



**BOSTON & MAINE CORPORATION
MAINE CENTRAL RAILROAD COMPANY
SPRINGFIELD TERMINAL RAILWAY COMPANY**

IRON HORSE PARK
NO. BILLERICA, MASS. 01862

208584

BY FEDERAL EXPRESS
July 31, 2003



Vernon A. Williams
Surface Transportation Board
1925 K Street, NW
Washington, D.C. 20006

RE: **Docket No.: NOR42083**
Granite State Concrete Company, Inc & Milford Bennington Railroad Company, Inc. vs.
Boston and Maine Corporation and Springfield Terminal Railway Company

Dear Secretary Williams:

Enclosed for filing are the original and ten (10) copies of the **Answer of the Boston and Maine Corporation and the Springfield Terminal Railway Company to Formal Complaint and Defendant's Motion to Dismiss**, in the above-captioned proceeding.

Thank you for your attention to this matter.

Sincerely,

Robert B. Culliford / (CSS)

Robert B. Culliford
Corporate Counsel

Enc.

Cc: Service List

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**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**

**ANSWER OF THE BOSTON AND MAINE CORPORATION and
THE SPRINGFIELD TERMINAL RAILWAY COMPANY
TO FORMAL COMPLAINT**



Robert B. Culliford
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Attorney for:

*Boston and Maine Corporation
Springfield Terminal Railway
Company*

July 31, 2003

**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**

**ANSWER OF THE BOSTON AND MAINE CORPORATION and
THE SPRINGFIELD TERMINAL RAILWAY COMPANY
TO FORMAL COMPLAINT**

Pursuant to 49 C.F.R. § 1111.4, the Boston and Maine Corporation and the Springfield Terminal Railway Company (collectively "Guilford") hereby file this answer to the Formal Complaint of Granite State Concrete Company, Inc. ("Granite State") and Milford-Bennington Railroad Company, Inc. ("MBR"). In response to the allegations contained in the Formal Complaint, Guilford responds as follows:

1. To the extent that the allegations contained paragraph 1 state a legal conclusion, no response is required. By way of further answer, Guilford denies the allegations contained in paragraph 1.
2. Guilford admits the allegations in paragraph 2.
3. Guilford admits the allegations in paragraph 3.
4. Guilford admits the allegations in paragraph 4.
5. Guilford admits the allegations in paragraph 5.
6. Guilford admits the allegations in paragraph 5.

7. Guilford denies the allegations contained in paragraph 7.
8. Guilford is without sufficient information upon which to admit or deny the allegations in paragraph 8.
9. Guilford is without sufficient information upon which to admit or deny the allegations in paragraph 9.
10. Guilford admits the allegations contained in the first and third sentences of paragraph 10. Guilford denies the remainder of the allegations contained in paragraph 10.
11. Guilford admits the allegations contained in the first, third and fourth sentences of paragraph 11. Guilford denies the remaining allegations contained in paragraph 11.
12. Guilford admits the allegations contained in the first and second sentences of paragraph 12. Guilford denies the remainder of the allegations contained in paragraph 12.
13. Guilford denies the allegations contained in paragraph 13.
14. Guilford denies the allegations contained in paragraph 14.
15. Guilford denies the allegations contained in paragraph 15.

Count I

16. Guilford hereby incorporates by reference its answers to paragraphs 1 through 15 above.
17. Guilford denies the allegations contained in paragraph 17.
18. Guilford denies the allegations contained in paragraph 18.

Count 2

19. Guilford hereby incorporates by reference its answers to paragraphs 1 through 18

above.

20. Paragraph 20 states a legal conclusion for which no response is required.

21. Guilford denies the allegations contained in paragraph 21.

22. Guilford denies the allegations contained in paragraph 22.

23. Guilford denies the allegations contained in paragraph 23.

24. To the extent that the allegations contained in paragraph 24 state a legal conclusion, no response is required. By way of further answer, Guilford denies the allegations contained in paragraph 24.

Count 3

25. Guilford hereby incorporates by reference its answers to paragraphs 1 through 24 above.

26. Guilford denies the allegations contained in paragraph 26.

27. Paragraph 27 states a legal conclusion for which no response is required. By way of further answer, Guilford denies the allegations contained in Paragraph 27.

28. Paragraph 28 states a legal conclusion for which no response is required. By way of further answer, Guilford denies the allegations contained in Paragraph 28.

29. Paragraph 29 states a legal conclusion for which no response is required. By way of further answer, Guilford denies the allegations contained in Paragraph 29.

