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(978) 663-1215

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June 12, 2018

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

**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 Boston and
Maine Corporation's and Springfield Terminal Railway Company's Reply to Milford-
Bennington Railroad's Protest.

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.

**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.**

**REPLY OF
BOSTON AND MAINE CORPORATION &
SPRINGFIELD TERMINAL RAILWAY COMPANY**

Applicants:

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

Attorney for Applicants

**Robert B. Burns, Esq.
1700 Iron Horse Park
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Dated: June 12, 2018

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

AB-1256

**BOSTON AND MAINE CORPORATION &
SPRINGFIELD TERMINAL RAILWAY COMPANY –
ADVERSE DISCONTINUANCE
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**REPLY OF
BOSTON AND MAINE CORPORATION &
SPRINGFIELD TERMINAL RAILWAY COMPANY**

Boston and Maine Corporation (“B&M”) and the Springfield Terminal Railway Company (“ST”) (collectively “Pan Am” or “Applicants”) hereby file this reply to Milford-Bennington Railroad Co., Inc.’s (“MBR”) protest to Pan Am’s application for adverse discontinuance of MBR’s Operating Authority (referred to herein as “Application”) over approximately 5.36 miles of rail line owned by B&M. (Pan Am and MBR are collectively referred to as “Parties”). As demonstrated in the 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.

As was earlier noted in Pan Am’s Application, 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 the 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 whereby the parties will be in continual litigation over an expired agreement. Pan Am is willing and able to provide service on its own property. It should be able to do so without having an uncooperative and litigious tenant forced upon it.

MBR's Protest reveals the arrogance that has led to this proceeding, a view that MBR should be allowed to do (and not do) whatever it wants on Pan Am's property because: (a) no one likes Pan Am; and (b) MBR's customer, Granite State Concrete, Inc. should be given preferential treatment over all other potential users and not be forced to accept the same level of rail service as others. MBR's hubris is supported by other entities who profess no love for Pan Am but great support for MBR and Granite State. Unfortunately, MBR, Granite State and their supporters all miss the central issue in this adverse discontinuance—the ability of a tenant carrier to dictate terms, avoid legal obligations and flaunt safety rules and practices while relying upon the Board's Tex Mex doctrine to shield it from being evicted or having to abide by any form of mutual agreement. .

As MBR and Granite State would have it, Pan Am rights to protect and oversee its own property are limited to endless litigation in forums other than the Board. Similarly, MBR's protest essentially ignores its appalling safety record and its long history of willfully ignoring established safety rules and practices with no concern for the outcome. Existing Board precedent has already determined that MBR cannot hide behind Board jurisdiction to avoid ouster from the Subject Line pursuant to State law, and the facts of

this case highlight the dangers to the relationships between host railroads and their tenants throughout the freight industry.

The Board should ignore MBR's arguments regarding the relative popularity of MBR or Pan Am, or whether Granite State should be allowed to use the threat of trucking through downtown Wilton, New Hampshire to achieve its desired result. Rather, the focus should be on whether a tenant railroad can engage in destructive and unsafe behavior over decades and still expect to be able to utilize Board jurisdiction as a shield from eviction. Quite simply, MBR's history—if not addressed by the Board—will embolden other tenant carriers to undertake similar behavior and threaten efficient freight rail operations wherever trackage rights relationships exist.

Allowing MBR to continue to operate over Pan Am's objections without an existing trackage rights puts MBR's rights above Pan Am's – the property owner. This the Board should not do. The track is Pan Am's private property. It owns it, has an obligation to maintain it, and has a residual common carrier obligation over it. Yes, Pan Am initially agreed to allow MBR to operate over its track for a certain amount of time and under certain conditions, but that "meeting of the minds" is long gone. The agreement terminated long ago. MBR no longer has a contractual right to operate over it and it should vacate the line. Allowing MBR to continue to operate over Pan Am's tracks is, in effect, compelling Pan Am to grant trackage rights to another carrier without Pan Am's consent, and to a bad actor who has consistently abused and infringed upon the property owner's rights.¹ This is bad policy. It will simply embolden other tenant

