

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. NOR 42083

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

vs.

**BOSTON AND MAINE CORPORATION and
SPRINGFIELD TERMINAL RAILWAY COMPANY**

**SURREPLY OF THE BOSTON AND MAINE CORPORATION and THE
SPRINGFIELD TERMINAL RAILWAY COMPANY TO REBUTTAL FILED BY
GRANITE STATE CONCRETE COMPANY, INC. and MILFORD
BENNINGTON RAILROAD COMPANY, INC. PURSUANT TO 49 U.S.C. § 11123
and 49 C.F.R. § 1146.1**

On July 23, 2003, the Boston and Maine Corporation and the Springfield Terminal Railway Company (collectively "Guilford") received the Rebuttal of Granite State Concrete Company, Inc. ("Granite State") and Milford-Bennington Railroad Company, Inc. ("MBR") in the above captioned matter. In their rebuttal, Granite State and MBR continue to assert that three train per day service to the Granite State processing facility in Milford, New Hampshire is essential to allow Granite State to continue to operate. Moreover, Granite State and MBR claim that the operating window made available by Guilford is unacceptable to meet this service, but once again fail to offer a valid reason why service cannot be accomplished or offer any valid alternatives. Because the Rebuttal lacks any basis in fact or law, the request of Granite State and MBR should be denied.

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Essentially, Granite State and MBR assert that any level of service below three round trips per day is a substantial, measurable deterioration in service that merits the entry of an emergency service order pursuant to 49 U.S.C. § 11123 and 49 C.F.R. § 1146.1. What Granite State and MBR do not disclose, however, is that service to Granite State regularly fell below three round trips per day long before Guilford elected to separate the operations of the two railroads. Verified Statement of Larry L. Ferguson (“Ferguson V.S.”), ¶ 2. More particularly, in June and July of 2002, MBR operated three round trips per day on 18 occasions, less than three round trips per day on 20 occasions. Id., ¶ 3. Similarly, in June of 2003—prior to Guilford’s decision to separate the operations of MBR and Guilford—MBR operated three round trips per day on 10 occasions, less than three round trips per day on 7 occasions¹. Id., ¶ 4. By contrast, since the operating window was amended to 4 a.m. to 1 p.m. daily on July 15, 2003, MBR has operated three and one half round trips per day on one occasion, two round trips on two occasions and less than two round trips on three occasions (on July 17, 2003, MBR only operated one half round trip due to sickness of its crew). Id., ¶ 5. Also, despite the fact that MBR could load its trains between 1 p.m. and 6:30 p.m. for transport the next morning at 4 a.m. to the Granite State processing facility, MBR apparently is satisfied with continuing to report to work at 6 a.m. and leaving the excavation site no earlier than 6:30 a.m., wasting two hours of operating time that could be devoted to serving its customer. Verified Statement of Peter Leishman in Support of Rebuttal (“Leishman V.S.”), Pages 3-4. Consequently, it is clear that Granite State does not require the level of service that it now demands, nor is MBR particularly committed to adapting its

¹ Interestingly, despite the alleged permitting restrictions on the excavation facility, MBR did operate on a weekend in June, 2003. Ferguson V.S., ¶ 6.

practices to the new service window. Instead, both parties simply insist that they should be allowed to return to the status quo despite no real need to do so.² Plainly, this is not the purpose behind the alternative service remedy. *Expedited Relief for Service Inadequacies*, STB Ex Parte No. 628, Service Date: December 21, 1998, unnumbered page 6.