AFFIRMATIVE DEFENSES

First Affirmative Defense

The Formal Complaint fails to state a cause of action upon which relief can be granted.

Second Affirmative Defense

All traffic being transported by MBR on behalf of Granite State is exempt from the provisions of 49 U.S.C. Subtitle IV pursuant to 49 U.S.C. § 10502 and 49 C.F.R. §1039.11(a).

Third Affirmative Defense

Granite State and MBR have failed to mitigate their damages.

Fourth Affirmative Defense

MBR's claims are barred by its material breach of the terms and conditions of the trackage rights agreement.

Fifth Affirmative Defense

Guilford's actions are a reasonable response to the refusal of MBR to adhere to customary railroad safety and operating rules, practices, regulations and standards.

Sixth Affirmative Defense

Guilford is not providing transportation or service to either Granite State or MBR as those terms are used in 49 U.S.C. §§ 11701(b) and 11704(b).

Respectfully submitted,



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Attorney for:

*Boston and Maine Corporation
Springfield Terminal Railway
Company*

Dated: July 31, 2003

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**

**MOTION OF THE BOSTON AND MAINE CORPORATION and
THE SPRINGFIELD TERMINAL RAILWAY COMPANY
TO DISMISS THE FORMAL COMPLAINT**

Robert B. Culliford
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Attorney for:

*Boston and Maine Corporation
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July 31, 2003

**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**

**MOTION OF THE BOSTON AND MAINE CORPORATION and
THE SPRINGFIELD TERMINAL RAILWAY COMPANY
TO DISMISS THE FORMAL COMPLAINT**

Pursuant to 49 C.F.R. § 1111.4, the Boston and Maine Corporation and the Springfield Terminal Railway Company (collectively "Guilford") hereby move to dismiss the Formal Complaint of Granite State Concrete Company, Inc. ("Granite State") and Milford-Bennington Railroad Company, Inc. ("MBR"). In support of this motion, Guilford submits that Granite State is in the business of producing concrete and stone products. Complaint, ¶ 2. To support the operations of Granite State, MBR transports crushed or broken stone, sand and/or gravel only between the Granite State excavation site and its processing plant. Verified Statement of Joseph K. Crawford ("Crawford V.S."), ¶ 2. MBR transports no other commodities on behalf of Granite State over Guilford's line. Crawford V.S., ¶ 3.

Congress has directed the Board, "to the maximum extent consistent with [the rail provisions of title 49 of the U.S. Code], to exempt persons, transactions and services from regulation when such regulation (1) is unnecessary to carry out the transportation

policy of the Interstate Commerce Commission Termination Act and (2) either the transaction or service is of limited scope or the application of the rail provisions “is not needed to protect shippers from abuse of market power.” 49 U.S.C. § 10502(a). Unless otherwise expressly stated by the Board, exemption of a commodity extends to all aspects of regulation, including rail service, *see Consolidated Rail Corp.—Declaratory Order—Exemption*, 1 I.C.C.2d 895 (1986), *aff’d sub nom. G&T Terminal Packaging Co., Inc. v. Consolidated Rail Corp.*, 830 F.2d 1230 (3rd Cir. 1987), and suspension of service. *see Consolidated Rail Corp.—Declaratory Order—Suspension of Service*, Ex Parte No. 346 (Sub-No. 14B), Decided June 13, 1989 (“*Suspension of Service*”).

Dimension stone, quarry; crushed or broken stone or riprap; sand (aggregate or ballast); and gravel (aggregate or ballast) are all exempt from regulation. 49 C.F.R. § 1039.11(a). As to the first exemption criterion, the Interstate Commerce Commission (“I.C.C.”) determined that, “Regulation is not necessary to carry out the transportation policy of 49 U.S.C. § 10101a. Because....the transportation of these commodities is competitive, an exemption will promote the goals of §§ 10101a (1), (4), and (5). *Rail General Exemption Authority—Petition of AAR to Exempt Rail Transportation of Selected Commodity Groups*, 9 I.C.C.2d 969, 973 (1993) (“*Class Exemption*”). As for the second criterion, the I.C.C. found that regulation is not necessary to protect shippers from an abuse of market power. *Id.*

The exemption of a person, transaction, or service does not divest this Board of its exclusive jurisdiction over the exempted activities and hence does not permit a shipper to resort to common law remedies. *See*, 49 U.S.C. § 10501(b); *G&T Terminal Packaging*

Co., Inc. v. Consolidated Rail Corp., 830 F.2d 1230 (3rd Cir., 1987). A shipper or other party seeking relief must first petition the Board for revocation of the exemption.

