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March 6, 2003

**BY FEDERAL EXPRESS**

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

207361



Re: *Surface Transportation Board Docket No. AB 848 -- Maine Central Railroad Company, State of New Hampshire, Department of Transportation -- Adverse Discontinuance of Service -- A Line of Maine Central Railroad Company known as the "Twin State Railroad" from Whitefield, NH to St. Johnsbury, VT*

Dear Secretary Williams:

Enclosed for filing with your office are the original and ten (10) copies of the Response of the Twin State Railroad Corporation to the Joint Petition for Waiver filed by the Maine Central Railroad Company and the State of New Hampshire in the above referenced matter.

Thank you for your kind assistance and cooperation in this matter.

Very truly yours,

*Leonard M. Singer*  
Leonard M. Singer

cc: Hon. Craig Benson  
Hon. Howard Dean  
Katherine E. Potter  
Craig Donais  
Christopher Morgan  
Vermont Dept. of Public Service  
Vermont Agency of Transportation

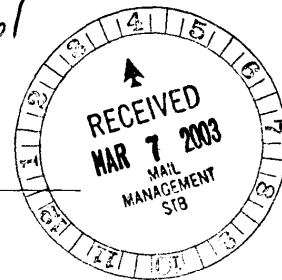
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Public Record

207 361

BEFORE THE  
SURFACE TRANSPORTATION BOARD  
Washington, DC



DOCKET NO. AB 848

MAINE CENTRAL RAILROAD COMPANY  
STATE OF NEW HAMPSHIRE, DEPARTMENT OF TRANSPORTATION  
-- ADVERSE DISCONTINUANCE --  
A LINE OF MAINE CENTRAL RAILROAD COMPANY KNOWN  
AS THE "TWIN STATE RAILROAD"  
FROM WHITEFIELD, NH TO ST. JOHNSBURY, VT

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**RESPONSE OF  
TWIN STATE RAILROAD CORPORATION  
TO JOINT PETITION FOR WAIVER**

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Attorney for the Twin  
State Railroad Corporation

Dated: March 6, 2003

BEFORE THE  
SURFACE TRANSPORTATION BOARD  
Washington, DC

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DOCKET NO. AB 848

MAINE CENTRAL RAILROAD COMPANY  
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**RESPONSE OF  
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**A. INTRODUCTION**

The Maine Central Railroad Company ("MEC") originally filed a Petition for Waiver and then an Amended Petition for Waiver, the latter of which was opposed by Twin State Railroad Corporation ("TSRR") on January 5, 2003. Thereafter, Maine Central Railroad Company, joined by the State of New Hampshire, filed a Request for Substitution of Parties (MEC and the State of New Hampshire are referred to herein as the "Applicants"). The Applicants have now filed a Joint Petition for Waiver which TSRR hereby opposes.

As an initial matter, TSRR moves that the Joint Petition for Waiver be struck to the extent that it seeks the same relief as MEC sought in its original and in its amended Petition for Waiver. In essence, the Applicants have repackaged and reformulated the

arguments made in the original Petition for Waiver to more adequately address the arguments made by TSRR in its Opposition to the original Petition for Waiver.

TSRR submits that a petition for waiver should contain all of the arguments in favor of the relief being sought. Parties opposing a petition for waiver should not be put to the burden and expense of having to file multiple oppositions. Neither the interests of judicial economy nor fairness to litigants are served by allowing these Applicants a second opportunity to do what should have been done in the first instance. That is particularly true in connection with a procedural matter, such as a petition for waiver. Whatever interest the public at large may have in having the ultimate issue with respect to this line of railroad determined on the substantive merits does not extend to the procedural relief sought in the Joint Petition for Waiver.

## **B. BACKGROUND**

Notwithstanding the limited nature of the waiver issue, the history of the TSRR Line may be useful to the STB as it considers the Joint Petition.

