

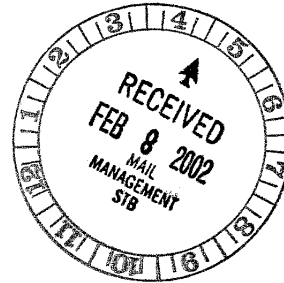
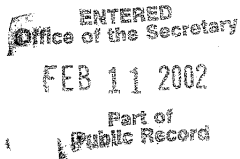


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February 8, 2002

ORIGINAL



Hon. Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

RE: Application of Rymes Heating Oils, for certain determinations and a prescription, all related to competitive access for Petitioner to two rail carriers (Finance Docket No. 34098)

Dear Secretary Williams:

Enclosed please find an original and ten copies of Petitioner's Rebuttal Statement in the above-captioned proceeding, together with Verified Statements of Marla Baldasaro, Jack E. Dodd, James T. Rymes, John A. Rymes (two) and Timothy A. Smith. I am advised that the Board granted my unopposed motion dated January 31, 2002 for an extension of time until today to file this Rebuttal Statement. Petitioner is grateful for that courtesy.

Respectfully submitted,

Ernest J. Ierardi, P.C.
Ernest J. Ierardi, P.C.
Counsel for Petitioner

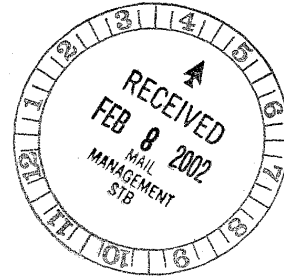
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Before the
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 34098



RYMES HEATING OILS, INC. – PETITION FOR DECLARATORY ORDER

Petitioner's Rebuttal Statement

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February 8, 2002

R555241.2

Before the
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 34098

RYMES HEATING OILS, INC. – PETITION FOR DECLARATORY ORDER

Petitioner's Rebuttal Statement

Background

Petitioner commenced this proceeding by filing a Petition with the Board, the Federal Railroad Administration, New England Central Railroad ("NECR") and Respondent railroads on or about September 11, 2001. Respondents appeared, filed replies and moved for the use of modified procedures.

After preliminary matters, the Board ruled in a Decision served December 31 that modified procedures would be used. It then set a procedural schedule. Under that schedule, Petitioner on January 10 filed its Supplemental Opening Statement adopting its Petition and attached affidavits, submitting verifications by each of those affiants and attaching a verified statement of counsel on the interpretation of "existing . . . shippers' facilities," a term that is important to the second Claim in the Petition. Respondents served their Verified Reply on January 22.

In this Rebuttal Statement, permitted under the Board's procedural schedule and for which the Board granted an unopposed motion for extension of time until February 8, Petitioner rebuts assertions and arguments in Respondents' Reply and urges the Board, once again, that Petitioner is entitled to have the Board determine that NECR may commence service to Petitioner and to have the Board prescribe alternative rail service, namely competitive service between NECR and Respondent Springfield Terminal Railway Company ("ST").

Rebuttal: General

In their Verified Reply, their first and only substantive filing in this proceeding, Respondents admit the inadequate rail service which ST provided to Petitioner over a lengthy period.¹ Respondents do not dispute, with any facts to the contrary, the detailed account in the Petition and its attachments, particularly in Exhibits JED-5 through JED-8, how that deficient service violated time and again the conditions under which ST was obligated to render service to Petitioners and others similarly situated. Instead, Respondents blame others,² blame circumstances of which they were well aware,³ offer erroneous statements as fact⁴ and raise a variety of meritless positions⁵ as to why, notwithstanding their numerous service failures, they should be permitted to go right on rendering deficient service to Petitioner's detriment.

As if an improvement in the quality of its service since the filing of the Petition could overcome a much longer period of service inadequacies, Respondents' Reply trumpets at every turn⁶ a claimed recent restoration of proper service, going so far as to characterize their current product as "exemplary."⁷ Indeed, ST's service this season has been exemplary, if the connotation of that word meaning "typical" or "illustrative" is intended. ST's performance in the current heating season for Petitioner has been marked by a series of snafus and failures -- *even as recent as the current week*, which is

¹ Reply at 6 (service "difficulty", "operational issues", "difficult period"); 10 (service "significantly better" today); 23 ("shortcomings in the past"); 25 ("individual instances ... where the service was not what Guilford intended it to be").

² Reply at 7-8, 9-10, 12, 19, 25-26 (other carriers); 11, 26 (Petitioner).

³ Reply at 7-11, 12-13, 13-14, 24-25 and 25-26.

⁴ Reply at 6, n.5 (Guilford schedule); 6, 13, 24 (siding near Petitioner unchanged, served continuously since '87); 12 (deliveries almost never exceed four cars); 15-16 (Guilford alerts on service problems; Petitioner did not state service failed to meet its needs); 18 (Guilford regularly picks up empties).

⁵ Reply at 7-8 (Conrail breakup); 11-12 (Petitioner's "cavalier approach"); 12-15 (pecking order and switch configuration); 16 (undisputed significant communication); 17-19 (improved service); 19-26 (legal arguments generally).

⁶ Reply at 10 (today significantly better); 11 (service during current season exemplary, Guilford to keep it that way); 17 (high level of service this season); 19 (service now excellent); 22 (current service at high level); 23 (shortcomings no longer obtain; Guilford meeting its service commitments, providing Petitioner excellent service, exemplary, etc.).

⁷ Reply at 11, 23.

altogether too reminiscent of the service failures of last season as detailed in Exhibits JED-5 through JED-8. No better evidence can be offered as to the improbability of ST restoring adequate rail service⁸ than the continued, repeated deficiencies marking recent ST service, Respondents' high-sounding claims to the contrary notwithstanding.

This Board should recognize Respondents' blame-spreading, its misstatements and its ill-founded arguments for what they are, and should conclude that continuing service deficiencies establish that restoration of adequate rail service within a reasonable period of time is quite unlikely. The Board should declare that Respondent ST has failed to meet the conditions prerequisite to exclusive service to Petitioner and that competitive service to Petitioner should commence forthwith. The Board should also find that the facts concerning Petitioner's use of rail service at its Distribution Center do not fit within the term "existing shippers and shippers' facilities," with the result that Petitioner would not be saddled with rail service solely from Respondent ST.

Rebuttal of Respondents' Specific Arguments

Respondents' argument, notwithstanding the headings in its Reply, begins in its "Facts" section, which is essentially a long and painful plea for treating quite ordinary failings, events and circumstances as forces majeures. Hence, Petitioner's rebuttal of specific Respondent Arguments begins with that major theme, moves to some of the particulars of which Respondents' "Facts" complain, and finally addresses legal positions in the "Arguments" section of the Reply.

Force majeure claim

As noted above, the Reply's drum-beating for excusal of its numerous service deficiencies during the Measurement Period⁹ on grounds of force majeure begins early and continues for most of the document, concluding in a one-paragraph section that cites to the TR T&C provisions offering relief on that basis.¹⁰ It is instructive to note, first, the

⁸ See Petition at paragraph 37 and 49 CFR 1146.1(ii) and 1147.1(ii).

⁹ See Exhibit JED-4 attached to the Petition.

¹⁰ Reply at 25-26.

obligation that a party claiming force majeure is under to establish grounds for it and, second, how flimsy are Respondents' claims to that extraordinary form of relief.

Section 9.6 of the TR T&C provides a limited "force majeure" excuse for non-performance of ST's obligations under certain circumstances:

Force Majeure: No party to this Agreement shall be responsible 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 in suppliers, derailments or failure of transportation, communication or power supply.

Respondents attempt to invoke this force majeure defense as an excuse for all of Respondent ST's defaults.¹¹ This attempt cannot avail.

Force majeure, as an excuse for non-performance of contract obligations, is an affirmative defense; the burden of proving the defense falls upon the party asserting it.¹² To sustain this burden, Respondents must establish both that a supervening event, beyond ST's control, occurred, and that this event was the sole proximate cause of the default in service to Petitioner.¹³

Respondents' generalized allegations – that other carriers were to blame in some cases, that Rymes was at fault in others – cannot suffice to make out the defense of force majeure. First, Respondents fail to demonstrate that the alleged acts or omissions of others were the proximate cause of ST's defaults in providing service to Petitioner. The mere assertion that some general circumstance caused service failures, without proof and without reference to the specific service failure claims made by Petitioner, cannot sustain Respondents' burden of proof as to this defense.

Respondents similarly fail to establish the other prong of the defense: that the circumstances cited were indeed "beyond its control." ST was, of course, obliged to apply reasonable diligence in the performance of its duties under the TR T&C. Respondents fail here to prove that the service defaults at issue were beyond ST's control

¹¹ Reply at 25-26.

¹² 17A Am.Jur.2d, Contracts, Section 674.

¹³ 1 Am.Jur.2d, Act of God, Section 11.

through the exercise of reasonable care. Their generalized, and unproven, assertions to that effect cannot establish the affirmative defense of force majeure.

In response to Petitioner's detailed listing of numerous events constituting a continuous stream of violations of Respondent ST's obligations under the TR T&C, Respondents' Reply simply asserts "of course, most of the difficulty was occasioned by circumstance beyond Guilford's control."¹⁴ It then rolls out a laundry list of generalities, making no effort to tie any of them to even one specific service failure. It even includes in this list so-called "short-term difficulties"¹⁵ of Respondents' own making, omitting to say just how these difficulties eluded their control. A one-sentence conclusion to this listing claims that "no basis for revoking Guilford's exclusive right to serve Rymes has been shown,"¹⁶ as though Petitioner were somehow obligated to establish that Respondent ST was not entitled to a force majeure excuse.

