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January 8, 2004

VIA HAND DELIVERY

Mr. Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W., Room 700
Washington DC 20423

ENTERED
Office of Proceedings

JAN 09 2004

Part of
Public Record



Re: **Docket No. NOR 42083—Granite State Concrete Co., Inc. and
Milford Bennington Railroad Co., Inc. v. Boston and Maine Corp.
and Springfield Terminal Railway Co.**

Dear Mr. Williams:

Please find enclosed for filing in the above captioned proceeding an original and ten copies of the opening statement of respondents Boston and Maine Corp. and Springfield Terminal Railway Company, together with five verified statements. One additional copy of the package is enclosed. I would appreciate your receipt-stamping that copy and returning it to our legal assistant. Because neither the opening statement nor any of the verified statements exceeds nineteen pages in length, no electronic version has been included. See 49 C.F.R. § 1104.3(b)(1).

The verification of Andrew Zompa is a facsimile; we will file the original as soon as we receive it. Please call me with any questions regarding this matter. Thanks for your assistance.

Sincerely,

Eric L. Hirschhorn

Enclosure

cc: James E. Howard, Esq. (w/ encl.)

**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**

**OPENING STATEMENT OF THE BOSTON AND MAINE
CORPORATION and THE SPRINGFIELD TERMINAL RAILWAY COMPANY**

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*Attorney for
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Springfield Terminal Railway Company*

January 8, 2004

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. NOR 42083

**GRANITE STATE CONCRETE COMPANY, INC. and
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SPRINGFIELD TERMINAL RAILWAY COMPANY**



**OPENING STATEMENT OF THE BOSTON AND MAINE
CORPORATION and THE SPRINGFIELD TERMINAL RAILWAY COMPANY**

I. INTRODUCTION

Pursuant to the Board's Amended Scheduling Order issued November 26, 2003, the Boston and Maine Corporation and the Springfield Terminal Railway Company (collectively "Guilford") hereby submit their Opening Statement in opposition to the Formal Complaint filed by the Milford-Bennington Railroad Company, Inc. ("MBR") and Granite State Concrete Company, Inc. ("Granite State") in the above referenced matter.

II. PROCEDURAL HISTORY

On July 11, 2003, MBR and Granite State filed a Formal Complaint in this proceeding seeking: (a) an order for alternative rail service pursuant to 49 U.S.C. §11123 and 49 C.F.R. §1146.1; (b) a determination that Guilford's decision to separate the operations of Guilford and MBR constituted an unreasonable practice pursuant to 49 U.S.C. §10702; and (c) damages pursuant to 49 U.S.C. §11704(b). In response to the request for alternative rail service, the parties each filed pleadings in support of their respective positions, with Guilford also filing an

Answer and Motion to Dismiss the Formal Complaint, which was replied to by MBR and Granite State. Subsequently, the Board issued an order denying the request of MBR and Granite State for alternative rail service, while also denying Guilford's Motion to Dismiss the Formal Complaint by partially revoking the exemption that applies to the products transported by MBR on behalf of Granite State. *Granite State Concrete Co., Inc. and Milford-Bennington Railroad Co., Inc. v. Boston and Maine Corp. and Springfield Terminal Railway Co.*, STB Docket No. 42083, Served September 15, 2003 ("September 15th Decision").

III. FACTUAL BACKGROUND

To summarize the facts underlying this action, in response to the decision by MBR to institute passenger service on its lines, Guilford requested that MBR install a derail device on its property. Verified Statement of Sydney B. Culliford ("Culliford V.S."), ¶ 2. This request was made for two reasons: first, Guilford was concerned with the possibility that the passenger cars to be stored on MBR property might break free and roll inadvertently onto Guilford property; and second, upon reviewing the physical layout of the MBR, Guilford recognized that the grade of .75 to 1.5% leading into the MBR connection with Guilford created a heightened threat of both passenger and freight cars breaking free and inadvertently rolling onto Guilford property. Culliford V.S., ¶ 3.

In response to this request, MBR agreed to install a derail device on its property to address the concerns of Guilford, and Guilford provided such a device to MBR, which was installed on December 12, 2002. Verified Statement of Andrew J. Zompa ("Zompa V.S."), ¶ 2, Deposition of Erwin R. Towle ("Towle Depo"), at 22, Exhibit A hereto. Immediately after delivering the derail device to MBR, Guilford issued a bulletin notifying its crews and the crews of the MBR of the change in physical characteristics of the MBR line. Zompa V.S., ¶ 3,

Attachment A. This bulletin was distributed to both Guilford and MBR crews and did not distinguish between the use of the derail device for passenger or freight operations, and was not objected to by MBR despite the fact that it applied to conditions on MBR property.

In response to a request to develop a plan to address the operations of the MBR, Guilford and the proposed passenger service on MBR lines, several Guilford representatives traveled to Wilton on June 19, 2003 to view the location where the three operations would intersect. Culliford V.S., ¶ 4. Upon arriving at this location—which is the same location where MBR and Guilford agreed to locate the derail device—Mr. Culliford and the other Guilford representatives noticed that the derail device was not applied properly, despite the fact that a freight train had recently passed the area and the derail was left in the non-derailing position. *Id.*, ¶ 5. When Mr. Culliford requested that Mr. Leishman explain why the derail device was not applied properly, Mr. Leishman stated that the State of New Hampshire—the owner of the line upon which MBR operates—had objected to its use and that MBR was in a difficult position trying to maintain the derail in light of this opposition. *Id.*, ¶ 6. Prior to Guilford’s discovery that the derail device was not being applied properly, no one from MBR had contacted Guilford to inform them of this fact or to contest the bulletin issued by Guilford. *Zompa V.S.*, ¶ 4.

Recognizing that MBR did not intend to utilize the derail in the agreed upon manner, on the afternoon of June 19th Guilford undertook to install a derail device on its own property, and issued a bulletin alerting both Guilford and MBR crews to its existence. *Zompa V.S.*, ¶ 5. Additionally, in light of MBR’s apparent willingness to disregard its agreements and standard safety regulations and practices without notice, Guilford also elected to separate the operations of MBR and Guilford in order to minimize the potential for an incident when MBR was operating on Guilford’s line. *Culliford V.S.*, ¶ 7. To accomplish complete separation of the two railroads,

separate operating windows were established on Guilford's lines, with the MBR being allowed to operate on Guilford's line from 12:00 am to 8:00 am. Id., ¶ 8. This operating window was selected to allow MBR maximum operating time on Guilford's lines, while also allowing Guilford to serve its customers, maintain and inspect the line during daylight hours. Id., ¶ 9. At the time the decision was made to institute this operating window, no one from Guilford was aware that the Granite State facility in Wilton, New Hampshire was subject to operating restrictions by its permit. Deposition of David A. Fink, at 46, Deposition of Thomas F. Steiniger, at 22-23, Deposition of Sydney B. Culliford, at 58, Exhibits B through D hereto. Once Guilford became aware of these operating restrictions at the Wilton facility, Guilford voluntarily altered the operating window to allow MBR to operate from 4:00 am to 1:00 pm daily. Culliford V.S., ¶ 10. Subsequently, Guilford also discovered that MBR had been maintaining Guilford's lines without any authority from Guilford. Id., ¶ 11.

During the next few months, Guilford attempted to accommodate MBR as much as possible in its service to Granite State. For example, on September 18, 2003, MBR encountered a broken rail on Guilford's line while serving Granite State within its operating window. Verified Statement of Warren Bostwick ("Bostwick V.S."), ¶¶ 2-3. To assist MBR, Guilford offered to have a member of its Engineering Department walk the MBR train over the broken rail and to allow MBR additional operating time on that Thursday and Friday to make up for time lost while repairs were performed. Bostwick V.S., ¶ 3. However, despite being informed that the operating window was only being temporarily suspended, MBR elected not to operate that day or the next, waiting until Monday, September 22nd to resume operations. Bostwick V.S., ¶¶ 5-6, Attachment A. Moreover, Guilford also performed extensive maintenance to the portion of its line over which MBR operates, increasing the speeds on that portion of the line to 10 miles

per hour, work which was performed in its entirety after the MBR had finished operating for the day at 1:00 pm and completed on October 29, 2003. Verified Statement of John F. Steiniger (“Steiniger V.S.”), ¶ 3. Furthermore, Guilford also continued to review the operating window in place, and ultimately came to the conclusion that an alternative means to ensure safety on Guilford’s line would be to maintain an “absolute block” whereby only one movement was permitted on Guilford’s line at any one time. Zompa V.S., ¶ 6. In other words, only one train or one maintenance/ inspection crew would be permitted on the line at any one time, and all other movements would be kept out until the line was clear. Id., ¶ 7. Once this conclusion was reached, Guilford implemented this new plan on November 10, 2003, thereby discontinuing the use of operating windows with set hours of operation. Id., ¶ 8, Attachment B. This new operating plan permitted MBR to conduct its operations in a manner similar to those performed prior to the imposition of the operating window. Id., ¶ 9.

Despite Guilford’s efforts to assist MBR by twice altering the operating window and improving speeds on the line, MBR continued to fall far short of its professed desire to make three to four round trips per day between the Granite State facilities in Milford and Wilton, New Hampshire. Verified Statement of Larry L. Ferguson (“Ferguson V.S.”), ¶ 2, Attachment A. In fact, even after the operating window was removed on November 10th, MBR only performed as many as 3 round trips on only two occasions prior to discontinuing operations on December 8, 2003, despite the increased speeds on Guilford’s line between Wilton and Milford. Ferguson V.S., ¶ 3, Attachment A.

IV. ARGUMENT

A. The Exemption is Applicable to the Products Shipped by Granite State Should not be Revoked in its Entirety.

In its September 15, 2003 decision instituting this proceeding, the Board found that

because Granite State lacks the service options that were the basis for the original Class Exemption, partial revocation was appropriate. More particularly, relying upon the Reply filed by MBR and Granite State in opposition to Guilford's Motion to Dismiss, the Board found that Granite State's excavation permit prohibits the movement of its products by truck to avoid movements through Wilton, thereby denying Granite State the option of trucking its product. *September 15th Decision*, at 5. Accordingly, the Board elected to revoke the exemption, "...to the extent necessary to allow the Board to give consideration to [Guilford's] actions with respect to the service provided by [MBR] to Granite State.¹" *Id.* Because discovery has shown that truck competition is available to Granite State if it chose to pursue it, however, the entire exemption should be reinstituted and not revoked in its entirety².

Despite Granite State's statements to the contrary, the permits applicable to the Wilton facility do not foreclose the option of trucking, and Granite State has in fact been trucking product from its Wilton facility since 1989. More particularly, there are two permits that have applied to the Wilton facility, one issued in 1989 and one issued in 2001. Exhibits E and F hereto. Despite the fact that the original 1989 permit explicitly stated that the products (of the rock crusher) at Wilton shall only be moved by rail, Granite State continued to move some product by truck from Wilton through the 1990's, because that product did not move well by rail. Deposition of John G. MacLellan, III (J. MacLellan Depo), at 19, 20. Exhibit G hereto. In the late 1990's, however, the Town of Wilton—apparently under the impression that no trucking was allowed under the 1989 permit---approached Granite State regarding this practice. J. MacLellan Depo, at 19. Despite its concerns, however, the Town never issued a cease and desist

¹ Taking this statement on its face, Guilford still is not subject to regulatory oversight because the exemption has only been partially revoked to permit the Board to institute this proceeding.

² As the Board has consistently stated, absent a finding of substantial market power, an exemption should not be revoked. *Rail General Exemption Authority—Miscellaneous Agricultural Commodities—Petition of G&T Terminal Packaging Co., Inc. to Revoke Conrail Exemption* ("G&T Terminal"), 8 I.C.C.2d 674, 682 (1992).

order or threatened legal action. *Id.* Rather, the Town simply requested that Granite State apply for a new permit that would account for the trucking of product from the Wilton facility. *J. MacLellan Depo*, at 21. Importantly, this new permit issued in 2001 did not have an explicit ban on trucking from the Wilton facility. Instead, this 2001 permit merely stated that, “Unless and until transportation by railroad becomes unavailable or *impracticable*, the crushed stone products of the plant shall be transported off-site by rail.” Exhibit F hereto, note 17. Accordingly, because no prior approval is required to begin trucking if rail transportation becomes impracticable, Granite State could have begun to truck its crush stone product once the operating window was put in place and Granite State began to allegedly lose inventory. Incredibly, however, Granite State did not even approach the Town of Wilton to discuss this issue—although prior approval was not necessary and despite the fact that the Town showed a willingness to work with Granite State to amend the 1989 permit to expressly allow trucking—instead choosing to allow its inventory to allegedly dwindle while pursuing its remedies at the Board. Moreover, contrary to the statements made by MBR and Granite State in their Reply, movement by truck does not require travel through Wilton. *J. MacLellan Depo*, at 23. Consequently, because truck competition was and is available to Granite State, the exemption should not be revoked in its entirety³.

B. The Class Exemption For Stone Products Applies to Guilford’s Transportation and Services Pursuant to the Trackage Rights Agreement.