MBR also continues to be unable to recognize or understand Guilford's concerns with the safety of MBR operations, despite a clear record of repeated irresponsible actions unaccompanied by any effort on the part of MBR to improve the safety of its operations. Verified Statement of Sydney B. Culliford in Support of Guilford's Motion to Dismiss and Reply, ¶¶ 4-5, Exhibits A and B to Motion to Dismiss and Reply, Complaint, ¶ 11. More particularly, MBR continues to claim that the derail device was only intended to be applied when the passenger service was operating, though this assertion fails to address the plain language of the bulletin issued by Guilford on December 12, 2002. Exhibit A hereto³. This bulletin, issued to both MBR and Guilford crews, clearly states that a derail was in place on MBR property, *but makes no distinction between freight and passenger service*. If the MBR truly believed that the derail was only intended to be applied during passenger operations, the MBR should have questioned the language of the bulletin. This failure to raise the issue clearly establishes that MBR was either unaware of its existence (despite its distribution to MBR crews), or

² It is also telling that MBR has operated up to 3.5 trains per day under the new operating window, calling into question their concerns with the number of hours made available.

³ To support their allegations, Granite State and MBR rely upon the Verified Statement of F. Colin Pease. While it was always Guilford's understanding that Mr. Pease resigned on good terms, his actions seem to indicate otherwise, calling into question his ability to offer impartial, credible testimony. Verified Statement of John R. Nadolny, ¶¶ 2-6.

that MBR elected to simply ignore its plain terms⁴. Either way, MBR's inability to adhere to the terms of the bulletin—as well as its inability to alert Guilford that it was not following the bulletin—supports Guilford's determination that safety demands a separation of the operations of the two railroads.

In addition, MBR has apparently decided to abandon its assertion that it was maintaining Guilford's track because Guilford had failed to do so, which also raises two troubling issues. First, if MBR elected to discontinue this assertion because it was untrue—as Guilford believes—then this decision calls into question the credibility of MBR. It is also possible, however, that MBR no longer raises this issue because it has finally accepted that this practice was in violation of multiple safety rules and practices. Verified Statement of Roger D. Bergeron in Support of Guilford's Reply and Motion and Dismiss, ¶¶ 3-7. Either way, the MBR's historical approach to track maintenance reflects an arrogant disregard for railroad safety that erodes any support for its claims that it operates a safe railroad. Therefore, Guilford elected to separate the operations of the two railroads because the MBR is either unwilling or unable to operate according to customary safety rules and practices, not as a pretext to somehow punish Granite State and MBR for reasons that have so far not been disclosed⁵.

Finally, MBR also alleges that it has engaged in good faith discussions with Guilford in an effort to resolve this issue privately, which is patently untrue. As evidenced by MBR's submissions, the MBR has failed to offer any meaningful proposals

⁴ MBR also fails to address the steep grade leading to its connection with Guilford. Verified Statement of Erwin R. Towle in Support of Guilford's Motion to Dismiss and Reply, ¶ 4.

⁵ Additionally, the allegation that Guilford only operates on the Branch one day per week is misleading. Guilford performed scheduled service on the Branch, but also operates service "on demand" to Guilford's customers on the Branch, not merely one day per week. Verified Statement of Roger D. Bergeron ("Bergeron V.S."), ¶ 2. In addition, MBR also fails to recognize that Guilford maintenance crews are regularly on the Branch several days per week. *Id.*, ¶ 3.

to address Guilford's concerns, instead simply demanding a return to the status quo.

Exhibit G to Rebuttal. Guilford, on the other hand, has attempted to address the concerns of MBR and Granite State, although each proposal has been rejected.

In closing, Guilford has made concessions that provide the MBR with ample time in which to serve its customer, and has also presented a consistent, reasonable basis for establishing separation between MBR and Guilford. Granite State and MBR, on the other hand, have simply alleged that Guilford's justifications are pretextual, without offering any real proof that either entity has been damaged⁶. Accordingly, to the extent Count I of the Formal Complaint is to be considered a Petition for Alternative Service, it should be denied.

Respectfully submitted,



Robert B. Culliford
Iron Horse Park
North Billerica, MA 01862
(978) 663-1029

Counsel for:

The Boston and Maine Corporation
The Springfield Terminal Railway Company

July 24, 2003

⁶ To the extent that Granite State offers evidence of its damages, Guilford believes that these allegations are premature since Guilford has not yet had the opportunity to respond to the remainder of the complaint.