At the risk of giving undue credit to an argument so incredible on its face, Petitioner here lists in outline form the most obvious holes in treating each of the generalities Respondents proffer as an underpinning for a force majeure claim:

- CSXT/NS division of Conrail properties.¹⁷ That the demise of Conrail and distribution of its properties would generate transition challenges in the Eastern rail industry was apparent. ST should have developed a gameplan to deal with them, not let their impact fall through to its customers and then respond with too little too late. In any event, an examination of Exhibit JED-4 will show that nearly three-quarters of the loaded cars that Petitioner purchased during the Measurement Period were routed via White River Junction, not via ST's marshalling Yard at East Deerfield. Since the cars travel, when thus routed, from Canada over the Canadian National Railway

¹⁴ Reply at 25.

¹⁵ Reply at 26.

¹⁶ *Id.*

¹⁷ At the opening of their discussion, Respondents complain of experiencing extensive service failures "[b]etween mid-1999 and early 2000;" the ensuing discussion identifies no other period. The Petition and its accompanying Verified Statements allude to ST service problems in that time-frame, but the First and Third Claims of Petitioner are based on the Measurement Period, October 1, 2000 through March 31, 2001 (its Second Claim refers to a much earlier period). If for no other reason, then, this portion of the Reply has no relevance to Petitioners' claims.

and NECR to White River Junction, there would be, and there was not, any adverse effect to this traffic as a result of the Conrail breakup.¹⁸

- Repair of Rymes facilities. Since it was much more in Petitioner's interest than that of Respondent ST to bring this outage of facilities to a rapid conclusion, Petitioner made it a top priority and exerted strong and continuous efforts to accomplish that objective.¹⁹ ST was well aware of the outage and yet offered no assistance to Petitioner. Only when Petitioner exhausted its list of contractors that could do the work, and made the request that ST itself do it, did ST suggest someone else.²⁰ The outage caused little if any problem for ST; if anything, it provided a needed respite from an unbroken succession of four-week periods, since the start of the Measurement Period, in which ST's service failures exceeded the standard prescribed in the TR T&C.²¹
- Time constraints on ST operations. ST knew the prevailing practice of railroads and the circumstances of serving on the Conn River Line when the TR T&C were formed. The ICC opinion reveals no indication that ST then objected to the conditions of service on grounds of impossibility or unusual difficulty. In fact, the development of the TR T&C indicates that ST's predecessor agreed to the operating arrangements in Article 5 before the ICC had to impose the TR T&C in its February 1990 order.²² Respondents nowhere allege that they ever sought redress under the provisions of TR T&C Section 5.1, which plainly gives them a voice in scheduling and offers them protection from discriminatory actions of the dispatching carrier. ST has had plenty of time to adapt to the circumstances of service on this line; that it would raise them as an excuse for its inadequate performance says more about the attention of its management to customer service, than it does about circumstances beyond its control.

¹⁸ See attached Verified Statement of Jack E. Dodd, para. 1.

¹⁹ See attached Verified Statements of James T. Rymes, paras. 6 through 9 and Jack E. Dodd, para. 5.

²⁰ See attached Verified Statement of James T. Rymes, para. 7.

²¹ See Exhibit JED-9 attached to the Petition; *cf.* TR T&C § 1.3.3.

²² National Railroad Passenger Corp., 6 I.C.C. 2d 539, at 554-555, 1990 LEXIS 52, at 34-36 (1990).

- Claremont Junction switch configuration. This is another condition well known to ST when the TR T&C were first imposed. Notwithstanding that (a) the southbound ST train can more readily negotiate this switch configuration and (b) Respondents claim regular pick-up of Petitioner's empty cars,²³ Exhibit JED-7 contains several instances in which that train either omitted to enter Petitioner's track to pull empties that had been noticed to ST or entered and placed loaded cars but failed to pull empties of which it had notice. The attached Verified Statement of Jack E. Dodd highlights these failures.²⁴ Respondent ST's service failures simply cannot be attributed to switch configuration.

Force majeure is not intended to be an every-week excuse for one's poor performance, but a temporary relief from one's obligations for an unusual, unanticipated circumstance wholly outside the control of a contracting party. Respondents' argument on force majeure fails to meet this test; it is vacuous. It warrants no credence from this Board.

Current season service claim

Next to their claim for entitlement to force majeure protection, Respondents' repeated assertions that ST's service problems are behind it and the level of service to Petitioner is now excellent are perhaps the most baseless position in Respondents' Reply. Although ST has had less Rymes traffic to handle - - due both to milder weather and Petitioner's use of alternate transport offering greater reliability, ST service problems this season continue apace, including the latest no more than *48 hours* before this Rebuttal Statement is being filed.²⁵

ST's service to Rymes resumed in November 2001.²⁶ In that month and in each of the other three months to date in the current heating season, Petitioner has documented at least one service failure by ST.

²³ Reply at 18, para. 1, second sentence.

²⁴ Attached Verified Statement of Jack E. Dodd, paras. 2 and 3.

²⁵ See Verified Statement of Marla Baldasano.

²⁶ See attached Verified Statement of Jack E. Dodd, para. 4.

On November 5, an ST representative called to say it was bringing a car to Petitioner's Distribution Center that night.²⁷ Petitioner's manager dispatched an employee to look for it and, when it failed to arrive, dispatched an employee each following day until it did arrive four days later.²⁸ While Respondents' Reply claims that the car "in fact was not received from NECR until November 8,"²⁹ a check of the car's movement history in the records of the carrier moving the car to the interchange point with ST revealed that the car was delivered in interchange to Guilford on the evening of November 4³⁰ (the day before ST's call to Petitioner). That date, rather than one four days later, certainly squares better with the implication of that call that ST had the car and was delivering it that night to Petitioner.

In December, ST misplaced a car, consigned to another shipper, on Rymes unloading track.³¹ Because of the position in which this car was left, the limited capability of Petitioner to move cars around³² and the design of Petitioner's facility for a specific unloading procedure, considerable time and effort by a group of Petitioner's employees (including its area manager) was required to move the misplaced car to another track for removal and to free up Petitioner's own cars for unloading. While it is possible that ST may be able to fault an interchanging carrier for improper marshalling of this interchanged traffic, ST had responsibility for the delivery to Petitioner and obviously did not confirm the appropriateness of the interchange group of cars before departing White River Junction.

In early January, an ST representative called Petitioner's attention to what he said were eight loaded cars consigned to Rymes that were located at an interchange some distance from Petitioner's Distribution Center.³³ Petitioner's manager responsible for propane movement could not confirm that as many as eight cars were on order, so he

²⁷ Attached Verified Statement of James T. Rymes, para. 4.

²⁸ Attached Verified Statement of Timothy A. Smith, para. 9.

²⁹ Reply at 17. No basis for this claim is offered in the Reply.

³⁰ Attached Verified Statement of Jack E. Dodd, para. 4.

³¹ See attached Verified Statement of Timothy A. Smith, paras. 10 through 13.

³² As the Reply at 19 notes, Petitioner has a trackmobile that can move rail cars. While that vehicle is sufficient for *its* work, it is not a locomotive and cannot be expected to handle readily misplaced cars in the position in which this one was left.

³³ Attached Verified Statement of Timothy A. Smith, para. 14.

requested his suppliers to verify cars shipped to Petitioner since the start of the season.³⁴ This lengthy process could also not confirm that eight cars should be approaching Petitioner's facility, so the manager dispatched the area manager to investigate.³⁵ En route to the interchange point, the latter was called by ST with word that the eight cars were in fact empty.³⁶

Later that month, two days elapsed without an ST acknowledgment of Petitioner's faxed release of a group of empty cars. When another day went by after a reminder to ST, Petitioner's area manager called ST and heard the comforting response that ST was preoccupied with attending to other customers. After more time elapsed, the manager again called, whereupon the ST representative had to admit the misplacement of the original faxed releases.³⁷ Despite these office failures, the ST train crew did seize the initiative and remove the empties, although it had no release form or other necessary documentation - - a questionable practice.³⁸

Also in January, it became apparent to Petitioner's Claremont area manager that information about a mailbox for ST trains, placed at the unloading track, had not been communicated to ST train crews.³⁹ The mailbox is important because it serves as the backup for alerting train crews to the release of empty cars and provides them the needed documentation for those cars.⁴⁰ Through experience, Petitioner has learned that train crews are not always notified by the ST office of Petitioner's release of empty cars through the established fax/acknowledgment procedure.⁴¹ This episode, and indeed the need for the mailbox in the first place, illustrate a breakdown of communication within the ST organization, not to mention the difficulty Petitioner is having in making clear to ST the importance to Petitioner of prompt turn-around of empty cars.

³⁴ Verified Statement of John A. Rymes, para. 7.

³⁵ *Id.*, paras. 8 and 9.

³⁶ *Id.*, para. 9; attached Verified Statement of Timothy A. Smith, para. 15.

³⁷ Attached Verified Statement of Timothy A. Smith, paras. 16-18.