### **1. Establishment of TSRR**

The railroad line which is the subject of this proceeding (the "Line" or the "TSRR Line") extends approximately 28.15 miles between St. Johnsbury, Vermont and Whitefield, New Hampshire. A related line of railroad operated by the Lamoyille Valley Railroad Company ("LVRC") extends approximately 98 miles between Swanton, Vermont and St. Johnsbury, Vermont (the "LVRC Line"). The TSRR Line and the LVRC Line connect at St. Johnsbury, and thus comprise a continuous corridor from Swanton, Vermont to Whitefield, New Hampshire.

For convenience in understanding the history of the subject Line and its recent operations, TSRR directs the STB to Finance Docket No. 29772, Guilford Transportation Industries, Inc. -- Control -- Boston and Maine Corporation (Decision served May 22, 1984), pursuant to which common control of LVRC and TSRR by the Northern Vermont Company ("NVC") was exempted from approval by the ICC.

TSRR also directs the STB to Finance Docket No. 31545, Clyde S. and Sandra Forbes and CSF Acquisition, Inc. -- Acquisition of Control -- Northern Vermont Company (Decision served \_\_\_\_\_, 1989). As indicated in Finance Docket No. 31545, CSF Acquisition, Inc. ("CSF," whose principal shareholder is Clyde S. Fobes, a veteran operator of Class II and Class III carriers) owns 100% of the capital stock of NVC. NVC, in turn, owns 100% of the capital stock of the LVRC and has operated the LVRC Line pursuant to lease and operating agreements with the State of Vermont since 1989. NVC also owns 100% of the capital stock of TSRR, which, since 1984, has operated the TSRR Line pursuant to a long-term lease agreement with MEC. As indicated in the 1989 Petition for Exemption in that Finance Docket:

The LVRC is a shortline railroad which has experienced financial difficulties described at length in the record before the Commission in Guilford Transportation Industries, Inc. -- Control -- Boston and Maine Corporation, 366 I.C.C. 292-372 (December 3, 1982) ("Guilford merger case"). Prior to the mid 1970's it was a bridge carrier owned by the Samuel Pinsly family and operated under the name St. Johnsbury & Lamoille County Railroad Company ("SJ&LC"). After SJ&LC experienced financial difficulties, Pinsly sought and received abandonment authority. The State of Vermont acquired the [LVRC Line] post abandonment and leased it to a succession of shortline operators prior to LVRC's establishment in 1978 as a shipper-owned railroad. After a short period of subsidized operation immediately after startup, the LVRC became marginally profitable due to aggressive marketing as a bridge route. The LVRC experienced financial

problems again in the early to mid 1980s due to loss of overhead traffic, which LVRC believes was diverted to competing B&M and MEC routes and deregulation of the railroad industry.

Anticipating the adverse affects of Guilford's control of B&M and MEC LVRC traffic and revenue base, the LVRC challenged that transaction before the Commission and in federal court. In settlement of that litigation, MEC in 1984 transferred to the NVC and LVRC a profitable branch between St. Johnsbury, VT and Whitefield, NH. NVC established TSRR as a new railroad corporation for the purpose of operating this [TSRR Line]. The TSRR has been marginally successful.

In short, the operational and financial difficulties experienced by the LVRC and the TSRR, and their respective Lines, are directly related to the consolidation of the B&M and MEC under Guilford Transportation Industries, Inc. As acknowledged by the Guilford merger case, common ownership and operation of the LVRC and TSRR are recognized to be in the public interest.

The Guilford entities are now effectively seeking to use the very circumstances they created in order to undermine TSRR's leasehold and operating rights, and to violate the 1984 settlement to which they agreed in the Guilford merger case (the "1984 Settlement").

## **2. MEC and TSRR Lease and Operating Agreement**

As required by the 1984 Settlement, MEC entered into a Lease and Operating Agreement with TSRR dated as of March 1, 1984 (the "TSRR Lease"). A copy of the TSRR Lease is attached to the Joint Petition for Waiver as Exhibit A.

Reflecting the merits of the challenges raised by LVRC in the Guilford merger cases, the TSRR Lease provides for a long-term lease by TSRR of the TSRR Line. Section VIII of the TSRR Lease provides for an initial term that ran from March 1, 1984

through December 31, 1988, and provides TSRR with the right to renew the term for up to a maximum of additional four (4) ten-year periods. Accordingly, the total term of the TSRR Lease is 44 years and ten (10) months, with approximately 26 years remaining in that term.

