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January 7, 2004

VIA FEDERAL EXPRESS

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

ENTERED
Office of Proceedings

JAN - 8 2004

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209807

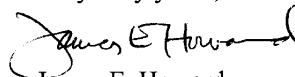
Re: Granite State Concrete Co., Inc., et al. v. Boston and Maine Corporation, et al.
Docket No. NOR 42083

Dear Secretary Williams:

Enclosed for filing in the above captioned matter are the original and 10 copies of the "Opening Statement of Granite State Concrete Co., Inc. and Milford-Bennington Railroad Co., Inc." Could you please acknowledge receipt of the Opening Statement by date stamping the extra enclosed copy of this letter and returning it to me in the self-addressed stamped envelope?

Thank you very much for your assistance. Please let me know if you need anything further.

Very truly yours,


James E. Howard

cc: Robert B. Culliford
enclosures

209807

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. NOR 42083

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

vs.

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



**OPENING STATEMENT OF GRANITE STATE CONCRETE CO., INC.
AND MILFORD-BENNINGTON RAILROAD CO., INC.**

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Company, Inc.

DATED: January 7, 2004

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INTRODUCTION

This case was initiated in July, 2003 by the filing of a complaint by Granite State Concrete Company, Inc. ("Granite State") and Milford-Bennington Railroad Company, Inc. ("Milford-Bennington") against Boston and Maine Corporation and Springfield Terminal Railway Company (both of which are subsidiaries of Guilford Transportation Industries, Inc. and which are referred to as "Guilford"). When actions by Guilford severely disrupted the rail service provided to Granite State by Milford-Bennington by means of trackage rights over Guilford, Granite State and Milford-Bennington filed their complaint seeking the entry of an emergency service order, a determination that Guilford was acting unreasonably, a direction to Guilford to cease its unreasonable actions and damages.

In a decision served September 15, 2003, the Board denied the request for an emergency service order but commenced "a proceeding to investigate whether

[Guilford's] conduct toward [Milford-Bennington] is in breach of its obligation to provide service or constitutes an unreasonable practice and whether damages for any violations are in order." Decision served September 15, 2003 at 8. The Board specifically found that Guilford was providing "transportation" and "service" within the meaning of 49 U.S.C. 11701(b) and 11704(b). Decision served September 15, 2003 at 7.

As demonstrated below, Guilford has failed to provide service on reasonable request and has established unreasonable rules and practices by arbitrarily and without justification restricting the hours during which Milford-Bennington could use its trackage rights over Guilford to serve Granite State. Guilford has attempted to excuse its unreasonable conduct by arguing that the restrictions were necessary for safety. To the contrary, however, as shown below, there was no safety issue--or any other reason, for that matter--that could possibly justify Guilford's action to restrict the hours of Milford-Bennington's operations, thereby making it impossible to provide the service that Granite State had received and expected for 11 years prior to June 20, 2003.

The evidence compels the conclusion that Guilford violated 49 U.S.C. 11101 and 10702. Consequently, the Board should direct Guilford to discontinue its illegal conduct. Moreover, the record will show that Milford-Bennington and Granite State were harmed by Guilford's actions, thereby entitling them to damages.

FACTS

I. Early History of Milford-Bennington Service to Granite State.

The Hillsborough branch extends from milepost 0.0 in Nashua, New Hampshire to milepost 34.9 in Bennington, New Hampshire. Leishman V.S. at 1.¹ The entire

¹ Verified Statements of Peter R. Leishman, John G. MacLellan, III, F. Colin Pease, Gilbert M. Robert and Susan Madigan are being filed herewith and are referred to as "[name] V.S."

branch was formerly owned by Guilford, but the portion between milepost 16.36 in Wilton, New Hampshire and Bennington was abandoned and acquired by the State of New Hampshire in 1989. Id. Guilford has continued to own and operate the Hillsborough branch between Nashua and milepost 16.36 in Wilton.

Granite State operates a processing facility which is located on the Guilford-owned portion of the Hillsborough branch at approximately milepost 13.0 in Milford, New Hampshire, at which Granite State produces concrete and crushed stone. MacLellan V.S. at 1. Granite State also owns an excavating site located on the Milford-Bennington line at approximately milepost 19.0 in Wilton. Id. at 3. In 1989, the town of Wilton issued a permit enabling Granite State to excavate and crush stone at the site but limiting the hours of operation to 6:30 AM to 6:30 PM on Mondays through Fridays. Id. at 2-3. The permit also contemplated that rail service would be initiated at the excavation site and, as a consequence, prohibited the use of trucks for the movement of stone from the site to the processing plant. Id.

The efforts of Granite State to obtain the permit coincided with the creation of Milford-Bennington Railroad. Leishman V.S. at 1-3. Milford-Bennington entered into an operating agreement with the State of New Hampshire for the operation of that portion of the Hillsborough branch owned by New Hampshire between milepost 16.36 and the end of the line. Id. In 1988, Granite State and Milford-Bennington began to plan the implementation of rail service by Milford-Bennington between the Granite State excavation site and the processing facility. Id. at 2. Milford-Bennington upgraded the line between milepost 16.36 and milepost 19.0 to Class 2 condition. Id. at 5.

In order to provide rail service to Granite State, Milford-Bennington sought trackage rights over the Guilford line in order to operate between milepost 13.0 and milepost 16.36. Leishman V.S. at 2-3. Guilford, however, refused to grant such trackage rights. Id. As a result, Milford-Bennington filed a "feeder line" application with the Interstate Commerce Commission ("ICC") seeking to obtain ownership of the Guilford line in order to serve Granite State. Id. at 3-4. Guilford opposed the feeder line application on a variety of grounds for several years. Id. In 1992, however, Guilford decided to end the litigation before the ICC by agreeing to enter into a trackage rights agreement with Milford-Bennington. Id.

The trackage rights agreement, which is dated June 22, 1992, permits Milford-Bennington to operate over the Guilford line for purposes of providing service to Granite State. Leishman V.S. at 4 and Exhibit 2. At Guilford's insistence, the agreement restricts the length of Milford-Bennington trains to ten cars per train. Id. The trackage rights agreement does not explicitly address the subject of the hours during which Milford-Bennington is permitted to operate, but the negotiators on both sides were aware of the conditions of the permit limiting Granite State's operations at Wilton and intended to enable Milford-Bennington to operate without any hourly restrictions. Leishman V.S. at 5; Pease V.S. at 5-6.

Prior to and throughout the existence of the trackage rights agreement, the Guilford portion of the Hillsborough branch, and in particular the portion of the line between milepost 13.0 and milepost 16.36, has been classified as excepted track. Leishman at 11. The speed limit on the line was generally ten miles per hour for the first several years after the trackage rights agreement was signed, thereby enabling Milford-

Bennington to operate 3 or 4 round-trips a day between the Granite State facilities. Id. The condition of the line deteriorated, however, and the speed limit dropped to five miles per hour. Id. As a result, the norm became two to three trips per day. Id.² Until June 20, 2003, Milford-Bennington generally operated its trains to coincide with the operating hours of the Granite State excavation site--between 6:30 AM and 6:30 PM on Mondays through Fridays. Id.

Granite State's operations at Milford and Wilton are seasonal in nature. MacLellan V.S. at 1-2. When temperatures drop below freezing, it is impossible to operate at Milford, because the processing requires a constant flow of water. Id. All of the stone produced at Wilton is moved to Milford. Id. Consequently, operations at the excavation site in Wilton and at Milford are generally shutdown 3 or 4 months a year in the winter. Id. The inability to operate in the winter places a premium on maximizing production in the summer months. Id. Granite State attempts every summer to move as much stone as possible from Wilton and to process the stone in Milford in order to build up stockpiles so that it will have sufficient materials to supply its customers during the winter months. Id.

Notwithstanding its agreement to grant the trackage rights in 1992, Guilford persisted in activities that made it difficult for Milford-Bennington to operate on the trackage rights line. Leishman V.S. at 5-11; Pease V.S. at 2-9. For example, in 1993, less than a year after the trackage rights were granted, Guilford petitioned the ICC to

² Due to the 10 car per train provision of the trackage rights agreement, sidetracks and other facilities were constructed by Granite State at the excavation site and at the processing plant in order to accommodate four 10-car trains a day, and the facilities themselves were designed to produce and process 40 cars of stone per day. MacLellan V.S. at 3. Consequently, the lowering of the speed on the Guilford line effectively precluded Granite State from realizing optimal production levels at Wilton and Milford. Id. at 4.

revoke the exemption by which the trackage rights had been authorized. Leishman V.S. at 6. The ICC summarily rejected the attempt by Guilford to terminate the trackage rights. Id. In April, 1993, Milford-Bennington notified Guilford, in accordance with the trackage rights agreement, of various defective conditions on the trackage rights line. Leishman V.S. at 7; Pease V.S. at 7. According to the agreement, Guilford was required to correct such defective conditions. Leishman V.S. at 7. Rather than to do so, however, Guilford sent an inspector to examine the Milford-Bennington equipment with the express goal of finding as many defects on the equipment as Milford-Bennington had reported with respect to the line. Id. As a result, Milford-Bennington was unable to operate for approximately 6 weeks. Id.³

II. Recent Events.

In late 2002, Wilton Scenic Railroad was organized with the goal of operating a scenic passenger railway over the state owned Milford-Bennington line. Leishman V.S. at 11; Pease V.S. at 10. Wilton Scenic obtained the permission of New Hampshire to use the Milford-Bennington line and agreed to have Milford-Bennington operate the passenger trains. Leishman V.S. at 12. Wilton Scenic contacted Guilford with a request to use a short spur track to reach a building adjacent to Guilford's yard and to use the Guilford yard at Wilton to store two passenger cars that Wilton Scenic was in the process of acquiring. Pease V.S. at 10-11. The response by Guilford imposed certain difficult preconditions for Guilford's cooperation, and the ensuing discussions did not lead to any agreement. Id. In early December, 2002, however, the two passenger cars acquired by Wilton Scenic arrived in Wilton. Id. at 11-12; Leishman V.S. at 12. The cars were

³ See pages 32-35 below for a discussion of additional actions by Guilford to harass or intimidate Milford-Bennington .

placed on the Milford-Bennington line just beyond milepost 16.36 and they were secured by "skate" devices and hand brakes so that the cars could not move. Leishman V.S. at 12.

On December 11, 2002, a Guilford employee, Erwin Towle, contacted Peter Leishman, the President of Milford-Bennington, with a request to place a portable derail device on the Milford-Bennington line at milepost 16.36. Leishman V.S. at 12. The same request was relayed by another Guilford employee, Andrew Zompa, on December 12, 2002. Id. These requests were made at the direction of Sydney Culliford, Guilford's Vice President-Operations, who had made no inquiry whether the passenger cars were already secured. Culliford Dep. at 8-10.⁴

On December 12, 2002, Mr. Zompa arrived in Wilton in the early afternoon with a temporary derail device that he had found at another Guilford location. Leishman V.S. at 13; Pease V.S. at 12. Colin Pease, a consultant working for Wilton Scenic and a former employee of Guilford, was also present when Mr. Zompa arrived. Id.; Pease V.S. at 12. Messrs. Zompa, Leishman and Pease conversed for approximately an hour at milepost 16.36. Id. Mr. Zompa was very concerned that the derail device be applied to the track immediately, because he understood that David Fink, the Chairman and Chief Executive Officer of Guilford, wanted the device installed and that Mr. Fink, a resident of Amherst, New Hampshire, an adjacent town, might be driving by that day to make sure that the derail device was in place. Id. Mr. Zompa expressed concern for his job if the device were not promptly attached to the track. Id.

⁴ Cited excerpts of deposition transcripts are referred to as "[name] Dep." and being submitted herewith.

Mr. Leishman and Mr. Pease understood that the portable derail device was intended to be used only for protection against the unlikely possibility that the passenger cars, which were on level track and already protected by hand brakes and skate devices, might inadvertently move onto the Guilford line. Leishman V.S. at 13; Pease V.S. at 12-14. While they did not believe that the derail was necessary, they did not object in view of the fact that all rail operations had ended for the winter. Id. Furthermore, they were sympathetic to Mr. Zompa's anxiety to be able to report to his superiors that the derail had been installed. Id. There was no discussion of any possible use of the portable derail device for freight operations when they resumed in the spring. Id.

On December 12, 2002, Guilford, which has trackage rights over Milford-Bennington to serve a quarry at approximately milepost 19, issued a bulletin stating that a new derail device had been placed in service on the Milford-Bennington line at milepost 16.36. Leishman V.S. at 14 and Exhibit 10. The bulletin contained no instructions concerning the use of the portable derail or its applicability to passenger or freight operations. Id.

In the first few days of April, 2003, and prior to the resumption of Milford-Bennington operations on April 7, 2003, Milford-Bennington moved the passenger cars from milepost 16.36 to a siding at approximately milepost 19. Leishman V.S. at 14. The siding itself has 2 derail devices that were kept in the closed position to prevent the movement of the cars, and the hand brakes and skate devices were applied. Id. When Milford-Bennington operations resumed on April 7, 2003, there was no derail device whatsoever at milepost 16.36. Id.

Wilton Scenic ran its first train on May 17, 2003. Pease V.S. at 15. Just prior to that time, Milford-Bennington reinstalled the temporary derail device at milepost 16.36. Leishman V.S. at 15. In late May or the first few days of June, 2003, Guilford provided and Milford-Bennington installed a permanent derail device at the same location-- milepost 16.36--as the temporary device had been placed. Id. at 15-16. A derail device was used whenever Wilton Scenic operated in May and through June 19, 2003. Such use was consistent with an understanding between Wilton Scenic and the Federal Railroad Administration ("FRA") that the passenger operations, which initially were to be conducted only on weekends, would be separated from the national rail system by means of the derail device. Pease V.S. at 15-16. Wilton Scenic informed Guilford that the derail would be used in this manner, and Guilford expressed no concerns or objections. Id.

No derail device located on the Milford-Bennington line was ever used for any freight operations prior to June 19, 2003. Leishman V.S. at 16. After May 17, 2003, Milford-Bennington trains passed milepost 16.36 multiple times each day, and the device was always in the "open" position. Id. Several Guilford trains, exercising trackage rights over Milford-Bennington to reach a quarry just north of the Granite State site, also operated past milepost 16.36 in the spring of 2003. Id. at 15-17. No Guilford crew that passed milepost 16.36 when there was no derail at all or that encountered the device in the open position ever reported this condition to the Guilford dispatcher or otherwise

raised any question concerning the fact that no derail was being used for freight operations.⁵ Id.

On June 19, 2003, a delegation of four Guilford representatives, including Sydney Culliford, the Vice President-Operations, arrived unannounced at milepost 16.36. Leishman V.S. at 18. By chance, Mr. Leishman was in the area, and he met with the Guilford representatives. Id. Mr. Culliford observed a Milford-Bennington train pass the derail device without opening or closing it, and inquired of Mr. Leishman whether the device would be closed. Id. Mr. Leishman indicated that the derail had not been and would not be used for freight operations and that the agreement was that it would be used only for passenger operations. Id.

The following day, June 20, 2003, Guilford installed a derail device at milepost 16.36 on its property and also advised Milford-Bennington that it could operate only between the hours of 12 AM and 8 AM. Leishman V.S. at 19. Milford-Bennington reluctantly acknowledged that it would, as requested by Guilford, open and close the Guilford derail at the new location whenever its trains passed the device, but protested that the restricted hours of operations would, in effect, put Milford-Bennington and Granite State out of business due to the terms and conditions of Granite State's permit for its operations in Wilton. Id. Milford-Bennington and Granite State requested the Board's Office of Enforcement and Compliance to provide informal mediation of the dispute. Id. at 20. Notwithstanding the efforts of the Office of Enforcement and Compliance, Guilford was unwilling to modify the hours during which it would permit Milford-Bennington to operate. Between June 20, 2003 and July 12, 2003, the date on which this

⁵On June 5, 2003, inspectors from FRA and the New Hampshire Department of Transportation observed the derail at milepost 16.36 in the open position and took no exception. Leishman V.S. at 17; Pease V.S. at

action was initiated, Milford-Bennington was able to operate only 11 trains, or an average of only 1 train per week day. Id.

As of July 15, 2003, Guilford unilaterally changed Milford-Bennington's permissible hours of operation from the period of 12 AM to 8 AM to the period of 4 AM to 1 PM. Leishman V.S. at 20. As in the case of the 12 AM--8 AM operating window, the 4 AM--1 PM window was established without any consultation with Milford-Bennington. Id.

Guilford operating personnel have denied that they were aware of the terms of the permit restricting Granite State's operations at Wilton even though senior officers of Guilford, including Mr. Fink, had been fully cognizant of such terms for many years. Pease V.S. at 2-3. Furthermore, on a number of occasions after June 20, 2005 Milford-Bennington made it absolutely clear that Granite State's operations at Wilton were restricted. In any event, whether or to what extent Guilford had knowledge of the Wilton restrictions in June, 2003, it is clear that the operating windows were unilaterally established without any effort to determine--and without any concern--whether such windows would permit Milford-Bennington to provide the service that Granite State had been receiving for eleven years. Leishman V.S. at 18-21; Culliford Dep. at 33-34; Steiniger Dep. at 30-31.

With the establishment of operating hours between 4 AM and 1 PM, Milford-Bennington was able on most days to operate two round trips. Leishman V.S. at 20. On many days, however, Milford-Bennington could operate only one round-trip. Id. As a result of the continued restriction on its hours of operation, Milford-Bennington averaged

less than 2 round trips per day from July 15, 2003 until it discontinued operations for the season on December 4, 2003. Id.

ARGUMENT

After eleven years of exercising its trackage rights without any limitation on its hours of operation, Milford-Bennington has been restricted by Guilford first to the hours of 12 AM to 8 AM and then to the hours of 4 AM to 1 PM. These restrictions have prevented Milford-Bennington from providing the service required by Granite State and from fulfilling its common carrier obligations. Such actions by Guilford constitute rules or practices that are unreasonable in violation of 49 U.S.C. 10702 and a failure to provide service on reasonable request contrary to 49 U.S.C. 11101. As demonstrated below, there is no valid reason justifying the actions taken by Guilford.

Guilford has argued that the restrictions on the hours of operation by Milford-Bennington were required by "safety" concerns. More specifically, Guilford points to an alleged violation by Milford-Bennington of the bulletin and agreement relating to the use of the derail device located on Milford-Bennington's property as a justification for the imposition of an "absolute block" system which prevents trains of both parties from being on the line between milepost 13.0 and milepost 16.36 at the same time. Indeed, Guilford has acknowledged that the sole reason for Guilford's action was Milford-Bennington's alleged misuse of the derail. Steiniger Dep. at 59-60. As shown below, however, the actions of Milford-Bennington with respect to the derail device were appropriate and in accordance with applicable regulations. Furthermore, the actions of Milford-Bennington were safe and did not warrant the limitation of its operating hours or the creation of "absolute blocks" to separate its operations from Guilford's.

I. The Actions of Guilford Violated 49 U.S.C. 10702 and 11102.⁶

A. The Restricted Hours of Operation Constituted an Unreasonable Rule or Practice.

Milford-Bennington provides rail transportation and service to Granite State. To the extent that such transportation and service may have been exempt, the Board has revoked the exemption as necessary to resolve the issues raised in this proceeding. Decision served September 15, 2003. Thus, the transportation and service provided to Granite State are subject to the Board's jurisdiction.

In connection with Milford-Bennington's service to Granite State, Guilford also provides transportation and service that are subject to the Board's jurisdiction. Specifically, Guilford provides access to its line through the trackage rights agreement and dispatching services that control access to and movements on its line.⁷ Contrary to the argument advanced earlier in the proceeding by Guilford, the Board has determined that Guilford provides transportation and service to Granite State and Milford-Bennington and that Guilford's "common carrier obligation to Granite State's processing facility . . . did not end when it signed the trackage rights agreement with [Milford-Bennington]." Decision served September 15, 2003 at 7. Indeed, without the provision of such transportation and service by Guilford, it would be impossible for Milford-Bennington to provide round trip service between the Granite State facilities.

Pursuant to 49 U.S.C. 10702, a rail carrier providing transportation or service subject to the jurisdiction of the Board must establish reasonable rules and practices on

⁶Guilford's actions also resulted in a commercial closing of a route. Although perhaps not a classic case, the effect of Guilford's action was tantamount to a commercial closing in that it inappropriately and artificially inhibited the flow of traffic.

⁷ Transportation is defined to include facilities or property of any kind related to the movement of property by rail and services related to such movement. 49 U.S.C. 10102.

matters related to such transportation or service. The question before the Board, therefore, is whether the rules and practices of Guilford related to the transportation and service provided to Milford-Bennington and Granite State are reasonable. Specifically, the central issue is whether Guilford's actions to restrict the hours during which Milford-Bennington could have access to the Guilford line in order to serve Granite State, in the first instance to the hours of 12 AM to 8 AM and subsequently to the hours of 4 AM to 1 PM, were reasonable.

The ICC has noted that unreasonable practices are not specifically defined in the statute. Shippers Committee, OT-5 v. The Ann Arbor Railroad Co., et al., 5 I.C.C. 2nd 856, 863 (1989) ("Shippers Committee"). Notwithstanding the lack of a specific definition, the Board is directed to find guidance in determining whether any particular practice is reasonable by reviewing relevant statutory provisions. In order to assess the reasonableness of a rule or practice, the Board should "review the carriers' actions according to the congressional directions embodied in the various relevant provisions of the Act." Id. As discussed below, guidance with respect to the reasonableness of Guilford's actions may be found in the rail transportation policy, which is codified at 49 U.S.C. 10101. In view of the goals of the rail transportation policy, as described below, the rules and practices of Guilford were unreasonable.

First and foremost, consideration of 49 U.S.C. 10101 (12), which establishes as goals the prohibition of predatory practices and unlawful discrimination and the avoidance of undue concentrations of market power, demonstrates the unreasonableness of Guilford's rules and practices. As described above, Granite State is prohibited from operating at Wilton other than from 6:30 AM to 6:30 PM on weekdays and is precluded

from using trucks to move stone from its excavation site in Wilton to its facility in Milford. The time limitations of the permit and the absence of a motor carrier alternative leave Granite State wholly at the mercy of Guilford, which has, through the restriction of Milford-Bennington's operating hours, unilaterally exercised the power to decide on the level of service that Granite State will receive. Moreover, Guilford has, through these rules and practices, sufficient market power to force Granite State to forego the use of Milford-Bennington for service between Wilton and Milford and to use joint line service with Guilford instead.⁸ Such a development would be more costly and less efficient for Granite State and would have a devastating effect on Milford-Bennington. *Leishman V.S.* at 3.⁹ Thus, precluding Guilford from applying its unreasonable rules and practices is essential in order to promote the goal of 49 U.S.C. 10101 (12) to prohibit predatory practices, to avoid undue concentrations of market power and to prohibit unlawful discrimination.

Other elements of the rail transportation policy are also implicated by the unreasonable rules and practices of Guilford. Prohibiting the restriction on the hours of operation by Milford-Bennington will promote the policies of allowing the demand for services to establish reasonable rates, developing an efficient rail transportation system by enabling Milford-Bennington to earn adequate revenues, and ensuring 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. 49 U.S.C. 10101 (1), (3) and (4). Requiring reasonable rules and practices so that the hours of Milford-

⁸ Prior to agreeing to grant trackage rights, Guilford wanted to participate in the movement of stone from Wilton to Guilford, but Milford-Bennington and Granite State resisted an interchange arrangement. *Leishman V.S.* at 3.

⁹ In view of the actions by Guilford over the years, as described at pages 32-35 below, it is easy to imagine an attempt by Guilford to cut Milford-Bennington out of participation in the Granite State traffic.

Bennington's operations are not restricted will foster sound economic conditions and, in particular, ensure effective coordination between Guilford and Milford-Bennington so that Granite State's needs are met consistently within the goals of 49 U.S.C. 10101 (5). Moreover, enforcing 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 in accordance with 49 U.S.C. 10101 (9).

A major motivating factor underlying the action by Granite State and Milford-Bennington to provide for rail service between Wilton and Milford was to minimize or completely eliminate the movement of trucks carrying stone from Wilton to Milford. The towns of Wilton and Milford have benefited by the removal of trucks from their streets and highways. Moreover, the use of rail service rather than truck has promoted energy conservation. Requiring Guilford to establish reasonable rules and practices that enable Milford-Bennington to continue to provide rail service to Granite State so that there is no need to use trucks is, therefore, consistent with the rail transportation policies set forth in 49 U.S.C. 10101 (8) and (14).

Research has not revealed any decision on reasonable rules and practices involving facts similar to this case. There are, however, decisions finding unreasonable practices that provide guidance by analogy. For example, in Liability for Contaminated Covered Hopper Cars, 10 I.C.C. 2nd 154 (1994), shippers that used covered hoppers objected to a proposed tariff which would have required the shippers, rather than the railroads, to inspect the cars and to be responsible for any consequential damages arising from contaminated cargo. The ICC found that the tariff would constitute an unreasonable

practice, because it attempted to shift responsibilities in a manner that was not bargained for and to impose liability in a manner that was not sanctioned. Id. at 169. In this case, Guilford has unilaterally restricted Milford-Bennington's operations in a manner that was not the subject of any bargaining, either in connection with the trackage rights agreement or otherwise. Furthermore, as in the case of the proposed hopper car tariff, Guilford's rules and practices were unreasonable, because they constituted a "shift in duties not bargained for". Id.

B. Guilford Has Failed to Provide Service on Reasonable Request.

Section 11101 requires carriers to provide service upon reasonable request. As described above, Granite State requires service between 6:30 AM and 6:30 PM on weekdays to comply with the permit issued by the town of Wilton. For eleven years, Milford-Bennington and Guilford provided such service. As of June 20, 2003, however, Guilford refused to provide service on the reasonable request of Granite State and Milford-Bennington. Not only were the rules and practices of Guilford to restrict the hours of operation of Milford-Bennington unreasonable in light of the mandate of Section 10702, the rules and practices constituted a violation of Section 11101.

Rail carriers have a duty to "provide transportation or services on reasonable request." 49 U.S.C. § 11101(a); Decatur County Comm'rs. v. Surface Transp. Bd., 308 F.3d 710, 715 (7th Cir. 1997); G.S. Roofing Products Co. v. Surface Transp. Bd., 143 F.3d 387, 391 (8th Cir. 1997). "This duty reflects the well-established principle that railroads 'are held to a higher standard of responsibility than most private enterprises.'" G.S. Roofing Products Co. v. Surface Transp. Bd., 143 F.3d at 391, citing General Foods Corp. v. Baker, 451 F.Supp. 873, 875 (D.Md. 1978). As a result, inconvenience or

insufficient profits are not reasonable grounds for refusing service. Decatur County Comm'rs. v. Surface Transp. Bd., 308 F.3d at 715; G.S. Roofing Products Co. v. Surface Transp. Bd., 143 F.3d at 391; Pejepscot Industrial Park, Inc. d/b/a Grimm Industries--Petition for Declaratory Order, Finance Docket No. 33989, Dec. dated May 9, 2003 (railroads cannot lawfully make the fulfillment of their statutory obligations under Section 11101 contingent on whether they think it is "worth it" to do so).

Rail carriers may excuse themselves from their common carrier obligations pursuant to Section 11101 only by abandonment or embargo. Pejepscot Industrial Park at 10. Absent a permanent cessation through abandonment or a temporary suspension of service by reason of an embargo, which is generally appropriate only in emergencies when a carrier is prevented from operating due to circumstances beyond its control, a railroad must provide transportation or service on reasonable request. It is not sufficient to refuse to do so because, for example, the railroad is being asked to handle a hazardous commodity or the railroad demands to be persuaded first that it is in its financial interest to do so. Id.

Guilford has not attempted to avail itself--nor could it--of either defense to a claim of failure to provide service on reasonable request. Instead, Guilford steadfastly refused to provide access to its line at times reasonably requested by Milford-Bennington and Granite State. Such refusal constituted a violation of Section 11101.

II. Milford-Bennington Used the Derail Properly and Safely.

Guilford has attempted to justify its unreasonable rates and practices and its refusal to provide service as being required for safety reasons. In particular, Guilford asserts that Milford-Bennington misused the derail at milepost 16.36 and that such

alleged misuse warranted the restricted hours of operation. To the contrary, however, as shown below, Milford-Bennington used the derail safely and in accordance with applicable regulations and the agreement between the parties. There is no justification for Guilford's unreasonable practices or refusal to provide transportation and service on reasonable request.

Guilford's position is that there was an agreement between the parties concerning the use of the derail device for all operations and that the agreement was embodied in the bulletin that was issued on December 12, 2002. Guilford contends that the bulletin and the applicable NORAC rules required the derail to be opened and closed each time a freight train passed the device. To the contrary, however, as demonstrated below, the agreement with respect to the derail device was to use it only for passenger operations, and such agreement is consistent with the bulletin and the applicable rules.

A. Milford-Bennington and Guilford Agreed that the Derail Would be Used Only for Passenger Operations.

The agreement governing the use of the derail device is an oral agreement in which the sole representative of Guilford was Mr. Zompa, who was discussing the matter with Mr. Leishman and Mr. Pease.¹⁰ No one else from Guilford--including the senior operating officer and president--had any involvement in or direct personal knowledge of the agreement. Culliford Dep. at 54. The arrival of passenger equipment and the prospect of passenger operations by Wilton Scenic was the sole motivation for Guilford

¹⁰ In a motion for sanctions concerning discovery, Milford-Bennington and Granite State questioned the credibility of Mr. Zompa. Mr. Zompa claimed in his deposition that Mr. Pease was not even present for the conversation on December 12, 2002 when the oral agreement was formed, but, as described in the motion, subsequently admitted that Mr. Pease was in fact at the meeting. Even though the Board has concluded that it lacked a basis to grant the motion (Decision served December 23, 2003), the Board must resolve questions relating to the participants in the discussion on December 12, 2002 when the oral agreement was made and the terms and conditions of the agreement. The record compels the conclusion that the terms and conditions of the oral agreement concerning the use of the derail device must be based solely on the testimony of Messrs. Leishman and Pease and without reliance on any testimony by Mr. Zompa.

to seek the installation of the derail; Guilford never even analyzed whether a derail was necessary for freight operations. Culliford Dep. at 6, 26-28; Steiniger Dep. at 36-42. Mr. Leishman and Mr. Pease are clear in their recollections that there was no discussion whatsoever of the use of the device for freight operations. Leishman V.S. at 13; Pease V.S. at 13. Indeed, Mr. Zompa does not dispute that there was no conversation on December 12, 2002 concerning the use of the device for freight operations. Zompa Dep. at 47. The derail was acceptable to Milford-Bennington in December, 2002 only for use in connection with the passenger equipment that was being stored for the winter at milepost 16.36. Leishman V.S. at 13.

In May, 2003, Wilton Scenic advised the FRA that the derail would be used when Wilton Scenic was operating in order to separate the line from the national system. Pease V.S. at 15 and Exhibit 1. Milford-Bennington agreed with this procedure, as did Guilford, Pease V.S. at 15; Leishman V.S. at 16. At the end of May, 2003 or beginning of June, Milford-Bennington agreed to replace the temporary derail device with a permanent device but reminded Guilford, consistently with the agreement of December 12, 2002, that the derail would be used only for passenger service. Leishman V.S. at 16.

The characteristics and capabilities of both of the derails provided by Guilford demonstrate that Guilford viewed them as being appropriate only for protection of the 2 stored passenger cars, not for freight operations. The temporary device was expressly designed for "car protection" in circumstances in which "temporary protection of workers and tracks are required." Leishman V.S. at 14. Moreover, the supplier warned that the device was effective only at speeds of 4 mph or less. *Id.* Obviously, the device was not intended, as Guilford belatedly contends, to stop freight trains or freight cars that may

have broken loose at the Wilton excavation site and which, after travelling 3 miles downhill, would be moving at speeds greatly in excess of 4 mph. While the device later installed was termed "permanent," because it was attached to the ties rather than simply to the rail, its characteristics and limitations were similar. Id. at 16. The only permissible inference is that Guilford shared the view that the derails were appropriate and to be used only for the protection of the passenger cars stored at milepost 16.36.

Although Guilford has attempted after the fact to argue that the agreement to use the derail extended both to freight and passenger operations, the argument is belied by 11 years of experience. Prior to December 12, 2002, Milford-Bennington had operated for 11 years over the Guilford line without anyone suggesting that there was any need for a derail device on the main line to separate freight operations. Milford-Bennington's operations did not change, and the grade of the line--albeit generally downhill from milepost 19 to milepost 16.36--had remained constant. The only change--and the sole reason for the derail--was the prospect of passenger service on Milford-Bennington's line.

The placement of a derail on a main track, as distinguished from a sidetrack or yard track connecting to a main track, is itself an extraordinary event. Derails are used almost exclusively on side tracks to prevent cars from moving inadvertently onto a main track. The only other derail on a main track in the Guilford system is at Skowhegan, Maine. The facts of the situation in Maine are, however, far different than the circumstances at milepost 16.36.

Guilford serves Sappi Fine Paper at Skowhegan on a branch line on which Sappi is the only customer. In order to facilitate the exchange of cars, Guilford granted Sappi the right to use approximately 1 mile of the branch line. S.D. Warren, d.b.a. Sappi Fine

Paper North America--Acquisition and Operation Exemption, F.D. No. 34133, notice filed July 3, 2002; see Appendix A attached. Sappi now has the ability to use its own locomotive to pick up, drop off and store cars on the main track rather than to have Guilford perform such service on a spur track within the Sappi facility. In order to control such operations on the Guilford main track, Sappi (not Guilford) opens a derail on the main track in the event that Guilford requires access. The main track to which Sappi has access serves, in effect, as an extension of the spur track within Sappi's facility. Sappi requested and the Board made a determination that Sappi would not become a common carrier by reason of this transaction. Id., decision dated September 25, 2002.

Thus, the facts and circumstances of the Sappi derail and the derail at milepost 16.36 are readily distinguishable. No through freight service was provided or affected in Maine. Moreover, the derail was desirable from the perspective of Sappi, which wanted the ability to store and switch cars and separation from the national rail system so that it would not become a common carrier.¹¹

Guilford's longstanding paranoia with respect to passenger operations supports the conclusion that the placement of the derail was motivated solely by the arrival of the passenger cars and the imminence of passenger operations on the Milford-Bennington line and was intended exclusively to isolate Guilford from such operations. Guilford has an unbroken history of opposition to passenger operations on its lines. The best evidence of this history is Guilford's opposition to Amtrak service between Boston and Portland. Other than the Amtrak trains and commuter operations of the Massachusetts Bay

¹¹ Ironically, this factor supports the view that the derail at milepost 16.36 was intended for passenger service only. Wilton Scenic, which is not a rail carrier subject to the jurisdiction of the Board, desired separation of its operation from the nation's rail system in order to meet FRA expectations.

Transportation Authority that are required by the terms of a 1976 transaction, there are no other passenger operations on Guilford lines. Steiniger Dep. at 46; Culliford Dep. at 13. Thus, while Guilford's post facto rationale is that the derail and the bulletin issued on December 12, 2002 were meant to apply to both freight and passenger trains, the fact is that in December, 2002 Guilford was reacting--consistently with its institutional opposition to passenger service--solely to the fact that Wilton Scenic would soon be operating on a line that connected to Guilford. As demonstrated below, however, Guilford had no reason in December, 2002 to believe or even to speculate that the freight operations of Milford-Bennington, either on its own line or on Guilford's line, posed any safety issues.

B. The Guilford Bulletin Did Not Compel Use of the Derail for Freight Operations.

Guilford also relies on the bulletin that it issued on December 12, 2002 for its argument that Milford-Bennington improperly failed to use the derail device for freight operations. The bulletin, however, states merely that the derail device had been "placed into service" on the Milford-Bennington line at milepost 16.36. The bulletin does not state whether or how it is to be used for passenger service, freight service or both. Based upon the agreement of December 12, 2002, Milford-Bennington properly viewed the bulletin as noting a derail that pertained only to the 2 passenger cars that were being stored at milepost 16.36. Indeed, Guilford crews traveling beyond milepost 16.36 in 2003 prior to June 19 apparently did not interpret the bulletin as requiring them to stop to open and close the device each time their train passed by; rather, the Guilford trains operated without opening or closing the device. Leishman V.S. at 15. Furthermore, no Guilford crew reported that there was no derail even installed at milepost 16.36 in 2003

between the resumption of operations in April and May 17, lending further support to the conclusion that even Guilford believed that the derail and the bulletin had nothing to do with freight service.

As a threshold matter, it is questionable whether the Guilford bulletin was ever effective as an instruction to crews of Milford-Bennington concerning a derail on the Milford-Bennington, not the Guilford, line. Bulletins are notices or instructions issued by a railroad to govern train movements on its lines. *Madigan V.S.* at 3. Bulletins are often used to modify operating rules or timetables. *Id.* The Guilford bulletin not only provided no guidance concerning its use, as described above, but it purported to apply to operations on Milford-Bennington's line. Certain of Guilford's operating personnel conceded that the bulletin was intended only to alert Guilford crews and was not valid to control Milford-Bennington's actions on its own line. *Towle Dep.* at 19-20. If, for example, Milford-Bennington had issued a bulletin requiring Guilford crews heading toward the Guilford-served quarry on the Milford-Bennington line to stop at milepost 14 to receive further instructions, the bulletin would properly be viewed as an ineffective attempt by Milford Bennington to control the operation of Guilford trains on the Guilford line.¹²

Guilford contends alternatively that Milford-Bennington should have issued its own bulletin as a companion to the Guilford bulletin or that Milford-Bennington should have notified Guilford if Milford-Bennington "disagreed" with Guilford concerning the effect and meaning of the bulletin. *Towle Dep.* at 19-20; *Culliford Dep.* at 14-18, 24-25.

¹² The senior Guilford operating officer, Sydney Culliford, agreed that a Milford-Bennington bulletin purporting to control activities on Guilford's line would be ineffective, but argued that the Guilford bulletin governed Milford-Bennington on its own line due to the agreement of the parties. *Culliford Dep.* at 14-18. As shown above, the agreement was that the derail would be used only for storage of the passenger cars.

Neither argument is persuasive. Milford-Bennington personnel were fully aware of the derail and the agreement that it was to be used only for passenger operations. Leishman V.S. at 17. Moreover, due to the terms and conditions of the agreement--to use the derail only for passenger operations--there was no "disagreement" about which Milford-Bennington should conceivably have notified Guilford.

Guilford's subsequent actions with respect to the derail installed on its property at milepost 16.36 indicate that the bulletin of December 12, 2002 did not mean what Guilford now, after the fact, argues that it was intended to mean. More specifically, Guilford issued a bulletin on June 20, 2003 noting that a derail had been moved from its main track at the south end of the Wilton yard to the north end of the yard at milepost 16.36 on Guilford property. Leishman V.S. at 19 and Exhibit 11. On June 23, 2003, apparently recognizing that the bulletin of June 20, 2003, like the bulletin of December 12, 2002, did not provide any instructions or illumination concerning the use of the derail device, Guilford amended the bulletin by adding language that required notification of the dispatcher when the device was opened or closed. Leishman V.S. at 19 and Exhibit 12. Such an amendment implies a recognition by Guilford that the prior bulletin of June 20, 2003, which described only the location of the device and which was virtually identical to the bulletin of December 12, 2002, did not address the manner in which the derail was to be used or, more to the point, whether it was to be used for freight or passenger service or both.

As noted above, the device that was installed on Guilford property at milepost 16.36 on June 20, 2003 was taken from the Guilford main line at the south end of the Wilton yard. The derail had apparently been last used several years ago when Guilford

stored or loaded cars on the main track. Leishman V.S. at 19. No Guilford witnesses were aware of any bulletin relating to the derail device when it was located at the south end of the yard. Towle Dep. at 24; Zompa Dep. at 57-58. Moreover, in recent years neither Guilford nor Milford-Bennington used the derail device, which was always in the open position and never closed. Towle Dep. at 25-26; Leishman V.S. at 20.

This course of conduct demonstrates that the mere placement of a derail device provides no information or direction whatsoever with respect to its use and that the parties used--or, more accurately, did not use--the derail in accordance with an oral or tacit understanding that it was not to be opened or closed for normal freight operations. Equally importantly, use of a derail based on an oral agreement is in accordance with applicable rules and safe operating practices. Madigan at 6.

C. Milford-Bennington Complied With NORAC Rules.

The use of the derail devices that were located on the Milford-Bennington line and formerly located at the south end of the Wilton yard was entirely consistent with the NORAC rules. Rule 104d provides, in effect, that derails that protect "fouling points" of a main track must be kept in the derailing (closed) position except when trains are passing. Madigan V.S. at 4 Neither derail was designated as a "fouling point". Id. Rule 104d also provides that the derails used for "other purposes"--i.e. purposes other than protecting fouling points on main tracks--must be applied "only when their use is required." Id. The use of the derail device located at milepost 16.36 on the Milford-Bennington line was required only when passenger operations were being conducted on the line and not when freight operations were being conducted. Use of the derail

formerly located at the south end of the Wilton yard was required only when cars were being loaded. In both cases, there was full compliance with the NORAC rules. Id.

III. Guilford's Restriction of Milford-Bennington's Hours of Operation Was Unreasonable and Unwarranted.

In reaction to the "discovery" that Milford-Bennington was purportedly not using the derail device in accordance with Guilford's view of the proper procedure, Guilford imposed the restrictions on Milford-Bennington's hours of operation. Guilford attempted to justify its actions as allegedly being required for safety reasons. Specifically, Guilford has asserted that the alleged misuse of the derail device was evidence of unsafe operations by Milford-Bennington that required additional action by Guilford. Steiniger Dep. at 58-60. The action chosen--the separation of operations of the two companies by use of an "absolute block" method or operations at different times--was intended, according to Guilford, to ensure that trains of only one carrier would be between milepost 13.0 and milepost 16.36 at any given time. On analysis, as demonstrated below, the action by Guilford was wholly unjustified, completely unnecessary and, as a result, unreasonable.

A. The Restrictions Were Not Necessary for Any Safety Reason.

Guilford has a sophisticated dispatching system that enables it to separate the operations of trains throughout its system. Ferguson Dep. at 12-14, 21-22; Robert V.S. at 2-3. In addition to passenger trains operated by Amtrak between Boston and Portland and certain commuter trains of the Massachusetts Bay Transportation Authority, all of which operate on lines owned or dispatched by Guilford, Guilford operates a significant number of its own freight trains each day. All of these trains are controlled by the dispatching office, which has been described by Larry Ferguson, the person in charge of

dispatching, as being adequate to separate train operations and ensure safe operations. Id.

The same system of dispatching has been used for eleven years on the Hillsborough branch, and no Guilford witness, including Mr. Ferguson, is aware of any safety problem resulting from the presence of Guilford trains or work crews and Milford-Bennington trains on the line or in the same area at the same time. Ferguson Dep. at 31; Culliford Dep. at 66; Steiniger Dep. at 28; Towle Dep. at 11.

The absolute block approach instituted between milepost 13.0 and milepost 16.36 represents the only place such an approach is used in the entire Guilford system. Zompa Dep. at 77-78; Steiniger Dep. at 59-60. Mr. Ferguson had no doubt that the dispatching system alone was adequate to ensure safe operations without the use of an absolute block system. Ferguson Dep. at 33-35. Moreover, the likelihood of two trains being in the area at the same time is extremely remote, because there is no passing siding on the single track line between milepost 13.0 and milepost 16.36. Culliford Dep. at 65.

Guilford's position is even less understandable in view of the fact that it has designated milepost 13.0 to milepost 16.36 as yard limits. NORAC Rule 93, which governs operations within yard limits, is specifically intended to enable the dispatcher to allow multiple trains within the yard limits at the same time. Madigan V.S. at 6-7. The Guilford dispatching system and Rule 93 are ample authority for the proposition that an absolute block system is not required for safe operations between milepost 13.0 and milepost 16.36. Id.; Robert V.S. at 2-3.

To the extent additional "protection" is arguably warranted, it has been in place since June 23, 2003 in the form of the derail device on the Guilford line at milepost 16.36 and the requirement that the dispatcher's office be notified each time a Milford-

Bennington train passes--and therefore opens and closes--the device. Guilford has monitored Milford-Bennington trains since June 20, 2003 and is aware of no instance in which the prescribed procedure was not followed. Zompa Dep. at 62; Culliford Dep. at 30.

The need for restricted hours of operation or absolute separation is even less apparent considering the minimal level of Guilford's own activity between milepost 13.0 and milepost 16.36. Guilford has 2 customers that it serves on that portion of the line. Leishman V.S. at 23; Towle Dep. at 8. One receives a few cars once or twice a week, and the other, a propane distributor, receives a few cars each winter. Id. A review of Guilford's train sheets for May, 2003 showed that no Guilford train operated between milepost 13.0 and milepost 16.36 during the entire month. Ferguson Dep. at 29. Given the extremely low level of Guilford activity on the line, restricted hours for Milford-Bennington or absolute blocks are patently absurd if the concern really is safety.

Milford-Bennington has offered to have the FRA review and resolve any safety issues that Guilford has raised. Guilford has steadfastly refused to have the FRA involved. Indeed, Guilford's president, Thomas Steiniger, has testified that the FRA should not review the alleged safety issues in this case because, according to Mr. Steiniger, the FRA is biased against Guilford. Steiniger Dep. at 63. Guilford cannot, however, attempt to justify its unreasonable rules and practices on the grounds of safety, while, at the same time, it refuses to accept any guidance from the agency that has jurisdiction with respect to safety issues. See, e.g., U.S. Dept. of Energy, et al. v. The Baltimore and Ohio Railroad Company, et al., 364 I.C.C. 951, 974 (1981) (burden is on

carrier seeking to justify practice on grounds of safety to show that compliance with valid regulations is not satisfactory).

B. Milford-Bennington Has Always Operated Safely.

Guilford witnesses have argued that Milford-Bennington's alleged disregard of the bulletin relating to the derail was symptomatic of unsafe operating practices. Zompa Dep. at 48-49; Steiniger Dep. at 59-60. This conclusion has been used by Guilford to justify the installation of a derail on its property at milepost 16.36 and the restriction of Milford-Bennington's hours of operation. As described below, Milford-Bennington's operations have always been conducted in a safe manner, and Guilford's use of the "safety" issue is a pretextual excuse to punish Milford-Bennington.

Guilford conducts safety and rules classes for Milford-Bennington personnel on a regular basis. Zompa Dep. at 16-18; Leishman V.S. at 25. All Milford-Bennington personnel have passed each exam given by Guilford. Id. Indeed, not one Milford-Bennington employee has ever failed. Id. No Milford-Bennington employee has ever been cited by Guilford for any inappropriate action concerning operating rules or procedures, including the test and observation rules compliance program that all railroads must adopt and follow. Leishman V.S. at 26; Robert V.S. at 8-9.¹³ No FRA or New Hampshire DOT inspection has ever resulted in any exception or citation with respect to the operating practices of Milford-Bennington. Robert V.S. at 8. Moreover, no Guilford officer familiar with Milford-Bennington's operations on the Guilford line had any reason to believe that there had ever been a safety problem--prior to the alleged "safety" problem

¹³ The FRA requires all railroads to have a comprehensive test and observation rules compliance program designed to monitor the safety of any operations on their lines. Guilford is required to observe Milford-Bennington's operations on Guilford and to report safety or operating rule infractions. Robert V.S. at 9. No such reports have ever been issued.

relating to the derail--due to operations by Milford-Bennington on Guilford. Culliford Dep. at 66; Steiniger Dep. at 36; Towle at 11.

C. The Restrictions on Milford-Bennington's Hours of Operation Were Arbitrary.

Mr. Fink and other senior managers of Guilford were aware of the restrictions placed on Granite State's operations by the permit issued by the town of Wilton. Pease V.S. at 2. The restrictions were the subject of numerous discussions involving Mr. Fink and others, and it is reasonable to infer that the knowledge of the restrictions had by 2003 been institutionalized among members of Guilford's management. As described below, the hostility of Mr. Fink toward Milford-Bennington was long-standing and well-known. Id. 2-9. It is simply not credible that the permit restrictions were not commonly known among Guilford personnel. At the very least, they knew that for 11 years Milford-Bennington had operated generally between the hours of 6:30 AM and 6:30 PM. Towle Dep. at 28-29.

Notwithstanding the likelihood that Guilford management knew that operations at Wilton were restricted to the hours of 6:30 AM to 6:30 PM, the managers who acknowledge responsibility for the decision to limit Milford-Bennington's operations claim that prior to June 20, 2003 they had no knowledge of the Wilton permit conditions. Culliford Dep. at 32, 58-59; Steiniger Dep. at 15-16. The decision to limit Milford-Bennington's operations to the hours of 12 AM to 8 AM was made by Mr. Steiniger after consultation with Sydney Culliford and Robert Culliford. Steiniger Dep. at 20; Culliford Dep. at 29. There was absolutely no prior consultation with Milford-Bennington to ascertain whether such hours would present a problem. Steiniger Dep. at 30-31; Culliford Dep. at 33-34. The decision was unilaterally and arbitrarily made by Guilford.

After June 20, 2003, Milford-Bennington and Granite State quickly reminded Guilford that the 12 AM to 8 AM “window” was not workable and would bring their respective activities to a complete halt. Towle Dep. at 27-29; Steiniger Dep. at 19; Culliford Dep. at 57. Rather than to ascertain the details of the problem, however, Guilford again unilaterally and arbitrarily changed the operating hours of Milford-Bennington to 4 AM to 1 PM. Thus, Guilford tacitly admitted its error in restricting the hours to 12 AM to 8 AM but continued the harm by means of a somewhat less restrictive, but nonetheless unworkable, operating window.

Notwithstanding Guilford's gratuitous suggestions that Milford-Bennington could serve Granite State in the restricted windows, service was severely reduced. Moreover, there were no actions that Milford-Bennington or Granite State could take to alleviate the hardship caused by the Guilford restrictions.

In recent years and prior to June 20, 2003, a round trip between the Granite State facilities took on average approximately 3.5 hours. Robert V.S. at 6. After June 20, 2003, Milford-Bennington required an average of 4 hours and 20 minutes for a round trip. Id. In 2003, prior to June 20, Milford-Bennington averaged 2.60 round trips a day, but after June 20 averaged only 1.35. Id. at 6-7 and Exhibit 1. Thus, there was 47% reduction in efficiency following the imposition by Guilford of the restricted hours of operation.¹⁴

Guilford's suggestions as to how Milford-Bennington could overcome the devastating impact of the restricted hours were unrealistic and unhelpful. Ignoring the facts that Guilford had insisted on a 10 car per train limit and that Granite State had built

¹⁴ On several occasions, requests to Guilford for a brief extension of the window were denied for no reason. Leishman V.S. at 20.

sidetracks and facilities to accommodate 10 car trains, Guilford suggested that the sidetracks be lengthened. Such extensions would not be feasible due to lack of space and environmental considerations and, even if feasible, would be inordinately expensive, particularly given the uncertainty concerning rail service created by Guilford's actions. Leishman V.S. at 22-23; MacLellan V.S. at 6. Guilford also urged Milford-Bennington and Granite State to operate at Milford, which is not limited by explicit permits, prior to the 6:30 AM starting time for operations at Wilton. Granite State has accommodated the desires of its neighbors in Milford by voluntarily limiting its operations, to a great extent, to daylight hours, and a change in this policy would not be prudent. MacLellan V.S. at 6-7. Finally, Milford-Bennington tried various alternative methods of operating after June 20, 2003, but was unable to increase the number of trips it was able to make. Leishman V.S. at 21-22.

D. The Trackage Rights Agreement Does Not Support Guilford's Unreasonable Action.

The restrictions imposed by Guilford cannot be explained or rationalized by any provision of the trackage rights agreement. The agreement contains no provision or reference whatsoever to the hours during which Milford-Bennington may operate. The intent of the parties, however, was to enable Milford-Bennington to serve Granite State at Wilton, and the Wilton permit restrictions were well-known to the parties. Leishman V.S. at 5; Pease V.S. at 5-6. Furthermore, the course of conduct between the parties from the inception of the agreement until June 20, 2003 was that Milford-Bennington could operate at any time during the day subject only to permission to occupy the line from the dispatcher. Leishman V.S. at 5.

In New Hampshire, as in most states, courts must interpret contracts in a manner that best reflects the parties' intent, taking into account the situation of the parties and the purpose of the agreement. Thiem v. Thomas, 119 N.H. 598 (1979); Griswold v. Heat, Inc., 108 N.H. 119 (1967).¹⁵ The interpretation must avoid a construction that leads to harsh or unreasonable results or places one party at the mercy of the other. Royal Oak Trust v. Mordita Realty Trust, 146 N.H. 578 (2001); Association of Portsmouth Teachers v. Portsmouth School District, 113 N.H. 659 (1973). The purpose of the trackage rights agreement was to enable Milford-Bennington to serve Granite State, which has restricted hours of operation in Wilton. Moreover, interpreting the agreement in a manner that would enable Guilford to preclude Milford-Bennington from serving Granite State would place Milford-Bennington at the mercy of Guilford and completely deprive Milford-Bennington of the benefit of the bargain.