EXHIBIT A

M: TRUADZ DSP65
12/02 11:30:29

DOCUMENT: T00100308

PAGE: 1 OF 1

SPRINGFIELD TERMINAL RAILWAY
SUPPLEMENTAL BULLETIN ORDER
NO 3-012B

IN EFFECT 1500 THURSDAY, DECEMBER 12, 2002

. HILLSBORO BRANCH
WILTON, NH

- A. A NEW DERAIL IS PLACED INTO SERVICE AT THE END OF MAIN TRACK JUST NORTH OF HOWARD ST. ON THE MILFORD AND BENNINGTON RAILROAD.

E.R. TOWLE
GENERAL MANAGER

E.J. REARDON
ASSISTANT GENERAL MANAGER

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. NOR 42083

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

vs.

**BOSTON AND MAINE CORPORATION and
SPRINGFIELD TERMINAL RAILWAY COMPANY**

**VERIFIED STATEMENT OF LARRY L. FERGUSON IN SUPPORT OF
SURREPLY OF THE BOSTON AND MAINE CORPORATION and THE
SPRINGFIELD TERMINAL RAILWAY COMPANY**

Larry L. Ferguson states as follows:

1. I am the Director of Train Operations for the Boston and Maine Corporation and the Springfield Terminal Railway Company (collectively "Guilford"). I make this statement in support of Guilford's Surreply to the Rebuttal filed by Granite State Concrete Company, Inc. ("Granite State") and Milford-Bennington Railroad Company, Inc. ("MBR").
2. Despite the claims of Granite State and MBR that present service levels are unacceptable, service to Granite State regularly fell below three round trips per day long before Guilford elected to separate the operations of the two railroads.
3. As shown in Attachment A to my statement, in June and July of 2002, MBR operated three round trips per day on 18 occasions, less than three round trips per day on 20 occasions.

4. Similarly, as shown in Attachment B to my statement, in June of 2003—prior to Guilford's decision to separate the operations of MBR and Guilford—MBR operated three round trips per day on 10 occasions, less than three round trips per day on 7 occasions.

5. By contrast, as shown in Attachment C to my statement, since the operating window made available to MBR was amended to 4 a.m. to 1 p.m daily on July 15, 2003, MBR has operated three and one half round trips per day on one occasion, two round trips on two occasions and less than two round trips on three occasions (on July 17, 2003, MBR only operated one half round trip due to sickness of its crew.)

6. Despite the alleged permitting restrictions on the excavation facility, MBR did operate on a weekend in June, 2003, as shown in Attachment B.

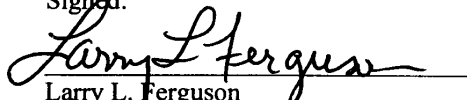
7. Attachments A, B and C were developed from the train records kept by Guilford in the ordinary course of business.

VERIFICATION

Commonwealth of Massachusetts)
) ss.:
County of Middlesex)

Larry L. Ferguson, being duly sworn, deposes and says that he has read the foregoing statement, and that to the best of his knowledge, the facts asserted there are true and the same are true as stated.

Signed:


Larry L. Ferguson

Subscribed and sworn to before me this 24th
day of July 2003.


