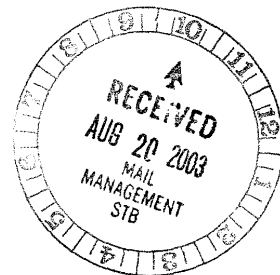


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August 19, 2003

VIA FEDERAL EXPRESS

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

Office of Proceedings *208755*
AUG 22 2003
U.S. DEPT. OF TRANSPORTATION

Re: Granite State Concrete Co., Inc. and Milford-Bennington
Railroad Co., Inc. v. Boston and Maine Corporation and
Springfield Terminal Railway Co.

Docket No. NOR 42083

Dear Secretary Williams:

Enclosed for filing in the above captioned matter are the original and 10 copies of the "Reply of Granite State Concrete Co., Inc. and Milford-Bennington Railroad Co., Inc. to 'Motion of the Boston and Maine Corporation and the Springfield Terminal Railway Co. to Dismiss the Formal Complaint'". Please date stamp and return the extra enclosed copy of the Reply in the enclosed self-addressed stamped envelope. Thank you very much for your attention to this request.

Very truly yours,

James E. Howard
James E. Howard

cc: Robert B. Culliford

BEFOR
SURFACE TRANSPC

Docket No. 1

original



GRANITE STATE CON
MILFORD-BENNINGTON R/



AMERICAN SHORT LINE AND
REGIONAL RAILROAD ASSOCIATION
The Voice of America's Independent Railroads

v.

BOSTON AND MAINE CORPORATION and
SPRINGFIELD TERMINAL RAILWAY CO.

REPLY OF GRANITE STATE CONCRETE CO., INC. AND
MILFORD-BENNINGTON RAILROAD CO., INC. TO
"MOTION OF THE BOSTON AND MAINE CORPORATION AND THE
SPRINGFIELD TERMINAL RAILWAY COMPANY
TO DISMISS THE FORMAL COMPLAINT"

Introduction

In this action, Granite State Concrete Company, Inc. ("Granite State") and Milford-Bennington Railroad Company, Inc. ("Milford-Bennington") have requested the Board to enter an emergency service order enabling Milford-Bennington to provide rail service to Granite State, to determine that Boston and Maine Corporation and Springfield Terminal Railway Company ("Guilford") have adopted unreasonable rules and practices and to award damages.¹ Guilford has filed a motion to dismiss the complaint. Granite

¹ Count 1 of the complaint requests the entry of a service order pursuant to 49 U.S.C. 11123. The parties have treated Count 1 as a petition under 49 U.S.C. 11123 and 49 C.F.R. 1146, and the issues have been fully briefed. Granite State and Milford-Bennington continue to suffer harm while the matter is pending, and, therefore, the need for a service order continues to exist.

State and Milford-Bennington hereby submit this reply in opposition to the motion to dismiss.

In the motion to dismiss, Guilford argues that the stone transported by Milford-Bennington for the account of Granite State is a commodity that has been exempted from regulation by the Board and that such exemption extends to the transportation service that is provided by Guilford and that is the subject of the complaint. Guilford contends that Granite State and Milford-Bennington must petition the Board to revoke the exemption before they can seek relief for the violations of Part A of subtitle IV of title 49 set forth in the complaint.

As demonstrated below, the exemption of stone does not relieve Guilford from its obligation to establish reasonable rules and practices with respect to the transportation and services provided by Guilford to Granite State and Milford-Bennington. Moreover, even if the exemption were construed to apply to Guilford--contrary to the argument set forth below--the Board should revoke the exemption without requiring a separate revocation proceeding.

Argument

I. The Rules and Practices of Guilford Have Not Been Exempted.

A. Guilford Provides Transportation Service to Granite State and Milford-Bennington.

In June, 1992, Milford-Bennington began to move stone for Granite State from Granite State's excavation site, which is located on the Milford-Bennington line, to Granite State's processing plant, which is located on a line owned by Guilford. Guilford granted Milford-Bennington trackage rights, thereby enabling Milford-Bennington alone

to handle the entire 6 mile movement, rather than to use a less efficient two carrier movement.

The permit by which Granite State operates its excavation site prohibits Granite State from using trucks to move stone from the site and restricts the operations at the site to weekdays between the hours of 6:30 AM and 6:30 PM. Due to these terms and conditions of the permit, Granite State's only option for moving stone from the site is to use rail. In order to do so, Granite State made investments to acquire rail cars and to configure its facilities to accommodate rail service. Milford-Bennington made investments to upgrade its line in order to handle the stone traffic and, as noted above, acquired trackage rights from Guilford in order to reach Granite State's processing plant directly.

From June, 1992 until June, 2003, Milford-Bennington operated 3 or 4 trains a day between the excavation site and the processing plant on weekdays between 6:30 AM and 6:30 PM without any time limitations or restrictions imposed by Guilford. Guilford did not handle any of these trains with its locomotives or crews in line haul or interchange service; rather, Guilford provided transportation service in the form of access to its line by means of the trackage rights afforded to Milford-Bennington and dispatching services.² As described in the complaint, however, beginning in June, 2003 Guilford has arbitrarily and without justification limited Milford-Bennington's hours of operation so that Milford-Bennington is unable to provide the level of service that is required by Granite State and that has been provided in the past.