Because the trackage rights agreement is silent on the hours of operation, extrinsic evidence pertaining to the parties' course of dealing or business practices is admissible to clarify their intent. Perry v. Maryland Casualty Co., 72 A. 369 (N.H. 1909); Hardware Specialties, Inc. v. Mishara Construction Co., Inc., 2 Mass. App. Ct. 277 (1974). As noted above, Milford-Bennington operated for 11 years without any restriction on its hours of operation. This course of conduct is conclusive evidence that the trackage rights agreement must be interpreted to permit Milford-Bennington to operate at any time without restriction.

¹⁵ The trackage rights agreement contains no choice of law provision, but the subject matter of the agreement is a line located in New Hampshire. Consequently, application of New Hampshire law is appropriate.

E. Guilford's Long Standing Animosity Toward Milford-Bennington Explains
Guilford's Action.

The actions by Guilford are designed primarily to punish Milford-Bennington and to "teach it a lesson" rather than to promote safety, as argued by Guilford. The unreasonable and unjustified actions by Guilford are consistent with the 2 decade history of animosity displayed by Guilford toward Milford-Bennington.

As described in more detail below, Guilford has opposed and harassed Milford-Bennington at every turn since it was created. Guilford's attitudes and actions have emanated from the very top of the organization--the Chairman and Chief Executive Officer, David Fink. Although Mr. Fink professed not to recall many of the incidents described below, the pattern of Guilford opposition toward Milford-Bennington is well documented.

As described above, Guilford refused to grant trackage rights to Milford-Bennington in the late 1980s, thereby forcing Milford-Bennington to file a feeder line application at the ICC in order to provide service to Granite State. Guilford went to extraordinary lengths at the ICC to oppose the application, including the filing of a motion to dismiss and the submission of a competing application by Hudson River Estates, an affiliate of Guilford. Eventually, for reasons that are not clear, Guilford decided to grant trackage rights. Leishman V.S. at 3-4; Pease V.S. at 4-5.

In 1992, a Milford Bennington train derailed on the Guilford line in Wilton. Leishman V.S. at 5-6; Pease V.S. at 6-7. Even though there were no injuries and the derailment was otherwise unremarkable, Mr. Fink went immediately to the scene of the derailment. Pease V.S. at 6. He promptly directed the institution of litigation against

Milford-Bennington in order to collect approximately \$6,000 in damages even though the cause of the derailment was the condition of Guilford's track. Id. at 6-7. The litigation was eventually settled, but only after Milford-Bennington was forced to incur substantial costs to defend itself against a meritless claim. Pease V.S. at 7; Leishman V.S. at 6.

Less than a year after the trackage rights agreement was signed, Guilford filed a petition with the ICC seeking to terminate the agreement. Leishman V.S. at 6. The ICC summarily dismissed the petition, determining that the trackage rights could not be ended without an adverse abandonment application and a decision by the ICC on the question whether Milford-Bennington's rights could be terminated consistently with the public interest. Id. and Exhibit 3.

In April, 1993, Milford-Bennington reported, as required by the trackage rights agreement, a number of track defects to Guilford so that Guilford could make repairs. Leishman V.S. at 7; Pease V.S. at 7. In response, Mr. Fink directed Guilford personnel to "find" as many defects with respect to the equipment of Milford-Bennington as Milford-Bennington had found with respect to the track. Id. The Guilford inspectors alleged a number of spurious defects requiring extensive inspection work by Milford-Bennington. Id. As a result, operations by Milford-Bennington were suspended for several weeks. Leishman V.S. at 7. Rather than to live up to its responsibilities to maintain the track pursuant to the trackage rights agreement, Guilford chose instead to respond by harassing Milford-Bennington.

In 1996, Guilford discovered that Milford-Bennington was negotiating with Canadian Pacific to purchase ten hopper cars that were leased by Canadian Pacific to Milford-Bennington and that comprised the entire Milford-Bennington fleet. Lesihman

V.S. at 8-10; Pease V.S. at 8-9. Guilford immediately purchased not only the cars but the debt owed by Milford-Bennington to Canadian Pacific in respect of the cars. Leishman V.S. at 9. Guilford promptly demanded that Milford-Bennington turn the cars over to Guilford and pay the debt. Id. at 9-10. Guilford knew that its actions, if successful, would put Milford-Bennington out of business. Id. Milford-Bennington was in fact forced to turn over the cars within 24 hours, resulting in a cessation of service for approximately 4 weeks. Id. The matter was eventually resolved but only after lengthy litigation. Id.

In 1995, Mr. Fink wrote letters to the New Hampshire Department of Transportation and to local newspapers castigating Milford-Bennington and its president for allegedly permitting certain track cars to be operated on the Milford-Bennington line. Leishman V.S. at 7-8 and Exhibits 5 and 7; Pease V. S. at 8; Fink Dep. at 16-27. The track cars had been involved in an accident in which personal injuries were suffered. Leishman V.S. at 7. Mr. Fink's knowledge of the operation of such cars was based entirely on media reports. Fink Dep. at 18. Furthermore, he made no attempt to inquire of Milford-Bennington or Mr. Leishman whether the story had any basis in fact. Fink Dep. at 25; Leishman V.S. at 8. Notwithstanding this lack of information, Mr. Fink's letters alleged that Milford-Bennington was permitting such cars to be operated on its line and that Milford-Bennington had interfered with a police investigation of the accident. Leishman V.S. at 8 and Exhibits 5 and 7. The New Hampshire Department of Transportation wrote back to Mr. Fink assuring him that the operators of the cars were trespassers, that Milford-Bennington had no policy permitting the operation of such cars and, quite to the contrary, that Milford-Bennington did not permit such operations.

Leishman V.S. at 9 and Exhibit 6. Furthermore, Mr. Fink was advised that Milford-Bennington had not interfered with any investigation. Id. The conclusion to be drawn is that Mr. Fink had no concern for the truth and intended only to harass and publicly embarrass Milford-Bennington and Mr. Leishman.

As noted above, Mr. Fink admitted little or no recollection of these events in his deposition. It is crystal clear, however, in Mr. Pease's recollection that Mr. Fink carefully followed all matters relating to Milford-Bennington and Mr. Leishman and that no actions with respect to them, especially litigation or other actions that would "make life difficult", were taken without Mr. Fink's specific knowledge or direction. Pease V.S. at 2-3. There was an anti Milford-Bennington attitude that began with Mr. Fink and that was well known to senior management at Guilford. Id. In this context, and notwithstanding Mr. Fink's cavalier statement that the litigation against Milford-Bennington was "nothing personal" and "normal business" (Fink Dep. at 55), the actions by Guilford to restrict the operations of Milford-Bennington in 2003 are readily understandable as simply another step in the long-standing efforts of Guilford to harm Milford-Bennington or eventually drive it out of business.

RELIEF REQUESTED

The relief sought by Granite State and Milford-Bennington is twofold. First, the Board should direct Guilford to cease and desist from any actions that restrict the hours of operation by Milford-Bennington. Second, the Board should award damages to Granite State and Milford-Bennington.

I. The Board Should Direct Guilford to Cease and Desist From Restricting Milford-Bennington's Service.

As demonstrated above, the rules and practices of Guilford, in the form of restricted hours of access to its line, were unreasonable and therefore in violation of section 10702. In accordance with 49 U.S.C. 10704 (a) (1), the Board may issue a cease and desist order in the event that it finds a rule or practice to be unreasonable. Moreover, the Board is authorized to prescribe the rule or practice that should be followed in the future instead of the rule or practice found to be unreasonable.

Guilford has also violated section 11101 by failing to provide transportation or service upon reasonable request. Upon finding such a violation, the Board is authorized by 49 U.S.C. 11701(a) to take appropriate action to compel compliance with Section 11101.

Thus, the Board has ample statutory authority to order Guilford to cease and desist from restricting Milford-Bennington's operating hours and to proscribe any such restrictions in the future. As the ICC noted in a complaint proceeding, such as this one, the Board must decide "whether defendants have acted unlawfully, and whether a cease and desist order (the relief requested) is needed to terminate unlawful activity and prevent its recurrence." Shippers Committee at 863. In this case, the answer to both questions is in the affirmative.

II. Granite State and Milford-Bennington Are Entitled to Damages.

A rail carrier subject to the jurisdiction of the Board is liable for damages that result from its act or omission in violation of Part A of title 49 (chs. 101-119). Guilford has acted in violation of section 10702 by establishing unreasonable rules or practices and in contravention of section 11101 by failing to provide service on reasonable request.

Consequently, damages are mandated. Moreover, it is the Board's "duty to award the full amount of damages sustained in consequence of any violation." U.S. Dept. of Energy v. Baltimore and Ohio Railroad Company, 364 I.C.C. 951, 975 (1981). If plaintiffs provide sufficient supporting detail to establish the amount of the damage suffered, they meet their burden and become entitled to payment of the full amount of the damages. Id. As demonstrated below, Granite State and Milford-Bennington have demonstrated specific and quantified damage.

A. Milford-Bennington Incurred Damages.

In the years 1999 through 2002, Milford-Bennington handled an average of 3,428 loaded cars a year. Leishman V.S. at 23. Because rail operations are shut down during the winter months, when Granite State is unable to operate, the average length of the operating year for Milford-Bennington has been approximately eight months a year. Id. Thus, from 1999 through 2002, Milford-Bennington handled approximately 396 cars per month. Id.

As a result of the restrictions placed by Guilford on Milford-Bennington's hours of operation beginning as of June 20, 2003, Milford-Bennington averaged only 241 cars per month from July 1, 2003 through November, 2003. Leishman V.S. at 24. In total, Milford-Bennington handled 945 fewer cars from June 20, 2003 until operations ceased for 2003 on December 4, 2003. Id. Milford Bennington earns \$75 for each car. Id. Consequently, Milford-Bennington lost \$70,875 of revenue that it would have earned absent the actions of Guilford. Id.

Milford-Bennington took various actions after June 19, 2003 to mitigate its damages. By curtailing the number of hours that employees worked, Milford-Bennington

saved approximately \$21,800 in wages and related payroll expenses. Leishman V.S. at 25. The fewer number of trains operated resulted in the avoidance of trackage rights payments to Guilford in the amount of approximately \$12,400 and savings on fuel of approximately \$2,400. Id. Consequently, the net loss suffered by Milford-Bennington--or the net amount of the damages incurred by Milford-Bennington--was approximately \$35,000 dollars.

B. Granite State Was Damaged by Guilford's Actions.

Granite State produces crushed and washed stone, washed sand, gravel products and ready mixed concrete. MacLellan V.S. at 1. These products are sold both to affiliates of Granite State and to outside parties, such as state or local highway departments and contractors. Id. Granite State's principal source of stone is an excavation site located in Wilton, New Hampshire and its primary processing facility is located in Milford, New Hampshire. Id.

At the excavation site in Wilton, Granite State drills and blasts rock, which is then crushed to produce two products. MacLellan V.S. at 1. One product is "4 inch minus" crushed stone, and the other product is "1 inch minus" crushed base. Id. The 4 inch minus stone is transported by rail to the processing facility in Milford and serves as the principal raw material at the Milford processing plant. Id. Because it is impossible to operate at Milford when the temperature is below freezing, operations at both Wilton and Milford are generally conducted only approximately 8 or 9 months a year. Id. Consequently, it has always been critical for Granite State to produce as much stone as possible in the 8 or 9 months of operation. Id. at 2.

At Milford, 4 inch minus stone is blended with sand and crushed, washed and sized into various finished products. MacLellan V.S. at 2. A large portion of the finished material produced at Milford is used for ready mixed concrete. Id. In prior years, finished material has been stockpiled at Milford, thereby enabling Granite State to maintain sales throughout the winter months even though neither the processing plant nor the excavation site in Wilton is operating. Id.

As a result of the actions by Guilford as of June 20, 2003, rail service from Wilton to Milford was severely curtailed. MacLellan V.S. at 4. As described in the Verified Statement of Peter R. Leishman, 945 fewer carloads of stone were moved after June 20, 2003 than would have moved in normal times. As a result, 85,050 fewer tons of raw material was moved from Wilton to Milford. Id. at 8. Furthermore, because sand is blended with 4 inch minus stone at a rate of approximately 37 percent, there was a loss of sand production of 31,468 tons. Id. at 8 and Exhibit 2. Finally, because activities in general at Wilton were curtailed in 2003, there was a reduction in the production of 1 inch crushed base of 12,077 tons. Id. at 8 and Exhibit 3. In total, production of 128,595 tons was lost as a result of Guilford's actions to restrict rail service. Id. at 8.

Lost production at Wilton means lost sales at Milford. MacLellan V.S. at 8-9. Over the last five years, Granite State has earned on the average \$.90 for each ton sold. Id. at 9 and Exhibit 4. Consequently, with a loss of production of 128,595 tons and assuming a profit of \$.90 for each such ton, Granite State will incur a loss of profit on sales of approximately \$116,000 as result of Guilford's actions. Id.

The reduction of activity at Milford forced Granite State to curtail deliveries of sand and stone from Milford to affiliated concrete plants in Lowell, Massachusetts and

Westford, Massachusetts. MacLellan V.S. at 8. Rather than to supply those plants from Milford, Granite State moved stone and sand by truck from another Granite State facility in Lyndeborough, New Hampshire. Id. By this means, those plants avoided having to purchase more costly material from third parties, but Granite State incurred additional trucking expenses of \$1.05 per ton or a total additional cost of approximately \$122,000 (116,518 tons x \$1.05). Id. at 9.

During the course of this winter, it may become necessary for Granite State to obtain materials from outside sources in order to meet the demands of customers. MacLellan V.S. at 9. The current cost of materials purchased from outside suppliers is \$1 to \$2 per ton higher than the cost of such materials from internal Granite State sources. Id. To the extent that Granite State is forced to pay higher prices for materials in order to supply its customers, there will be additional damages attributable to Guilford's actions. Id.

Granite State took reasonable actions to mitigate its damages. For example, the activities of blasting and drilling subcontractors at Wilton were curtailed, resulting in a reduction of approximately \$50,000 in expenses for 2003 compared to 2002. MacLellan V.S. at 10. The number of hours that Granite State employees worked at Wilton was reduced. Id. Furthermore, as described above, production of materials from Granite State-owned sources was increased in order to avoid paying the higher cost of outside materials. Id.

LEISHMAN

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. NOR 42083

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

vs.

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

VERIFIED STATEMENT OF PETER R. LEISHMAN

Peter R. Leishman states as follows:

The Hillsborough Branch runs from Nashua, New Hampshire through the towns of Milford and Wilton to Bennington, New Hampshire. In the mid 1980's Guilford prosecuted a hard fought and ultimately successful battle to abandon the portion of the line from milepost 16.36 in Wilton to Bennington. After completion of abandonment proceedings Guilford ultimately sold the abandoned line to the State of New Hampshire. ICC Docket No. AB-32(Sub. 32) The abandoned portion was eventually leased by the State to Milford-Bennington Railroad in 1989.

In 1986 I began the process of forming the Milford-Bennington Railroad with the intention of operating a short line railroad on the newly abandoned line. The railroad

company was incorporated in 1987 but did not immediately operate any rail service. As early as 1984 I attempted to secure rights to use a portion of the Guilford owned line that ended at milepost 16.36. Guilford was strongly opposed to any sharing of its right of way with Milford-Bennington and refused to sell any portion of its remaining ownership of the Hillsborough branch.

In 1987 I applied for and was hired to work for Boston and Maine, a subsidiary of the Guilford. When I was hired by the personnel department I was told that prior to being hired the department would have to check with someone and it was my understanding that the person was Colin Pease. I was approved and worked for Guilford for less than a year. In 1988 I was approached by John MacLellan, president of Granite State Concrete, who asked if I would work for his company and initiate a rail freight service operating between a Granite State material excavation site in Wilton and Granite State's processing plant in Milford, New Hampshire. I accepted his offer and resigned my position with Guilford.

In 1989 Granite State successfully secured a permit from the town of Wilton, New Hampshire to install a stone crusher and expand the use of its excavation site, which is located at milepost 18.5 on the section of the Hillsborough line that had been abandoned by Guilford. Granite State's excavation site was set up to quarry and crush stone for movement to Granite State's processing facility located approximately five miles away in the adjacent town of Milford, New Hampshire. The processing facility is located on the Guilford owned portion of the line at milepost 13.5.

In order to minimize the impact of the quarry operations on the town of Wilton and to eliminate heavy trucking on Wilton's main street the town required that Granite State move stone between the excavation site and the processing plant by rail. Granite State agreed with the town's position and asked Milford-Bennington to provide the service. The terms and conditions of the permit are matters of public record and are well known to the people in the area.

In order to serve Granite State's requirements it was necessary to secure rights to operate over three miles of Guilford owned line between milepost 16.36 and milepost 13. I approached David Fink, the President and Chief Executive Officer of Guilford, and asked if he would grant Milford-Bennington trackage rights under a compensatory arrangement. He rejected my proposal. Between 1985 and 1991 Guilford opposed the sale of or Milford-Bennington operations over all or a portion of the Guilford owned section of the Hillsborough line that serves the Granite State processing facility arguing instead that the two railroads should share the five mile move with an interchange at milepost 16.36. A two carrier move for 5 miles would have been inefficient and would not have provided the best service possible for Granite State. In addition, the economics of a two carrier move would have made the service either unremunerative for Milford-Bennington or more costly for Granite State.

Ultimately, Milford-Bennington filed a feeder line application with the Interstate Commerce Commission seeking to purchase the needed mileage while protecting

Guilford's rights as a long haul connecting carrier. The line subject to the feeder line application had been placed in "category 1" status by Guilford in 1987 meaning that it was anticipating filing to abandon or discontinue service on the line within three years. The feeder line procedure was established to specifically provide for a smooth transfer of ownership of lines scheduled to be abandoned so that service could be preserved. Guilford, under Mr. Fink's direction vigorously opposed the feeder line application and even filed a competing feeder line application using a Guilford owned company called Hudson River Estates. The ICC rejected Guilford's application because Hudson River was a real estate holding company and had no rights to operate a railroad and because it was, in effect, the same company as Guilford. See Exhibit 1 attached.

Guilford's behavior made no apparent business sense and I ultimately appealed to Guilford's chairman and owner, Timothy Mellon. I wrote Mr. Mellon and he responded to my letter by telephoning me. I explained to Mr. Mellon that I was just following the law, that I would be satisfied with a simple trackage rights agreement, that Guilford had already indicated an interest in abandoning the line and that I was simply working to preserve service. Within days of my contacting Mr. Mellon, I received a telephone call from Mr. Pease offering Milford-Bennington a trackage rights agreement. We finalized the agreement on June 22, 1992 after just a few days of negotiations. See Exhibit 2 attached. The agreement permitted the Milford-Bennington to serve its customer efficiently and compensated Guilford fairly for the use of its line. The agreement even established a goal that Guilford install welded rail over the portion of railroad subject to the trackage rights agreement and required that Guilford maintain its portion of the line in

accordance with FRA track safety standards. Due to Guilford's refusal to permit longer trains, Milford-Bennington trains are restricted to 10 cars. The trackage rights agreement is silent on the question of the hours during which Milford-Bennington could operate over Guilford. The restrictions on Granite State's operations at Wilton were obviously known to me and, I believe, to Mr. Pease, who negotiated for Guilford. Our intent was to permit Milford-Bennington to operate without any time restriction in order to serve Granite State, and for 11 years, until June 20, 2003 we operated without time restrictions.

Milford-Bennington had programmed and ultimately completed a major rehabilitation project on the state owned section of railroad between milepost 16.36 and the Granite State's excavation facility so that it could accommodate safe speeds of 25 mph or even higher. The Guilford line between MP 16.36 and MP 13 was listed as excepted track and was posted for speeds of 10 mph or less. In 1992 it was and remains today in need of rail and additional ties.

While on June 22, 1992 I believed the Milford-Bennington and Guilford could work cooperatively, the events described below soon made it very clear that Guilford, under the direction of Mr. Fink, would fight Milford-Bennington's existence.

On November 3, 1992 Milford-Bennington derailed several cars of stone on Guilford's track in Wilton due to a defective switch. The derailment was clearly caused by a faulty switch that Guilford was responsible for maintaining. Even though the derailment was on

a lightly used line, resulted in no injuries, did not involve any hazardous material and did not involve any Guilford personnel or equipment, Mr. Fink personally, accompanied by Mr. Pease and others on Mr. Fink's staff, drove to Wilton to inspect the site.

To support the repair of Guilford track at the derailment site Milford-Bennington and Granite State provided Guilford with stone and ties to perform track repairs. Guilford weighed the derailed cars and found them all to be within approved weight limits. Even though Milford-Bennington cars were all within legal limits and even though the derailment was caused by faulty Guilford track, Guilford prosecuted a lawsuit for over a year to recover \$5922.44 in repair costs. In 1993 it became very clear that the cost of the litigation would significantly exceed the Guilford charge for the track repairs and in the interest of peace and under protest I paid the bill. To continue to defend our company through the courts would have been devastatingly expensive.

In 1993, only ten months after signing a 12-year trackage rights agreement, Guilford attempted to terminate the agreement and revoke Milford-Bennington's rights. Guilford petitioned the Interstate Commerce Commission asking them to revoke Milford-Bennington's operating rights and notified me they were terminating the trackage rights agreement. Guilford's actions were strongly opposed by the State of New Hampshire, by Granite State and by Milford-Bennington. The ICC determined that Guilford did not have the right to terminate Milford-Bennington service. See Exhibit 3 attached. I believe that this action could not have been processed without the knowledge and support of Mr.

Fink. Guilford's action confirmed that Guilford had no intention of working cooperatively.

On April 6, 1993 I provided Guilford with an inspection report noting approximately 30 track defects in the trackage rights line used by Milford-Bennington. See Exhibit 4 attached. The defects were substantial enough to cause another derailment, something I clearly wanted to avoid after our 1992 experience. I provided the notice in accordance with the trackage rights agreement that Guilford was attempting to terminate. Guilford immediately sent a team to inspect my locomotive and rail cars. When talking to some of the Guilford employees inspecting Milford-Bennington cars I learned that the team was told by Mr. Fink to "find" the same number of defects in the cars and locomotive as I had noticed on the track. The team reportedly "found" defects on Canadian Pacific cars leased by Milford-Bennington which were the only cars we had. Some of the defects were not visible requiring that trucks be removed from cars and inspected. The result of the Guilford inspection was the shutting down of our railroad for approximately six weeks in part to make "repairs" to make the cars acceptable to Guilford and in part because some of the inspections specified by Guilford required that cars be lifted off of their trucks, a difficult and time consuming process for a small railroad such as Milford-Bennington. The process could easily have been managed in a way that any defects could have been repaired and the railroad kept running had that been Guilford's desire. It was not.

On September 30, 1995 an individual not associated with the Milford-Bennington, acting against Milford-Bennington policies and without our approval or knowledge trespassed on our line with a small rail inspection gas car. The individual had an accident with the car and a woman passenger was seriously injured. Eleven days later Mr. Fink wrote a letter to New Hampshire Transportation Commissioner Charles O'Leary alleging that Milford-Bennington had permitted the car on the line, that Milford-Bennington permitted private parties to operate over its lines with gas cars and accusing Milford-Bennington of unsafe practices. See Exhibit 5 attached. Prior to writing the letter neither Mr. Fink, nor any of his staff made any attempt to contact me or anyone affiliated with our company to determine the facts of the case. In addition to writing the Commissioner Mr. Fink also wrote the local newspaper and his letter was published. See Exhibit 6 attached. The New Hampshire DOT determined appropriately that it was not the policy of the Milford-Bennington to permit any of the activities alleged by Mr. Fink and that the accident was not the fault of the Milford-Bennington. See Exhibit 7 attached. They also determined that the Milford-Bennington was not interfering with a police investigation into the accident as alleged by Mr. Fink and they communicated their findings to Fink in writing. Had Mr. Fink wanted to know the facts of the case he could have done so by contacting me or accepting the information provided by the New Hampshire Department of Transportation. Apparently Mr. Fink's goal was not to find the facts but rather to publicly attack my reputation and my company's.

In 1996 Milford-Bennington served Granite State, our only customer, using ten hopper cars leased from the Canadian Pacific Railroad. They were the only cars leased or owned

by the Milford-Bennington for operating our service. Milford-Bennington had notified CP of its desire to purchase the cars. Milford-Bennington and CP were also at the time working amicably to resolve an issue relating to the leased cars and at the time Milford-Bennington had an outstanding but questioned debt to CP of \$107,800. Much of the debt had accrued after the one-year lease had expired and after I thought I had an agreement to purchase the cars. While our discussions continued with CP, Guilford, under circumstances that are not clear, was able to purchase the cars being used by Milford-Bennington without our knowledge. See Exhibit 8 attached. Immediately upon the purchase of the cars Guilford directed Milford-Bennington to turn them over within 24 hours. See Exhibit 9 attached. Mr. Fink's counsel, John Nadolny, who would not have acted without Mr. Fink's knowledge and authority, sent the notice. Mr. Fink would have been fully aware that removal of the cars would shut our railroad down. Fortunately, CP rail, upon learning of their mistake, immediately moved replacement cars at their expense to our system but not before service was halted for about four weeks. While CP moved expeditiously to move other cars to our railroad, Guilford did the opposite. When the replacement cars were received in interchange by Guilford enroute to us, they were held at the point of interchange in Mechanicville for a number of days for "inspection".

Guilford, in addition to purchasing the CP cars, purchased our debt under an arrangement in which Guilford would pay CP 50% of all funds recovered. As soon as the deal was struck Guilford immediately initiated a collection action. Such an action could only have been authorized by and approved by Mr. Fink knowing that such an action would have serious ramifications to our railroad. Mr. Nadolny's letter demanding that the cars be

turned over also demanded payment in full within one week and demanded that I meet with "representatives of our company here in North Billerica" the next day. See Exhibit 9 attached. When I went to North Billerica the next day I met with Mr. Fink who offered to purchase Milford-Bennington in exchange for cancellation of the debt and any outstanding issues. Mr. Pease also sat in on the meeting. When meeting with Mr. Fink I asked him who I would be working for if I were to sell him the railroad. Mr. Fink answered I would be working for him. I declined the offer. When I spoke to CP about the debt transaction I learned that the debt was not something CP tried to sell to Guilford but something Guilford sought to acquire.

On October 1, 1996 Guilford filed a motion in Superior Court in Hillsborough County, New Hampshire seeking to attach property of Milford-Bennington and also property of J.G. MacLellan Concrete Co. Inc., the parent company of Granite State Concrete. A year later the court denied the Guilford attachment request.

From the time the Milford-Bennington was formed and throughout its 11 years of safe operations, my staff and I worked cooperatively with Guilford railroad staff who worked in the Nashua region. Despite this good working relationship at the local level it was also clear, as described above, that Milford-Bennington was closely scrutinized and on frequent occasions harassed either directly by Mr. Fink or by Mr. Fink's staff under his direction. The actions described above could have destroyed our company but did not because of our resolve and the merit of our positions and support from public agencies such as the New Hampshire Department of Transportation and from our customer,

Granite State. The animosity towards me and my company were made clear by the litigation and other actions described above and in letters to me and the Department of Transportation as well as to the press regarding the motor car incident. In view of the history of animosity, the actions by Guilford in June, 2003 are simply a continuation of the attempts by Guilford to make it difficult or impossible for Milford-Bennington to operate

Since the beginning of the trackage rights agreement in 1992, the Guilford track has been classified as excepted track. For the first five years of operation over Guilford track Milford-Bennington was able to operate 4 stone trains on most days between the Granite State excavation site and the Granite State processing facility. After approximately five years, however, it became increasingly difficult to deliver 4 trains per day as speeds on the line were reduced from 10 MPH to 5 MPH under excepted track conditions. The track was simply not maintained to permit safe operation over 5 mph and even at 5 mph there were occasions when it was necessary to make remedial repairs to Guilford track in order to avoid derailments. Guilford did not invest the sums necessary to even maintain its track at 10 mph under an excepted track designation, a level that is below the FRA minimum level of Class 1. They simply allowed the track to deteriorate and lowered speeds to a crawl. At all times prior to June 19, 2003, Milford-Bennington operated generally from 6:30 am to 6:30 pm Mondays through Fridays without any restrictions with respect to our hours of operation.

In the fall of 2002 a local businessman in Wilton approached me and told me he desired to start a scenic railroad and that he wanted to operate over the state owned rail from Wilton to Bennington. I suggested he hire a consultant to assist him in his endeavor. He did and retained Colin Pease, formally Executive Vice President of Guilford. During the fall of 2002 Mr. Pease worked to initiate service by the Wilton Scenic Railroad and in that capacity assisted with the purchase of two self propelled passenger cars and with the creation of a business plan for the scenic railroad. He proposed that the Wilton Scenic contract with Milford-Bennington for all operations of the scenic railroad and I agreed.

In late November 2002 the two passenger cars arrived in Wilton. Wilton Scenic had asked Guilford if they could lease a siding to store the cars for the winter in Wilton yard but the request was denied. Milford-Bennington had discontinued rail operations for the winter, coinciding with the cessation of Granite State's operations for the winter so I agreed to store the passenger cars on our single track main line in Wilton near milepost 16.36, the point where Guilford ownership ends and State ownership begins. The arrival of the cars was well documented in local papers that are sold in Wilton, Milford and the neighboring town of Amherst where Mr. Fink lives. It is also my understanding that the initial request to Guilford about storage of the cars was made in a personal letter from Wilton Scenic owner Stuart Draper to Mr. Fink at his home.

When the cars were stored they were placed on level track, the handbrakes were set and I applied devices called skates under the cars' wheels to assure that the cars would not

move. The cars were very visible in the center of Wilton adjacent to the post office parking lot.

On December 11 I received a telephone call from Guilford's General Manager Erwin Towle and on the morning of December 12, 2002 I received a telephone call from Guilford Rules Examiner Andy Zompa to ask if I would agree to the installation of a derail device to secure the passenger cars. I met Mr. Zompa at approximately 2:30 pm on December 12 at the location where the passenger cars were stored in Wilton near milepost 16.36. Mr. Pease was in Wilton frequently and had been meeting with Mr. Draper earlier that day to continue planning for start up of the scenic railroad. After Mr. Pease finished his meeting with Mr. Draper he came over to inspect the passenger cars, also around 2:30 PM. Mr. Pease and I both spoke with Mr. Zompa and for approximately an hour we had a friendly discussion.

Mr. Pease and I questioned whether there was any need for the derail, given the fact that the cars were secured by handbrakes and skates, and whether the location made any sense in view of the fact that Guilford already had a derail at the south end of the Wilton Yard, approximately 600 feet from milepost 16.36. It was clear from our discussion that Mr. Zompa was clearly concerned that if the derail was not installed that afternoon he would lose his job. Even though I did not believe that a derail was necessary, I was sympathetic to Mr. Zompa's concern, and I saw no harm, since Milford-Bennington operations had ceased for the winter. Mr. Zompa helped me remove the portable derail from his vehicle and we placed it on the track. I did not install it at the time. Mr. Zompa, after looking at

the passenger cars left but as he was leaving he asked that I make sure the derail device was installed on the track because Mr. Zompa said that he believed that Mr. Fink would drive by that evening and that if the portable derail was not installed on the rail, Mr. Zompa would lose his job. I installed the portable derail device later that afternoon and was observed doing it by Mr. Draper who arrived late in the day to check on his cars. The cars and the derail remained in place for the winter. At no time was there any discussion or agreement that the derail would be permanent or used to control freight operations.

The derail device provided by Mr. Zompa was a portable device, manufactured by a company called Hayes. It is designed to clamp onto the rail using specialized rail tools. The device is sold by Aldon Company, Inc. a company well known in the rail industry that has been in business since 1904. Aldon, in their catalogue, clearly states that the portable derail that was provided by Mr. Zompa is for use "when temporary protection of workers and tracks are required" and specifically states that the device is only effective at "speeds of 4 mph or less" and for "car protection" not trains. It is not designed to control main line operations. Because the derail was installed within a few yards of the secured passenger cars, the cars would be moving very slowly when they hit the derail device in the unlikely event that the brakes and skate devices did not prevent the cars from moving. The device would have been completely useless if for example, a Milford-Bennington train or stone cars were rolling over the device. Guilford issued a bulletin on December 12, 2002 noting the placement of the derail device. See Exhibit 10 attached. The bulletin did not say anything about how it was to be used.

In April, prior to the initiation of Milford-Bennington operations for 2003 on April 7, 2003, I moved the passenger cars from the main line in Wilton to a rail siding approximately 3 miles from Wilton. Milford –Bennington has two sidings, one at a quarry called Pike and one at the Granite State facility. Both are protected by derail devices. The passenger cars were moved to the Pike siding. The Milford-Bennington sidings are protected by derails so that no equipment could inadvertently roll down onto the Milford-Bennington main line or onto Guilford tracks in Wilton. When the cars were placed on the Pike siding, their brakes were applied, skate devices were applied and two derails were placed in the closed or derailing position.

After the passenger cars were relocated I removed the portable derail located at milepost 16.36 in Wilton, as it no longer served any purpose. It has always been my understanding and it was my agreement with Mr. Zompa that the portable derail would be used to secure the Wilton Scenic passenger cars and at all times the passenger cars were fully secured with a derail device. At no time did I agree to use the portable device to in some way secure freight cars as no freight cars were ever stored in Wilton and cars stored on the side tracks at the Granite State Facility and at the Pike facility were always secured with derail devices.

From April 7, 2003 through May 17, 2003 Milford-Bennington and Guilford, using trackage rights enabling them to operate directly to the Pike Quarry, operated between milepost 16.36 and milepost 19 without any derail in place and no exception was taken

by any Guilford official and at no time did any Guilford crew take any exception to the removal of the derail.

On May 17, 2003 just prior to the initiation of service by Wilton Scenic I reinstalled the portable derail device and assured that the derail was maintained in the closed position during the time when the Wilton Scenic was operating. Wilton Scenic operated in 2003 generally on weekends until August due to a major track rehabilitation project and Milford-Bennington rarely operates on weekends. Mr. Pease had informed me that he had reached an agreement with the FRA, in writing, to use the derail while passenger services were operating and I agreed with this action. He provided me with copies of his correspondence with the FRA.

In early June 2003 I installed a permanent derail device, at the request of Mr. Zompa. Mr. Zompa delivered the device to Wilton. The permanent derail was manufactured by Hayes and can be purchased through the Aldon Company. Aldon clearly states that the derail device is effective for speeds of 4 mph or less and clearly states that it is not to be used for main line locomotives. Aldon further notes that no derail is effective at speeds in excess of 4 mph. I again made it clear to Mr. Zompa that the device would be used only during passenger service operations in order to separate the passenger trains from the rest of the rail system. In fact as I was installing the derail I questioned whether its position would permit passenger trains to stop at the correct location to facilitate passenger boarding from the boarding platform. After Mr. Zompa left I did in fact move the device a short distance to assure that it would not foul passenger trains while they

were at the passenger station. During the first 19 days of June the permanent derail was always used during passenger operations and was always left in the open position during the operation of Guilford freight trains and Milford-Bennington trains. Guilford trains did not open or close the derail when they passed the derail and at no time did any Guilford crew or any other Guilford officials take exception to the way the derail was used. I advised all Milford-Bennington crew members that the purpose of the derail was to control passenger operations and that it was not to be used for freight operations.

On June 5, 2003 I participated in a detailed inspection of track that was to be used by the Wilton Scenic Railroad that was conducted by an official of the Federal Railroad Administration and a federally certified New Hampshire DOT track inspector. The inspection started at milepost 16.36 and we began by observing the derail device that was in the open and locked position as no passenger services were operating on June 5. The two inspectors took no exception to the fact that the derail was in the open position but the state inspector reiterated the same message I had received from other state officials to the effect that they wanted me to remove the derail from the State owned track. They told me that they believed that the derail was not necessary for the safety of passenger operations and that it was located at a place where a derailment could damage adjacent buildings and even injure people. I ultimately did remove the derail device but I removed it after June 20 when Guilford had installed a derail on Guilford owned track.

On June 19, 2003 I was working in Wilton and observed Sydney Culliford, Vice President of Operations for Guilford, Warren Bostwick, assistant general manager, Andy

Zompa and Dick Miller, assistant vice president for transportation, on our track standing over the derail. None of these four Guilford employees had notified Milford-Bennington that they would be coming to Wilton and the purpose of their trip did not seem to me to be simply to observe the derail device.

I went over and talked to Mr. Culliford near the derail device and he asked me why the device was in the open position. I told him it was kept in the open position except when Wilton Scenic was operating. He told me that I had agreed to use the derail during the operation of freight trains and I responded that I had agreed to use it only for passenger operations. After a brief and heated discussion Mr. Culliford and his crew left. The next day I was informed by Guilford General Manager Erwin Towle that Milford-Bennington would be allowed to operate over Guilford track only between the hours of midnight and 8 AM. I told Mr. Towle that I could not serve my customer with the proposed operating window and it would effectively shut me down. I made it clear to Mr. Towle that Granite State Concrete could not operate their Wilton facility at night and they were restricted to operate between the hours of 6:30 AM and 6:30 PM. In addition to telling Mr. Towle I made it very clear to Mr. Zompa, Mr. Miller and John Steiniger, an area supervisor, who were assisting with the installation of a derail on Guilford property on June 20 that Guilford's actions would make it impossible for Milford-Bennington and Granite State's Wilton quarry to operate. The Guilford staff who would talk to me were clearly not in a position to make any changes and simply told me I had to live with the new operating window. There was no opportunity for any discussion.

On June 20 Guilford installed a new permanent derail device on Guilford property near MP 16.36. While I believed strongly that use of a derail at that the location would not enhance safety on the railroad, and indeed would detract from it, I immediately wrote a letter to Guilford agreeing to use the derail device. I was willing to comply with their order if that was what was required to get my railroad running again. Even though I agreed to meet their demands they still would not change my hours of operation. Even though Guilford stated the reason for restricting Milford-Bennington hours was for safety, they refused our suggestion to involve the Federal Railroad Administration Office of Safety to help determine if any safety issue exists. Mr. Zompa, their rules examiner refused our offers to ride on Milford-Bennington trains on Milford-Bennington property to evaluate our operations and they have made no effort at all to assure themselves that cars are safely stored while on Milford-Bennington, which they are.

On June 20, 2003 and June 23, 2003, Guilford issued bulletins relating to the derail on its line near milepost 16.36. See Exhibit 11 and 12 attached. The June 20 bulletin noted that the derail that had been at the south end of the Wilton yard was being relocated on Guilford's line at approximately milepost 16.36. The derail at the south end of the yard had been on the main track for many years but had never been used for normal freight operations. It had been used at one time when Guilford loaded stone cars, but in recent years the derail was always in the open position. There was no bulletin relating to the derail, and the understanding of Milford-Bennington and Guilford was that it would not be used for general operations.

Immediately after the Guilford actions on June 19 and 20 I contacted the Regional Office of the Federal Railroad Administration and the New Hampshire Department of Transportation. Both offices could not understand Guilford's actions and both questioned why placing a derail device in the middle of a main line adjacent to a public road, several public buildings and near a senior citizen housing apartment complex contributed towards improving rail safety. Intentionally derailling a car traveling at even a slow rate of speed at that location could easily have serious impacts on the public. Granite State and I also contacted the STB's Office of Enforcement and Compliance in the hopes of resolving whatever issues Guilford had.

Finally on July 15, 2003 Guilford unilaterally changed our operating window permitting operations between the hours of 4AM and 1PM. Between June 20 and July 15 I was able to operate a total of 11 trains or an average of 1 train per weekday. The new operating window enabled me to operate two round trips per day if everything worked perfectly, but we were still only able to average about 1.4 trips per day after July 15, 2003..

However, any delays in loading or unloading cars, or even minor delays in getting dispatching approval to enter Guilford property resulted in operating only one trip a day. On a number of days a Milford-Bennington train approached MP 16.36 near the end of our operating window. On those occasions we sought a small extension of time, often as little as 15 to 30 minutes. Had that time been granted we could have completed a second trip. Each time our crew contacted the dispatcher, the dispatcher indicated he would have to ask a higher authority, which we assumed, was Mr. Culliford, Vice President for Operations, Mr. Steiniger, President, or Mr. Fink, CEO. On all occasions our requests

were denied even though there were no Guilford trains operating in the area. Guilford senior management made no effort whatsoever to help us serve our customer or to complete at least two trips per day. It was clear to me the operating windows were established to intentionally harm my business, not to enhance safety. Guilford has argued that Milford-Bennington should have been able to deliver three trains per day during the time when the 4:00 am to 1:00 pm restriction was in effect. As explained below 3 trains a day were not possible.

Milford-Bennington has 2 (3 prior to Guilford restrictions) full time employees including myself, and 2 part time employees. Milford-Bennington crews consisting of 2 people generally report for work at 6:00 AM or 30 minutes before the Granite State excavation site can start operations under their permit, and they use this time to inspect their train and assure that it meets all safety requirements for the day's operations. At 6:30 AM they load their train and that takes approximately 30 minutes and at approximately 7:00 AM they leave for Milford. If the Guilford dispatcher gives them a quick clearance, something that has not always happened, they will arrive in Milford at approximately 8:00 AM. Prior to raising the speed limit to 10 mph in November 2003 it took about 45 minutes to unlock the derail at milepost 16.36, relock it and travel the 3 miles over Guilford track. Upon arrival at Granite State the crew switches the cars into the plant and unloads their train, an operation that takes about an hour and 15 minutes. By 9:15 AM they are ready to return to Wilton. The return trip takes about 50 minutes and at 10 AM the crew is ready to load again. The loading process is usually completed at 10:35 AM and if the dispatcher grants a quick approval the train departs and arrives in Milford at

approximately 11:10 AM. Again the crew switches the cars into the processing plant and unloads the stone, a process that takes about an hour and 15 minutes. If the train does not depart by 12:15 PM it is impossible to arrive at Wilton by 1:00 PM after which Guilford prohibited operations over Guilford track. On many days the operation has not operated this smoothly. Guilford managers have stopped and boarded the Milford-Bennington train to inspect the crew's credentials, even though the crew just recently went through Guilford's "derail" school and is listed as approved to operate with Guilford's dispatchers. Milford-Bennington has experimented with loading the train in Wilton in the afternoon so the crew could depart exactly at 6:30 AM. This saved the crew 30 minutes but not nearly enough time to make a third round trip that takes about 3.5 hours under ideal conditions.

Guilford has also suggested that Milford-Bennington could run on weekends. The suggestion is at best disingenuous as Guilford is fully aware that the Granite State excavation facility cannot operate and thus load a train on weekends. As stated above and in Granite State's permit the excavation facility can only operate Monday through Friday from 6:30 am to 6:30 pm.

Guilford has also suggested that Granite State could enlarge their rail facilities at the excavation facility and at the processing plant to accommodate longer trains and that such actions could be done relatively easily. They are wrong and they could not have made these statements honestly if they had performed a physical inspection of the sites. Guilford knows that it was Guilford that originally insisted on a 10-car restriction for

Milford-Bennington and the trackage rights agreement so provides. Knowing the 10-car restriction the Granite State facilities were designed and built to accommodate the restrictions. To lengthen the rail siding at the excavation site Granite State would have to relocate an existing haul road and remove a substantial amount of ledge. Prior to commencing any work in Wilton Granite would first have to seek Wilton planning board review and approval a difficult and lengthy process. In Milford at the processing plant it would be necessary to extend the siding across an existing wash pond. There is no room to add a siding off the existing siding as the existing siding runs between the wash pond and washed sand pile. To enlarge the siding the wash pond would need to be filled and the sand conveyor and wash towers at the plant would need relocating. Even if this were done more than ten cars on the siding would block the road crossing the Granite State facility and to two other businesses. Finally it would be necessary to purchase an additional 5 stone cars.

Guilford alleges that Guilford and Milford-Bennington must operate separately in order to be safe. The fact is that the two railroads have operated safely for 11 years. Milford-Bennington receives clearance from Guilford dispatchers before operating over three miles of Guilford rail line. Approval is granted by dispatchers only when it is safe to operate and there is no risk that Milford-Bennington and Guilford trains could be involved in an accident. Guilford serves its line infrequently. It has one primary customer who receives a few cars per week. It has another who receives only a few cars in the winter. The fact is they do not use their line with any frequency and most days dispatchers are able to grant Milford-Bennington broad latitude to operate as Guilford

trains are not operating at all. There is no reason whether because of safety or any other valid reason that the operations should or must be separated completely.

The operations of Milford-Bennington coincide generally with the operations of Granite State in the sense that such operations are seasonal. Granite State is unable to operate its excavation site in Wilton or processing plant in Milford when temperatures are below freezing. Consequently, the operating season for the excavation site and for Milford-Bennington usually begins in April and in most years ends in November or December. The average length of the operating season is generally approximately eight months a year.

For the calendar years 1999 through 2002, Milford-Bennington handled an average of 3,428 cars per year. If it is assumed that the operating year consisted of approximately eight months, the average number of cars handled per month for the years 1999 through 2002 was approximately 396.

In 2003, Milford-Bennington began operating as of April 7 and stopped as of December 4. In April 2003, we handled 401 cars. In May 2003, we delivered 486 cars from Wilton to Milford. The average number of cars per month for April and May of 2003 was, therefore, 443.

As described above, Guilford restricted our operations beginning as of June 20, 2003. In June 2003 we handled 360 cars. The total number of cars moved by Milford-Bennington

for the remainder of the year 2003 were, according to our records, as follows: July 225; August 216; September 225; October 261; November 279; and December 54. The average number of cars handled per month for the period July 1, 2003 through November 30, 2003 was 241.

It is evident that the actions of Guilford had a severe negative impact on the traffic handled by Milford-Bennington after June 19, 2003. From June 19, 2003 to the cessation of operations, we handled 945 fewer cars than we would have if we had averaged the number of cars that we handled for the years 1999 through 2002. From June 19, 2003 to the cessation of operations, we handled 928 fewer cars than we would have if we had stayed at the same pace that we established in April and May 2003. Each car that we did not handle represents foregone revenue of \$75. Consequently, the total loss suffered by Milford-Bennington as a result of the actions by Guilford to restrict our operations was \$70,875 if measured against averages for the years 1999 through 2002 or \$69,600 if compared to the average for the first two months of 2003 before the restrictions were implemented.

We have done our best to mitigate such damages. For example, after June 19, 2003, we curtailed the hours of employees when possible if we were unable to operate and furloughed one full-time employee. In this way, we avoided wages and related payroll expenses to the extent of approximately \$21,800. In addition, because we ran fewer trains, trackage rights payments to Guilford were approximately \$12,400 less than they would have been if we had been operating at historic levels. Similarly, our fuel expenses

were reduced as a result of fewer trains by approximately \$2,400. However, other expenses continued unabated, because they were not related to the lower level of activity caused by Guilford's actions.

As described above, over the past 11 years Guilford under the direction of Mr. Fink has taken a series of actions that went well beyond what would be considered normal business practices. I believe that the litigation by Guilford and the other actions referred to above were designed to drive Milford-Bennington out of business.

Mr. Fink has alleged that I run an unsafe railroad even though no one at Guilford who knows our operations has testified that they have ever had a safety problem with my railroad and at no time have they felt unsafe working on the railroad when Milford-Bennington was running. His staff has testified under oath that no Milford-Bennington employee has ever failed a rules exam. They have testified under oath that they took no exception to Milford-Bennington operations when they conducted safety tests or observed our rail operations. No federal or state authority has ever made any determination that our railroad is unsafe and indeed they will confirm that our safety record and our commitment to safety is first class. An inspection of our track will reveal that it is maintained to a condition that would safely support speeds significantly higher than the 25 miles per hour we operate; an inspection of Guilford track between milepost 16.36 and Granite State at MP 13 would show a stark contrast between the way we maintain our track and facilities and the way Guilford maintains theirs.

Mr. Fink has testified that he hardly knows who the Milford-Bennington is, hardly knows me and never focuses on such a small part of his railroad. His testimony is flatly contradicted, however, by the actions of Guilford as described above. These actions would have destroyed Milford-Bennington had I not had the solid support of my customer, Granite State and the State of New Hampshire. I believe that this latest series of actions is simply a continuation of this pattern of behavior and that it is time to bring that behavior to a stop.

Exhibit 1



SERVICE DATE

FEB 27 1992

EC

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 31701 (Sub-No. 2)¹

HUDSON RIVER ESTATES, INC. - ACQUISITION OF
BOSTON AND MAINE CORPORATION REVERSIONARY
INTEREST - HILLSBOROUGH BRANCH

Decided: February 21, 1992

On June 21, 1990, Milford-Bennington Railroad Company, Inc. (MBR) filed a feeder line application under 49 U.S.C. 10910 in Finance Docket No. 31701, Milford-Bennington Railroad Company, Inc. - Feeder Line Acquisition - Boston And Maine Corporation Hillsborough Branch. MBR seeks the acquisition and operation of a 5.58-mile line segment between Wilton and Milford, NH owned by the Boston and Maine Corporation (B&M) and leased to its corporate affiliate, Springfield Terminal Railroad Company (ST).²

In December 1991, Hudson River Estates, Inc. (HRE), filed a competing feeder application to purchase B&M's reversionary interest in the same line segment sought by MBR.³ By decision served December 18, 1991, the Director of the Office of Proceedings (Director) rejected HRE's competing application on the grounds that: (1) HRE is the corporate affiliate of three class II railroads--B&M, ST and MCR--and, as such, it is not permitted to be an applicant under the Commission's feeder line rules; (2) the application was untimely; and (3) HRE failed to show good cause for waiving the rules and accepting its filing.

In its appeal of the Director's rejection of its application, HRE argues that the decision exceeds the statutory authority of the Commission and is inconsistent with the feeder line development program. To support its position, HRE alleges that the feeder line statute, while specifically disqualifying a class I or II railroad from its definition of a "financially

¹ This competing application has been reentitled "Sub-No. 2" to distinguish it from the previously filed feeder line application.

² By decision served October 31, 1991, the Commission found the subject line eligible under the feeder line statute and denied B&M/ST's petition to reject MBR's application and re-established the procedural schedule. Subsequently, in a decision served December 12, 1991, the Secretary of the Commission denied B&M/ST's motion to compel MBR to produce certain documents, but granted their extension request in part. Under this revised schedule, B&M/ST's response to the application was filed on January 21, 1992, and reply of applicant MBR is due February 10, 1992.

³ In its application, HRE indicates that it is a real estate development company that is wholly-owned by the Guilford Transportation Industries, Inc. (GTI) and that GTI also owns B&M, ST, and the Maine Central Railroad Company (MCR). HRE states that it was entitled to submit a competing bid since it is a financially responsible party with assets of approximately \$1.95 million and it is able to obtain additional operating capital from its parent GTI. HRE argues, moreover, that its bid is substantially higher than MBR's and that its application is timely. HRE indicates that upon its selection by B&M as the successful applicant, it intends to continue ST's present lease arrangement and operation of line.

responsible person", does not mention or exclude affiliates of such carriers. Under HRE's statutory construction, entities not expressly excluded by statute may qualify as feeder line applicants if they otherwise meet the applicable criteria. HRE also contends that such an exclusion would significantly reduce the quality and quantity of potential feeder line bidders and thereby undermine the program's objective of preserving rail service. According to HRE, both the Director's rejection and the Commission's rule on which his action was based, 49 CFR 1151.4(a)(2) (which expressly disqualifies affiliates of classes I and II carriers as feeder line applicants) are unlawful exercises of agency power.

HRE's argument is an impermissible collateral attack on our well-established rules governing the feeder railroad development program of the Staggers Rail Act of 1980. Congress adopted the feeder line statute in section 401 of the Staggers Act and we first promulgated our rules in 1981. Although HRE cites both our prior implementing decisions in Feeder Railroad Development Program, 365 I.C.C. 93 (1981) (Feeder Program I) and 367 I.C.C. 261 (1983) (Feeder Program II) to support its appeal, it ignores the fact that from the very inception of our feeder line procedures in 1981, affiliates of classes I and II railroads have been disqualified as potential feeder line applicants. See Feeder Program I, 365 I.C.C. at 109.

Moreover, in our 1983 revision of the feeder line rules, we specifically considered a proposal by the New York Department of Transportation (NYDOT) to remove the then-existing ban on class I and class II carrier affiliates because, according to NYDOT, "they are not expressly excluded by statute . . . [and] the exclusion of such affiliates may result in the termination of all rail service." In rejecting NYDOT's proposal, we stated that such entities were not included in the categories of targeted groups--i.e., shippers and government agencies--intended by Congress to participate in the program. We also found it unlikely that existing rail service would terminate since a carrier affiliate may still negotiate a voluntary agreement or acquire a line after abandonment under section 10905. Feeder Program II, 367 I.C.C. at 270. It is clear that HRE has failed to distinguish its argument from that advanced by NYDOT and rejected by us in 1983. The fact that HRE now disagrees with our interpretation of Congressional intent on this matter does not change our long-standing rule disqualifying carrier affiliates from the feeder line procedures and HRE's collateral efforts to undo that rule must fail.