In its operations, maintenance, administration and insurance of the Line, TSRR has made substantial investment in the TSRR Line. Furthermore, as provided in Section 1.01 of the Lease, TSRR made a substantial one-time, up-front lease payment of \$200,000. That substantial investment by TSRR would be lost were the STB to permit or facilitate the threatened adverse discontinuance in this matter.

**3. TSRR Has Met and Continues to Meet its Common Carrier and Leasehold Obligations on the TSRR Line**

TSRR has performed its operations on the TSRR Line as warranted by changing traffic levels as required by the TSRR Lease. Since CSF assumed ownership of the TSRR, the TSRR Line has had only one actual or prospective customer, the paper mill at Gilman, Vermont. And the mill at Gilman has struggled over the years. In 1989, the mill was owned by Georgia Pacific, then sold to Simpson Paper Company in the early 1990s. Traffic levels on the line during this period were in the vicinity of only 800 carloads per year. Simpson Paper closed the mill in October 1999. At some later date, the mill was sold to American Tissue Company (aka, The Paper Mill at Gilman, Inc.). No rail service has been required by the mill since the October 1999 closure.

**C. REQUEST FOR WAIVER**

In their Joint Petition for Waiver, the Applicants say that they "seek waiver of certain requirements . . . for an adverse discontinuance application that the Applicants intend to file." (Joint Petition for Waiver, p. 1.) The Applicants allege that waiver of such requirements is permitted by 49 C.F.R. § 1152.24(e)(5), and they argue that "[t]hese requirements are inapplicable or irrelevant in an adverse discontinuance context . . . ." (Joint Petition for Waiver, p. 1.).

As the facts in this matter will indicate, the motivations of the Applicants in this matter are not public convenience and necessity. Rather, the dispute between the Applicants and TSRR involves exclusively private contractual rights pursuant to TSRR's long-term leasehold interest in the subject railroad line.

For these reasons and as described herein, TSRR opposes the Applicants' Joint Petition for Waiver. Furthermore, should the Applicants file an adverse discontinuance application, TSRR intends to oppose that filing as well. Public convenience and necessity would not be served by granting the Joint Petition for Waiver or by granting the threatened adverse discontinuance application. Rather, granting either request would only devalue TSRR's substantial investment in the subject line, and vitiate its long-term leasehold rights therein.

MEC's actions in this matter represent a patent attempt to violate the terms of the 1984 Settlement in the Guilford merger cases and to interfere with TSRR's long-term leasehold rights in the TSRR Line. The STB should not facilitate this conduct by permitting any exemption of its regulations and procedures.

In particular, the Applicants should not be exempted from meeting the requirements of the following regulations.<sup>1</sup> As explained in the following material, the information required by the regulations is applicable and is relevant to the issues that will be presented by the promised adverse discontinuance proceeding.

**49 C.F.R. §§ 1152.22 (c)**

This subparagraph requires that an applicant submit information concerning the service provided on the line including the "reasons for the decline in traffic . . . in the best judgment of the applicant." In their Joint Petition for Waiver the Applicants assert that they "will likely institute a new operator or new operators, which will re-create a viable freight rail service option in this area." Joint Petition for Waiver pp. 2-3. Significantly, Section IV of the TSRR Lease provides that "MEC shall have and retain the *exclusive* right to deal directly with shippers and receivers regarding traffic moving to or from the Line and to solicit such traffic in the best interest of MEC and the [Guilford system]." (Emphasis added.)

In other words, in the petition for adverse discontinuance which Applicants say that they will file, they will argue that the decline in traffic on the TSRR Line is the fault of TSRR. However, the TSRR Lease strongly suggests that MEC bears substantial responsibility for any decline in traffic. The Applicants should not be permitted to finesse the issue of what happened to the traffic on the Line and why. Contrary to their assertion, information regarding the trend in revenue on the Line is highly relevant and material.

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<sup>1</sup> TSRR does not understand the Applicants to be seeking an exemption from 49 CFR 1152.22(a) other than from subparagraph (5) thereof. It does not understand them to be seeking any exemption from 49 CFR 1152.22(b).