As the Board considers whether the Exemption of stone products applies to Guilford’s

³ In fact, as the Board recognized in enacting this Class Exemption, transport of stone products by truck is often more desirable than by rail, principally because of the short haul nature of the transportation. *Rail General Exemption Authority—Petition of AAR to Exempt Rail Transportation of Selected Commodity Groups*, 9 I.C.C.2d 969 (1993), at 975.

transportation and services pursuant to the Trackage Rights Agreement, it is instructive to review the original Class Exemption as well as the regulation promulgated to implement this decision. *Rail General Exemption Authority—Petition of AAR to Exempt Rail Transportation of Selected Commodity Groups*, 9 I.C.C.2d 969 (1993), 49 C.F.R. §1039.11(a). Pursuant to this authority, the only regulation excepted from the exemption was the regulation of stone products was the regulation of car hire, car service and Class III railroad protections related to car service. Indeed, section 1039.11(a) explicitly states that, “Except as indicated in paragraph (b) of this section, the rail transportation of commodities listed below is exempt from the provisions of 49 U.S.C. Subtitle IV.” 49 C.F.R. §1039.11(a).⁴

As the Board recently found, absent a specific reservation of regulatory oversight, a Class Exemption is intended to broadly exempt commodities from the regulatory requirements of 49 U.S.C. Subtitle IV. *Pejepscot Industrial Park, Inc. D/B/A Grimmel Industries—Petition for Declaratory Order* (“Grimmel Decision”), STB Finance Docket No. 33989, Served May 15, 2003, Footnote 13. Accordingly, where no specific regulatory oversight is specifically reserved for either the requirements of 49 U.S.C. §10702 regarding reasonable practices or 49 U.S.C. §11323 governing a grant of trackage rights, no such reservation should be inferred.

C. Even if the Class Exemption was Completely Revoked in the September 15th Decision, Granite State and MBR Cannot Recover Damages Accruing Before that Date.

Granite State and MBR will most likely argue that they are entitled to damages from the date that Guilford’s allegedly unreasonable conduct first began. What Granite State and MBR fail to realize, however, is that until the Board elected to institute this proceeding, the Class Exemption was in effect and—as described in Point IV.B above—applied to Guilford’s statutory

⁴ The exceptions are those identified in this Class Exemption proceeding and discussed above, as well as an exception for movements where a finding of market dominance is made. 49 C.F.R. §1039.11(b). Because truck competition is available, as discussed in Point IV.A, however, no finding of market dominance can be made.

duties to establish reasonable practices pursuant to 49 U.S.C. §10702 and its liability pursuant to 49 U.S.C. § 11704(b).

More particularly, provided an exemption is in place, a carrier is relieved of its common carrier duties and cannot be charged with a violation of those duties. *Grimmel Decision*, at 4. Consequently, even if Guilford's conduct prior to September 15th would have constituted a violation of section 10702 or section 11704(b), the Class Exemption bars relief during the period in which the exemption was in force. *Id.* Accordingly, even under the best case scenario for Granite State and MBR—that the entire Class Exemption for stone products was revoked by the September 15th Decision—any damages that accrued before that date cannot be recovered⁵.

D. Guilford's Actions Were a Reasonable Response to MBR's Failure and/or Inability to Abide by Customary Safety Rules and Practices.

When the facts underlying this proceeding are viewed as a whole, it becomes clear that the only party taking a reasonable approach to the actions of MBR has been Guilford. Since the MBR first approached Guilford with a proposal to operate passenger service, Guilford has attempted to implement practices that will allow each railroad to conduct its operations safely and efficiently. Unfortunately, each time that Guilford looked closely at the operating practices of the MBR, Guilford found yet another reason to be concerned with MBR's commitment to safety. As a result, Guilford was compelled to adopt more stringent safety practices to protect not only Guilford, but its employees, the employees of MBR and the general public as well.

More particularly, when Guilford was informed that passenger service would be limited to the line operated by MBR, Guilford still recognized that the storage of vintage cars on this line could pose a safety problem. *Culliford V.S.*, ¶ 3. Moreover, when Guilford looked more closely

⁵ As discussed in Point IV.A, a determination that the entire Class Exemption was revoked would be contrary to the plain language of the *September 15th Decision*.

at the geographic layout of the MBR, Guilford also recognized that the steep grade leading into Wilton Yard could result in either the passenger cars or freight cars from breaking free and traveling onto Guilford property with little or no advance notice. *Id.* To address this concern, Guilford requested that a derail device be installed on MBR property, a proposition with which MBR readily agreed without any distinction between passenger and freight operations. *Zompa V.S.*, ¶ 2, Towle Depo, at 22, Exhibit A hereto. To further ensure that operations were conducted safely, Guilford immediately issued a bulletin to advise Guilford and MBR crews of the existence and location of the derail device to alert crews to a change in physical characteristics on the line. *Zompa V.S.*, ¶ 3, Attachment A.

While MBR should also have issued its own bulletin to alert its crews of the presence and location of the derail device, it never did so. Deposition of Peter R. Leishman (“Leishman Depo”), at 58, Exhibit H hereto. Nor did MBR ever object to the fact that the bulletin issued pertained to operations on its line and did not distinguish between passenger and freight operations. *Leishman Depo*, at 56, 61. Instead, MBR simply elected to first discontinue use of the derail device for a period of time, then to improperly use the derail device once it was reinstalled by leaving it in the open position even when trains were not operating in the area. *NORAC Rule 104(d)* (requiring derails to be kept in the locked position at the fouling point of Main Track⁶), *Leishman Depo*, at 58-59. Moreover, MBR also apparently permitted its crews to operate pursuant a bulletin that was either incorrect or was not being followed, a direct violation of NORAC Rules 1 and 104(d), requiring employees reporting for duty to familiarize themselves with, and comply with, instructions pertaining to any portions of the territory in which they

⁶ Since the derail was put in place at the intersection of the MBR and Guilford lines, it was located at the Fouling Point of Guilford’s line. *Zompa V.S.*, ¶ 2.

operate.⁷ Finally, by first removing the derail device and then improperly using it when it was reinstalled, MBR also violated its agreement with Guilford to install and utilize the derail device regardless of whether freight and/or passenger trains were operating. *Zompa V.S.*, ¶ 2, *Towle Depo*, at 22, Exhibit A hereto. Consequently, when Guilford first discovered that the MBR was not following the appropriate safety rules and practices, Guilford elected to take the appropriate action to protect all parties involved, action that would not have been taken had MBR been operating in the same manner as all other railroads with which Guilford connects. *Culliford V.S.*, ¶ 14. In its defense, MBR first contended that the State of New Hampshire and the Federal Railroad Administration (“FRA”) ordered the derail to be removed, but this contention ultimately proved to be incorrect. *Leishman Depo*, at 54-55, 63.

As if the MBR’s unwillingness and/or inability to comply with its agreements and customary safety rules and practices in relation to the derail device were not enough, once this matter was brought to the attention of the Board, Guilford also discovered that MBR had allegedly been maintaining Guilford’s track for a number of years, without the proper qualifications or approvals to do so. Specifically, Mr. Leishman readily admits that he was maintaining Guilford’s track. *Leishman Depo*, at 21. When asked under what authority he was performing this maintenance, however, Mr. Leishman indicated a woefully poor understanding of the relevant safety rules and regulations that govern track maintenance.

First, any person maintaining a railroad’s track is required by the FRA’s Track Safety Standards to be qualified by that railroad to perform such maintenance, qualifications that Mr. Leishman admits he has never obtained. *49 C.F.R. §213.7*, *Leishman Depo*, at 16. Second, any person taking control of a line of railroad to perform maintenance is required to be qualified

⁷ Whether the bulletin was issued by Guilford is irrelevant to this analysis, since it was the only document indicating the existence of the derail on the MBR line.

under that railroad's Roadway Worker Protection program, qualifications that Mr. Leishman admits that he has never obtained. 49 C.F.R. §214.313(a), Leishman Depo, at 37. Third, in order to perform maintenance within yard limits—as is the case with this portion of the Hillsboro Branch—under the NORAC Rules that person would be required to obtain verbal permission from the Dispatcher to simply occupy the track, and would be required to obtain a written “Form D” from the Dispatcher to actually perform maintenance. *NORAC Rules 93, 132*. In his defense, Mr. Leishman contends that he had control of the track because the Guilford dispatcher had given him permission to operate his train there, and in any event the maintenance was being done with the full knowledge and consent of Guilford⁸. Leishman Depo, at 39. Unfortunately, this contention is incorrect as well, as the NORAC Rules require that the permission given by the Dispatcher be in writing if the track is to be disturbed. *NORAC Rule 132*. Furthermore, none of the Guilford employees deposed at the request of MBR and Granite State has any recollection of this work being performed, or of giving their consent or authorization to perform it. Depositions of Roger D. Bergeron, at 30-35; Steven Larkin, at 12-13; Gary S. Nault, at 10; Thomas Garrity, at 7; Calvin R. Preston, at 9; and Michael S. Moretto, at 5-6; Exhibits I through N hereto.

Finally, Guilford's concern was also heightened when it was contacted by MBR to permit a MBR train to enter Guilford's property while being operated by an engineer who was not qualified by Guilford to operate on the Hillsboro Branch. More particularly, on October 28, 2003 MBR requested permission to enter the Guilford line and identified the engineer and conductor on the MBR train, as is customary. *Ferguson V.S.*, ¶ 4. When Guilford checked its records to confirm that the MBR crew was qualified to operate on Guilford's track, it was discovered that the engineer—Wayne Wheeler—had not received the proper qualifications. Apparently, Mr.

⁸ Even if the Dispatcher had given MBR permission to maintain the track—which he did not—this practice by MBR would still be a breach of its Trackage Rights Agreement with Guilford. Exhibit O hereto, sections 1(c)(i), 1(f).

Leishman was under the impression that because Mr. Wheeler had been qualified by Guilford on another railroad, that qualified him to operate on the Hillsboro Branch. Leishman Depo, at 105. Once again, however, Mr. Leishman was mistaken, because the NORAC Rules require that any person operating on a line of railroad be qualified *for that line of railroad* and also be familiar with the physical characteristics of that line of railroad, neither of which pertains to Mr. Wheeler. *NORAC General Rule C, Zompa V.S., ¶ 10.*

Clearly, in light of the repeated and flagrant violations of customary and mandatory safety rules, regulations and practices, MBR has shown that it either does not understand these rules, regulations and practices or chooses to ignore them. As a result, Guilford was entirely justified in taking steps to separate the operations of the two railroads.

Notwithstanding the safety concerns arising from the manner in which MBR conducts its operations, the steps taken by Guilford to accommodate both MBR and Granite State—while also maximizing safe operations—are also indicative of the reasonableness of Guilford’s actions. What seems to have been lost in all of the rancor is that Guilford has taken considerable steps to improve the efficiency of operations on the line, despite little or no cooperation from either MBR or Granite State.

Specifically, when Guilford originally decided that its operations should be kept separate from those of MBR, Guilford elected to permit MBR to operate between the hours of 12:00 am and 8:00 am for one simple reason: this operating window would provide MBR with eight hours of uninterrupted access to the line, without the need to clear the line to allow Guilford to perform maintenance and inspections during daylight hours. *Culliford V.S., ¶ 9.* Moreover, at the time this operating window was selected no one from Guilford was aware that the Wilton facility was subject to the permitting restrictions that were subsequently disclosed. Depositions of David A.

Fink, at 46, Thomas F. Steiniger, at 22-23, and Sydney B. Culliford, at 58, Exhibits B through D hereto. When Guilford was informed of this permitting restriction, Guilford voluntarily altered the operating window to permit MBR more flexibility in serving Granite State, while also permitting Guilford to maintain and inspect the track during daylight hours, and to serve its customers. Culliford V.S., ¶ 10.

Additionally, once the 4:00 am to 1:00 pm operating window was put in place, Guilford also undertook a project to rehabilitate the portion of the Hillsboro Branch over which the MBR operates to permit speeds of up to 10 miles per hour on the line. Culliford V.S., ¶ 12. This project was undertaken to permit MBR to conduct its operations at higher speeds and to improve the efficiency of Guilford's operations. Id., ¶ 13.

Furthermore, Guilford also attempted to assist MBR and Granite State by making additional operating time available in response to a broken rail that delayed an MBR train. Specifically, on September 18, 2003, MBR contacted Guilford to report a broken rail as it was operating over the Guilford line. Bostwick V.S., ¶ 2. In response, Guilford dispatched a member of its Engineering Department to the scene to determine whether the MBR train could be walked over the broken rail and to initiate repairs. Id., ¶ 3. By the time the Guilford employee arrived, however, the MBR crew had left the scene and apparently would not return that day. Leishman Depo, at 89. Guilford also contacted Mr. Leishman to inform him that Guilford would temporarily lift the operating window to permit MBR to make up for time lost due to the broken rail. Bostwick V.S., ¶ 3. Mr. Bostwick informed Mr. Leishman that the operating window would be lifted for the remainder of that day, and through the weekend. Id. Curiously, MBR never attempted to operate later that day, all of Friday or the weekend, and waited until the following Monday, September 22nd to resume operations. Bostwick V.S., ¶ 6. Furthermore, not

only did MBR fail to take advantage of this increased operating time, Mr. Leishman also chose to berate Guilford personnel because he misconstrued the nature of Guilford's offer. Bostwick V.S., Attachment A.

Finally, throughout this proceeding Guilford also continued to explore additional alternatives to accommodate MBR and Granite State, with little or no guidance from MBR or Granite State as to their actual needs. Nevertheless, Guilford was ultimately able to identify a method to maintain separation between the operations of the two railroads, while also allowing MBR more time to serve Granite State within the permitting restriction at Wilton. This method—which maintains an absolute block on the portion of the Guilford line utilized by MBR—allows only one movement at a time on the line. Zompa V.S., ¶ 6, Attachment B. In other words, only one entity can control the line at one time, whether it be a Guilford maintenance crew, a Guilford train or an MBR train. This “absolute block” now permits MBR to serve Granite State in a manner as close as possible as it did before, while also addressing Guilford's concerns with safety on the line.

Consequently, given all the reasons why it made sense for Guilford to separate the operations of Guilford and MBR, as well as Guilford's consistent efforts to accommodate MBR and Granite State, it is clear that Guilford has acted responsibly and reasonably throughout this episode.