Notary Public

My commission expires March 12, 2010

ATTACHMENT A

**MILFORD BENNINGTON RAILROAD
MONTH OF JUNE 2002**

		NORTHBOUND		SOUTHBOUND	
# TRIPS	DATE	LOAD	EMPTY	LOAD	EMPTY
0	6/1				
0	6/2				
2	6/3	0	10	10	0
		0	10	10	0
2	6/4	0	10	10	0
		0	10	Lite	
2	6/5	Lite		10	0
		0	10	10	0
2	6/6	0	10	10	0
		0	10	10	0
3	6/7	0	10	10	0
		0	10	10	0
		0	10	10	0
0	6/8				
0	6/9				
2	6/10	0	10	10	0
		0	10	10	0
3	6/11	0	10	10	0
		0	10	10	0
		0	10	10	0
2	6/12	0	10	10	0
		0	10	10	0
2	6/13	0	10	10	0
		0	10	10	0
3	6/14	0	10	10	0
		0	10	10	0
		0	10	10	0
0	6/15				
0	6/16				
2	6/17	0	10	10	0
		0	10	10	0
3	6/18	0	10	10	0
		0	10	10	0
		0	10	10	0
3	6/19	0	10	10	0
		0	10	10	0
		0	10	10	0
2	6/20	0	10	10	0
				10	0
0	6/21				
0	6/22				

# TRIPS	DATE	NORTHBOUND		SOUTHBOUND	
		LOAD	EMPTY	LOAD	EMPTY
0	6/23				
2	6/24	0	10	10	0
		0	10	10	0
3	6/25	0	10	10	0
		0	10	10	0
		0	10	10	0
2	6/26	0	10	10	0
		0	10	10	0
0	6/27				
2	6/28	0	10	10	0
		0	10	10	0
0	6/29				
0	6/30				

Number of 1/2 trips = 0
 Number of 1 round trips = 0
 Number of 1-1/2 round trips = 0
 Number of 2 round trips = 12
 Number of 3 round trips = 6
 Number of days did not operate = 12

**MILFORD BENNINGTON RAILROAD
MONTH OF JULY - 2002**

# TRIPS	DATE	NORTHBOUND		SOUTHBOUND	
		LOAD	EMPTY	LOAD	EMPTY
1.5	7/1	0	10	10	0
		0	10		
0.5	7/2	0	10		
3	7/3	0	10	10	0
		0	10	10	0
		0	10	10	0
0	7/4				
2	7/5	0	10	10	0
		0	10	10	0
0	7/6				
0	7/7				
2	7/8	0	10	10	0
		0	10	10	0
3	7/9	0	10	10	0
		0	10	10	0
		0	10	10	0
3	7/10	0	10	10	0
		0	10	10	0
		0	10	10	0
3	7/11	0	10	10	0
		0	10	10	0
		0	10	10	0
3	7/12	0	10	10	0
		0	10	10	0
		0	10	10	0
0	7/13				
0	7/14				
2	7/15	0	10	10	0
		0	10	10	0
3	7/16	0	10	10	0
		0	10	10	0
		0	10	10	0
3	7/17	0	10	10	0
		0	10	10	0
		0	10	10	0
2	7/18	0	10	10	0
		0	10	10	0
3	7/19	0	10	10	0
		0	10	10	0
		0	10	10	0

# TRIPS	DATE	NORTHBOUND		SOUTHBOUND	
		LOAD	EMPTY	LOAD	EMPTY
0	7/20				
0	7/21				
1	7/22	0	10	10	0
1	7/23	0	10	10	0
3	7/24	0	10	10	0
		0	10	10	0
		0	10	10	0
0	7/25				
3	7/26	0	10	10	0
		0	10	10	0
		0	10	10	0
0	7/27				
0	7/28				
3	7/29	0	10	10	0
		0	10	10	0
		0	10	10	0
3	7/30	0	10	10	0
		0	10	10	0
		0	10	10	0

Number of 1/2 trips = 1
 Number of 1-1/2 trips = 1
 Number of 1 round trips = 2
 Number of 2 round trips = 4
 Number of 3 round trips = 12
 Number of days did not operate = 10

