Hampshire on the ground that the ICC Termination Act of 1995 ("ICCTA"), in particular 49 U.S.C. § 10501(b), completely preempted MBR and Leishman's claims. The district court stayed the case when the parties agreed to hold a third investigative hearing. At that hearing, Leishman asserted that he had complied with Rule 138(e) and that Pan Am's interpretation of the rule was incorrect. Once more, Pan Am upheld its original decision.

After the third hearing but before the district court made any substantive rulings, Leishman and MBR filed an amended complaint that listed four causes of action, all described as breaches of the Agreement. Count One alleged that Pan Am breached its covenant of good faith and fair dealing in excluding Leishman because Pan Am had not objected to MBR's practices in the past, and MBR arguably had not violated Rule 138(e). Count Two alleged that Pan Am's hearing process was improper. Count Three claimed that Pan Am unreasonably excluded Leishman because the accident was unavoidable and because Pan Am had filed a report with the Federal Railroad Administration stating that the truck driver was at fault. Count Four claimed that Pan Am misinterpreted Rule 138(e). Pan Am moved to dismiss the amended complaint on the grounds that the ICCTA preempted MBR and Leishman's claims, Leishman was not a party to the Agreement, and Count Four of the amended complaint duplicated Count One. The district court held that the ICCTA did

not preempt MBR and Leishman's claims, but it dismissed Leishman from the action and dismissed Count Four. The district court then held a hearing at which it determined that Leishman had violated Rule 138(e) and that Leishman's interpretation of the rule was "not a plausible one at all."

After the hearing, the only remaining issue before the district court was whether Pan Am's decision to exclude Leishman violated the duty of good faith and fair dealing implicit in the Agreement. Pan Am moved for summary judgment, arguing that because the Agreement gives it the express right to exclude an employee of MBR for violating its rules, the duty of good faith and fair dealing could not prohibit it from excluding Leishman. The district court granted Pan Am's motion, and MBR timely appealed.

II. Analysis

A. Jurisdiction

In every case, we are required to satisfy ourselves of jurisdiction. García-Velázquez v. Frito Lay Snacks Caribbean, 358 F.3d 6, 8 (1st Cir. 2004). Here, the record suggests a possible defect in the district court's jurisdiction. Although MBR and Leishman's state-court petition raised no issues of federal law, Pan Am removed this action based on federal-question jurisdiction -- specifically, complete preemption of MBR and Leishman's claims by the ICCTA. See Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 8 (2003) ("[A] state claim may be removed to

federal court . . . when a federal statute wholly displaces the state-law cause of action through complete pre-emption."). When the district court held that the ICCTA did not completely preempt MBR and Leishman's claims, the basis for federal jurisdiction became subject to question. See Fayard v. Ne. Vehicle Servs., LLC, 533 F.3d 42, 45, 49 (1st Cir. 2008) (in the absence of complete preemption, district court required to remand state-law claims); See also Martin H. Redish, 16 Moore's Federal Practice - Civil § 106.66[1] (3d ed. Supp. 2012) (listing cases from seven courts of appeals holding that a district court may not exercise supplemental jurisdiction over state-law claims without original jurisdiction over the action).

On appeal, the parties claim that the district court also had diversity jurisdiction under 28 U.S.C. § 1332, which grants the district courts original jurisdiction over civil actions between citizens of different states in which the amount in controversy exceeds \$75,000. Here, the plaintiffs and defendants are citizens of different states,¹ but the original petition filed in state

court alleged damages "in excess of \$50,000."

Thus, it is not facially apparent whether the plaintiffs satisfied

¹ Leishman is a citizen of New Hampshire. MBR is a New Hampshire corporation with a principal place of business in New Hampshire. Pan Am Railways, Inc. and Boston and Maine Corporation are Delaware corporations with principal places of business in Massachusetts. Springfield Terminal Railway Company is a Vermont corporation with a principal place of business in Massachusetts.

the amount-in-controversy requirement. Because the party invoking federal jurisdiction bears the burden of demonstrating that the court has subject-matter jurisdiction over the case, Amoche v. Guarantee Trust Life Ins. Co., 556 F.3d 41, 48 (1st Cir. 2009), Pan Am must show that the amount in controversy exceeds \$75,000. Although we have not decided how heavy a burden the removing party must bear in this precise situation, we have decided that a party removing a case under the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d), 1453, must show a "reasonable probability" that the jurisdictional threshold is satisfied. Amoche, 556 F.3d at 48-49.