E. Granite State and MBR have Failed to Take Reasonable Steps to Mitigate Their Damages.

It has been somewhat frustrating to Guilford that throughout this proceeding neither Granite State nor MBR has put forth much of an effort to mitigate their alleged damages, apparently electing to hold Guilford responsible for all of their alleged losses. This position is

contrary to logic and the established rule that a complainant must take reasonable steps to mitigate its damages in order to recover that which it is seeking, even for a statutory violation.

Louisiana Railcar, Inc. v. Missouri Pacific RR Co., 7 I.C.C.2d 30 (1990), *Competitive Associates, Inc. v. International Health Sciences, Inc., et. al.*, 1975 WL 349 (S.D. NY 1975).

Here it is clear that both MBR and Granite State could have done much more than they have to decrease their alleged damages, as detailed below.

In the first instance, MBR has failed to take full advantage of the operating window that was made available to it, particularly the 4:00 am to 1:00 pm operating window and the recent “absolute block” implemented on November 10, 2003. More particularly, when the 4:00 am to 1:00 pm operating window was instituted, MBR continued to finish its day empty at the Milford plant, and would not return to Wilton to load for the next morning between 1:00 pm and 6:30 pm. As justification for not doing so, MBR claims that they could not deliver a loaded train to Milford for unloading prior to 6:30 in the morning because of concerns that Granite State has with its neighbors, and could not begin railroad operations at Wilton before 6:30 am because of the permitting restrictions at that facility, which is the only safe place for the train to be left overnight on the MBR line. Leishman Depo, at 78, 80-82. Of course, this explanation ignores the fact that there are no permitting restrictions on the Milford plant, as well as the fact that the local permitting restrictions at Wilton are generally preempted as applied to railroads. Leishman Depo, at 72, *Joint Petition for Declaratory Order--Boston and Maine Corporation and Town of Ayer, Ma*, STB Finance Docket No. 33971, Served May 1, 2001.

Secondly, despite the fact that speeds on the line were increased to 10 miles per hour on October 29, 2003, and the 4:00 am to 1:00 pm operating restriction was removed on November 10, 2003, MBR made three round trips on only two days until it elected to shut down operations

for the winter on December 8th. Ferguson V.S., ¶ 3, Attachment A. Clearly, if a minimum of three round trips per day were essential to support the Milford facility, as claimed by Granite State and MBR, it would seem that MBR would have committed itself to making more trips than it actually did during this period. Similarly, if service to the Milford facility were so critical, it is astounding that MBR did not take advantage of the increased operating times offered to it between September 18-22nd, as described in Point III, above.

Another means available to MBR to increase shipments to the Milford facility include leasing of additional rail cars and locomotives to operate more trains, which it did not pursue⁹. MBR and/or Granite State could have also have approached Pike's Quarry, located just north of the Wilton facility and rail served, to supply stone to Milford, but neither party elected to take this step. Finally, Granite State could have also begun trucking stone out of Wilton, as discussed in Point IV.A, above, which it elected not to pursue as well.

Clearly, there were several steps that either Granite State or MBR could have taken to mitigate the damages that they claim to have incurred. Consequently, the failure to take these steps should minimize the amount of damages available.

V. CONCLUSION

For the reasons discussed herein, the Boston and Maine Corporation and the Springfield Terminal Railway Company respectfully request that they be found to have acted in a responsible and reasonable manner under the circumstances.

⁹ Importantly, the Trackage Rights Agreement limits the number of cars per train, it does not limit the number of trains to be operated. Exhibit O hereto, section 1(a), Leishman Depo, at 85.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'RBC', written over a horizontal line.

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

Counsel for:

Boston and Maine Corporation
Springfield Terminal Railway Company

Dated: January 8, 2004

A

Granite State, et al vs. Boston and Maine, et al David A. Fink

November 14, 2003

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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 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.		1 INDEX 2 DEponent DIRECT REDIRECT CROSS RECROSS 3 DAVID A. FINK 4 By Mr. Howard 4 -- 5 By Mr. Culliford 57 -- 6 7 8 EXHIBITS 9 <table border="1"> <thead> <tr> <th>EXHIBIT NO.</th> <th>DESCRIPTION</th> <th>PAGE NO.</th> </tr> </thead> <tbody> <tr> <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>2</td> <td>Letters to the Editor</td> <td>23</td> </tr> <tr> <td>3</td> <td>Letter - 10/28/02 to Mr. David Fink from Stuart S. Draper</td> <td>29</td> </tr> <tr> <td>4</td> <td>Verified Statement of John R. Nadeoin in Support of Surreply of the Boston and Maine Corporation and The Springfield Terminal Railway Company</td> <td>36</td> </tr> </tbody> </table> 10 11 12 13 14 15 16 17 18 19 20 21 22 23		EXHIBIT NO.	DESCRIPTION	PAGE NO.	1	Letter - 10/11/95 to Charles P. O'Leary, Jr. From David A. Fink with Attachment	17	2	Letters to the Editor	23	3	Letter - 10/28/02 to Mr. David Fink from Stuart S. Draper	29	4	Verified Statement of John R. Nadeoin in Support of Surreply of the Boston and Maine Corporation and The Springfield Terminal Railway Company	36
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November 14, 2003

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1 Q And you say you don't recall who told you
2 this?
3 A No.
4 Q Well, would it have been Mr. Steiniger?
5 A It could have been. I just don't recall who
6 did.
7 Q Do you talk to others on a regular basis on
8 the railroad?
9 A No, no.
10 Q Do you have any recollection or information
11 as to what the normal operating hours of
12 Milford-Bennington have been over the last
13 ten years prior to June of this year?
14 A No. I think they call and go down the track
15 and do what they do and go home.
16 Q Whenever they want to?
17 A I don't recall. I never got into that.
18 Q Have you -- Are you familiar with the Granite
19 State quarry in Wilton?
20 A No.
21 Q Never seen it?
22 A In Wilton? No, I don't believe so. I've
23 seen the -- I don't know which -- I saw the

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1 A No.
2 Q You don't have any recollection talking about
3 those restrictions with Mr. Pease or Mr.
4 Coffin (phonetic)?
5 A No.
6 Q Are you familiar with the stone business,
7 generally?
8 A I've spent a great deal of time in the stone
9 business.
10 Q And is it your impression that operations of
11 a quarry at night in terms of loading trains
12 and unloading trains would be difficult?
13 A No. All of our quarries, and we had some 14
14 of them with Ashland, there was never any
15 questions about that.
16 Q Do you have lighting at those quarries?
17 A Yes, indeed.
18 Q It would be difficult without lighting, would
19 it not?
20 A We had some, but it would be much much better
21 with lighting, I would say, yes.
22 Q Did you know that the restriction on the
23 hours of operation that I referred to

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1 Quinn Quarry, but that -- I don't know the
2 other quarry.
3 Q Do you know anything about the permitting
4 restrictions that relate to the Wilton
5 Quarry?
6 A No.
7 Q You're not aware that they're limited to 6:30
8 a.m. to 6:30 p.m. in terms of their
9 operation?
10 A I mean, who does that? Who limits them?
11 Q By the town?
12 A No. Interstate Commerce. I always
13 thought -- in fact, you, in a couple of
14 cases, had restrictive hours. I thought
15 under the Interstate Commerce clause that
16 they have difficulty in doing that. I don't
17 know that.
18 Q I'm asking about operations of the quarry,
19 crushing stone at the quarry?
20 A I don't anything about the quarry.
21 Q You're not aware of any permitting
22 restrictions limiting their hours of
23 operations?

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1 restricted Milford-Bennington to the hours of
2 12:00 a.m. to 8:00 a.m., were you aware of
3 that?
4 A The railroad or the quarry?
5 Q The railroad. We're back on the railroad.
6 A Okay. There was a limitation, but I don't
7 know what it was.
8 Q You don't know what the hours were?
9 A No.
10 Q Well, knowing the -- if I told you that the
11 quarry at Wilton didn't have lights, do you
12 think it would be difficult to serve them if
13 you had to operate between 12:00 a.m. and
14 8:00 a.m.?
15 MR. CULLIFORD: Objection. He's never
16 seen the quarry.
17 MR. HOWARD: I said if the quarry
18 didn't have lights, --
19 A We serve -- Wait a minute. Wait a minute.
20 We serve coal mines and various other things
21 at night with no lights. I think it would be
22 beneficial to have lights; but if you didn't,
23 that's why you have the trainman's lantern,

Granite State, et al vs. Boston & Maine, et al Erwin R. Towle

October 31, 2003

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Erwin R. Towle

October 31, 2003

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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

B

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Granite State, et al vs. Boston & Maine, et al Thomas F. Steiniger

November 3, 2003

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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.		INDEX DEPONENT DIRECT REDIRECT CROSS RECROSS THOMAS F. STEINIGER By Mr. Howard 4 85 By Mr. Culliford 73 -- EXHIBITS <table border="1"> <thead> <tr> <th>EXHIBIT NO.</th> <th>DESCRIPTION</th> <th>PAGE NO.</th> </tr> </thead> <tbody> <tr> <td>1</td> <td>Verified Statement of Thomas F. Steiniger in Support of Motion to Dismiss and Reply to Petition for Relief</td> <td>4</td> </tr> </tbody> </table>		EXHIBIT NO.	DESCRIPTION	PAGE NO.	1	Verified Statement of Thomas F. Steiniger in Support of Motion to Dismiss and Reply to Petition for Relief	4
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November 3, 2003

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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

D

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November 3, 2003

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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 SYDNEY B. CULLIFORD, taken pursuant to Notice on behalf of Granite State Concrete Company, Inc., and Milford Bennington Railroad Company, Inc., before Simone 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.		INDEX <table border="1"> <thead> <tr> <th>DEPONENT</th> <th>DIRECT</th> <th>REDIRECT</th> <th>CROSS</th> <th>RECROSS</th> </tr> </thead> <tbody> <tr> <td>SYDNEY B. CULLIFORD</td> <td></td> <td></td> <td></td> <td></td> </tr> <tr> <td>By Mr. Howard</td> <td>4</td> <td>--</td> <td></td> <td></td> </tr> <tr> <td>By Mr. Culliford</td> <td></td> <td>82</td> <td>--</td> <td></td> </tr> </tbody> </table> EXHIBITS <table border="1"> <thead> <tr> <th>EXHIBIT NO.</th> <th>DESCRIPTION</th> <th>PAGE NO.</th> </tr> </thead> <tbody> <tr> <td>1</td> <td>Verified Statement of Sydney B. Culliford</td> <td>18</td> </tr> <tr> <td>2</td> <td>Verified Statement of Sydney B. Culliford in Support of Motion to Dismiss and Reply of the Boston and Maine Corporation and The Springfield Terminal Railway Company</td> <td>38</td> </tr> <tr> <td>3</td> <td>Invoice - 6/30/03 to Mr. Richard Miller from Peter E. Leishman</td> <td>67</td> </tr> <tr> <td>4</td> <td>Guilford Rail System Supplemental Bulletin Order No. 3-006G - In Effect 0700 Friday, June 20, 2003</td> <td>78</td> </tr> </tbody> </table>		DEPONENT	DIRECT	REDIRECT	CROSS	RECROSS	SYDNEY B. CULLIFORD					By Mr. Howard	4	--			By Mr. Culliford		82	--		EXHIBIT NO.	DESCRIPTION	PAGE NO.	1	Verified Statement of Sydney B. Culliford	18	2	Verified Statement of Sydney B. Culliford in Support of Motion to Dismiss and Reply of the Boston and Maine Corporation and The Springfield Terminal Railway Company	38	3	Invoice - 6/30/03 to Mr. Richard Miller from Peter E. Leishman	67	4	Guilford Rail System Supplemental Bulletin Order No. 3-006G - In Effect 0700 Friday, June 20, 2003	78
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Vol. 1 - 2 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 D. 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		Vol. 1 - 4 (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.																																				

Granite State, et al vs. Boston & Maine, et al Sydney B. Culliford**November 3, 2003****Vol. 1 - 57**