Indeed, as the Interstate Commerce Commission found in *Suspension of Service*:

...we made clear that the only recourse available to a person aggrieved with respect to a matter that has been exempted under section [10502] is a petition for revocation of the exemption under section [10502(d)]...Because the proposed service suspension is directly related to such a matter, Conrail is correct that a determination regarding the propriety of the suspension can take place only as part of a revocation proceeding. That is, before we can determine the legality of Conrail's suspension under the Interstate Commerce Act, we would first have to revoke Conrail'sexemption...and to reregulate the traffic.

Suspension of Service, unnumbered page 2.

In any revocation proceeding, the moving party bears the burden of demonstrating that revocation is necessary to carry out the transportation policy of 49 U.S.C. § 10101. 49 U.S.C. § 10502(d); 49 C.F.R. § 1121.4(f). If the Board revokes the exemption, regulation is reimposed and the shipper or other affected party may ask the Board to consider alleged violations of the rail of title 49. *See G&T Terminal Packaging Co., Inc.*, 830 F.2d at 1235-36. Since neither MBR nor Granite State have petitioned for revocation of the exemption, the Formal Complaint is premature.

Furthermore, neither MBR nor Granite State can seek relief by claiming that Guilford is interfering with the rights of MBR or Granite State pursuant to the trackage rights agreement because Guilford has not interfered with the MBR's ability carry out its common obligations. Rather, MBR has no common carrier obligations with regard to its service of Granite State, because the commodity being shipped is exempt. *See Pejebscot Industrial Park, Inc. D/B/A Grimm Industries—Petition for Declaratory Order*, STB Finance Docket No. 33989, Served May 15, 2003. (no common carrier obligation exists after effective date of exemption). As a result, MBR cannot—and indeed does not—

allege that Guilford is preventing it from carrying out its common carrier duty as to Granite State. Rather, MBR and Granite State instead allege that Guilford is providing service to those entities, and that Guilford's actions in providing that service are in violation of the Interstate Commerce Act. However, because the *Class Exemption* applies to all aspects of Subtitle IV of Title 49—with the exception of car hire issues—such regulation does not presently exist. *Class Exemption*, at 983.

Accordingly, since the exemption applies to the those commodities being shipped by MBR on behalf of Granite State—and by extension to any service that Guilford is allegedly providing—the Board should dismiss the complaint. Moreover, because Guilford is acting pursuant to its rights under the trackage rights agreement, the Board should not involve itself with interpreting those terms and conditions, *See Review of Rail Access and Competition Issues*, STB Ex Parte No. 575, Service Date: March 2, 1999, at 3, and should focus instead on its prior finding that regulation of the transportation of these commodities is unnecessary.

As a result, Guilford respectfully requests that the Formal Complaint be dismissed.

Respectfully submitted,



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Attorney for:

*Boston and Maine Corporation
Springfield Terminal Railway Company*

July 31, 2003

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 34381

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

vs.

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

**VERIFIED STATEMENT OF JOSEPH K. CRAWFORD IN SUPPORT OF THE
MOTION TO DISMISS OF THE BOSTON AND MAINE CORPORATION and
THE SPRINGFIELD TERMINAL RAILWAY COMPANY**

Joseph K. Crawford states as follows:

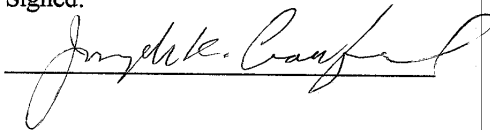
1. I am the Vice President of Marketing for the Boston and Maine Corporation and the Springfield Terminal Railway Company (collectively "Guilford"). I make this statement in support of Guilford's Motion to Dismiss the Formal Complaint filed by Granite State Concrete Company, Inc. ("Granite State") and Milford-Bennington Railroad Company, Inc. ("MBR").
2. To support the operations of Granite State, MBR transports crushed or broken stone, sand and/or gravel only between the Granite State excavation site and its processing plant.
3. MBR transports no other commodities on behalf of Granite State over Guilford's line.

VERIFICATION

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

Joseph K. Crawford, 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 31st
day of July 2003.



Notary Public

My commission expires _____
Roland L. Theriault
Notary Public
My Commission Expires
August 7, 2009

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing documents was served on July 31, 2003, by sending a copy by Federal Express and by on counsel for the plaintiffs and the Surface Transportation Board, as follows:

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


Robert B. Calliford

July 31, 2003