³⁸ *Id.*, para. 19.

³⁹ *Id.*, paras. 21 and 22.

⁴⁰ Verified Statement of Marla Baldasano, para. 6.

⁴¹ Attached Verified Statement of Timothy A. Smith, para. 20.

Only two days ago, on Wednesday, February 6, ST managed yet another service failure, one which exemplifies its inattention to the prompt removal of Petitioner's empties and its apparent policy of not notifying Petitioner when it will not make a schedule commitment.

On Wednesday four empties were awaiting removal by the ST train that afternoon or evening.⁴² ST had been notified of them through the agreed procedure and, in addition, as a backup in case that notification had not been relayed to the train crew, copies of all documentation needed to identify and remove the empties was placed in the mailbox at the Distribution Center's track.⁴³ No call was ever received from ST about it, but the train never showed and Petitioner's employee had to call the ST's representative the next morning for an explanation.⁴⁴ It was clear that he was uninformed about the omitted removal and it is also plain that the train was in the vicinity of the Distribution Center, yet failed to stop there.⁴⁵

While Petitioner and virtually the entire commercial world has learned to carry on service to customers in the face of temporary computer failures, evidently that know-how, or motivation, has not reached the ST.⁴⁶ Efforts by the called ST representative to assure the railroad's computer is now up and running with the Rymes information in it⁴⁷ are appreciated, but the net result of this latest in a long string of ST service failures regarding empties is that four cars have been delayed at least two days in their return. This costs Rymes money in lengthened car cycle times with its suppliers, it costs Rymes employee services that could otherwise be devoted to useful work and it underscores (if any underscoring be needed at this point) that Petitioner simply cannot rely upon adequate service from Respondent ST.

As unsatisfactory as ST's "service" continues to be, this section of Petitioner's Rebuttal Statement is not intended as an extension of the Petition's inescapable (and essentially unchallenged) showing that during the Measurement Period Respondent ST

⁴² Verified Statement of Marla Baldasano, paras. 2 through 4.

⁴³ *Id.*, paras. 2 and 4 through 7.

⁴⁴ *Id.*, paras. 8 and 9.

⁴⁵ *Id.*, para. 10.

⁴⁶ *Id.*

clearly and continually, over a long period of time, violated the terms which the I.C.C. established for the service ST must render to shippers on the Conn River Line. On that basis, Petitioner is entitled to the competitive service the Commission prescribed as the remedy if those service obligations were not met. While they tend to show a continuing pattern of failure and are extremely frustrating to Petitioner, the service deficiencies noted in this section are intended to show that Respondents' repeated claims that it is now rendering excellent, even exemplary, service are nothing more than self-delusion -- a pipedream.

Other claims: erroneous statements of fact

In contrast to Petitioner's extensive and detailed factual presentation herein, Respondents essentially rely on the "Facts" section of its Reply, to which verification is offered by one senior officer of both Respondents. That one individual, however knowledgeable about railroading generally, could command all the particulars of service to an individual customer like Petitioner is quite doubtful, but is made the more so by errors of fact in the Reply itself. Notable examples follow:

- (1) Reply at 6, note 5. The ST runs on the Conn River Line on Sunday and has done so for over a year.⁴⁸
- (2) Reply at 6, 13, 24. The siding at Claremont Junction has been changed since 1987 and has not been served continuously since that year.⁴⁹
- (3) Reply at 12, first full para. In fact, deliveries to Petitioner's Distribution Center have frequently contained more than four cars.⁵⁰

⁴⁷ *Id.*, para. 11.

⁴⁸ Attached Verified Statement of Timothy A. Smith, para. 2.

⁴⁹ See attached Verified Statement of Jack E. Dodd, para. 6; Verified Statement of John A. Rymes I and attached Verified Statement of James T. Rymes, paras. 10 and 11.

⁵⁰ See Exhibit JED-4, column headed "#LD. CARS PLACED". For the six months of the Measurement Period, there were no fewer than nine instances in which more than four cars were delivered, not counting the two instances the Reply cites.

(4) Reply at 15, last full sentence. Guilford personnel do not in fact alert Petitioner as a matter of course where there are foreseeable service problems, the incident this very week being a typical example of Petitioner having to inquire about the problem after the fact.⁵¹ This absence of any notice of deficient service is a longtime irritant in the Rymes/ST relationship and is thoroughly documented in the Exhibits attached to the Petition.⁵²

(5) Reply at 16, first full paragraph, first sentence. A Guilford representative maintaining contact with Rymes about its business is simply preposterous.⁵³

(6) Reply at 16, first full paragraph, last sentence. President Jim Rymes gave a full account of problems to an ST representative who inquired in the course of a discussion on rates.⁵⁴

(7) Reply at 17, second sentence. This claim has no substance to it.⁵⁵

Other claims: northbound service

In a passage complaining of the configuration of the switch by which Petitioner receives rail cars, Respondents make much of the difficulty of serving Petitioner on northbound runs.⁵⁶ Petitioner has sought to obtain service on this northbound leg of ST's Conn River Line train,⁵⁷ but has always been told by ST that it is too difficult. Recently,

⁵¹ See Verified Statement of Marla Baldasano.

⁵² Exhibits JED-3, para. 13 (top of final page); JLJ-1, para. 5; JTR-1, para. 6; MSR-1, para. 5. Verification of these exhibits was included in Petitioner's January 10, 2002 filing.

⁵³ Exhibit JTR-1 attached to Petition, para. 6, last two sentences; Verified Statement of John A. Rymes II, paras. 1 and 3.

⁵⁴ Attached Verified Statement of James T. Rymes, paras. 1 and 2.

⁵⁵ See, e.g., attached Verified Statement of Timothy A. Smith, para. 6; Verified Statement of Marla Baldasano.

⁵⁶ Reply at 14-15.

⁵⁷ Note that the TR T&C define the service to be provided as "in each direction." § 1.3.2.

as part of a shipment to its neighbor, ST offered to deliver and Petitioner received a loaded car from the northbound ST train. To make it easier for ST to undertake this assertedly difficult operation, Petitioner volunteered to pick up the car from its neighbor's track; however, to its surprise, the car appeared on its own unloading track.⁵⁸ Petitioner is grateful for this service, but must point out that, in fact, its being served on the northbound run of ST's train appears eminently feasible.

Other claims: communications between ST and Rymes

Some of the Reply's most extensive citations may be found in its passage on communications.⁵⁹ The Board would do well to examine carefully Respondents' citations to the Exhibits attached to the Petition, particularly the full exhibit in each instance. These clearly give the lie to claims being made here that Respondent ST has extensively and fully communicated with its customer. The full text of these Exhibits, now Verified Statements,⁶⁰ plainly indicates how difficult "communication" with ST has been. Equally revealing are recent Statements of Petitioner's president and manager of product movement.⁶¹

Other claims: Three-day median time lapse

As noted in the Petition and attachments, the expeditious handling of empty cars is important to the economics of Petitioner's business. It is also a portion of ST's rail service that has been particularly deficient.

Among their claims for improved service in the current heating season, Respondents advance a claimed median lapse of time of three days from notification that

⁵⁸ Verified Statement of John A. Rymes II, paras. 4 and 5.

⁵⁹ Reply at 15-16.

⁶⁰ Petitioner's January 10, 2002 filing converted these exhibits to Verified Statements.

⁶¹ See attached Verified Statements of James T. Rymes, paras. 4 and 5; Verified Statement of John A. Rymes II, paras. 1 through 3.

an empty is available until that empty is delivered in interchange.⁶² In the limited time since learning of this claim, Petitioner has not been able to verify it. Nonetheless, a median three-day period, even if true, is simply too long.

A three-day median lapse of time does not identify how many if any cars were interchanged in three days, only that there were as many cars handled in excess of three days as there were in less time. Considering that notification occurs in most instances the day of or day before a scheduled southbound ST train (occasionally two days before)⁶³ and the empty car need then travel less than 50 miles to the customary interchange point,⁶⁴ three days should be, not the median, but the maximum time lapse until interchange.

Thus, even if substantiated, Respondents' three-day median lapse time claim for the handling of empties from Petitioner's Distribution Center insures no special achievement in service improvement. Respondent ST really needs to grapple, among other things, with developing information on and management techniques with respect to its interchange points with carriers returning Rymes cars to their points of origin. ST evidently has at Brattleboro, VT, a main interchange point, a completely inadequate system for information on and management of empties.⁶⁵ Until situations like that are corrected, declining lapse time for *all* Rymes empties, not just a median time, will be more accidental than the result of better performance.

Other claims: "acceptable" delivery

The Reply asserts that delivery of loaded cars to either track at the Distribution Center is "acceptable" since Petitioner can move cars with its trackmobile.⁶⁶ To adapt an

⁶² Reply at 18.

⁶³ Rymes makes every effort to empty cars in anticipation of a scheduled southbound ST train. Hence, notification is seldom sent after a train has left Claremont; rather, it will be sent on that day ahead of its arrival or on the preceding day. Only if a car is emptied, and notification given, on a Saturday (train due on Monday), would two days intervene between notification and a scheduled train's arrival.

⁶⁴ Reply at 18, n.9.

⁶⁵ See attached Verified Statement of Timothy A. Smith, paras. 6 through 8.