HRE also collaterally attacks our rules by arguing that the Director's rejection of its application is inconsistent with the statutory purpose of section 10910. To the contrary, we believe that HRE's participation is contrary to Congressional intent in the feeder line statute--i.e., to provide communities and shipper groups an opportunity to preserve rail lines before they are abandoned or downgraded by the owning railroad. HRE is the affiliate of B&M and ST, the respective owner and operator of the line it seeks to acquire. HRE wants to maintain the line's status quo by preserving ST's operation of it. The clear purpose of section 10910 is to give local interests an alternative to the status quo. We believe that HRE's participation, if permitted, goes beyond the mere filing of a competing application. Its clear purpose is to supplant and defeat the bid by local

interests to acquire the line under our feeder line rules.⁴ Accordingly, we agree with the Director that HRE's participation here is contrary to the statute's intent.

HRE has failed to demonstrate that the Director's action was unwarranted or that the applicable feeder line rule--49 CFR 1151.4(a)(2)--is unlawful. Because of its affiliation with class II carriers, it does not qualify as a feeder line applicant. Thus, we need not address its remaining argument that its competing feeder line application was timely filed.

It is sufficient to note that our rules clearly require that competing applications be filed within 30 days of the filing of the feeder line application. MBR filed its application on June 21, 1990, more than 17 months before HRE filed its December 1991 application. HRE's argument that MBR's application should be deemed to have been filed on the date the Commission denied B&M's motion to dismiss MBR's application because HRE thought that MBR's application might be dismissed is thoroughly unconvincing. We allow competing applications to be filed so that a party interested in acquiring a line pursuant to a feeder line application may not be forced out by a preemptive filing by another party. At the same time, we require that competing applications be filed promptly to permit the applicant, the carrier and this Commission to proceed knowing that all the applicants are before the agency.

HRE's filing of the application only after the denial of the motion to dismiss merely underscores the conclusion that HRE is not an independent party with an interest in providing service but rather is acting in concert with its affiliate to defeat MBR's application. This is precisely the type of obstructive activity that we intended to preclude by our rules requiring the prompt filing of competing applications and prohibiting the filing of applications by rail affiliates.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. HRE's appeal from the Director's decision served December 18, 1991, is denied.
2. This decision is effective on February 27, 1992.

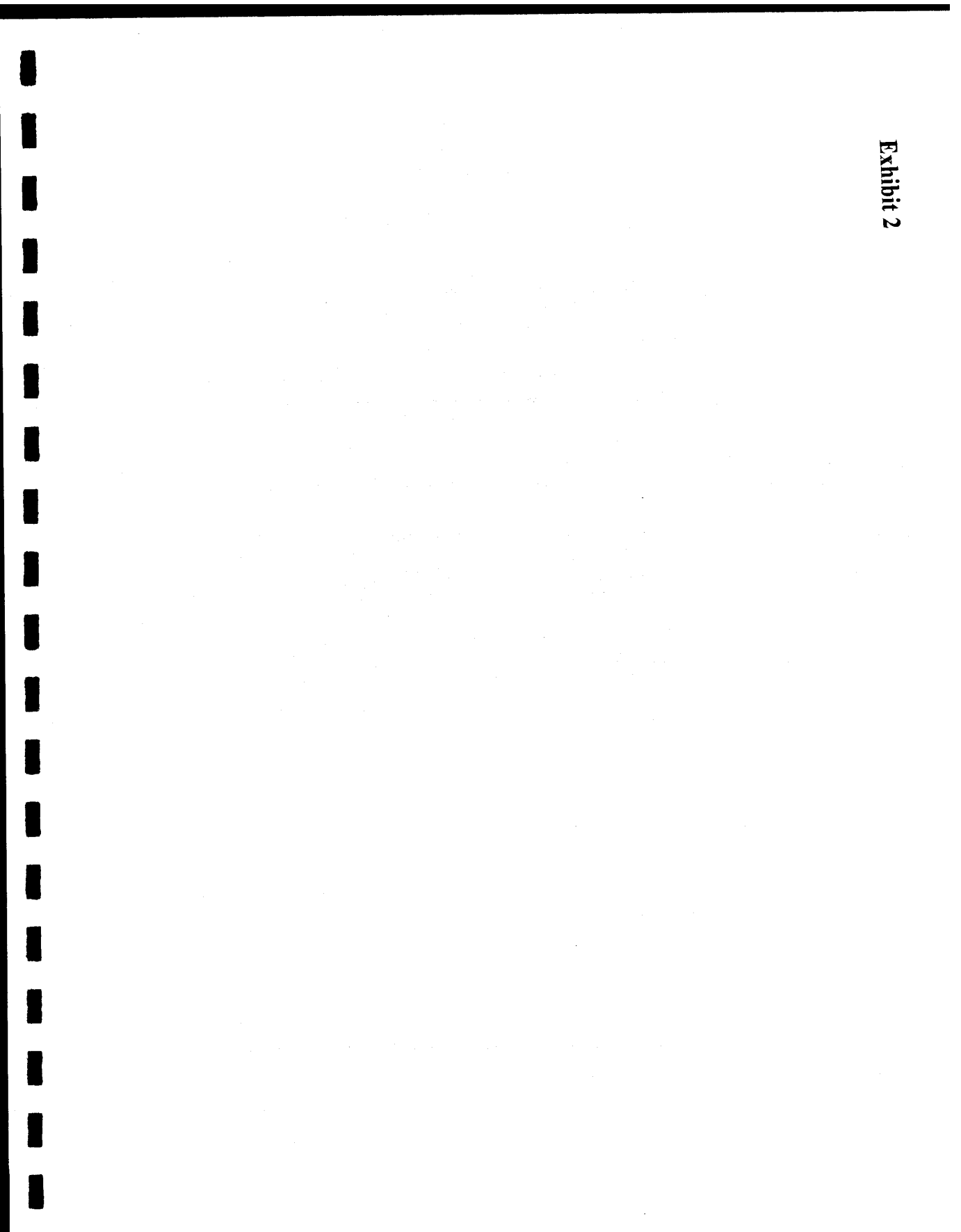
By the Commission, Chairman Philbin, Vice Chairman McDonald, Commissioners Simmons, Phillips, and Emmett.

(SEAL)

Sidney L. Strickland, Jr.
Secretary

⁴ Under our feeder line rules, the owning railroad, not the Commission, selects the competing applicant to which it will sell the line. 49 CFR 1151.2(i). Here, HRE is virtually assured that its affiliate B&M will select it rather than MBR.

Exhibit 2



AGREEMENT

~~CONFIDENTIAL~~

AGREEMENT, made as of this 22nd day of June, 1992 by and among Milford-Bennington Railroad Company, Inc. ("MBR") and Boston and Maine Corporation ("B&M") and the Springfield Terminal Railway Company ("ST") (collectively "B&M/ST").

WHEREAS, B&M is the owner/lessor and ST is the current lessee of certain railroad trackage between Wilton and Milford, New Hampshire, and,

WHEREAS, the parties hereto desire to enter into an agreement to provide for the overhead movement of traffic between Wilton, New Hampshire and Milford, New Hampshire, and whereas MBR required access to Milford over B&M/ST tracks;

NOW, THEREFORE, in consideration of the promises, covenants and undertaking contained herein, the parties agree as follows;

1. Trackage Rights between Wilton and Milford. B&M/ST hereby grant MBR the non-exclusive right to operate MBR trains, locomotives, cars and equipment with MBR's own crews (the "Trackage Rights") over the B&M/ST's trackage which extends from the point of the junction with MBR and the B&M/ST at approximately milepost N-16.36 in Wilton, New Hampshire, to approximately milepost N-11.0 in Milford, New Hampshire (the "Trackage"), subject to the following terms and conditions:

(a) The Trackage Rights are overhead rights only and are solely for the purpose of permitting the movement of stone and gravel cars, each not more than 2000 cubic feet in volume, in ten car trains between Wilton and Granite State Concrete Company,

Inc. in Milford. MBR shall not move any other shipments or perform any local freight service whatsoever over the Trackage. B&M/ST's right to use the Trackage shall not be diminished by this Agreement. B&M/ST hereby retain the right to grant to other persons or entities rights of any nature in the Trackage. The Trackage Rights shall not confer on or vest in MBR any title or estate in the Trackage beyond that contemplated herein.

(b) MBR shall be solely responsible for and shall report and pay directly to the owner of all cars in MBR's trains on the Trackage all mileage, car hire and other charges accruing on such cars while on the Trackage.

(c) Additional connections to the Trackage which may be required by B&M/ST shall be constructed, maintained, repaired and renewed as follows:

(i) B&M/ST shall furnish all labor and materials and shall construct, maintain, repair and renew at B&M/ST's sole cost and expense such portions of the tracks located on the B&M/ST right-of-way which connect with the Trackage.

(d) From time to time, B&M/ST may, at B&M/ST's sole cost and expense, make such changes in, additions and betterments to and retirements from the Trackage as shall, in B&M/ST's sole judgment, be necessary or desirable for the economical or safe operation thereof or as shall be required by any law, rule, regulation, or ordinance promulgated by any governmental body having jurisdiction. Such additions and betterments shall become a part of the Trackage and such retirements (the "Retired Track")

shall, except as provided in sub-section (e) below, be excluded from the Trackage.

(e) If MBR determines that (i) changes in or additions and betterments to the Trackage, including changes in communications or signal facilities as they existed immediately prior to the date of this Agreement or (ii) continued use of any tracks which are proposed by B&M/ST to become Retired Track, are required to accommodate MBR's operations, beyond that required by B&M/ST to accommodate B&M/ST's operations over the Trackage, MBR shall pay for the construction of such additional or altered facilities, shall (subject to the notice and response requirements set forth below) be allowed the continued use of such otherwise Retired Track, and shall also pay for the annual expense of maintaining, repairing and renewing such additional or altered facilities and such Retired Track as MBR may, by written notice, elect to continue to use. B&M/ST shall provide MBR with ten (10) days notice of any planned retirements from the Trackage and MBR shall be required to notify B&M/ST, within said ten (10) day period, of any desire to continue the use of Retired Track. Notwithstanding the foregoing, B&M/ST shall have the right to approve or disapprove, in their exclusive discretion, any such addition or alteration prior to its construction, and such addition or alteration approved shall be constructed in such a manner as to minimize interference with B&M/ST's and MBR's operations over the Trackage.

287-0241

(f) B&M/ST shall maintain, repair, and renew the Trackage at B&M/ST's own expense and with B&M/ST's own supervision and labor. B&M/ST shall perform routine and regular maintenance on the Trackage. It is the intent of B&M/ST to install welded rail between milepost N-11 and milepost N-16.36 within 5 years of the effective date of this agreement in order to eliminate existing webber type joint bars. The railroad will be maintained in compliance with Federal Railroad Administration Safety Standards.

However, B&M/ST do not guarantee the speed at which trains will be able to operate over the Trackage. MBR shall not by reason of failure or neglect on the part of B&M/ST to maintain, repair, or renew the Trackage, have or make any claim or demand against B&M/ST or B&M/ST's directors, officers, agents or employees for any injury to or death of any person or persons whomsoever, or for any damage to or loss or destruction of any property whatsoever, or for any damages of any nature suffered by MBR resulting from any such failure or neglect unless (i) MBR shall have notified B&M/ST, with confirmation in writing, of specific alleged defective conditions which MBR reasonably believes to constitute a breach of B&M/ST's maintenance obligation hereunder and (ii) B&M/ST shall have failed to remedy, dispute, or otherwise respond to said specific alleged defective conditions within seven (7) days after receipt of such notification. B&M/ST shall bear no responsibility for any loss or damage which may occur during the seven (7) day period.

(g) B&M/ST shall also perform, at the expense of MBR, such additional maintenance as MBR may request.

(h) B&M/ST shall have exclusive control of the management, dispatching and operation of the Trackage. MBR shall comply with the provisions of the Federal Locomotive Inspection Act and the Federal Safety Appliance Act, as amended, and all other federal and state laws, regulations, and rules respecting the operation, condition, inspection, and safety of MBR's trains, locomotives, cars and equipment while such trains, locomotives, cars and equipment are operated over the Trackage. MBR shall indemnify, protect, defend, and save harmless B&M/ST and B&M/ST's directors, officers, agents, and employees from and against all fines, penalties, and liabilities imposed upon B&M/ST or B&M/ST's directors, officers, agents or employees under such laws, rules, and regulations by any public authority or court having jurisdiction, when attributable solely to the failure of MBR to comply with the provisions of this Section.

(i) MBR in its use of the Trackage will comply in all respects with the operating rules and regulations of B&M/ST, and the movement of MBR's trains, locomotives, cars and equipment over the Trackage shall at all times be subject to the orders of the transportation officers of B&M/ST. MBR's trains shall not include locomotives, cars or equipment which exceed the width, height, weight or other restrictions or capacities of the Trackage as published in the Railway Line Clearances, and no train shall contain locomotives, cars or equipment which require speed restrictions or other movement restrictions below the authorized freight speeds as provided by B&M/ST's operating rules and regulations without the prior written consent of B&M/ST,

which consent shall not be unreasonably withheld. MBR shall indemnify, protect, defend, and save harmless B&M/ST and B&M/ST's directors, officers, agents and employees from and against all liabilities when attributable to the failure of MBR to comply with the provisions of this Section.

(j) MBR shall make such arrangements with B&M/ST as may be required to have all of MBR's employees who shall operate MBR's trains, locomotives, cars and equipment over the Trackage qualified for operation thereover, and MBR shall reimburse B&M/ST for any cost incurred by B&M/ST in connection with the qualification of such employees of MBR, as well as the cost of pilots furnished by B&M/ST, until such time as such MBR employees are deemed by the appropriate examining officer of B&M/ST, in his exclusive discretion, to be properly qualified for operation over the Trackage as herein contemplated.

(k) In the event B&M/ST conduct an investigation or hearing concerning the violation of any operating rule or practice of B&M/ST by any employee or employees of MBR, MBR shall be notified in advance of any such investigation or hearing. Such investigation or hearing shall be conducted by B&M/ST, and may be attended by any official designated by MBR and shall be conducted in accordance with the collective bargaining agreements, if any, that pertain to said employee or employees.

(l) B&M/ST shall have the right to exclude from the Trackage any employee of MBR determined by B&M/ST, as a result of such investigation or hearing described above, to have violated B&M/ST's rules, regulations, orders, practices or instructions.

MBR shall release, indemnify, defend, and save harmless B&M/ST and B&M/ST's directors, officers, agents, and employees from and against any and all claims and expenses resulting from such exclusion.

(m) The trains, locomotives, cars and equipment of B&M/ST and MBR shall be operated and dispatched over the Trackage or any portion thereof without prejudice or partiality to any party to this Agreement and in such manner as will afford the most economical and efficient manner of movement of all traffic.

(n) If by reason of any mechanical failure or for any other cause not resulting from the accident or derailment, any train, locomotive, car or equipment of, or in the account of, MBR becomes stalled or unable to proceed under its own power, or fails to maintain the speed required by B&M/ST on the Trackage, or if in an emergency crippled or otherwise defective cars are set out of a MBR train on the Trackage (collectively, the "Interference"), and MBR is unable to remedy said Interference within a reasonable time, the B&M/ST shall have the option to furnish motive power or such other assistance as may be necessary to haul, help, or push such train, locomotive, cars or equipment, or to properly move the disabled equipment off the Trackage, or otherwise clear the Interference, and MBR shall reimburse B&M/ST for the cost of rendering any such assistance.

(o) If it becomes necessary to make repairs to or adjust or transfer the lading of such crippled or defective cars in order to move them off the Trackage, and MBR is unable to make such repairs, adjustments or transfers within a reasonable period of

time, then such work shall be done by B&M/ST and MBR shall reimburse B&M/ST for the cost thereof.

(p) MBR shall release, indemnify, defend, protect and save harmless B&M/ST and B&M/ST's directors, officers agents and employees from and against any and all claims expenses arising out of the movement of the traffic contemplated herein, the Trackage Rights or this Agreement as a result of the collective bargaining agreements between B&M/ST and their respective labor organizations, or incurred as a result of any labor protection obligations imposed by the Interstate Commerce Commission. Notwithstanding the foregoing, B&M/ST reserve their right to take such steps as are reasonably necessary to terminate this Agreement in the event that claims or labor protection obligations are created hereby which are beyond MBR's financial capacity to bear under its indemnification obligation.

2. Compensation.

(a) MBR agrees to pay B&M/ST for the trackage rights covered by this agreement \$5.00 per car, loaded or empty.

(b) MBR agrees that said Base Charge will be applicable to all cars, loaded and unloaded, moved by MBR over the Trackage Rights during the term of this Agreement.

(c) The "Base Charge" will be subject to revision as specified in paragraph (d) of this section.

(d) All payments to be made by MBR under this Agreement (including the Base Charge) shall be adjusted effective July 1 of each year beginning July 1, 1993, for price level changes as reflected in the Annual Indices of Charge Out Prices (1977 = 100)

series RCR, included in "Railroad Recovery Index" and supplements thereto, issued by the Association of American Railroads. The final "Material Prices, Wage Rates, and Supplements Combined (excl. fuel)" index for the Eastern District shall be used. The price level charges shall be based on the relationship of the most recent annual indices to the previous comparable annual indices. The first adjustment shall be based on the comparison of final figure for calendar 1992 to the final figure for calendar 1991.

3. Term and Termination. This Agreement shall take effect as of the date first set forth above and shall continue in full force and effect for a term of twelve (12) years; provided, however, that this Agreement may be terminated (i) at any time upon the mutual agreement of the parties or (ii) by B&M/ST upon 30 days prior written notice to MBR in the event of a breach by MBR of any of its covenants under this Agreement which breach shall not have been remedied within fifteen (15) days of notice of said breach by B&M/ST to MBR. Termination of this Agreement shall not relieve, release or excuse either party from any liability which either party may have incurred or any obligation which may have accrued under any provision of this Agreement prior to the effective date of termination.

4. Clearing of Derailments and Wrecks. In the event of any derailment or wreck of any train, locomotive, car or equipment of, or in the account of, MBR on the Trackage, B&M/ST shall, at MBR's expense, clear and repair the Trackage to allow for the passage of other trains within a reasonable time. B&M/ST

shall perform any re-railing, wrecking or wrecking train service as may be required in connection with such derailment or wreck.

5. Release and Indemnification.

(a) MBR hereby agrees to release, indemnify, defend, protect and hold B&M/ST, Guilford Transportation Industries, Inc. and their officers, agents, representatives and employees harmless from and against any and all liability, cost or expense (including expenses incurred by B&M/ST in clearing wrecks and derailments and repairing trackage as described in Section 4, above) which relate to or arise out of any loss of, damage to, or destruction of any property whatsoever, or any injury to or death of any person or persons whomsoever, when such liability, cost or expense arises out of or is in any way connected with the operation of trains, locomotives, cars or equipment of, or in the account of, MBR, either solely or in conjunction with trains, locomotives, cars or equipment of, or in the account of B&M/ST.

(b) B&M/ST hereby agree to release, indemnify, defend, protect and hold MBR and its officers, agents, representatives and employees harmless from and against any and all liability, costs or expense which relate to or arise out of any loss of, damage to, or destruction of any property whatsoever, or any injury to or death of any person or persons whomsoever, when such liability, cost or expense arise solely out of the operation of trains, locomotives, cars of, equipment of, or in the account of, B&M/ST, or any other party to whom B&M/ST might grant Trackage Rights, haulage rights or other rights.

(c) In every case of death or injury suffered by an employee of either MBR or B&M/ST, when compensation to such employee or employee's dependents is required to be paid under any workmen's compensation, occupational disease, employer's liability or other law, and either of said parties, under the provisions of this Agreement, is required to pay such compensation, if such compensation is required to be paid in installments over a period of time, such party shall not be released from paying such future installments by reason of the expiration or other termination of the Agreement prior to any of the respective dates upon which any such future installments are to be paid.

6. Payment of Bills by MBR. All payments called for under this Agreement shall be made by MBR to B&M/ST within thirty (30) days of the receipt of the bills therefor by check made payable to the order of "Boston and Maine Corporation". No payments shall be withheld because of any dispute as to the correctness of items on the bills rendered. Any discrepancies reconciled between the parties shall be adjusted in the accounts of the subsequent month. The records of each party relating to the subject of this Agreement shall be open at all reasonable times to inspection by the other party. Bills rendered pursuant to the provisions of this Agreement shall include direct labor and material costs, together with the surcharges, overhead percentages and equipment rentals in effect at the time any work is performed by B&M/ST.

7. Land Sale.

(a) Prior to B&M's offering of part or all of the Trackage and associated right-of-way, which would result in a break in the continuity of the right-of-way, for sale to a third party, B&M shall offer the entire right-of-way to MBR. The offer shall be upon the terms and conditions set forth in the purchase and sale agreement attached hereto and incorporated herein as Exhibit "A".

The purchase price shall be determined by the B&M at the time of the offer in accordance with its appraisal of the right-of-way. MBR shall have 30 days from receipt of B&M's offer to accept the offer, after which time the offer will be deemed to have been rejected. MBR shall signify acceptance by signing the purchase and sale agreement, in the form attached hereto, which shall accompany B&M's offer. Milford shall return the purchase and sale agreement and a deposit in the amount of 10% of the purchase price as stated in the offer to B&M within said 30 day period. In the event Milford accepts B&M's offer, the closing shall take place 90 days after the date on which Milford received B&M's offer. If said date falls on a day when the Hillsborough County Registry of Deeds is closed, the closing shall take place on the next day during which it is open.

8. General Provisions.

(a) No Waiver. Waiver of any provision of this Agreement, in whole or in part, in any one instance shall not constitute a waiver of any other provision in the same instance, nor any waiver of the same provision in another instance, but each provision shall continue in full force and effect with respect to any other then existing or subsequent breach.

(b) Notice. Any notice required or permitted under this Agreement shall be given in writing to the parties at their respective addresses specified at the end hereof, or at such other address for a party as that party may specify by notice as provided herein, by (i) (A) delivery in hand or by postage prepaid, United States first class mail or (B) registered or certified mail, return receipt required, or Federal Express or other form of expedited mail that provided for delivery to the sender of a signed receipt, or (iii) telegram or telefacsimile transmission. Notice so sent shall be effective upon receipt.

(c) Integration. This Agreement constitutes the entire agreement of the parties with respect to its subject matter, superseding all prior oral and written communications, proposals, negotiations, representations, understandings, courses of dealing, agreements, contracts and the like between the parties in such respect.

(d) Miscellaneous. The Agreement: (i) may be executed in any number of counterparts, each of which when executed by all parties to this Agreement shall be deemed to be an original, and all of which counterparts together shall constitute one and the same instrument; (ii) may be amended, modified, or terminated, and any right under this Agreement may be waived in whole or in part, only by a writing signed by all parties; (iii) contains headings only for convenience, which headings do not form part of and shall not be used in construction of this Agreement; and (iv) except as to indemnification, is not intended to inure to the benefit of any party not a party to this Agreement.

(e) Force Majeure. No party to this Agreement shall be responsible to the others 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 of suppliers, or failure of transportation, communication or power supply.

(f) Trains, Locomotives, Cars or Equipment. As used in this Agreement, whenever reference is made to the trains, locomotives, cars or equipment of, or in the account of, one of the parties hereto, such expression means the trains, locomotives, cars and equipment in the possession of or operated by one of the parties and includes such trains, locomotives, cars and equipment which are owned by, leased to, or in the account of such party. Whenever such trains, locomotives, cars or equipment are owned or leased by one party to this Agreement and are in the possession or account of, or under the control of the other party to this Agreement, such trains, locomotives, cars and equipment shall be considered those of the other party.

(g) Assignment. This Agreement shall bind and inure to the benefit of the parties and their respective legal representatives, successors and assigns. MBR hereby acknowledges and agrees that B&M and ST shall have the right to assign any and all of B&M and ST's rights and obligations under this Agreement to any affiliate of B&M or ST, or to any other person or entity without MBR's consent. MBR may, with the prior written consent

of B&M/ST, which consent shall not be unreasonably withheld, assign its rights and obligations under this Agreement to an affiliate of MBR, provided that said affiliate shall be a suitably capitalized and financially acceptable substitute for MBR. MBR may not otherwise assign its rights and obligations under this Agreement without the prior written consent of B&M/ST which consent may be withheld for any reason or for no reason.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as a sealed instrument as of the date first set forth above by their duly authorized representatives.

BOSTON AND MAINE CORPORATION

By: Sydney B. Culliford
Sydney B. Culliford
Vice President-Transportation
Iron Horse Park
North Billerica, MA 01862

SPRINGFIELD TERMINAL RAILWAY
COMPANY

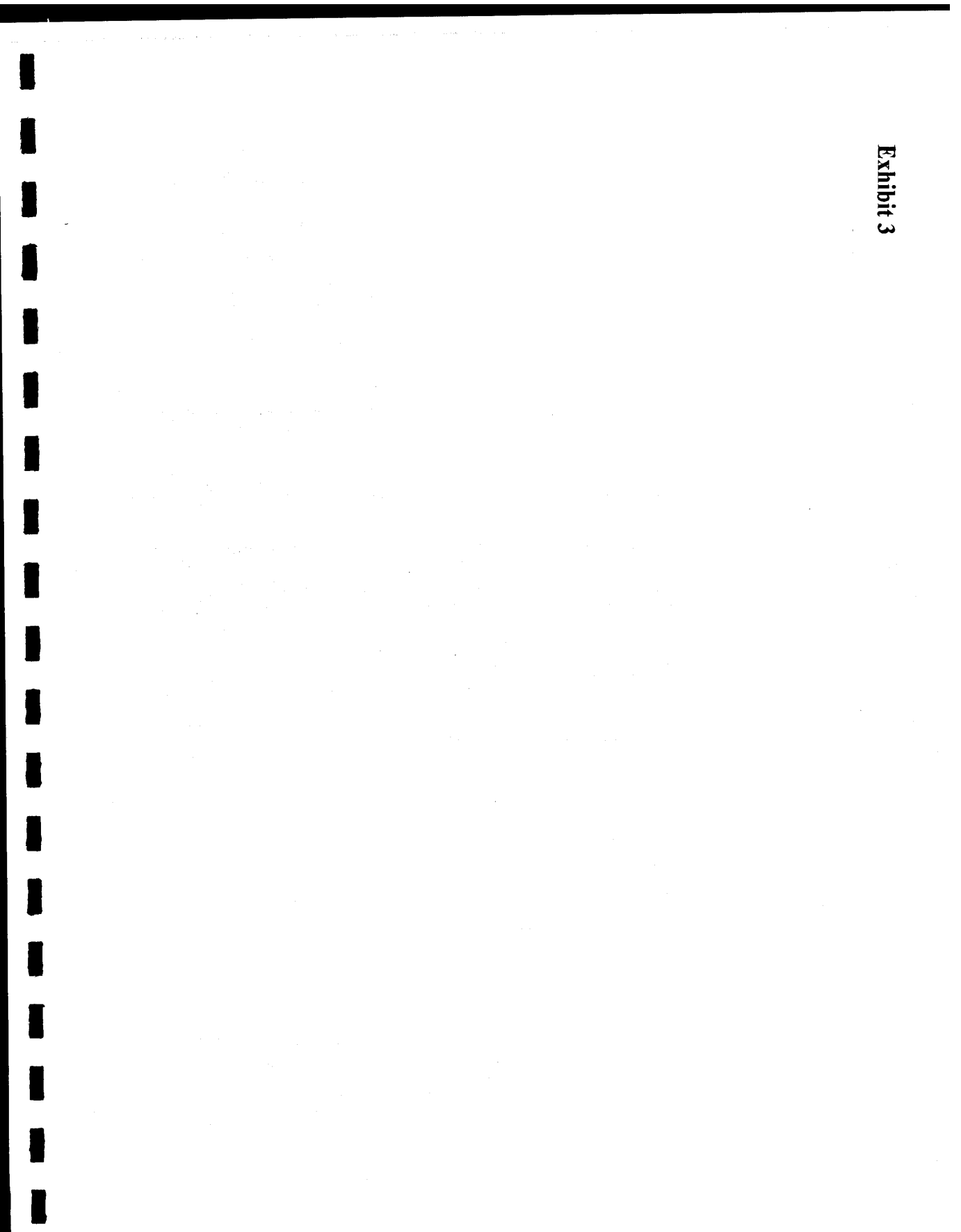
By: Sydney B. Culliford
Sydney B. Culliford
Vice President-Transportation
Iron Horse Park
North Billerica, MA 01862

MILFORD-BENNINGTON RAILROAD
COMPANY, INC.

By: Peter R. Leischman
Peter R. Leischman
President
62 Elm Street
Milford, NH 03055

CONFIDENTIAL

Exhibit 3



Mr. Howard

FD/CCL/4

EC

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 32103

SERVICE DATE

SEP 3 1993

MILFORD-BENNINGTON RAILROAD COMPANY, INC.--
TRACKAGE RIGHTS EXEMPTION--BOSTON AND MAINE CORPORATION
AND SPRINGFIELD TERMINAL RAILWAY COMPANY

Decided: August 23, 1993

On June 25, 1992, Milford-Bennington Railroad Company, Inc. (MBR), filed a verified notice of exemption under 49 CFR 1180.2(d)(7) indicating its acquisition of 5.36 miles of overhead trackage rights between Wilton (milepost N-16.36) and Milford, NH (milepost N-11.0), from Boston and Maine Corporation (B&M) and Springfield Terminal Railway Company (ST). Under the Commission's rules, MBR's exemption notice became effective 7 days later on July 1, 1992.

On March 26, 1993, B&M/ST petitioned to revoke MBR's exemption, alleging that MBR breached its underlying trackage rights contract and that the rail transportation policy at 49 U.S.C. 10101a requires that MBR's exemption be revoked. Specifically, B&M/ST contend that MBR is responsible for a variety of alleged contractual problems, including late payment of trackage rights fees, checks returned unpaid, failure to reimburse all costs from a MBR derailment on the line, and interfering with B&M/ST's collection under an irrevocable letter of credit. Because of allegedly unpaid trackage rights fees and line repair costs, B&M/ST notified MBR that their trackage rights agreement would be terminated April 3, 1993. Petitioners argue that these actions have deprived them of their ability to earn adequate revenues and raise questions about the honesty of MBR's management, thus implicating objectives of the rail transportation policy in 49 U.S.C. 10101a.

In its April 2, 1993 reply, MBR disputes B&M/ST's claims and argues that the petition is inappropriate and should be denied. It contends that the proximate cause of the derailment was B&M/ST's failure to make necessary track repairs. According to MBR, it was petitioners' responsibility to maintain the track in a safe condition after having been notified several months before by MBR of a defective switch at the accident site.¹ MBR states that it is providing essential rail service in the area, is fully prepared to meet its legitimate obligations under the agreement, and is willing to resolve its dispute with B&M/ST through compromise or, if necessary, arbitration or appropriate court proceeding.

The New Hampshire Department of Transportation (NH-DOT) filed a pleading requesting a speedy resolution of the dispute. It notes that the State is the owner of a line between Wilton and Bennington which is operated by MBR and that the trackage rights are critical to the operation of the Wilton-Bennington line. Finally, NH-DOT submits that the substitution of truck service is not an option due to local restrictions.

B&M/ST filed a response disputing MBR's assertions that the line's condition was unsafe and that MBR notified them of a

¹ Under paragraph 1(f) of the agreement, B&M/ST must "maintain, repair, and renew" the trackage. However, MBR must notify them of the defect and they must remedy the condition within 7 days.

defective switch.² Petitioners also dispute NH-DOT's claim that the trackage rights are critical to the successful operation of the line, stating that continued rail service is available under an existing interchange agreement at Wilton, NH. Finally, petitioners reiterate that the Commission should resolve this matter as a straightforward breach of contract case where MBR has deliberately refused to meet its contractual obligations.

MBR's trackage rights were authorized under the Commission's class exemption at 49 CFR 1180.2(d)(7). See Railroad Consolidation Procedures - Trackage Rights Exemption, 1 I.C.C.2d 270 (1985). Even though petitioners seek to revoke MBR's exemption, trackage rights remain in effect until the Commission either authorizes discontinuance under 49 U.S.C. 10903 or approves a new agreement. See Thompson v. Texas Mexican Ry. Co., 328 U.S. 134, 146-148 (1946); and Finance Docket No. 31281, Arkansas & Mo. RR Co. v. Mo. Pac. RR Co. (not printed), served March 17, 1989. Under the circumstances, revocation would not be sufficient to accomplish petitioners' stated goal of terminating MBR's trackage rights; petitioners must ultimately seek and obtain adverse discontinuance authority to release MBR from its common carrier obligation. See Finance Docket No. 32049, Cheatham County Rail Authority "Application And Petition" For Adverse Discontinuance (not printed), served July 21, 1992. Thus, we will dismiss this petition without prejudice to petitioners' filing an application for adverse discontinuance.³ An additional filing fee will be required.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition to revoke is dismissed without prejudice to B&M/ST filing a formal application for adverse discontinuance under 49 U.S.C. 10903.

2. This decision is effective on September 3, 1993.

By the Commission, Chairman McDonald, Vice Chairman Simmons, Commissioners Phillips, Philbin, and Walden. Commissioner Walden dissented in part with a separate expression.

(SEAL)

Sidney L. Strickland, Jr.
Secretary

² MBR moved to reject petitioners' response as a nonconforming reply to a reply. In its motion, MBR indicates that it is currently meeting all of its undisputed financial obligations under the contract and that petitioners have initiated court proceedings to resolve claims from the above-mentioned derailment. Even though MBR is correct that B&M/ST's pleading is a reply to a reply and fails to conform to our rules, it will not be stricken in view of our ultimate disposition of this petition.

³ See Modern Handcraft, Inc.--Abandonment, 363 I.C.C. 969 (1981). Also, petitioners are advised that the exemption alternative under 49 U.S.C. 10505 is not available for adverse abandonments or discontinuances. See Finance Docket No. 31269, Massachusetts Bay Trans. Auth.--Exempt.--Discon. of Service in MA (not printed), served August 30, 1990.

Exhibit 4



of this receipt, it
on a
ECIPY
GPO: 1963-91

Page 1 of 4.
Milford-Bennington Railroad

INSPECTION AND REPAIR REPORT

DIST. _____ ZONE _____ PATROL NO. _____ DATE OF PATROL 4-6-93

LINE Hillsboro Branch MILE POST 14.36 Howard St xing TO Westchester Div.

LINE _____ MILE POST _____ TO _____

LINE _____ MILE POST _____ TO _____

YARD _____

YARD _____

Michael P. Mitchell
Foreman's Signature

WORK TO BE DONE

	JOB	LOCATION AND DESCRIPTION	CONDITION			DATE COMPLET
			1	2	3	
1	213-53.03	See to Sengdyan Wood Products 57 3/4" gage	✓			✓
2	213-109.02	60" to 2 1/2' of 1st condensation to 1st joint Sr of North				✓
3		end of run around - Wilton	✓			✓
4	213-53.01	58" gage in turnout, N. end of run around "Wilton"	✓			✓
5	213-113.04	2" V.S.H. opposite heel of frog M/L. No. end of run around.	✓			✓
6	213-37.04	B. track along run around "Wilton"	✓			✓
7	213-113.04	V.S.H. in joint 3rd rail Sr. of Sr. end of run around	✓			✓
8	213-121.06	8-joint Sr. of Sr end of run around no bolts in railhead	✓			✓
9	213-121.08	9th joint Sr. of Sr end of run around loose joint -				✓
10		run track in "as is"	✓			✓

WORK DONE ON PATROL

1	
2	
3	
4	

SWITCHES WALKED FOR INSPECTION

LINE	NO. OF T. O.	REMARKS
1 Hillsboro		Sengdyan Wood Products "as above"
2		N. end of run around at Wilton "as above"
3		Sr. end of run around at Wilton "as above"
4		

DISTRIBUTION: 1 — Track Supervisor 3 — Foreman's Copy
2 — Maintenance Engineer

Page #2 of 4.

Milford-Bennington Railroad

INSPECTION AND REPAIR REPORT

DIST.	ZONE	PATROL NO.	DATE OF PATROL
PATROL			
LINE	Hillbrow Branch	MILE POST	Howard St xing 16.36 TO Westchester River
LINE		MILE POST	TO
LINE		MILE POST	TO
YARD			
YARD			

Michael P. Mitchell
Foreman's Signature

WORK TO BE DONE

	JOB	LOCATION AND DESCRIPTION	CONDITION			DATE COMPLE
			1	2	3	
1	213-121.03	16.1 center broken joint bar - opposite Putnam St sign.	✓			✓
2	213-121.08	15.8 - 6 - Loose joints "mismatched gap side"	✓			✓
3	213-113.05	Split Web - 2 spots - 1 spot 1" 1 spot 4" 15.8	✓			✓
4	213-63.02	Low spot at culvert 15.77 (3 1/2" low)	✓			✓
5	213-121.03	15.76 - center broken joint bar low side of				✓
6		curve	✓			✓
7	213-121.08	Loose joint causing mismatch of 1/2" gap side -				✓
8		N. side of Private xing Pine Valley	✓			✓
9	213-53.01	No end of Private xing at Pine Valley 58 1/2" gap - with				
10		low spot & reverse elevation of 3"	✓			

WORK DONE ON PATROL

1	
2	
3	
4	

SWITCHES WALKED FOR INSPECTION

	LINE	NO. OF T. O.	REMARKS
1			
2			
3			
4			

DISTRIBUTION: 1 — Track Supervisor 3 — Foreman's Copy
2 — Maintenance Engineer

Page #3 of 4

Milford-Bennington Railroad

INSPECTION AND REPAIR REPORT

DIST.	ZONE	PATROL NO.	DATE OF PATROL
LINE	PATROL	MILE POST	TO
LINE		MILE POST	TO
LINE		MILE POST	TO
YARD			
YARD			

Michael N. McPherson
Foreman's Signature

WORK TO BE DONE

	JOB	LOCATION AND DESCRIPTION	CONDITION			DATE COMPLET
			1	2	3	
1	213-63.02	Bridge 15.47 - Approach on No. end - 5" low	✓			
2	213-08	Mismatch 1/2" No. end of dirt xing 15.1	✓			
3	213-63.02	Low joint So end of dirt xing 15.1	✓			
4	213-08	Loose joint & mismatch 2nd joint No of M.P. 15	✓			
5	213-03	14.97 West rail center broken joint bar	✓			
6	213-06	No bolts in rail end at insulated joint So side				
7		of Savage Rd. xing	✓			
8	213-63.02	33' from 3rd joint So of Savage Rd xing - 7-ties				
9		hanging 2" with high spikes	✓			
10						

WORK DONE ON PATROL

1	
2	
3	
4	

SWITCHES WALKED FOR INSPECTION

	LINE	NO. OF T. O.	REMARKS
1			
2			
3			
4			

DISTRIBUTION: 1 — Track Supervisor 3 — Foreman's Copy
2 — Maintenance Engineer

Page #4
Milford-Bennington Railroad

INSPECTION AND REPAIR REPORT

DIST.	ZONE	PATROL NO.	DATE OF PATROL <i>4-6-93</i>
LINE <i>Hillsboro Branch</i>		MILE POST <i>Howard St</i>	TO <i>Worcester Drive</i>
LINE		MILE POST	TO
LINE		MILE POST	TO
YARD			
YARD			

Michael P. Mitchell
Foreman's Signature

WORK TO BE DONE

	JOB	LOCATION AND DESCRIPTION	CONDITION			DATE COMPLET
			1	2	3	
1	<i>213-115.01</i>	<i>Mismatch on tread of rail at step joint Sr. end</i>				
2		<i>of stock rail - Suburban Propane</i>	✓			
3	<i>213-37.04</i>	<i>Vegetation blocking view of xing - Hillsboro Way</i>	✓			
4	<i>213-33.01</i>	<i>curb cut 14.07 - Headwall's collapsing</i>	✓			
5	<i>213-121.03</i>	<i>center Broken joint bar 14.07</i>	✓			
6	<i>213-121.03</i>	<i>center Broken joint bar Br #13.81 No side</i>	✓			✓
7	<i>213-63.04</i>	<i>Low joint - hanging 2 1/2" & Loose 13.81</i>	✓			✓
8	<i>213-63.04</i>	<i>Loose joint & hanging ties 4 joints Sr of Br 13.81</i>	✓			✓
9	<i>213-121.03</i>	<i>9-joints Sr of Granite State xing center break</i>				
10		<i>joint bar - inside</i>	✓			✓

WORK DONE ON PATROL

1	
2	
3	
4	

SWITCHES WALKED FOR INSPECTION

LINE	NO. OF T. O.	REMARKS
1 <i>Hillsboro</i>	<i>Suburban Propane</i>	<i>on shore</i>
2	<i>Hillsboro</i>	<i>O.K.</i>
3	<i>Howard St</i>	<i>O.K.</i>
4	<i>Granite State</i>	<i>O.K.</i>

DISTRIBUTION: 1 — Track Supervisor 3 — Foreman's Copy
2 — Maintenance Engineer

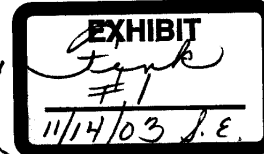
Exhibit 5





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

IRON HORSE PARK
NO. BILLERICA, MASS. 01862



J+M
10/13/95

October 11, 1995

Charles P. O'Leary, Jr.
Commissioner
Department of Transportation
State of New Hampshire
John O. Morton Building
P. O. Box 483 - Hazen Drive
Concord, NH 03302

RECEIVED
COMMISSIONERS OFFICE

OCT 13 1995

THE STATE OF NEW HAMPSHIRE
DEPT. OF TRANSPORTATION

Dear Chuck:

The recent news stories regarding the use of privately-owned track cars on the Milford Bennington Railroad, and in particular the September 30th accident in which a woman was seriously injured, raise issues that must be addressed. The practice of the Milford Bennington Railroad in permitting the use of these vehicles on a State-owned rail line represents a serious hazard to public safety and to the safety of rail operations in the State.

It is and has been the policy of our company to prohibit the use of any such vehicles on our property. That policy is consistent with the views expressed by the Operation Lifesaver Program and the Federal Railroad Administration. Our employees work diligently to prohibit the use of these vehicles and we have enjoyed the cooperation of many local police forces in these efforts. The behavior of the Milford Bennington Railroad in permitting track cars on the State's property and apparently interfering with local police in their investigation of the recent accident hurts all of us who work to keep trespassers off our rail properties.

We are particularly concerned that the Milford Bennington Railroad has permitted private parties to operate these vehicles on lines which connect to our branch line in Wilton. The behavior of the Milford Bennington Railroad and its management reflects a complete disregard for the work of the many public and private people dedicated to safe rail operations in the State of New Hampshire.

I am writing to urge that the Department review any agreements permitting rail operations over State owned lines and to clarify those agreements where necessary to prohibit the practices being followed by the Milford Bennington Railroad. As an active participant in many of our safety initiatives in the past, the Department of Transportation may, through your contractual

Commissioner O'Leary
October 11, 1995
Page 2

relationship with the Milford Bennington, be the only party that has the immediate ability to stop this activity.

We stand ready to work with you and your safety officials in any way we can to assist in efforts to improve safety on New Hampshire's railroads.

Sincerely,


David A. Fink
President

Exhibit 6



Letters to the Editor

Private track cars are safety hazard

To the Editor:

To the Editor:
As chairman and chief executive of the Boston and Maine Corp. and a resident of Amherst, I am writing to express the strong disapproval of any railroad, including the Milford Bennington, that permits the operation of privately owned track cars on rail property.

The practice of permitting non-railroad employees to use these vehicles on railroad property represents a serious hazard to public safety and to the safety of rail operations. Any railroad official who condones such use cannot be considered as qualified to be in our line of work.

It is and has been the policy of our company to prohibit the use of any such vehicles on our property. That policy is consistent with the views expressed by the Operation Lifesaver program and the Federal Railroad Administration. Our police work diligently to prohibit the use of these vehicles and we have enjoyed the cooperation of the many local police forces in these efforts, including policy from towns such as Lyndeborough.

The behavior of the Milford Bennington Railroad an its president in permitting track cars on their rail line, which is owned by

the State of New Hampshire, and apparently interfering with local police in their investigation of the tragic Sept. 30 accident involving a truck car, hurts all of us who work to keep trespassers off our rail properties.

I am concerned that the Milford Farmington Railroad has permitted private parties to operate these vehicles on lines which connect to our railroad in Wilton. The behavior of the Milford Farmington Railroad and its president reflect a complete disregard for the work of the many public and private people dedicated to safe rail operations in the State of New Hampshire.

The work of running a railroad is serious. We operate with very rigid operating and safety rules. It is this dedication that enabled our railroad and its employees to win the gold Harriman Award for rail safety this past year. We are proud to be number one in safety. It is time that the Wilford Bennington recognize that railroading is a very unforgiving business. They have, in this matter, shown a level of

judgement that should worry local self-defence rather than cause them to interfere with a legitimate police investigation.

DAVID A. FINK
Chairman and CEO

Check the services offered by
the advertisers in the
BUSINESS DIRECTORY
of The Cabinet

More letters

Bass must use rea

To the Editor:

Ask persons over 65 years of age to remember U.S. Rep. Charles Bass the next time he runs for office. Charlie is convinced the 60-page document he sent to me rescues Medicare. Ask him to send you a copy and see for yourself.

Nothing in the document spells out how the \$270 billion in cuts will be made, nor whether that amount is necessary to cut.

Looking for answers

To the Editor:

Should Senate Bill 2, or as I like to call it, "The just say no bill," be on the official ballot this year? Have the esteemed senators considered anything other than the rush to get Senate Bill 2 passed, a bill that could in fact be illegal?

It seems to me that besides debating the merits of SB 2 there are two overriding questions that need addressing. As of yet, no one has come up with a satisfactory explanation to the following questions.

Question One: Has the Senate in its haste to pass this bill usurped a constitutional right? Both the federal and state constitutions include articles giving citizens the right to petition their

Feeling tied in knots?

You may have

**ANSWERS
TO LAST
WEEKS PUZZLES**

[illegible]

Business Directories
of The Cabinet

Exhibit 7





THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF TRANSPORTATION

October 18, 1995

CHARLES P. O'LEARY, JR.
COMMISSIONER

David A. Fink, President
Boston and Maine Corporation
Iron Horse Park
N. Billerica, MA 01862

Dear Mr. Fink,

Commissioner O'Leary referred your letter concerning the motorcar incident on the railroad in Lyndeboro to me. I agree that the incident was a serious one, and we are discussing with the Attorney General's office the measures the state has at its disposal in this case.

I would like to clarify the background of the case. The Milford-Bennington Railroad does not allow motorcars on the line as a matter of policy. The last such use of the line was more than two years ago, which was an inspection tour that included state and railroad personnel. As you may be aware, there has been a rehabilitation project underway on the line this year, and the contractor has used his own motorcars during that job. Needless to say these are in radio contact with the railroad at all times. Possibly some may have interpreted these uses as trespassing.

I am not aware that the railroad has interfered with local police in investigating the incident. There may have been concerns that the investigation was not thorough enough, but I believe these have been resolved, and both our Department and the railroad are working with the police in attempting to take the appropriate actions regarding this unfortunate incident.

Sincerely,

James F. Marshall

James F. Marshall, P.E.
Director, Public Works & Transportation

2001 年 5 月 20 日

[Handwritten marks]

✓
✓

✓ PLG
✓ TRANS.

[Handwritten marks]

✓ ID.

SRR - Hittchard - M-B

Exhibit 8





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

IRON HORSE PARK
NO. BILLERICA, MASS. 01862

LAW DEPARTMENT
(508) 663-1029

VIA FAX AND U.S. MAIL TO:
(518) 383-7621

August 2, 1996

Timothy G. Mulcahy, Esq.
General Attorney - D&H
CP Legal Services
200 Clifton Corporate Park
P.O. Box 8002
Clifton Park, NY 12065

Re: Sale of Cars Leased to
Milford-Bennington RR Co.

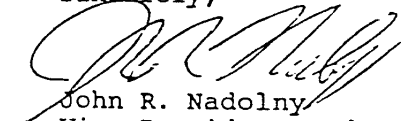
Dear Tim:

Enclosed are my revised documents to close the deal on the ten (10) D&H hopper cars currently in the possession of Milford-Bennington Railroad Company. Please obtain the necessary signature(s) to finalize the transaction.

This will also confirm our understanding regarding the "purchase" of D&H's claim against Milford-Bennington. Based upon the materials your office sent on July 23, 1996, the total unpaid lease debt appears to be approximately \$103,100.00. We have agreed that my office will pursue that claim and that our companies will split the ultimate recovery, net of legal fees, on a 50/50 basis. No part of the costs shall reflect services provided by in-house counsel. As consideration, D&H will be paid \$5,000.00 of its share up front. D&H will not be required to reimburse Maine Central any portion thereof. We also agree with the other conditions set forth in your letter of August 2, 1996.

I trust that we can move this matter promptly to closure. Thank you for your cooperation.

Sincerely,


John R. Nadolny
Vice President and
General Counsel

Enc.
JRN/smd

Post-it Fax Note	7671	Date <u>8/8</u>	# of Pages <u>1</u>
To <u>JOHN NA00/114</u>	From <u>BRIAN W. 1301</u>		
/Dept <u>GTI</u>	Co. <u>CPRAI</u>		
Phone #	Phone #		
Fax # <u>508-663-1213</u>	Fax # <u>518-383-7222</u>		

RAILROAD HOPPER CARS

This Agreement is made as of this 8th day of August, 1996, by and among Delaware and Hudson Railway Company, Inc. ("Seller"), and Maine Central Railroad Company ("Purchaser").

For and in consideration of the mutual covenants and agreements herein contained, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by Seller and Purchaser, the parties hereto hereby agree as follows:

1. Purchase and Sale. Upon the terms and subject to all the conditions herein set forth, Seller agrees to sell, and Purchaser agrees to purchase the ten (10) used 100 ton Open Top Hopper railcars identified as D&H Nos. 102, 115, 117, 119, 123, 161, 183, 205, 213 and 214 (the "Cars"). Title to and risk of loss of the Cars shall pass to Purchaser upon Seller's receipt of the Purchase Price and the delivery of the bill of sale (in the form annexed hereto).

2. Purchase Price. The purchase price ("Purchase Price") for the Cars shall be \$70,000.00 (\$7,000.00 per unit).

3. Closing and Payment. The closing of the purchase and sale of the Cars shall occur, and payment shall be due to the Seller on or before August 9, 1996. Purchaser shall take all cars subject to all liens, encumbrances and other defects of title, if any, relating to the cars.

4. Delivery of Cars. The Cars are presently being utilized by the Milford-Bennington Railroad Company ("MBRR") under a hold over lease from Seller. Purchaser shall, along with the Cars and for an additional consideration, receive from Seller an assignment of the lease and all of Seller's claim against MBRR for possession of the Cars and any unpaid rents. Purchaser's obtaining possessions of the Cars shall be subject to all delays however incurred and Seller will not be liable for any delays or damage resulting therefrom.

5. Property, Sales and Transfer Taxes and Fees. Purchaser shall be responsible and liable for any and all sales and/or use taxes that may be imposed or incurred as a result of or incident to the sale of the Cars agrees to reimburse Seller on demand for any such sales and/or use taxes that may be assessed against or imposed on Seller.

6. Condition of the Cars. PURCHASER SHALL BE DEEMED TO HAVE REPRESENTED TO SELLER THAT PURCHASER HAS INSPECTED THE CARS TO ITS FULL SATISFACTION. PURCHASER AGREES TO PURCHASE THE CARS ON AN "AS IS, WHERE IS" BASIS AND WITH ALL FAULTS. PURCHASER ACKNOWLEDGES AND AGREES THAT SELLER HAS NOT MADE AND WILL NOT MAKE ANY REPRESENTATIONS OR WARRANTIES AS TO THE MERCHANTABILITY,

WARRANTY OR PHYSICAL CONDITION OF OR ANY OTHER MATTER AFFECTING OR RELATING TO THE CARS EXCEPT AS SPECIFICALLY SET FORTH IN THIS AGREEMENT. SELLER MAKES NO WARRANTY, EITHER EXPRESS OR IMPLIED, AS TO THE CONDITION, OPERABILITY OR DESIGN OF, OR AS TO THE QUALITY OF THE MATERIAL OR WORKMANSHIP IN, THE CARS, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND HEREBY EXPRESSLY DISCLAIMS LIABILITY AND SHALL NOT BE LIABLE FOR LOST PROFIT OR FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL OR COMMERCIAL LOSSES OF ANY KIND.