¹ It is well settled precedent that the Board has no authority to compel a carrier to grant trackage rights over its line to another carrier. See Magner-O'Hara Scenic Railway v. ICC, 692 F.2d 441, 445 (6th Cir. 1982); Boston & Maine Corp. Trackage Rights Over Conrail, 360 I.C.C. 239, 241 (1979); Baltimore & O.R. Co. Operation, 261 I.C.C. 535, 544 (1945). Yet that is precisely what the Board will be doing if it does not allow Pan Am to exercise its private property rights and evict its bad faith tenant.

carriers to undertake similar behavior any time a trackage rights agreement expires. This will threaten efficient freight rail operations wherever trackage rights relationships exist where the landlord carrier wishes to change operators on the line. A brief summary of MBR's history of non-compliance with legal and safety obligations is as follows:

- 2001 litigation involving MBR's unauthorized removal of Pan Am's derail device – Pan Am prevailed. MBR acknowledged the 1.5% grade at the Wilton Yard area in its Protest but completely failed to acknowledge its unauthorized removal of Pan Am's derail device installed at the same location as a safety measure.
- 2011 litigation involving MBR's violation of NORAC operating rules resulting in a crossing accident – Pan Am prevailed. To this day, MBR refuses to acknowledge that one is not stationed at a crossing when one is on a moving train.
- 2016 litigation involving MBR's non-payment – Pan Am prevailed. MBR merely stopped all payments for its use from 2012 until 2016 when Pan Am was forced to file suit to recoup payment. In 2017, MBR paid approximately one-half of the amounts invoiced to MBR.

The Board was faced with a similar situation as it is faced with here. In *Jacksonville*, the moving party Jacksonville Port Authority ("JPA") sought "adverse discontinuance" of service by Jaxport Terminal Railway Company ("JTRC") over approximately 10 miles of terminal switching tracks that JPA owned and that connected its Terminal Facility in Jacksonville, FL, with the tracks of line-haul carriers. JPA asserted that the application has been necessitated by JTRC's refusal to honor the lawful termination of its lease of the subject trackage, and by JPA's selection of a new rail

operator for the line. See Jacksonville Port Authority- Adverse Discontinuance- in Duval County, FL, AB-469, 1996 WL 396950 (S.T.B.) (ICC served July 17, 1996)

(“Jacksonville”) stating (“ ... our jurisdiction, may not be cited to shield a carrier from the legitimate processes of state law. See *Chelsea*, *supra*, at 778, and *Fore River*, *supra*, at 310, citing *Kansas City*, at 224-26. JTRC has violated its contract obligations to JPA. The judicial process necessary to afford JPA a remedy cannot go forward unless we find that the continued operation over the Talleyrand track by JTRC is no longer required by the public convenience and necessity. JPA's agreement with [a different rail carrier] assures that the public will continue to receive adequate rail service. Under these circumstances, we can see no reason to deny JPA's petition.”).

In implementing the statutory standard in an adverse proceeding, the Board will consider the relative burdens that continuation of service on the one hand, and cessation of service² on the other, would have on the involved carrier, on the owner-lessor of the line, and on the public. *Id.* Here, there will be no cessation of service as Pan Am will replace MBR service with its own service over its own tracks. On the other hand, continuation of MBR's service will simply perpetuate continued litigation and non-compliance with contracts or applicable safety laws.

When an owner charges that an operator has trespassed upon its rights and asks the Board to act so that the owner may avail itself of the customary procedures to secure redress, [in this case eviction] the Board must examine those assertions. If they are justified, the Board must take the action requested. *Id.*

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

² As made clear in Pan Am's application, there will be no cessation of service.