⁶⁶ Reply at 19, first paragraph.

analogy offered by Respondents on the same page,⁶⁷ Respondents' assertion is akin to saying that mail delivered, not in the mailbox, but in the garage or in a tool shed is sufficient. As noted above, the trackmobile is a vehicle of limited capability and Petitioner not infrequently receives shipments of five cars or more at a time. For Petitioner to devote its resources to straightening out incorrect actions of ST is an imposition, and one requiring little information or effort on ST's part to correct.⁶⁸

Claim that Petitioner lacks standing

The Trackage Rights Terms and Conditions state that "This Agreement . . . is not intended to inure to the benefit of any party not a party to this Agreement." TR T&C § 9.4. In other words, to be precluded from standing as one not intended to benefit from the agreement, one must be: (1) a party; and (2) not a party to the Agreement. All persons or entities, except for parties not a party to the TR T&C, thus retain standing. As an examination of the use of the term "party" in the ICC opinion and District of Columbia caselaw reveals, "party" is used to refer to those persons or entities involved in the prior proceedings of the ICC. In this usage, the "rest of the world" – Petitioner included – is not denied standing by the TR T&C.⁶⁹

An examination of the TR T&C and the ICC's 1990 decision suggest that "parties" refers to the parties to the proceeding, and that the statement "not inure to the benefit of any party not a party to this Agreement . . ." at most precludes only non-contracting parties to the proceeding, and not outside individuals, from asserting standing.

⁶⁷ Reply at 19, last full paragraph.

⁶⁸ See attached Verified Statement of Timothy A. Smith, paras. 3 through 5.

⁶⁹ A common sense analysis intuitively reveals why this interpretation must be so. If parties to a TR T&C could, by operation of a single provision, entitled "Miscellaneous," bar any complaint by all potential victims of their non-compliance with it, such a power would create a dangerous potential for abuse, and would undermine the foremost purpose of ICC regulation – protecting the public interest -- by disallowing a member of that public from complaining of the signatory parties' non-compliance.

Trackage Rights Agreements are generally contracts between two or more railroads for use of one railroad's trackage by another. In this type of contract, the parties thereto are clearly identified at the beginning of the document.

The TR T&C list several entities which could be construed to fall within the term "parties": Amtrak, to whom the CRL was conveyed; B&M, from whom the line was conveyed; CCR (an intervenor desiring connections with both CV and B&M); CV, to whom Amtrak conveyed its interests in the CRL; GMRC, which connects with the CRL at Bellows Falls, VT; and ST, which connects with the CRL at Charlestown, NH.

Similarly, the ICC's 1990 decision employs the term "parties" to encompass a broader range of entities, using it to refer generally to parties to the proceeding.⁷⁰

Furthermore, the ICC's diction notwithstanding, the TR T&C as a practical matter assign significant benefits and burdens to parties not parties to that document, including Amtrak and other rail carriers.⁷¹ Equitable principles demand standing for these entities, who notwithstanding their absence as parties to the TR T&C are nonetheless significantly affected by that document's enforcement or violation. Thus, where parties explicitly barred by the TR T&C from adjudicating their grievances under it should nonetheless be allowed to do so, non-parties such as Petitioner, who are not similarly barred under the TR T&C, should be able to bring their claims all the more freely.

Under the governing District of Columbia law, parties to an underlying proceeding are referred to generally as "parties" for purposes of determining standing.

⁷⁰ National Railroad Passenger Corp., 6 I.C.C. 2d 539, at 540 (1990), 1990 ICC LEXIS 52, at *4 (1990) ("the parties consummated the transactions" as referring to Amtrak, B&M, and CV) ("1990 Decision" or "1990 opinion").

⁷¹ See, e.g., TR T&C §§ 3.5 (B&M must pay charges accruing on its cars to owners); 4.2 (additions to minimize interference with Amtrak's operations); 5.1 (operation of equipment of Amtrak and other line users).

The TR T&C are, by their express terms, to be interpreted under the laws of the District of Columbia. TR T&C § 9.9. While no District of Columbia case could be found defining “parties” generally with respect to declaratory orders, cases involving the STB’s review of prior orders under 28 U.S.C. § 2344 are instructive. In this analogous context, the District of Columbia Circuit Court has held that where the ICC/STB reviews an agreement, parties with standing include those which were previously “parties to any proceedings before the agency preliminary to issuance of its order . . . [and so the ICC] must read ‘party’ as referring to a party before the agency” *Simmons v. Interstate Commerce Commission*, 716 F.2d 40, 42 (D.C. Cir. 1983). Therefore, not having been involved with this proceeding prior to the instant one, Petitioner is not a “party” as that term is used in the TR T&C, and thus is not denied standing by it.

Therefore, whether the definition of “parties” derives from examination of the ICC opinion itself, or principles articulated in District of Columbia caselaw, Petitioner is not a “party,” for purposes of the TR T&C, and cannot be denied standing to initiate this proceeding under its terms.

Petitioner is the logical party to bring this proceeding. As the ICC itself recognized, determination of a railroad’s “compliance or noncompliance with [a TR T&C] condition will depend on shipper evidence.”⁷² Thus, regardless of the identity of the petitioner, customers such as Rymes, which are the parties ultimately aggrieved by noncompliance, would be called upon to furnish the evidence demonstrating it. Respondents’ suggestion that Petitioner lacks standing to bring this proceeding yields the illogical result that, although Rymes possesses the only credible evidence to prove

⁷² National Railroad Passenger Corp., 6 I.C.C. 2d at 533, 1990 ICC LEXIS 52, at *6 n. 6.

Respondent ST's noncompliance and its injury to Rymes' interests, Petitioner nonetheless is barred from vindicating those interests in its own name.

The ICC must be presumed to have contemplated a vehicle for an aggrieved shipper to vindicate its interest where it goes to the trouble of marshalling the evidence of noncompliance. Any other result is absurd. This proceeding, in which Petitioner extensively detailed ST's violation of its service obligation over a lengthy period and asks simply that the Board declare what the TR T&C direct in such circumstances (competitive service), is an appropriate vehicle for the vindication of both Petitioner's interest and the ICC's clear intention.

Even if Petitioner lacks standing as a petitioner for a declaratory order in this proceeding, Petitioner nonetheless has standing to assert its claims as complaints made under 49 U.S.C. § 11701. Under that statute, any entity believing itself to be aggrieved by a rail carrier's violations may file a complaint with the Board setting forth the facts which comprise the subject matter of the violation.⁷³ Formal reference to the statute is unnecessary; the allegations alone are sufficient to authorize the Board to act upon the complaint under the statute's authority.⁷⁴

In the instant case, Rymes has alleged facts supporting multiple violations of the ICC's order in contravention of the ICC's statutory authority. Furthermore, Rymes has alleged and demonstrated the way in which it is "aggrieved" by these violations. Therefore, having alleged facts to support its claim that the ICC's 1990 opinion and the attached TR T&C have been violated and to support its belief that it is aggrieved hereby, Petitioner's claims – and its standing – are sufficient under 49 U.S.C. § 11701 to sustain this proceeding.

⁷³ 49 U.S.C. § 11701(b); *FTC v. Klesner*, 280 U.S. 19 (1929).

⁷⁴ 49 U.S.C. § 11701; *Chicago v. United States*, 274 U.S. 29 (1927).

Relief under Parts 1144, 1146 and 1147

Petitioner never sought relief under Part 1144 of the Board's regulations, nor sought to establish facts that would entitle it to such relief. It need only be added that Respondents overstate their claimed overtures to Rymes since the Petition was filed.⁷⁵

Petitioner does claim entitlement to relief under Parts 1146 and 1147 in the Second Claim of its Petition. The facts it asserts therein do meet the requirements of those Parts. That the Board's consideration of Petitioner's evidence now will occur some months after the events therein took place is regrettable. However, Petitioner urged prompt relief from the outset of this proceeding, moving the Board to adopt a procedural schedule when three months passed without one.⁷⁶ The service failures of Respondent ST in relation to Petitioner have been so extensive, moreover, that assembling, organizing and presenting them constituted a major effort.

Although it concedes no obligation to do so in order to remain entitled to the relief it seeks, Petitioner has endeavored to present instances of continuing violation by Respondent ST of its obligations under the TR T&C. These demonstrate that little has changed in the way of ST "service" to Petitioner, Respondents' claims to the contrary notwithstanding. The record of ST's performance during the Measurement Period,⁷⁷ augmented by the cited continuing service deficiencies, speaks directly to the portions of Parts 1146 and 1147 which require a showing that the "incumbent carrier [is] unlikely to restore adequate rail service ... within a reasonable period of time."⁷⁸ That record, which Respondents are careful never to address except indirectly and by way of generalities, can hardly be characterized as showing "occasional service shortcomings."⁷⁹

Existing shippers and shippers' facilities

Respondents' Reply seeks to undercut the Petitioner's Second Claim for relief by asserting that Respondent service to other facilities at Claremont, NH during and since

⁷⁵ See attached Verified Statement of James T. Rymes, paras. 1 through 3. Petitioner's counsel received one inquiry from Respondents' counsel.

⁷⁶ Petitioner's Motion to Expedite Procedural Schedule and Renewal of Motions to Make Answers More Definite, filed December 14, 2001.

⁷⁷ Exhibit JED-4 to the Petition.

⁷⁸ 49 CFR 1146.1, 1147.1.