7. Miscellaneous Provisions.

(a) Assignment. This Agreement shall inure to the benefit of the parties hereto and their respective successors and assigns.

(b) Expenses. Except as otherwise provided, each of the parties hereto shall bear and pay its own expenses in connection with the preparation of this Agreement.

(c) Amendment. This Agreement may not be amended or modified except by a written instrument executed by Seller and Purchaser.

(d) Choice of Law. It is the intention of the parties that the laws of the State of New York (without reference to conflicts of laws principles) shall govern the validity of this Agreement, the construction of its terms, and the interpretation of the rights and duties of the parties hereunder.

(e) Notices. Any notices or other communications required or permitted under this Agreement shall be sufficiently given if delivered personally or sent by certified registered mail, postage prepaid, or transmitted via telecopier, as follows:

Seller: Delaware and Hudson Railway Company, Inc.
200 Clifton Corporate Park
P.O. Box 8002
Clifton Park, NY 12065
Telecopier: (518) 383-7621

Purchaser: Springfield Terminal Railway Company
Iron Horse Park
North Billerica, Massachusetts 01862
Attention: Mr. James P. Coffin
Telecopier: 508-663-1174

(f) Sections, Paragraphs and Other Headings. Sections, paragraphs and other headings contained in this Agreement are for convenience of reference only and shall not affect in any way the meaning or interpretation of this Agreement.

(g) Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but

all of which together shall constitute but one and the same instrument.

(h) Integrated Agreement. This Agreement constitutes the entire Agreement between the parties hereto with respect to the subject matter contained herein and there are no agreements, understandings, restrictions, warranties or representations among the parties other than those set forth or provided for herein.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the date first above written.

DELAWARE AND HUDSON RAILWAY COMPANY

By: *B. D. Wilson*

Name: B. D. WILSON

Title: DISTRICT GENERAL MANAGER

MAINE CENTRAL RAILWAY COMPANY

By: *James P. Coffin*

Name: JAMES P. COFFIN

Title: VICE PRESIDENT - MECHANICAL

Approved as to Legality and Form:

Witnessed for:
Delaware and Hudson Railway Company, Inc.

Exhibit 9





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

IRON HORSE PARK
NO. BILLERICA, MASS. 01862

LAW DEPARTMENT
(508) 663-1029

August 8, 1996

Mr. Peter R. Leishman
President
Milford-Bennington Railroad Company, Inc.
62 Elm Street
Milford, New Hampshire 03055

Re: Demand for Return of Hopper Cars
and Payment of Lease Debt

Dear Mr. Leishman:

This letter serves to notify Milford-Bennington Railroad Company, Inc. ("MBRR") that as of today Maine Central Railroad Company ("MeC") is the owner of the ten (10) D&H 100 ton hopper cars the ("Cars") presently in the possession of MBRR. You are also hereby notified that the May 12, 1993 lease or any other agreement which MBRR may have had with D&H for the use of those Cars is hereby terminated, effective immediately. MBRR is hereby instructed to present the Cars to MeC's representatives for inspection by placing them on the run-around track in Wilton not later than noon tomorrow, August 9, 1996. They will be inspected and MBRR will be invoiced for repairs as required.

As the owner of the Cars MeC is also entitled and authorized to pursue the collection of \$107,800.00 in unpaid lease charges owed by MBRR in connection with the Cars, and demand for payment of same is hereby made. Payment in full should be directed to:

Maine Central Railroad Company
Attn: John R. Nadolny, Esq.
Law Department
Iron Horse Park
North Billerica, MA 01862

Failing to receive either the Cars (by tomorrow at noon) or your payment by August 16, 1996, MeC will have no choice but to take such action as is necessary to protect its interests in this matter.

Peter R. Leishman
President
Milford-Bennington Railroad Company, Inc.
Page 2

In view of the serious financial ramifications associated with this situation and remembering our past difficulties in the securing of payment from MBRR, I am also requesting that you meet with representatives of our company here in North Billerica on Friday, August 9, 1996 at 2:00 PM for the purpose of discussing the operational and financial issues associated with this new situation and making arrangements to resolve same. Please bring a copy of MBRR's most recent financial statements. You are also invited to bring your attorney if you choose to do so.

Sincerely,



John R. Nadolny
Vice President and
General Counsel

Exhibit 10

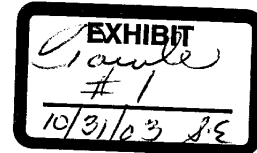


M: TRUADZ DSP65
2/02 11:30:29

DOCUMENT: T00100308

PAGE: 1 OF 1

SPRINGFIELD TERMINAL-RAILWAY
SUPPLEMENTAL BULLETIN ORDER
NO 3-0128



IN EFFECT 1500 THURSDAY, DECEMBER 12, 2002

HILLSBORO BRANCH
WILTON, NH

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

R. TOWLE
GENERAL MANAGER

E.J. REARDON
ASSISTANT GENERAL MANAGER

Exhibit 11



GUILFORD RAIL SYSTEM
SUPPLEMENTAL BULLETIN ORDER
NO. 3-006G

PAGE 1 OF 1



IN EFFECT 0700 FRIDAY, JUNE 20, 2003

1. HILLSBORO BRANCH, WILTON

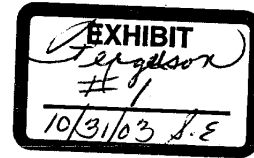
THE DERAIL LOCATED ON THE MAIN TRACK AT THE SOUTH END OF THE WILTON RUN AROUND
HAS BEEN RELOCATED TO A POINT APPROXIMATELY 65 FEET NORTH OF THE NORTH END RUN
AROUND SWITCH.

E.R. TOWLE
GENERAL MANAGER

E.J. REARDON
ASSISTANT GENERAL MANAGER

Exhibit 12





PAGE 1 OF 1

**GUILFORD RAIL SYSTEM
SUPPLEMENTAL BULLETIN ORDER
NO. 3-006H**

IN EFFECT 0001 MONDAY, JUNE 23, 2003

1. SUPPLEMENTAL BULLETIN ORDER 3-006G IS CANCELLED
2. HILLSBORO BRANCH, WILTON

THE DERAIL LOCATED ON THE MAIN TRACK AT THE SOUTH END OF THE WILTON RUN AROUND HAS BEEN RELOCATED TO A POINT APPROXIMATELY 80 FEET NORTH OF THE NORTH END RUN AROUND SWITCH.

THE DISTRICT 2 T.O.M. MUST BE NOTIFIED WHEN THIS DERAIL IS THROWN TO THE NON-DERAILING POSITION AND AGAIN NOTIFIED WHEN IT IS RESTORED TO NORMAL DERAILING POSITION.

PAGE 117C OF TIMETABLE IS CHANGED

E.R. TOWLE
GENERAL MANAGER

E.J. REARDON
ASSISTANT GENERAL MANAGER

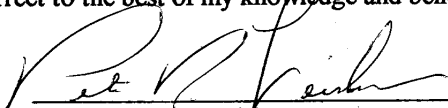
VERIFICATION

STATE OF NEW HAMPSHIRE)

)ss:

COUNTY OF HILLSBOROUGH)

I, Peter R. Leishman, being duly sworn, depose and state that I am President of Milford-Bennington Railroad Company, Inc. ("Milford-Bennington"); that I am authorized to sign the foregoing "Verified Statement" on behalf of Milford-Bennington, that I have examined all of the statements contained in the "Verified Statement"; and that all such statements are true and correct to the best of my knowledge and belief.


Peter R. Leishman

Subscribed and sworn to before me
This 2nd day of January, 2004


Notary Public

My Commission Expires: _____ **My Commission Expires 9/17/08**

MacLellan

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. NOR 42083

**GRANITE STATE CONCRETE COMPANY and
MILFORD-BENNINGTON RAILROAD COMPANY, INC.
VS
BOSTON AND MAINE CORPORATION and
SPRINGFIELD TERMINAL RAILWAY COMPANY**

VERIFIED STATEMENT OF JOHN G. MACLELLAN, III

John G. MacLellan, III states as follows:

I am the president of Granite State Concrete Co., Inc., a New Hampshire corporation based in Milford, New Hampshire. Granite State is a subsidiary of J.G. MacLellan Concrete Co. Inc., of which I am also the president.

Granite State produces crushed and washed stone, washed sand, gravel products and ready mixed concrete. These products are sold to manufacturers, state and local highway departments, contractors and others. A major part of the business of Granite State involves the excavation, processing and transportation of stone. Our primary source of stone is an excavation site located in Wilton, New Hampshire, which has been in operation for over forty years. Granite State's principal aggregate processing facility is located in Milford, New Hampshire.

At the excavation site in Wilton, we drill and blast rock, which is then crushed to produce two products, 1" minus crushed base and 4" minus crushed stone. All of the 1" minus crushed base is transported by truck from Wilton and sold directly to outside customers. The 4" minus rock is an unfinished product which is transported by rail to the

processing facility in Milford and serves as the primary raw material for the Milford processing plant. The production process of Wilton and Milford is dependent upon the continuous flow of raw material by rail. Therefore the production volumes of 4" minus stone and the 1" minus by product are directly related to the amount of material that can be moved by rail. Operations at Wilton generally are conducted for approximately nine months a year and generally shut down in the coldest months of the winter. It is impossible to operate at Milford when the temperature is below freezing, because the process requires a constant flow of water. The Wilton plant is integral to the production flow in Milford and therefore operates, in general, when Milford operates. As a result of the seasonal nature of the operations at Wilton and Milford, it has always been critical to produce as much crushed stone and sand as possible during the production season. Until this year, as described below, we have always been able to produce enough stone at Wilton to provide inventories at Milford that will carry us through the winter months and allow us to meet the needs of our customers.

In Milford the 4" minus stone from Wilton is blended with natural sand from another excavation site and crushed, washed and sized into various finished products (i.e. washed sand, 1 ½" stone, ¾" stone ½" stone etc.). Because sand is blended at a predetermined ratio with the stone in order to meet specifications, the volume of our sand production is in direct relation to the amount of stone available to process.

Much of the finished material produced at Milford is used for ready mixed concrete production. Other finished material is sold directly to customers. A large portion of the product at Milford is sold to other ready mixed concrete companies within the MacLellan family of companies, and a relatively smaller portion is sold directly to

third parties. In prior years, we have stockpiled finished material to enable us to maintain sales, both intercompany and to outside buyers, throughout the winter months even though the excavation site in Wilton is shut down.

In 1989, Granite State obtained a permit from the town of Wilton allowing us to use processing equipment at the excavation site. The permit allowed operations to occur only between the hours of 6:30 AM and 6:30 PM and only on weekdays (Monday through Friday). Furthermore, the permit required us to transport all 4 inch minus stone by rail. Prior to the issuance of the permit and the initiation of rail operations, all of the material excavated at Wilton was moved by truck. Much of the truck traffic moved over the streets of Wilton, causing congestion and a burden on the local highway system.

In conjunction with our effort to obtain the permit, we began working with Milford-Bennington Railroad to initiate rail service between Wilton and Milford. The site in Wilton is located on the line that is operated by Milford-Bennington and owned by the State of New Hampshire Department of Transportation. The processing plant in Milford is located on a line owned by Guilford. The two facilities are approximately six miles apart, with approximately three miles of the distance on the Guilford line and approximately three miles on the Milford-Bennington line.

The initial efforts of Milford-Bennington to obtain the consent of Guilford to operate over Guilford's line to serve our facility in Milford were unsuccessful due to Guilford's unwillingness to grant trackage rights. Unable to gain access on a consensual basis, Milford-Bennington filed a feeder line application with the Interstate Commerce Commission in 1991 seeking to obtain ownership of the Guilford line. Eventually, there

was a settlement in 1992 pursuant to which Guilford granted trackage rights to Milford-Bennington permitting it to operate to Milford.

In order to accommodate rail service at both the Wilton and Milford facilities, Granite State made the necessary investment to install railroad sidings and loading and unloading facilities. We also purchased a locomotive and later a caboose and nine rail cars. The trackage rights agreement limited the length of trains that could be operated by Milford-Bennington to 10 cars each. The plants and facilities in both Wilton and Milford were therefore designed and constructed to accommodate four 10 car trains of material per a 10-12 hour day. The rate of production of finished, saleable product in Milford is directly related to the number of rail cars received daily from Wilton.

Beginning in 1992 when rail service started and for several years after that time, Milford-Bennington was usually able to make four 10 car round trips each day between Wilton and Milford. In more recent years, however, the average number of round trips per day was reduced to approximately 3. It is my understanding that the reduction from four trains a day to three trains a day was due to the poor track conditions and reduced speeds on the Guilford line. As a result, the processing facility at Milford has been operating for several years at approximately 75 percent of its capacity due to a reduction of the rail service relating to the track conditions on the Guilford portion of the line. There is no problem with the NHDOT portion of the line which has been upgraded and rehabilitated.

On June 20, 2003, we were informed by Milford-Bennington that rail service had been interrupted due to the actions of Guilford. Specifically, Guilford had limited Milford-Bennington's operations to the hours of 12 AM to 8 AM. Because no activity

was permitted at the Wilton site until 6:30 AM, the action by Guilford made it virtually impossible to obtain any rail service between Wilton and Milford. Furthermore, as described above, we were unable to use truck transportation due to the terms of the permit issued by the town of Wilton. As a result of these actions by Guilford, the production of crushed stone at Wilton was virtually halted and the production at Milford was similarly adversely affected.

On approximately July 15, 2003, Guilford unilaterally determined that Milford-Bennington could operate between 4 AM and 1 PM. This permitted rail service to be increased somewhat, but the number of round trips each day was limited to 1 or 2. It was never possible to restore service to three round trips per day, much less the four round trips originally contemplated. This limitation on the rail service that was available to Granite State continued to adversely affect production at both Wilton and Milford. As described above production was at 75% for several years, now production was further reduced approximately by half.

From the beginning of rail service in 1992 through June 20, 2003, Milford-Bennington had always operated without any hourly restrictions during daylight hours concurrent with when the excavation site in Wilton could be operated. The rail service provided during that time by Milford-Bennington was always responsive to our needs except for the fact that round trips were limited to approximately three per day due to the condition of Guilford's track. The action by Guilford has effectively denied Granite State the rail service that it requires and that Milford-Bennington had been providing prior to June 20, 2003.

Despite the fact that we have received normal rail service during daylight hours without incident for the past 11 years, it has been suggested that we operate our business at night. Beyond the fact that our permit in Wilton prohibits night work, neither the Wilton excavation site nor the Milford processing facility has lighting which would permit operations to be conducted during non daylight hours. It would be extremely expensive to install sufficient lighting, and it would be extremely dangerous to attempt to operate in the dark without lights. Guilford has suggested that the rail facilities at Wilton or Milford or both could be expanded in order to make up for the lack of three round trips a day. As discussed above the Milford and Wilton facilities were designed to handle 10 car trains as mandated by the Guilford trackage agreement. To reconfigure the facilities to handle longer trains would require a major reconstruction at both sites including the relocation of major components of the production facilities which would be extremely difficult due to physical constraints at the sites and due to prohibitive costs. Parenthetically, it would be difficult to justify a major reconstruction expense when we have no indication or commitment either long term or short term from Guilford to provide reasonable access, use or rights to their track for longer trains or to maintain their track to handle longer trains.

Granite State's hours of operation at Milford are not limited by any permit or regulations. We do try, however, to accommodate the interests and desires of the community by maintaining our operations as much as possible to reasonable daylight hours. It would not be prudent, for example, to attempt to unload trains at Milford prior to 6:30 a.m.. In the past, trucks have operated in and out of the Milford site (which is located on a State Highway) during nighttime hours, however no production activity has

ever taken place at night, and deviation from this past practice would, we believe, subject us to unnecessary scrutiny by neighbors and town regulators.

Guilford has never provided any adequate explanation to Granite State as to why it chose to limit the hours of operations of Milford-Bennington. On June 26, 2003 I placed a telephone call to Tom Steiniger, the President of Guilford, in an attempt to seek the restoration of reasonable access to the Guilford track and upon the belief that Guilford was willing to sell the track between Wilton and Milford. I was not at my office when Mr. Steiniger called in return and I again attempted to contact Mr. Steiniger. I eventually received a return call from Robert Culliford of Guilford, who told me that there was nothing that Guilford could do to help us. Contrary to statements by Guilford in this case, I never requested that Guilford provide service directly to Granite State.

Granite State has been severely damaged by the restriction of its rail service. The stockpile of stone that normally exists in Milford at this time of the year is minimal. On December 5, 2003, we were forced by cold weather to discontinue operations for the season. The shut down of production at this time is consistent with prior practice and local industry practice. Consequently, there will be no further stone production until the spring of 2004. It will never be possible to make up for production lost during the normal warm weather production season.

The opportunity to produce materials between June 20, 2003 and December 5, 2003 has been severely reduced, and there is no way to recover the production that has been lost. Because each ton of material that is produced (sand, crushed stone, crushed base, etc.) is eventually sold (usually prior to the next production season) each ton not produced equals a lost sale. These losses are quantified as follows:

The flow of raw material (4" minus stone) from Wilton controls production in Milford. This flow of material is easily measured by reference to the number of rail cars moved between Wilton and Milford. Comparing the five year average car counts to the 2003 season it is apparent that a minimum of 945 car loads were lost due to the restricted rail service. See Exhibit 1 attached. Based on the weights recorded at the unloading facility in Milford, on average, each car carries 90 tons of 4" minus stone. Thus, there was a loss of raw material shipped to Milford in the amount of 85,050 tons all of which would have been converted directly into finished product. Because natural sand is blended with the 4" minus during production at a rate of approximately 37% there is an additional loss of sand production of 31,468 tons, which brings the total lost production in Milford to 116,518 tons. See Exhibit 2 attached. In addition, because the production volume of crushed base material at Wilton is on average equal to 14% of the production of 4" minus stone, the production of crushed base available for sale to customers was reduced by 12,077 tons. See Exhibit 3 attached. Therefore the total lost production of finished salable products in Milford and Wilton due to reduced rail service equals 128,595 tons.

Due to the reduction in production in Milford we were forced to sharply curtail deliveries of sand and stone from Milford to our concrete plants in Lowell, MA and Westford, MA. In recent years Milford has supplied nearly 100% of the material needs for those two sites. To minimize costs, we began in July 2003 to supply Lowell and Westford primarily from our production plant in Lyndeborough N.H. (This plant did not operate in 2002 and was put into production to supply a newly acquired concrete production plant in Wakefield, MA.. Because of the rail service issue this production

could not be used in Wakefield, where material was purchased from outside sources). In effect, in order to address the production shortfall in Milford we were able to shift some demand to Lyndeborough which was the most economical way to replace the lost Milford production. Because some sales were shifted to Lyndeborough the lost production in Milford and Wilton affected sales at all three locations. The five year combined per ton profit for the three locations equals \$.90 per ton. See Exhibit 4 attached. Thus the loss of 128,595 tons of production/sales due to restricted rail service results in lost profit of \$115,735.50.

Because Lyndeborough is further from Lowell and Westford than is Milford, the shifting of demand to that location resulted in an unavoidable increase in transportation costs. Much of this additional trucking is done by outside third party haulers who charged \$1.05 more per ton to haul from Lyndeborough than to make the same deliveries from Milford. As of the end of December 2003, 115,640 tons of material have been shipped from Lyndeborough to replace lost Milford production. See Exhibit 5 attached. By the first week of January we will have replaced all of the lost Milford production from our Lyndeborough site (i.e. with the sale of 878 additional tons). Thus the additional transportation cost relating to the replacement of the Milford lost production (116,518 tons) equals \$101,983.35.

If we exhaust the inventory in Lyndeborough and are not able to fully replace the lost production in house it will be necessary to purchase material from outside sources. Current costs for materials purchased from outside suppliers is \$1.00 to \$2.00 per ton higher than our in house price. In addition, it is projected that additional trucking costs for the acquisition of outside materials will exceed \$1.50 per ton. We hope to avoid this

added expense by utilizing our own resources as efficiently as possible. However, we do anticipate the need to purchase additional outside sourced materials during this winter but we are not able to quantify those purchases at this time.

Throughout the period subsequent to June 20, 2003, Granite State has taken a number of actions to mitigate its damages. For example, we limited the activity of subcontractors at Wilton that normally provided blasting and drilling services. By way of comparison, blasting expenses between July 2002 and November 2002 totaled \$90,491.71, and for the same period of 2003 the total equals \$41,361.05. We also limited the number of hours that our own employees worked at Wilton. In fact, we eventually had one crew that split its time between Wilton and Milford resulting in the elimination of two full time positions; prior to June 20, 2003, we always had a full crew at each location. Of most value, as described above, we worked diligently to increase production at our in house facilities to avoid the necessity of replacing the lost production with higher cost outside sourced materials. To replace the lost production in Milford alone from outside sources, rather than in house, would have resulted in estimated additional costs ranging from \$168,000 to \$285,000.

Exhibit 1



Milford-Berlington Railroad Company, Inc.

Table Comparing Carloading - 1999 to 2003 (Inclusive)

Month	2003	2002	2001	2000	1999	Monthly Average - April to December, (inclusive) (excluding comparison year - 2003)	Comparison Year - 2003	Difference
January		36						
February								
March				333				
April	481	252	279	423	245	220	401	n/a
May	486	609	357	270	483	441	486	n/a
June	360 (*)	470	279	405	462	404	360	(44)
July	225 (*) (**)	520	407	522	252	425	225	(200)
August	216 (*) (**)	350	439	540	546	473	216	(257)
September	225 (*) (**)	328	387	522	385	405	225	(180)
October	261 (*) (**)	441	405	423	363	379	261	(110)
November	279 (***)	369	358	324	279	322	279	(43)
December	54	dnv	324	180	124	157	54	(103)
Total	2507	3375	3255	3942	3139	3326	2507	(945)

- (*) As of June 19, 2003, Guilford imposed the operational time limitations which MBRR contends have absolutely no legal or logical justification.
- (**) As of July 2003 entire Hillsborough Branch under Guilford's ownership subject to 5 mph speed restriction due to unsafe track conditions, notwithstanding Guilford's contractual obligation to maintain trackage in condition that would allow 10 mph. This restriction remained in place until November 10, 2003, and resulted in 35 minute travel time to traverse the 2.86 mile section.
- (***) November 10, 2003 unjustified operational restrictions lifted and 5 mph track speed restriction lifted from milepost 13 to 16.36.

File Industries Wilson Quarry Adjacent to Granite State Winter Shut Down 11/19/03

Exhibit 2



Exhibit 2

Sand Production as Percentage of 4" Minus Processed in Milford

<u>Period</u>	<u>4" Minus Processed</u>	<u>Sand Processed</u>	<u>Sand as % of Stone</u>
4/1/02-3/31/03	337,500 tons	132,020 tons	39%
4/1/01-3/31/02	322,600 tons	137,304 tons	42%
4/1/00-3/31/01	364,600 tons	145,742 tons	39%
4/1/99-3/31/00	351,400 tons	111,262 tons	31%
4/1/98-3/31/99	309,100 tons	110,755 tons	<u>36%</u>
		Average	37%

Exhibit 3



Exhibit 3

Crushed Base Production as Percentage of 4" Minus Produced in Wilton

<u>Period</u>	<u>Total Wilton Production</u>	<u>4" Minus</u>	<u>Crushed Base</u>	<u>Crushed Base as % of 4" Minus</u>
4/1/02-3/31/03	371,430 tons	337,500 tons	33,930 tons	10%
4/1/01-3/31/02	381,400 tons	322,600 tons	58,800 tons	18%
4/1/00-3/31/01	415,218 tons	364,600 tons	50,618 tons	14%
4/1/99-3/31/00	420,344 tons	351,400 tons	68,944 tons	20%
4/1/98-3/31/99	368,639 tons	309,100 tons	59,539 tons	19%
			Average	14.2%

Exhibit 4



Exhibit 4

Profit per ton- Aggregate Production Plants- Wilton/Milford/Lyndeborough

<u>Period</u>	<u>Tons Sold</u>	<u>Income</u>	<u>Income per ton</u>
y/e 2003	500,976	467,123	.93
y/e 2002	440,517	314,115	.71
y/e 2001	483,333	386,251	.80
y/e 2000	453,745	398,482	.88
y/e 1999	483,837	571,471	<u>1.18</u>
		Average	.90

Exhibit 5



Exhibit 5

Lyndeborough Sales –Washed Sand and Stone-Tons Sold per Month

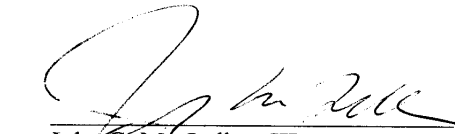
Intercompany to Replace Lost Milford Production

	Westford	Lowell	Milford
June	7417	663	—
July	13,148	8747	1023
August	10,525	3376	866
September	7818	7404	3021
October	7082	9540	714
November	4919	16,621	171
December	<u>6812</u>	<u>5773</u>	—
Total	57,721	52,124	5795
Total (all sites)	115,640		

VERIFICATION

Commonwealth of Massachusetts)
)ss:
County of Middlesex)

I, John G. MacLellan, III being duly sworn, depose and state that I am President of Granite State Concrete Co., Inc., that I am authorized to sign the foregoing "Verified Statement" on behalf Granite State Concrete Co., Inc. that I have examined all of the statements contained in the "Verified Statement", and that all such statements are true and correct to the best of my knowledge and belief.



John G. MacLellan, III

Subscribed and sworn to before me
This 5th day of January 2004.



Pease

**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 F. COLIN PEASE

F. Colin Pease states as follows: /

From June 1983 until August 1998 I worked for the railroads that made up the Guilford rail system. Initially I served as the company's vice president for government affairs and in the late 1980's was the senior vice president for marketing and sales for approximately six months when I was appointed as Executive Vice President. Throughout my tenure with the company I worked very closely with its President David Fink. I had met Mr. Fink in the early 1970's when I was Deputy Transportation Commissioner for Rail and Motor Carriers for the State of Connecticut. In my position as Deputy Commissioner I was responsible for Mr. Fink being appointed to the Connecticut Transportation Authority. When the governor of Connecticut that I worked for chose not to seek

reelection I took a position with the Federal Railroad Administration where I worked in Washington for approximately 8 years.

I became aware of Peter Leishman's efforts to start the Milford-Bennington Railroad sometime in the mid 1980's. Until I resigned from Guilford in 1998 I was involved in nearly all of the decisions made by Guilford over the years that in some way impacted Mr. Leishman's efforts to form and ultimately operate his railroad. I had discussions with Mr. Fink which he initiated on many many occasions regarding Mr. Leishman, the Milford-Bennington and less frequently but on a number of occasions regarding John MacLellan Sr., the president of Granite State Concrete, and even personal matters relating Mr. MacLellan's daughter.

Those discussions included on occasion discussion of the operation of the Granite State quarry in Wilton and the fact that the quarry was limited to moving stone by rail and the fact that the quarry operations were limited to daytime operations due to a restrictive permit issued by the town of Wilton. Over the years others in our organization were included in discussions including Syd Culliford, Vice President – Operations, Jim Coffin, VP Mechanical, now retired, and John Nadolny, VP Law. Those discussions referred to and acknowledged the existence of the restrictions placed on Granite State's operations in Wilton. There could have been no doubt in the minds of any senior official at Guilford that Mr. Fink did not like Mr. Leishman or Milford-Bennington. As a result, senior management people generally adopted the same anti-Milford-Bennington attitude and acted accordingly in order to avoid criticism by Mr. Fink. While discussions about Mr.

and as well as prior to his employment at Guilford Mr. Leishman approached Guilford seeking trackage rights in order to enable him to serve Granite State and at one point he sought an arrangement under which he would operate over Guilford's line beyond Granite State to a location where Coca-Cola had a manufacturing facility.

When Mr. Leishman sought to acquire a portion of Guilford's Hillsborough line between Nashua and Wilton, I informed Mr. Leishman on more than one occasion that Guilford had no interest in selling its rail line. At all times any decision or position that I communicated to Mr. Leishman was based on decisions by Mr. Fink. Failing to gain an agreement with Guilford, Milford-Bennington filed a feeder line application with the Interstate Commerce Commission to force the sale of the line segment.

To promote his feeder line petition and efforts to commence operations by Milford-Bennington Mr. Leishman successfully generated considerable political support in the State of New Hampshire and at the time he was viewed by Mr. Fink as someone who was causing Guilford considerable political problems in the state. During the late 1980's and early 1990's Guilford was criticized in New Hampshire by elected officials such as members of the Governor's council and Guilford had an adversarial relationship with Transportation Commissioner Charles O'Leary. New Hampshire took a position that Guilford did not own the land under its rights of way in many areas but only owned an easement, thereby limiting the opportunity to sell property. Mr. Fink and I spoke on numerous occasions about Mr. Leishman's efforts. On numerous occasions Mr. Fink expressed his anger over Mr. Leishman's efforts. While the portion of the line Milford-

Bennington sought to acquire was a light density line that Guilford had identified for abandonment system, Mr. Fink disagreed strongly with the principal that a governmental agency could force a private company to sell an asset to another rail carrier. Guilford put considerable time and effort into opposing Mr. Leishman's efforts.

The feeder line process went on for several years between 1989 and 1992. Guilford made numerous filings and took whatever actions possible to oppose the application. Any filing that was made was discussed with Mr. Fink and usually with me and no actions were pursued without clear guidance from Mr. Fink. In 1992 Mr. Fink determined, without any explanation of which I am aware, that it was preferable to settle the dispute with Mr. Leishman. He directed me to propose a long term trackage rights arrangement with Mr. Leishman. I contacted Mr. Leishman and met with him in Nashua, New Hampshire and reviewed the proposed agreement. The agreement included language, at the direction of Mr. Fink, establishing a goal of installing welded rail over the portion of the line covered by the trackage rights agreement. Mr. Leishman virtually accepted the agreement as proposed with very few changes and it was signed quickly on June 22, 1992. The feeder line application was withdrawn by Milford-Bennington.

The trackage rights agreement was silent on the question of hours during which Milford-Bennington could operate, and I do not recall that the question was discussed. The portion of the Guilford line that was subject to the trackage rights agreement was used infrequently by Guilford and I assumed that Milford-Bennington would operate primarily during daylight hours due to the restrictions placed on Granite State by the town of

Wilton but would be permitted to operate whenever they wanted to, assuming that they received permission from the dispatcher. When the agreement was signed we were fully aware that Milford-Bennington intended to operate with ten car trains, a restriction imposed by the agreement, and shuttle stone between Wilton and Milford during day light hours. We were also aware that they would be operating numerous trips per day.

In November 1992 I was in my office when we received word that the Milford-Bennington had derailed their train in Wilton, New Hampshire. I and others were summoned to Mr. Fink's office and within minutes, at the direction of Mr. Fink, we were driving to Wilton. In addition to me and Mr. Fink it is my recollection that Vice President for Mechanical Jim Coffin joined us and I believe someone from the engineering department. It was clear that the reason Mr. Fink wanted to go to Wilton was because the derailment involved a train operated by Milford-Bennington. While it would not have been unusual to visit a major main line derailment on the system, it was not normal to visit a derailment on a light density line in which there were no injuries, no hazardous commodities and no Guilford train or personnel involved. In fact it would have been normal to remain in the office and assure that the mechanical and engineering departments were dispatching the appropriate people to the site to perform necessary rerailling functions and assure that the track was repaired.

Upon our return from Wilton, Mr. Fink asked that we carefully review the recently signed trackage rights agreement to determine if Milford-Bennington was financially liable. It was determined that Guilford should assert a claim, and the mechanical and engineering

forces were directed to carefully calculate the costs of the derailment so that they could be billed to the Milford-Bennington. The payment was aggressively pursued and litigated for a considerable time and there were no efforts to settle the dispute until after extensive litigation.

Throughout the litigation Guilford, under Mr. Fink's direction, took a series of actions to collect the approximately \$6,000 charge for the derailment including seeking a letter of credit from Mr. Leishman and Milford-Bennington. At one point Guilford attempted to draw down on a letter of credit that had been provided and Mr. Leishman's bank refused to honor the request as the derailment charge was the subject of a dispute and in litigation. Mr. Leishman was ordered to place a new letter of credit with a "friendly" bank that would honor Guilford requests and not with a bank that was friendly to Mr. Leishman. The dispute was ultimately settled by Milford-Bennington paying the charge instead of pursuing endless rounds of litigation.

In the spring of 1993 Mr. Leishman sent Guilford a long list of track defects that they discovered on the trackage rights portion used to serve Granite State. The engineering department delivered the list to Mr. Fink who was angry at Milford-Bennington taking such an action. It was viewed as another effort by Mr. Leishman to embarrass Guilford in New Hampshire. Mr. Fink ordered his mechanical staff to immediately inspect Milford-Bennington's equipment and to do as thorough a job as Mr. Leishman did in his inspection report. There was no mistaking what he wanted to accomplish which was to find as many Milford-Bennington equipment defects as Mr. Leishman had reported.

My office was a short distance from Mr. Fink's and I spent a considerable amount of time during each day in his office with him. When in my office I could easily be reached with a loud call. In 1995 I was summoned along with others because word had come in (I believe through the railroad police who had been contacted by a local police department in New Hampshire) that there had been an accident involving a gas car on the Milford-Bennington line. Mr. Fink wanted to write the New Hampshire Department of Transportation and to notify the public of Guilford's views regarding the accident and to particularly portray the Milford-Bennington and Mr. Leishman as being unsafe. Letters were prepared to New Hampshire Commissioner of Transportation and to the editor of a local newspaper and they were reviewed and signed by Mr. Fink. No effort was made to determine the facts of the case from Mr. Leishman.

In 1996 either Mechanical Department Vice President or John Nadolny, VP Law discovered through a conversation with an employee of CP Rail that it was possible to purchase ten rail hopper cars that were owned by CP Rail and leased by Milford-Bennington Railroad to serve Granite State and that the Milford-Bennington owed CP Rail in excess of \$100,000. There was a dispute between CP and Milford-Bennington over past lease payments. The opportunity was presented to Mr. Fink, I believe by Mr. Nadolny, and Mr. Fink directed that Mr. Nadolny immediately pursue the purchase of the cars and specifically acquire the debt so that Guilford could pursue its collection. The opportunity was clearly viewed as an opportunity to "get" Mr. Leishman and it was clearly understood that requiring an immediate delivery of the cars to Guilford would seriously hinder Milford-Bennington's ability to operate. The debt purchase agreement

with CP Rail provided that Guilford would share equally the amount ultimately collected after paying for legal expenses. The cars were taken within 24 hours of presenting a notice to Milford-Bennington, essentially shutting down Milford-Bennington, and the debt was litigated over a lengthy period of time. During the litigation Guilford aggressively pursued the collection action and even attempted to attach property belonging to the Milford-Bennington Railroad and the parent company of Granite State Concrete, J.G. MacLellan Concrete Co. Inc. Ultimately Guilford settled for approximately \$80,000, paying legal expenses and splitting the remaining funds with CP Rail.

Mr. Leishman was directed by Mr. Nadolny to meet with Guilford when he was notified that Guilford had purchased the hopper cars they were using to serve their customer and to pay their debt within one week. That meeting took place between Mr. Fink and Mr. Leishman within a day or two of his receiving the notice. I was also present at the meeting. During the meeting Mr. Fink offered to purchase the Milford-Bennington. Mr. Leishman refused. Mr. Fink and I discussed the meeting at length both before and after it took place.

In August, 1998 I resigned from Guilford rail. I was not a "disgruntled employee" as Mr. Fink has suggested; I was not forced to resign; but I clearly believed at the time that it was time to leave and pursue other opportunities. I did just that and opened my own consulting business and over the past five years have operated a successful business and have started another growing logistics business that has been in operation for nearly two

years. I have never resented my departure from Guilford and have a very high regard for many many employees I worked with over the years that I worked for Guilford.

In the fall of 2002 I received a telephone call from Mr. Leishman in which he asked if I would be interested in assisting Stuart Draper in the formation of a scenic railroad. Mr. Draper is a prominent local businessman in the town of Wilton and also the chairman of the town's board of selectman. He believed that creation of a scenic railroad based in the town would bring business activity to the town and would complement the town's efforts to expand economic activity, particularly along the town's main street. While a somewhat unusual project, Mr. Draper's goals and ideals appealed to me. I proposed a path of action to him and he retained me to support his efforts. Throughout the fall of 2002 and winter of 2003 we worked on a business plan for the new railroad and purchased two RDC passenger cars that had been built in the mid 1950's and fully reconditioned in 1985 and 1986. They were in operation in Canada and were perfect for our application. Mr. Draper purchased the cars and I helped him get them transported across Canada and to Wilton via the Guilford rail system. In late November 2002 the cars arrived in Wilton.

Prior to their arrival Mr. Draper wrote a friendly letter to Mr. Fink at his home. Mr. Fink lived in a nearby town and Mr. Draper wanted his assistance. Wilton Scenic had identified an unused sidetrack in Wilton within a few feet of where Guilford ownership ended at MP 16.36 and it would have been a perfect place to store the cars for the winter. In addition Mr. Draper was seeking approval, when the scenic railroad commenced

operations in the spring, to use several hundred feet of Guilford track in order to use an old freight house owned by Mr. Draper as a base passenger station for the scenic railroad. Mr. Draper's letter, written just as the cars were moving to Wilton, gave Mr. Fink an overview of what the scenic railroads plans were and sought his advice.

Mr. Fink did not respond to the letter though a response was received from Robert Culliford, Guilford's corporate counsel. Guilford rejected any thought of leasing the siding for storing cars for the winter and provided conditions for the use of the siding to the freight house. Those conditions included a requirement that Wilton Scenic secure \$75 million in liability insurance, a financial impossibility. Shortly after receiving the letter I told Mr. Culliford that the cars would be stored on the State owned line just beyond milepost 16.36 for the winter and that that Wilton Scenic would not pursue use of the siding. As Milford-Bennington does not operate during the winter months and Guilford had told me that they would not be operating between milepost 16.36 and Pike Industries at milepost 19 during the winter months, storage of the cars on the single track main line did not create any problems for either carrier.

On December 12, 2002 I traveled to Wilton and met with Mr. Draper at approximately 11:00 AM. I was working on various projects to support start up of Wilton Scenic operations and I spent several hours with Mr. Draper discussing our business plan and planning our future activities. Mr. Draper's office is in the center of the small town of Wilton and a short walk from the location where the passenger cars were safely secured and stored for the winter. After our meeting and lunch I went over to where the

passenger cars were stored. The cars had recently arrived from Vancouver and everybody working on the scenic railroad project was understandably excited about their arrival. When I got to where the passenger cars were parked I met up with Mr. Leishman who was working in the area. We talked about the cars and work that was being performed to check various mechanical systems.

As we were talking Andy Zompa from Guilford rail drove up in his vehicle. Mr. Zompa stayed for about an hour during which time he said that he had been ordered to bring a derail device and install it in order to prevent the two passenger cars from rolling down onto Guilford owned track, a distance of about 50 feet. Mr. Zompa said when he was ordered to get a derail and take it to Wilton, since he did not have one in inventory, he said that he had to remove the device from another location on Guilford. It was not a so called permanent derail device that is installed in the track structure but a portable device that is fastened directly to the rail. Mr. Zompa made it very clear that he was concerned that Mr. Fink would drive to Wilton that evening to verify that the derail was installed. He told us that he was afraid that if Mr. Fink were to find that the derail was not installed, Mr. Zompa could lose his job. Mr. Fink lives in the town of Amherst, New Hampshire, just few miles from Wilton and Mr. Zompa was very aware that Mr. Fink lived nearby. Mr. Leishman was clearly sympathetic to Mr. Zompa's plight and agreed to place the derail on the rail but commented that it was so flimsy that it was not likely to hold a car even if a car should get away. He also made it very clear that the cars were well secured and that they could not possible roll onto Guilford property. I asked Mr. Zompa why everyone was so worked up over two passenger cars stored on a remote section of

railroad next to a lightly used line and he replied that I should understand why more than anybody. Mr. Zompa was well aware of whom I was and that I had worked for Guilford for many years as its Executive Vice President. I inferred from Mr. Zompa's statements that everyone was worked up because Mr. Fink was involved and issuing instructions.

Our discussions were friendly and relaxed. At one point Mr. Zompa mentioned that his girl friend had lived in Florida and that it would be nice to work down there sometime. I told him that I had recently had a heart attack and that I had difficulty with cold weather and shared his interest in living in warming climates. I told him that if he ever wanted to move that I had a number of friends who worked for CSX in Jacksonville and I would be happy to help him find some contacts in the event he wanted to pursue employment with CSX.

Mr. Leishman also joined in the conversation and expressed surprise at what we both perceived as a dramatic overreaction by Guilford, sending their rules examiner out to find a derail somewhere, deliver it to Wilton and ask that it be installed. Mr. Leishman said several times that it wouldn't bother anyone or cause any harm as no freight service would be running until the spring and it was clear that he was willing to use the derail to protect the passenger cars to keep Mr. Zompa from getting in trouble. At no time did anyone, including Mr. Zompa, mention that the derail was to be used to in any way control freight operations. All of our conversations with Mr. Zompa related to the use of the derail for the winter to prevent any possibility that the passenger cars might roll onto Guilford track. I was there during the entire discussion of the derail between Mr. Zompa

and Mr. Leishman on the afternoon of December 12, 2002. I saw Mr. Zompa remove the portable derail from his vehicle and put it on the ground and I saw Mr. Leishman place it on the rail in the Milford-Bennington's main line. I spoke at some length with Mr. Zompa and Mr. Zompa clearly knew my name and knew who I was. At no time then or during our later planning for service initiation of the Wilton Scenic was I under any impression that Mr. Zompa or anyone from Guilford that I spoke with had any intention that the derail was to be closed during the operation of freight service on the Milford-Bennington line.

I had no discussion with anyone at Guilford regarding the derail device throughout the winter. In the spring prior to the resumption of rail freight service by Milford-Bennington the two RDC cars were moved from their Wilton location to a Milford-Bennington siding approximately three miles from Wilton. They were stored on the same siding used by Guilford when they placed cars for loading at the Pike industries quarry. Guilford was permitted to serve Pike directly under a trackage rights agreement with Milford-Bennington. The passenger cars were secured on the Pike siding at all times by applying the handbrakes, through the use of skates and the use of two derail devices on the Pike siding that would have intentionally derailed the cars before they could roll onto Milford-Bennington's main line (if the cars for some reason began to roll) and long before they could reach Guilford tracks. When the cars were secured on the remote siding the portable derail device placed near milepost 16.36 was removed.

Throughout the spring of 2003 the Wilton Scenic conducted a comprehensive program to rehabilitate the track that would be used by the scenic railroad. Wilton Scenic scheduled its first day of operations for Saturday, May 17 to coincide with an arts and film festival being held in the town of Wilton. Prior to the initiation of service I met with Terry Robbins, Chief Inspector, in the Federal Railroad Administration's regional safety office in Cambridge, MA. During that meeting I discussed our plans and explained to Mr. Robbins how the Wilton Scenic would operate. During that meeting I also agreed with him that during the initial start of operations the Wilton Scenic would reinstall the temporary derail and close and lock the derail device placed at approximately milepost 16.36, essentially separating the Wilton Scenic operations from the nation's railroad system. I confirmed my agreement in a letter to Mr. Robbins dated May 13, 2003. See Exhibit 1 attached. I discussed in detail the agreement that I had reached with Mr. Robbins with Mr. Draper and also with Mr. Leishman. Both Mr. Draper and Mr. Leishman agreed with the approach taken with the FRA and both were given copies of my letter to Mr. Robbins.

I did not send a copy of the Robbins letter to Guilford as the letter referred entirely to actions to be taken on the Milford-Bennington but I did notify Robert Culliford, Guilford corporate counsel by telephone that the scenic railroad would be operating and that it would operate with the derail closed, separating Wilton Scenic operations from the nation's rail system. I notified Mr. Culliford because Guilford has the right to operate trains between milepost 16.36 and the Pike Industries quarry at approximately milepost 19 and I wanted to be sure that Guilford was not planning any weekend operations as the

line would be closed and their trains would not be permitted to operate past milepost 16.36. Mr. Culliford indicated that Guilford was not planning any operations and he expressed no concerns or objections to our weekend operating plan.

On June 5, representing the Wilton Scenic Railroad, I participated in a track inspection of the State owned line from milepost 16.36 approximately milepost 27. Mr. Leishman also participated in the inspection. The inspection was conducted by a track safety inspector from the Federal Railroad Administration and a federally qualified track safety inspector from the New Hampshire Department of Transportation. Both inspectors and I walked the first three miles of track beginning at milepost 16.36. Mr. Leishman made a point of showing the inspectors the derail device and explaining how it was used to control passenger operations. The derail device was in the open position and neither inspector took any exception to the fact that the device was open.

On about June 10 I again contacted Robert Culliford at Guilford to ask for a meeting between Guilford, Wilton Scenic and Milford-Bennington. I told Mr. Culliford that at some point in the near future it was the intent of the Wilton Scenic to initiate service during the week as well as on weekends. I told him that it would no longer be feasible to use the derail at milepost 16.36 on weekdays as its use would severely impact the efficiency of both freight carriers and that I wanted to make sure that a sound plan was agreed to by all carriers to safely control train operations in the corridor. I also told Mr. Culliford that I had been working with the FRA Office of Safety to make sure that the FRA was in agreement with Wilton Scenic plans for initiating operations. In my

discussions with Mr. Culliford I told him that I wanted to jointly develop a written procedure for dispatching trains between milepost 16.36 and milepost 19 before starting weekday operations and removing the use of the derail that was being used to separate Wilton Scenic from the nation's rail system. Mr. Culliford agreed that it would be beneficial for all three railroads to develop an operating plan prior to initiating weekday services. He did not express any reservations or concerns about discontinuance of the use of the derail once the operating plan was developed. Mr. Culliford suggested that a meeting might not be necessary and that we could possibly accomplish our objectives by phone.

On June 18, 2003, in anticipation of a meeting with Guilford, either in person or by phone, I wrote another letter to Mr. Robbins at the FRA explaining how Wilton Scenic would abide by the various FRA safety regulations. See Exhibit 2 attached. I wrote the letter because it was the intention of the Wilton Scenic to commence weekday operations and the use of the derail at milepost 16.36 to separate Wilton Scenic from the nation's railroad system would no longer apply. I indicated that I had discussed these matters with Robert Culliford of Guilford in order to coordinate weekday passenger services between milepost 16.36 and milepost 19.67 and to minimize any impact on Guilford's freight operations to or from the Pike quarry. I told Mr. Robbins that only Wilton Scenic would operate beyond milepost 19.67 and that steps would be taken to isolate milepost 19.67 to the end of the line from the national system. I also told Mr. Robbins that no changes in operating procedures would be initiated unless and until the FRA agreed with the changes.

At that point—June 18, 2003-- there had been no discussions between me and any representative from Guilford that would have led me to believe that Guilford intended the derail device to be used for controlling the operation of freight services on the line.

On June 19, 2003 Guilford severely restricted the hours during which Milford-Bennington could operate over Guilford tracks. Subsequently, Guilford on several occasions stated that prior to June 19, 2003 they were not aware that Milford-Bennington's customer, Granite State was restricted at Wilton to operating between 6:30AM and 6:30PM during weekdays. That is not the case. As pointed out earlier while I was at Guilford Mr. Fink and I engaged in a number of discussions between the years 1987 and 1998 about Peter Leishman, the MacLellan family, the operations of the quarry and the operations of Milford-Bennington. These discussions included discussions of when the quarry could operate. I can think of no rational reason for requiring Milford-Bennington to operate between the hours of midnight and 8:00 AM other than to punish Milford-Bennington and ultimately force it to cease operating.

Exhibit 1



**F. COLIN PEASE
8 RIVER STREET
CONCORD, MA 01742**

May 13, 2003

Mr. W.T.Robbins
Chief Inspector
Federal Railroad Administration, Office of Safety
55 Broadway, 10th Floor
Cambridge, MA 02142

Dear Terry:

I appreciated your taking the time last Friday to discuss plans for the start up of the Wilton Scenic Railroad and am pleased to follow up with a written description of how the railroad will operate and adhere to the requirements of the Office of Safety.

The Wilton Scenic Railroad will operate over a line of railroad between the Town of Wilton (MP 16.36), New Hampshire and Greenfield, New Hampshire, a distance of approximately 12 miles. The rail line is owned by the State of New Hampshire. The line extends beyond Greenfield to the town of Bennington and it is the Wilton Scenic's goal to extend operations to Bennington after completion of a line rehabilitation projected in future years. The Wilton Scenic will use the line in accordance with an operating/lease agreement with the New Hampshire Department of Transportation. The agreement has been approved by the parties and received the approval of New Hampshire's Governor and Council on May 7.

The Milford-Bennington Railroad presently operates over a portion of the rail line between MP 16.36 and MP 20 Monday through Friday. In addition Guilford Rail System has been granted trackage rights by the Milford Bennington to operate from MP 16.36 to a quarry located at MP 19. While Guilford has used these trackage rights in the past year it does not appear at this time that they will be operating with any frequency over the trackage rights portion of the line in the near future. The Milford Bennington maintains the rail line and the active portion presently meets or exceeds FRA Safety standards for Class II track. Beyond MP 19.50 the rail line is in need of upgrading prior to the commencement of service and that upgrading program is presently underway. Beginning in the fall of 2002 the Wilton Scenic commenced a program to brush cut the entire line and that work is nearly completed. Commencing today a contractor, hired by the Wilton Scenic, has begun work to install 4,000 ties, replace rail where needed, restore broken joint bars and tighten bolts, install ballast as required and surface the rail line between MP 19.50 and MP 28.50. Upon completion of the rehabilitation work the line will meet or exceed requirements necessary to comply with FRA class 1 safety standards.

The Wilton Scenic has purchased two RDC cars from BC rail for use in its service. The cars, an RDC 1 and an RDC 3 were built in 1957 and 1956 respectively and rebuilt in

1985 and 1989 respectively. As recently as October 2002 they were used by BC rail in daily long haul passenger services operating at speeds in excess of 60 MPH. Since the their arrival in Wilton the cars have undergone a thorough cleaning and cosmetic upgrade and two diesel "pony" engines have either been replaced or overhauled. The cars have been inspected by several parties including staff of the Milford Bennington Railroad and will be inspected by mechanical staff of the Hobo Railroad prior to commencement of service.

The Wilton Scenic is scheduled to commence rail passenger operations on May 17, 2003 and intends to operate between MP 16.36 and MP 21 provided that rehabilitation work between milepost 19.5 and milepost 21 is completed to the satisfaction of the Milford Bennington Railroad. The railroad will operate only on weekends when there are no operations by the Milford Bennington. Recently a permanent derail device has been installed at approximately MP 16.36 and the Wilton Scenic and the Milford Bennington have agreed that during the hours that Wilton Scenic is operating on weekends the derail will remain closed and locked in order to physically separate the line used by Wilton Scenic from the "nations" rail system. A notice will be provided to Guilford that the track will be out of service and physically not accessible during Wilton Scenic's weekend operations.

The Wilton Scenic Railroad has entered into a contract with the Milford Bennington under which the Milford Bennington Railroad will be responsible for the operation of Wilton Scenic trains. All crewmembers subject to hours of service regulations will be provided by the Milford Bennington Railroad including a licensed locomotive engineer. Milford Bennington will have absolute control over all operations on line presently operated and maintained by Milford Bennington during the initial start up weekend operations between MP 16.36 and MP 21. After rehabilitation work has been completed to Greenfield and the work has been accepted by Milford Bennington and been determined sufficient to permit safe operations over track that meets Class 1 safety standards or better, Milford Bennington will continue to maintain control over the operations of Wilton Scenic trains and will continue to provide operating crews. In addition the Milford Bennington, under a contract with the Wilton Scenic will provide track maintenance and inspection services, will provide daily inspections of motive power and will assure compliance with Hours of Service requirements, Locomotive Safety Standards, Safety Appliance Standards, Power Brakes and Drawbars and will assure Grade Crossing Signal System Safety. Wilton Scenic will provide a range of onboard services related to comfort and service to its customers and provide all station services, ticket sales and other services related to the scenic rail service. Wilton Scenic Railroad, working in conjunction with the Milford Bennington will be responsible for Accident/Incident Reporting in accordance with 49 CFR Part 225 under the reporting marks WSRX.

At some point in the future, perhaps as early as mid June, it is expected that the Wilton Scenic will expand its operations to weekend and weekday service. At that point the Wilton Scenic would be operating over track also used by the Milford Bennington and potentially used by Guilford Rail System. Weekday operations cannot be operated

efficiently in the manner described above in which the track will be physically separated through the use of a derail. It is also expected at that time that the Wilton Scenic will extend its operations to Greenfield and that a portion of its operations will be over track occupied exclusively by the Wilton Scenic that can remain physically separated from the nations rail system. Prior to expanding operations to weekday service the Wilton Scenic Railroad will provide you with a plan showing how the railroad will comply with the Code of Federal Regulations that apply to railroads operating as part of the general system of transportation. Wilton Scenic will not expand operations until it has determined that its plan meets the requirements of the FRA Office of Safety and until you agree that their plans meet your requirements.