ATTACHMENT B

**MILFORD BENNINGTON RAILROAD
MONTH OF JUNE 2003**

# TRIPS	DATE	NORTHBOUND		SOUTHBOUND	
		LOAD	EMPTY	LOAD	EMPTY
0	6/1				
2	6/2	0	9	9	0
		0	9	9	0
2	6/3	0	9	9	0
		0	9	9	0
2	6/4	0	9	9	0
		0	9	9	0
3	6/5	0	9	9	0
		0	9	9	0
		0	9	9	0
3	6/6	0	9	9	0
		0	9	9	0
		0	9	9	0
0	6/7				
0	6/8				
3	6/9	0	9	9	0
		0	9	9	0
		0	9	9	0
2	6/10	0	9	9	0
		0	9	9	0
3	6/11	0	9	9	0
		0	9	9	0
		0	9	9	0
3	6/12	0	9	9	0
		0	9	9	0
		0	9	9	0
3	6/13	0	9	9	0
		0	9	9	0
		0	9	9	0
0	6/14				
0	6/15				
3	6/16	0	9	9	0
		0	9	9	0
		0	9	9	0
3	6/17	0	9	9	0
		0	9	9	0
		0	9	9	0
3	6/18	0	9	9	0
		0	9	9	0
		0	9	9	0

# TRIPS	DATE	NORTHBOUND		SOUTHBOUND	
		LOAD	EMPTY	LOAD	EMPTY
3	6/19	0	9	9	0
		0	9	9	0
		0	9	9	0
0	6/20				
0	6/21				
0	6/22				
0.5	6/23			9	0
1	6/24	0	9	9	0
0	6/25				
1	6/26	0	9	9	0

Number of 1/2 trips = 1
 Number of 1 round trips = 2
 Number of 1-1/2 round trips = 0
 Number of 2 round trips = 4
 Number of 3 round trips = 10
 Number of days did not operate = 9

ATTACHMENT C

**MILFORD BENNINGTON RAILROAD
MONTH OF JULY - 2003**

NORTHBOUND				SOUTHBOUND	
# TRIPS	DATE	LOAD	EMPTY	LOAD	EMPTY
1	7/1	0	9	9	0
1	7/2	0	9	9	0
1	7/3	0	9	9	0
0	7/4				
0	7/5				
0	7/6				
1	7/7	2	0	lite	
0.5	7/8			9	0
0.5	7/9	0	10		
0.5	7/10			9	0
1	7/11	0	9	9	0
0	7/12				
0	7/13				
1	7/14	0	9	9	0
1.5	7/15	0	9	9	0
		0	9		
1.5	7/16	0	9	9	0
				9	0
0.5	7/17	0	9		
2	7/18	0	9	9	0
		0	9	9	0
0.5	7/19			9	0
0	7/20				
2	7/21	0	9	9	0
		0	9	9	0
3.5	7/22	0	9	9	0
		0	9	9	0
		0	9	9	0
		0	9		

Number of 1/2 trips = 5
 Number of 1 round trips = 6
 Number of 1-1/2 round trips = 2
 Number of 2 round trips = 2
 Number of 3.5 round trips = 1
 Number of days did not operate = 6

**BEFORE THE
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MILFORD BENNINGTON RAILROAD COMPANY, INC.**

vs.

**BOSTON AND MAINE CORPORATION and
SPRINGFIELD TERMINAL RAILWAY COMPANY**

**VERIFIED STATEMENT OF ROGER D. BERGERON IN SUPPORT OF
SURREPLY OF THE BOSTON AND MAINE CORPORATION and THE
SPRINGFIELD TERMINAL RAILWAY COMPANY**

Roger D. Bergeron states as follows:

1. I am the Assistant Vice President of Engineering for the Boston and Maine Corporation and the Springfield Terminal Railway Company (collectively "Guilford"). I make this statement in support of Guilford's Surreply to the Rebuttal filed by Granite State Concrete Company, Inc. ("Granite State") and Milford-Bennington Railroad Company, Inc. ("MBR").
2. In addition to scheduled service on the Branch leading to the MBR, Guilford also operates service "on demand" to Guilford's customers on the branch, not merely one day per week.
3. Guilford maintenance crews are also regularly on the Branch several days per week performing inspections and maintenance.

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VERIFICATION

Commonwealth of Massachusetts)
) ss.:
County of Middlesex)

Roger D. Bergeron, being duly sworn, deposes and says that he has read the foregoing statement, and that to the best of his knowledge, the facts asserted there are true and the same are true as stated.