⁷⁹ Reply at 22.

the Conveyance Period shows that Petitioner is using existing facilities. This argument is built on erroneous facts, an artifice of Respondents' own making and a contorted interpretation of the TR T&C.

Respondents allege that the trackage Rymes built in the mid-1990s connects "to a pre-existing rail siding that in turn connects to [the Conn River Line]."⁸⁰ They describe this siding as one that "has existed since well before 1987 and has been served continuously since at least 1987."⁸¹ These statements are inaccurate. As both paragraph 32 of the Petition and paragraphs 2 and 3 of Exhibit JTR-1 (both cited by Respondents⁸²) make clear, the rail siding in question (which is more extensive than that built by Rymes) is new as of the mid-1990s, having been installed at approximately the same time as the tracks on Rymes' property.⁸³ Only a short segment of track extending from this siding to the switch at the main line predates the mid-1990s.

As is only too clear from Verified Statements of Petitioner's president and manager of product movement,⁸⁴ Respondent ST or its predecessor evidently engaged in a ruse to establish "rights" to serve customers along the Conn River Line, including a facility located at Claremont Junction near where Petitioner's Distribution Center is now located. These efforts undercut any claim Respondents might otherwise be able to show concerning "existing ... facilities."

Using their inaccurate history of rail facilities at Claremont, NH, Respondents then reconstruct as well the meaning of the TR T&C to try to show that Rymes fits within the term "existing shippers and shippers' facilities" as used in the TR T&C.⁸⁵ They do so by suggesting that it is rail sidings, rather than shippers and their facilities, which receive and tender rail shipments. With grammatical interpretations having nothing to do with railroading, they ignore the obvious: That it is "industries ... which received or tendered

⁸⁰ Reply at 6.

⁸¹ *Id.*

⁸² *Id.*

⁸³ See also attached Verified Statement of Jack E. Dodd, para. 6.

⁸⁴ See Verified Statement of John A. Rymes I; attached Verified Statement of James T. Rymes, paras. 10 through 11.

⁸⁵ See TR T&C §§ 1.3 and 1.3.1; Reply at 23-24. The word "existing" here refers to being in existence during the twelve months prior to the Conveyance Date, that date being September 9, 1988.

rail shipments” during the relevant time period and their “facilities,” if located at rail sidings, that similarly “received or tendered rail shipments” during that same period. Since, as Respondents concede, Rymes was not a shipper during that relevant period, nor were its facilities in place until the mid-1990s, there is no way that Rymes can be either an existing shipper or be located at facilities existing during the latter part of the prior decade. Respondents’ attempt to link Rymes’ mid-1990s Distribution Center with service pre-dating the Conveyance Date because other sidings and facilities were located elsewhere in the area distorts the words of the TR T&C and defies sensible use of commonly understood terms.

Under Section 3.1 of the TR T&C, Respondent ST’s exclusive privilege of serving customers on the Conn River Line extends only to (1) existing shippers and shippers’ facilities located on that line as of the Conveyance Date and, after that, to (2) new shippers located at such existing facilities, i.e., at facilities dating from the Conveyance Date. Since Petitioner does not qualify under either (1) or (2), Respondent ST’s exclusive does not apply to it. Rather, Petitioner is entitled to the competition described in Section 1.4 since it meets the tests in subdivisions (a) and (b) of that Section.⁸⁶

Episodic, unintentional service shortcomings

In this argument, Respondents stress that they have not failed to “offer” three-day-per-week service.⁸⁷ Such a claim is beside the point. Section 1.3 of the TR T&C, as well as its subdivisions, speaks in terms of *providing* such service,⁸⁸ not simply listing it somewhere and then routinely failing to follow through. Similarly, Respondents’ reliance on the ICC’s distinction between an obligation to “maintain” and one to “make

⁸⁶ As argued in the Petition’s First Claim, and elsewhere herein, Petitioner is also entitled to that same competition since it meets the test of subdivision (c).

⁸⁷ Reply at 24; italics in original.

⁸⁸ “. . . provided that B&M makes available a minimum three day per week service B&M must . . . ensure their needs are met up to three day per week service” (§1.3); “three day per week service’ shall mean the provision of . . . service . . . at least three times per week . . .” (§1.3.2); “[competitive service] upon B&M’s failure to make available three day per week service . . .” (§1.3.3); “[competitive service to shippers] to which B&M does not provide minimum three day per week service . . .” (§1.4 (c)) (emphasis supplied).

available”⁸⁹ service is unavailing; the Commission was clearly concurring that service need not be maintained where customers don’t need it. No such circumstance obtains here.

Respondents’ concluding paragraph on this point shows that their argument amounts to little more than a desperate attempt to play on words: apparently, so long as it’s “offered,” service may be as bad as can be – it’s still service.

The essential point to be noted here, one that should be obvious, is that Petitioner is *not* complaining about occasional, accidental oversights in performance. Petitioner’s proof, essentially ignored in Respondents’ Reply, presents an extended, repetitive series of service failures amounting to a pattern of continual violation of the standards under which ST is supposed to be serving Petitioner. *That* is where the problem lies, not in “episodic, unintended shortcomings in service.”⁹⁰ Whatever the TR T&C can be claimed to mean, they surely do not condone a protracted period of deficient service in which Respondent ST meets its prescribed service obligation only once in six months.⁹¹

Just Compensation Claim

The Reply makes much of the point that ST’s predecessor was afforded “rights” to serve customers along the Conn River Line as compensation for its forced sale of that line to Amtrak in the late 1980.⁹² Petitioner nowhere disputes that, in the documents flowing from New England railroad reorganization during that period, the incumbent carrier was afforded the privilege of maintaining service to certain customers. What is equally clear, however, is that these “rights” were not *carte blanche* to serve adequately or poorly as the railroad chose. Section 1.3 of the Trackage Rights Terms & Conditions (“TR T&C”)⁹³ exacted specific conditions as part of the arrangement, concluding with the admonition that failure to comply with the conditions may open the line to competitive service. If, then, the conditions are not met, the “rights” can be terminated.

⁸⁹ 6 I.C.C. 2d 539, 542; 1990 I.C.C. LEXIS 52 at ____ (1990).

⁹⁰ Reply at 1.

⁹¹ Petition, at ¶¶ 22 and 23 and Exhibit JED-9.

⁹² See, e.g., Reply at 3-4; “deprivation of Guilford’s rights” (p.25); p.26.

⁹³ Appendix to 6 I.C.C.2d 539 (1990); 1990 I.C.C. LEXIS 52 (1990).

In fact, absent a force majeure showing, they *are* terminated, since the TR T&C state that the competing railroad “shall be permitted to commence service.”⁹⁴

The authority to serve which the TR T&C afforded ST’s predecessor (and, by succession, ST) is no more than a privilege terminable if the conditions in which it was wrapped are fulfilled.⁹⁵ Here, they were amply fulfilled (a failure for every four-week period of Distribution Center operations in the 2000-01 heating season save one)⁹⁶ and, by the express terms of that privilege, competitive service commences “unless such failure is excused by [force majeure].”⁹⁷

A fair reading of that “unless” clause is that each such failure must be excused by force majeure. In fashioning their Reply as a series of generalizations about events and circumstances allegedly beyond their control, Respondents seek to avoid the detailed specification of ST’s failures which Petitioner has set out in its Petition and Exhibits JED-3 through JED-8. Indeed, their frequent references⁹⁸ to “most of the fault,” “largely...due to circumstances beyond Guilford’s control,” “mostly...due to circumstances beyond Guilford’s control,” “most of the difficulty,” etc., should be recognized as carefully chosen generalized expressions which in reality advance as force majeure claims no more than something over 50% of the failure instances. That hardly qualifies as refutation of the numerous instances of service failures Petitioner has cited, even were this blame shifting to be accepted.

Conclusion

Operating under the modified procedures of the Board, which restrict Petitioner’s ability to make the case for a railroad non-compliance that The Interstate Commerce Commission envisioned in its 1990 order,⁹⁹ Petitioner has nonetheless presented to the Board overwhelming evidence that ST has repeatedly and over a lengthy period, violated

⁹⁴ TR T&C, §1.3.3. See also § 1.4.

⁹⁵ “If B&M [ST’s predecessor] does not make available three-day per week service, then B&M loses the right to provide exclusive service and will then be subjected to competition from CV [NECR’s predecessor].” 6 I.C.C. 2d 539, at 543 (1990); 1990 I.C.C. LEXIS at 11 (1990).

⁹⁶ Petition ¶¶ 22 and 23 and Exhibit JED-9.

⁹⁷ TR T&C, §1.3.3.

⁹⁸ See, e.g., Reply, pp. 19, 22, 25.

⁹⁹ 6 I.C.C. 2d 539, at 543, n.6 (1990); 1990 LEXIS 52 at 10, n.6 (1990).

the conditions under which the Commission placed it. Instead of finding one or two instances of violation, Petitioner's evidence shows violation of ST's obligations in every four-week period save one for which Petitioner could receive ST's "service." And, contrary to Respondents' unsupported puffing in their only substantive filing herein, that service continues to be inadequate.

Rather than dispute Petitioner's extensive and detailed proof, Respondents admit past deficient service, but blame others and seek refuge in a defense they have not established and which, in any event, is hardly capable of excusing the week-after-week failures in service for which Respondent ST is responsible.