² By providing access to its line and dispatching, Guilford is providing "transportation" within the meaning subtitle IV of title 49. "Transportation" is defined to include any facility or property of any kind related to the movement of property by rail and services related to such movement. 49 U.S.C. 10102.

B. Guilford's Rules and Practices are Not Exempt.

In September, 1993, the Interstate Commerce Commission exempted a number of commodities, including stone, from all provisions of subtitle IV of title 49 with certain exceptions that are not relevant. Rail General Exemption Authority--Petition of AAR to Exempt Rail Transportation of Selected Commodity Groups, 9 I.C.C.2d 969 (1993). The ICC found, without explanation, that regulation of the commodities in question, including stone, was not necessary to carry out the Rail Transportation Policy. In addition, the ICC determined that transportation of such commodities was competitive and, as a result, that exemption would promote several of the goals of the Rail Transportation Policy. For example, the ICC stated that exemption would increase competition between rail carriers and trucks and encourage energy conservation by diverting traffic from trucks to rail. Noting the relatively small rail market shares of the various commodities being exempted, the ICC concluded that regulation was not necessary to protect shippers from an abuse of market power.

The sole focus of the ICC in exempting the various commodities, including stone, was on the actions of the rail carrier actually handling the commodities in line haul service. This focus is particularly well illustrated in the discussion of the absence of market power. The ICC noted that no shipper had "expressed concern that any railroad carrying any of these 17 commodities would abuse market power or has even alleged that any carrier hauling any of this freight has any market power to abuse." 9 I.C.C.2d at 973 (emphasis added). Thus, the exemption of stone traffic was intended to free rail carriers that handle stone from regulation in light of the ICC's view that there existed comprehensive competition from motor carriers and other modes.

The exemption of stone movements from regulation under subtitle IV in 1993 was not directed, however, at the activities of rail carriers other than those actually handling the movements of the exempted commodities. The exemption was not directed at, does not encompass and should not be extended to, for example, ancillary transportation services, as distinguished from actual movement of stone. As applied to this case, the exemption of stone was not intended to free from regulation the actions of Guilford as the owner of a line over which Milford-Bennington has trackage rights and as the dispatcher of traffic on that line.

The contrary interpretation, which is urged by Guilford, would lead to the untenable conclusion that the rules and practices of Guilford would be exempt if Milford-Bennington were handling stone but not exempt if Milford-Bennington were moving a commodity that is not exempt. Surely this is not what the ICC intended by exempting stone movements, and acceptance of Guilford's argument would subvert the purposes of the exemption. Moreover, interpretation of the stone exemption in the manner argued by Guilford would give Guilford carte blanche to violate the provisions of title 49 in connection with Granite State's stone traffic.

As demonstrated above, the transportation and related services provided by Guilford are subject to the jurisdiction of the Board under subtitle IV of title 49. Consequently, the rules and practices of Guilford related to such transportation or service must be reasonable. 49 U.S.C. 10702. The exemption of the movement of stone by Milford-Bennington does not mean that the transportation and related services provided by Guilford are also exempt.

II. If the Transportation and Service Provided by Guilford are Exempt, the Exemption Should be Revoked.

The Board may revoke an exemption when it finds that application of a provision of Part A of subtitle IV is necessary to carry out the Rail Transportation Policy. 49 U.S.C. 10502(d). The ICC and the Board have held, and courts have confirmed, that the Board need not examine all of the factors of the Rail Transportation Policy in order to evaluate the need for a revocation. Rather, the Board uses the same analysis to revoke an exemption as it does to issue an exemption in the first place. The focus of the analysis should be on those sections of the Rail Transportation Policy that are related to the underlying statutory section as to which exemption or revocation is sought. Minnesota Commercial Railway, Inc.--Trackage Rights Exemption--Burlington Northern Railroad Company, 8 I.C.C.2d 31 (1991); Village of Palestine v. Interstate Commerce Commission, 936 F.2d 1335 (D.C. Cir. 1991).

The ICC explained that a petition to revoke must show that there has been conduct that frustrates the Rail Transportation Policy and that regulation will be effective in carrying out the Rail Transportation Policy. Rail General Exemption Authority -- Miscellaneous Argicultural Commodities -- Petition of G. & T. Terminal Packaging Co., Inc., et al. to Revoke Conrail Exemption, 8 I.C.C. 2d 674, 676 (1992). In general, exemption is appropriate to effectuate the Rail Transportation Policy “whenever ‘competition or the demand for services’ will ensure reasonable rates and practices.” Id. at fn. 4. If, however, a rail carrier possesses market power, the Board must determine whether regulation is necessary to protect against the abuse of such power. Id. at 682.