Signed:

Roger D. Bergeron
Roger D. Bergeron

**Subscribed and sworn to before me this 24th
day of July 2003.**

James J. Dumeau
Notary Public

My commission expires March 12, 2010

**BEFORE THE
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MILFORD BENNINGTON RAILROAD COMPANY, INC.**

vs.

**BOSTON AND MAINE CORPORATION and
SPRINGFIELD TERMINAL RAILWAY COMPANY**

**VERIFIED STATEMENT OF JOHN R. NADOLNY IN SUPPORT OF
SURREPLY OF THE BOSTON AND MAINE CORPORATION and THE
SPRINGFIELD TERMINAL RAILWAY COMPANY**

John R. Nadolny states as follows:

1. I am the Senior Vice President and General Counsel of Guilford Transportation Industries, Inc. ("GTI"). Prior to assuming my position with GTI in August of 1998, I served as Vice President and General Counsel for the Boston and Maine Corporation and the Springfield Terminal Railway Company (collectively "Guilford"). I make the statement in support of Guilford's Surreply to the Rebuttal filed by Granite State Concrete Company, Inc. ("Granite State") and Milford-Bennington Railroad Company, Inc. ("MBR").
2. In the course of my employment with Guilford, I worked with F. Colin Pease, who held the position of Executive Vice President. Our offices were located in N. Billerica, Massachusetts. We both reported to Guilford's President, David A. Fink.

3. Mr. Pease resigned his position with Guilford in July of 1998. At the time of his resignation, it appeared to me that he remained on friendly terms with both Mr. Fink and the other employees of Guilford. In fact, Mr. Fink arranged for Mr. Pease to receive a continuation of his salary and medical insurance benefits for a number of months, as well as a longer period of time for the use of a Guilford office, including telephone service, from which Mr. Pease could operate what I understood to be his self-employed consulting business. Mr. Pease utilized these benefits and eventually relocated his business to another location. Several months later, Mr. Fink learned that Mr. Pease had suffered a serious medical event while in Canada. Mr. Fink immediately offered to send an aircraft to fly Mr. Pease back to the United States, at no expense to Mr. Pease.
4. In January 2002, Mr. Pease gave a deposition in support of a lawsuit initiated against GTI by individuals Richard Flier and Neil Farmer. I have read the transcript of that deposition. Mr. Pease's deposition testimony contains derogatory statements about Mr. Fink, including allegations (i) that Mr. Fink was verbally confrontational with Mr. Pease while the two discussed Mr. Pease's decision to resign from Guilford and (ii) that Mr. Fink made accusations against Mr. Pease and statements about others of a derogatory nature.
5. The statements contained in Mr. Pease's deposition in the lawsuit brought by Messrs. Flier and Farmer are inconsistent with the circumstances under which Mr. Pease was provided and accepted extended compensation, insurance benefits and use of Guilford offices subsequent to his resignation.

6. Mr. Pease was engaged by Messrs. Farmer and Flier to assist them with at least one business venture subsequent to his resignation from Guilford.

VERIFICATION

Commonwealth of Massachusetts)
County of Middlesex) ss.:

John R. Nadolny, being duly sworn, deposes and says that he has read the foregoing statement, and that to the best of his knowledge, the facts asserted there are true and the same are true as stated.



Signed

Subscribed and sworn to before me this 23rd day of July 2003.


Notary Public

My commission expires March 12, 2010

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing documents was served on July 24, 2003, by sending a copy by Federal Express and by on counsel for the plaintiffs and the Federal Railroad Administration, as follows:

James E. Howard, Esquire
James E. Howard, L.L.C.
One Thompson Square, Suite 201
Charlestown, MA 02129

Mark H. McKeon
Regional Administrator
Federal Railroad Administration
55 Broadway - Room 1077
Cambridge, MA 02142


Robert B. Culliford

July 24, 2003