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ENTERED
Office of Proceedings
June 22, 2018
Part of
Public Record

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June 22, 2018

VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, DC 20423-0001

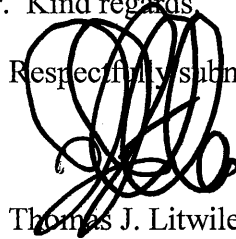
Re: **Docket No. AB-1256**
Boston and Maine Corporation & Springfield Terminal
Railway Company -- Adverse Discontinuance of Operating
Authority -- Milford-Bennington Railroad Company, Inc.

Dear Ms. Brown:

Attached for filing in the above-captioned proceeding is the **Motion of Milford-Bennington Railroad Company, Inc. to Partially Strike Reply of Boston and Maine Corporation and Springfield Terminal Railway Company**, dated June 22, 2018.

Should any questions arise regarding this filing, please feel free to contact me.
Thank you for your assistance on this matter. Kind regards,

Respectfully submitted,



Thomas J. Litwiler
Attorney for Milford-Bennington
Railroad Company, Inc.

TJL:tl

Attachment

cc: Parties on Certificate of Service

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. AB-1256

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

**MOTION OF MILFORD-BENNINGTON RAILROAD COMPANY, INC.
TO PARTIALLY STRIKE REPLY OF BOSTON AND MAINE CORPORATION
AND SPRINGFIELD TERMINAL RAILWAY COMPANY**

Janet H. Gilbert
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Bradon J. Smith
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Suite 920
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(312) 252-1500

**ATTORNEYS FOR MILFORD-BENNINGTON
RAILROAD COMPANY, INC.**

Dated: June 22, 2018

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. AB-1256

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

**MOTION OF MILFORD-BENNINGTON RAILROAD COMPANY, INC.
TO PARTIALLY STRIKE REPLY OF BOSTON AND MAINE CORPORATION
AND SPRINGFIELD TERMINAL RAILWAY COMPANY**

Pursuant to 49 C.F.R. § 1104.8, Milford-Bennington Railroad Company, Inc. ("MBR") moves to partially strike the Reply Boston and Maine Corporation and Springfield Terminal Railway Company (collectively, "Pan Am") filed June 12, 2018. MBR disagrees with much of the Pan Am Reply, which is often bombastic in tone and redundant in substance. But certain false and misleading allegations in the Reply were not included in Pan Am's initial application and are not based on any demonstrable fact. Pan Am is not permitted to introduce this type of new and unsupported argument at the reply stage, and those portions of its Reply should be stricken.

Specifically, Pan Am now seeks to justify the ouster of MBR from its longstanding trackage rights over a Pan Am line in reliance upon "2001 litigation involving MBR's unauthorized removal of Pan Am's derail device - Pan Am prevailed." Pan Am Reply at 15. Pan Am provides no legal citation or factual basis for this assertion, and the Board and interested parties could be forgiven for wondering what Pan Am is talking about. MBR will assume that Pan Am was intending to reference the Board's 2004 decision in *Granite State Concrete Co. v. Boston and Maine Corp.*, 7 S.T.B. 834 (2004). But that decision had nothing to

do with an “unauthorized removal” of “Pan Am’s derail device,” and certainly not a determination by the agency that MBR had engaged in any such wrongdoing. Here is the Board’s description of the relevant facts in that proceeding:

... BM/ST installed a “derailment device,” first on the M-B side of the point where the lines connect and subsequently, after M-B allegedly refused to activate the first derailment device, on the BM/ST side of the point of connection.

Granite State, 7 S.T.B. at 835. The decision thus does not reflect even an allegation by Pan Am that MBR engaged in a dramatic “unauthorized removal” of a Pan Am derail device.