In 1993, as described above, the ICC exempted stone, with exceptions that are not relevant, from all of the provisions of title 49. The only reason articulated for the exemption was that the commodities in question had competitive transportation alternatives. There was no discussion in the ICC's decision, for example, of section 10702 and the requirement that rail carriers establish reasonable rules and practices. The decision, therefore, provides no specific guidance, other than the conclusion that the existence of competition supported the exemption, for purposes of analysis of a revocation of the exemption. As shown below, however, regulation of rules and practices under section 10702 in the circumstances described in the complaint in this case is necessary in order to carry out the Rail Transportation Policy and is warranted in view of the Board's mandate, as explained above.

Application of section 10702 in this case is necessary to implement several of the provisions of the Rail Transportation Policy, including the following:

1. Imposing reasonable rules and practices on Guilford will allow the demand for services by Granite State to establish reasonable rates for transportation by rail. 49 U.S.C. 10101(1).
2. Regulation of Guilford's rules and practices will promote an efficient rail transportation system by allowing Milford-Bennington to operate additional trains in order to earn adequate revenues. 49 U.S.C. 10101(3).
3. Regulation will ensure the continuation of a sound rail transportation system with effective competition among rail carriers and other modes in order to meet the needs of the public, including Granite State. 49 U.S.C. 10101(4).

4. Regulation in the form of reasonable rules and practices is necessary to foster sound economic conditions and, in particular, ensure effective coordination between Guilford and Milford-Bennington so that Granite State's needs are met. 49 U.S.C. 10101(5).

5. Regulation is required to permit the operation of transportation facilities without detriment to the public health and safety. 49 U.S.C. 10101(8).

6. Enforcing the requirement of reasonable rules and practices will preclude arbitrary actions that inhibit the movement of rail traffic and will thereby encourage honest and efficient management of railroads. 49 U.S.C. 10101(9).

7. Regulation of Guilford's rules and practices is necessary to encourage and promote energy conservation by keeping the Granite State stone traffic moving by rail to the maximum extent and minimizing its need to obtain stone for its processing plant from other sources by trucks. 49 U.S.C. 10101(14).

Perhaps most significantly, the rationale for the exemption of stone in 1993 simply is not applicable to the facts of this case. As described above, Granite State is prohibited from using trucks to move stone from its excavation site. There is, therefore, no truck competition for the Granite State stone traffic handled by Milford-Bennington. The lack of competition leaves Granite State wholly at the mercy of Guilford, which has the power, through the exercise of its unreasonable rules and practices, unilaterally to decide on the level of service that Granite State will receive from Milford-Bennington. Indeed, Guilford has market power sufficient to force Granite State to forego use of Milford-Bennington through trains and to use joint line service with Guilford. Such a development would be more costly and less efficient for Granite State and would have a

devastating effect on Milford-Bennington. Consequently, regulation of Guilford's rules and practices is necessary in order to prohibit "predatory" practices, to avoid "undue concentrations of market power, and to prohibit unlawful discrimination." 49 U.S.C. 10101(12).

For the reasons described in Section I above, the rules and practices of Guilford are not exempt, and the Board may adjudicate the complaint. If, however, the Board is of the view that revocation is a prerequisite to consideration of the complaint, the Board should decide to revoke the exemption on the basis of Guilford's motion and this reply. The issue has been joined, and there is no need to require a separate petition, which could be subjected to a schedule that might not result in a decision for 12 months. 49 U.S.C. 10502(d). As described in the complaint, Granite State and Milford-Bennington are being harmed daily and deserve a decision on these matters at the earliest possible time. Deciding the revocation issue, if necessary, on the basis of this record would promote the expeditious handling and resolution of proceedings required or permitted under Part A of subtitle IV, thereby fulfilling yet another aspect of the Rail Transportation Policy. 49 U.S.C. 10101(15).

Conclusion

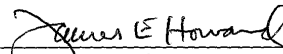
For the reasons stated above, the Board should deny the motion to dismiss the complaint and resolve the issues presented by Granite State and Milford-Bennington in the complaint. Alternatively, if the Board determines that the transportation and services provided by Guilford in the form of access to its line and dispatching are covered by the exemption for stone, then such exemption should be revoked on the basis of this record

so that the parties may proceed promptly to a decision on the complaint.

Respectfully submitted,

GRANITE STATE CONCRETE CO., INC.
and
MILFORD-BENNINGTON
RAILROAD COMPANY, INC.

By their attorney,



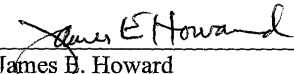
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Dated: August 19, 2003

CERTIFICATE OF SERVICE

I hereby certify that the foregoing "Reply of Granite State Concrete Co., Inc. and Milford-Bennington Railroad Co., Inc. to 'Motion of the Boston And Maine Corporation and the Springfield Terminal Railway Company to Dismiss the Formal Complaint'" was served this 19th day of August, 2003 by sending a copy by Federal Express to counsel for the defendants, as follows:

Robert B. Culliford
Guilford Rail System
Iron Horse Park
N. Billerica, MA 01862



James B. Howard