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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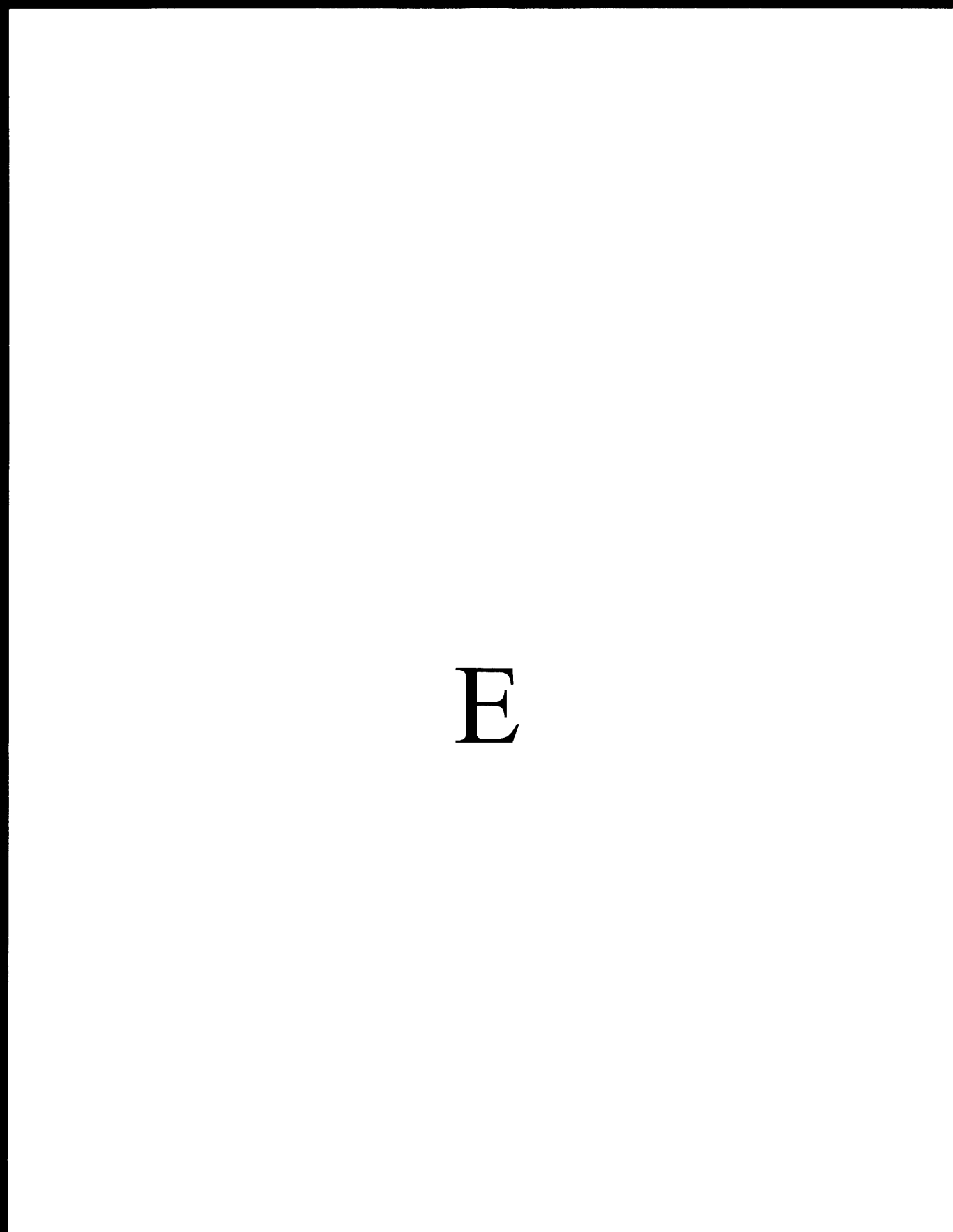
1 Q Well, you understand that they have one
2 customer, and the trackage rights are limited
3 to service of Granite State, right?
4 A That's right.
5 Q So you never bothered to find out whether
6 there were any restrictions in terms of the
7 operations at Wilton to Granite State?
8 A No, I didn't.
9 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 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 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



E

TOWN OF WILTON
PLANNING BOARD

MINUTES AUGUST 16, 1989

Chairman Mark Whitehill called the meeting to order at 7:32 PM. Members present were Alec MacMartin, Minot Ring, Alternate Pam Ellis, David Glines, Dick Rockwood, Mike Davidson, David Stein - Selectmen's representative, Julie Cummings - NRPC and Secretary Joanna K Eckstrom. Press coverage was provided by Peter Ferrand of the Telegraph as well as reporters from the Cabinet and Union Leader. Whitehill reminded all of the new protocol for hearings stating that meeting would adjourn at 11 and no new business would be opened after 10:30. The minutes of the previous meeting were deferred until later. Whitehill called the first case.

RICHARD S KAHN - SUBDIVISION, continuing and final - Alec MacMartin stepped down and is replaced by Alternate Pam Ellis. Kahn says all information needed for approval for his plan has been provided. Ms Eckstrom noted that State approval for septic and subdivision had been received.

Stein moved to approve the subdivision plan pending Silas Little's favorable review of easement language. Second by Davidson. Vote on motion in favor unanimously. Language (for easement) is to be forwarded to Little. Fees of \$22 for NRPC, \$24 for mylar and \$14 for documents (total \$60) was paid to secretary. Case closed. Ellis steps down and MacMartin resumes seat on Board.

MONAHAN AND PROLMAN, NOTTINGHAM - Cluster Site Plan Review preliminary, continuing - not present.

GRANITE STATE CONCRETE CO INC - Non Residential Site Plan Review continuing. Peter Leishman presents for GSC and company is also represented by their attorney William Drescher, their Vice President John MacLellan Jr, and Phil Tuomala, their engineer from Monadnock Survey.

Leishman noted that all concerns mentioned by the Board at the last meeting had been met. Regarding hours of operation, note 9 states hours will be 6:30 AM to 6:30 PM. Another says rock crusher will be located at floor of operation. Concern for volume of water and misters (4) is cited in note 11. Fuel storage tank is addressed on page 1 and generator location is shown as well as crusher on plans. Plan shown tonite, Leishman says, shows best locations and grassy swales, as requested by Weston, are also indicated. Regarding the question of tonnage, output of facility, Leishman said the MacLellan's would abide by 3000 T per day, if they had to, but would challenge this in court.

Whitehill asked if the crusher location had been changed. Leishman said it had adding that the best locations for crusher and rail were now shown on the plans.

MacMartin asked what the "arms" were on the conveyor belts. These are noted to be the four misters or sprayers that will be used to keep dust down.

Aug 16, 1989
Page 2

Leishman said that complete site specific drainage and reclamation plans are available and have been submitted. Whitehill noted that the letter received from Weston addresses the four sprayers (nozzles) and the Board was concerned about swales and drainage of water on site. Said letter doesn't really address those items Board wanted given more consideration.

Phil Tuomala - have the site specific approval of the State for Section 1. Overall parcel is 70+ acres and Section 1 encompasses approximately 16 acres. Drainage has been specifically designed for Section 1, he said. Drainage calculations based on Section 1 are larger than plan shown tonite. Agrees that Weston's letter infers swales needed (shown) for entire site and not just area around four sprayers.. He added that when regrading is done (anywhere) you must redesign and the swales shown have been planned for a specific site.

Glines agreed that the plans shown look like twice the actual area under consideration.

MacMartin criticized Leishman saying he'd put the cart before the horse. Usually when an applicant goes to Weston, the Planning Board has put together its "laundry list" of things it wants Weston to look at. Leishman did not do this. He personally delivered the plans to Weston and spent the better part of the afternoon in Concord while they reviewed the plans.

Tuomala said the plan had been to take the rock out of the north corner, but now removal would be at northeast end to minimize on-site trucking.

Rockwood said the reason he had asked for figures substantiating GSC's claim of 3000 T per day was so Board would have good idea what it was dealing with, especially if there is (or may be) expansion in the future.

MacMartin said Silas Little suggested Board put 3000 T per day in their approval as a benchmark. Added that GSC represented that they do 3000 T/day.

Rockwood repeated that the Board was merely trying to establish what's there.

Bill Drescher said that GSC's application is for placement of a crusher. His client says this machine could do 3000 T per day. And they are only asking for this one machine. He is concerned that if GSC agrees to 3000 T per day and they had a day when equipment broke down or the train wasn't going to be there, that they'd be prohibited from removing more than 3000 T on a subsequent day. Rockwood said he didn't think that was what the Board meant.

Asking MacLellan for confirmation Drescher continued stating that the machine GSC intends to place on site is capable of 3000 T per day with a maximum output of 3500 T per day. Drescher said if the machine could do 10K T a day, they'd be lying and if they were to consider one of that size (now or later) they'd be back before the Board for it, or for the different machine.

MacMartin says this has been an ongoing problem for the Town. Feels Planning Board has opportunity now to make approval of plan less objectionable to applicant and Town by citing the machine's average capabilities.

*inclusion of
OUTPUT REQ.
PART of
next the Town's interests.*

August 16, 1989

Page 3

Stein asked if we were assuming the operation is grandfathered. MacMartin replied that ZBA was implicit in ~~its~~^{ZBA} decision ~~that~~^{was} the operation is grandfathered. Stein thought according to SB67 one needed to know the current level so that we could talk about expansion.

Drescher argued that "expansion" relates to new areas of excavation, not his clients proposal. Based on the scope of the operation, he could envision that limit of 3000 T day could have a terrible impact on the neighborhood.

Stein said that cease and desist orders issued against GSC have been to no avail. He wants to establish criteria to protect the neighborhood as well as the applicant.

Rockwood said what the Board was told (about capacity) was somewhat different than what's being discussed now.

Davidson said that Board needs a distinction over what's been shipped.

Stein added that ZBA's approval was given saying that they were only changing their means of transportation (via rail instead of truck).

Richard Greeley, speaking from the audience, said that what Stein failed to note in determining impact on the neighborhood is that there's two excavation businesses up there. And the Board hasn't determined which one is causing the problems.

Leishman and MacLellan attended a meeting today with PVA. PVA has alleged that damaged was caused this year by GSC's blasting. GSC has not blasted at all this year. Both MacLellan and Leishman stressed that they have been working with PVA, not against them, and PVA now realizes it wasn't GSC doing the blasting.

Minot Ring asked about seismographs being placed at site when blasting occurs. He wanted to know at what point have you gone over safe levels? MacLellan insisted that readings from companies' they've used show there has been no adverse impact.

MacMartin asked for clarification regarding GSC's exemption from local zoning relative to 155E-2. Drescher said that their activity is exempt from local zoning, but that it is not exempt from site plan review, nor have they ever represented any exemption from site plan review. ZBA says they're grandfathered. They have been prepared to comply (with site plan review) even before any notification from the Planning Board had been given. Drescher asked if GSC was entitled to site plan approval.

Whitehill repeated the question of why GSC doesn't have to comply with zoning. Drescher replied because it has been determined that theirs is a legitimate expansion of a use.

Neil Faiman, ZBA member present in the audience, said he questions reasoning ZBA may have said use was grandfathered. But concurs that 155E and SB67 do take away regulatory authority from ZBA.

Glines said that issuance of the Building Permit (improperly) set the path that has been followed.

MacMartin said that bonding was an issue to be discussed prior to any approval.

for installing
new crushing
plant.

Drescher said they're in a time bind; have been here (or before some other Board) since March. Said there's a lease for railroad with NHDOT that is contingent upon Leishman's getting GSC as a customer. Said lease could be lost if this goes on much longer. He requested the Board's acceptance and approval conditional upon satisfying Weston and a bond. He repeated the time constraints.

Glines said it was too bad that a railroad tied into such a sensitive issue as a rock crusher. He said he was tired of hearing complaints about the Planning Board holding up the railroad. Insisted that it was not this Board's fault. Whitehill agreed it wasn't Planning Board fault.

Drescher asked again that Board be mindful of GSC.

Davidson asked if there was enough info presented for acceptance?

Stein moved to accept. Julie Cummings said she had not seen these plans until tonight, no chance to review them. Leishman said plans had been here since last week and were available for NRPC to look at today. Whitehill added that Weston's letter doesn't address drainage swales. MacMartin thought approval could be handled conditionally.

Stein moved to accept subject to Weston's review and bonding; second by Glines. Motion carried 6 to 1, with Ring voting no.

Stein asked why it was necessary to have two separate bonds. MacMartin said this was for two different things. Whitehill agreed that separate bonds can be required per ordinance. Drescher said they'd agree to bonding for erosion control.

Greeley said he hoped that Lesihman didn't just pay \$5000 for what may be a \$10 letter as far as engineering review is concerned.

Tuomala will prepare figures for erosion control bond but noted time constraints.. Leishman said that drainage work and track work should be done by Sept. Hope is that railroad would be operating by fall. Leishman disagreed about railroad being tied to GSC project. Said if GSC doesn't go, neither will the railroad. Whitehill asked when lease would be forfeited. Lesihman said he has paid the State for the lease, which is expired now.

Condition for approval is that if bonding figures aren't forthcoming approval would be withdrawn.

MacMartin moved to approve the Non-Residential Site Plan conditional upon 1. a favorable review of the sedimentation and erosion control plans by Weston; 2 a favorable review of and posting of bond within 30 days, failing of which this approval would be withdrawn; 3. subject to the conditions listed on revised 8/15/89 plans, notes 1 through 11; 4 that approval is for a machine capable of output of 3000 T per day, maximum of 3500 T per day, which is the sole machine to be placed on site per this approval. Davidson seconded. The motion carried by vote of 5 yeas, 2 abstentions. Ring and Stein abstained. Fees of \$110 for NRPC are due and will be paid to Secretary.



Application for Permit to Build, Alter or Enlarge Buildings

PERMIT

No 1626

A Plot Plan showing location or proposed structure must accompany Building Permit. Please indicate streets, surface water, and other buildings.

WILTON, N.H., Date March 13, 1989

Owner Granite State Concrete Co., Inc.
Address P.O. 185, Elm Street, Milford State of N.H. Tel. 673-3327
Type of Use: Dwelling..... Commercial..... Industrial..... Other X Quarry
New Building See below Addition..... Alteration.....
Zoning District R+A Tax Map B Lot # 11
Location of Building Off Route 31 - Forest Road Street
Town Water No Town Sewer No
Purpose of Building To allow transport by railcar of material currently being removed from site by truck.
Kind of Building Equipment
Size of Building N/A Frontage Right of Way Size of Lot 73.18 ac.
Height of Building N/A Septic Tank N/A NHWS & PCC App. No. N/A
Distance from Street Line 1600' Distance from Nearest Boundary Line 400'
Outer Wall Covering N/A Type of Foundation Concrete pad
Style of Roof N/A Roof Covering N/A
Non Residential Site Plan Approval & Date.....
Architect N/A Plumber N/A Lic. #.....
Carpenter N/A Electrician N/A Lic. #.....
Mason N/A
Description of Proposed Work To incorporate as part of a pre-existing and ongoing material removal process, a portable rock crusher/processor. This equipment will allow the transport by railcar of on-site materials currently being removed as per continuous operation
Square Footage of Bldg. (outside measurement) See plan
Blue prints & plans required for new construction and additions
Estimated Cost \$600,000.
Fee \$186.25 P.C.L. 3/16/89 p/c
SEPTIC TANK - Design and specifications must be approved by N.H. Water Supply and Pollution Commission before permit is issued.

The undersigned agrees that the proposed work shall be done in accordance with the foregoing statement and with the plans and specifications submitted and that the work connected therewith shall conform to the building code and

regulations of the Town of Wilton, and that..... will notify the Building Inspector when frame, chimney, firestops, and electric wiring are ready for inspection.