Whatever the appropriate burden, Pan Am has satisfied it. On appeal, counsel for MBR told this court that after the district court ruled that MBR's claims were not preempted, the court held a conference call during which the parties agreed that MBR's claims satisfied the amount-in-controversy requirement. Moreover, shortly after removal, MBR filed a motion for a preliminary injunction stating that "[t]he current economic impact to [MBR] and the State of New Hampshire are, at present, approximately \$300,000." Seeing nothing in the record that belies the parties' agreement regarding the amount in controversy, we conclude that the district court had jurisdiction over this action.

B. Good Faith

The only issue before us is whether Pan Am's decision to exclude Leishman from its trackage violated the duty of good faith and fair dealing implicit in the Agreement.² The district court granted summary judgment to Pan Am, holding that the Agreement "plainly gives it the right to act as it did, regardless of its motive for doing so. Under the circumstances, MBR cannot rely on the duty of good faith and fair dealing to restore a right that it bargained away by agreeing to the [Agreement]." Milford-Bennington R.R. Co. v. Pan Am Rys., Inc., No. 10-cv-00264-PB, 2011 WL 6300923, at *6 (D.N.H. Dec. 16, 2011). We review the district court's grant of summary judgment de novo. Hunt v. Golden Rule Ins. Co., 638 F.3d 83, 86 (1st Cir. 2011).

New Hampshire law, which governs the Agreement, requires that parties to an agreement "act in good faith and fairly with one another." Livingston v. 18 Mile Point Drive, Ltd., 972 A.2d 1001, 1005 (N.H. 2009). The good-faith obligation limits the parties' discretion in contractual performance, id. at 1006, by "excluding behavior inconsistent with common standards of decency, fairness, and reasonableness, and with the parties' agreed-upon common

² MBR argues on appeal that Pan Am waived its right to enforce Rule 138(e) because it had been aware for years that MBR routinely pushed its trains through highway crossings without an employee stationed at the crossing. Because MBR failed to make this argument to the district court in its opposition to Pan Am's motion for summary judgment, the argument is waived. See Sony BMG Music Entm't v. Tenenbaum, 660 F.3d 487, 496 (1st Cir. 2011).

purposes and justified expectations." Centronics Corp. v. Genicom Corp., 562 A.2d 187, 191 (N.H. 1989) (Souter, J.). Surveying its own cases, the New Hampshire Supreme Court has explained that

under an agreement that appears by word or silence to invest one party with a degree of discretion in performance sufficient to deprive another party of a substantial proportion of the agreement's value, the parties' intent to be bound by an enforceable contract raises an implied obligation of good faith to observe reasonable limits in exercising that discretion, consistent with the parties' purpose or purposes in contracting.

Id. at 193. Put differently, "the concept of good faith in performance addresses the particular problem raised by a promise subject to such a degree of discretion that its practical benefit could seemingly be withheld." Id.

In Centronics, the New Hampshire Supreme Court listed four questions that must be answered in the affirmative to state a claim for breach of the duty of good faith and fair dealing. Id. MBR and Pan Am dispute the answers to two of these four questions:

1. Does the agreement ostensibly allow to or confer upon the defendant a degree of discretion in performance tantamount to a power to deprive the plaintiff of a substantial proportion of the agreement's value?

.

3. Assuming an intent to be bound, has the defendant's exercise of discretion exceeded the limits of reasonableness?

Id.³

As to the first question, MBR points out that the Agreement gives Pan Am the "right to exclude from the Trackage any employee of MBR" who violates Pan Am's rules, without any limitation on the length of the exclusion and without regard to the severity of the violation. MBR has only two employees, both of whom are necessary to operate MBR's trains. As a result, MBR argues, Pan Am can effectively deprive MBR of the Agreement's value by excluding an MBR employee for life, even for trivial violations of Pan Am's rules.