Nor did the Board purport to address safety matters related to placement and operation of the derail device. Instead, the Board concluded that “[t]he Federal Railroad Administration (FRA) has primary responsibility over rail safety matters, and therefore, it is not the Board’s role to be the final arbiter of safety issues.” *Granite State*, 7 S.T.B. at 836. And the Board’s ultimate decision turned on the propriety of Pan Am’s behavior, not MBR’s. In that regard, the Board simply found that Pan Am’s actions were not “necessarily unreasonable” and did not violate Pan Am’s common carrier obligations. 7 S.T.B. at 836, 837. Even then, the Board felt compelled to caution that:

“BM/ST could have moved more quickly to be responsive and work out arrangements that would meet Granite State’s needs while adequately protecting BM/ST’s interests. It should not have waited until there was litigation to take into account the interests of parties other than itself.

7 S.T.B. at 836. The Board also declined to reinstate the previously-revoked class exemption for Granite State’s traffic, based on “the record of [Pan-Am’s] conduct.” 7 S.T.B. at 838.

Pan Am’s Reply turns this precedent into a case where “Pan Am prevailed” on “MBR’s unauthorized removal of Pan Am’s derail device.” Reply at 5. That’s patently false, if not willfully misleading. It’s also not what Pan Am originally argued in this proceeding:

“MBR’s sole owner, Mr. Peter Leishman, at first agreed to install a device but then removed the device without any notice to Pan Am.” Pan Am Application at 15. That statement is a far cry from Pan Am’s new declaration that MBR was somehow found guilty of the “unauthorized removal” of Pan Am’s derail.¹ Pan Am Reply at 5. MBR, of course, had no ability to address this glaring misstatement in its Protest, because Pan Am didn’t choose to invent it until it filed its reply.

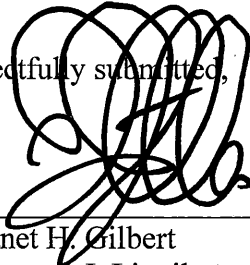
Raising new arguments or matters in this manner on reply is grounds for a surreply by MBR. See *Ballard Terminal Railroad Company, L.L.C. – Acquisition and Operation Exemption – Woodinville Subdivision*, Docket No. FD 35731 (STB served Jan. 15, 2014). However, 49 C.F.R. § 1104.8 empowers the Board to order that any “redundant, irrelevant, immaterial, impertinent, or scandalous matter be stricken,” and the Board has recognized that this regulation is an adequate reservoir of power to combat vexatious pleadings that are reckless with the truth. *Offers of Financial Assistance*, Docket No. EP 729 (STB served Sep. 30, 2016). MBR thus requests that Pan Am’s arguments regarding the “2001 litigation,” Pan Am Reply at 5, be stricken.

In seeking this limited relief, MBR obviously does not concede the merits of the remainder of the Pan Am reply. Pan Am’s arguments are largely non-responsive to MBR’s Protest and, except as discussed above, almost wholly redundant of Pan Am’s initial application. Pan Am seems to believe that the expiration of the trackage rights contract between the parties is itself sufficient justification for adverse discontinuance authority – a position that would simply write *Thompson v. Texas Mexican Ry. Co.*, 328 U.S. 134 (1946) and more than 70 years of

¹ The allegation in Pan Am’s current Reply can be fairly read to imply that MBR somehow tampered with a derail on *Pan Am’s* track. Yet as the record in *Granite State* makes clear, the derail at issue was located on MBR’s own line. Indeed, the State of New Hampshire – the owner of MBR’s line – believed that it was Pan Am that had wrongfully installed the derail on the State’s line with no permission from or notice to the State. See Exhibit 1 hereto.

subsequent regulatory jurisprudence out of existence. Pan Am's recitation of a "private property" interest, Reply at 4, does not obviate the public interest analysis that *Tex Mex* compels. Beyond that, Pan Am would predicate the ouster of MBR from longstanding trackage rights – the continuation of which is uniformly supported by all relevant shipper and community interests – nearly entirely on a single incident that occurred seven years ago. Pan Am Reply at 5, 8-9. Pan Am has not approached satisfaction of the public convenience and necessity standard that is necessary to allow such drastic action.²

WHEREFORE, MBR respectfully requests that Pan Am's Reply be stricken to the extent discussed above.