Permit good for one year
from date of issue.

Name GRANITE STATE CONCRETE CO. INC.
By John A. MacLellan

Selectmen's Meeting 4/17/89 Approved..... Not Approved X Hearing Required.....
Hearing July 12, 1989 Approved X BY ZONING BOARD Not Approved.....

PERMIT

THIS CERTIFIES THAT GRANITE STATE CONCRETE CO. INC. Owner,
may INSTALL A PORTABLE ROCK CRUSHER, ON CONCRETE PIERCEMENTS
BEING REMOVED BY RAIL CAR, FOR REMOVAL OF RAILROAD REMAINS,
in accordance with the foregoing application and approved plans.
By Removal in 150 Days

Frank A. MacLellan Building Inspector.

PERMIT No. 1626

TOWN OF WILTON, NEW HAMPSHIRE
BOARD OF SELECTMEN

BUILDING PERMIT

DATE 7-14-89

W. S. P. C. C. APPROVAL #

has permission to

alter and/or add as per Application on file at Selectmen's Office

at WILTON NH

*All work under this PERMIT shall conform to terms of
Application filed in Selectman's Office and to
Provisions of State & Town Building Codes
Ordinances & Statutes as shall apply.*

*Any person, partnership or corporation who violates
any provision of this Permit shall be subject
to action as determined by the Board of Selectmen.*

**NO INSULATION OR FINISH SHALL BE INSTALLED NOR WIRING, PLUMBING,
OR FRAMING BE CONCEALED PRIOR TO INSPECTION.
FOOTINGS AND FOUNDATION MUST BE COMPLETELY EXPOSED FOR INSPECTION.**

THIS PERMIT MUST BE POSTED AT JOB SITE & VISIBLE FROM ROAD.

APPLICANT GRANITE STATE CONCRETE BUILDING INSPECTOR Frank D. Milner

FOOTING/
FOUNDATION

FRAMING

ELECTRIC

PLUMBING

CHIMNEY/
FIREPLACE

SERVICE

OIL BURNER

DRIVEWAY

FINAL



Nº 0232

Town of Wilton, New Hampshire

OFFICE OF THE BUILDING INSPECTOR

CERTIFICATE OF OCCUPANCY

Date Issued 9-7-90 TAX MAP B LOT NO. 11
PERMIT NO. 1626
TYPE ☒ New Building ☐ Alteration/Addition ☐ Change Use
STREET FORREST RD WILTON, NH. 03086
ZONING DISTRICT RES. 176
SIZE OF STRUCTURE N.A. OUT DOOR CRUSHER PLANT
N.H.W.SP.CC NUMBER _____

OCCUPANCY CLASSIFICATION

☐ Residential ☒ Industrial ☐ Commercial ☐ Other (Specify)

USED FOR ROCK PROCESSINGOWNER GRANITE STATE CONCRETEADDRESS P.O. 185 BLM ST. MILFORD NH

Frank S. Millward
BUILDING INSPECTOR



ZONING BOARD OF ADJUSTMENT
WILTON
NEW HAMPSHIRE 03086

July 12, 1989

NOTICE OF DECISION

CASE NUMBER Jul#2
July 12, 1989

You are hereby notified that the request of GRANITE STATE CONCRETE CO INC for an Appeal from an Administrative Decision regarding a building permit for the installation of a portable rock crusher at the Granite State Wilton Site IS GRANTED with the following conditions:

1. The products (of the rock crusher) shall only be removed by way of railroad; and
2. The rock crusher shall be removed within 180 days if the railroad ceases to operate.

This was granted by a vote of 3 to 2.

NOTE: Any person affected has a right to appeal this decision. If you wish to appeal, you must act within twenty days of the date on this note. The necessary first step, before any appeal may be taken to the Courts, is to apply to the Board of Adjustment for a rehearing. The motion for rehearing must set forth all the grounds on which you will base your appeal. See: New Hampshire Statutes, RSA Chapter 677, for details.

Signed: .

Thomas Mitchell
Chairman, Zoning Board
of Adjustment

TM/jke

SCALE: 1" = 100'
DATED DECEMBER 5, 1984 PREPARED BY ALLAN H.
SWANSON, INC. (H.C.R.D. PLAN NO. 17388).

4. "PLAN - OF - LAND IN - WILTON, N.H. - SHOWING A
RIGHT OF WAY - CONVEYED TO - JAMES W. QUINN, JR. ET
AL - FROM - VERNAL C. STOWELL ET AL" SCALE: 1" =
100' DATED 2/15/66 PREPARED BY THOMAS M. QUINN C.E.
(H.C.R.D. VOLUME 1870 PAGE 223).

NOTES:

1. OWNER OF RECORD IS GRANITE STATE CONCRETE CO.,
INC., ELM STREET, P.O. BOX 185, MILFORD, N.H.
03055. TELE. NO. 673-3327
2. DEED REFERENCE TO THE PARCEL IS VOLUME 2794 PAGE
512, TRACT TWO, DATED SEPTEMBER 16, 1980 IN THE
HILLSBOROUGH COUNTY REGISTRY OF DEEDS.
3. PARCEL HAS THE BENEFIT OF A RIGHT OF WAY ACCESS TO
THE PREMISES FROM FOREST ROAD (N.H. ROUTE 31) AS
DESCRIBED IN STOWELL TO WRIGHT (H.C.R.D. VOLUME
1788 PAGE 457 DATED 6/16/64).
4. TOTAL AREA OF THE PARCEL IS 73.183 ACRES.
5. PARCEL IS LOT 11 ON MAP B OF THE WILTON TAX MAP.
6. ZONING FOR THE PARCEL IS RESIDENTIAL & AGRICULTURAL
(R & A).
7. THE SITE PLAN PROPOSAL IS TO CONSTRUCT A RAILROAD
SPUR INTO THE EXISTING SITE OPERATIONAL AREA AND
INSTALL A PORTABLE PLANT TO PROCESS EARTH PRODUCT
MATERIALS FOR TRANSPORTATION OFF-SITE BY THE
EXISTING RAILROAD LINE.
8. RAILROAD SPUR CONSTRUCTION TO BE IN ACCORDANCE WITH
BOSTON & MAINE CORPORATION STANDARDS AND SPECI-
FICATIONS.
9. HOURS OF OPERATION TO BE LIMITED TO MONDAY THROUGH
FRIDAY 6:30 A.M. TO 6:30 P.M.
10. PORTABLE CRUSHER TO REMAIN ON THE FLOOR OF THE PIT.
11. DUST EMISSIONS FROM CRUSHER TO BE CONTROLLED BY 4
MIST SPRAYERS WITH FLOW VOLUME OF 6.7 GALLONS PER
HOUR PER SPRAYER.

F

*See Plan
Approved
4/15/91*

NOTES

- 1) PROPERTY BOUNDARIES FROM PLAN ENTITLED "SITE BOUNDARY PLAN, EARTH REMOVAL OPERATION ON LOT B-11, PREPARED FOR GRANITE STATE CONCRETE CO., INC., WILTON, NEW HAMPSHIRE," DATED 6/1/89, REVISED 9/15/89, BY MONADNOCK SURVEY, INC.
- 2) BASE TOPOGRAPHY FROM PLAN ENTITLED "SITE RECLAMATION PLAN FOR REMOVAL OPERATION ON LOT B-11, PREPARED FOR GRANITE STATE CONCRETE CO., INC., WILTON, NEW HAMPSHIRE", DATED 12/16/88, REVISED 9/15/89, BY MONADNOCK SURVEY INC.
- 3) EXISTING PROCESSING FACILITY LOCATIONS BY NORTH AMERICAN RESERVE, FROM AERIAL PHOTOGRAPHY DATED AUGUST, 2000, BY HORIZON AERIAL PHOTOGRAPHY.
- 4) OWNER OF RECORD IS GRANITE STATE CONCRETE CO., INC., ELM STREET, P.O. BOX 185, MILFORD, NH 03055.
- 5) DEED REFERENCE TO THE PARCEL IS BOOK 2794, PAGE 512, TRACT TWO, DATED SEPTEMBER 16, 1980 RECORDED IN THE HILLSBOROUGH COUNTY REGISTRY OF DEEDS.
- 6) PARCEL HAS THE BENEFIT OF A RIGHT OF WAY ACCESS TO THE PREMISES FROM FOREST ROAD (NH ROUTE 31) AS DESCRIBED IN STOWELL TO WRIGHT (HCRD BOOK 1788, PAGE 457, 6/16/64). ROAD ACCESS TO SITE IS PROVIDED BY STATE HIGHWAY AND PRIVATE RIGHT-OF-WAY. ACCESS BY TRAVEL OVER TOWN ROADWAYS IS NOT REQUIRED.
- 7) TOTAL AREA OF THE PARCEL IS 73.183 ACRES.
- 8) PARCEL IS TAX LOT 11 ON TOWN OF WILTON TAX MAP B.
- 9) THE PARCEL IS LOCATED IN THE INDUSTRIAL DISTRICT ZONE. PARCEL WAS PREVIOUSLY ZONED RESIDENTIAL-AGRICULTURAL WHEN SITE PLAN FOR PORTABLE PLANT/RAILROAD SPUR ORIGINALLY APPROVED IN 1989.
- 10) HOURS OF OPERATION: MONDAY THROUGH FRIDAY 6:30 AM TO 6:30 PM. TRUCKING SHALL NOT OCCUR OUTSIDE THE APPROVED HOURS OF OPERATION.
- 11) PORTABLE CRUSHER TO REMAIN ON PIT FLOOR.
- 12) EXCAVATION OPERATION SHALL BE CONDUCTED PURSUANT TO THE OPERATIONAL STANDARDS OF RSA 155-E:4-a.
- 13) DUST EMISSIONS FROM THE CRUSHER TO BE CONTROLLED BY 4 MIST SPRAYERS WITH FLOW VOLUME OF 6.7 GALLONS PER HOUR PER SPRAYER.
- 14) FUELING AND MAINTENANCE OF EXCAVATION AND EARTHMOVING EQUIPMENT SHALL CONFORM TO THE BEST MANAGEMENT PRACTICES DESCRIBED IN NHDES ENVIRONMENTAL FACT SHEET WD-WS-22-6.
- 15) SOIL TYPE FOR THE SITE AREA IS 143D : MONADNOCK STONY FINE SANDY LOAM, 15 - 35% SLOPES AS MAPPED IN THE SOIL SURVEY OF HILLSBOROUGH COUNTY, NH - WESTERN PART, DATED OCTOBER 1985 BY THE USDA SOIL CONSERVATION SERVICE.
- 16) ORIGINAL 1989 SITE PLAN APPROVED CONSTRUCTION OF A RAILROAD SPUR INTO THE EXISTING SITE'S OPERATIONAL AREA AND THE INSTALLATION OF A PORTABLE PLANT TO PROCESS EARTH PRODUCT MATERIALS.
- 17) UNLESS AND UNTIL TRANSPORTATION BY RAILROAD BECOMES UNAVAILABLE OR IMPRACTICABLE, THE CRUSHED STONE PRODUCTS OF THE PLANT SHALL BE TRANSPORTED OFF-SITE BY RAIL. APPLICANT MAY EMPLOY TRUCKING FOR THE LIMITED PURPOSES OF HAULING UNPROCESSED MATERIAL, HAULING BY-PRODUCT OR MATERIAL THAT CANNOT BE REMOVED BY RAIL, OR FOR BLASTING, DRILLING, MAINTENANCE OR SERVICE-RELATED EQUIPMENT.
- 18) "UNPROCESSED MATERIAL" SHALL MEAN EARTH AND ROCK NOT PROCESSED THROUGH THE PORTABLE PLANT. "BY-PRODUCT OR MATERIAL THAT CANNOT BE REMOVED BY RAIL" SHALL MEAN CLAYS, FINES, MIXED FINES OR SCREENINGS GENERATED BY THE PORTABLE PLANT THAT CAN CLOG THE RAILCARS. "BLASTING, DRILLING, MAINTENANCE OR SERVICE-RELATED EQUIPMENT" SHALL MEAN THE ADMINISTRATIVE AND OPERATIONAL ACTIVITIES OF APPLICANT NOT DIRECTLY RELATING TO THE HAULING OF MATERIAL.
- 19) UNLESS AND UNTIL TRANSPORTATION BY RAIL BECOMES UNAVAILABLE OR IMPRACTICABLE, APPLICANT SHALL LIMIT ITS TRUCK TRAFFIC TO 3,000 LOADS PER EXCAVATION YEAR OF "UNPROCESSED MATERIAL" AND "BY-PRODUCT OR MATERIAL THAT CANNOT BE REMOVED BY RAIL".
- 20) APPLICANT SHALL ANNUALLY SUPPLY TO THE TOWN DOCUMENTATION OF ITS TRUCK TRAFFIC BY MAY 15th FOR THE PRECEEDING EXCAVATION YEAR.
- 21) THIS PLAN SHALL SUPERCEDE THE 1989 SITE PLAN REGARDING TRANSPORTATION.

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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 JOHN G. MacLELLAN, III,
taken pursuant to Notice on behalf of Boston
and Maine Corporation and Springfield Terminal
Railway Company, 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
Wednesday, November 12, 2003 at 9:06 a.m.

NEAL A. SALLOWAY - COURT REPORTERS
FIVE CARDIGAN ROAD
WEST PEABODY, MA 01960
781-581-3993 - 978-535-0313 - FAX 978-536-3142

1 if I can refer to it in that sense, is that
2 still in effect today?