Similarly, Respondents claim that ST's numerous service failures constitute but "episodic, unintentional shortcomings", ignoring the plain wording of the obligations imposed on it that the carrier "makes available" the requisite service and meets the "provision of. . .service" described. It is not enough to issue a schedule and not fulfill it.

What this proceeding comes down to is whether ST has lived up to its obligations with respect to Rymes, or it hasn't. The proof can be interpreted in no other way than that it has not.

Petitioner asks only for the simple remedy that the Commission clearly provided for failure of the railroad to meet those obligations: competitive service. Respondents themselves favor that concept¹⁰⁰, at least where it does not adversely affect them.

The Board should declare that Petitioner is entitled to it.

February 8, 2002

Respectfully submitted,

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¹⁰⁰ Reply at 9, second full paragraph.

VERIFIED STATEMENT OF MARLA BALDASARO

**Before the
Surface Transportation Board**

Rymes Heating Oils, Inc. Petition for Declaratory Order STB Finance Docket No.

34098

Verified Statement of Marla

Baldasaro

1. My name is Marla Baldasaro and I am assistant to the manager of Rymes operations in the Claremont, NH area. My responsibilities include assisting the manager by following up on problems involving rail service at the company's Distribution Center in Claremont

2. On Tuesday, February 5, 2002, we released two empty rail cars at the Distribution Center. In the usual manner, we notified Springfield Terminal Railway Company ("ST") of their release by a faxed release form. ST acknowledged receipt of that form.

3. The next ST train that could have removed these two empties was scheduled for Wednesday, February 6.

4. Yesterday (Wednesday, February 6) we released two additional empty cars at the Distribution Center. Again, we notified ST of their release by a faxed release form sent at 1:15 p.m. yesterday. ST did not acknowledge receipt of that form, but a delay in acknowledgment is not that unusual; thus, I did not follow up on that immediately.

5. On the day of a scheduled train, our procedure is to notify ST of any cars emptied that day through a faxed release form sent not later than 3:00 p.m. Our experience has been that a release sent by that time provides ST enough time to notify the train crew of the released cars, since the train typically does not reach the Distribution Center before late afternoon or evening.

6. As Mr. Smith described in his Verified Statement of February 6, we maintain a mailbox alongside the unloading track at the Distribution Center in which we place a copy of the release forms described above and the Emergency Response Forms for each empty car. The mailbox serves as a backup in case the train crew is not informed of our faxed release forms.

7. The shipping documents (release form and Emergency Response Form) for all four cars mentioned above were placed in the mailbox before late afternoon yesterday.

8. The four empties were still standing on the track reserved for empties at the Distribution Center this morning. Evidently, yesterday's train did not remove them.

9. I called Allan Ortino of ST around 7:30 this morning to ask him why the empty cars were not picked up yesterday. I made notes of our conversation.

10. Mr. Ortino first said that the computers were down all day. A little later, there was a note of surprise in his voice: "Oh, they haven't been picked up?" He then said that the train never made it all the way, that the crew stayed overnight in White River Junction, but the train didn't; it started out of Claremont. He said he would transmit the information on the empties and they would be picked up on Friday, i.e. February 8. He said he would put the release form in the computer and fax it back, i.e., that we would receive by fax the usual acknowledgment of release described above.

11. Mr. Ortino later called back to indicate that the empties now were in the computer and would be picked up on Friday (February 8) when a full car at White River would be delivered. I have also since received the release acknowledgment as promised.

State of New Hampshire
County of Cheshire

I, Marla Baldasaro, declare under penalty of perjury that the foregoing is true and correct.
Further I certify that I am qualified and authorized to file this Verified Statement.
Executed on February 7, 2002.

Marla K. Baldasaro
Marla Baldasaro

Subscribed and sworn
to before me this 7th day
of February 2002.

Christine St. Aubin
Notary Public

My commission expires 4-19-2005



VERIFIED STATEMENT OF JACK E. DODD

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 34098

RYMES HEATING OILS, INC. - PETITION FOR DECLARATORY ORDER

VERIFIED STATEMENT OF JACK E. DODD

My name is Jack E. Dodd. I am a Transportation Consultant retained by Petitioner in the above captioned matter. I give this Verified Statement on personal knowledge in support of Rymes Heating Oils, Inc.'s (Petitioner) Rebuttal Statement, to the Verified Reply of Boston and Maine Corporation and Springfield Terminal Railway Company (collectively, "Guilford").

1. While tracing and monitoring loaded cars for Rymes during the Measurement Period, I was in a position to know from which suppliers these loaded cars were shipped. I tracked each car from the time it was shipped as a loaded car to the time it was returned to the shipper as an empty car. This process measured the entire car cycle time for each car Rymes received during the Measurement Period. A review of this data indicates that during the Measurement Period, a total of 135 cars was received by Rymes. Of this total, 99 cars (73%) were purchased from Canadian suppliers located in Ontario, Quebec and Nova Scotia, all served by Canadian National Railways (CN). Once shipped, these cars traveled over CN to the New England Central Railroad (NECR) at St. Albans, VT. Then, the cars were moved by NECR to White River Jct., VT, where the cars were delivered in interchange to Guilford. Since these cars traveled through eastern Canada and northern and central Vermont to reach Rymes' Distribution Center, there was no instance in which the effects of the Conrail breakup adversely affected the movement of the cars to the interchange point between NECR and Guilford.
2. The second sentence on page 18 of the Respondents' Reply says, "Guilford regularly picks up empty cars when delivering loads, thereby minimizing the dwell time of these empty cars at the Distribution Center". Part of my responsibilities to Rymes involved the monitoring and examination of the movement of empty cars that were released by personnel at the Distribution Center. During a recent review of the car movement data outlined in Exhibit JED-7, I focused on empty cars which experienced delays in pickup at the Distribution Center as well as empty cars which were timely removed from the Distribution Center but were delayed at Guilford's main yard at East Deerfield. Of the 39 empty cars that were delayed at either the Distribution Center or at East Deerfield, 19 were timely removed from the Distribution Center but suffered delays of 2 days each at East Deerfield before beginning movement to the interchange points with connecting carriers. Another 16 were timely removed from the Distribution Center but were delayed 3 days each at East Deerfield before beginning movement to the interchange points with connecting carriers. The remaining 4 cars experienced delays of 2 days each at the Distribution Center, thence delayed an additional 3 days each before beginning movement to the interchange points with connecting carriers. The 39 empty cars represented 29% of the total loaded cars (135 loaded cars) Rymes received during the Measurement Period. Needless to say, the empty cars were once loaded cars that had been made empty at the Distribution Center.

3. The removal of empty cars from Rymes' Distribution Center was another area on which I focused during the Measurement Period. While Paragraph 1 refers to 4 cars that experienced delays at the Distribution Center, I found that there were a total of 5 instances when empty cars, which had been released by Rymes in accordance with its internal procedures, were not removed on the next available train. In 3 of those cases, Guilford's southbound train delivered loaded cars but did not pick up the empty cars at the same time. On two other occasions, there were no loaded cars to deliver, but in each instance there was one empty car to be removed. The southbound train, for no apparent reason, did not stop to pick up the empty cars at the Distribution Center on the day the empty cars were ready to be removed. Rather, the southbound train two days later picked up the empty cars. While I have not been directly involved in monitoring the flow of loaded and empty cars to and from the Distribution Center during the current season, I have recently reviewed Rymes' accounts of Guilford's service from early November, 2001 through mid-January, 2002. Part of this examination focused on the movement of empty cars from the Distribution Center to Brattleboro, VT, the interchange point with NECR. I contacted NECR Customer Service to determine what had transpired to date. NECR Customer Service Representative, Vicky Lagrow, told me on January 31, 2002, that NECR never knows whether there are empties from Rymes' Distribution Center at Brattleboro until someone goes to the yard and actually looks for them. Ms. Lagrow also advised me that, in her experience, she believes that NECR cannot rely on ST giving correct information in this regard.
4. Another failure, this time involving a loaded car, occurred in early November, 2001. According to Rymes' records, car PROX 98989 was received in interchange from CN by NECR at St. Albans, VT early on Sunday, November 4. In checking NECR's equipment movement history for the car, I found that it in fact was delivered in interchange by NECR to Guilford that same evening, November 4, at 9:00 PM. I understand that Rymes was advised by Guilford the next day, November 5, that the car was to be delivered that day, however, Rymes' account of the incident indicates that the car did not arrive as planned.
5. On the morning of Friday, November 17, 2000, during the Measurement Period, Rymes notified me that a derailment had occurred at the Distribution Center the previous afternoon. Rymes requested me to locate a qualified contractor to effect the necessary repairs, as the track had been removed from service by Guilford. I immediately placed telephone calls to the only two qualified railroad contractors I knew in the region. One contractor was based in Vermont and the other contractor was based in Massachusetts. I met with a manager from the Vermont contractor at the Distribution Center on November 22nd, the day before Thanksgiving Day. The manager assessed the damage to the track and advised me on November 28th that it could not effect the necessary repairs until the week of December 11th. Concurrently, the Massachusetts contractor contacted me and advised its schedule did not permit even a visit to the Distribution Center to inspect the track damage. During this time, Jim Rymes called me to determine if I had made any progress in finding a contractor. Jim told me that he was also attempting to secure a contractor to make immediate track repairs, also without success. On November 29th, Jim Rymes advised me that Guilford had located a Massachusetts contractor, the owner of which I immediately contacted and with whom I met at the Distribution Center that very afternoon. The owner indicated his crews were in the area and could perform the work that weekend. The repair crews did in fact make the necessary repairs on December 2nd and 3rd. On December 4th, the contractor arranged with Guilford track foremen to inspect the track to ensure its fitness for handling cars. That inspection occurred on December 5th, and, finding the track acceptable, Guilford restored the track to service that same day. It was unfortunate that the repairs to the Distribution Center track were not made and completed before the third week after the derailment, however, Rymes understood the urgency of repairing the siding and used its best efforts, during a holiday period, to accomplish the work.
6. When I was initially retained by Rymes in June, 2000, to assess Guilford's rail service to and from the Distribution Center, I felt it was prudent for me to inspect the physical plant in order for me to understand how service was provided. Tim Smith, Distribution Center Manager and I walked the entire property, including the siding from which cars are unloaded, the track leading from the