We look forward to working with you and your office as the Wilton Scenic starts its operations. If you have any questions or concerns about our plans please don't hesitate to let me know.

Sincerely

F. Colin Pease

CC: Stuart Draper
Peter Leishman
Kit Morgan.

Exhibit 2



**F. COLIN PEASE
8 RIVER STREET
CONCORD, MA 01742**

June 18, 2003

Mr. W.T. Robbins
Chief Inspector
Federal Railroad Administration, Office of Safety
55 Broadway, 10th Floor
Cambridge, MA 02142

Dear Terry:

The purpose of this letter is to provide you with information on the start up of the Wilton Scenic Railroad and to provide you with information regarding the scenic railroad's plans for complying with FRA safety regulations. When we last met and in my subsequent letter I indicated that the Wilton Scenic Railroad would initially provide a limited service over a portion of railroad that is presently operated and maintained by the Milford-Bennington Railroad, that is owned by the State of New Hampshire and that is maintained to a standard that meets or exceeds FRA class 1 safety conditions. The Wilton Scenic Railroad did, in fact, operate on Saturday, May 17 during an arts and film festival in Wilton. While Wilton Scenic was operating the section of track used by the service was separated from the nations rail network through the use of a permanent derail that was locked in the closed position and no other operations, freight or passenger were operated. Operations were provided in accordance with a contract between the Wilton Scenic and the Milford-Bennington under which the Milford-Bennington provided all operating services for the train and under which Milford-Bennington inspected and controlled all aspects of track use. The start up service went very smoothly and was well patronized. Since May 17 the Wilton has only operated one additional trip for some school children and similar procedures were followed to separate the operations from the nations rail system.

In my earlier letter I mentioned that the Wilton Scenic in conjunction with the New Hampshire Department of Transportation was initiating a track rehabilitation program designed to upgrade the track between milepost 19.50 and 28.50 to a condition that meets or exceeds FRA class 1 safety standards. That program includes the installation of approximately 4,000 ties, rail replacement where needed, repair of broken joint bars, brush cutting and surfacing as required. I'm pleased to report that the rehabilitation program is presently ongoing and we expect its completion in the near future. Once completed the line of railroad from Wilton (MP 16.36) to Greenfield (MP 28.50) will meet or exceed FRA class 1 safety conditions.

It is the intention of the Wilton Scenic Railroad to initiate a more consistent schedule of operations commencing on June 21, 2003. At that time the railroad will operate, subject

to completion of track rehabilitation work, from milepost 16.36 to a point beyond milepost 19.50. The actual termination of operations will be determined by the extent that rehabilitation work has been completed. As the work proceeds from milepost 19.50 to milepost 28.50 operations will be expanded. However, operations will only be performed over sections of track that have been subject of the track rehabilitation program and that meet or exceed FRA class 1 safety standards.

Once rehabilitation work is completed to Greenfield the Wilton Scenic will be expanding its schedule of operations to weekend and weekday service at which time it will be operating between milepost 16.36 and milepost 19.67 along with the operations of two other carriers, the Milford-Bennington and Springfield Terminal Railroad. Currently the Milford-Bennington is generally operating six trips per day over the line and Springfield Terminal operates infrequently. Beyond milepost 19.67 no other carrier will operate and the Wilton Scenic, in conjunction with the Milford-Bennington will take steps to isolate milepost 19.67 to milepost 28.50 from the nations rail system.

The Wilton Scenic railroad is aware that once its operations are commenced over track used by other carriers it must comply with a wide range of Federal Safety Regulations. I am pleased to provide you with an explanation of how compliance with those regulations will be met.

49 CFR Part 210 Noise Emission Compliance (excluding steam locomotives)

The noise emissions standards were designed primarily to regulate noise in railroad yard operations to minimize the impact of railroad noise on the public. The Wilton Scenic will not be operating any yard operations and will not be performing any switching services. The railroad owns two RDC cars that were fully upgraded in 1985 and 1989. Both cars are designed to be shut down when not in operation and it is not anticipated that the cars will be left idling for extensive periods of time. In the event that it is necessary to leave cars running for extensive periods of time, such as overnight, it is expected that they will be stored in a rural area near a quarry that is well sheltered from the public.

49 CFR Part 211 Rules of Practice

The Wilton Scenic Railroad is aware of the authority of the FRA with respect to the issuing of Rulemaking procedures, processing of Waivers to safety rules and the issuing of Emergency Orders and looks forward to working with the FRA within the provisions of 49 CFR Part 211.

49 CFR Part 213 Track Safety Standards

The section of rail line that the Wilton Scenic will operate over belongs to the State of New Hampshire and historically has been maintained by the Milford-Bennington Railroad in accordance with an agreement between the Milford-Bennington and the New Hampshire Department of Transportation. The Milford-Bennington will continue to be responsible for maintaining the rail line between milepost 16.36 and milepost 20. This

section presently meets or exceeds FRA class 1 safety standards. Between milepost 20 and milepost 28.50 the Milford-Bennington has historically performed basic maintenance necessary to maintain the integrity of the rail line and to permit infrequent movement of work trains. As stated above milepost 19.50 to milepost 28.50 is presently the subject of a substantial rehabilitation program. When the rehabilitation is completed the Wilton Scenic will be the only railroad that will provide ongoing operations between Milepost 19.67 and milepost 28.50 and it will be possible to separate this section from the nations rail system through the use of a derail.

The Wilton Scenic Railroad has entered into a contract with the Milford-Bennington Railroad under which the Milford-Bennington will continue to provide all maintenance and inspection work in the section presently operated by Milford-Bennington and in the section of railroad between milepost 20 and milepost 28.50. The Milford-Bennington will assure that the rail line is maintained at FRA class 1 safety standards or they will not permit the operation of passenger trains should conditions fall below standards necessary to meet FRA class 1. In addition Milford-Bennington will inspect the entire rail in accordance with the requirements of 49 CFR Part 213.

49 CFR Part 215 Freight Car Safety Standards

The Wilton Scenic Railroad does not own any rail freight cars and will not be providing rail freight services.

49 CFR Part 216 Special Notice/Emergency Order Procedures

The Wilton Scenic Railroad understands that the FRA and its designees have the authority to issue orders that certain rail equipment must be removed from service in the event that equipment fails to meet certain safety standards, that the FRA has the authority to inspect and lower the grade of class and require operations to conform to that grade of track and that the FRA has broad authority to issue Emergency Orders in the event the FRA believes that serious safety conditions warrant such action.

49 CFR Part 217 Railroad Operating Rules

The Wilton Scenic Railroad operations will be managed and conducted by the Milford-Bennington Railroad in accordance with a contract between the two companies. Milford-Bennington will provide all operating personnel for Wilton train operations and the rail service will operate in accordance with the operating rules of the Milford-Bennington.

49 CFR Part 218 Railroad Operating Practices

The contract between Wilton Scenic Railroad and Milford-Bennington provide for Milford-Bennington performing various mechanical and inspection services. Milford-Bennington will be responsible for placing of Blue Flag protection as required and assuring that the placement of Wilton Scenic cars will be done in such as way as to assure compliance with 49 CFR Part 218. It is possible that some mechanical work will be

performed on Wilton Scenic equipment by outside contractors. In those cases Milford Bennington will assure that blue flag protection is properly applied and that contractors are apprised of their obligations under the Blue Signal Protection provisions.

Milford-Bennington will be providing all operating services and will assure compliance with Subpart C – Protection of Trains and Locomotives and as part of their normal inspection and oversight will assure that Safety Devices are not tampered with. Wilton Scenic employees and contractors will also be informed of their obligations under this section.

Wilton Scenic does not own and does not anticipate owning Camp Cars.

49 CFR Part 219 Control of Alcohol Use.

It is not anticipated that the Wilton Scenic Railroad will employ any employees who are subject to the hours of service laws or that the Milford-Bennington will employ more than 15 employees who are covered by the Hours of Service laws. However, the Wilton Scenic Railroad will have a policy that prohibits the use of drugs and alcohol by all of its employees and will work with the Milford-Bennington to assure that all employees that participate in the operation of Wilton Scenic trains that are subject to hours of service laws are fully aware of the company's policy against the use of Drugs and Alcohol.

49 CFR Part 220 Radio Standards and Procedures

The Wilton Scenic Railroad will operate two RDC cars both of which are equipped with radios that will function in accordance with procedures specified by the Milford-Bennington Railroad. Under a contract with the Milford-Bennington the Milford-Bennington will be responsible for the operations of Wilton Scenic trains and the Milford-Bennington will maintain control over radio use and procedures. It is not expected that the Wilton Scenic Railroad will have 400,000 or more annual work hours.

49 CFR Part 221 Rear End Marking Devices

The Wilton Scenic Railroad will operate 2 RDC cars in conjunction with its contract with the Milford-Bennington Railroad. The cars were operated in regular main line passenger services in British Columbia until November 2002. They are equipped with appropriate rear end marking devices.

49 CFR Part 223 Safety Glazing Standards

The two RDC cars owned by the Wilton Scenic Railroad were operated in the Canadian Railway system until November 2002. The cars contain glazing that conforms to Canadian regulatory standards but may not comply with U.S. regulatory standards. The Wilton Scenic has applied to the FRA for a waiver of the Safety Glazing Standards to the extent that the glazing does not conform to U.S Standards.

49 CFR Part 225 Accident/Incident Reporting

The Wilton Scenic Railroad will report accidents and incidents as required by 49 CFR Part 225 under the reporting marks WSRX. It is not expected that the Wilton Scenic Railroad will employ individuals subject to the Hours of Service laws, as these functions will be performed by the Milford-Bennington Railroad. In the event that the Wilton Scenic Railroad were to employ individuals subject to the Hours of Service laws, it is not likely that they will employ 15 or more employees in this category.

49 CFR Part 228 Hours of Service

The operating functions of the Wilton Scenic Railroad will be performed by the Milford-Bennington Railroad in accordance with a contract between the two companies. It is not anticipated that the Wilton Scenic Railroad will employ people responsible to perform functions subject to Hours of Service regulations including the maintenance of signal systems or the dispatching of trains. In the event that the Wilton Scenic Railroad does employ people to perform duties subject to the Hours of Service laws, the railroad will maintain records in accordance with 49 CFR Part 228.

49 CFR Part 229 Locomotive Safety Standards

The Wilton Scenic Railroad owns and will operate an RDC 1 and an RDC 3 that were built by the Budd Company in 1957 and 1956 respectively. Both units were rebuilt in 1985 and 1987 respectively. The units were used by BC Rail in daily passenger service operations on BC Rail. The Wilton Scenic railroad has entered into a contract with the Milford-Bennington Railroad under which the Milford-Bennington will perform daily and periodic (92) day inspections. Annual and bi-annual inspections will be performed under contract by a third party expected to be the Hobo Railroad or other organization qualified to inspect and work on the RDC equipment. Milford-Bennington will determine whether units are safe to operate in daily service and will prescribe any measures that are necessary to assure both units are maintained to the standards established by 49 CFR Part 229.

49 CFR Part 230 Locomotive Inspection (Steam)

The Wilton Scenic Railroad does not own and steam locomotives and has no plans to operate steam locomotives in its service.

49 CFR Part 231 Safety Appliance Standards

Wilton Scenic Railroad in conjunction with its contract with the Milford-Bennington railroad will assure that the Wilton Scenic's two RDC cars remain in compliance with the applicable provisions of the Safety Appliance Standards.

49 CFR Part 232 Power Brakes and Drawbars

To the extent applicable, the Milford-Bennington Railroad under contract with the Wilton Scenic Railroad will administer 49 CFR Part 232 and assure Wilton Scenic equipment compliance.

49 CFR Part 233 Signal System Reporting

Under a contract between the Milford-Bennington Railroad and the Wilton Scenic, Milford-Bennington will oversee the maintenance of the few signal devices that exist on the rail line between Milepost 16.36 and Milepost 28.50. The rail line does not contain a signal system for controlling the movement of trains but does contain several grade crossing signal devices.

Safety49 CFR Part 234 Grade Crossing Signal System

Grade Crossing signal systems located on the rail line to be used by the Wilton Scenic are maintained by the Milford-Bennington Railroad and the Milford-Bennington will continue to maintain responsibility for management of those signals and compliance with 49 CFR Part 234.

49 CFR Part 235 Discontinuance or Material Modification of a Signal System/Relief from Part 236

Operations over the rail line between milepost 16.36 and milepost 28.50 are not presently controlled through the use of a signal system.

49 CFR Part 236 Signal and Train Control Systems, Devices and Appliances.

Operations over the rail line between milepost 16.36 and milepost 28.50 are not presently controlled through the use of train control systems, devices and appliances and it is not anticipated that operations will warrant the introduction of a system in the near future.

The Wilton Scenic Railroad continues to finalize plans to expand its service to milepost 28.50 and also to extend its service from a weekend only operation to a full week service. We have been working closely with the Milford-Bennington through our start up of services and will continue to work closely as we approach full week operations. In addition I have personally contacted Mr. Rob Culliford, VP Law of Springfield Terminal to inform him of our plans and to assure that there is ample communication and coordination between the Wilton Scenic and the ST prior to the start up of full week operations. We will continue to work with the ST to assure that expansion of Wilton Scenic service expansion goes smoothly and safely and is done in a manner such that it causes little or no disruption to ST's freight operation between milepost 16.36 and 19.50.

If you have any questions or concerns about the above or about any other aspect of our operation please don't hesitate to get in touch with me. In addition I will contact you after you have had a chance to review the above to assure that we have met any concerns you may have.

We look forward to working with you and your office as the Wilton Scenic moves into full operations for the summer.

Sincerely:

F. Colin Pease

Cc: Stuart Draper
Peter Leishman
Kit Morgan.

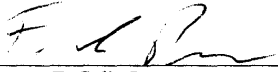
VERIFICATION

COMMONWEALTH OF MASSACHUSETTS)

)ss:

COUNTY OF MIDDLESEX)

I, F. Colin Pease, being duly sworn, depose and state that I have examined all of the statements contained in the "Verified Statement"; and that all such statements are true and correct to the best of my knowledge and belief.


F. Colin Pease

Subscribed and sworn to before me

This 2 day of January, 2004


Notary Public

My Commission Expires Mar. 13 2009

Robert

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. NOR 42083

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

vs.

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

VERIFIED STATEMENT OF GILBERT M. ROBERT

Gilbert M. Robert states as follows:

I am the principal of Gilbert M. Robert and Associates, a transportation management consulting firm which I formed in 1997. Operational planning and practices for freight and passenger rail services both domestic and internationally are among my areas of expertise. From 1989 through 1997, I was the Executive Director of the Tri County Commuter Rail Authority, which operated commuter rail service between Palm Beach and Miami, Florida. In this position, I was responsible for all aspects of the operation of the commuter rail service.

From 1984 to 1989 I was employed by Guilford Transportation Industries or its affiliates ("Guilford") in various capacities including the positions of Director of Transportation Planning, Director of Train Operations (which is the position that is currently held by Larry Ferguson), Assistant-Director Train Operations, and Trainmaster – Mechanicville, New York. While employed in the positions of Director of Train Operations and Assistant Director of Train Operations, specific responsibilities included

the supervision of the train operation control center and dispatching function for the entire Guilford system.

From 1977 through 1983, I worked for the Delaware and Hudson Railway in various freight operating management positions throughout the Mid-Atlantic States.

In addition to the general operating expertise gained through the experience described above, I am familiar with the operating procedures of the Guilford dispatching system. I have reviewed the verified statements of Peter Leishman and Colin Pease, certain deposition transcripts from this case, bulletins and other documents. In addition, as described below, I have observed the operations of Milford-Bennington.

It is my understanding that Guilford restricted the hours of operation of Milford-Bennington so that Guilford trains and work crews would not be within the yard limits between milepost 13.0 and milepost 16.36 on the Hillsboro branch at the same time as Milford-Bennington trains. In November, 2003, I understand that the time restrictions were eliminated but that Guilford issued a bulletin indicating that only one train would be permitted within the yard limits at any given time. In essence, whether through restricted hours of operation or through bulletins limiting the number of trains within the yard limits, Guilford has created "absolute blocks" prohibiting trains of both Guilford and Milford-Bennington from occupying any portion of the line between milepost 13.0 and milepost 13.36 at the same time.

Operation pursuant to such absolute blocks is not required for any safety purpose. The Guilford dispatching system and operating rules are fully capable of separating trains and work crews so that operations may be conducted safely even if trains of both carriers are in the yard limits at the same time. The Guilford dispatching system and operating rules control lines within the Guilford system where numerous commuter trains and a

number of freight trains are operating each day. There is no problem separating such trains so that operations are completely safe and under the control of the dispatcher. The Hillsboro branch, and in particular that portion of the branch between milepost 13.0 and milepost 16.36, presents a much easier task for the dispatchers in view of the relatively few trains that operate daily.

On December 4, 2003, I rode a Milford-Bennington train and observed the operation of the crew. The crew meticulously followed applicable rules and procedures, and I observed no violations of any such rules or procedures. The crew members appear to be well trained and highly knowledgeable. Their radio procedures were excellent.

On December 4, I noted the time required for Milford-Bennington to make a round-trip between the Granite State facilities at Wilton and Milford, and I observed various factors that could affect the time required for a round-trip. The chronology of the round-trip on December 4 is outlined below.

At 8:30 AM, the Milford-Bennington train crew reported for duty at the Granite State Facility in Milford NH. At approximately 9:15 AM, the Milford-Bennington train consisting of a locomotive, 9 empty covered hopper cars and 1 caboose, was prepared to depart the Milford processing facility but was delayed on account of a Guilford track inspection patrol occupying the track.

At 9:25 AM, the Guilford track patrol passed the processing facility and the Milford-Bennington train proceeded down the Granite State industrial lead to the Guilford branch line switch. At 9:31 AM, the Guilford dispatcher granted the train authority to occupy the Hillsboro branch. At 9:35 AM, the dispatcher granted permission for Milford-Bennington to proceed north on the line.

The Milford Bennington train arrived at milepost 16.36 at 9:59 AM and received permission from the Guilford dispatcher to open the derail device at milepost 16.36. At 10 AM, the train moved over the derail device and stopped after the entire train had passed the derail device. At 10:02 AM, the derail was placed in the closed position and the Guilford dispatcher was informed of this action. At 10: 03 AM, the train began moving again, arriving at the Granite State excavation site at 10:09 AM.

At 10:11 AM, the train was spotted on the loading siding at the Granite State facility in Wilton. By 10:35 AM, the first car was loaded. By 12:05 PM, all nine cars had been loaded and were ready to proceed south to the processing plant. Loading delays were encountered this day, with the bucket-loader operator arriving 10 minutes late, which delayed the start of the loading process, and the conveyor belt became jammed numerous times due to weather related ice conditions. This was the last day of operations for the stone quarry prior to closing for the winter season. Total delays at the quarry amounted to approximately 30 minutes.

At 12:15 PM, the train arrived at milepost 16.36 and attempted three times, without success, to make contact with the Guilford dispatcher. At 12:22 PM, the Guilford dispatcher granted permission to open the derail and proceed south. After opening the derail, moving the train past the derail and locking it, the train proceeded toward the processing plant at 12:27 PM. Attempts were made to reach the dispatcher to notify him that the derail had been closed, but there was no response until 12:50 PM.

At 12:45 PM, the Milford-Bennington train arrived at the processing plant, and at 12:52 PM the first car of the train was in position to begin unloading. The first car was unloaded at 1:00 PM, and the entire train took approximately 1 hour 5 minutes to unload.

As described above, a complete round-trip for Milford-Bennington required approximately 4 hours 30 minutes on December 4, 2003.

As has been described by Mr. Leishman, the Milford- Bennington operation has been tailored since it began service to serve the operating requirements of Granite State. The excavation site in Wilton is restricted in its hours of operation by local ordinances that stipulate that stone processing may only occur from 6:30 AM to 6:30 PM, Monday through Friday. When Milford Bennington began service in June 1992, its service plan was designed to maximize the efficiency of rail transportation between the stone quarry and the processing facility during these locally restricted hours of service. Milford-Bennington has been able to maximize service during this designated production period for Granite State up until the institution of the operating restrictions imposed by Guilford on June 20, 2003. Prior to June 20, 2003, Milford Bennington has had no operating time restrictions placed on its service when operating over the Guilford line.

In order to determine the operating conditions and system efficiencies that the Milford Bennington service achieved prior to the mandated service restrictions dictated by Guilford, I reviewed eight years of operating records from 1996 through 2003. This included a detailed review of the Time Return and Delay Report's completed by a conductor on a Milford-Bennington train at the conclusion of each day. These reports not only indicate the hours worked by the respective train crew members for each day, but include detailed train operating times between stations, train delays and any other unusual events associated with the train operation on a particular day.

In reviewing these Time Return and Delay Report's for this service from 1996 through 2002, it was determined that the average time required to perform a complete cycle, operating from the processing facility to the quarry, back to the processing facility,

took approximately 3 hours and 30 minutes during this period. There were many instances when Milford-Bennington completed trip cycles in less than 3 hours. There were isolated instances of service delays when the trip cycle could take longer due to equipment malfunctions or other operational disruptions.

As stipulated in the trackage rights agreement with Guilford, Milford-Bennington may operate a maximum 10-car train consist over the Guilford track. Milford Bennington operated 10-car train consists from 1992 to 1996, 7-car train consists in 1997 and 1998 and 9-car train consists from 1999 to the present. The train sizes varied during these periods due to equipment availability.

For the first three months of 2003, up to the institution of the operating restrictions implemented by Guilford on June 20, 2003, Milford Bennington generally operated between 2-3 round-trips per day, with each round-trip requiring approximately 3 hours and 45 minutes to complete. From June 20, 2003, up to the end of service on December 4, 2003, Milford Bennington operated between 1-2 round-trips per day. There were days that the service did not operate due to the operating restrictions imposed by Guilford. During the period with the new Guilford operating procedures, the average trip took approximately 4 hours and 20 minutes.

The increase of 50 minutes in round-trip times after the institution of the Guilford operating restrictions compared to the 3 hour and 30 minute average trip time, from 1996 to 2002 was significant. Further, there was an adverse impact to the service by reason of the reduced operating time window that was put into effect by Guilford over its segment. Based on the delay reports, there were many days when Milford-Bennington was returning with a loaded train from the stone quarry and denied access over Guilford and forced to cease operations at the property line between Guilford and Milford-Bennington

because the designated operating window was about to expire. This was despite the fact, that the Milford Bennington train crew had more than sufficient time remaining under the FRA Hours of Service rules to complete the remaining 30 minute trip to the processing facility.

Since the institution of these operating restrictions on June 20, 2003, and up to the end of operation for Milford Bennington on December 4, 2003, Guilford has modified the permissible times of operation over this segment for this service three times. From June 20, 2003 up to July 15, 2003, Guilford required that the Milford-Bennington service operate from 12:01 AM until 8:00 AM. During this period, there were 16 work days to operate this service. Based on past production averages for 2003, Milford-Bennington should have delivered and unloaded approximately 375 cars for this period. Due to the new operating plan dictated by Guilford and specifically, the reduced hours of access to the facility, Milford-Bennington only unloaded 90 cars during this period.

From July 15, 2003, up until November 11, 2003, Guilford required that the service operate from 4:00 AM to 1:00 PM. During this period, Milford Bennington was able to complete a few 2-trip cycles per day to the processing facility, however, average production rates still were significantly less than past performances prior to this operating change. On November 11, 2003, Guilford removed the designated or restricted hours of operations for Milford Bennington but continued with the requirement of an absolute block operation which continued to reduce overall productivity. Included in the attached Exhibit-1 is a summary of the operating statistics for 2003 that illustrate the Milford Bennington service for Granite State. This exhibit illustrates that the operating restrictions imposed by Guilford on the Milford Bennington service since June 20, 2003, reduced overall efficiencies for this service by approximately 47 percent.

From mid-1996, up to July 2003, the Guilford maintained section of this line included approximately a two-mile section of 5 MPH speed restrictions and a one-mile section at 10 MPH. From July 2003, up to the end of October 2003, the entire Guilford section was restricted to 5 MPH. Mr. Leishman has advised me that during October 2003, Guilford did install approximately 800 crossties on this segment and the entire section is presently 10 MPH. This line still maintains an FRA "excepted class" designation, which is the lowest track classification permissible for operations. These reduced operating speed restrictions imposed on the Milford-Bennington service over the Guilford maintained section from 1996 through October 2003, have had an additional adverse impact on this operation. By sharp contrast, the adjoining Milford Bennington maintained, State of New Hampshire owned line segment, from MP 16.36 up to the Quarry MP 19.0, has been rehabilitated to FRA Class II track standards providing a maximum allowable freight speed of 25 MPH.

In reviewing certain Milford-Bennington operation reports for the period 1996 through December 2003, there were numerous instances when FRA safety inspectors have been present supervising the train operations. During this period, the FRA has conducted many inspections of the Milford Bennington operation and never taken any exception as to the manner in which the train service is operated. Similarly, the state of New Hampshire employs FRA-certified inspectors that regularly review the operation of this service and they have never found exceptions or concerns as to how Milford Bennington was operating.

During this same period, Guilford, according to Milford-Bennington records, has had numerous Safety, Engineering, Mechanical and Transportation management personnel inspecting the Milford Bennington operation over the Guilford segment of this

line. These inspections have included field observations and train riding reviews performed by various managers. Guilford, like all railroads, is required by the FRA to maintain a comprehensive Test and Observation Rules Compliance Program to monitor the safety of its rail operation on a continuing basis. This would include observing the operations of the Milford Bennington service while operating over Guilford track.

In performing the required procedural steps to effectively administer the FRA Test and Observation Rules Compliance Program, designated field operating management personnel are required to actively participate in the monitoring of railroad operating employees. When a railroad manager observes an individual not adhering to a specific safety or operating rule, through either a planned test or through the normal course of work, then that manager must advise this individual immediately of the infraction and note the failure on the appropriate document to be maintained by the railroad. Depending upon the severity of the rule infraction (s), the railroad manager may verbally advise and instruct the employee of the violation and the need for corrective action, provide a written warning or remove that employee from service immediately. In all of the times that Guilford operation managers have monitored the Milford Bennington operation, Mr. Leishman has indicated that they have never taken exception to the manner in which the service was operated, or advised a Milford Bennington employee of any operating or safety rule infractions.

Finally, after completing a comprehensive review of historical operating documents pertinent to the operation of the Milford Bennington railroad, observing the operation of the train service, and reviewing the testimony of key individuals involved in this dispute for both Guilford and representatives from Milford Bennington, I see no reason to conclude that the Milford-Bennington operation is, or has been, an unsafe

service warranting the restrictive operating conditions instituted June 20, 2003. Prior to the implementation of the absolute block dispatching requirements along with specified hours of operations, the Milford Bennington service appeared to operate in an efficient safe manner.

In operating this service, Milford Bennington worked effectively with the local Guilford switching crews NA-1 and NA-2 when they were in the same area, through the utilization of the prescribed yard limit NORAC Operating Rules and Procedures. Since the beginning of the Milford Bennington operation on June 20, 1992, there has been, according to my review of the records and through discussions with Mr. Leishman, no documented train operating rules infractions or safety concerns outlined between the two railroads or its operations over this segment. To the contrary, the local railroad officials, train crews and train dispatchers for both Milford-Bennington and Guilford seemed to have worked in a positive, cooperative and diligent manner in the provision of safe rail freight transportation.

Exhibit 1



Exhibit 1.

**2003 Milford Bennington Operations
To
Granite State Concrete**

From Start of Service 2003 to Institution of Guilford Operating Restrictions - 6/20/03

Period	Train Size	Days Operated To Granite State Cement	#Trips/Period	Avg. Trips/ Days Operated	Avg. # Cars Delivered/ Days Operated
April	9-Cars	18	46	2.55	22.95
May	9-Cars	20	54	2.70	24.30
June 19	9-Cars	15	38	2.53	22.80
Total		53	138	2.60	23.43

From Institution of Guilford Operating Restrictions 6/20/03 to End of Service 2003

Period	Train Size	Days Operated To Granite State Cement	#Trips/Period	Avg. Trips/ Days Operated	Avg. # Cars Delivered/ Days Operated
June 20	9-Cars	4	4	1.0	9.00
July	9-Cars	24	30	1.25	11.25
Aug	9-Cars	14	18	1.28	11.57
Sept	9-Cars	20	25	1.25	11.25
Oct	9-Cars	22	29	1.31	11.86
Nov	9-Cars	18	32	1.77	16.00
Dec	9-Cars	4	6	1.50	13.50
Total		106	144	1.35	12.22

Trips represent the number of loaded trains delivered to Granite State Concrete.

VERIFICATION

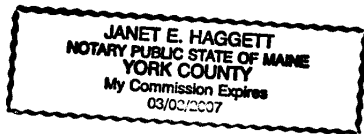
STATE OF MAINE)
)
COUNTY OF YORK)

I, Gilbert M. Robert, being duly sworn, depose and state that I have examined all of the statements contained in the foregoing "Verified Statement" and that all such statements are true and correct to the best of my knowledge and belief.


Gilbert M. Robert

Subscribed and sworn to before me
this 2ND day of JANUARY, 2004.

Jonat E. Haggitt



Madigan

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. NOR 42083

**GRANITE STATE CONCRETE CO., INC. and
MILFORD-BENNINTON RAILROAD CO., INC**

vs.

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

VERIFIED STATEMENT OF SUSAN MADIGAN

Susan Madigan states as follows:

I am the founder and owner of Transit Safety Management (TSM), which was incorporated in 1995. TSM provides a variety of consulting services for clients in the rail transportation business, including system safety audits and regulatory compliance audits. In addition, TSM has undertaken a number of projects for the Federal Railroad Administration (FRA), including a study of train dispatcher training programs, the development of a model training program for train dispatchers, and a study of train dispatcher fatigue issues.

I have extensive experience in railroad safety matters. From 1990 until 1993, I served as an Operating Practices Safety Inspector for the FRA with responsibility for the assurance of safe operating practices on both freight and passenger carriers and

compliance with federal safety regulations governing operating practices. While with the FRA, I monitored railroad operating practices and assessed safety plans and the conduct of information sessions for railroad personnel. I conducted regulatory compliance audits on a number of rail carriers, both passenger and freight, including Boston and Maine and Maine Central, both of which are owned by Guilford.

From 1987 until 1990, I served as a Supervisor of Operations for Amtrak with responsibility for all terminal activities at North Station in Boston. In this position, I was responsible for the safe and efficient movement of approximately 200 commuter trains each day. From 1981 through 1986, I was a Train Dispatcher and a Chief Train Dispatcher for Boston and Maine with responsibility for the management of commuter, intercity passenger and freight trains across the Guilford system. As a result of this experience, I am very familiar with the Guilford dispatching system.

I am familiar with the NORAC rules and with the Guilford timetable. In connection with this case, I have reviewed the verified statements of Peter Leishman and Colin Pease as well as various bulletins and other documents. Based upon this review, I have an understanding of the facts relating to the derail placed at milepost 16.36 on the Milford-Bennington line in December 2002 and to the operation of Milford-Bennington trains over the Guilford line between milepost 13.0 and 16.36.

Based upon the verified statements of Messrs. Leishman and Pease, it is my understanding that the parties, that is, Milford-Bennington and Guilford, agreed in December, 2002 that a portable derail would be placed on the Milford-Bennington mainline in order to provide additional protection for two passenger cars stored during the winter on the Milford-Bennington main track and to prevent this equipment from

inadvertently moving onto the Guilford track. This portable derail, supplied by Guilford, was placed on the rail and locked in the derailing position.

A supplemental bulletin order was issued by Guilford on December 12, 2002 noting the placement and location of a new derail on the Milford-Bennington line at milepost 16.36. The purpose of bulletin orders is to govern train movements, and bulletin orders are issued to modify operating rules, timetables, special instructions, etc. The supplemental bulletin order issued by Guilford simply noted that the derail was being placed in service but it did not modify any rules or special instructions, nor did it provide any information or guidance with respect to the use of the derail. Neither was it within Guilford's scope to do so, since the derail was located on territory that is operated, maintained, and controlled by Milford-Bennington. Thus, the use of the device, in the absence of instructions in any Milford-Bennington issued bulletin, would be governed by the applicable NORAC rules, the Milford-Bennington timetable or special instructions by Milford-Bennington, or the agreement between the parties who operate over the derail device.

It is my understanding that in early 2003 the passenger cars were moved further north on the Milford-Bennington line and placed on a side track equipped with two permanent derails. The portable derail at milepost 16.36 was removed, as protection was no longer needed. Subsequently, however, a permanent derail was installed in nearly the same location, per Mr. Leishman's verified statement, on the Milford-Bennington line. It is my understanding that Mr. Pease, on behalf of Wilton Scenic Railway, agreed with the FRA in May, 2003 that the derail would be used to separate the Milford-Bennington line from the general system of railroad transportation whenever Wilton Scenic was

operating. This understanding was reinforced in a May 13, 2003 letter from Mr. Pease to the FRA's Chief Inspector, and a copy of the letter was provided to Milford-Bennington. According to Mr. Pease this agreement was verbally communicated to Guilford. The understanding of the parties in December 2002 was oral, but such an understanding is effective to govern the use of the derail. There was no bulletin or special order issued by Milford-Bennington that affected or superseded the oral agreement. According to Mr. Leishman, all Milford-Bennington personnel were made aware of the terms of the arrangement concerning the derail.

Both Guilford and Milford-Bennington have adopted and are governed by the NORAC Operating Rules on their properties. Rule 104(d) of the NORAC rules applies to the location and position of derails. The rule states in the first sentence of paragraph 2 that derails that protect the "fouling point" of a main track are to be kept in the derailing position except to permit train movements. Since the derail at milepost 16.36 was not intended to protect a fouling point, that is, the point at which the tracks converge at a turnout or crossing, the second sentence of paragraph 2 of Rule 104 would apply. The second sentence provides that, "derails that are used for other purposes (blue signal protection, occupied camp car protection, Roadway Worker Protection, etc.) must be applied only when their use is required." Because the agreed upon purpose of the derail was initially to protect against the movement of two passenger cars and then subsequently to separate the anticipated scenic rail operation from the "nation's rail system", the use of the derail was only necessary when the scenic operation was running, that is, originally only on weekends. The letter of May 13, 2003 from Mr. Pease to the FRA further states that the derail will be closed and locked in order to physically separate

the line used by the Wilton Scenic from the nation's rail system and that a notice will be provided to Guilford that the track will be out of service and physically inaccessible during the scenic rail operations. Mr. Pease has indicated that Guilford was advised of this and expressed no objection or concern. Thus, during the weekdays, or otherwise when the scenic railroad was not in operation, the derail should have been left in the open and locked position, that is, not in the derailing position, as its sole stated and agreed upon purpose was to protect the passenger equipment and provide physical separation from the general system of railroad transportation.

As previously stated, there is nothing in the Guilford bulletins or timetable of which I am aware that would modify the use of the derail on the Milford-Bennington line at milepost 16.36. Furthermore, any information in the Guilford bulletins or timetable could only apply to and govern operations on Guilford property, though these instructions would govern a foreign operator such as Milford-Bennington when operating on Guilford property, in accordance with NORAC operating rule number 1. Any Guilford-issued bulletins or special instructions would not apply to or govern operations on the Milford-Bennington operated segment of track.

Based upon the statements of Mr. Leishman, Guilford maintained a derail on the main track at the south end of the Wilton yard for many years. This derail was left open, in the non-derailing position, except when Guilford was using the mainline at this location to load stone into rail cars from trucks on the access road paralleling the tracks. There was no special bulletin or timetable entry governing the use of this derail that I am aware of. The understanding between the parties was apparently that the device did not have to be opened and closed each time a train passed. It was left in the open position

unless it was being used for a special purpose, that is, to protect against the unintended movement of cars while being loaded.

In my opinion, the use of the derail on the Milford-Bennington line at milepost 16.36, as well as the use of the derail at the south end of the Wilton Yard, as described above, was in accordance with applicable rules and safe operating practices. There were no bulletins, timetable provisions or special instructions that governed the use of the derails, so the oral agreements controlled their use. Such use was entirely consistent with the NORAC rules and, in particular, rule 104.

In reviewing the Guilford Timetable No.3, it states that the track from Nashua to milepost 13 on the Hillsboro Branch is DCS Territory, that is, that a Form D control system is in effect and that movement must be authorized in writing by the District 2 Train Operations Manager. Further, I understand that Guilford has designated milepost 13.0 to milepost 16.36 as yard limits. Rule 93 of the NORAC rules permits the movement of trains within yard limits upon the verbal permission of the dispatcher. The historical purpose of rule 93 is to permit multiple trains to be within the yard limits simultaneously, with train movements made at restricted speed, that is, able to stop within one-half the range of vision, not exceeding 20 miles per hour, stopping short of other trains, obstructions, switches not properly lined, derails set in the derailing position, stop signals, and any other deliberately placed objects. This is normal practice on Guilford as well as other railroads, and it is a longstanding and safe method of railroad operation. Given the terms of rule 93 and the Guilford dispatching system, it is not necessary for safety reasons to limit operations between milepost 13.0 and milepost 16.36 to only one train at a time, because, as previously stated, the purpose of yard limits was to permit

more than one train to move safely within these limits at restricted speed, able to stop short of other trains, etc., without express instructions for movement from a train dispatcher.

VERIFICATION

COMMONWEALTH OF MASSACHUSETTS)

COUNTY OF Middlesex)ss:
)

I, Susan Madigan, being duly sworn, depose and state that I have examined all of the statements contained in the "Verified Statement"; and that all such statements are true and correct to the best of my knowledge and belief.

Susan Madigan
Susan Madigan

Subscribed and sworn to before me
This 5th day of January, 2004

Sandra S. Mitchell
Notary Public

My Commission Expires: 2/6/09

A

sappi

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North America

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briana.o'regan@na.sappi.com

Briana K. O'Regan
Intellectual Property
and Legal Counsel

July 2, 2002

Mr. Vernon Williams, Secretary
Surface Transportation Board
1925 K Street NW
Washington, DC 20423

Dear Mr. Williams:

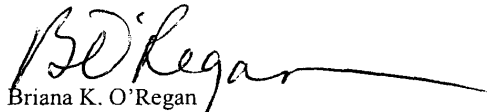
**Re: Finance Docket No. 34133
Notice of Exemption
Motion to Dismiss Notice of Exemption**

Please find enclosed the following items:

1. The original and ten (10) copies of Verified Notice of Exemption pursuant to 49 C.F.R. §1150.31(a)(1) & (4);
2. The original and ten (10) copies of Motion to Dismiss the Notice of Exemption;
3. Three (3) computer diskettes with copies of the above referenced documents; and
4. A check for the filing fee in the amount of \$1,300.00.

Please do not hesitate to contact me if you have questions regarding this submission or need further information.

Sincerely,


Briana K. O'Regan
Intellectual Property & Legal Counsel

cc: w/enclosures

✓ Robert B. Culliford
Vice President - Transportation
Maine Central Railroad Company
Springfield Terminal Railway Company
Iron Horse Park
North Billerica, MA 01862

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34133

**S.D. WARREN COMPANY, d.b.a.
SAPPI FINE PAPER NORTH AMERICA
ACQUISITION AND OPERATION EXEMPTION
PURSUANT TO 49 C.F.R. §1150.31(a)(1) & (4)**

**MOTION OF S.D. WARREN COMPANY, d.b.a.
SAPPI FINE PAPER NORTH AMERICA
TO DISMISS NOTICE OF EXEMPTION**

Briana K. O'Regan
Sappi Fine Paper North America
225 Franklin Street
Boston, MA 02110
Tel: (617) 368-6594
Fax: (617) 368-6580

Attorney for:
S.D. Warren Company d.b.a
Sappi Fine Paper North America

Dated: July 2, 2002

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34133

**S.D. WARREN COMPANY, d.b.a.
SAPPI FINE PAPER NORTH AMERICA
ACQUISITION AND OPERATION EXEMPTION
PURSUANT TO 49 C.F.R. §1150.31(a)(1) & (4)**

**MOTION OF S.D. WARREN COMPANY, d.b.a.
SAPPI FINE PAPER NORTH AMERICA
TO DISMISS NOTICE OF EXEMPTION**

I. INTRODUCTION

Pursuant to a Joint Operating Agreement (the "Agreement") by and between the S.D. Warren Company d.b.a. Sappi Fine Paper North America ("Sappi"), a non-carrier, and the Maine Central Railroad Company and the Springfield Terminal Railway Company (collectively "Guilford"), Sappi will be acquiring certain joint operating rights over the Guilford main line of railroad between milepost 8.55 and milepost 9.80 in Skowhegan, Maine (the "Subject Line").¹ The total distance of operating rights to be acquired over the Subject Line is approximately 1.25 route miles.

The joint operating rights being acquired by Sappi will be limited to moving its own traffic to, from and on the Subject Line. These operations will be limited solely to traffic originating and terminating at the Sappi facility in Skowhegan, Somerset County, Maine ("Somerset facility"), and Sappi will not be holding itself out as a common carrier on the Subject Line, nor are there any other rail customers on the Subject Line. Moreover, Sappi will receive no

compensation under the Joint Operating Agreement, it being Sappi's sole intent to expedite and improve efficiency of switching cars to and from its Somerset facility.

Sappi has filed concurrently herewith a Verified Notice of Exemption (the "Notice") pursuant to 49 C.F.R. §1150.31 *et seq.* to acquire these joint operating rights over the Subject Line and hereby moves the Surface Transportation Board (the "Board") to dismiss the Notice. Sappi submits that, because of the nature and terms of the proposed transaction as described in the Notice and Joint Operating Agreement attached thereto, the transaction is not subject to Board approval. 49 U.S.C. §10906.

II. FACTS

A. The Parties and Freight Operations on the Subject Line

Sappi is a manufacturer of pulp and paper with manufacturing facilities located throughout the United States. Sappi understands that the Maine Central Railroad Company and the Springfield Terminal Railway Company are Class II carriers that, in conjunction with their affiliates, own and operate railroad lines in the northeastern United States.

As stated in the Verified Statement of Robert Nichols attached hereto as Exhibit A and hereby made a part hereof, Sappi is the only customer on the Subject Line, and is served by Guilford on a daily basis. Presently, Guilford's service consists of the movement of empty and loaded cars between Guilford's Waterville, Maine yard and tracks located entirely within the Somerset facility. Under the Agreement, Sappi would obtain rights to perform two distinct operations on the Subject Line. First, after the Guilford train delivers cars inbound to Sappi to a designated location on the Subject Line, Sappi would have access to the Line to move those cars

¹ The Joint Operating Agreement is attached as Exhibit A to the Notice of Exemption filed simultaneously with this Motion.

into its facility. Second, Sappi would also have access to the Subject Line to drop off cars outbound from Sappi for movement by Guilford to its Waterville yard, where these cars would be incorporated into through train service.

Pursuant to Section 3 of the Joint Operating Agreement, Sappi will maintain control of the Subject Line by means of a derail or similar device, which is locked and unlocked by Sappi's contractor and should isolate the Subject Line from the remainder of Guilford's trackage. However, because Sappi has agreed to not allow its switching operations to interfere with Guilford's railroad and maintenance obligations, Sappi will remove the blocking device at the request of Guilford.

Sappi seeks these joint operating rights to expedite and improve the overall efficiency of rail movements into and out of its Somerset facility. By retrieving and placing cars on the Subject Line, Sappi will be able to enhance its ability to switch cars within the facility, thereby improving the flow of cars into and out of the facility. Currently, Sappi has an agreement with a third party contractor to provide services on tracks owned wholly by Sappi, including the movement of cars, delivered to and from Guilford's rail line, on the tracks located within the Sappi facility.² Also, by utilizing these operating rights to place cars on the Subject Line for further movement by Guilford, thereby removing the necessity of Guilford's operations on the tracks owned by Sappi, this transaction is expected to decrease the overall dwell and transit times for this traffic, as well as demurrage charges.

Therefore, as more particularly described in the Agreement, the use of the Subject Line by Sappi will be limited to placing and receiving its own traffic on the Subject Line. As a result, the common carrier rights and obligations on the Subject Line will remain with Guilford and

² Although the actual switching services are expected to be provided by Sappi's contractor, Sappi is acquiring the joint operating rights, and does not intend to transfer those rights to the contractor.

Sappi's right to use the Subject Line will not interfere with those rights and obligations. Finally, Sappi does not intend to become a common carrier, nor will Sappi hold itself out to be a common carrier.

III. ARGUMENT

A. This Transaction is Excepted from Board Authority Pursuant to 49 U.S.C. §10906

Pursuant to 49 U.S.C. Section 10906, a rail carrier providing transportation subject to the jurisdiction of the Board may enter into arrangements for the joint use of spur, industrial, team, switching or side tracks without Board approval. In making a determination whether the Board has authority over these arrangements, the focus is upon the status of the trackage subject to any agreement. *Chevron, U.S.A., Inc.—Lease and Operation Exemption—Richmond Belt Railway*, Finance Docket No. 32352, STB Served: June 12, 1995 (1995 WL 348739 (ICC)) ("*Richmond Belt*"). Where operating rights are acquired for switching purposes only, the acquisition of such rights is not subject to Board jurisdiction. *Richmond Belt*. Moreover, in any analysis to decide whether the agreement involves the acquisition or operation of trackage requires Board approval, the determining factor is the intended use of the trackage by the entity acquiring the operating rights. See *Nicholson v. I.C.C.*, 711 F.2d 364, 367 (D.C. Cir. 1983); *Brotherhood of Locomotive Engineers v. United States*, 101 F.3d 718, 726 (D.C. Cir. 1996) ("Accordingly, although the tracks at issue were main-line Union Pacific tracks, because the tenant carriers used them solely for switching, the Commission ruled the agreements beyond its jurisdiction.") Finally, where two entities enter into an agreement to share the use of trackage, the tenant's use is the controlling factor in determining the character of the track. *Brotherhood of Locomotive Engineers v. United States*, 101 F.3d at 727.

In this instance, Sappi is acquiring joint operating rights on the Subject Line, which Guilford presently operates as a "rail line" pursuant to 49 U.S.C. section 10901. However, as in *Richmond Belt*, the operating rights to be acquired by Sappi (as Guilford's tenant) are limited to the performance of moving its own rail cars into and out of property owned wholly by Sappi. (Agreement, §§3 & 5) Further, Guilford will retain its common carrier rights and obligations over the Subject Line, and will continue to operate over the Subject Line to deliver and retrieve Sappi's shipments and will also continue to maintain the Subject Line. (Agreement, §§3 & 4) Sappi is not intending to become a common carrier or hold itself out as providing common carriage, and its use of the Subject Line will be limited to Sappi's obligation to obtain and control a derail or similar device to limit access to and from the Subject Line during its operations. (Agreement, §3) Because of this limitation and the fact that Sappi is the only customer on the Subject Line, Sappi will not have the ability to perform additional operations, including extensions into new territory, nor does it seek such rights. Moreover, in order to prevent interference with Guilford's common carrier operations on the Subject Line, Sappi has agreed to remove the blocking device at the request of Guilford. (Agreement, §§2(c) & 3(i-iii)) Finally, the Agreement provides for termination by either party upon thirty (30) days notice, with or without cause, allowing Guilford to reclaim control over the Subject Line in the event that the joint operations unduly interfere with Guilford's ability to perform its common carrier duties. (Agreement, §8)

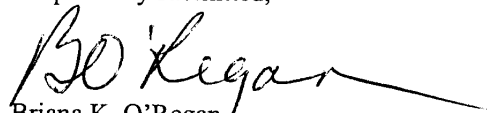
IV. CONCLUSION

While the Subject Line is a "rail line" pursuant to 49 U.S.C. section 10901, this designation is limited to Guilford's operations as a common carrier over the Subject Line. 49

U.S.C. §§10901, 10102(5), (6)(B). The present transaction, however, will provide Sappi with operating rights on the Subject Line that will be used solely for moving its own traffic to enhance switching of cars to and from Sappi's Somerset facility. Because Sappi, as the tenant on the Subject Line, will not have the ability to perform additional operations, including extensions into new territory, this transaction is properly classified as an arrangement for joint operating rights on switching trackage, and is therefore not subject to Board approval. *49 U.S.C. §10906.* Accordingly, for the reasons set forth herein, Sappi respectfully requests that the Board dismiss the Notice of Exemption filed simultaneously with this Motion.

Dated: July 2, 2002

Respectfully submitted,

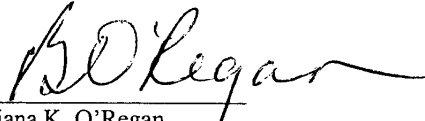

Briana K. O'Regan
Intellectual Property & Legal Counsel

Attorney for:
S.D. Warren Company d.b.a.
Sappi Fine Paper North America

CERTIFICATE OF SERVICE

I certify that I this day have served copies of the foregoing
Motion to Dismiss Notice of Exemption upon each of the parties by mailing a
copy by prepaid first class U.S. Mail.

Dated at Boston, Massachusetts, this 2nd day of July, 2002.

A handwritten signature in cursive script, reading "B O'Regan", written in black ink.

Briana K. O'Regan
Intellectual Property & Legal Counsel

Exhibit A
Verified Statement
of
Robert Nichols

VERIFIED STATEMENT

OF

ROBERT NICHOLS

My name is Robert Nichols. I am employed by S.D. Warren Company d/b/a Sappi Fine Paper North America ("Sappi") as Regional Transportation Coordinator at Sappi's pulp and paper facility located in Somerset County, Maine ("Somerset facility"). I have held my current position for five (5) years and have been employed by Sappi for twenty (20) years. As Regional Transportation Coordinator, my responsibilities include the management of all incoming and outgoing shipments for the paper mill side of the facility, including rail, truck, intermodal and ocean container shipments. This involves the management of incoming empty containers, trailers and rail cars and outgoing shipments of paper products to customers. I coordinate the activities of 26 carriers plus the rail carrier.

The Somerset facility is adjacent to and is served by the railroad line owned and operated by Maine Central Railroad Company and Springfield Terminal Railway Company (collectively "Guilford"). The Somerset facility is at the end of Guilford's railroad line, which in fact, stub ends on Sappi's property.

There is a spur from the main railroad line to the tracks owned by Sappi within the facility. The spur is approximately 400 feet long. A map showing the relationship between the main line and the spur is included with the Joint Operating Agreement attached as Exhibit A to the Notice of Exemption.

The manufacturing operations of Sappi require the movement of empty and loaded cars between Sappi's facility and Guilford's yard, and within Sappi's facility. Due to the space constraints of the spur, Guilford can only deliver or remove a maximum of 32 cars per train.

For normal operations, Sappi should have a minimum of 38 cars delivered per day, as follows: 7 log cars; 6 empty cars for pulp shipments; 2 cars containing pulping chemicals; 15 empty cars for paper shipments; and 8 cars containing chemicals used in paper manufacture.

The mill's requirements for cars are often subject to change. For instance, the shipping department may need additional empty cars or re-scheduling of the manufacture of paper grades on the paper machines may require the delivery of additional cars of chemicals. Usually Sappi needs more than 38 cars delivered per day. The ability to use a portion of Guilford's line to hold additional cars temporarily in accordance with the Joint Operating Agreement would expedite and enhance the efficiency of receiving and forwarding rail traffic at the Somerset facility.

The portion of Guilford's line that Sappi needs to use is between milepost 8.55 and milepost 9.80, and will be subject to the joint operating agreement. This segment holds approximately 60 cars. There are no other customers on this segment of Guilford's line. The segment would be used by Sappi exclusively for rail traffic to and from Sappi's facility. Because the segment connects directly to Sappi's spur, Sappi would use the segment as an extension of the spur.

Currently, Sappi starts to pay demurrage charges on incoming cars when they arrive at the Guilford yard located in Waterville, Maine, approximately 20 miles from the Somerset facility. Currently cars are being held at Guilford's Waterville yard because of the space limitations of Sappi's spur. Therefore, at all times when the cars are on this segment of Guilford's line, the cars are under demurrage. This demurrage arrangement would continue

under the joint operating agreement but Sappi would at least have access to the cars as demurrage charges were being incurred.

The ability to hold a greater number of cars at the Somerset facility on the segment is economically beneficial to Sappi because Sappi will be able to unload or load the cars at will rather than waiting for the next delivery of 32 cars. Faster turnaround of cars not only will improve operations at the facility by reducing scheduling complications but also will reduce the demurrages charges that Sappi incurs.

Currently Guilford performs no switching services for Sappi at the Somerset facility other than delivering and removing cars from the spur. Under the Joint Operating Agreement, Guilford would perform the same services – delivery and removal of cars from the jointly operated segment. In fact, use of that segment by Sappi as an extension of its spur will relieve congestion on the spur caused by Guilford's switching activities between its line and Sappi's spur.