3 A Not exactly, no.

4 Q Okay. What's different?

5 A In the -- Sometime in the late '90s, I guess,
6 the town questioned our right to truck
7 material from the site. They were under the
8 impression that there was to be zero trucking
9 from the site based on the prior permit. So,
10 as a result, we were called before the
11 Planning Board and asked to explain why, in
12 their view, we were violating the terms of
13 our permits. The issue was discussed over a
14 period of time in several meetings with the
15 Board, and the Board requested that we file a
16 new site plan for a new approval which we
17 did, and that was issued in April of 2001.

18 Q So what was the disagreement over the use of
19 trucks at the Wilton facility; what was the
20 basis of that disagreement?

21 A I think it primarily was generated by
22 neighbor complaints to the town that we were
23 trucking material from the site and that the

1 neighbors understood that there was to be no
2 trucking from the site, and I believe the
3 town took that position initially.

4 Q Okay. What product was being trucked from
5 the site?

6 A Products that were being trucked from the
7 site were, you know, certain raw materials.
8 There was very little of that; and then,
9 primarily, it was a crushed-base material
10 which is, you know, basically, it's
11 three-quarter inch minus material which
12 includes dirt and clay and, you know,
13 basically, all the non-rock material that was
14 produced by the crushing operation.

15 Q Now, why was it being trucked as opposed to
16 being sent by rail?

17 A Because the material, it's fine, and it packs
18 and, you know, it's clay fines in it; and
19 when we tried to move it by rail, it would
20 pack into the railcars and wouldn't come out
21 by the time it got to the delivery point.

22 Q Now, were any products or raw materials that
23 were suitable for shipment by rail being

1 trucked at that point?

2 A No.

3 Q When the town notified you, did they issue a

4 cease and desist order or take any legal

5 action to prevent the trucking?

6 A No. They asked us to come to the board

7 meeting and answer their questions concerning

8 the trucking. You know, at that point, we

9 pointed out that the '89 permits referred

10 only to what we called the final product of

11 the crusher which is the crushed stone and,

12 you know, it was our position that everyone

13 on the Board at that time understood that.

14 Q Okay. Was the Board substantially different

15 when you went before them?

16 A It was a different Board.

17 Q This was the Board of Selectmen?

18 A Planning Board.

19 Q Planning Board. What was the end result; did

20 you apply for a new site plan review?

21 A Yes, we did.

22 Q And is that -- Is this document identified by

23 notes with handwritten comments on the side,

1 other owners' properties, there's access, but
2 there's no legal access.

3 Q Okay. All right. Now, are you familiar with
4 New Hampshire Route 31?

5 A Yes.

6 Q Does that connect to Route 101A or any
7 major --

8 A Yeah. I believe it -- I think it crosses
9 101A or 101, actually.

10 Q 101?

11 A Yeah.

12 Q To get there, does New Hampshire Route 31 go
13 through the center of Wilton?

14 A You can get to 101 through the center of
15 Wilton, but there's another way.

16 Q All right. Okay. Note 10, it essentially
17 says the hours of operation are 6:30 a.m. to
18 6:30 p.m., and then it says trucking shall
19 not occur outside of the approved hours of
20 operation.

21 Now, that seems to imply that trucking
22 is an option from Wilton without any
23 limitations on it, is that correct?

1 knowledge of what the term "impracticable"
2 would mean within this?

3 A I'm not sure.

4 Q Okay. Now, beginning on June 19th and
5 continuing until, originally, say, July 11th
6 or 14th and then continuing again until
7 November 10th, there were operating
8 restrictions on the manner in which the
9 Milford-Bennington could -- the times that
10 the Milford-Bennington could operate, is that
11 correct?

12 A That's what I've been informed.

13 Q Did that -- Did those operating restrictions
14 affect the amount of crushed stone that could
15 be removed from Wilton and transported to
16 Milford?

17 A Yes, it did.

18 Q Did anyone from Granite State or, to the best
19 of your knowledge, Milford-Bennington
20 approach the Town of Wilton pursuant to this
21 Note 17 and request relief from the trucking
22 restrictions?

23 A I didn't.

1 trucking from the Wilton excavation site,
2 correct?

3 A As long as there's a crusher on the site,
4 yes.

5 Q And, previously, when there were complaints
6 about trucking, the town took no action to
7 stop the trucking, is that correct?

8 A Yeah. I mean, they threatened to -- I mean,
9 they called us before the Board and
10 threatened to find us in violation of the
11 permit, yeah.

12 Q But did they ever find you in violation of
13 the permit?

14 A No.

15 Q It was resolved by means of this site plan
16 review?

17 A Uh-huh.

18 Q So is it correct to say that the town was
19 cooperative with the prior trucking issue?

20 A Yes, but I mean they were -- and they were --
21 They were wrong on it, but it wasn't much of
22 a -- it wasn't much of a reason to agree to
23 it.

1 A It's because we can't get the material from
2 Wilton by rail.
3 Q So on a percentage basis, if I could ask:
4 How much of the product from Wilton has been
5 replaced by Lyndeborough?
6 A To date, not very much.
7 Q 10 percent, 20 percent?
8 A I don't know.
9 Q Okay. In addition to the Lyndeborough
10 quarry, are you familiar with Pike's Quarry,
11 formerly, Quinn's Quarry?
12 A I know where it is, yeah.
13 Q That's on the Milford-Bennington line as
14 well, correct?
15 A Right.
16 Q Did Granite State ever approach Pike's as a
17 source of stone for use in Milford?
18 A No.
19 Q Is there any particular reason why not?
20 A Well, you know, very shortly, we're going to
21 run out of material, and then we're going to
22 approach a lot of people to buy stone. So,
23 yeah, they'll probably be one of the people

1 A Well, you asked about the market price, how I
2 know what the market price is. I know the
3 market price because I know what we pay.
4 Q Okay. And just for my own educational
5 purposes, are those materials used at
6 Wakefield similar to what you produce at
7 Wilton for use at Milford?
8 A Yes.
9 Q What is the market price?
10 A It's \$2.00 to \$3.00 more than what we charge
11 ourselves.
12 Q Is that \$10.00, \$20.00 a ton?
13 A No. It's \$7.00 or \$8.00 per ton depending on
14 what the material is.
15 Q Okay. Are there other costs included in that
16 such as transportation costs?
17 A There would be transportation cost on top of
18 that.
19 Q Do you have an idea of what those costs would
20 be?
21 A The transportation cost is probably -- it's
22 probably about \$1.00 difference in the
23 transportation cost per ton.

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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 PETER R. LEISHMAN, taken
pursuant to Notice on behalf of Boston and
Maine Corporation and Springfield Terminal
Railway Company, 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
Tuesday, November 11, 2003 at 10:02 a.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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EXHIBITS

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Clemens from James E. Howard with
Attachments
2 Letter - 7/2/03 to Melvin F. 49
Clemens from James E. Howard with
Attachments
3 Springfield Terminal Railway 55
Supplemental Bulletin Order
No. 3-012B in Effect 1500
Thursday, December 12, 2002
4 Letter - 9/22/03 to Warren 86
Bostwick, General Manager from
Peter R. Leishman with
Attachment
5 Responses and Objections of 98
Granite State Concrete Co., Inc.
and Milford-Bennington Railroad Co.,
Inc. to "First Discovery Requests
of the Boston and Maine Corporation
and the Springfield Terminal Railway
Company to Granite State Concrete
Co., Inc. and Milford-Bennington
Railroad Co., Inc."

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6 Letter - 7/16/03 to Mr. Peter 106
R. Leishman from E.R. Towle
7 Milford-Bennington Railroad Co., 118
Inc. - Financial Statement
Profit & Loss - August 1, 2001
July 31, 2002 - FY02

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1 A One. I just said that from --
 2 Q And that was on a siding if I'm correct?
 3 A It was on a switch off the main line. So it
 4 was on the main line from us.
 5 Q Okay. And from 1992 to, if I understand this
 6 correctly, 1997, approximately, the speed on
 7 the line was ten miles an hour?
 8 A I'm sorry. When?
 9 Q What was the speed on the line from 1992 to
 10 approximately 1997?
 11 A I think two miles to ten miles an hour and
 12 then the remaining mile, roughly, was five
 13 miles an hour. It was recently done. I
 14 think maybe '99, about one mile was ten miles
 15 an hour.
 16 Q Okay.
 17 A And then it was degraded this year down to
 18 entirely five miles an hour.
 19 Q Okay. In that same paragraph, you assert
 20 that, "During the past ten years we have
 21 installed literally hundreds of ties, rails
 22 and gauge rods on Guilford owned track --."
 23 A That's correct.

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1 Q You have, in fact, done that?
 2 MR. HOWARD: I'm sorry. I didn't hear
 3 that.
 4 MR. CULLIFORD: I just -- Strike that.
 5 Q If I could ask you: Under whose authority
 6 was this work being done?
 7 A Well, perhaps Mr. David Fink's authority
 8 because in 1995 in a court proceeding, Mr.
 9 Fink asked if I was working on his railway, I
 10 think, specifically, as he said it, and I
 11 said, "Absolutely," and knowing that Mr. Fink
 12 perhaps has seen us working out there, and he
 13 told me to be careful.
 14 Q This was in 1995?
 15 A '95, '96, we had a court proceeding in
 16 Nashua, New Hampshire where Mr. Fink was
 17 present.
 18 Q Okay. Do you know if Mr. Fink establishes
 19 roadway worker rules and/or the NORAC rules?
 20 Are you familiar with those rules?
 21 A Absolute 214 roadway worker. Very familiar.
 22 I assume Mr. Fink establishes a lot of
 23 things, so I'm not going to assume what he

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1 establishes here or not, whether he
 2 establishes that or as the company owner, as
 3 I believe he is, what he establishes. So I
 4 won't speculate.
 5 Q Do you know which federal agency promulgates
 6 the roadway worker rules?
 7 A Yeah, the Federal Railroad Administration.
 8 Q Is Mr. Fink employed by the Federal Railroad
 9 Administration?
 10 A I'm not sure. I'm not going to comment on
 11 his employment who he's employed by.
 12 Q To the best of your knowledge?
 13 A To the best of my knowledge, I'm not aware
 14 that he is.
 15 Q Okay. So I'd ask you again -- Let me ask you
 16 in this term. If this conversation actually
 17 took place with Mr. Fink in 1995, does Mr.
 18 Fink, to the best of your knowledge, have the
 19 ability to override federal regulations and
 20 the NORAC rules?
 21 A Override? The owner of the company has a
 22 variety of options, and he can decide who is
 23 qualified to do whatever. But, again, I'm

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1 not sure what your question really is. Your
 2 question now is a little different than the
 3 one you first asked.
 4 Q No. You asked -- I asked you under what
 5 authority you were performing maintenance on
 6 our track. Your response was Mr. Fink,
 7 allegedly, in 1995, gave you that authority.
 8 A He told me to be careful. I didn't say he
 9 gave me that authority.
 10 Q He told you to be careful?
 11 A Right.
 12 Q All right. Then let me ask the question
 13 again. Under whose authority were you
 14 performing this maintenance work on
 15 Guilford's property?
 16 A I assume my authority.
 17 Q Your authority?
 18 A Yeah, since we did the work.
 19 Q Okay. Did you contact anyone from Guilford
 20 prior to going on the property to perform
 21 this work?
 22 A Contact? In what sense, contact who?
 23 Q Did you ask permission of anyone or notify

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1 anyone that you would be occupying the
 2 property?
 3 A Every time that we occupied or I occupied the
 4 property, we had control of the track. Our
 5 crews were down at Milford. We had specific
 6 control. From 1993, I believe, on, we worked
 7 with the supervisors in the field providing
 8 material even working with them at times, and
 9 it was well established what was going on out
 10 there; but a specific written authority, no,
 11 we didn't.
 12 Q Did you contact the Guilford dispatcher to
 13 get control of the track?
 14 A We had control of the track when we occupied
 15 the track with a train.
 16 Q The question is: Did you contact the
 17 Guilford dispatcher?
 18 A To say we were working on the track? There
 19 were times we did contact -- There were
 20 situations where I would call in a broken
 21 joint bar. I'd say, "We'd take care of it."
 22 And it was just basically always -- I'm
 23 trying to think. If we controlled the track,

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1 I would let, perhaps, Mike Moretto know or
 2 some other dispatcher at the time, Gordy,
 3 that there was a broken rail, and I would
 4 take care of it and get the train over it,
 5 and that's how it was done.
 6 There was never a Form D issued or
 7 anything of that sort, but there was clear
 8 knowledge what was going on.
 9 Q If I could ask you this: How did you get the
 10 train over a broken rail?
 11 A Walked it over.
 12 Q Were you qualified to walk a train over a
 13 broken rail under the track safety standards
 14 or Guilford's rules?
 15 A Well, we called broken rails in, and, "Can
 16 you get over the broken rail?" I'd said,
 17 "We'll walk it over." Any conductor can even
 18 walk a train over a broken rail.
 19 Q The question is simply. Are you qualified
 20 to --
 21 A I'm qualified, yes.
 22 Q Under Guilford's rules?
 23 A I assume so, if I'm a qualified NORAC Rules

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1 qualified employee.
 2 Q Can we go back to Section 213.7 again?
 3 A I don't want to be argumentative, Rob, but we
 4 run over broken rails every day out there.
 5 Q I don't dispute that, Mr. Leishman. I'm
 6 asking you about walking a train over a
 7 broken rail, correct?
 8 A Correct.
 9 Q Can we look at Section 213.7 again?
 10 A Sure. Specifically, what section?
 11 Q Are you qualified by Guilford to maintain
 12 and/or walk a train over a broken rail on
 13 Guilford property?
 14 A I don't believe this section has anything to
 15 do with walking trains over broken rails.
 16 Q Does Section 213.7 establish guidelines or
 17 qualifications of track maintenance personnel
 18 on the railroad?
 19 A But you asked the question about walking a
 20 train over a broken rail.
 21 Q Does -- Let's try it this way. Does Section
 22 213.7 establish procedures for qualified
 23 maintenance personnel on a railroad?