Applicants should not be permitted to avoid their obligation under the regulations to provide the "reasons for the decline in traffic . . . in [their] best judgment." 49 C.F.R. § 1152.22 (c)(9).

**49 C.F.R. §§ 1152.22 (d)**

This subparagraph requires that an applicant submit information concerning revenues and costs, including future revenues and costs. In the Joint Petition for Waiver the Applicants disclose that the purpose of their promised petition for adverse discontinuance is so that a new operator can re-create a viable freight rail service option in this area. Joint Petition for Waiver pp. 2-3. If the STB is to be asked to permit an adverse discontinuance so that a viable freight rail service option may be established, clearly the projected revenues and costs of that freight rail service option are relevant.<sup>2</sup>

For similar reasons Applicants' calculation of cost is highly relevant. The TSRR Lease requires TSRR to maintain and operate the Line only up to levels that are concordant with the traffic demands on the Line. Section 2.02 of the TSRR Lease provides that "TSRR shall operate the Line and shall provide train service which shall be equal in all respects, including frequency, reliability and speed, to the service presently provided on the Line by MEC *or such other manner of service as may be warranted by traffic levels and operating conditions as they may exist from time to time.*" (Emphasis added.) Section 2.06 of the TSRR Lease provides that "TSRR shall, at its own expense, maintain the Line in good condition and repair so that freight train operations can be

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<sup>2</sup> Applicants concede that they can estimate what current and projected costs and revenues will be. Joint Petition for Waiver at p. 7.

conducted on the Line *as warranted by traffic levels . . .*" (Emphasis added.) Section 1.03 of the TSRR Lease underscores this maintenance standard by permitting TSRR to retire portions of the TSRR Line "which may no longer be required for the performance of the duties of TSRR under this Agreement, and MEC shall not unreasonably withhold approval of such requests." TSRR may also retain the proceeds from any such retirements. Manifestly, Applicants' estimate of past and future costs of operating the Line are highly relevant in view of their obvious intention to assert that TSRR has not adequately maintained the Line.

Finally, Applicants seek to avoid their obligation to provide information by arguing that other information is in the possession of TSRR. Obviously, TSRR has information that is relevant to the promised Adverse Discontinuance Petition. But that does not excuse the Applicants from providing such relevant information as they can make available.

#### **D. CONCLUSION**

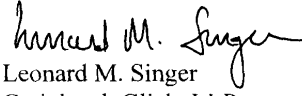
Applicants promised Adverse Discontinuance Petition is a transparent attempt to violate the 1984 Settlement and to interfere with TSRR's long-term leasehold interest in the TSRR Line. The Petition is not because TSRR has failed to meet its common carrier obligations or its leasehold obligations, but solely in an attempt to push TSRR off the Line and thereby deprive TSRR of the leasehold value of the Line.

No shipper currently exists on the TSRR Line. TSRR, however, continues to maintain the TSRR Line in accordance with its leasehold and other obligations. Should

traffic conditions change, and should service be required on the Line in the future, the TSRR is prepared to respond to those requests for service.

In light of the circumstances described above, TSRR respectfully submits that the STB's regulations should not be waived in this matter. TSRR respectfully requests that Applicants' Joint Petition for Waiver be rejected in its entirety, or in such parts as the STB deems appropriate.

Respectfully submitted,



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Attorney for the Twin  
State Railroad Corporation

Dated: March 6, 2003

**CERTIFICATE OF SERVICE**

I hereby certify that I have caused a copy of the foregoing Response of Twin State Railroad Corporation to the Petition for Waiver filed by the Maine Central Railroad Company, in the above referenced matter, to be served by first class mail, postage prepaid, United States mail, on the following:

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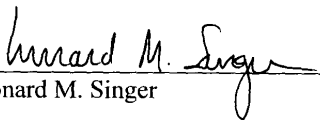
Vermont Dept. of Public Service  
112 State Street, Drawer 22  
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Hon. Craig Benson  
Governor  
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on March 6, 2003.

  
Leonard M. Singer