Pan Am responds that the Agreement does not give MBR the right to have a particular employee operate a train after violating Pan Am's rules, so Pan Am does not deprive MBR of the Agreement's value by excluding an MBR employee from Pan Am's trackage. When it executed the Agreement, MBR was aware of Pan Am's right to exclude its employees, and it could have prepared for the scenario in which Pan Am exercised that right.

We need not decide whether Pan Am's right to exclude MBR's employees confers "a degree of discretion in performance tantamount to a power to deprive the plaintiff of a substantial proportion of the agreement's value," id., 562 A.2d at 193, because

³ The other two questions are whether the parties intended to create an enforceable contract and whether the defendant's actions caused the plaintiff's damages. Centronics, 562 A.2d at 193-94. The parties agree that the answer to both questions is yes.

we are satisfied that even if Pan Am had such discretion when deciding whether to exclude MBR's employees, its exercise of that discretion was reasonable, see id. ("[H]as the defendant's exercise of discretion exceeded the limits of reasonableness?").

Following three hearings by Pan Am and one of its own, the district court ruled that Leishman violated NORAC Rule 138(e) by failing to station an employee at the crossing while MBR's train crossed the highway. Moreover, Leishman's violation was followed by the very type of accident the rule presumably was intended to prevent: a collision between a train and a vehicle at an unguarded crossing. MBR has chosen not to appeal this ruling, and we will not revisit it here. In light of Leishman's violation of a safety rule and the accident that followed, we conclude that Pan Am's decision to exclude Leishman from its trackage did not "exceed[] the limits of reasonableness." Id. at 193.

Although Pan Am had an objective basis for its decision, MBR urges us to look to Pan Am's subjective intent, which it claims was to force MBR into an unfavorable contract or shut down MBR's operations. MBR cites a number of cases in which the court warned parties against violating the duty of good faith by acting on subterfuge or illicit motives.⁴ Most of these cases follow a

⁴ These cases include Olbres v. Hampton Coop. Bank, 698 A.2d 1239, 1243 (N.H. 1997); Bayview Condominium Ass'n v. Ohanian, No. 08-C-0129, 2008 WL 7467082 (N.H. Super. Ct. Oct. 24, 2008); McAdams v. Massachusetts Mutual Life Insurance Co., 391 F.3d 287, 302 (1st Cir. 2004) (applying Massachusetts law); Original Great

common pattern: a contract gives a party the right to take action if a certain condition is met, the party allegedly determines in bad faith that the condition is met, and the party takes action accordingly. E.g., Olbres v. Hampton Coop. Bank, 698 A.2d 1239, 1243 (N.H. 1997) (bank's right to set off customer's deposits against its liabilities). This case does not conform to that pattern, however, because Pan Am's decision that Leishman violated Rule 138(e) is beyond dispute. Pan Am had an unassailably valid reason to exclude Leishman, so its alleged ulterior motives are irrelevant. See Tuf Racing Prods., Inc. v. Am. Suzuki Motor Corp., 223 F.3d 585, 589 (7th Cir. 2000) (Posner, C.J.) ("If a party has a legal right to terminate the contract . . . its motive for exercising that right is irrelevant.").

Leishman and MBR's actions after the accident reinforce our conclusion. At Pan Am's third hearing and before the district court, Leishman and MBR argued that Leishman had not violated Rule 138(e), despite the rule's clear requirement that MBR station an employee at the crossing. Although MBR chose not to appeal the district court's ruling that Leishman violated Rule 138(e), it continues to refer in its appeal brief to the "purported violation," which it describes as trivial. We would be hard-

American Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd., 970 F.2d 273, 280 (7th Cir. 1992) (Posner, J.); and Carlson Machine Tools, Inc. v. American Tool, Inc., 678 F.2d 1253, 1262 (5th Cir. 1982).

pressed to say that Pan Am's decision to exclude Leishman is "inconsistent with common standards of decency, fairness, and reasonableness," Centronics, 562 A.2d at 191, when MBR has not challenged the finding of a violation but, nevertheless, neither it nor Leishman accepts responsibility for the violation despite a spate of adverse rulings over the course of more than two years of litigation. Therefore, even if Pan Am was bound by a duty of good faith and fair dealing when exercising its right to exclude Leishman, Pan Am has not breached that duty.

III. Conclusion

We affirm the district court's judgment.