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1 A Oh, absolutely.
 2 Q Have you been qualified, pursuant to Section
 3 213.7, by Guilford to maintain Guilford
 4 property?
 5 A I answered that earlier, no.
 6 Q Okay. Now, I'll ask you one more time. What
 7 is your regulatory authority to be specific
 8 to walk a train over Guilford -- over a
 9 broken rail on Guilford's property?
 10 A I don't see where this prevents me from
 11 walking a train over --
 12 Q If you're not qualified -- I guess my
 13 question is this: If you're not qualified
 14 pursuant to 213.7 to maintain Guilford's
 15 property, would you be qualified to walk
 16 trains over broken rails which in railroad
 17 parlance, as I understand it, is part of
 18 maintenance?
 19 A Well, I'm sure of the answer on that one.
 20 Q Okay.
 21 A But I see nothing in this section that would
 22 prevent me from walking a train over a broken
 23 rail.

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1 Q Okay.
 2 A And I believe that was your question.
 3 Q What about under Guilford's rules and
 4 regulations?
 5 A Of walking a train over a broken rail?
 6 Q Yes.
 7 A We've always done it in the past with full
 8 knowledge of Guilford. So, apparently, there
 9 has been no problem with that.
 10 Q Can you describe for me what you mean by full
 11 knowledge of Guilford?
 12 A Dispatchers. We've called in a broken rail,
 13 "Can you get over it?" "Yes, we'll walk over
 14 it." I mean, that's knowledge, I would
 15 assume.
 16 Q Who were those dispatchers?
 17 A Specifically, I'd have to go back and look at
 18 my records.
 19 Q You mentioned Mike Moretto previously.
 20 A Yeah, Mike Moretto, generally, the day
 21 dispatcher. So I would assume there have
 22 been times when Mike has been on or Gordy in
 23 the afternoon.

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1 Q Okay.
 2 A But the question has certainly been asked,
 3 "Can you get over it?" "Yes, we'll walk over
 4 it."
 5 Q Now, in addition to walking trains over a
 6 broken rail, you also assert that you have
 7 installed, literally, hundreds of ties, rails
 8 and gauge rods.
 9 A Yep. We've provided that information.
 10 Q Pardon me?
 11 A I believe we've provided that information
 12 through discovery.
 13 Q Okay. And I would ask -- And you stated
 14 previously that you had control of the track
 15 when you were doing this?
 16 A Yes.
 17 Q And I'll ask you to clarify for me, anyway,
 18 how did you get control of the track?
 19 A Our train had permission to occupy the track
 20 between Wilton and Granite State, and that's
 21 when we controlled the track.
 22 Q Are you familiar with the Trackage Rights
 23 Agreement?

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1 A Yes, I am.
 2 Q From 1992?
 3 A Yep, very familiar.
 4 Q What authority does that agreement give to
 5 Milford-Bennington as far as operations on
 6 Guilford's track?
 7 MR. HOWARD: Do you want to look at
 8 Trackage Rights Agreement?
 9 THE WITNESS: Sure.
 10 MR. CULLIFORD: We can go off the
 11 record for a minute.
 12 (Whereupon an off-the-record
 13 discussion took place.)
 14 (Break takes place at 10:31 a.m.)
 15 (Back on the record at 10:34 a.m.)
 16 A Probably Page 2, Section C (i) deals with the
 17 maintenance, etcetera.
 18 MR. HOWARD: Just make sure there's a
 19 question pending. Is there?
 20 Q Could you look at Section 1(a) of the
 21 Trackage Rights Agreement?
 22 A Yep. I'm there.
 23 Q Could you read that?

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1 A (Reviewing document) "Trackage Rights are
 2 overhead rights only and are solely for the
 3 purpose of permitting the movement of stone
 4 and gravel cars, each not more than 2000
 5 cubic feet in volume, in ten car trains --,"
 6 underlined, "-- between Wilton and Granite
 7 State Concrete Company, Inc. in Milford."
 8 Q That's fine. Could you read Section 1(c)(i)?
 9 A "B&M/ST shall furnish all labor and materials
 10 and shall construct, maintain, repair and
 11 renew at B&M/ST'S sole cost and expense such
 12 portions of the tracks located on the B&M/ST
 13 right-of-way which connect with the
 14 Trackage."
 15 Q Could you also go to Section 1(e) which is
 16 Page 3, 1(f), I apologize, and read the first
 17 two sentences of that section?
 18 A B&M/ST shall maintain, repair, and renew the
 19 Trackage at B&M/ST's own expense and with
 20 B&M/ST's own supervision and labor. B&M/ST
 21 shall perform routine and regular maintenance
 22 on the Trackage."
 23 Q Thank you. So I'll ask the question: Does

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1 this agreement, to the best of your
 2 knowledge, allow Milford-Bennington to
 3 maintain Guilford's property?
 4 A This agreement, no.
 5 Q Okay. Now, you also stated that Guilford's
 6 dispatchers, possibly, would have given you
 7 permission to be on Guilford's track and
 8 perform maintenance.
 9 A Had knowledge.
 10 Q Had knowledge?
 11 A Had knowledge.
 12 Q Okay. Now, you're the President and owner of
 13 the Milford-Bennington?
 14 A Yes.
 15 Q And do you know -- As the President and
 16 owner, do you feel you have a different set
 17 of responsibilities than, say, an employee of
 18 Guilford would have towards operations?
 19 A As owner/President, different responsibilities
 20 than employees of Guilford?
 21 Q Yes.
 22 A Oh, absolutely.
 23 Q And what would those different

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1 responsibilities be?
 2 A To maintain a safe operating profitable
 3 company, something that an employee of
 4 Guilford wouldn't be necessarily concerned
 5 with.
 6 Q So would you say one of your responsibilities
 7 is to maintain a safe company?
 8 A Yes.
 9 Q Do you consider performing maintenance on the
 10 track of another railroad without explicit
 11 authority in violation of an agreement and in
 12 violation, possibly, of federal safety
 13 regulations to be a safe railroad?
 14 MR. HOWARD: Objection. To the
 15 extent you're characterizing violations of
 16 agreements and violations of regulations.
 17 Q Let me rephrase the question. Do you
 18 consider -- Do you consider performing work
 19 on track of another railroad that's not
 20 authorized by the agreement between you and
 21 that railroad, is not authorized by any
 22 federal safety regulations and under which
 23 you're not qualified, as you've testified

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1 previously, to perform to be safe?
 2 MR. HOWARD: Objection.
 3 MR. CULLIFORD: On what basis?
 4 MR. HOWARD: You've got about five
 5 assumptions in there that aren't necessarily
 6 correct. If he can answer the question, let
 7 him go ahead, but I object to the form of the
 8 question.
 9 A I guess the concern I have in answering the
 10 question is: What if the railroad is in
 11 violation of their contract?
 12 MR. HOWARD: Can you answer the
 13 question? If you can answer the question,
 14 try to answer it. If not, --
 15 Q Do you want to break it in sections?
 16 A Break it in a section, yes.
 17 Q Are you qualified pursuant to 49 CFR 213.7 to
 18 maintaining Guilford's track?
 19 A No.
 20 Q Do you consider maintaining Guilford's track
 21 even though you're not qualified pursuant to
 22 that regulation to be a safe practice?
 23 A Yes.

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1 Q You do?
 2 A I do.
 3 Q Okay. Do you -- Are you -- Does the Trackage
 4 Rights Agreement from 1992 authorize you or
 5 anyone from Milford-Bennington to maintain
 6 Guilford's track?
 7 A Well, I'll look at it again. (Reviewing
 8 document)
 9 I believe there may be a section in
 10 here, maybe, Jim, you can help me, that if we
 11 want something in and above that we have to
 12 take care of it or pay for it, but I'm not
 13 sure, but there's something in here about --
 14 Let's see.
 15 MR. HOWARD: Can we go off the record
 16 a minute?
 17 (Whereupon an off-the-record
 18 discussion takes place.)
 19 (Break takes place at 10:41 a.m.)
 20 (Back on the record at 10:45 a.m.)
 21 MR. HOWARD: Could you read back the
 22 pending question?
 23 (Whereupon the Stenographer read back

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1 the requested information.)
 2 A I'm not aware of it, no.
 3 Q You're not aware that it authorizes you?
 4 A Right.
 5 Q Okay. This is the same question that's
 6 separate and apart: Are you qualified,
 7 pursuant to Guilford's roadway worker track
 8 maintenance program to perform work on
 9 Guilford's track?
 10 A I haven't taken a test if there's one that is
 11 required. So I'm not aware that I'm -- if
 12 there is such a requirement that I'm
 13 qualified.
 14 Q Have you taken it?
 15 A If there is, I haven't taken a test, no.
 16 Q So, to the best of your knowledge, you're not
 17 qualified?
 18 A To Guilford's, right.
 19 Q Do you consider performing maintenance on a
 20 railroad's track when you're not qualified
 21 under that railroad's roadway worker
 22 protection regulation rules to be a safe
 23 practice?

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1 A If we control a track, I would say yes.
 2 Q Are you familiar with the NORAC Operating
 3 Rules?
 4 A I believe so.
 5 Q Is Milford-Bennington a member of the NORAC
 6 Operating Rules?
 7 A Yes, we are.
 8 Q Are you familiar with Rule 133 of the NORAC
 9 Operating Rules?
 10 A I think I am, but I'd like to look at it
 11 first.
 12 Q Okay. I can arrange that.
 13 MR. HOWARD: 133 did you say?
 14 MR. CULLIFORD: Yes.
 15 A I'm sorry. I thought you said 130.
 16 (Reviewing document) I guess I'm waiting for
 17 a question now.
 18 Q When you were maintaining Guilford's track,
 19 did you ever get Form D authority from the
 20 dispatcher?
 21 A There's no Form D required on that section of
 22 track.
 23 Q What authority is required?

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1 A Verbal permission.
 2 Q For exclusive use of the track?
 3 A That's just changed. Prior to that, there
 4 was just verbal permission from the
 5 dispatcher to occupy the track which two
 6 trains or a maintenance crew could, in fact,
 7 occupy the --
 8 Q Okay. But for exclusive use of the track?
 9 A There's no Form D required from 13 to 16.36
 10 even presently under this new bulletin order.
 11 Q Okay. Are you familiar with --
 12 MR. HOWARD: I'm just going to -- I
 13 think this will help. If you both will wait
 14 until the answer is finished and the question
 15 is finished because the stenographer is
 16 having a difficult time getting everything
 17 down.
 18 Q Are you familiar with NORAC Rule 140?
 19 A I think I'll look at it, though. Yep.
 20 Q Now, when you were maintaining Guilford's
 21 track, were you following the requirements of
 22 that rule?
 23 A Again, there's no Form D required to occupy

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1 that section of the Hillsboro branch.
 2 Q Does Rule 140 require a Form D?
 3 A Dispatcher must issue a Form D, Line 13. I
 4 still -- see, file time still would not be
 5 required as we control the track when we had
 6 our train on the track. Nobody could enter
 7 that space unless they talked to the crew at
 8 Milford.
 9 So I don't see where file time would
 10 be required because we already control the
 11 track. We're filling the track with,
 12 technically, our train, and nobody can come
 13 into those limits.
 14 Q You were authorized to be on the track to
 15 operate your trains?
 16 A Right.
 17 Q When and how did you get authorization to
 18 maintain Guilford's track?
 19 A We control the track. I went out there with
 20 one of my employees, and we made simple
 21 repairs while we controlled the track.
 22 Q Are you classifying installing hundreds of
 23 ties, installing rails and installing gauge

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1 project on one side, and there's a post
 2 office with parking right up to the tracks on
 3 the other. So after their meeting with me on
 4 the 5th, who, I believe, Colin Pease was also
 5 present on the 5th as well because of the
 6 concerns of the Wilton Scenic, I removed the
 7 derail.
 8 Q Okay. And you said Mr. Grady was with the
 9 Federal Railroad Administration?
 10 A That's correct.
 11 Q And Mr. Robinson was the State of New
 12 Hampshire track inspector?
 13 A Yeah.
 14 Q Was he authorized by FRA to perform those
 15 functions?
 16 A I assume he is.
 17 Q Did they order you to remove the derail?
 18 A Who, the state or the FRA?
 19 Q Either/or?
 20 A Order? I was asked by the director of the
 21 bureau, Jim Marshal, who is over at the
 22 Bureau of Rail and Transit would I please
 23 support the decision of John Robinson which I

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1 did.
 2 Q Did John Robinson order you to remove the
 3 derail?
 4 A He asked me to. I don't know if that's an
 5 order. He didn't say to take it off rails.
 6 He asked me to remove it.
 7 Q Did he indicate to you that it was a
 8 violation of any safety rule or regulation to
 9 have the derail there?
 10 A I don't believe he did. I don't recall what
 11 he used for a his main reason, but he didn't
 12 say it was a safe location for a derail.
 13 Q Okay. But to the best of your knowledge, if
 14 you did not remove the derail, would you be
 15 subject to some sort of civil or criminal
 16 liability?
 17 A My insurance carrier had concerns as well, so
 18 I would say yes.
 19 Q Is that civil or --
 20 A Well, civil, I think if we had a derailment
 21 there and someone was killed and someone said
 22 it was a poor location, I would assume that I
 23 would be responsible for negligence.