Currently Sappi has an agreement with a third party to provide to Sappi intraplant services on the spur and tracks wholly owned by Sappi within its Somerset facility. Under the joint operating agreement, Guilford would deliver cars to and remove cars from the jointly used segment. The third party contractor would move the cars between that segment and Sappi's intraplant tracks. While the third party contractor handles the cars, the cars are under demurrage and are out of the stream of interstate commerce. The third party contractor only performs such switching services for Sappi and would not be providing similar services to others on the jointly used segment of Guilford's line.

The State of Maine

)

)

SS:

County of Somerset

)

Robert Nichols, being first duly sworn, deposes and states that he has read the above document, knows the facts stated therein, and that the same are true as stated.

Robert H. Nichols

Robert Nichols

Sworn to before me this 25 day of

June, 2002

Lynne A. Marshall
Notary Public

My commission expires: 7/25/05

JOINT OPERATING AGREEMENT

THIS AGREEMENT dated as of this 4th day of Sept, 2001, by and between the MAINE CENTRAL RAILROAD COMPANY and the SPRINGFIELD TERMINAL RAILWAY COMPANY, (collectively "Railroad") and S.D. WARREN COMPANY, d.b.a. SAPPI FINE PAPER NORTH AMERICA ("Industry").

WITNESSETH:

WHEREAS, Railroad currently provides transportation services, including switching, between Milepost 8.35 and the industrial track serving the facilities of Industry located in Skowhegan, Maine; and

WHEREAS, Industry desires for purposes of economic and convenient operations, to perform the switching of cars into, out of and within such facilities itself; and

WHEREAS, in order to perform such switching services, Industry desires to operate, jointly with Railroad, over certain property of Railroad;

NOW, THEREFORE, in consideration of the sum of one dollar (\$1.00) per year, together with other valuable consideration and the mutual promises of the parties hereto, as set forth herein, Railroad and Industry agree as follows:

1. Railroad hereby grants to Industry permission to operate, jointly with Railroad, subject to the rights hereinafter excepted and reserved and upon the terms and conditions hereinafter set forth, the real property, including the tracks and other railroad facilities located thereon, designated as "joint use" on the attached Exhibit A, which is made a part hereof (all of which shall hereinafter be referred to as the "Premises"), for a term beginning as of the date hereof and ending when this Agreement shall be terminated as hereinafter provided.

2. Railroad hereby excepts and reserves the right, to be exercised by Railroad and by any others who have obtained or may obtain permission or authority from Railroad so to do (a) to

operate, maintain, renew and relocate any and all existing pipe, power and communication lines and appurtenances and other facilities of like character upon, over or under the surface of the Premises, (b) from time to time to construct, operate, maintain, renew and relocate such additional facilities of the same character as will not unreasonably interfere with the use of the Premises by Industry for the purposes specified in this Agreement, (c) to use and to operate over the track designated as "joint use" in the Exhibit A attached hereto for any purpose necessary in order to permit Railroad to discharge any common carrier obligation it may have and (d) to use and to operate over any other tracks and facilities on the Premises.

3. Industry shall allow only qualified personnel, as reasonably determined by Railroad, to operate over the joint use tracks and the Premises. Industry is not a common carrier by rail and is not hereby intending to become such a carrier or to hold itself out as performing any activity on the premises other than its own industrial switching. Industry shall control Railroad's access to and from the joint use tracks and the Premises by means of one or more derails, private switch locks, or similar devices, which shall be installed at appropriate locations. Locking and unlocking of the derails, or private switch locks to provide such access and egress shall be the responsibility of Industry, which agrees to promptly open the derail(s), or remove private switch locks, upon the request of Railroad, for the purposes of (i) allowing Railroad to deliver cars to Industry for further handling by Industry; (ii) allowing Railroad to pick up cars from Industry for further handling by Railroad; and (iii) allowing Railroad to deliver to and/or pick up cars from any customers of Railroad located on or beyond the joint use tracks and Premises.

4. The Premises shall be maintained in good condition and repair by Railroad. Railroad shall, subject to the indemnification provisions of paragraph 6 hereof, repair and rebuild the tracks or other facilities in the event of damage or destruction, whether by derailment or otherwise. Industry shall be responsible for snow removal with respect to switches utilized by Industry on track subject to this Agreement.

5. In using the Premises, and in operating over the track, Industry shall comply with any and all requirements imposed by federal or state statutes on Industry, or by ordinances, orders

or regulations of any governmental body having jurisdiction thereover and shall use the Premises only for switching its own traffic. Claims related to derailment of equipment on the Premises and the cost of rerailling such equipment shall be borne by the parties in accordance with Section 6. Such rerailling shall be performed by Railroad. In conducting such operations over crossings at grade, if any, Industry shall undertake such action as is necessary to protect same, including but not limited to, flagging, traffic control, illumination, etc. In no event shall Industry provide or hold itself out to provide rail transportation service for any other shipper.

6. Responsibilities.

6.1 Industry shall be responsible for inspection of the Premises and shall report any defect, in track or otherwise, to Railroad. Railroad shall be responsible for any loss, cost, damage or expense which arises solely as a result of any such defect, but only if (i) Railroad has received prior notice of the defect from Industry and (ii) has failed to remedy same within fourteen (14) days of such notice.

6.2 Except as otherwise provided in Section 6.3, responsibility for Claims (as defined in Section 6.6) as between the parties shall be borne as follows:

(i) Provided that Industry's negligence or its failure to comply with its obligations under this Agreement are not a contributing cause to any Claims, Railroad shall be responsible for such claims arising from its negligence or its failure to comply with its obligations under this Agreement when such negligence or failure are a contributing cause to such Claims;

(ii) Provided that Railroad's negligence or its failure to comply with its obligations under this Agreement are not a contributing cause to any Claims, then Industry shall be responsible for such Claims which arise from its negligence or its failure to comply with its obligations under this Agreement when such negligence or failure are a contributing cause to such Claim;

(iii) The parties shall share responsibility for all Claims arising from their joint or concurring negligence or failure to comply with their respective obligations under this Agreement when any such failure is a contributing cause to such Claims in proportion to their level of fault. If Railroad is subjected to any Claims under the Federal Employers' Liability Act ("FELA") based on the allegation that Railroad failed, in respect to the premises, to provide a safe place to work or failed to correct or guard against an unsafe condition, the standards of negligence and causality established by FELA shall be applied

in determining whether such Claims arose from the joint or concurring negligence of Industry.

(iv) Each party shall be responsible for Claims arising from the presence of trespassers, vandals or other unauthorized persons on the Premises.

6.3 Industry shall be responsible for Claims arising from any non-standard conditions pertaining derails, private switch locks, or similar devices, installed by Industry, as well as any equipment used by Industry, now or hereinafter existing, provided that Railroad's negligence or its failure to comply with its obligations under this Agreement are not a contributing cause to any such Claims. In the event that Railroad's negligence or its failure to comply with its obligations under this Agreement are a contributing cause to any such Claims, then Section 6.2(iii), above, shall apply.

6.4 The negligence of any tenant, invitee, or licensee of Industry occurring on the Premises shall be deemed the negligence of Industry. The negligence of any tenant, invitee, or licensee of Railroad occurring on the Premises shall be deemed the negligence of Railroad.

6.5 Except as otherwise provided in Section 6.2, the party which is responsible shall release the other party from all responsibility for such Claims and shall defend, indemnify, protect and save harmless the other party and its parent company, affiliates, directors, officers, agents, and employees from and against all such Claims. Industry and Railroad waive any constitutional, statutory or decisional immunity which would invalidate their respective obligation to indemnify each other as set forth herein.

6.6 The word "Claims" as used in this Section 6 shall mean all claims, liabilities, demands, actions at law and equity, judgments, settlements, losses, damages, and expenses of every character for any injury to or death of any person or persons, for any damage to or loss or destruction of property of any kind, and for any damage to the environment, caused by, arising out of, or occurring in connection with the construction, use, maintenance, replacement, presence or removal of the Premises.

7. Neither party may assign this Agreement in whole or in part, or any of a party's rights or obligations hereunder without the prior consent of the other party, which consent shall not be unreasonably withheld or delayed. Notwithstanding the foregoing, a party may assign this Agreement and any of its rights hereunder (i) pursuant to any sale of all or substantially all of its assets or securities, merger, acquisition or consolidation, or (ii) to any subsidiary or affiliate of that party; provided, however, that the assignee agrees to be bound by the terms and conditions of this Agreement.

8. Either party may terminate this Agreement at any time by giving thirty (30) days' written notice of termination to the other party, stating therein the date that such termination shall take place, and upon the expiration of the time specified in any such notice, this Agreement and all rights of the parties hereunder, except for a party's responsibility to indemnify the other party, or their affiliates for incidents which occur on or related to a date prior to the effective date of the termination, shall absolutely cease.

9. Upon the termination of this Agreement in any manner herein provided, Industry shall forthwith surrender to Railroad possession of the Premises and, if a condition interferes with the future use of the Premises and was caused by the negligence of Industry, Industry shall restore the track and other facilities on the Premises so that it does not interfere with the future use of the track by Railroad, reasonable wear and tear excepted. In the event Industry fails to make such restoration, then Railroad may, at its election, restore the Premises, and in such event Industry shall promptly pay Railroad on rendition of a bill therefor the costs so incurred. Notwithstanding the foregoing, Industry shall not be required to undertake any restoration which is caused by natural disasters, Acts of God, criminal acts of third parties, or is directly attributable to Railroad's failure to maintain the Premises in accordance with Section 4 hereof.

10. Any notice hereunder to be given by Railroad to Industry shall be deemed to be properly served if it is deposited in the U.S. mail, postage prepaid, addressed to Industry at: S.D. Warren Company, d.b.a. Sappi Fine Paper North America, 225 Franklin St., 28th Fl., Boston, MA

02110, Fax (617) 368-6580. Any notice to be given hereunder by Industry to Railroad shall be deemed to be properly served if it is deposited in the U.S. mail, postage prepaid, addressed to Vice President - Transportation, Springfield Terminal Railway Company, Iron Horse Park, North Billerica, Massachusetts 01862. Notice so served shall be effective upon receipt.

11. All the covenants and provisions of this Agreement shall be binding upon the successors, legal representatives and assigns of the parties to the same extent and effect as the same are binding upon the parties individually, and each and every covenant herein shall inure in favor of and run to the successors and assigns of the parties and to each and every person, firm or corporation which may hereafter own or be in possession of or operate Railroad or Industry to the same extent and as fully as though such person, firm or corporation were specifically named in this Agreement in the place and stead of Railroad or Industry; provided, however, that no assignment hereof by Industry, its successors, legal representatives or assigns, or any subsequent assignee, shall be binding upon Railroad without its prior written consent.

IN WITNESS WHEREOF, this Agreement has been duly executed by the duly authorized representatives of the parties as of the day and year first above written.

**S.D. WARREN COMPANY, d.b.a.
SAPPI FINE PAPER
OF NORTH AMERICA**

**MAINE CENTRAL RAILROAD COMPANY
SPRINGFIELD TERMINAL RAILWAY
COMPANY**

By: David G. Mahoney
Printed Name: DAVID G. MAHONEY
Title: VP Supply Chain Management
Date: Sept 4, 01

By: S. B. Cullford
Printed Name: S. B. Cullford
Title: V. P. Transportation
Date: _____

B

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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

DEPOSITION OF ERWIN R. TOWLE, taken
pursuant to Notice on behalf of Granite State
Concrete Company, Inc., and Milford Bennington
Railroad Company, Inc., before Simonne J. Elwood,
R.P.R. and a Notary Public in and for the
Commonwealth of Massachusetts, at the office of
Guilford Rail System, Iron Horse Park, North
Billerica, Massachusetts, commencing on Friday,
October 31, 2003 at 1:18 p.m.

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APPEARANCES:

JAMES E. HOWARD, ESQ.
JAMES E. HOWARD LLC
ONE THOMPSON SQUARE - SUITE 201
CHARLESTOWN, MA 02129
REPRESENTS GRANITE STATE CONCRETE
COMPANY, INC., and MILFORD BENNINGTON
RAILROAD COMPANY, INC.

ROBERT B. CULLIFORD, ESQ.
CORPORATE COUNSEL
GUILFORD RAIL SYSTEM
IRON HORSE PARK
NORTH BILLERICA, MA 01862-1692
REPRESENTS BOSTON AND MAINE CORPORATION
and SPRINGFIELD TERMINAL RAILWAY
COMPANY

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2 DEPONENT DIRECT REDIRECT CROSS RECROSS

3 ERWIN R. TOWLE

4 By Mr. Howard 4 --

5 By Mr. Culliford 46 --

EXHIBITS

9 EXHIBIT NO. DESCRIPTION PAGE NO.

10 1 Springfield Terminal Railway 14
11 Supplemental Bulletin Order
12 No. 3-012B in Effect Thursday,
December 12, 2002

13 2 Guilford Rail System 23
14 Supplemental Bulletin Order
No. 3-006G in Effect 0700
Friday, June 20, 2003

15 3 Memo - 7/15/03 to Robert 26
16 Culliford from Erwin Towle

17 4 Letter - 7/16/03 to Mr. Peter R. 33
Leishman from E.R. Towle

18 5 Verified Statement of Erwin R. 35
19 Towle in Support of Motion to
20 Dismiss and Reply of the Boston
and Maine Corporation and the
Springfield Terminal Railway
Company

21
22
23

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(Deposition of Erwin R. Towle
commencing at 1:18 p.m.)

ERWIN R. TOWLE

A witness called on behalf of the
Granite State Concrete Company, Inc., and
Milford Bennington Railroad Company, Inc.,
first having been duly sworn, under oath,
deposes and says as follows:

DIRECT EXAMINATION

15 Q (By Mr. Howard) Mr. Towle, if you have any
16 trouble understanding my questions or need
17 clarification, please let me know.

18 A Absolutely.

19 Q I understand you've recently retired from
20 Guilford?

21 A Yes, I did.

22 Q How many years were you employed here?

23 A About 34 and-a-half.

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1 Q Okay. And, generally, could you just run
2 through your various positions that you've
3 held during that time?
4 A I was hired out as a mechanic with the Boston
5 Maine Railroad as a fireman, locomotive
6 fireman, on March 21st, 1969. I qualified as
7 an engineer in 1971; worked as a combination
8 engineer fireman back and forth wherever they
9 needed me.
10 I accepted a job in management in 1975
11 as a train master road foreman combination.
12 I was promoted to assistant superintendent of
13 the Boston Division in 1977. I was promoted
14 to superintendent of the -- I think it was
15 still the Boston Maine in approximately '82,
16 somewhere in there, '82, '83; and when Mr.
17 Ferry (phonetic) retired as general manager,
18 I was promoted to general manager, and I
19 believe that was in the 1980s. It was either
20 the last part of '86 or '87, first part of
21 '87, and I remained in that capacity until I
22 retired.
23 Q As general manager, what were your duties and

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1 responsibilities?
2 A I was basically responsible for train crews
3 and engine and train movements on the
4 railroad.
5 Q Who did you report to in that position?
6 A I reported directly to Mr. Sydney Culliford,
7 Vice President.
8 Q And did you have a staff under you?
9 A Yes, I did. I had several train masters and
10 road foremen, three or four road foremen.
11 Q Now, are you familiar with the Hillsboro
12 branch?
13 A Yes, I am.
14 Q And are you familiar with Milford-Bennington
15 Railroad and its operation over the portion
16 of the Hillsboro branch?
17 A Yes, I am.
18 Q Do you recall the train operations by
19 Guilford on the Hillsboro branch over the
20 last few years in terms of how many
21 customers, how many trains, when did they
22 operate, that sort of thing?
23 A Well, over the last -- the last few years, I

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1 don't remember exactly the years, but I'm
2 going to say the last three or four years, we
3 were going up to the Hillsboro branch three
4 days a week and return.
5 Q Okay. And where would the customers -- where
6 are the customers on that line?
7 A Actually, they're all along the -- They're
8 up -- They're starting at South Nashua. I'm
9 not sure if it's actually Amherst or Wilton
10 and -- Excuse me. Milford and Wilton.
11 Q Are you familiar with the Granite State
12 processing facility at Milford?
13 A Yes, I am.
14 Q And what milepost is that, approximately?
15 A Approximately Milepost 13.
16 Q Okay. Now, beyond the Granite State facility
17 to the end of the line, how many Guilford
18 customers are there?
19 A At present, there's only one.
20 Q Which is that?
21 A It's Hendricks Wire & Cable, I believe it is.
22 There are other customers, but I don't
23 know -- Well, excuse me. I'm sorry.

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1 Suburban Gas as well which is seasonal. So
2 they'll be taking gas again this winter.
3 They'll be starting up if it hasn't already.
4 Q So they only receive cars in the winter?
5 A Moreso. They'll get an occasional in the
6 summertime. It's more seasonal.
7 Q You said there are three days a week service.
8 Do all of those trains go beyond Milepost 13?
9 A No, not only -- only if service is required
10 beyond Milford. Otherwise, they turn at
11 Milford and go back.
12 Q So Hendricks Cable gets service only when it
13 needs it?
14 A That's correct.
15 Q And Suburban Propane gets service --
16 A As needed.
17 Q -- as needed but mostly in the winter?
18 A Correct.
19 Q What time of the day, if you can recall, do
20 the Guilford trains, when they operate beyond
21 Milepost 13, what time of day do they
22 generally operate?
23 A They would normally be up in that area

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1 after -- in the afternoon. I'm going to say,
2 roughly, 1:00 o'clock. 12:00 or 1:00
3 o'clock, they go by Milford. I mean, I can't
4 be exact; but somewhere in the afternoon,
5 they go by Milford.
6 Q Three days a week service; was it Tuesday,
7 Thursday, Saturday, is that correct?
8 A That's correct. There's a main line on
9 Monday and Wednesday. That's correct.
10 Tuesday, Thursday and Saturday as needed.
11 That's right.
12 Q Now, are you familiar with the
13 Milford-Bennington operations on the Guilford
14 line?
15 A The fact that they came down with stone
16 trains and backed off into MacLellan, yes.
17 Q Do you know how many trains a day,
18 approximately, they normally ran?
19 A I think it varied from two to four.
20 Q Do you know whether they ever ran on
21 weekends?
22 A I think they did occasionally if they needed
23 stone.

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1 Q Now, --
2 A I want to put an "I think" on that. I don't
3 know. I think they did.
4 Q Fair enough. Was part of your
5 responsibilities -- Well, excuse me. Let me
6 ask it differently.
7 How did your responsibilities and
8 duties relate to the dispatcher's duties?
9 A Any dealings that I would have normally
10 through the dispatchers, I would do through
11 Mr. Ferguson. You're talking about the train
12 dispatchers?
13 Q Yes.
14 A Yes. If I had a problem, although, at times,
15 I talked to the train dispatchers; but if I
16 had a problem or anything like that, I would
17 talk to Mr. Ferguson.
18 Q Did the dispatchers report to you?
19 A They reported to Mr. Ferguson.
20 Q Okay. And he didn't report to you?
21 A Mr. Ferguson reports to Mr. Culliford.
22 Q Okay. So you're generally aware, I take it,
23 of how the dispatching system worked, in

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1 general, and how it worked on the Hillsboro
2 branch?
3 A Yes.
4 Q And were there times, to your knowledge, when
5 Guilford trains and Milford-Bennington trains
6 were both on the Hillsboro branch?
7 A I'm sure they were, yeah.
8 Q And that was just controlled through the
9 normal dispatching system?
10 A That's correct.
11 Q Are you aware of any problems, safety
12 problems or otherwise that resulted because
13 of operations of both companies on the
14 Hillsboro branch?
15 A Am I aware of any safety problems that
16 occurred when they were actually there?
17 Q Yes.
18 A When they were actually down there?
19 Q Yes.
20 A Not that I'm aware of.
21 Q Are you aware of any other safety issues
22 relating to the operations of
23 Milford-Bennington that were brought to your

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1 attention during the time that you were at
2 Guilford?
3 A Well, it was brought to my attention in early
4 December that --
5 Q December of which year?
6 A Of last year. It would be 2002. That they
7 had some passenger coaches stored at the --
8 right at the Wilton Station on the main line,
9 and there was some question as to how they
10 were secured; and, of course, the question
11 arose because of the fear of the cars getting
12 away and rolling and where would they stop.
13 Who knows? It's practically all downhill all
14 the way up to Nashua.; and, at that time, it
15 was requested to have a derail put in
16 position up there, and we put the -- I talked
17 to Peter Leishman about it because I was
18 requested to do so by my boss, and we were
19 told they were going to put a derail up
20 there, and then the question came up of
21 exactly where the derail would be. They
22 wanted it as close to the property line as
23 possible.

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1 get away or vandals or whatever the case
2 might be, let the car get away, they wouldn't
3 roll down and over the crossings and onto our
4 property, and then we'd be involved in a
5 major disaster.
6 Q Okay. So he basically told you that it
7 should be installed?
8 A That's correct.
9 Q Did you agree with that or disagree or
10 discuss it?
11 A No. In the interest of safety, I did not
12 disagree. I agreed. I didn't see any
13 problem in putting it in there.
14 Q And you mentioned that Mr. Culliford became
15 aware that there were passenger cars there.
16 Was the concern -- the safety concern arose
17 because of passenger cars, is that correct?
18 A Well, that's what brought it to light. I
19 mean, it wasn't necessarily just limited to
20 that as far as I know. I mean, he didn't
21 discuss it. He and I didn't have further
22 discussion on that. I don't know that. We
23 were -- It came to light because the

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1 passenger equipment was parked there, but I
2 would have to think that there was a concern
3 for anything getting away up on that hill.
4 Q Well, Milford-Bennington had been operating
5 at that point for 11 or so years without a
6 derail in place, correct?
7 A Yes, they had.
8 Q Okay. Had there ever been any problem
9 because of the hill or otherwise that you're
10 aware of?
11 A Not that I'm aware of.
12 Q Now, the derail was placed on the
13 Milford-Bennington line rather than the
14 Guilford line, is that right?
15 A That's correct, at the agreement of Peter
16 Leishman.
17 Q Well, why did Guilford want to put the derail
18 on Milford-Bennington property?
19 A Well, they wanted -- I wasn't the one that
20 actually went up there. Andy Zompa went up
21 and had the meeting. They wanted the derail
22 as close to the property line as possible and
23 possibly on his line, that Peter Leishman

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1 volunteered the information. That is hearsay
2 to me. But he volunteered that he had
3 switched timbers or means of securing the
4 derail already in place on his property, and
5 he took no exception to putting the derail
6 there. So we supplied the derail, and that's
7 where he put it.
8 Q Okay. Now, I take it your office or your
9 position over the years has authorized a
10 number of bulletins like this?
11 A Yes.
12 Q And how would you -- How would you interpret
13 this one when the derail is on the
14 Milford-Bennington property, is that supposed
15 to govern Milford-Bennington trains, or is
16 that only supposed to govern Guilford trains
17 when they are on Milford-Bennington property?
18 A No. This was to advise our employees that
19 the derail was in position and was there. In
20 the event we were going to Quinn's (phonetic)
21 to get stone or something, they would have to
22 remove the derail and put it back on after
23 they cleared.

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1 Q Okay.
2 A It's the responsibility of Mr. Leishman to
3 advise his employees.
4 Q Okay. So this bulletin was not intended to
5 be advice to Milford-Bennington employees,
6 right?
7 A That this bulletin -- Well, these are the
8 facts that were in place for both railroads,
9 and this bulletin was to advise our employees
10 of the condition, and he was to advise his
11 employees of the condition.
12 Q Okay. So, again, my question is: This
13 bulletin we're looking at was not intended to
14 be directed and followed by
15 Milford-Bennington employees, rather, it
16 was -- you anticipated that Mr. Leishman
17 would issue something else governing his
18 employees?
19 A It was our understanding that his employees
20 would follow the same provisions, but they
21 were not directed to do so by this bulletin.
22 They would be directed by their own which
23 should have been, basically, the same thing.

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1 Q Now, you say it was your understanding that
2 he was going to do that. But you didn't have
3 any conversations with Mr. Leishman about
4 this, right?
5 A Well, verbally, when we talk about the
6 derail, right. I mean, when this
7 initially -- My conversation with Mr.
8 Culliford, and then I called Peter Leishman
9 to tell him about it; and within a day or
10 two, Andy Zompa took it from there and went
11 up to talk to Peter Leishman, and that's when
12 they installed the derail.
13 Q Approximately when was your conversation with
14 Mr. Culliford, your first conversation with
15 Mr. Culliford on this subject?
16 A At the same time. This all took place within
17 a day or two.
18 Q So shortly before December 12th?
19 A Yeah. Yes.
20 Q Then after that, you called Peter Leishman?
21 A Probably the -- I don't remember for sure but
22 probably the same day.
23 Q Okay. And tell me, as best you can remember,

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1 what the substance of that conversation was?
2 A That from a safety standpoint, that we were
3 concerned about the equipment on their
4 property.
5 Q The passenger equipment?
6 A Well, I mentioned the passenger cars, yeah,
7 but I don't recall that I absolutely limited
8 it to that, but we were concerned that if the
9 equipment or vandals or their own
10 carelessness, whatever, anything could
11 happen, possibly defective equipment, could
12 get away and roll onto our property, and who
13 knows where it would stop, and Peter
14 indicated that he knew what I was talking
15 about, "Yeah, that is downhill," and he
16 didn't take exception to it.
17 Q So you told him that you wanted to install
18 it, and he didn't take exception?
19 A That's right.
20 Q And was that the end of the conversation?
21 A It was with me, yeah.
22 Q And did you ever talk to him again about the
23 derail?

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1 A No, not until several months later and
2 probably in the last part of June or July.
3 Q Okay.
4 MR. HOWARD: I ask to mark that as
5 Exhibit 2, please.
6 (Whereupon the Stenographer marked as
7 Exhibit No. 2 - Guilford Rail System -
8 Supplemental Bulletin Order No. 3-006G - In
9 Effect 0700 Friday, June 20, 2003.)
10 Q The document marked Exhibit 2 is another
11 supplemental bulletin order dated June 20,
12 2003. Are you familiar with this, Mr. Towle?
13 (Indicating)
14 A Yes. I do recall the bulletin, yes.
15 Q And this is when the derail located at the
16 south end of the Wilton Yard was relocated to
17 a point just at the property line at the
18 north end, correct?
19 A Right. That's correct.
20 Q Okay. Now, when the derail was at the south
21 end of the yard, it was on the main track,
22 right, on the branch?
23 A There's one on the main track, and there's

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1 one on the run-around.
2 Q Okay. Now, the one on the main track, was
3 that one covered by any kind of bulletin?
4 Was there any instruction to anybody about
5 the use of that?
6 A Well, that's been there for years and years.
7 So I would imagine there is from old
8 bulletins, but I'm not aware of any off the
9 top of my head.
10 Q Do you know why that derail was put in place
11 in the first place?
12 A I'm going to -- I believe the derail was put
13 in there before I came or one like it. So I
14 assume it was for the same reason in the
15 event that if you left anything up there,
16 that the derail would be in place and would
17 keep anything from running away, per se.
18 Q Do you know whether Guilford left cars or
19 trains on the branch at that location?
20 A Yes, we have left cars up there at Wilton.
21 Q At will?
22 A At Wilton.
23 Q At Wilton. Okay. Do you still do that, or

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1 have you done that in recent years?
2 A Yes, we do. We leave them on the run-around
3 and with the derail in position.
4 Q Well, that's a different track than the main
5 one, right?
6 A The one right adjacent to it.
7 Q But do you store -- say, from 1999 through
8 the present time, has Guilford stored cars or
9 trains on the branch line as opposed to the
10 run-around?
11 A Not that I'm aware of. At Wilton, they would
12 put them on the run-around as a rule and put
13 the derail on.
14 Q Okay. Do you know whether the derail on the
15 main track when it was at the south end of
16 the yard there, do you know whether that was
17 used by Guilford crews or by
18 Milford-Bennington trains; in other words,
19 when they went back and forth over that, did
20 they open and close?
21 A I don't believe that they did, no. I don't
22 believe that was -- like I said, if we left
23 cars up there or they were on the run-around,

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1 the derail was on, I don't believe the one on
2 the run-around was used, if at all. I don't
3 know for sure, but I don't think it was too
4 much.
5 Q Do you think -- It was probably left opened
6 all the time, wasn't it?
7 A As a rule, I think that's correct. I think
8 that's correct as a rule.
9 Q That was the practice that both
10 Milford-Bennington and Guilford followed,
11 right?
12 A Yeah.
13 MR. HOWARD: Mark that as Exhibit 3,
14 please.
15 (Whereupon the Stenographer marked as
16 Exhibit No. 3 - Memo - 7/15/03 to Robert
17 Culliford from Erwin Towle.)
18 Q The document marked Exhibit 3 is a memo from
19 you to Robert Culliford as opposed to Syd
20 Culliford. Do you recall this, Mr. Towle?
21 (Indicating)
22 A Yes, I do.
23 Q And the thrust of this, as I understand it,

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1 is that Milford-Bennington would be able to
2 operate over Guilford only between the hours
3 of 4:00 a.m. and 1:00 p.m., right?
4 A That's correct.
5 Q And do you recall that before that, the time
6 limitations for Milford-Bennington were 12:00
7 midnight to 8:00 a.m.?
8 A I was on vacation when that went into effect;
9 and when I came back, I believe that's
10 correct. I was advised that it was midnight
11 to 8:00.
12 Q 8:00 a.m.?
13 A Yeah, midnight to 8:00. I think that's
14 close, yes.
15 Q So if you were on vacation, I take it you
16 were not involved in the decision to limit
17 the operations to those hours?
18 A No, I wasn't.
19 Q Were you involved in any decision to limit
20 the hours from 4:00 a.m. to 1:00 p.m.?
21 A Only to the extent that somewhere in between
22 here, I had a conversation with Peter
23 Leishman. He called me and advised that he

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1 was having difficulty making the trips, and I
2 believe that I advised Mr. Culliford of that,
3 and I'm going to say from that conversation,
4 at some point, the decision was made to
5 change the hours, but I can't remember
6 exactly how it went, something like that.
7 Q Okay. So do you recall why Peter was having
8 trouble? You said he was having trouble?
9 A Making his trips.
10 Q Making his trips, right?
11 A Yeah.
12 Q Do you understand why he was having trouble?
13 A Again, hearsay to me, but it came out then
14 that there was some type of a restriction of
15 the times that he could load up at the quarry
16 and the times that they could unload down
17 at -- in other words, they weren't allowed to
18 work during the night hours or something like
19 that.
20 Q Well, do you recall that for the last 11
21 years, Milford-Bennington has operated
22 generally during daylight hours from 6:00
23 a.m. to 6:00 p.m.?

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1 A That's correct.
2 Q Okay. And did you have any knowledge of any
3 kind of restrictions on the operations at the
4 quarry?
5 A No. I didn't know that, no.
6 Q You have no knowledge of that?
7 A Personally, I did not know that.
8 Q So Peter advised you of that for the first
9 time?
10 A I think that's how I find out. I found out
11 from somebody, and I don't know how I would
12 have found out if it wasn't from him.
13 Q Okay. Now, when you talked to Mr. Culliford,
14 Syd Culliford, I take it, about this, he
15 agreed to modify the time then?
16 A I advised him of this, and I don't believe
17 that he really responded. He heard me, and I
18 think he wanted some time to think about it
19 or do whatever; and a short time after that,
20 he had called me into the office and advised
21 me to change the hours to this; and, at that
22 time, I took -- I had Mr. Nelson come into
23 the office with me. We called Peter

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1 Leishman, had him on the speaker phone, and I
2 advised him verbally that the hours -- that
3 these were the hours that he could go on.
4 Q Did Mr. Culliford tell you why he was
5 changing the operating hours?
6 A Not really, no. I assumed it was because of
7 what I had told him, but I don't know.
8 Q Was there any discussion of changing the
9 hours to coincide more with the operations at
10 the quarry?
11 A No. That was the extent of the conversation
12 I had with Mr. Culliford.
13 Q So there was basically no conversation; you
14 were just told that the operating hours would
15 now be 4:00 a.m. to 1:00 p.m.?
16 A That I -- I was told that I could contact Mr.
17 Leishman and advise him that they could work
18 those hours, correct.
19 Q Okay. And that was the extent of the
20 conversation?
21 A That's right.
22 Q Did Mr. Leishman say anything when you told
23 him that the hours were being changed?

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1 A I don't know. I don't recall. I'm sure he
2 acknowledged what the hours were.
3 Q Did he tell you that it would still be
4 difficult to make three trips a day if he
5 were limited to those hours?
6 A I really don't recall what he said. I really
7 don't.
8 Q Okay. Do you know what the purpose of
9 limiting the hours of operations was?
10 A I think it was -- I don't really know for
11 sure at all, no. He didn't want his crews
12 and our crews up there at the same time.
13 Q Who is he?
14 A Mr. Culliford.
15 Q So the way to keep the crews from being there
16 at the same time was to limit the hours that
17 Milford-Bennington could operate?
18 A Right.
19 Q Even though, I think you agreed earlier, that
20 the dispatching system had dealt with
21 separation of trains and crews adequately for
22 11 or so years, correct?
23 A We had no problem that I'm aware of.

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1 Q Okay. Did you ever think or did anybody ever
2 indicate that the reason for these restricted
3 operating hours was to punish
4 Milford-Bennington for not using the derail
5 device?
6 A I wouldn't say that. I think it was a
7 legitimate concern of safety by Mr. Culliford
8 and Springfield Terminal. They felt that Mr.
9 Leishman had lessened his safety procedures,
10 and they felt that some type of action had to
11 be taken to ensure that nothing would happen.
12 Q Although there was a derail in place as of
13 June 20th on the Guilford side of the street
14 there, isn't that right?
15 A That's correct.
16 Q And so as far as you know, did
17 Milford-Bennington use that derail as
18 instructed?
19 A I'm almost positive they did because I
20 believe somebody was sent up there to observe
21 them.
22 MR. HOWARD: Mark that as Exhibit No.
23 4, please.

C

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

DEPOSITION OF SYDNEY B. CULLIFORD, taken
pursuant to Notice on behalf of Granite State
Concrete Company, Inc., and Milford Bennington
Railroad Company, Inc., before Simonne J. Elwood,
R.P.R. and a Notary Public in and for the
Commonwealth of Massachusetts, at the office of
Guilford Rail System, Iron Horse Park, North
Billerica, Massachusetts, commencing on Monday,
November 3, 2003 at 1:40 p.m.

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DEPONENT DIRECT REDIRECT CROSS RECROSS

SYDNEY B. CULLIFORD

By Mr. Howard 4 --

By Mr. Culliford 82 --

EXHIBITS

EXHIBIT NO. DESCRIPTION PAGE NO.

1 Verified Statement of Sydney B. 18
Culliford

2 Verified Statement of Sydney B. 38
Culliford in Support of Motion to
Dismiss and Reply of the Boston
and Maine Corporation and The
Springfield Terminal Railway
Company

3 Invoice - 6/30/03 to Mr. Richard 67
Miller from Peter R. Leishman

4 Guilford Rail System 78
Supplemental Bulletin Order No.
3-006G - In Effect 0700 Friday,
June 20, 2003

APPEARANCES:

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JAMES E. HOWARD, ESQ.
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IRON HORSE PARK
NORTH BILLERICA, MA 01862-1692
REPRESENTS BOSTON AND MAINE CORPORATION
and SPRINGFIELD TERMINAL RAILWAY
COMPANY

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(Deposition of Sydney B. Culliford
commencing at 1:40 p.m.)

SYDNEY B. CULLIFORD

A witness called on behalf of the
Granite State Concrete Company, Inc., and
Milford Bennington Railroad Company, Inc.,
first having been duly sworn, under oath,
deposes and says as follows:

DIRECT EXAMINATION

- Q (By Mr. Howard) Mr. Culliford, you're
employed by Guilford, I take it?
A That's correct.
Q What's your position?
A Vice President of Transportation.
Q How long have you held that position?
A With Guilford, 20 some odd years.
Q And before that, with Boston and Maine?
A That's correct.

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1 Q What are your responsibilities at this point?
2 A My responsibilities are for the operations,
3 safe provisions of the trains that operate on
4 the railroad.
5 Q Are you the Chief Officer of the company in
6 terms of rail operations?
7 A That's correct.
8 Q Okay. To whom do you report?
9 A Mr. Steiniger.
10 Q Okay. Do you have people who report to you?
11 A Yes, I do.
12 Q Who are they?
13 A I have two general managers, the Director of
14 Operations that report to me and an assistant
15 to the Vice President, and that's it, and a
16 secretary.
17 Q Okay. You're familiar, I take it, with the
18 Hillsboro branch?
19 A Yes, I am.
20 Q And are you generally familiar with the
21 Milford-Bennington operations on the
22 Hillsboro branch?
23 A Yes, I am.

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1 Q Now, do you recall in December of 2002
2 talking to Mr. Zompa to tell him to put a
3 derail device on the Milford-Bennington line?
4 A Yes, sir.
5 Q What caused you to do that, do you recall?
6 A Well, there was cause by the fact that we
7 were -- there had been some dialogue about
8 service going on -- additional service going
9 on on the Milford-Bennington line, and it was
10 mutually agreed at that time that a derail
11 should go on. So I said, "Let's get it on
12 and get it over with."
13 Q Okay. The service being the passenger
14 service at Wilton Scenic was about to start?
15 A That's correct. It was going to start
16 sometime, that's correct.
17 Q And the dialogue that you referred to, were
18 you involved in that?
19 A With the Milford-Bennington?
20 Q With anybody? I think you said dialogue.
21 A No. Just as far as putting the derail on,
22 that was my involvement.
23 Q Okay. Who did you talk to, just Mr. Zompa?

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1 A Mr. Zompa and Mr. Towle.
2 Q Okay. And what did you tell them?
3 A They had dialogue with -- They had had
4 dialogue with Mr. Leishman, and it was
5 mutually agreed that it would go on there, so
6 I said, "Let's put it on."
7 Q Okay. And why in December -- Well, do you
8 remember the date that that happened?
9 A December, about December 12th, I think it
10 was.
11 Q Why at that particular time?
12 A No real reason, just it was talked about, and
13 there was discussion that I was not involved
14 with the passenger service, and I said,
15 "Let's put it on."
16 Q Okay. Were you aware that two passenger cars
17 had been delivered at about that time to the
18 Milford-Bennington line?
19 A That's correct, they were. I don't know the
20 approximate time, but they were delivered
21 about that time.
22 Q Okay. Were you -- Do you know where those
23 cars were on December 12th?

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1 A They were up on the Milford-Bennington
2 Railroad to my knowledge.
3 Q Who made the decision to send Mr. Zompa to
4 install the derail, was that yours?
5 A Well, he didn't install the derail.
6 Q To deliver the derail?
7 A What?
8 Q To deliver the derail?
9 A Deliver it?
10 Q Yes.
11 A Yeah, that was mine.
12 Q Okay. Did you talk with anybody about that
13 before you decided to do it?
14 A Only from the discussion I had with Mr.
15 Steiniger about it. That's all.
16 Q What was the substance of that discussion?
17 A Just that there is a -- There's -- Well,
18 there was -- I've had experience on them, on
19 the Milford-Bennington, as far as that line
20 is concerned, and you can properly say that
21 those cars, Bud cars were sent up to the
22 Milford-Bennington, didn't know where they
23 were going to store them; and I said, "Hey, I

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1 think it's a good idea to put the derail on."
 2 Q Okay. Did you talk to Mr. Fink at that time
 3 when you decided that the derail ought to go
 4 up there?
 5 A No.
 6 Q You never notified him that it was happening?
 7 A No.
 8 Q Did Mr. Steiniger, to your knowledge?
 9 A I don't know.
 10 Q Do you talk to Mr. Fink on a regular basis?
 11 A Not really.
 12 Q Do you ever talk to him?
 13 A Oh, yes.
 14 Q Does he call you directly?
 15 A Yes.
 16 Q How often?
 17 A At his discretion.
 18 Q Once a week, once a day?
 19 A Maybe once a week.
 20 Q Okay. Do you ever call him?
 21 A Not really. If there's a reason to call him;
 22 if I have no reason to call him, I don't call
 23 him.

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1 Q Now, did anyone ever tell you where the two
 2 passenger cars were on December 12th and
 3 whether they were secured or anything like
 4 that?
 5 A No.
 6 Q Did you ever ask anybody to check the
 7 passenger cars to see where they were?
 8 A No.
 9 Q I think, as I understand your testimony,
 10 prior to December 12th, 2002, you had not had
 11 any conversation with Mr. Leishman or anyone
 12 else about the derail or the passenger cars,
 13 correct?
 14 A No, that's correct. I had not had any
 15 dialogue.
 16 Q And who was it that had the dialogue that you
 17 were relying on, Mr. Towle?
 18 A Either Mr. Towle or Mr. Zompa would be one of
 19 the two that would be involved.
 20 Q Okay. Did you tell both of them to do
 21 something with Mr. Leishman? What was the
 22 instruction?
 23 A The instruction was to go up and see about

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1 putting the derail on which was agreed to be
 2 put on by Mr. Leishman on his property.
 3 Q When was -- According to your understanding,
 4 when was there an agreement between Mr.
 5 Leishman and somebody from Guilford about the
 6 derail?
 7 A Sometime prior to December 12th.
 8 Q Do you know when?
 9 A No.
 10 Q Do you know who it was who talked with Mr.
 11 Leishman about the agreement?
 12 A No, I don't. Probably I would have to say
 13 it's either Mr. Towle or Mr. Zompa, one of
 14 the two. Of the two, it would probably be
 15 Mr. Towle. He normally did the interface
 16 with Mr. Leishman.
 17 Q So, assuming it was Mr. Towle, at some point,
 18 he told you that there was an understanding
 19 with Mr. Leishman?
 20 A Uh-huh.
 21 Q You don't have any recollection of a
 22 conversation with Mr. Fink about that time
 23 indicating that he was going to check to see

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1 if the derail was up there?
 2 A No.
 3 Q Had Mr. Zompa ever expressed to you the
 4 thought that Mr. Fink might be up there to
 5 check to see whether the derail had been
 6 delivered?
 7 A No.
 8 Q Do you know why the derail was placed on the
 9 Milford-Bennington line rather than the
 10 Guilford line?
 11 A Well, as I understand, and I think it was a
 12 good move, was to put it on the
 13 Milford-Bennington, and it was mutually
 14 agreed to go up there, and it was just on
 15 their line just north of the crossing.
 16 Q Okay. Do you think that it would have made
 17 any difference in terms of safety if it had
 18 been put on the Guilford side of the line?
 19 A The only difference being is that crossing
 20 was involved. That's all.
 21 Q Based on your experience and many years at
 22 Guilford, is there any kind of policy or
 23 attitude that you're aware of concerning

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1 passenger operations on Guilford property?
 2 A Any kind of policy?
 3 Q Is passenger operation something that
 4 Guilford encourages, discourages, doesn't
 5 care about?
 6 A Well, we're not -- We've got the Amtrak
 7 operating on us.
 8 Q Right. But that was not voluntarily, right?
 9 A That's correct.
 10 Q And the MBTA operates, but that was --
 11 there's no way to avoid that, right?
 12 A Well, that operates on their railroad.
 13 Q Do they operate on any Guilford lines?
 14 A No.
 15 Q No longer?
 16 A No.
 17 Q So is there any -- Other than Amtrak, is
 18 there any passenger operation on Guilford?
 19 A No.
 20 Q I'm going to ask you to take a look at a
 21 document that was marked last week as Exhibit
 22 No. 1 from Mr. Towle's deposition, and it's a
 23 bulletin, and I ask you if you're familiar

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1 with that? (Indicating)
 2 A Yes, I am.
 3 Q Okay. Were you involved in having that
 4 bulletin issued?
 5 A What do you mean by being involved?
 6 Q Did you direct somebody to issue this thing?
 7 A No, that's a normal function.
 8 Q A normal function of who?
 9 A Of the general manager and the rules examiner
 10 to issue a bulletin, in this case, where
 11 there was something that was going to change
 12 the operation.
 13 Q Okay. Now, is it your view that this
 14 bulletin was intended to govern Guilford
 15 crews and to alert them to a derail on the
 16 Milford-Bennington line, or was it also
 17 intended to govern Milford-Bennington crews?
 18 A It was to govern both crews, both the
 19 Milford-Bennington, and our own, although
 20 this is a Guilford bulletin.
 21 Q Okay. Now, if Milford-Bennington had issued
 22 a bulletin that related to Milepost 14 on the
 23 Hillsboro branch which is owned by Guilford,

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1 would that have been something that would
 2 probably govern Guilford trains?
 3 A Try that again.
 4 Q Suppose Milford-Bennington issued a bulletin
 5 that said that at Milepost 14, if there's a
 6 Guilford train going to the quarry on the
 7 Milford-Bennington line, for example, that it
 8 had to stop at Milepost 14 and get permission
 9 from Milford-Bennington to continue?
 10 A They would have a copy of our bulletin. The
 11 Milford-Bennington crews would have a copy of
 12 our bulletin.
 13 Q No. But I'm talking -- I'm asking you a
 14 hypothetical question. If Milford-Bennington
 15 issued a bulletin relating to Milepost 14 on
 16 the Guilford System, would that be a
 17 legitimate way to govern Guilford operations
 18 on its line? Would Guilford comply with
 19 that?
 20 A No.
 21 Q Why not?
 22 A We would take issue with it.
 23 Q Why would you take issue?

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1 A Well, because there's a bulletin that's on
 2 Springfield Terminal's property.
 3 Q Okay. Well, why is this bulletin you're
 4 looking at as Exhibit 1 any different? Why
 5 would that govern Milford-Bennington?
 6 A It was put on as information for our crews
 7 and for their crews so that they knew a
 8 derail was there that was mutually agreed
 9 upon by the Milford-Bennington and ourselves.
 10 Q Right. But is this bulletin -- does this
 11 have the force of a binding order on
 12 Milford-Bennington crews being issued as it
 13 is by Guilford and relating to a derail that
 14 is on Milford-Bennington's line?
 15 A I would say, yes, based on the fact that
 16 there's a mutual agreement of this bulletin
 17 being out and that even though it's on the
 18 Milford-Bennington that it is -- it is okay.
 19 It should be in effect.
 20 Q Okay.
 21 A If for some reason that there was any
 22 opposition to it, the Milford-Bennington
 23 should take issue with us, and they didn't.

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1 with the bulletin?
2 A That's one of the issues, that's correct.
3 Q And what other issues?
4 A Well, the issue being is that there's a
5 derail that's out there that's been
6 installed, and that derail is there for the
7 purpose of protecting the property; and if
8 there's any -- after understanding between my
9 people and Mr. Leishman, if it isn't going to
10 be adhered to, it's saying that I'm not going
11 to live up to the bulletin that's out there,
12 and you have a right or have a necessity to
13 tell us that you don't want to do it.
14 Q Okay. But your assumption is that there was
15 an agreement; and as I understand your
16 testimony, you're saying that the problem was
17 that the bulletin was issued and
18 Milford-Bennington did not let you know that
19 it didn't agree with the bulletin; that's the
20 problem, right?
21 A That's what I say, yes.
22 Q Okay. The next sentence in Paragraph 3, it
23 says, "However, as Guilford looked more

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1 closely at the operations of the MBR, it
2 became apparent that a derail device made a
3 great deal of sense from a freight and
4 passenger safety perspective --." Do you see
5 that?
6 A Yes, I do.
7 Q When is it that Guilford looked more closely
8 at the operations of MBR?
9 A About the time that this derail was going to
10 be put on in that area.
11 Q So after December 12th?
12 A No. It would be prior to December 12th is
13 that we are looking to put the derail on. My
14 people had meetings with Mr. Leishman, and it
15 had been agreed that it would be put on.
16 Q But what, specifically, did you look more
17 closely at in terms of the operations of
18 Milford-Bennington?
19 A Well, I looked at the fact that, No. 1,
20 there's a grade there. There's a grade on
21 that line as it states in my statement here;
22 and in my own experience being on that line
23 and operating on that line, I had a damn near

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1 catastrophic thing happen to me on that line.
2 So I'm very knowledgeable about the grade.
3 Q Okay. Well, the grade has been the same
4 since the beginning of the trackage rights of
5 Milford-Bennington, right?
6 A Yes, that's true.
7 Q Okay. And the first time -- You're saying
8 the first time that there was concern about
9 the grade was in December of 2002?
10 A There's always been a concern on that grade
11 on that line.
12 Q Okay. But there was never a concern
13 sufficient to install a derail, correct?
14 A No, but it was agreed that -- mutually agreed
15 that a derail would go on the line, and
16 that's where I say we were with the thing.
17 Q Well, I'm just trying to understand what
18 you're referring to when you say you looked
19 more closely.
20 Did you, in December of 2002, assign
21 anybody to study the Milford-Bennington
22 operations?
23 A No, but we -- No, we did not.

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1 Q Was there any analysis done of their
2 operations?
3 A It was obvious that under the plan that we
4 knew about that there was going to be
5 passenger and freight operations on the
6 Milford-Bennington; and that being the case,
7 let's put the derail on, and that's what we
8 did. That was agreed upon.
9 Q Okay. Now, do you know whether the derail
10 was used when the Wilton Scenic operated?
11 A Do I know whether it was used?
12 Q Was it in the closed position or locked
13 position or derail position, whatever you
14 call it?
15 A Not when I saw it.
16 Q When Wilton Scenic was operating?
17 A I don't know.
18 Q Did anybody ever tell you that the derail
19 wasn't used according to the bulletin when
20 the Wilton Scenic was operating?
21 A No.
22 Q Now, the next page of that statement, in
23 Paragraph 8, you say that, "-- Guilford

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1 determined that the MBR could not be relied
 2 upon to take appropriate measures to ensure
 3 the safe operation --," and as a result, you
 4 immediately elected to implement additional
 5 safety measures.
 6 You made this decision at Wilton after
 7 you had talked with Mr. Leishman?
 8 A That's correct.
 9 Q Right there on --
 10 A No, no. I consulted with Mr. Steiniger and
 11 told him what I saw and my recommendation.
 12 Q Did you consult with anybody else other than
 13 Mr. Steiniger?
 14 A No.
 15 Q Mr. Fink wasn't involved?
 16 A No.
 17 Q Now, you say -- In Paragraph 9, you say, "The
 18 first of these measures was to install a
 19 derail on Guilford's property --." That's
 20 the one that's there now right across the
 21 road from the Milford-Bennington property?
 22 A That's correct.
 23 Q Okay. And did you take steps to monitor that

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1 derail to see whether it was being used?
 2 A Yes.
 3 Q What steps?
 4 A I had people up there physically watching the
 5 operations of the Milford-Bennington and the
 6 operations over that line and our own people.
 7 Q And is there any report that the derail
 8 wasn't properly used?
 9 A Our derail?
 10 Q Right.
 11 A The new one?
 12 Q Right.
 13 A No.
 14 Q Okay. In Paragraph 10, you say you also
 15 required MBR crews to attend a rules training
 16 and qualifications class the next day. Was
 17 that a class specifically to talk about the
 18 use of the derail?
 19 A That's correct. That was part of it and
 20 general review of the rules.
 21 Q Okay. And Milford-Bennington was not
 22 permitted to operate until they attended
 23 that, right?

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1 A That's correct.
 2 Q Did you give any -- Did you give any class on
 3 derail used to Guilford crews at that time as
 4 well?
 5 A I don't know whether they did specifically or
 6 not.
 7 Q Did you direct -- Well, how did these classes
 8 take place? Did you issue the order that
 9 they should take place?
 10 A I told them that they should have a class
 11 with the Milford-Bennington crews.
 12 Q Okay. You told who, Mr. Zompa?
 13 A Yes, sir and Mr. Towle.
 14 Q Now, in Paragraph 11, you also adopted a new
 15 operating plan that allows MBR to operate on
 16 Guilford's line from 12:00 a.m. to 8:00 a.m.
 17 each day.
 18 Who decided on the 12:00 a.m. to 8:00
 19 a.m. time frame?
 20 A That was a discussion that I had with Tom
 21 Steiniger and myself.
 22 Q And was it your recommendation or his, or how
 23 did that come about?

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1 A It was a mutual recommendation that we --
 2 that we put this type of an operation in
 3 effect.
 4 Q Were you aware that the Granite State
 5 facility in Wilton was restricted in its
 6 hours of operation?
 7 A Not at that time, I was not aware of it.
 8 Q You had no idea whatsoever?
 9 A Huh?
 10 Q You had no idea about the restrictions?
 11 A No. At that time, I did not.
 12 Q You never heard that from Mr. Fink over the
 13 years?
 14 A No.
 15 Q Did you -- What's your understanding about
 16 the normal time of operation for
 17 Milford-Bennington prior to June 20th of this
 18 year?
 19 A They operated at their own discretion.
 20 Q Do you know what times their trains generally
 21 operate?
 22 A No, but they had the right to operate any
 23 time they wanted to.