Respectfully submitted,

By: _____
Janet H. Gilbert
Thomas J. Litwiler
Bradon J. Smith
Fletcher & Sippel LLC
29 North Wacker Drive
Suite 920
Chicago, Illinois 60606-2832
(312) 252-1500

**ATTORNEYS FOR MILFORD-BENNINGTON
RAILROAD COMPANY, INC.**

Dated: June 22, 2018

² MBR notes that the parties apparently agree that MBR's trackage rights on the Subject Line from Westchester Drive at Milepost 13.4 (east of the Granite State facility in Milford) to Milepost 11.0 in Milford are not utilized by MBR or necessary for the provision of service to Granite State. MBR thus does not object to the granting of Pan Am's adverse discontinuance application with respect to that segment. MBR, joined by an array of other parties, strenuously objects to the ouster of MBR from the remainder of the Subject Line, from Milepost 13.4 in Milford to Milepost 16.36 in Wilton.



THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF TRANSPORTATION

CAROL A. MURRAY, P.E.
COMMISSIONER



June 20, 2003

Robert B. Culliford, Corporate Counsel
Guilford Rail System
Iron Horse Park
N Billerica, MA 01862

via fax: 978-663-1213

Dear Mr. Culliford,

I have received your letter concerning the Milford-Bennington Railroad Company and the Wilton Scenic Railway. This is the first communication I have had from your company regarding any concerns about the new tourist operation. Since the new railroad will be operated by the experienced staff of the Milford-Bennington Railroad in full compliance with FRA regulations, I am not sure what the basis of your concerns is.

I would appreciate it if you would explain to me your thinking behind the installation by your employees of a derail on railroad property owned by the state of New Hampshire, with no notice to or permission from the state, and without discussing with the state any of your concerns about either freight or passenger operations. Can you cite any other examples of derails installed on main line track (track already protected by derails on the side tracks) that connects a short line operation to your freight operation?

The dispatching procedures to ensure safe operation of the respective railroads on this line have been clearly established. I believe the tourist railroad and the Milford-Bennington have been in contact with the Federal Railroad Administration to ensure that their plans satisfy FRA safety requirements.

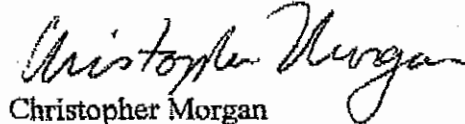
I cannot accept your questioning the state's commitment to safety. We are willing to support any reasonable measures to ensure safe operations on this line. We would welcome the opportunity to meet with the appropriate representatives of all the parties in a constructive manner to determine what such measures should be.

Finally, I would ask that the interests of the freight shipper on the state-owned line be protected as these matters are resolved. As you know, this company depends on rail service, which has been successfully and safely provided by the Milford-Bennington Railroad for many years. It is unreasonable to restrict freight rail service

to nighttime operation, or to require opening numerous main-line derails on each move.

I would welcome the opportunity to have a constructive discussion with you on any of these issues, and would hope that you would feel free to address any concerns to this Department before a crisis atmosphere is created.

Sincerely,



Christopher Morgan
Administrator

cc: Peter Leishman

File: Hillsboro Branch

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of June, 2018, a copy of the foregoing
**Motion of Milford-Bennington Railroad Company, Inc. to Partially Strike Reply of Boston
and Maine Corporation and Springfield Terminal Railway Company** was served by
electronic mail and first class mail, postage prepaid, upon:

Robert B. Burns, Esq.
Corporate Counsel
Pan Am Railways
1700 Iron Horse Park
North Billerica, MA 01862-1641
rburns@panam.com

and by first class mail, postage prepaid, upon:

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Kellie-Sue Boissonnault
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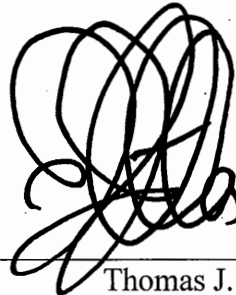
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A handwritten signature in black ink, appearing to read 'Thomas J. Litwiler', is positioned above a horizontal line.

Thomas J. Litwiler