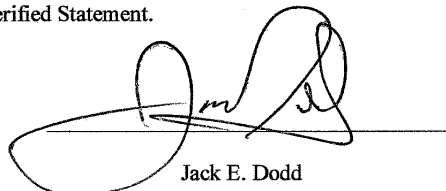
unloading track to the main line switch and the track serving Eastern Bridge, located south of the Distribution Center. While observing the track leading to Eastern Bridge, I noted that there was evidence of a track that had once led to the north side of the building which houses Eastern Bridge. Later, Jim Rymes explained to me that in the process of installing the Eastern Bridge siding in 1995, the track extending from the main line switch had been realigned in a northerly direction to allow proper placement of the Eastern Bridge track.

State of Vermont

County of Franklin

I, Jack E. Dodd, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

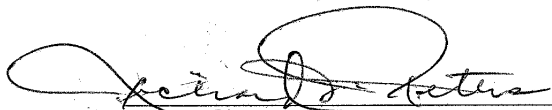
Executed on February 6, 2002



Jack E. Dodd

Subscribed and sworn to

before me this 6th day of February 2002



Notary Public

My Commission expires 2-10-03

VERIFIED STATEMENT OF JAMES T. RYMES

**Before the
Surface Transportation Board**

**Rymes Heating Oils, Inc. Petition for Declaratory
Order**

STB Finance Docket No. 34098

Verified Statement of James T.
Rymes

Settlement overtures

1. After our petition was filed in September, I was speaking to an ST representative about a rail rate matter when he asked what ST could do to improve service to Rymes. It was a strange conversation.
2. I told him a number of things ST could do to improve our service. He replied in words or substance that doing what I described was not possible, leading me to ask why, if that was ST's position, why he even bothered asking.
3. That is the only inquiry from ST about resolving service issues I have had in response to our petition.

Communications with ST

4. I have talked with ST representatives over the years about rail rate matters. I also spoke with an ST representative regarding the rail spreading incident at Claremont in November 2000. There have been other calls about particular situations. For example, I was called by ST representative Allan Ortino on November 5, 2001 to the effect that: we're bringing in a car tonight. I then alerted our staff to this development.
5. I can never recall an ST representative calling me to inquire about the quality of service ST was providing Rymes.

Rail spreading incident

6. When the track near our Distribution Center sustained an outage on November 16, 2000, I tried a number of area contractors to get the track repaired. In addition, I asked our rail consultant, Jack Dodd, to try contractors that he knew. All of

these contractors reported, essentially, that they were busy and could not do the job until weeks later.

7. After numerous such efforts, I asked the ST if it would repair the tracks. It had not offered any help to that point and I was not expecting a favorable answer. Its response was negative, but it did provide the name Industrial Track Service of Woburn, MA. We immediately contacted ITS and it agreed to do the job.

8. ITS was on-site shortly after that, worked over a weekend and completed the job in a couple of days.

9. Repairing that track was a top priority for Rymes. We would have done it ourselves if we could. We tried all sources known to the company and its consultant.

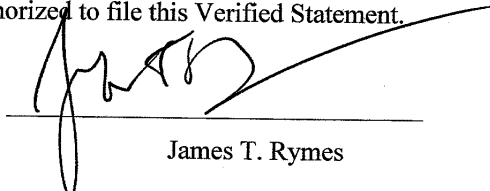
Sand car placement

10. John A. Rymes covers the luncheon meeting about the sand car in his Verified Statement. My recollection agrees entirely with his.

11. The sand car was on the track at East Coast Steel from as long as I can remember. My understanding is that it had been there, stationary and unemptied, for years before I became interested in the Claremont site.

State of New Hampshire
County of Merrimack

I, James T. Rymes, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.
Executed on February 6, 2002.



James T. Rymes

Subscribed and sworn

To before me this 6th

Day of February 2002.

Nancy B. Rondeau
Notary Public

My commission expires 12/1/04.

I.

VERIFIED STATEMENT OF JOHN A. RYMES

**Before the
Surface Transportation Board**

**Rymes Heating Oils, Inc. Petition for Declaratory
Order**

STB Finance Docket No. 34098

Verified Statement of John A.
Rymes

1. My name is John A. Rymes. I am, and was at the time of the events described below, a manager of Rymes Heating Oils, Inc. ("Rymes"), the Petitioner in the above-captioned proceeding. I make this Statement as part of Petitioner's Rebuttal to that part of Respondents' Reply (p. 6) which asserts that a siding near Rymes' unloading and storage facility ("Distribution Center") has been served continuously by Guilford since at least 1987.

2. On January 26, 1999, James T. Rymes, James T. Rymes, Jr. (both officers of Rymes) and I drove to our Claremont, NH rail unloading and storage facility to meet with Stan Maxwell, a representative of Guilford Transportation Industries, which operates the Springfield Terminal Railway ("ST") serving Rymes and also operated the B&M, predecessor of the ST. This meeting was set up by Paul Ouellette, sales representative from the Brodie Corporation, a track-mobile rail car moving machine distributor. We had expressed our concerns with Guilford's service and Mr. Ouellette thought that, if we brought our concerns to Mr. Maxwell's attention, he would be able to help remedy the deficiencies in service that we had been experiencing.

3. At the morning meeting, James T. Rymes explained in detail the many deficiencies in Guilford service that we had experienced. Mr. Maxwell stated in words or substance that he agreed that the service that we had been experiencing was extremely poor and that he would try to improve the poor service that ST was providing.

4. We continued the meeting over lunch at a local restaurant in Claremont. The topic of how and why Guilford had the rights to our new facility and that of our neighbor, East Coast Bridge, was brought up. East Coast Bridge is located south of the Rymes facility. The new Rymes spur with its switch is located beyond the switch newly constructed for use by East Coast Bridge.

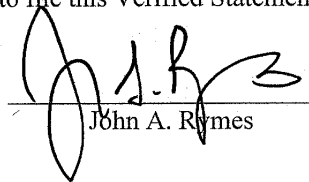
5. During this discussion, Mr. Maxwell stated in words or substance: When B&M heard about what the requirements were to protect their rights at facilities on the line, B&M elected to fill a number of junk sand rail cars and distribute them throughout the area. One such car was delivered to a track at East Coast Steel where it remained unemptied for years. Mr. Maxwell also stated that he was one of the engineers on the line at the time these cars were placed. He then laughed about how clever B&M was to have done this.

6. The discussion included whether, if this one car had not been placed on the siding, Rymes and East Coast Bridge would have been free to use any other rail company available. Mr. Maxwell stated that was correct.

7. My understanding is that this car remained stationary until it was pulled out in the mid-1990s.

State of New Hampshire
County of Merrimack

I, John A. Rymes, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement. Executed on February 6, 2002.



John A. Rymes

Subscribed and sworn
to before me this 6th
day of February 2002.



Notary Public

My commission expires 12/1/04

II.

VERIFIED STATEMENT OF JOHN A. RYMES

**Before the
Surface Transportation Board**

**Rymes Heating Oils, Inc. Petition for Declaratory
Order**

STB Finance Docket No. 34098

Verified Statement of John A.
Rymes

Communications with ST.

1. For the last year, my duties have included the responsibility for purchasing our propane and moving it from the supplier to the Distribution Center at Claremont. During that period, our off-season shipments declined from 109 cars delivered by ST in 2000 to none delivered by that carrier in 2001.

2. Essentially, Rymes built up a substantial inventory purchasing product (a) imported on seagoing ships at substantially greater cost than could be obtained by rail delivery from our traditional suppliers who ship by rail and (b) from pipeline terminals in the Northeast. In both cases, we bought from these sources and brought the product to our Distribution Center by truck because we were unwilling to rely on ST rail service.

3. All during this period, ST never called Rymes to ask about the absence of business we were providing it. I do not even know the name of the ST sales representative serving our account and, to my knowledge, have never spoken to that individual.

Northbound service.

4. For several years, we have tried to have ST deliver loaded cars and pull empty cars on its northbound run. The ST claim has always been that it's not possible. In January, we had a loaded car at East Deerfield. ST had a shipment there to be delivered to East Bridge, our neighbor, and offered to drop off our car at the same time, during its northbound run.

5. Our representative said that leaving the car at East Bridge would be all that would be necessary, that we would make arrangements to bring it from there to the Distribution Center. Instead, ST delivered our car right on our receiving track.

January 2002 loaded/empties incident.