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1 Q Before you imposed this 12:00 a.m. to 8:00
2 a.m. time frame, did you check to see when
3 Milford-Bennington was running its trains?
4 A Not really.
5 Q Did you care?
6 A I cared, but I also wanted to be sure that we
7 had a safe operation and that unless I heard
8 otherwise from Milford-Bennington, that we
9 would operate between 12:00 midnight and 8:00
10 a.m.
11 Q You didn't consult with the
12 Milford-Bennington to find out whether this
13 would be inconvenient or possible for them?
14 A No, nor did they with us.
15 Q Well, they didn't have any input to the 12:00
16 to 8:00 a.m. time frame?
17 A Excuse me?
18 Q They didn't have any input in the decision to
19 limit their operations from 12:00 a.m. to
20 8:00 a.m., right?
21 A On that, no.
22 Q Didn't you assume that that was going to be
23 inconvenient for them?

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1 A I didn't know whether it was going to be an
2 inconvenience or not. My concern was safety
3 at that point.
4 Q You go on to say there that that operating
5 window is substantially greater than any that
6 existed when both MBR and Guilford were
7 operating on the line during the same
8 periods. How was it substantially greater?
9 A We gave them a specific time to operate
10 without any interference whatsoever. It was
11 their railroad from 12:00 a.m. to 8:00 a.m.
12 in the morning. There was nobody on the
13 railroad but them. They could run back and
14 forth as much as they wanted to without any
15 interference from Guilford.
16 Q Okay. That, in your view, is a greater
17 window than being able to operate 24 hours a
18 day?
19 A Certainly. It gave them an opportunity
20 without any delays at all from our
21 operations.
22 Q Are you aware that they were delayed because
23 of Guilford operations?

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1 A I'm aware that they could possibly be
2 delayed, and I wanted to be sure that we had
3 no two railroads on that property at the same
4 time.
5 Q I understand that. I'm just asking why you
6 think it was substantially greater to have
7 the track all to yourself for 8 hours versus
8 the ability to operate 24 hours with --
9 A Well, it can go down and back. I didn't hear
10 anything differently from them, and I was
11 certainly going to be sure that we were not
12 on the railroad when they're there.
13 Q You say you didn't hear anything differently,
14 but you didn't consult with them before you
15 made this decision, right?
16 A That's correct.
17 Q Did you learn subsequently that they were
18 unhappy with 12:00 a.m. to 8:00 a.m.?
19 A Yes, I did.
20 Q In Paragraph 12 there, Mr. Culliford, it
21 talks about MBR operating trains, possibility
22 of operating trains longer than nine cars.
23 Do you see that?

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1 A Uh-huh.
2 Q Are you familiar with the trackage rights
3 agreement?
4 A Yes, I am.
5 Q Are you familiar with the restriction there
6 to ten cars per train?
7 A That's correct.
8 Q So it wouldn't have been -- It wouldn't have
9 been of any help to MBR to try to run trains
10 greater than ten cars in length unless
11 Guilford would agree to change the trackage
12 rights agreement, right?
13 A Every time a train went down there, they
14 never ran with ten cars.
15 Q But you're saying that they could have added
16 one more car per train?
17 A That's correct.
18 Q Guilford wasn't offering to waive the
19 restriction that would have permitted them to
20 run 15 or 20 cars, right?
21 A It wasn't asked.
22 Q Maybe you weren't asked, but you're
23 volunteering this information, and I'm just

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1 derail device, right?

2 A That's right.

3 Q Okay. Now, my question is: Is there

4 anything else that you think that they did

5 that willfully disregarded safety and

6 operating rules?

7 A Well, one thing that comes up is the fact

8 that they were out on our railroad without

9 authority.

10 Q Doing maintenance?

11 A Huh?

12 Q Doing maintenance?

13 A Yes.

14 Q Okay. And what's the basis for your

15 knowledge of that?

16 A Came out of the deposition of Mr. Leishman.

17 Q Okay. Mr. Leishman's statement?

18 A Statement, yeah.

19 Q Did anybody at Guilford ever tell you that

20 they saw Mr. Leishman out there?

21 A No.

22 Q Now, in Paragraph 8, you say that "-- MBR was

23 willing to abandon its prior agreement with

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1 A I thought the bulletin was quite clear. It

2 did not relate to just passenger. The

3 bulletin was clear that it related to trains.

4 Q The bulletin isn't the agreement, is it?

5 A It's part of the agreement.

6 Q Well, I thought we just decided the agreement

7 was whatever Mr. Leishman and Mr. Towle

8 talked about in December of 2002?

9 A Of the derail going in place on the property

10 of the Milford-Bennington and a bulletin

11 being issued is, to my knowledge, what was

12 agreed to.

13 Q Okay. Let me ask again: Is it your

14 understanding that Milford-Bennington

15 believes that the agreement, including the

16 bulletin, means that the derail should be

17 used for passenger and not freight?

18 A I don't know what the interpretation -- what

19 their interpretation is. The bulletin is

20 quite clear.

21 Q Okay. Now, in 8, you also say that

22 Milford-Bennington failed to inform anyone

23 from Guilford that the derail was not in

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1 Guilford regarding use of the derail --," and

2 the agreement you're talking about there, I

3 take it, is whatever agreement Mr. Leishman

4 reached with Mr. Towle or others in December

5 of 2002, is that right?

6 A That's correct.

7 Q Okay. And it's not any agreement that you

8 had any personal involvement in, right?

9 A Only through those, no.

10 Q And you understand, I take it, that

11 Milford-Bennington doesn't share Guilford's

12 view of what the agreement was?

13 A I don't know that. I was not aware of that.

14 Q You're not aware that Milford-Bennington

15 believes that the agreement related to the

16 use of a derail only for passenger service,

17 not for freight?

18 A I can't see how they could interpret it that

19 way.

20 Q Well, I understand your position, but are you

21 telling me that you don't understand that

22 Milford-Bennington views the agreement as

23 relating only to passenger?

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1 service. The derail was on the track, right?

2 A The derail? It was installed on the track,

3 the track structure.

4 Q Okay. And derails work, in general terms, by

5 somebody putting it into the derailing

6 position or taking it out of the derailing

7 position, correct?

8 A That's correct.

9 Q Okay. So what's your -- When you say in

10 service, what do you mean there?

11 A It means that to be in service, it means that

12 when that derail should be on, be on the on

13 position, except when a train is passing over

14 it.

15 Q Okay. And so far as you know, the derail was

16 always in the on position when the passenger

17 trains were operating, right?

18 A I don't know that.

19 Q You have no information to indicate that it

20 wasn't being used when passenger trains were

21 operating, right?

22 A I have no information. My information is

23 what I saw when I was watching their train go

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1 over -- go onto the property of the
 2 Milford-Bennington.
 3 Q Okay. There came a time, I take it, when the
 4 so-called operating window was changed from
 5 12:00 a.m. to 8:00 a.m. to 4:00 a.m. to 1:00
 6 p.m. Do you recall that?
 7 A Yes, I do.
 8 Q Did you make that decision?
 9 A Yes, I did, with Mr. Steiniger.
 10 Q Okay. Was anybody else involved in that
 11 decision?
 12 A Mr. Towle was involved with that as well.
 13 Q Okay. And whose idea was it?
 14 A I would say it was a joint idea, the purpose
 15 being to give an absolute block to the
 16 Milford-Bennington to operate on which we
 17 would not operate ourselves.
 18 Q Okay. And why was the decision made to
 19 change the hours?
 20 A Because we had heard that the hours, the
 21 12:00 to 8:00 a.m., were not workable for the
 22 Milford-Bennington.
 23 Q Did you also understand that

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1 Milford-Bennington wanted to operate as it
 2 had in the past to at least 6:30 in the
 3 afternoon?
 4 A I wasn't aware of that; but, in any event, we
 5 wanted to have time enough to work on our
 6 own -- work and operate on our own railroads,
 7 so we were not going to have two railroads
 8 out on the property together. So that's
 9 really what drives the window.
 10 Q Were you aware when this change was made of
 11 the restrictions on the Granite State
 12 operations of Wilton?
 13 A I'm not sure what you're talking about.
 14 Q Were you aware, at that time, that Granite
 15 State could not operate at Wilton except
 16 Monday through Friday, 6:30 a.m. to 6:30
 17 p.m.?
 18 A No.
 19 Q Did you ever become aware of that?
 20 A No, because I'm interested in the
 21 Milford-Bennington Railroad, and the
 22 Milford-Bennington Railroad can run seven
 23 days a week if they want to.

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1 Q Well, you understand that they have one
 2 customer, and the trackage rights are limited
 3 to service of Granite State, right?
 4 A That's right.
 5 Q So you never bothered to find out whether
 6 there were any restrictions in terms of the
 7 operations at Wilton to Granite State?
 8 A No, I didn't.
 9 Q Nobody ever told you that when -- Well, who
 10 suggested a change from 12:00 to 8:00 to 4:00
 11 to 1:00?
 12 A That was suggested based on some dialogue
 13 that -- to be honest with you, I can't
 14 remember who had the dialogue that the --
 15 that the 12:00 to 8:00 was not -- was posing
 16 problems. So that's why we changed it. But
 17 who, at that time, I don't remember to be
 18 honest with you.
 19 Q Well, whoever it was, what kinds of problems,
 20 did they tell you?
 21 A What kind of problems?
 22 Q You said 12:00 to 8:00 was posing problems,
 23 and I assume they were problems for Granite

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1 State and/or Milford-Bennington?
 2 A Just operating at that window was not
 3 opportune for them, and so we just
 4 extended -- changed it and moved it and
 5 extended it out. They didn't ask the reason
 6 why.
 7 Q And you didn't care why it was not an
 8 opportune window for them?
 9 A I can't say I didn't care. That's what I
 10 went with at the time was to go from 4:00
 11 a.m. to 1:00 p.m. which gave them the
 12 daylight to operate in.
 13 Q Well, if you didn't understand what
 14 restrictions applied at Wilton to Granite
 15 State's operations, how could you make a
 16 decision whether to change the window and
 17 what to change it to?
 18 A Based on the -- Basically, that we needed
 19 time for our own railroad, and we were going
 20 to give them time, and we gave them the best
 21 part of the day to operate on their road, and
 22 we had to work from the 4:00 p.m. to 4:00
 23 a.m., so 1:00 p.m. to the following morning

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1 for two trains to be in there at the same
2 time?
3 A There's no physical way, but neither are we
4 going to have anybody on that -- when I say
5 anybody, any maintenance of way or any high
6 rails or any trains on that line which is
7 different than prior to June 19th.
8 Q Okay. Let's stay with trains. Prior to June
9 19th, if the Milford-Bennington asked that --
10 the train asked the dispatcher for permission
11 to go from 16.36 to Granite State and got
12 permission, then there would be no Guilford
13 train in that area, right?
14 A That was yard limits, and there would be no
15 train in that area. Yeah, that's obvious.
16 It's a single track.
17 Q Okay. So to the extent of trains and train
18 operations, the situation now is the same as
19 it was prior to June 19th?
20 A No, that's not correct. You have a -- You
21 have now -- you could very well, prior to
22 June 19th, have a train go from Wilton to
23 Milford and have the maintenance of way out

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1 on that railroad working.
2 Q I'm not talking about maintenance of way.
3 I'm talking about --
4 A Well, I'm talking about the railroad
5 operations. So you've got to take them all
6 into consideration.
7 Q All right. Let's talk about maintenance of
8 way then. Prior to June 19th, as you say,
9 there could be a maintenance crew, and there
10 could be a train in there at the same time?
11 A That's correct.
12 Q And in those situations, the dispatcher would
13 make sure that the train and the maintenance
14 crew were aware of each other, correct?
15 A That's correct.
16 Q Okay. And are you aware of any instance at
17 all where there was a problem with, a safety
18 problem with a maintenance crew and a
19 Milford-Bennington train?
20 A I'm not aware.
21 Q Okay. So prior to June 19th, there was no
22 evidence or no indication that there was any
23 safety problem between Milford-Bennington

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1 trains and Guilford track workers, right?
2 A But after June 19th and on November 10th,
3 there's an absolute block there now that I
4 don't have to worry about unless somebody
5 violates the operating rules.
6 Q Right. But there was nothing you knew about
7 to worry -- There was nothing to worry about
8 prior to June 19th as far as you knew?
9 A Not that I know of, but why take a chance.
10 Q Okay. Now, after December 12th, when the
11 derail was placed on the Milford-Bennington
12 line and prior to the time it was removed,
13 did Guilford operate over the
14 Milford-Bennington line?
15 A I don't know.
16 Q There would be the possibility of some
17 ballasting, correct?
18 A There would be.
19 MR. HOWARD: Let's mark that as
20 Exhibit No. 3.
21 (Whereupon the Stenographer marked as
22 Exhibit No. 3 - Invoice - 6/30/03 to Mr.
23 Richard Miller from Peter R. Leishman.)

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1 Q Mr. Culliford, the document marked Exhibit 3
2 is a three-page document. The top one is an
3 invoice from Milford-Bennington to Boston &
4 Maine; and as I understand it, it looks like
5 it's an invoice for three Guilford trains
6 moving over the Milford-Bennington line in
7 the year 2003; is that -- would that be your
8 understanding?
9 A How many trains?
10 Q Well, it looks to me like three trains; three
11 in and two out.
12 A That's what I see.
13 Q Okay. So would that lead you to believe that
14 there were at least those five trains that
15 moved over the -- Guilford trains that moved
16 over Milford-Bennington in 2003?
17 A I would accept that as a conclusion.
18 Q Okay. Are you aware of any report or
19 information from the Guilford crews on those
20 trains that the derail on the
21 Milford-Bennington property was opened or
22 closed or anything?
23 A I don't have any knowledge of that at all.

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1 A Not really, not very much.
 2 Q You don't recall that Guilford opposed
 3 Milford-Bennington's attempt to buy the land?
 4 A I can honestly say, no, I was not involved
 5 with it.
 6 Q Do you know Peter or John MacLellan?
 7 A No.
 8 Q Never met them?
 9 A Nope.
 10 Q Have you ever heard anyone at Guilford,
 11 including Dave Fink, speak about
 12 Milford-Bennington or Peter Leishman or
 13 Granite State or the MacLellans?
 14 A No.
 15 Q Not one word?
 16 A No.
 17 Q Never any derogatory comments about Mr.
 18 Leishman or Milford-Bennington?
 19 A I haven't heard any. I haven't been
 20 involved.
 21 Q You've never been sitting around in Mr.
 22 Fink's corner office with some of the staff
 23 and heard him say anything about

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1 Milford-Bennington or Peter Leishman?
 2 A Not to my knowledge.
 3 Q You can't recall anything?
 4 A Nope.
 5 MR. HOWARD: Could you mark that one,
 6 please?
 7 (Whereupon the Stenographer marked as
 8 Exhibit No. 4 - Guilford Rail System -
 9 Supplemental Bulletin Order No. 3-006G - In
 10 Effect 0700 Friday, June 20, 2003.)
 11 Q Mr. Culliford, the document that has been
 12 marked Exhibit 4 is another Supplemental
 13 Bulletin Order dated June 20, 2003. Have you
 14 seen that before? (Indicating)
 15 A Yes, I have.
 16 Q Okay. Now, this relates, as I understand it,
 17 to a derail on the main track at the south
 18 end of the Wilton run around. Are you
 19 familiar with that location?
 20 A Yes, I am.
 21 Q And have you ever been out there to see the
 22 derail when it was there?
 23 A No, but I know it's there or was there.

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1 Q And that's the one, as I understand it, that
 2 was moved to the north end of the Wilton
 3 Yard, correct?
 4 A That's correct.
 5 Q Now, when that derail -- how long was the
 6 derail at the south end on the main line, do
 7 you know, the main track?
 8 A I don't know how long it's been there.
 9 Q Are you aware of any bulletin governing the
 10 derail when it was there?
 11 A Well, it was on the side track to my
 12 knowledge.
 13 Q Well, this says main track. Are you sure
 14 there are not two derails there, one on the
 15 side track and one on the main track?
 16 A The one that -- I'm not aware of the one --
 17 There was one derail on the main track south
 18 of Wilton, that's correct.
 19 Q Okay. And you're not aware of any bulletin
 20 that related to that?
 21 A Not that I'm aware of.
 22 Q Are you aware of what the operating practice
 23 was before that derail was moved; in other

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1 words, did Guilford trains passing by there
 2 open and close the derail, or did
 3 Milford-Bennington trains open and close the
 4 derail?
 5 A That's what I expect them to do, that's
 6 correct.
 7 Q Do you know for a fact what they did?
 8 A No, I don't. No.
 9 Q Is there any record that Guilford keeps that
 10 would indicate whether trains stopped there
 11 to open and close the derail?
 12 A No, not to my knowledge, there would be
 13 anything there.
 14 Q Well, if a Milford-Bennington train went
 15 through there and left the derail in an
 16 opened position and a Guilford train came to
 17 it in an opened position, would that be
 18 reported?
 19 A That should be reported, that's correct.
 20 Q Do you have any record of that?
 21 A I don't have any record of that.
 22 Q Never heard of anything one way or the other?
 23 A No.

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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

DEPOSITION OF LARRY L. FERGUSON, taken
pursuant to Notice on behalf of Granite State
Concrete Company, Inc., and Milford Bennington
Railroad Company, Inc., before Simonne J. Elwood,
R.P.R. and a Notary Public in and for the
Commonwealth of Massachusetts, at the office of
Guilford Rail System, Iron Horse Park, North
Billerica, Massachusetts, commencing on Friday,
October 31, 2003 at 11:57 a.m.

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APPEARANCES:

JAMES E. HOWARD, ESQ.
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and SPRINGFIELD TERMINAL RAILWAY
COMPANY

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EXHIBITS

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1	Guilford Rail System Supplemental Bulletin Order No. 3-006H - In Effect 0001 Monday, June 23, 2003	40

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(Deposition of Larry L. Ferguson
commencing at 11:57 a.m.)

LARRY L. FERGUSON

A witness called on behalf of the
Granite State Concrete Company, Inc., and
Milford Bennington Railroad Company, Inc.,
first having been duly sworn, under oath,
deposes and says as follows:

DIRECT EXAMINATION

Q (By Mr. Howard) Mr. Ferguson, have you ever
been deposed before?
A Yes.
Q So you understand how this works. I ask
questions, and you answer them.
A Yes.
Q If you don't understand a question or if you
need clarification, please let me know.
A Yes.

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1 G-O-R-D-O-N, V-I-E-W-E-G.
 2 Q Anybody else?
 3 A You have the relief position, Dan Peck,
 4 P-E-C-K.
 5 Q Okay. And those four -- Anybody else?
 6 A We have a spare. You have Dave Nagy,
 7 N-A-G-Y, Dave Nagy.
 8 Q That's it?
 9 A Yeah.
 10 Q So those five people are the dispatchers who
 11 deal with District 2?
 12 A Right.
 13 Q Now, in addition to the Hillsboro branch,
 14 what other lines are within District 2?
 15 A You have the Portsmouth branch, and you have
 16 the freight main line that runs between
 17 Portland and North Chelmsford, and the New
 18 Hampshire main line that runs from North
 19 Chelmsford to Concord.
 20 Q Okay. Approximately how many trains a day
 21 are running on the lines within District 2,
 22 do you know?
 23 A Including passenger trains, you have

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1 approximately 40 trains a day.
 2 Q And some of those trains are passenger
 3 trains, right?
 4 A Yeah, that's correct.
 5 Q Would that be MBTA commuter trains?
 6 A Yes.
 7 Q And the Amtrak train between Portland and
 8 Boston?
 9 A Yes.
 10 Q And on those lines where you have Amtrak
 11 trains or MBTA trains, do you also have
 12 freight trains?
 13 A Yes.
 14 Q Might you also have maintenance-of-way
 15 workers out there on those lines?
 16 A Yes.
 17 Q Now, does the dispatcher control the movement
 18 of freight trains, passenger trains and
 19 maintenance-of-way people on those lines?
 20 A Yes.
 21 Q How does one become a dispatcher; how do you
 22 get qualified to be a dispatcher?
 23 A Well, you're trained under a train dispatcher

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1 while the train dispatcher is working, and
 2 you work directly under him. You review the
 3 road, then you come back in and train with
 4 the same dispatcher, and then you have a
 5 rules class; and then once you qualify from
 6 the rules, then you come back and train with
 7 the dispatcher again, the same dispatcher,
 8 and then you come through me, and then I will
 9 qualify you as a train dispatcher.
 10 Q When you say -- I think you referred to going
 11 out actually on the lines?
 12 A Yes.
 13 Q So part of the training, I take it, is that
 14 the dispatcher has to understand the physical
 15 characteristics of the line?
 16 A That is correct.
 17 Q How long does the process generally take from
 18 start to finish in order to train somebody to
 19 be a qualified dispatcher?
 20 A Six to eight weeks.
 21 Q And all of your dispatchers, I take it, have
 22 gone through this training program and are
 23 qualified?

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1 A Yes.
 2 Q And I take it that means that you're
 3 comfortable that they're all able to do their
 4 jobs as they're supposed to be done?
 5 A Yes.
 6 Q Now, on a line in District 2 where you have
 7 both freight and MBTA trains, how many trains
 8 per day would you have on the busiest of
 9 those lines?
 10 A Explain your question again.
 11 Q Well, one of the lines -- take one of the
 12 lines in District 2 like the freight and main
 13 line or the New Hampshire main, do either of
 14 those have MBTA operations?
 15 A Yes.
 16 Q And which of those has the most MBTA trains
 17 and how many?
 18 A 20 on District 2 that runs between Haverhill
 19 and Boston.
 20 Q That's the New Hampshire main line?
 21 A That's the New Hampshire main line.
 22 Q And how many freight trains on that line
 23 every day?

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1 A Eight trains.
 2 Q Eight?
 3 A Yeah.
 4 Q So the New Hampshire main is the busiest line
 5 in District 2 then, is that correct?
 6 A I wouldn't say it's the busiest line, but
 7 it's part of its duties.
 8 Q Well, what other line is busier? By busy, I
 9 mean, what other line in District 2 has more
 10 than 28 trains a day?
 11 A You have the District 3 portion of the
 12 railroad which controls out of Fitchburg
 13 going into Boston.
 14 Q And that's the MBTA trains as well?
 15 A Right.
 16 Q Okay. But that's District 3, not District 2?
 17 A Right.
 18 Q Okay. Now, take the New Hampshire main line
 19 with 28th trains, are freight trains and
 20 passenger trains in the same areas during the
 21 course of that day?
 22 A Yes.
 23 Q And I take it they're separated by direction

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1 of the dispatchers, correct?
 2 A Yes.
 3 Q And is there any problem, in general, in
 4 operating a railroad that way where you have
 5 freight and passenger trains on the same
 6 track controlled by the dispatcher?
 7 A No.
 8 Q That's pretty much the standard for railroads
 9 in this country, isn't it?
 10 A Yes.
 11 Q Now, are you familiar with the number of
 12 trains on the Hillsboro branch? In
 13 particular, all I'm concerned about, really,
 14 is the Hillsboro branch from Milepost 13 to
 15 the end of the branch which is approximately
 16 Milepost 16.36.
 17 A Yes.
 18 Q Okay. How many Guilford trains normally
 19 operate on that section of track?
 20 A None.
 21 Q There's no schedule?
 22 A Right.
 23 Q -- Guilford service in there?

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1 A Between 13 and 16?
 2 Q Yes.
 3 A There's no scheduled trains.
 4 Q Okay. Are there any Guilford customers in
 5 that area?
 6 A Between 13 and 16, I think you have one.
 7 Q Who is that, do you know?
 8 A I'm not sure. We serve five customers up
 9 there.
 10 Q Five on the Hillsboro branch?
 11 A On the Hillsboro branch. I'm not exactly
 12 sure where the location is, where the
 13 customer is, but we serve customers up there.
 14 Q Okay. Are you familiar with the Granite
 15 State processing plant in Milford?
 16 A Yeah.
 17 Q Okay. Do you know what milepost that is,
 18 approximately?
 19 A I think it's 13.6, six and-a-half, something
 20 like that.
 21 Q And after that to the end of the line, are
 22 there any Guilford customers?
 23 A I'm not sure. I just can't say right now.

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1 Q But your recollection is that there aren't
 2 any Guilford trains that operate in that area
 3 from Milepost 13 and --
 4 A We don't have any scheduled trains operate in
 5 there.
 6 Q Okay. Well, what kind of trains operate, if
 7 any?
 8 A Local freight trains.
 9 Q Okay. How often does it operate?
 10 A Three days a week.
 11 Q Every week?
 12 A Tuesday, Thursday and Saturdays. It's a
 13 schedule.
 14 Q That's the schedule?
 15 A Yes. Tuesday, Thursday and Saturday.
 16 Q Does it operate as scheduled?
 17 A On demand or close to it.
 18 Q So the schedule says three days a week, but
 19 it doesn't really operate unless a customer
 20 wants service?
 21 A No, no, no. We have traffic that goes up
 22 there, and they're scheduled to call
 23 Tuesdays, Thursdays and Saturdays.

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1 Q I know, but what I'm trying to understand is
2 if that's what the schedule says, but do you
3 run a train every Tuesday, every Thursday and
4 every Saturday?
5 A No. It could vary. It could vary.
6 Something could happen. We don't go Tuesday,
7 and we end up going on Wednesday. Something
8 could happen; we don't go Thursday; we go
9 Friday. You have a lot of varies that could
10 happen up there.
11 Q Okay. But the exact number of Guilford
12 trains on that section of line could be
13 determined from reviewing the train sheets,
14 could it not?
15 A Yes.
16 Q Okay. So the train sheets would show any
17 Guilford train that went in that area?
18 A Yes, it would.
19 Q Now, do you know how many trains
20 Milford-Bennington runs between Milepost 13
21 and Milepost 16.36?
22 A Based on what you said on the train sheets, I
23 have to look at the train sheets and give you

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1 a correct.
2 Q Okay. But you don't have any general
3 understanding?
4 A Somewhere between one and three trains a day.
5 Q Okay. And when the Guilford trains or the
6 Milford-Bennington trains are on that section
7 of the line, I take it they're under the
8 control of the dispatchers?
9 A Yes.
10 Q And they can both be in that section of track
11 at the same time sometimes if the dispatchers
12 permit it?
13 A Yeah. If there's something that happen, they
14 could very well be there.
15 Q And so, as far as you now, has there ever
16 been any problem in controlling that line by
17 the dispatchers, any problem created by
18 having two different railroads in there at
19 the same time?
20 A No.
21 Q How do your dispatchers communicate with the
22 Milford-Bennington trains?
23 A By telephone or radio.

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1 Q Either one?
2 A Yes.
3 Q Do you know which is more common?
4 A Radio, obviously, because they have to call
5 for permission to enter into the yard limits
6 before they get there.
7 Q So suppose a Milford-Bennington train calls a
8 dispatcher and gets permission to enter the
9 Guilford line, would your dispatcher then be
10 able to contact that train at any given time
11 while it's on the Guilford line?
12 A The radio communication could fail at any
13 time; but I would say, yes, if there's no
14 problem with the communication.
15 Q Okay. And, conversely, the Milford-Bennington
16 train could reach the dispatcher?
17 A Yes.
18 Q And it would be up to the dispatcher, I take
19 it, to make sure that when the
20 Milford-Bennington train is on that line that
21 there is no Guilford train close enough to
22 create a problem, right?
23 A That's correct.

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1 Q And that's the way the system has worked
2 forever, correct?
3 A Yes.
4 Q Now, how about if there's a track worker, a
5 Guilford maintenance worker between Milepost
6 13 and Milepost 16 and a Milford-Bennington
7 train wants to enter the track, does that
8 happen from time to time?
9 A I can't answer that.
10 Q Would that show up on the train sheets?
11 A Yes. Well, it would show up where a
12 dispatcher would give a train or track car
13 permission to work, verbally.
14 Q And that would be recorded on the train
15 sheets?
16 A I'm not sure. I haven't studied train sheets
17 that closely if it's there; but everything in
18 yard limits is all verbally, permission in,
19 permission when he leaves.
20 Q Okay. But if a track worker gets permission
21 to go onto that track and he's out there
22 working and Milford-Bennington wants to have
23 its train enter the track, that's something

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1 that could be done under the control of the
2 dispatcher, correct?
3 A No.
4 Q Why not?
5 A Because the dispatcher, he allowed the one
6 train -- the one person out there working.
7 Where if he's fixing a broken rail, how would
8 you let a train into it?
9 Q Well, what if it's just a track inspector who
10 is doing his normal weekly inspection?
11 A He's just out there. The dispatcher would
12 have to notify the track people that a train
13 has called to enter into the track. One has
14 to clear it up.
15 Q Okay. So you would never have a situation
16 where they're both in the same place at the
17 same time?
18 A No.
19 Q And that would be controlled by the
20 dispatchers?
21 A Yes.
22 Q Do you have any reason to believe that your
23 dispatching system is not working exactly the

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1 way it's intended?
2 A No.
3 Q So, to the best of your ability, your
4 ensuring the safety operations through your
5 dispatching system, right?
6 A Yes.
7 MR. HOWARD: Let's go off the record a
8 minute, please.
9 (Whereupon an off-the-record
10 discussion took place at 12:18 p.m.)
11 (Back on the record at 12:24 p.m.)
12 Q Mr. Ferguson, you've brought out train sheets
13 for the months of May, April and May of 2003,
14 is that correct?
15 A Yes.
16 Q Could you just describe in general terms what
17 these train sheets show?
18 A The train sheets is a federal document that
19 the dispatcher -- it's a log that the
20 dispatcher keeps of the times of each
21 passenger and freight train as they go
22 through a different location.
23 The train sheet also has a record of

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1 any memorandums of unusual incidents that
2 occurred that we keep, and we're required to
3 keep them for five years.
4 Q And there's one sheet for each day, is that
5 correct?
6 A Yes.
7 Q And the handwritten entries on these sheets
8 are made by the dispatchers, is that right?
9 A Yes.
10 Q Now, could you show me on this sheet for May
11 31st where the Milford-Bennington trains are
12 shown?
13 A On the far left.
14 Q And that's -- it's under the heading,
15 "Hillsboro Branch"?
16 A That is correct.
17 Q Okay. And it's apparently blank for May
18 31st?
19 A That's correct.
20 Q Does that mean there were no
21 Milford-Bennington trains?
22 A That's correct.
23 Q And that's probably because it was a

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1 Saturday, or don't you know that?
2 A That's correct.
3 Q Now, were there any Guilford trains on the
4 Hillsboro branch that day?
5 A No.
6 Q Now, what I would like you to do, please, is
7 to look through these train sheets for May;
8 and when we come to a day when there were
9 Milford-Bennington trains and Guilford trains
10 on the Hillsboro branch, stop and let me ask
11 a question or two about that, is that
12 possible?
13 A Yes.
14 Q Okay. May 27th. What does that show on the
15 Hillsboro branch that day?
16 A The M&B Railroad operating three round trips.
17 Q Okay. That's Milford-Bennington, right?
18 A Yes.
19 Q Any trains from Guilford that day?
20 A No.
21 Q Any record of any maintenance-of-way work
22 that day?
23 A No.

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1 Is there any reason to believe, Mr.
2 Ferguson, that May of 2003 was not a typical
3 month for operation on the Hillsboro branch?
4 A I have to go through the entire train sheets.
5 Q Okay. You don't know for sure whether it's
6 typical or not?
7 A No.
8 Q You would agree with me then, or I take it
9 that Guilford didn't operate beyond Milepost
10 13 in May?
11 A Yes.
12 Q Now, is my understanding correct that the
13 conversations between the train dispatchers
14 and the trains are recorded?
15 A Yes.
16 Q And is that the case both on telephone calls
17 and radio calls?
18 A Yes.
19 Q Both?
20 A Yes.
21 Q And do you keep the tapes of those
22 recordings?
23 A Three weeks.

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1 Q Just three weeks?
2 A Yes.
3 Q And they're destroyed after three weeks?
4 A No. We tape over them.
5 Q I'm sorry?
6 A We tape over the conversations.
7 Q So after three weeks, you can't go back and
8 hear a conversation that occurred because
9 you're running the same tape and going over
10 it?
11 A That's correct.
12 Q So you've basically destroyed the tape?
13 A Yes.
14 Q What's the purpose of taping those
15 conversations?
16 A Any unusual occurrence, any incidents that
17 would facilitate any hearings that would come
18 about that we will be able to retain the
19 conversation that the crew had told the
20 dispatcher or the fact they told the crew.
21 Q And why do you keep them only three weeks?
22 A If nothing happened between the next three
23 weeks, we don't have a problem.

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1 Q Okay. Now, am I also correct in my
2 understanding that there's one telephone line
3 in the dispatcher's office that is not taped?
4 A That's correct.
5 Q And why is that?
6 A That's in the Chief's office on the desk.
7 All the train dispatchers are on the tape.
8 Q But the Chief's is not?
9 A That's correct.
10 Q But what's -- Is the Chief talking to people
11 in the field or on trains?
12 A No.
13 Q So that phone is not taped; is not to be used
14 to communicate with trains?
15 A No.
16 Q All right. Are you aware of any situation
17 where the dispatchers have indicated that
18 there's a safety problem relating to the
19 operations of Milford-Bennington on the
20 Guilford line?
21 A No.
22 Q Are you aware of the so-called operating
23 window that has been in effect on the

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1 Hillsboro branch since late June of this
2 year?
3 A Yes.
4 Q Okay. And you're aware that, at one time,
5 Milford-Bennington was restricted to the
6 hours of midnight to 8:00 a.m., and then it
7 was changed from 4:00 a.m. to 1:00 p.m.?
8 A Yes.
9 Q Okay. Were you involved in any discussions
10 concerning the establishment of those
11 operating windows or anything relating to the
12 operating windows?
13 A Yes.
14 Q And who were you talking with?
15 A I was talking with the General Manager.
16 Q Who would that be?
17 A Erwin Towle.
18 Q And what was the substance of the
19 conversations?
20 A We had -- So there wouldn't be any conflicts.
21 We had times that the Milford-Bennington
22 operate there by themselves, and then we
23 operate when we're by ourselves.

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1 Q Okay. That's the result of the operating
2 windows, right?
3 A Right.
4 Q Did you talk to anybody besides Mr. Towle
5 about this?
6 A No.
7 Q Did he tell you the reason for establishing
8 these operating windows?
9 A It's to separate the trains.
10 Q Why was it appropriate to separate the
11 trains?
12 A So that we wouldn't have no mishaps up there
13 on the branch.
14 Q Okay. And did you think that your
15 dispatching system was adequate to handle a
16 separation of trains?
17 A Yes. It was adequate based on the rules that
18 we have applied that was in yard limits that
19 no one could go in there, yes.
20 Q But quite apart from these operating windows,
21 didn't your dispatching system adequately
22 separate the operations of Milford-Bennington
23 and Guilford on that line?

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1 A Yes.
2 Q So the operating window really didn't add
3 anything in terms of safety to what you had
4 with the dispatching, right?
5 A It gave the Milford-Bennington Railroad
6 proper time or whatever time they need and
7 not worry about if anybody else is going to
8 come into the territory. So they had a
9 window. It's like a blocking. They had
10 time.
11 Q Right. But for as long as you've been doing
12 the dispatching or been responsible for the
13 dispatching, you've testified that the
14 dispatching system has been adequate and been
15 safely to separate the operations of the two
16 railroads, right?
17 A That's correct, yes.
18 Q And there's no reason to believe that the
19 dispatching system is not currently adequate
20 to separate the operations of the two
21 railroads?
22 A No, no.
23 Q So the operating windows were something that

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1 went beyond what was necessary or what was --
2 went beyond what was capable under the
3 dispatching system, right?
4 A Any extra protection that you can have in the
5 operation of a railroad, it can be added to
6 the additional rules. If you need extra
7 protection, you apply; and this way right
8 here, it was separation, and there was no
9 misunderstanding.
10 Q Okay. And did Mr. Towle tell you, or did you
11 have an understanding from any other source
12 as to why the operating window was
13 appropriate or necessary here?
14 A No.
15 Q Do you have any views of your own as to why?
16 A No.
17 Q Do the train sheets indicate whether there
18 are derailed devices on the Hillsboro branch?
19 A No.
20 Q And do the train sheets indicate whether a
21 train, if there is a derail device, whether a
22 train stops to open and close the derail when
23 it passes?

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1 A Only verbal permission. We have no
2 indication on the board of any indication
3 where we would know unless the crew reported
4 that they put the derail on and they took the
5 derail off.
6 Q But is that something that the train crew
7 would communicate to the dispatcher's office
8 about?
9 A Yes.
10 Q Okay. And would the dispatcher record
11 anything concerning the derail on the train
12 sheets?
13 A No.
14 Q Are you familiar with the derail device that
15 was located at the south end of the yard in
16 Wilton?
17 A No.
18 Q Are you familiar with the physical layout up
19 there?
20 A Yes.
21 Q You've been on that line?
22 A Yes, yes.
23 Q Okay. And were you aware that there was a

E

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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

DEPOSITION OF ANDREW D. ZOMPA, taken
pursuant to Notice on behalf of Granite State
Concrete Company, Inc., and Milford Bennington
Railroad Company, Inc., before Simonne J. Elwood,
R.P.R. and a Notary Public in and for the
Commonwealth of Massachusetts, at the office of
Guilford Rail System, Iron Horse Park, North
Billerica, Massachusetts, commencing on Friday,
October 31, 2003 at 9:42 a.m.

Vol. 1 - 2

APPEARANCES:

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and SPRINGFIELD TERMINAL RAILWAY
COMPANY

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1 Verified Statement of Andrew 20
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2 Response of the Boston and Maine 44
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Inc.

3 Verified Statement of Andrew D. 64
Zompa in Support of Motion to
Dismiss and Reply to Petition for
Relief

4 Memorandum - 6/21/03 to File from 64
Safety Department

5 Letter - 10/30/03 to Mr. Peter R. 64
Leishman from W.J. Bostwick

6 NORAC 2003 - 6/20/03 64

7 Guilford Rail System 100
Supplemental Bulletin Order
No. 3-006G - In Effect 0700
Friday, June 20, 2003

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(Deposition of Andrew D. Zompa
commencing at 9:42 a.m.)

ANDREW D. ZOMPA

A witness called on behalf of the
Granite State Concrete Company, Inc., and
Milford Bennington Railroad Company, Inc.,
first having been duly sworn, under oath,
deposes and says as follows:

DIRECT EXAMINATION

Q (By Mr. Howard) Mr. Zompa, have you ever
been deposed before?

A No.

Q Do you understand you're under oath here this
morning?

A Correct.

Q If I ask a question that you don't understand
or you need clarification, please let me
know. I want you to understand the

Vol. 1 - 13

- 1 Q -- the current operation of trains?
 2 A That's correct.
 3 Q Do you give classes to and qualify the
 4 Guilford crews that operate over MBTA lines,
 5 for example?
 6 A I qualify all Guilford crews who are
 7 qualified under the operating rules. Where
 8 they qualify above and beyond that is up to
 9 the connecting railroad.
 10 So if they want to get qualified under
 11 the physical characteristics of the MBTA, for
 12 instance, they must go to the MBTA. Their
 13 road foreman would provide with the training.
 14 Q Okay. But in qualifying all Guilford
 15 employees, that would include Guilford
 16 employees who might be also qualified to
 17 operate trains on MBTA lines?
 18 A Sure. It's wherever they are qualified above
 19 and beyond that, yes.
 20 Q Would that also include Guilford employees
 21 who might operate trains on Amtrak lines?
 22 A Yes, it would.
 23 Q Do you also -- In addition to Guilford

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- 1 for Milford-Bennington employees the same as
 2 the training and qualification for Guilford
 3 employees?
 4 A It is the -- The contents of the classes are
 5 the same. It's different because of the
 6 actual physical characteristics of the
 7 territory which we operate up there and the
 8 method of operation. So it does differ only
 9 by the general rules I take from the book to
 10 train. That's the only difference. Other
 11 than that, it's the same set of rules.
 12 Q You emphasize different things that you're
 13 training --
 14 A Correct.
 15 Q -- Milford-Bennington as opposed to the
 16 Guilford employees?
 17 A Yes.
 18 Q You just said in your last answer, I believe,
 19 that you took into account physical
 20 characteristics when you're training a short
 21 line?
 22 A Let me rephrase physical characteristics.
 23 The method of operations is what I meant to

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- 1 employees, do you give classes to and qualify
 2 employees of other railroads that have
 3 operating rights on Guilford lines?
 4 A Yes, I do.
 5 Q And Milford-Bennington would be one of those,
 6 I take it?
 7 A That's correct.
 8 Q Any other short lines or other railroads that
 9 are in that category?
 10 A Yes. We do annual classes for the New
 11 England Southern also.
 12 Q Anybody else?
 13 A Offhand that I can think of, no.
 14 Q Do you do classes for and qualify Amtrak
 15 employees who operate on the Guilford line
 16 between Boston --
 17 A No, I do not.
 18 Q You need to let me finish the question.
 19 A Okay. Sure.
 20 Q On the Guilford line between Boston and
 21 Portland?
 22 A No, sir.
 23 Q Is the training and qualification that you do

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- 1 say. Method of operation on the track, so
 2 not physical characteristics.
 3 Q What do you mean by method of operation then?
 4 A What rules are in effect on a particular
 5 piece of track. So the method of operation
 6 may be signaled, non-signaled, yard limits,
 7 etcetera. So I'll train for that particular
 8 method of operation.
 9 Q Now, you've trained and tested and qualified
 10 Milford-Bennington employees, is that right?
 11 A Yes.
 12 Q How many employees fall in that category, do
 13 you know?
 14 A I believe it's -- The last training class I
 15 had, I had four employees from the
 16 Milford-Bennington to qualify.
 17 Q And did they all qualify without any problem
 18 or question?
 19 A Yes, sir.
 20 Q That includes, I take it, Peter Leishman?
 21 L-E-I-S-H-M-A-N.
 22 A Correct.
 23 Q Have you ever been out to review the

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1 operations of the Milford-Bennington?
 2 A Yes, I've observed their operations.
 3 Q Okay. And how did you observe them?
 4 A How did I observe them?
 5 Q Right. Were you on a train; were you
 6 standing?
 7 A Let's see. I rode their train on our
 8 property on a couple of trips and also
 9 observed it from my vehicle.
 10 Q Is that part of your follow-up to the
 11 training and qualifications?
 12 A Yes. I do that on every employee. I do test
 13 and observations, yes.
 14 Q And when you were observing
 15 Milford-Bennington, did you observe anything
 16 that was contrary to their training or
 17 qualification?
 18 A No, sir.
 19 Q Was there ever any time that you observed
 20 something on the Milford-Bennington operation
 21 that caused you to have them come in for
 22 additional training or that type of thing?
 23 A Anything that I observed that caused them to

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1 come in for additional training?
 2 Q Right.
 3 A No, nothing that I observed.
 4 Q Well, is there something that you're aware of
 5 that required additional training?
 6 A No, not to date.
 7 Q So as far as you're concerned, I take it that
 8 Milford-Bennington has been operating in
 9 compliance with your training and
 10 qualifications?
 11 A The operating rules, yes.
 12 Q Are you aware of any Milford-Bennington
 13 employee that has ever failed any of your
 14 exams?
 15 A No, sir.
 16 Q When an employee is, whether it's Guilford or
 17 Milford-Bennington, is qualified, do you
 18 notify anyone of that fact; for example, do
 19 you notify the dispatching office?
 20 A Yes. They'll have a list of who is qualified
 21 on particular lines if they're a connecting
 22 railroad.
 23 Q So all four of the Milford-Bennington

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1 employees who are qualified are known to the
 2 dispatching offices?
 3 A That's correct.
 4 Q Do you know Wayne Wheeler?
 5 A I've just heard the name.
 6 Q You don't know who he is?
 7 A No.
 8 Q Do you know if he's qualified under your
 9 rules?
 10 A No, I don't. No. I can't tell you offhand.
 11 Like I said, I've heard the name. I can't
 12 tell you if he's qualified.
 13 Q If he -- You don't know who he is, though,
 14 right?
 15 A No.
 16 Q And you have no recollection of qualifying
 17 him over the last ten years or the last three
 18 years?
 19 A Over the last three years? Actually, yes, I
 20 do. If he was employed with the New England
 21 Southern, then he would have been through my
 22 class which I believe he was employed now
 23 that -- Yes. New England Southern. He was

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1 probably in the class there.
 2 Q So if -- Let's assume he was qualified. His
 3 name should be with the dispatchers, correct?
 4 A Not under Milford-Bennington, no. Under New
 5 England Southern, if he was qualified there,
 6 he would have the name under New England
 7 Southern.
 8 Q So if he were operating or wanted to operate
 9 a Milford-Bennington train and he was listed
 10 under New England Southern, the dispatcher
 11 wouldn't let him operate that train?
 12 A No, sir.
 13 MR. HOWARD: I'm going to ask the
 14 reporter to mark this as Exhibit 1, please.
 15 (Whereupon the Stenographer marked as
 16 Exhibit No. 1 - Verified Statement of Andrew
 17 Zompa.)
 18 Q Mr. Zompa, do you recognize this document?
 19 It's titled, "Verified Statement of Andrew
 20 Zompa." (Indicating)
 21 A Yes, I do.
 22 Q And this is your verified statement, is it?
 23 A That's correct.

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1 of that?

2 A Preparing it? I probably discussed portions

3 of this with Rob, yes, I did.

4 Q Okay. Take a look, please, at Page 3.

5 A Uh-huh.

6 Q At the carryover paragraph on Page 3, there's

7 a reference to, and I'm paraphrasing,

8 Guilford elected to request that a derail

9 device be installed on Milford-Bennington

10 property to prevent freight and passenger

11 cars from breaking free and traveling onto

12 Guilford property. Do you see that?

13 A No, not yet.

14 Q It's in the carryover paragraph.

15 A Okay. Yes. Correct. I've got it. Yep.

16 Q Okay. Now, were you the one who requested

17 the derail device --

18 A No.

19 Q -- to be installed?

20 A No, I wasn't.

21 Q You were just carrying out Mr. Culliford's

22 instructions to contact Mr. Leishman to --

23 A Correct.

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1 Q -- take the derail device?

2 A Correct.

3 Q So do you know who elected to request the

4 derail device?

5 A No.

6 Q You were not involved in any discussions

7 about that?

8 A No.

9 Q So you wouldn't know anything about that last

10 sentence in that paragraph which says, "This

11 request was conveyed to Mr. Pease who was in

12 agreement."?

13 A No.

14 Q Now, in any of your conversations with Mr.

15 Leishman on December 12th or the day before,

16 was there any discussion of freight cars?

17 A I'm not sure if I understand your question.

18 Q Did anybody say that the derail was intended

19 to prevent freight cars from moving or --

20 A No. The discussion was not of any particular

21 equipment. The discussion of a derail being

22 in place and put in place is to derail, break

23 away equipment, not specific equipment.

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1 Q Okay. So nobody mentioned freight, is that

2 what you're saying?

3 A No one mentioned any specific equipment.

4 Q Did anybody mention passenger equipment?

5 A No, sir. No specific equipment was

6 mentioned.

7 Q Did you ask about the passenger equipment

8 that you saw sitting there?

9 A Yeah. I asked him in passing about the

10 passenger equipment, yes.

11 Q What did you ask about that?

12 A I asked him where he got it, how old it was,

13 that kind of thing, as interest only.

14 Q Did you ask him what he was going to do with

15 it?

16 A No.

17 Q Now, on Page 4 of that document, there are,

18 in the middle of the page, eight numbered

19 sentences there; and as I understand this,

20 you're familiar with those alleged violations

21 of rules and safety practices by

22 Milford-Bennington, is that right?

23 A Let me read them and make sure.

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1 (Reviewing document)

2 I can't attest to Item 4. I can't

3 attest to 5, 6, 7 or 8.

4 Q Well, you say you can't attest. What do you

5 mean by that?

6 A Well, I have no knowledge of those instances,

7 personally.

8 Q Okay. Now, the first three, you have some

9 specific knowledge, do you?

10 A Yes, I do.

11 Q Were you consulted in putting together this

12 list?

13 A Uh-huh.

14 Q The first three items?

15 A Correct.

16 Q Now, the first one there is failing to

17 acknowledge a posted bulletin. What does

18 acknowledge mean?

19 A Acknowledge means operate by the posted

20 bulletin which is in discussion here.

21 Q So acknowledge means failing to abide by?

22 A Correct.

23 Q In the second one, there's a reference to

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1 Q On Page 7 of this same document, Mr. Zompa,
 2 at the bottom, there's a reference to a
 3 derail device that was at Milepost 16 on the
 4 Hillsboro branch. Do you see that?
 5 A Uh-huh. Yes, sir.
 6 Q Are you familiar with that derail device?
 7 A I saw where it was, yes, I did. Yep. I'm
 8 familiar.
 9 Q And is it your understanding that that's no
 10 longer there?
 11 A That's correct. Well, it's no longer at
 12 Milepost 16, correct.
 13 Q It was moved up the line away?
 14 A Correct.
 15 Q Did you have any bulletin governing that
 16 derail when it was at Milepost 16?
 17 A I don't believe so. It was there long before
 18 I was writing bulletins for it.
 19 Q Well, you didn't issue any bulletin, is that
 20 correct?
 21 A Pertaining to the installation of the derail
 22 at 16?
 23 Q Installation or use or change of use or

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1 anything else?
 2 A No.
 3 Q Okay. Are you aware of any bulletin that
 4 governed that derail?
 5 A No, sir.
 6 Q Was there any way in your records, if there
 7 is such a bulletin, to find it?
 8 A We can look. I don't think we have anything
 9 pertaining to that derail.
 10 Q What was anybody to understand with respect
 11 to the use of that derail then?
 12 A What was anyone to understand?
 13 Q In other words, if there's no bulletin
 14 governing that derail, was it supposed to be
 15 in the closed position all the time?
 16 A When you say closed, you're referring to the
 17 derailing position?
 18 Q Yes.
 19 A Okay. I just have to understand that.
 20 Q Yes.
 21 A Yes. It's restored to the derailing position
 22 when not in use.
 23 Q And this was clearly on Guilford line so that

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1 until it was moved, -- When was it moved, do
 2 you know?
 3 A I believe it was on the evening of June 20th.
 4 I believe that was the exact date.
 5 Q Okay. So prior to that time, Guilford trains
 6 and Milford-Bennington trains should have
 7 been putting that in the applied on position
 8 every time they went back and forth over
 9 that --
 10 A Correct.
 11 Q Do you know whether that was actually being
 12 done?
 13 A I don't know.
 14 Q Did you ever hear from anybody about the
 15 operations up there with that derail in
 16 place?
 17 A No.
 18 Q Page 8 of that same document, Mr. Zompa, if
 19 you would look at that, please. In the
 20 response to 3, it says that the training is
 21 continuing in nature and therefore has no set
 22 completion date.
 23 Do you contemplate further training of

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1 Milford-Bennington employees with respect to
 2 derail devices?
 3 A That's part of my training in the annual
 4 operating rules. So, yes, absolutely.
 5 Q But do you plan anything specifically for
 6 derails other than a review as part of the
 7 annual review?
 8 A No. Part of the annual review would be
 9 covering the rules applying to derails and
 10 their operation.
 11 Q In your view, has Milford-Bennington
 12 completed all of its training satisfactorily
 13 so far?
 14 A Yes, sir.
 15 Q And look at the response to No. 4, please,
 16 where it says, "-- Guilford both gave and
 17 required instruction and training to
 18 Milford-Bennington on the NORAC (particularly
 19 Rule 104) and Guilford operating rules, --"
 20 What was the substance of the instruction and
 21 training on Rule 104?
 22 A That is in reference to main line switches
 23 and derails, and that's -- Rule 104 states

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1 switches attached to the main line and
 2 controlled siding must be left in the normal
 3 position when not in use as well as derails.
 4 Derails on the main track controlled
 5 siding -- when not in use are restored to the
 6 derailling position when not in use.
 7 Q So you went over Rule 104 with them, is that
 8 what you did?
 9 A Yes.
 10 Q I take it the Milford-Bennington employees
 11 satisfactorily completed that instruction?
 12 A Yeah.
 13 Q Are you aware of whether or not Guilford is
 14 monitoring the derail that's now on Guilford
 15 property at Milepost 16.36; in other words,
 16 do they monitor Milford-Bennington trains
 17 that pass by that derail device?
 18 A It has been monitored, yes.
 19 Q Subsequent to June 20th, that's been every
 20 day?
 21 A Not every day, no, that I'm aware of.
 22 Q Is that something that you're responsible
 23 for?