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 would have the Board believe that Pan Am is asking it to do the work of the courts by ousting MBR from the Subject Line for "contractual breaches that never happened". [See Protest – Pg.6] That is simply not the case. Pan Am is asking the Board to disallow MBR from hiding behind the Board's jurisdiction in order to do whatever it wants in the absence of an active contract, so that it can exercise its legal rights in evicting MBR where the New Hampshire Court has found there is no contract. See Verdict Form – Adverse App. Exh. 2 – ("... do you find the plaintiffs have proven the existence of an implied contract for the time period of 2012 – 2016 ... Answer: No"). Allowing MBR to continue to operate without a contract 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 leaving Pan Am with no recourse to enforce payment or safety violations other than to seek dimes-on-the-dollar for unjust enrichment claims for no, or partial, payment by MBR. 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.

In the present case, the contract has long expired between Pan Am and MBR, yet MBR is still operating over Pan Am's track while either not paying for its use, or only paying what it sees fit, and while routinely ignoring safety rules and choosing for itself when and which contract terms are in force or not. If the Board fails to act in favor of Pan Am, the message will ring loud and clear to all tenant railroads across the country -- why not adopt the same approach as MBR? The only recourse for the host railroad will be to ask the FRA to enforce safety rules, litigate over compliance with the terms of an expired contract and/or seek new terms and conditions at the Board. But even if the Board sets new terms and conditions, that recourse will not have any impact on the tenant's willful avoidance of safety rules and practices, nor will it necessarily compel the tenant to make timely payments or otherwise comply with at least a course of conduct.

As a glowing example, MBR's complete misrepresentation and/or offensive spin of the Parties' past litigation is telling of future conduct. MBR ignores the safety and financial concerns involved in the litigation and the failure to live up to their own bargained for terms under the operating arrangement. For example, MBR attempts to turn the New Hampshire verdict in Pan Am's favor on its face by claiming victory that the jury found no contract existed (seeing how it expired in 2004 by its own language). MBR totally ignores the fact that it acted unlawful in failing to pay one penny for its use over Pan Am's property for more than four years - similar to a squatter tenant not paying rent to its landlord. MBR's sense of entitlement to Pan Am's property is telling how it would conduct itself if allowed to continue to operate.

Another example is where MBR fails to acknowledge its unsafe practices and liability involving the 2009 crossing accident. Mr. Leishman cites to the fact that the police and insurance providers did not find MBR at fault, but fails to acknowledge to this day, that the Federal Court did find MBR at fault for improperly protecting a crossing by

ignoring a safety/operating rule – period! If the police and insurers were knowledgeable of pertinent railroad operating rules, perhaps the outcome would have been different?

MBR consistently fails to acknowledge the reasons for past litigation and the holdings in the past litigation cases, and instead simply focuses on irrelevant statements of Pan Am's perceived motivations, rather than its own unlawful conduct. This is certain to continue if MBR is allowed to continue to operate over Pan Am property and Pan Am will have no recourse short of never-ending litigation to protect its rights if the Board does not allow discontinuance. MBR should not be allowed to use the Board's jurisdiction to shield it from its financial obligations and its obligation to operate in a safe manner.

In conclusion, Notwithstanding MBR's efforts to distance itself from multiple verdicts finding that Pan Am was correct in enforcing its rights to its property and maintaining safe operations, the bottom line is that in each instance of litigation over the past 15 years Pan Am has prevailed. However, at some point the diversion of scarce resources by Pan Am to legally compel MBR to honor its commitments and operate safely must end. That end point will not be reached unless the Board grants Pan Am's adverse discontinuance petition.

For the foregoing reasons, the Board should grant Pan Am's application for adverse discontinuance.

Respectfully Submitted,



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June 12, 2018

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 12th day of May, 2018, he caused a true and correct copy of the foregoing **REPLY of Boston and Maine Corporation and Springfield Terminal Railway Company** to be electronically served on upon counsel of record for Milford-Bennington Railroad Co. and served upon all other Parties of Record via deposit on the 13th of June, 2018 in the United States Mail chute located at 1700 Iron Horse Park, Billerica, MA 01862 with proper postage prepaid:

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