6. On January 7, 2002, I received a call from our Distribution Center Manager, Tim Smith. He informed me that he had just been told by a ST representative that we had eight loaded cars consigned to Rymes sitting in the yard at Brattleboro.

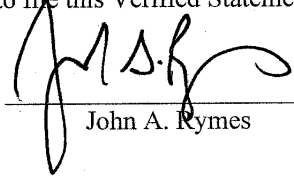
7. This didn't sound right to me, as we expected no more than one car per week during this period. However, cars are frequently not delivered on time and other mistakes do occur. I then called both our suppliers who ship by rail, BP Canada and Conoco, and asked each to verify the cars that they had sent to us in the current season.

8. After a long verification process, each got back to me with information on the prior two months' shipments. Comparing that to our own car receipt and release information, I still could not account for that many loaded cars in transit to us.

9. At that point, I dispatched Tim Smith to Brattleboro so we could have first-hand information on this matter. An hour or so later he called and told me he had been advised by ST that the cars were in fact all empties.

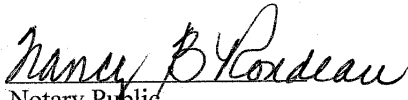
State of New Hampshire
County of Merrimack

I, John A. Rymes, declare under penalty of perjury that the foregoing is true and correct.
Further, I certify that I am qualified and authorized to file this Verified Statement.
Executed on February 6, 2002.



John A. Rymes

Subscribed and sworn
to before me this 6th
day of February 2002.



Nancy B. Poideau
Notary Public

My commission expires 12/1/04

VERIFIED STATEMENT OF TIMOTHY A. SMITH

**Before the
Surface Transportation Board**

Rymes Heating Oils, Inc. Petition for Declaratory Order STB Finance Docket No.

34098

Verified Statement of

Timothy A. Smith

1. My name is Timothy A. Smith and I am the manager of Rymes operations in the Claremont, NH area. My responsibilities include unloading rail cars which Springfield Terminal Railway ("ST") delivers to our Distribution Center, notifying others in the company of their readiness for return, moving them to the track we maintain for this purpose and generally supervising ST rail activity on Rymes Distribution Center property.

Schedule

2. Since February 2001, the ST operates on a Sunday-through-Friday schedule. On Sunday, Tuesday and Thursday, its train moves north from East Deerfield, MA to White River Junction, VT carrying any cars for Rymes located at East Deerfield. The next day (Monday, Wednesday and Friday), it runs south, usually reaching Claremont in late afternoon or evening, and carrying both cars from East Deerfield and cars at White River Junction.

Continued misplacement of loaded cars

3. This season, ST's practice of leaving, from time to time, our loaded cars on the track we reserve for empties has continued. I have asked the train conductor repeatedly to leave loaded cars on the unloading track.

4. That track is clearly marked by unloading towers, while the other track can be identified by the presence there of empties awaiting removal. No more time or effort by the train crew is required to leave the loaded cars on the appropriate track.

5. While we have the capability to move the loaded cars to the unloading track, that requires considerable extra work by our people and diverts them from their other assigned tasks.

Continuing car return problem

6. The return to Rymes' vendors of empty cars we make available to the ST is a continuing problem with which I deal. An important factor in this return is the ST's delivering of these empties to (i.e., interchanging them with) connecting railroads. Frequently this involves the New England Central Railroad ("NECR") which interconnects with the ST at Brattleboro, VT.

7. ST representative Allan Ortino told me that ST has no tracking system for traffic at Brattleboro. For that reason, he Mr. Ortino cannot tell me when an empty car is delivered there by the ST for interchange with NECR.

8. For the same reason, the ST cannot notify the NECR that cars pulled from Rymes' Distribution Center are awaiting interchange at Brattleboro with NECR.

Nov. 2001 delayed delivery

9. On Monday, November 5, 2001, my assistant Ms. Marla Baldasaro mentioned that Jim Rymes had called her to alert her that a loaded car would be arriving that day.

As a result I directed that an employee from the Claremont office go to the Distribution Center to look for the car and, when it didn't arrive, directed the same procedure each day thereafter until it arrived at 3:45 p.m. on Friday, November 9.

December 2001 erroneous delivery

10. On December 17, 2001, the ST placed a number of cars at the Distribution Center. On the same day, Rymes notified ST of the placement of these cars, giving their identifying data. The following day, in a message from Diane Cunio of ST, we were advised that one of the cars was not ours and were requested not to unload it.

11. When we receive a group of cars at the Distribution Center, our normal unloading procedure is to move the entire group two-at-a-time into unloading position, unloading them by twos until the unloading procedure is completed.

12. In this instance, however, we had to first get the car that was not ours out from in front of ones that were ours for unloading. In that maneuver, we had to break up the line of cars and switch them out individually in order to move the car from its received position to the track from which our empties are to be pulled.

13. This procedure required three of my men and I to handle that car three different times in order to move it out of our way to unload our cars.

January 2002 loaded/empties incident

14. ST representative Allan Ortino called on January 7, 2002 and told me that we had eight loaded cars at Brattleboro. I immediately informed John Rymes of this unusual development. Several hours later that day, John Rymes called and said he had not been able to confirm that we should have eight cars en route to the Distribution Center. He directed me to drive to Brattleboro (over an hour away) to investigate this situation.

15. I set off in my car and, as I approached Brattleboro, my cell phone rang. It was Allan Ortino. He told me that the cars he had earlier called about were all empty.

January 2002 failure to acknowledge empty cars' release

16. My assistant Ms. Baldasaro told me on January 30, 2002 that she had called ST representative Allan Ortino to express concern that a group of empty-car release forms faxed to ST on January 28 had not been signed and faxed back in accordance with established procedure.

17. When they had not been received by the next morning, I called Mr. Ortino myself. He mentioned that a woman at ST's office in Billerica, MA had not returned the release forms. He said that they (ST) had been awfully busy attending to other customers.

18. When the release forms had not been received by that afternoon, I again called Allan Ortino. At this point Mr. Ortino said he could not find them and asked that they be refaxed to him. We did so and later that afternoon the signed forms were faxed back.

19. Notwithstanding that the conductor of the ST train running from White River Junction to East Deerfield apparently had no release form to identify our empty cars, nor the Emergency Response Form used for hazardous materials, either from ST Customer Service or from the mailbox situated at the Distribution Center's receiving track for the benefit of the train crew, the ST train did manage to pick up and remove the empties for which ST had been unable to locate the original car release forms.

Train crew notification of mail box installation

20. Although I initiate notification to ST whenever we unload a car and ready it for return, we had become aware that some train crews did not always have notice from ST Customer Service that empty cars were available for pick-up at the Distribution Center.

21. To remedy this, on January 8, 2002, I purchased a mail box and installed it alongside the receiving track at the Distribution Center for the crew's convenience. I then notified Allan Ortino of this box and its purpose. We placed in there copies of the empty-car release form we fax to ST Customer Service and the Emergency Response Form.

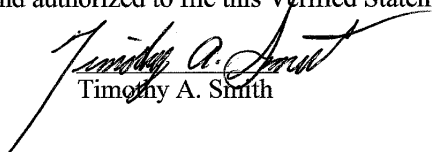
22. When Mr. Ortino notified us last Friday of a change in the scheduled hours of the train crew, I reminded him of the mail box. He evidently had not notified train crews about it, since he said he would ask another ST representative to put out a memo to train crews concerning it.

Effect of continued deficient service

23. I have general responsibilities for Rymes operations in the Claremont area, but feel I am devoting all my available time to running down and resolving rail service issues at the Distribution Center. In my view, our rail carrier should be taking care of these.

State of New Hampshire
County of Cheshire

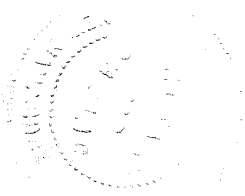
I, Timothy A. Smith, declare under penalty of perjury that the foregoing is true and correct. Further I certify that I am qualified and authorized to file this Verified Statement. Executed on February 6, 2002.


Timothy A. Smith

Subscribed and sworn
to before me this 6th day
of February 2002.


Notary Public

My commission expires 4-9-2005



Certificate of Service

Re: Application of Rymes Heating Oils, Inc. for certain determinations and a prescription, all related to competitive access for Petitioner to two rail carriers (Finance Docket No. 34098)

I, Elizabeth Whittle, certify that I have this day served copies of the Rebuttal Statement and attachments upon

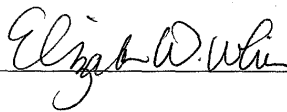
Surface Transportation Board
Federal Railroad Administration
S. Mark Lindsey
Acting Deputy Administrator
Eric L. Hirschhorn, Esq.
Attorney for Springfield
Terminal Railway Company
Robert B. Culliford, Esq.
Attorney for Springfield
Terminal Railway Company
New England Central Railroad
Boston and Maine Corporation,

entities required by the Surface Transportation Board's regulations to be served in this proceeding, by hand in the case of

Surface Transportation Board,
Federal Railroad Administration
S. Mark Lindsey
Acting Deputy Administrator and
Eric L. Hirschhorn, Esq.
Attorney for Springfield
Terminal Railway Company

and by overnight express service in the case of

Robert B. Culliford, Esq.
Attorney for Springfield
Terminal Railway Company,
New England Central Railroad and
Boston and Maine Corporation.



February 8, 2002