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1 A I do that, yes. Yes, I do that all over the
 2 railroad. I make sure that there's
 3 compliance with the operating rules. That's
 4 part of my job.
 5 Q So how many times since June 20th have you
 6 watched a Milford-Bennington train go by that
 7 derail?
 8 A Maybe 20 times, 25 times. I don't know the
 9 exact number. I've watched them a lot.
 10 Q Is anybody else assigned to watch that
 11 location?
 12 A Yeah. Road foreman, Chris Goreck.
 13 G-O-R-E-C-K.
 14 Q So is every Milford-Bennington train observed
 15 going by that derail?
 16 A Not every train, no.
 17 Q But the two of you have watched it
 18 substantially?
 19 A In the past, we've watched it substantially.
 20 Q And have you noticed any failure to comply
 21 with the rules using that derail?
 22 A No, sir.
 23 Q Who asked you to monitor the

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1 Milford-Bennington trains at that derail?
 2 A Mr. Culliford asked me to monitor them.
 3 Q 20 times in the last several months seems
 4 like more than you would normally do if
 5 you're just checking up on somebody after a
 6 rules class, isn't it?
 7 A There's no distinguishing how many times I
 8 would go to a location to check the rules,
 9 the procedures.
 10 Q Are there any other instances that you can
 11 recall where you've given that close
 12 attention to something?
 13 A I've given my close attention to everything.
 14 Yes, there are times if -- especially when
 15 there's work equipment and crews out there,
 16 I'll visit them daily for days in a row,
 17 absolutely.
 18 MR. HOWARD: Why don't we take a
 19 couple-minute break.
 20 (Break takes place at 10:51 a.m.)
 21 (Back on the record at 10:57 a.m.)
 22 MR. HOWARD: Mark these last four
 23 documents.

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1 (Whereupon the Stenographer marked as
 2 Exhibit No. 3 - Verified Statement of Andrew
 3 D. Zompa in Support of Motion to Dismiss and
 4 Reply to Petition for Relief.)
 5 (Whereupon the Stenographer marked as
 6 Exhibit No. 4 - Memorandum - 6/21/03 to File
 7 from Safety Department.)
 8 (Whereupon the Stenographer marked as
 9 Exhibit No. 5 - Letter - 10/30/03 to Mr.
 10 Peter R. Leishman from W.J. Bostwick.)
 11 (Whereupon the Stenographer marked as
 12 Exhibit No. 6 - NORAC 2003 - 6/20/03.)
 13 Q I'm handing you a document that's been marked
 14 as Exhibit 3. Do you recognize that? It's
 15 another verified statement. (Indicating)
 16 A Uh-huh.
 17 Q And that's your verified statement?
 18 A That's correct.
 19 Q I'd like to direct your attention to --
 20 starting at Paragraph 8, Page 2.
 21 A Okay.
 22 Q You're talking about the Milford-Bennington
 23 operation consists of loading a train at

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1 authorized to access those limits when
 2 another movement was on the track. And I
 3 said, "Yes. You can facilitate that by
 4 issuing a bulletin restricting one movement
 5 at a time within the yard limits that are
 6 established on that main track."
 7 Q So your suggestion was then followed, I
 8 take it?
 9 A Yes, it was.
 10 Q Any disagreement among the group?
 11 A No. It was agreed upon.
 12 Q Is there any other track or yard within the
 13 Guilford system where this kind of operating
 14 rule is in effect?
 15 A The operating rule? Yes. We have yard
 16 limits on the Guilford Rail System in many
 17 locations.
 18 Q The operating rule that only one movement at
 19 a time is permitted?
 20 A You're pertaining to special instruction that
 21 I've added here?
 22 Q Yes.
 23 A No. This is the only location where we

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1 designate one movement at a time within yard
 2 limits.
 3 Q Okay. Was there any discussion in this
 4 meeting you were just referring to as far as
 5 the reason for having such an operating rule?
 6 A It was discussed that for safety sake, we
 7 make sure that only one movement is permitted
 8 within yard limits at one time in that
 9 location, and I said, "Okay. If that's the
 10 reason, we can facilitate that in the
 11 bulletin."
 12 Q Well, for safety reasons?
 13 A Uh-huh.
 14 Q But this is the only place in the system
 15 where you have this kind of an operating --
 16 A That's correct.
 17 Q So what is the safety problem that's
 18 perceived here?
 19 A That was brought up to me. Mr. Culliford
 20 said, "Can we do this for safety?" And I
 21 said, "Absolutely."
 22 Q So you don't know what the safety issue is?
 23 A My job is to put together the bulletin per my

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1 instructions.
 2 Q But the question is: You don't -- You're
 3 telling me that you don't know what the
 4 safety issue is that's being addressed by
 5 this rule, is that right?
 6 A I know the safety issue is that we want to
 7 make sure that one movement at a time is in
 8 that yard limit --
 9 Q That's the solution, isn't it?
 10 A -- so that there's no conflicting movements
 11 within that yard limit.
 12 Q Why would that kind of a rule be imposed on
 13 this particular track?
 14 MR. CULLIFORD: I think he's already
 15 answered that.
 16 MR. HOWARD: I'm sorry?
 17 MR. CULLIFORD: I think he's already
 18 said that it's for safety. To the extent of
 19 his knowledge, I think he said it's for
 20 safety. It seems that you're asking for the
 21 rationale for -- He doesn't know much more
 22 than what he's telling you. He doesn't know
 23 anything else.

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1 MR. HOWARD: I want to make sure that
 2 I understand the answer.
 3 Q Do you understand the rationale for imposing
 4 this kind of a rule on this particular track?
 5 A I understand that what we need to do is
 6 isolate the movements within those yard
 7 limits. Therefore, this bulletin has been
 8 issued.
 9 Q But you don't understand why you need to
 10 isolate the movements?
 11 A I do understand. That is a directive. That
 12 is a direct order, and I will abide by that.
 13 Q It's a direct order, but nobody gave you the
 14 reasoning or any kind of rationale to support
 15 the direct order?
 16 MR. CULLIFORD: Objection. He's
 17 answered it. It was asked, and he answered
 18 it.
 19 MR. HOWARD: I don't think he has.
 20 Q You've given me a conclusion. You've given
 21 me the solution. Either you know or you
 22 don't know the reason, the rationale for
 23 imposing these kinds of rules.

F

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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

DEPOSITION OF THOMAS F. STEINIGER, taken
pursuant to Notice on behalf of Granite State
Concrete Company, Inc., and Milford Bennington
Railroad Company, Inc., before Simonne J. Elwood,
R.P.R. and a Notary Public in and for the
Commonwealth of Massachusetts, at the office of
Guilford Rail System, Iron Horse Park, North
Billerica, Massachusetts, commencing on Monday,
November 3, 2003, at 9:52 a.m.

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APPEARANCES:

JAMES E. HOWARD, ESQ.
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CHARLESTOWN, MA 02129
REPRESENTS GRANITE STATE CONCRETE
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and SPRINGFIELD TERMINAL RAILWAY
COMPANY

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3 THOMAS F. STEINIGER

4 By Mr. Howard 4 85

5 By Mr. Culliford 73 --

EXHIBITS

11 EXHIBIT NO. DESCRIPTION PAGE NO.

12 1 Verified Statement of Thomas F. 4
13 Steiniger in Support of Motion
14 to Dismiss and Reply to Petition
15 for Relief
16
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(Deposition of Thomas F. Steiniger
commencing at 9:52 a.m.)

The following exhibit was premarked
per Attorney Howard:

(Whereupon the Stenographer marked as
Exhibit No. 1 - Verified Statement of Thomas
F. Steiniger in Support of Motion to Dismiss
and Reply to Petition for Relief.)

THOMAS F. STEINIGER

A witness called on behalf of the
Granite State Concrete Company, Inc., and
Milford Bennington Railroad Company, Inc.,
first having been duly sworn, under oath,
deposes and says as follows:

DIRECT EXAMINATION

Q (By Mr. Howard) Mr. Steiniger, would you
please tell me your position with Guilford?

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1 and, if I can say, young, David Fink had?
2 A That's correct.
3 Q So as was the case with Paragraph 4, you
4 don't have any direct personal knowledge of
5 any of the statements in Paragraph 5, is that
6 right?
7 A My knowledge came through, in this case,
8 discussions both with Rob Culliford and David
9 Fink.
10 Q Now, is your understanding based on those
11 conversations with Mr. Culliford and Mr. Fink
12 that Granite State was asking Guilford to
13 provide service directly?
14 A Yes, I do.
15 Q And what -- Do you have any understanding of
16 any response that was given to Granite State?
17 A Yes, I do, because when that was discussed,
18 we said the one thing that we wanted to make
19 clear that this was a safety issue. It
20 wasn't a case of trying to replace the MBR in
21 serving Granite State.
22 Q This is what Mr. Culliford and Mr. Fink told
23 you they said to Granite State?

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1 A Yeah. That was a part of our discussion, and
2 that's the reply that was given back to the
3 MacLellans.
4 Q Okay. So the essence of the replies, as it
5 was reported to you, is that Guilford did not
6 want to serve Granite State directly?
7 A Our reply was that we were -- The reason and
8 the purpose of this was a safety situation.
9 The MacLellans, as I understand it, had asked
10 us to see if they would serve them directly.
11 Now, as we noted here, the fact is we
12 had to address a safety concern. That was
13 the purpose of doing what we were doing, and
14 we wanted to make it clear that we were not
15 trying to replace the MBR as far as the
16 serving carrier knowing that that's the
17 operation that they had.
18 Q Okay. So to the extent that Granite State
19 asked you to provide service, you said, no,
20 you wouldn't provide service?
21 A We said, no, we would not provide service at
22 the time. Where we would provide service, if
23 they needed us, if there was a window for

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1 whatever reason between the time we moved on;
2 but from the standpoint of replacing someone,
3 we said, no, we weren't doing that. There
4 was a safety concern that we had, and that's
5 why we were -- that's why we were doing what
6 we were doing with regards to the adjustment.
7 Q Now, in Paragraph 6, you say that, "Once
8 Guilford became aware of the permitting
9 restrictions on Granite State's excavating
10 operation, Guilford did offer to provide
11 service to Granite State until its safety
12 concerns with MBR were fully addressed, an
13 offer that was declined."
14 When did Guilford become aware of the
15 permitting restrictions on Granite State's
16 excavating operation?
17 A I'm not sure of the exact time. I know this
18 was in discussion with Rob Culliford that
19 became -- well, at least it was brought to
20 our attention that there was some permitting
21 restrictions on the excavating site, and I
22 assume they were put on by the City of
23 Wilton. Up to that time, certainly, I wasn't

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1 aware of any restrictions.
2 Q So any knowledge on your part was imparted by
3 Mr. Rob Culliford?
4 A That's what I understand, and that's exactly
5 where we moved forward.
6 Q And the time that you became aware of this
7 was when, as best you can recall?
8 A In the June, July time frame.
9 Q Of 2003?
10 A That's correct.
11 Q You never had any discussions with Mr. Fink
12 or others at Guilford in which they indicated
13 that Granite State had restrictions on its
14 operations at Wilton?
15 A No.
16 Q After you became aware of the restrictions,
17 did you have any conversations with Mr. Fink
18 or others at Guilford in which they indicated
19 that they had been aware of the restrictions
20 prior to that time?
21 A No, I did not.
22 Q Now, when you say that Guilford did offer to
23 provide service, who made that offer?

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1 A That was offered by Rob Culliford to the best
2 of my knowledge.
3 Q Okay. When was that offer made, do you know?
4 A I can't give you the exact time. It was all
5 within the same time frame of what was taking
6 place here.
7 Q Did he tell you who he made the offer to?
8 A I know it was to MacLellan.
9 Q Which MacLellan?
10 A I assume it was John MacLellan.
11 Q Directly?
12 A Yes.
13 Q And did Mr. Culliford tell you what John
14 MacLellan's response was?
15 A I believe the response that came back was
16 that, basically, they were going to carry
17 this forward in connection with the Surface
18 Transportation Board and that, apparently,
19 that was not their interest.
20 Q And this is, again, based on a report from
21 Rob Culliford?
22 A That's correct.
23 Q Was there any explanation as to why Granite

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1 A I do.
2 Q Now, you refer to it as a new operating
3 window. Was there an operating window prior
4 to that time?
5 A The original operating window went back to
6 the time frame from 12:00 to 8:00 a.m.
7 Q And when was that in place?
8 A That, basically, was in place back in -- I
9 want to say after the occurrence of the
10 derail event, somewhere in June, late June.
11 Q Now, how would a change from 12:00 a.m. to
12 8:00 a.m. to 4:00 a.m. to 1:00 p.m. further
13 facilitate service to Granite State?
14 A From the standpoint that, apparently, Granite
15 State had brought to our attention that they
16 were operating only between 6:30 a.m. and
17 6:30 p.m., I assume, due to the restrictions
18 at Wilton. Therefore, we thought the --
19 allowing the time between 4:00 a.m. to 1:00
20 p.m. would give them the time frame in which
21 to operate.
22 Q Now, were you involved in the decision to
23 limit their operations from 12:00 a.m. to

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1 State apparently declined your offer to
2 provide service when earlier you say that
3 they had asked you to provide service?
4 A I do not know.
5 Q Did you ask that question of anybody?
6 A The only thing that -- I did not, no. I'm
7 just assuming that when it came back was the
8 fact that they rejected it. They did not
9 want to move forward with us servicing their
10 facility. I think the fact is they were
11 going to move forward with whatever avenue
12 that was open to them.
13 Q Did Mr. Culliford tell you when his
14 conversation with John MacLellan occurred in
15 which Guilford was offering to provide
16 service?
17 A I can't tell you the exact date, no.
18 Q Now, in Paragraph 7, you say that, "To
19 further facilitate service to Granite State,
20 on July 11, 2003 Guilford informed counsel
21 for MBR that a new operating window--from
22 4 a.m. to 1 p.m.--would be implemented." Do
23 you see that?

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1 8:00 a.m.?
2 A Yes, I was.
3 Q And you say that occurred in June of 2003?
4 A Yes, that's correct.
5 Q Okay. Who else, if anyone, was involved in
6 the decision to restrict those operations?
7 A Rob Culliford and Syd Culliford, the Vice
8 President of Transportation.
9 Q No one else?
10 A No.
11 Q Did you talk to Mr. Fink about it?
12 A I let him know what was happening.
13 Q You let him know that you had decided -- Did
14 you make the ultimate decision?
15 A I did.
16 Q Was it a recommendation from somebody?
17 A Basically, it was a consensus between Rob
18 Culliford, Sydney and myself.
19 Q Okay. And you reached that consensus, and
20 then did you call Dave Fink to talk about it?
21 A What we had done, no, basically, I had
22 already told him to move in the field because
23 this had occurred, and we would -- I was

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1 looking for some way to make sure that there
2 was an absolute block with regards to the
3 railroad between MBR and ourselves so that we
4 would not have two railroads on the property
5 at the same time on. The only way we could
6 assure ourselves of the absolute block was to
7 put a time frame in which one railroad would
8 operate and, at that time, we would not be on
9 the railroad.
10 Q Okay. But the question was: When you
11 decided to impose the 12:00 a.m. to 8:00 a.m.
12 window, did you then call Mr. Fink and talk
13 to him about it?
14 A I mentioned to him what it was going to be,
15 yes.
16 Q And what was his response?
17 A Basically, he had little or no response.
18 "That's fine." That's my decision to make.
19 Q So you didn't ask him for permission, and he
20 didn't direct you, is that what you're
21 saying?
22 A That's correct.
23 Q Did he think it was a good idea?

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1 A He thought it was definitely a good idea to
2 have an absolute block, safetywise.
3 Q Did he tell you, at that time, that Granite
4 State had restrictions on its operations at
5 Wilton?
6 A No, he did not.
7 Q If he had told you or you had been aware of
8 the restrictions at that time, would you have
9 imposed a 12:00 midnight to 8:00 a.m. window?
10 A You know, I'm not sure because looking at
11 some of these restrictions from a standpoint
12 of cities and towns, I might take umbrage
13 with it myself, simply, especially, coming
14 off this latest situation with the Town of
15 Ayer, and that's where we're trying to be
16 restricted on how we operate our rail
17 operations. That's the only thing that would
18 give me some consideration.
19 Q I'm not sure I understand your answer.
20 My question is: If you had known when
21 the 12:00 a.m. to 8:00 a.m. window was
22 imposed, if you had known that Granite State
23 had restrictions on its operations at Wilton,

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1 would you have imposed the same restrictions
2 on the MBR operations?
3 A I think we would have sat down and looked to
4 see if we could make some accommodations
5 which we eventually did. In fact, when it
6 came to our attention that they had
7 difficulties because of this Wilton
8 restriction, that they could not get in the
9 turns that they thought was necessary, I
10 thought by modifying and making accommodation
11 to operate then between 4:00 a.m. and 1:00
12 p.m. would be a modification that would
13 accommodate their needs.
14 Q Okay. Were you aware that Milford-Bennington
15 didn't operate, generally, between the hours
16 of midnight and 8:00 a.m.?
17 A No. No, I was not.
18 Q You had no idea when they operated?
19 A I will say this: I assume that they were
20 operating mainly during the day.
21 Q Okay. Was that -- Were their hours of
22 operation something you discussed with Mr.
23 Culliford or anybody else?

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1 A Prior to that time, not really. My concern
2 was to find a block time that would allow
3 them hours to operate on the railroad and to
4 be absolutely separate from ourselves.
5 Q Okay. But you understood, I take it, that
6 that would be a difficult time for them to be
7 operating, didn't you?
8 MR. CULLIFORD: Objection. Can you
9 rephrase that? You're asking him sort of a
10 subjective -- I don't understand what you're
11 asking him.
12 MR. HOWARD: Well, I'll ask it again.
13 Q When you decided on a 12:00 a.m. to 8:00 a.m.
14 window, you understood, did you not, that
15 that would make it difficult for
16 Milford-Bennington to operate?
17 A No. I don't think so. I don't think so.
18 Q Did you care, at that time, whether it would
19 be difficult for them to operate?
20 A I think my major concern was the safety. My
21 major concern was safety, and the safety
22 situation I was looking for is to make sure
23 that the absolute block existed. The fact

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1 that the time between 12:00 and 8:00 was a
 2 blocked time for them; and beyond that
 3 allowed us access to our railroad whether it
 4 was for operations or whether it was for
 5 inspection and maintenance, allowed us the
 6 necessary time.
 7 Q Are you familiar with the Guilford operations
 8 on the Hillsboro branch between Milepost 13
 9 and the end of the line?
 10 A I believe so.
 11 Q In June of this year, what, generally, were
 12 those operations?
 13 A From a standpoint of servicing which
 14 customers?
 15 Q Well, let's start with the customers between
 16 13 and the end of the line, how many Guilford
 17 customers are there?
 18 A Well, if I back up to the customers between
 19 Milepost 13 and 16 and taking a look at those
 20 customers alone, there's Suburban Propane;
 21 there's Hendricks Wire & Cable.
 22 Q And how many --
 23 A And then we have, of course, beyond that

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1 Quinn's Quarry?
 2 A Quinn's.
 3 Q To go to Quinn's, you operated at night, is
 4 that correct?
 5 A We had operated at some time during the
 6 evenings. Yes, there were some times we
 7 operated at night simply to make sure that we
 8 had the necessary ballasts for the Nepra job.
 9 Q Well, you operated at night, I take it, so
 10 that you wouldn't be in the same -- in the
 11 way of the Milford-Bennington operations
 12 during the daylight hours, right?
 13 A I don't believe that was the choice. The
 14 choice happened to fall on us at the time to
 15 make that type of operation for the move;
 16 and, obviously, if it fell in the slot that
 17 accommodated both carriers, then I would see
 18 where there would be no problem, and that's
 19 probably the way it was accommodated.
 20 Q Okay. So as --
 21 A I say that because I'm not, every day,
 22 looking at what the operations are with
 23 regards to that particular line.

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1 Quinn's Quarry.
 2 Q And that's the location that's on
 3 Milford-Bennington that you serve with
 4 trackage rights?
 5 A That's correct.
 6 Q How many trains a week, generally, were being
 7 sent to provide service to Hendricks or
 8 Suburban Propane?
 9 A One to two trains per week.
 10 Q And what time of the day would those trains
 11 generally operate, do you know?
 12 A Well, they normally operate during the
 13 daylight hours. Although when we were moving
 14 stone out of Quinn's Quarry for the Nepra
 15 Project, we had started different hours in
 16 order to service that particular account.
 17 Q Different hours being what hours?
 18 A Well, we started later in order to try and
 19 make sure that we cleared for both lines and
 20 also to make sure that we got the empties and
 21 the loads out simply because it was quite a
 22 movement.
 23 Q So, in other words, just to go to -- Is it

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1 Q So, as far as you know, were the operations
 2 on that line conducted in an efficient and
 3 safe manner when you had both Guilford trains
 4 and Milford-Bennington trains there?
 5 A Obviously, from a standpoint that when we
 6 operated up there, everything occurred, and
 7 there was no incident that I'm aware of.
 8 Q Now, when the decision was made to go to a
 9 new operating window from 4:00 a.m. to 1:00
 10 p.m., who made that decision?
 11 A I made that decision in connection with
 12 consensus with Rob Culliford and Syd
 13 Culliford, Vice President of Transportation.
 14 Q Did you talk to anybody else about that
 15 before the decision was made?
 16 A No, I did not.
 17 Q Did everybody agree that that was the
 18 appropriate new operating window?
 19 A Yes. Yeah. Yes, they did.
 20 Q Did you talk to Mr. Fink before that decision
 21 was made?
 22 A No, I don't recall talking to Mr. Fink before
 23 that decision.

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1 Q Did you talk to him afterwards?
 2 A Yes, I did.
 3 Q What did he say?
 4 A He just said, "Keep me advised."
 5 Q And, at that time, he didn't tell you about
 6 the restrictions at the Granite State Quarry
 7 in Wilton?
 8 A No. Mr. Fink never did mention to me about
 9 any restrictions at the quarry at Wilton.
 10 Q When the new operating window, 4:00 a.m. to
 11 1:00 p.m., was put into effect, you were then
 12 aware, I take it, of the restrictions on
 13 Granite State at Wilton, correct?
 14 A Yes.
 15 Q And you were aware, I take it, that they
 16 could operate only Monday through Friday from
 17 6:30 a.m. to 6:30 p.m.?
 18 A You know, I'm not sure of that because my
 19 understanding is, at least in talking to past
 20 operating people, that for some reason, they
 21 have operated on a weekend. I don't know if
 22 it's something special.
 23 Q Well, do you have an understanding of what

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1 the restrictions are at Wilton?
 2 A The only understanding I had is my
 3 understanding is from 6:30 to a.m. to 6:30
 4 p.m. That's the knowledge I have that's come
 5 through my people.
 6 Q Okay. And how did you think that 4:00 a.m.
 7 to 1:00 p.m. would permit Milford-Bennington
 8 to provide the service that it wanted to
 9 provide to Granite State?
 10 A Because I believe that -- and I mentioned
 11 this before with preloading their train and
 12 moving it forward so that they're in position
 13 for the first run. I thought the timing from
 14 4:00 a.m. to 1:00 p.m. would probably
 15 accommodate their needs.
 16 Q Did you consult with anybody for
 17 Milford-Bennington before you made that
 18 conclusion?
 19 A I did not, no.
 20 Q Did anybody at your direction consult with
 21 Milford-Bennington?
 22 A Not to the best of my knowledge.
 23 Q So it was basically --

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1 A I would think, though, that Milford-Bennington
 2 would have been advised of the accommodating
 3 window change, though, at the time we did it.
 4 Q Now, my question is: Did you consult with
 5 them to find out whether 4:00 a.m. to 1:00
 6 p.m. was adequate for their purposes?
 7 A I did not.
 8 Q And you don't know anybody else at Guilford
 9 who did, right?
 10 A I'm not aware of them.
 11 Q So, basically, you made a judgment as to what
 12 you thought would be satisfactory to
 13 Milford-Bennington, right?
 14 A I made a judgment based on the fact that, in
 15 my belief, that if they had to operate
 16 between a certain window that this
 17 accommodation would allow them to do that;
 18 and, at the same time, it would put into
 19 effect what we need, and that is the absolute
 20 block on time of keeping this railroad
 21 separated.
 22 Q In Paragraph 8, Mr. Steiniger, you say, "For
 23 a number of years Guilford had been operating

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1 under the impression that the operations of
 2 the MBR were being conducted safely and
 3 responsibly."
 4 Now, do you have any basis to believe
 5 to the contrary?
 6 A I do.
 7 Q And what would that be?
 8 A That basis would be going back to the
 9 incident with regards to the derail and the
 10 fact that the MBR did not live up to the
 11 rules and regulations regarding the derail.
 12 Q This is the June 19th conversation?
 13 A That's correct.
 14 Q Okay. Other than that, is there anything
 15 that would give you any reason to believe
 16 that Milford-Bennington was not operating
 17 safely and responsibly?
 18 A Yes. I believe the track record that the MBR
 19 has with regards to, at least the publications
 20 I've read and the notoriety they've received,
 21 I believe that brings to bear some light as
 22 to whether they were operating safely and
 23 responsibly.

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1 Q What are you referring to?
 2 A Well, I'm referring to, for instance, the
 3 situation they had moving up to Lyndeborough
 4 with the Wilton Scenic, and the Chairman of
 5 the Conservation Commission and their
 6 involvement which I read in the paper that
 7 they, obviously, had difficulties with
 8 regards to the way they brush-cut,
 9 difficulties with regards to possible
 10 contamination of wetlands. I think some of
 11 the things that they were involved with,
 12 according to the press that I read, would
 13 lead one to believe that they're not
 14 operating safely and responsibly.
 15 Q So, is there any other press report or any
 16 other knowledge that you have that would lead
 17 you to that conclusion?
 18 A Well, I think that, and I think the fact is
 19 that going back over a number of years ago,
 20 they had an incident with regard to the small
 21 mechanical carts operating on your railroad.
 22 I think things like that in which you have a
 23 situation that you allow people to come on

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1 your railroad, that gives me a lot of angst;
 2 it certainly does.
 3 Q Now, the incident or the event, whatever it
 4 is that you're referring to about brush
 5 cutting and that sort of thing, when did that
 6 occur?
 7 A As I recall, the article is back in July in
 8 the Union Leader. I don't know the exact
 9 date.
 10 Q July of what year, 2003?
 11 A 2003.
 12 Q Okay. And do you know anything about that
 13 other than what you read in the paper?
 14 A Basically, what I read in the paper.
 15 Q Basically or entirely?
 16 A Entirely.
 17 Q Okay. And these carts that you're talking
 18 about, what's your basis of information
 19 there?
 20 A That is also back in the press going back
 21 sometime ago.
 22 Q So, in July of this year, you had formed --
 23 is it fair to say you had formed an opinion

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1 that Milford-Bennington was not conducting
 2 its operations safely and responsibly?
 3 A I think that -- I think if I go back to what
 4 instigated this occurrence is back to the
 5 fact that our Vice President of Operations
 6 was on the railroad and, obviously, observed
 7 where the derail was not being utilized
 8 properly. I think, without question, that
 9 gave us a lot of concern. It gave me a lot
 10 of concern.
 11 Q Well, I'm trying to find out the basis for
 12 your statement in Paragraph 8 and where you
 13 say that Guilford was under the impression
 14 that Milford-Bennington was operating safely
 15 and responsibly, and you're telling me that
 16 an event on June 19th of 2003 changed your
 17 view?
 18 A I think the fact is that, as I mentioned to
 19 you earlier, there was incidents with regards
 20 to whether it's the gas cart incident, the
 21 situation with regards to the derail incident
 22 back in June is the one that concerned me
 23 most of all because the fact that Peter did

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1 not want to abide by the regulations of the
 2 derail and flagrantly would violate that
 3 would indicate to me that if he's willing to
 4 do that, what other unsafe acts would we have
 5 to confront with Peter.
 6 Q Okay.
 7 A All right. That's a --
 8 Q Other than newspaper reports, you don't have
 9 any specific instances of alleged unsafe acts
 10 that occurred prior to June 19th, 2003,
 11 correct?
 12 A No. Up until that period of time, I thought,
 13 reasonably, he was operating under normal
 14 rules and procedures.
 15 Q Now, in Paragraph 9, you say that, "It was
 16 not until the MBR and Mr. Draper approached
 17 Guilford with a proposal to operate passenger
 18 service that Guilford began to look closely
 19 at the operation of the MBR, --." Do you see
 20 that?
 21 A That's correct.
 22 Q When did Guilford begin to look closely at
 23 the operation of MBR?

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1 freight combined, you bring in a set of
 2 safety parameters that have to be considered
 3 quite differently, and it's very difficult.
 4 Q Now, other than the Amtrak service that you
 5 just mentioned and to the extent that there
 6 may be MBTA trains that run on Guilford
 7 lines, are there any other passenger
 8 operations on the Guilford System?
 9 A The only other one that they operate in which
 10 we operated were trackage rights and where we
 11 would be in connection with would be on the
 12 Connecticut river line.
 13 Q And that's a line that you don't own,
 14 correct?
 15 A That's correct.
 16 Q And you don't have any ability to restrict
 17 passenger operations because you don't own
 18 it, correct?
 19 A No, but that's not the nature of my answer.
 20 Q Okay. I'm just trying to follow up. If you
 21 could -- Well, it's not your decision as to
 22 whether passenger trains operate on the
 23 Connecticut river line, right?

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1 A No, that's correct.
 2 Q So there are no other -- there are no
 3 passenger operations on Guilford other than
 4 Amtrak and the MBTA, is that right?
 5 A That's correct.
 6 Q Were you aware, Mr. Steiniger, that Mr.
 7 Draper requested the ability to store
 8 passenger equipment on Guilford track in the
 9 Wilton Yard, and he wasn't requesting the
 10 ability to operate over Guilford's lines
 11 other than to store his cars there?
 12 A My understanding was that was part of it,
 13 that's correct.
 14 Q Okay. But did you understand also that he
 15 wasn't asking to run trains beyond Wilton
 16 Yard?
 17 A You meaning, initially?
 18 Q Any time?
 19 A See, I'm not sure of that. The letter that
 20 he instituted and sent to Mr. Fink and
 21 forwarded it to me for my handling had
 22 indicated that he was very much involved in
 23 looking at establishing this Wilton Scenic

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1 Railroad and would probably look in the
 2 future, and I assume the future with regards
 3 to how the operations could be fairly opened.
 4 Q Okay. But, as of last year when the subject
 5 came up, all he was asking for was the
 6 ability to store cars on the track in Wilton
 7 Yard, correct?
 8 A That's correct.
 9 Q Okay. Now, Paragraph 10 of your statement
 10 indicates that, "Mr. Pease also contacted
 11 Guilford with a request to participate in
 12 development of an operating plan that would
 13 encompass the operations of Guilford, the MBR
 14 and the passenger service on the MBR's lines,
 15 a proposal that seemed reasonable to Guilford
 16 at the time."
 17 When was this contact by Mr. Pease?
 18 A This was in the spring of 2003.
 19 Q Okay. And did he contact you?
 20 A No, he did not. He contacted Mr. Rob
 21 Culliford.
 22 Q Did you ever talk to Mr. Pease about this?
 23 A No, I did not.

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1 Q Okay. So what you know about this is based
 2 on what Rob Culliford told you?
 3 A That's correct.
 4 Q Now, isn't it correct that, at some point in
 5 the spring 2003, Guilford had -- Guilford
 6 decided that it wasn't necessary to have an
 7 operating plan because you didn't have any
 8 immediate plans to operate on the
 9 Milford-Bennington line?
 10 A As I understood the conversation between Mr.
 11 Pease and Mr. Culliford was that we, too,
 12 thought that was a reasonable request on the
 13 part of Mr. Pease to look at the development
 14 of an operating plan, but the immediate use
 15 of that particular quarry and bringing that
 16 stone wasn't right there in the necessary
 17 future. I think perhaps from that standpoint
 18 going through with a plan of that nature,
 19 whether it made any difference or not
 20 depended upon whether we were going to
 21 operate from the quarry.
 22 Q And in June of 2003, you had made the
 23 decision that it was your view, I take it,

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1 clearly that the derail is on the
 2 Milford-Bennington line, and this was issued,
 3 I take it, to Guilford employees, correct?
 4 A It was issued to Guilford employees, that's
 5 correct. And, also, my understanding is it's
 6 also issued that MBR is aware of it as well.
 7 Q Okay. Now, is it --
 8 A Can you excuse me for a minute?
 9 (Break takes place at 10:52 a.m.)
 10 (Back on the record at 10:56 a.m.)
 11 MR. HOWARD: Is there a question
 12 pending?
 13 (Whereupon the Stenographer read back
 14 the last question and answer.)
 15 Q Now, is it your view that this bulletin that
 16 we're looking at is a valid order for
 17 Milford-Bennington trains?
 18 A That's correct.
 19 Q Even though it's issued by Guilford and it
 20 applies to a derail on Milford-Bennington
 21 property?
 22 A It applies for both carriers operating
 23 through that territory.

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1 Q Now, suppose Milford-Bennington issued a
 2 bulletin that said that any Guilford trains
 3 going to the quarry on your trackage rights
 4 had to stop at Milepost 14 and get further
 5 instructions, would that bulletin be
 6 something that Guilford would have to abide
 7 by?
 8 A I assume it would be.
 9 Q Okay. If Milford-Bennington issues bulletins
 10 of that nature, can we expect then that
 11 Guilford will abide by those?
 12 A I would say from a standpoint, and I'm not
 13 the operating person, but I would assume if
 14 they're going to issue bulletins, obviously,
 15 those are bulletins for the safety of the
 16 operation, and we would abide by them just
 17 like they would abide by ours.
 18 Q Okay. We talked a little bit about the
 19 operating window and the times that were set
 20 for Milford-Bennington operations. Do you
 21 know, Mr. Steiniger, are there any other
 22 situations in the Guilford System where
 23 operations are separated that way?

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1 A From a standpoint of the windows themselves?
 2 Q Well, the windows, I take it, as you
 3 described it, as I understand it, is an
 4 absolute block so that during the given
 5 hours, only Milford-Bennington can be on the
 6 track, and Guilford won't be on the track,
 7 correct?
 8 A That's correct.
 9 Q And that's the norm around the system,
 10 though, is it?
 11 A No, it isn't.
 12 Q The norm is that trains of different
 13 railroads, generally, can operate at the same
 14 time subject to dispatching orders, correct?
 15 A That's correct. And, as you know, that
 16 action was taken simply because of violating
 17 the derail regulations and looking upon this
 18 as a very unsafe operation.
 19 Q Okay. So this is the only situation on the
 20 Guilford System where there's such an
 21 absolute block operating window device,
 22 right?
 23 A It's the only place that we ran into an

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1 operation that we felt got into an unsafe
 2 situation that we felt that we needed to
 3 protect everyone.
 4 Q It's the only instance on the system,
 5 correct?
 6 A It's the only one that I'm aware of.
 7 Q Okay. Do you recall, during the course of
 8 this case, Milford-Bennington suggesting that
 9 to the extent that the parties disagreed over
 10 safety practices and that sort of thing that
 11 the Federal Railroad Administration be asked
 12 to review the situation and provide some
 13 guidance?
 14 A That was suggested at the mediation.
 15 Q Well, do you recall that --
 16 A I recall a comment being made at the
 17 mediation. Is that what you're referring to?
 18 Q No. I'm just asking you if you recall
 19 earlier in this case whether
 20 Milford-Bennington made that suggestion?
 21 A I recall the request being made at the
 22 mediation meeting we had last week.
 23 Q And you weren't aware of that prior to that

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1 time?

2 A It doesn't register with me.

3 Q Okay. Well, do you have any views as to

4 whether or not it would be appropriate for

5 the FRA to review the situation and provide

6 guidance?

7 A Yeah. I think I expressed those views before

8 at the mediation meeting. I just didn't

9 think that was necessary.

10 Q Why is that?

11 A Because I feel from a standpoint that the

12 ownership of the railroad -- that reviewing

13 any of the safety standards in that we

14 already lived with under the FRA regulations,

15 we're more than willing and able to control

16 our own operation, especially with somebody

17 operating over our own line.

18 Q Well, you would agree, I take it, that there

19 is a disagreement between the parties as to

20 whether there is a need for the derail,

21 whether the operating window is appropriate

22 as a safety issue; wouldn't you agree that

23 there is a dispute?

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1 A Yeah, obviously.

2 Q Okay. And don't you think that that

3 dispute -- that some light might be shed on

4 that dispute and how to resolve it by asking

5 the FRA to get involved?

6 A No, I don't think so.

7 Q And why is that?

8 A I just don't think it's the proper body. I

9 don't see any reason why the FRA would be

10 involved in this particular type of dispute.

11 Q Well, they certainly have expertise with

12 respect to railroad safety, correct?

13 A That's their area of administration, yes.

14 Q And you're saying that this is a safety

15 issue, correct?

16 A That's correct.

17 Q And why then wouldn't it be appropriate for

18 the FRA to review this?

19 A Because I just don't believe, in this

20 particular instance, the FRA is the

21 particular body that should review it.

22 Q Why not?

23 A Why not?

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1 Q Yes.

2 A Because I believe that the FRA, in some

3 instances, especially with regards to the

4 makeup of Region 1, can be a biased body.

5 Q You think the FRA is biased against Guilford?

6 A I think so.

7 Q And if it reviewed this situation, that it

8 would come up with a biased report or

9 recommendation?

10 A It's possible.

11 Q And that's the reason that the FRA shouldn't

12 be involved here?

13 A I believe that's correct.

14 Q Now, you've been with Guilford for 15 years,

15 you said, I think. Do you recall in the

16 early 1990s when Milford-Bennington filed a

17 feeder-line application seeking to acquire

18 ownership of a line over which it now has

19 trackage rights?

20 A Very sketchily. The reason I say that is

21 because I didn't always have direct

22 involvement with the Milford-Bennington back

23 then.

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1 Q Okay. Were you ever in meetings or

2 discussions when that situation came up?

3 A I'm not sure. I'm not sure.

4 Q Do you have a recollection of Guilford's

5 position with respect to Milford-Bennington's

6 attempts to operate on the Guilford line?

7 A Again, I really didn't -- I really didn't

8 become that involved with the

9 Milford-Bennington. That was handled by

10 Colin Pease for the most part.

11 Q Okay. But were you aware that Guilford

12 opposed Milford-Bennington's attempt to

13 acquire the line or to operate on the line?

14 A I was aware, yes.

15 Q Okay. And did you ever talk to Mr. Fink

16 about that?

17 A No, I did not.

18 Q Okay. Do you have any recollections in

19 conversations with Mr. Fink of him making

20 comments about Mr. Leishman or

21 Milford-Bennington?

22 A The only comments that I recall Mr. Fink

23 making is, on occasion, that he felt that

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Vol. 1 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 DEPOSITION OF DAVID A. FINK, taken pursuant to Notice on behalf of Granite State Concrete Company, Inc., and Milford Bennington Railroad Company, Inc., before Simonne J. Elwood, R.P.R. and a Notary Public, at the office of Pan Am Services, 62 Durham Street, Portsmouth, New Hampshire, commencing on Friday, November 14, 2003 at 12:56 p.m. NEAL A. SALLOWAY - COURT REPORTERS FIVE CARDIGAN ROAD WEST PEABODY, MA 01960 781-581-3993 - 978-535-0313 - FAX 978-536-3142	Page 1 I N D E X <table> <tr> <td>1</td> <td>DEPONENT</td> <td>DIRECT</td> <td>REDIRECT</td> <td>CROSS</td> <td>RE CROSS</td> </tr> <tr> <td>2</td> <td>DAVID A. FINK</td> <td></td> <td></td> <td></td> <td></td> </tr> <tr> <td>3</td> <td>By Mr. Howard</td> <td>4</td> <td>--</td> <td></td> <td></td> </tr> <tr> <td>4</td> <td>By Mr. Culliford</td> <td></td> <td></td> <td>57</td> <td>--</td> </tr> </table> E X H I B I T S <table> <tr> <td>9</td> <td>EXHIBIT NO.</td> <td>DESCRIPTION</td> <td>PAGE NO.</td> </tr> <tr> <td>10</td> <td>1</td> <td>Letter - 10/11/95 to Charles P. O'Leary, Jr. From David A. Fink with Attachment</td> <td>17</td> </tr> <tr> <td>11</td> <td>2</td> <td>Letters to the Editor</td> <td>23</td> </tr> <tr> <td>12</td> <td>3</td> <td>Letter - 10/28/02 to Mr. David Fink from Stuart S. Draper</td> <td>29</td> </tr> <tr> <td>13</td> <td>4</td> <td>Verified Statement of John R. Nadolny in Support of Surreply of the Boston and Maine Corporation and The Springfield Terminal Railway Company</td> <td>36</td> </tr> </table>	1	DEPONENT	DIRECT	REDIRECT	CROSS	RE CROSS	2	DAVID A. FINK					3	By Mr. Howard	4	--			4	By Mr. Culliford			57	--	9	EXHIBIT NO.	DESCRIPTION	PAGE NO.	10	1	Letter - 10/11/95 to Charles P. O'Leary, Jr. From David A. Fink with Attachment	17	11	2	Letters to the Editor	23	12	3	Letter - 10/28/02 to Mr. David Fink from Stuart S. Draper	29	13	4	Verified Statement of John R. Nadolny in Support of Surreply of the Boston and Maine Corporation and The Springfield Terminal Railway Company	36
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Vol. 1 APPEARANCES: JAMES E. HOWARD, ESQ. JAMES E. HOWARD LLC ONE THOMPSON SQUARE - SUITE 201 CHARLESTOWN, MA 02129 REPRESENTS GRANITE STATE CONCRETE COMPANY, INC., and MILFORD BENNINGTON RAILROAD COMPANY, INC. ROBERT B. CULLIFORD, ESQ. CORPORATE COUNSEL GUILFORD RAIL SYSTEM IRON HORSE PARK NORTH BILLERICA, MA 01862-1692 REPRESENTS BOSTON AND MAINE CORPORATION and SPRINGFIELD TERMINAL RAILWAY COMPANY	Page 2 (Deposition of David A. Fink commencing at 12:56 p.m.) DAVID A. FINK A witness called on behalf of the Granite State Concrete Company, Inc., and Milford Bennington Railroad Company, Inc., first having been duly sworn, under oath, deposes and says as follows: DIRECT EXAMINATION Q (By Mr. Howard) Mr. Fink, by whom are you employed? A Guilford Transportation Industries. Q And what's your position? A President. Q Okay. Do you have any position with the railroad subsidiaries of Guilford? A I'm the Chief Executive Officer of the Railroads.																																												
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1 trackage rights and deals back in those days.
2 It was nothing unusual. I don't recall,
3 specifically, trackage rights with them.
4 They have it, so it had to be, but my memory
5 doesn't -- anymore than one other railroad.
6 Q Do you have any recollection talking to Mr.
7 Mellon (phonetic) about granting trackage
8 rights to Milford-Bennington?
9 A No.
10 Q Do you have any recollection that Mr. Mellon
11 (phonetic) and Mr. Leishman talked about
12 trackage rights in 1992?
13 A I don't recall that.
14 Q Okay. Let's ask another one. How about a
15 derailment in 1992 involving a
16 Milford-Bennington train in the Wilton yard
17 on the Guilford track; do you recall that?
18 A You're serious?
19 Q I'm serious, yes.
20 A I have derailments, my God, I don't know
21 how -- No, I don't recall whether he had a
22 derailment in Wilton. I don't recall that --
23 Q Do you recall --

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1 A -- 13, 14 years ago.
2 Q It's actually 11.
3 A Okay. Let's make it ten if that makes you
4 feel better. I'm an old man. My memory
5 isn't quite as sharp as a young man.
6 Q Do you recall going, personally, to the
7 derailment site?
8 A No.
9 Q Did you ordinarily go to derailments when it
10 was somebody else's train; in other words,
11 not a Guilford train but --
12 A Yeah. We had a MBTA derailment that it was a
13 MBTA train. I recall going to that, and I've
14 been to so many derailments in 50 years. I,
15 quite frankly, don't have any idea. I could
16 have gone there. I just don't recall being
17 at the derailment. There's been such a
18 plethora and multitude of derailments in my
19 career.
20 Q Okay. How about in 1993, do you remember
21 asking the ICC to terminate
22 Milford-Bennington's trackage rights?
23 A No, but I could have. I don't recall the

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1 occasion.
2 Q Do you have any recollection in the mid-'90s
3 of purchasing some rail cars that had been
4 leased to Milford-Bennington?
5 A Yes, I recall we bought some hopper cars.
6 Q Okay. Who did you buy those from?
7 A I don't really know.
8 Q Do you have any recollection of asking
9 Milford-Bennington to return those cars or to
10 turn them over to Guilford?
11 A If they had them, that could happen. I don't
12 recall talking to anybody on the
13 Milford-Bennington or requesting anything of
14 that nature.
15 Q Do you recall why Guilford bought the cars?
16 A I think probably it was a financial
17 arrangement. We just bought 50 hoppers here
18 a couple of weeks ago. It was a good
19 investment. That's all I have to say about
20 it. It's a financial deal.
21 Q Did you know when you bought the cars that
22 they were being used by Milford-Bennington?
23 A I am sure we did, or we should have.

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1 Q Do you recall Guilford suing
2 Milford-Bennington in connection with those
3 cars?
4 A I knew there was a suit back then, but I
5 don't know what happened or anything, but
6 there was a suit.
7 Q Okay. Do you have any recollection of asking
8 Mr. Leishman to come to your office to
9 discuss that lawsuit?
10 A No.
11 Q Do you have a recollection of offering to buy
12 Milford-Bennington in order to resolve the
13 lawsuit?
14 A Buy the Milford-Bennington?
15 Q Yes.
16 A I don't know who owns the Milford-Bennington
17 let alone buying it. There's three miles of
18 track. Not to my knowledge.
19 Q Now, do you have any recollection in 1995 of
20 learning of an accident on the
21 Milford-Bennington line concerning a private
22 track car?
23 A Yes, I do.

Page 17 1 Q Okay. And what do you recall of that? 2 A I recall that they were using track cars, and 3 there was a very very serious injury where an 4 individual had to be Medivac down to Boston, 5 to Mass. General. I think they're very 6 unsafe. I don't believe they belong on the 7 railroad, and I'm just totally against them. 8 Q Okay. How did you find out about that 9 accident, do you remember? 10 A I think it was on the radio. I mean, it was 11 quite a stir that they had there, and I don't 12 recall, specifically, whether it was on the 13 radio or I learned about it when I got to 14 where I was going. I'm not sure of that. 15 MR. HOWARD: I'm going to ask the 16 reporter to mark this document as Exhibit 1, 17 please. 18 (Whereupon the Stenographer marked as 19 Exhibit No. 1 - Letter - 10/11/95 to Charles 20 P. O'Leary, Jr. From David A. Fink with 21 Attachment.) 22 Q Mr. Fink, the document that's been marked as 23 Exhibit 1 consists of three pages. The first	Page 19 1 hazard to public safety. Do you see that? 2 A Yes, I do. 3 Q Do you know whether Milford-Bennington 4 permitted the use of these on their line or 5 had a practice of permitting the use? 6 A Do I recall? I don't know. It was on their 7 railroad, I believe, wasn't it? 8 Q It was, but the question is whether you know 9 that they had a practice of permitting these 10 vehicles on their line? 11 A I don't. I don't recall that. I don't know 12 that. But if you have a serious injury that 13 someone has to be Medivac and you're 14 operating on that railroad, that's a serious 15 safety situation. 16 Q Absolutely. 17 A And if it was on my railroad, I would 18 certainly know who was there and what they 19 were doing as a good safety practice, I 20 guess. 21 Q Okay. I was just asking whether you knew 22 whether they had a practice of permitting, 23 and I think the answer was, no, you don't
Page 18 1 two appear to be a letter from you to Charles 2 O'Leary, the Commissioner of Transportation 3 of New Hampshire. Do you recall writing this 4 letter? (Indicating) 5 A No, I don't, but it has my signature, so I 6 did, but I don't recall the letter. Give me 7 a minute, and I'll read it. 8 Q Okay. Take a look at it. 9 A (Reviewing document) It has to do with 10 safety of the track car. 11 Q Okay. Do you see in the first line of that 12 letter, you refer to recent news stories? 13 A Uh-huh. 14 Q Is that the source of your information for 15 writing this? 16 A Evidently, it was. 17 Q Okay. Do you recall any other source? 18 A As I say, whether it was radio, I don't 19 recall that. 20 Q Okay. Now, in the first paragraph, in the 21 middle there, it says: The practice of the 22 Milford Bennington Railroad in permitting the 23 use of these vehicles represents a serious	Page 20 1 know for sure? 2 A I don't know what they're permitting or not 3 permitting. 4 Q Okay. Now, in the second paragraph, the last 5 sentence, there's a reference to 6 "-- apparently interfering with local police 7 in their investigation --." Do you see that? 8 A I see "property and apparently interfering," 9 yes, I see that. 10 Q Do you know -- Do you have any basis to know 11 whether Milford-Bennington was interfering 12 with the police? 13 A Eight years ago, I don't recall that, no. 14 Q Do you have any knowledge as to who the 15 management of the Milford-Bennington is? 16 A No. 17 Q So you don't have any understanding, one way 18 or the other, that the management is only 19 Peter Leishman? 20 A Since I left the railroad, I don't have any, 21 you know, -- 22 Q I'm saying in 1995? 23 A I would imagine. I have no idea who owned it

Page 21 1 or who did what. I just think it's a very 2 unsafe act. That was the purpose of it. 3 Q Now, turning if you would, please, to the 4 third page of that Exhibit 1, and there's a 5 letter from Mr. Marshall of the New Hampshire 6 Department of Transportation to you. Do you 7 have any recollection of receiving it? 8 A No. 9 Q Do you have any doubt that you did receive it 10 at the time? 11 A I'm sure I did if it was addressed to me, I 12 would imagine. 13 Q Do you see in the second paragraph where he 14 says in the second sentence that 15 Milford-Bennington does not allow motorcars 16 on the line as a matter of policy? 17 A No, I don't see where that is. 18 Q Second paragraph, second sentence. 19 A Last such use of line was -- 20 Q One second. 21 A It says, "The last such use of line was more 22 than two years ago, which was an inspection 23 --."	Page 23 1 A That's what he said. I don't recall the 2 letter, and that's -- I think it's an 3 opinion. I don't know whether it's fact, but 4 it's there. That's what it says in the 5 letter. 6 Q Okay. But do you have any basis to know -- 7 to disagree, to have some belief that the 8 railroad did interfere with the police 9 investigation? 10 A Eight years ago, no. I just don't recall 11 anything. 12 MR. HOWARD: Mark that, please, as 13 Exhibit 2. 14 (Whereupon the Stenographer marked as 15 Exhibit No. 2 - Letters to the Editor.) 16 Q Exhibit 2 is a copy of a portion of The 17 Milford Cabinet and Wilton Journal from 18 October 18, 1995. 19 A Uh-huh. 20 Q And there appears to be a letter to the 21 editor that you wrote there. Do you have a 22 recollection of that? 23 A I don't have a recollection of the letter,
Page 22 1 Q All right. It's the third sentence. 2 A Third sentence you're looking at now? 3 Q Yes. Go back to the second sentence. 4 A "The last such use of the line was more than 5 two years ago, which was an inspection tour 6 that included state and railroad personnel." 7 Q Well, in my Paragraph 2, the second sentence 8 says, "The Milford-Bennington Railroad does 9 not allow motorcars on the line as a matter 10 of policy." Do you see that? 11 A I thought that was still the first sentence. 12 Q Okay. I'm sorry. I think it's the second. 13 But do you see that? 14 A Yes. 15 Q Now. Do you have any basis to disagree with 16 that? 17 A No. 18 Q Okay. The third paragraph of that letter, 19 the first sentence, Mr. Marshall says he's 20 not aware that the railroads has interfered 21 with local police in investigating the 22 incident. Do you have any basis to disagree 23 with that?	Page 24 1 but it says I wrote it, so I'm sure I did. 2 Q Why did you write this to the paper, do you 3 recall? 4 A I would say safety. I think that would have 5 been my motive. The same as you asked me 6 about the track car. I don't think the 7 railroad business is a very unforgiving 8 business, and I've been in it long enough. 9 Fatalities, things of this nature, it's not 10 something that's taken lightly. So I would 11 imagine that's what prompted it. 12 Q Okay. But you had already written a week 13 previously to the Department of 14 Transportation in New Hampshire to make the 15 same point, right? 16 A Evidently, the dates -- that one is dated 17 October the 11th, and this is October the 18 18th. That's seven days. That's a week. 19 Q Okay. So why write to the paper after you 20 had already raised the issue with the New 21 Hampshire DOT? 22 A I think if you would talk to my colleagues, 23 when it comes to safety, I'm a fanatic; and

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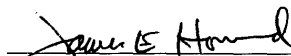
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CERTIFICATE OF SERVICE

I hereby certify that I have served the Opening Statement of Granite State
Concrete Co., Inc. and Milford-Bennington Railroad Co., Inc. as of January 7, 2004 by
causing a copy to be delivered by Federal Express to

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


James E. Howard