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1 Q Did John Robinson or Mr. Grady indicate that
 2 you would be subject to civil or criminal
 3 sanctions if you did not remove the
 4 derailment?
 5 A I don't know if they did, but that's for a
 6 court to decide.
 7 Q Okay. So, essentially, between your -- in
 8 addition to your concerns about the derail
 9 possibly being a safety concern and it made
 10 no sense, it was also the State of New
 11 Hampshire's concerns that made you remove the
 12 derail between --
 13 A Correct.
 14 Q I'm just trying to --
 15 A I follow. It's a lot of stuff.
 16 Q Okay. All right. If we could go back then
 17 to when the derail was installed; and the
 18 temporary derail was installed in December?
 19 A December 12th.
 20 Q December 12th. Short or -- Either on
 21 December -- If I could go show you Exhibit 3.
 22 (Whereupon the Stenographer marked as
 23 Exhibit No. 3 - Springfield Terminal Railway

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1 - Supplemental Bulletin Order No. 3-012B in
 2 Effect 1500 Thursday, December 12, 2002.)
 3 A (Reviewing document)
 4 Q Shortly after or on December 12th, did you
 5 receive a copy of this document?
 6 (Indicating)
 7 A I did.
 8 Q Can you identify what that document is?
 9 A It's a supplemental bulletin order. Do you
 10 want me to read it?
 11 Q No, not yet, anyway. In that supplemental
 12 bulletin order, what was the purpose of that
 13 bulletin order to the best of your knowledge?
 14 A Like all bulletins, it's to advise of changes
 15 in track conditions or situations.
 16 Q Does this bulletin distinguish between
 17 freight and passenger service?
 18 A No, it does not.
 19 Q Does this bulletin permit the derail to be
 20 maintained in the opened position?
 21 A It doesn't say either/or.
 22 Q Does it -- Does it distinguish between a
 23 temporary or permanent derail?

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1 A It just says a derail. It depends what
2 someone classifies as temporary, but this
3 clearly was a temporary derail. It doesn't
4 distinguish, no.
5 Q Does this bulletin accurately describe what
6 was in place on the Milford-Bennington's
7 tracks?
8 MR. HOWARD: Objection. You're asking
9 about a Guilford document. I mean, you're
10 asking him to speculate what a Guilford
11 document means.
12 MR. CULLIFORD: I asked him if it
13 accurately describes conditions on his
14 property. I think he knows that.
15 MR. HOWARD: You're asking him --
16 You're asking him to answer questions about
17 the intent of a Guilford document. If you
18 want to ask him what he thought it meant,
19 that's a different question.
20 Q In your opinion, does this accurately
21 describe the conditions on the
22 Milford-Bennington property?
23 A Well, I'm not sure of Erwin Towle's or Mr.

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1 Q But then a permanent derail was installed?
2 A Yes, which was left in the off position.
3 Q Well, I guess if it's to identify a change in
4 the physical characteristics whether the
5 derail device was on or off, it's still a
6 change, correct?
7 A It's a change within the yard limits of our
8 track which is restricted speed, and the crew
9 is well familiar. It's a crew that's not
10 going to be different. They were aware that
11 the location was -- the permanent was placed
12 there for about 30 days.
13 Q Okay. So I guess if I could, just for my own
14 clarity, when the temporary derail device was
15 on, the Milford-Bennington was not performing
16 any operations?
17 A Right. Shut down for the winter.
18 Q When Milford-Bennington began operations, the
19 temporary device was removed?
20 A Removed.
21 Q In approximately a month later?
22 A It was sometime in the middle of May that the
23 permanent arrived sometime when the passenger

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1 Reardon's intent by issuing it. You know,
2 we did place a temporary derail there.
3 Guilford's crews often went on our side of
4 the railroad to switch cars in the yard, so I
5 assume that this was a notice to Guilford's
6 crews if they were switching on our side,
7 there was a derail that they should be aware
8 of that could be on in that location.
9 Q Okay. Now, you testified earlier that the
10 purpose of a bulletin is to notify or to
11 provide notice of a change in, essentially,
12 the physical characteristics of track?
13 A That's correct.
14 Q Did Milford-Bennington issue a notice
15 regarding this derail device that was on
16 Milford-Bennington's property?
17 A No.
18 Q Why not?
19 A First of all, the temporary derail was always
20 supposed to be for passenger operation, never
21 for freight. Once the freight operations
22 resumed, the temporary derail was removed and
23 was not there.

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1 operation began, operations which I believe
2 was on the 15th for that one weekend.
3 Q So for about a month, --
4 A A strong month.
5 Q -- Milford-Bennington was performing freight
6 operations without any derail in place?
7 A There was no derail there. The permanent was
8 locked -- the temporary was locked away.
9 Q And you did not feel -- Was anyone from
10 Guilford notified that the derail device was
11 off?
12 A Specifically notified in writing or verbally?
13 Q Either/or?
14 A Verbally, they were aware of it because
15 Guilford had asked for permission to come up
16 under our track. We were running stone
17 trains, and I informed, I believe, Andy or
18 maybe even Erwin that the temporary was gone,
19 and they had all been up to observe the
20 operation which is common, and I believe one
21 of your road foreman was on the property as
22 well because they requalified their train
23 crew to go up to Pike Industries for physical

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1 characteristics. So everyone knew that it
 2 was temporary, and it was gone.
 3 Q Knew from observing that it was gone, or knew
 4 because you had told --
 5 A From telling and observation.
 6 Q Okay. Did you request that this bulletin be
 7 rescinded?
 8 A I don't believe it's my responsibility. It's
 9 not my bulletin.
 10 Q As a matter of operational safety, would you
 11 consider it prudent --
 12 A I would certainly --
 13 MR. HOWARD: Let him finish the
 14 question.
 15 Q -- to notify Guilford that it has an
 16 incorrect bulletin?
 17 A Guilford was notified that it was no longer
 18 there. Whether they wanted to remove the
 19 bulletin, I guess that's Guilford's call, not
 20 mine.
 21 Q Okay. Now, if we could go to Exhibit B
 22 (sic).
 23 MR. HOWARD: 2.

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1 told me, specifically, he found it very
 2 unusual to be placing a derail on a main
 3 track at the bottom of a grade like that.
 4 Q Okay. Back to Exhibit A, --
 5 MR. HOWARD: 1.
 6 Q Exhibit 1. So when you -- And this is the
 7 top of Page 7, the first sentence, second
 8 sentence where you say, "Mr. McKeon could not
 9 understand the purpose of the derail and
 10 agreed to look into the matter." Do you know
 11 what he did to look into the matter?
 12 A I believe that he further patched me over,
 13 like I said, to Kenny England who he said
 14 he's my track specialist, and I believe Phil
 15 Grady, subsequent to that, also came up to
 16 discuss track and safety and that sort of
 17 thing.
 18 Q So Mr. McKeon's efforts to look into the
 19 matter were to transfer you to another FRA
 20 representative?
 21 A I don't know what he did, but he transferred
 22 me over to Kenny England, but I don't know
 23 what he did after that.

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1 MR. CULLIFORD: I'm sorry. Exhibit
 2 No. 2. I'm glad one of us is paying
 3 attention.
 4 Q On Page 7, the second to the last paragraph,
 5 it states, "After their departure I
 6 immediately telephoned Mr. Mark McKeon, the
 7 Federal Railroad Administration Regional
 8 Administrator for Safety and told him of my
 9 conversation with Mr. Culliford."
 10 A Yep.
 11 Q To the best of your knowledge, has Mr. McKeon
 12 contacted Guilford to express concern with
 13 the use of the derail?
 14 A To my knowledge, no.
 15 Q During your conversation with Mr. McKeon, did
 16 he indicate that the use of the derail was in
 17 violation of any applicable regulation or
 18 rule with regard to railroad safety?
 19 A I believe he patched me over to Kenny
 20 England, who was the Region Track Specialist
 21 for the FRA, who said that the FRA didn't
 22 ever really get into derail locations except
 23 in Class 4, 5 and 6 track, and Mr. England

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1 Q Have you spoken to Mr. McKeon subsequently
 2 about this issue?
 3 A I did. I actually informed him that the
 4 derail, in fact, had been removed.
 5 Q Okay. Did you call him, or did he call you?
 6 A I called him.
 7 Q Okay. Returning to Exhibit 1, I'm going --
 8 Returning to Exhibit 1. This is Page 7 in
 9 the middle of the page of your discussion of
 10 the 1:00 a.m. to 8:00 a.m. operating
 11 restriction.
 12 A Okay.
 13 Q And you state, "On Monday morning, June 23,
 14 2003 we were able to operate one train to the
 15 Granite State processing plant arriving
 16 prior to 8:00 am but we were not able to
 17 return as the dispatchers refused me entry
 18 after 8:00 am."
 19 A That's correct.
 20 Q What time did you -- I assume when you say
 21 the Granite State processing plant, you're
 22 describing a trip from the Granite State
 23 excavating plant in Wilton to the Granite

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1 because the noise, the starting and
 2 everything else, you know, gets extremely
 3 dark. There's no lighting up there
 4 whatsoever, and it's very isolated and
 5 another poor location to tie a train up.
 6 Q As a matter of course, don't railroads
 7 operate in the dark pretty frequently?
 8 A Yeah, they certainly do. But, certainly, if
 9 they're allowed to operate in the dark, I
 10 think there are restrictions on operations
 11 around the country as far as blowing whistles
 12 at night and so forth at crossings. I know
 13 there's some on your railroad as far as
 14 different things that are done at night
 15 versus during the day.
 16 Q So it's your belief that the local permitting
 17 restrictions on Granite State applied to
 18 Milford-Bennington?
 19 A Within the quarry itself, as far as any
 20 operations within the quarry. Once we cross
 21 from our track which we control onto Granite
 22 State's property, we're under the guidelines
 23 of Granite State. We've debated this with

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1 sometimes, you know, an hour and 15 minutes.
 2 Again, as I'm sure the MacLellans will
 3 testify, belts, if they're wet, they slip.
 4 You have to run them to dry them off. You're
 5 not gaining a lot if you're starting before
 6 sunrise and the temperature gets warm. Even
 7 in the summer, the belts are covered with
 8 heavy dew, and I think you'll find most of
 9 your quarry operations, and I'm pretty
 10 familiar with all of them around New
 11 Hampshire; I've been to quite a few of them;
 12 none of them run in the dark.
 13 Q Okay.
 14 A So for us to run in the dark would be, first
 15 of all, unsafe, could damage the MacLellans'
 16 equipment because of the historic knowledge
 17 that I have that you don't run the belts when
 18 they're wet. It's just unsafe.
 19 Q Did you ever attempt to make deliveries to
 20 Granite State in Milford on Saturdays?
 21 A Yes, we did. Yeah.
 22 Q What happened there?
 23 A We actually made two or three deliveries on a

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1 the Bureau of Mines. The Bureau of Mines
 2 with the Federal Railroad Administration has
 3 nothing to do once we cross off our main
 4 track into the Bureau of Mines. That's
 5 all Granite State and the Bureau of Mine's
 6 jurisdiction. And I'm not a lawyer like you;
 7 but if I'm told we shouldn't be operating out
 8 of there before 6:30, we probably shouldn't.
 9 Q Did you ever investigate your rights with the
 10 Surface Transportation Board?
 11 A Not formally, no, or informally, I don't
 12 believe; but, again, it's private property.
 13 It's not like a railroad controlled property.
 14 I haven't, no.
 15 Q Okay. In any event, was there anything that
 16 would prevent you from performing the brake
 17 test prior to 4:00 a.m.?
 18 A Brake test prior to 4:00 a.m.? I guess not.
 19 Q So if you get down to -- and this is a
 20 hypothetical and for my own education. If
 21 you get down to Milford at 5:00, 5:30, it
 22 takes about an hour to unload?
 23 A Like I said, an hour, an hour and-a-half,

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1 Saturday, and we unloaded during the day. We
 2 had a train loaded at Wilton that we got
 3 back, say, on a Friday. I believe we did
 4 this at least once, and I recall that we had
 5 a loaded train, and we brought it down on a
 6 Saturday.
 7 Q Why did you only get --
 8 A Well, Wilton is restricted because you can't
 9 run the quarry on weekends, period, daytime
 10 or otherwise. So unless we had a loaded
 11 train in Downtown Wilton, that didn't work
 12 very well either. I mean, we tried every
 13 possible arrangement to -- and at the very
 14 most, we were in that hour or those hours
 15 that you referred, 4:00 a.m. to 1:00 p.m. we
 16 were only able to get two trains a day.
 17 Q Did you look into leasing additional cars?
 18 A I did not, no.
 19 Q Did you look into leasing additional
 20 locomotives?
 21 A No. We didn't have any need to leasing any
 22 locomotives. And as far as additional cars,
 23 Rob, I guess we had that restriction that we

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1 couldn't do anything more than ten cars at a
 2 time within our Trackage Rights Agreement.
 3 Q If you could look at Section 1(c). It's the
 4 first page.
 5 A Yeah.
 6 Q I'm sorry. 1(a). It's the first page.
 7 This ten-car restriction you're
 8 referring to, is that referenced in that
 9 paragraph?
 10 A It is, yeah. It's underlined.
 11 Q What's underlined?
 12 A It says, "in ten car trains."
 13 Q Does it say -- Does it limit the number of
 14 trains you can operate?
 15 A No. Just units, maximum ten cars at a time.
 16 It doesn't limit the number of trains, no.
 17 Q Does it limit the number of cars that you
 18 could lease or control?
 19 A No.
 20 Q Okay. If we could go back to --
 21 MR. CULLIFORD: This would be Exhibit
 22 4, I believe.
 23

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1 that the restrictions had been removed, no
 2 questions. We were back to normal. I
 3 believe it was a Thursday, perhaps, we had
 4 this conversation, and there had been a
 5 running problem with broken rails where we
 6 couldn't move, and Warren called me, and I
 7 believe somebody else; maybe Erwin; but I
 8 know Warren and I spoke, and Larry Ferguson
 9 was in the room, and John Steiniger was in
 10 the room. I believe those three individuals.
 11 And Warren said that, you know, with all the
 12 problems, the broken rails and so forth,
 13 we're lifting the restrictions so you won't
 14 have to worry, and that's how I understood
 15 the conversation to a point where I called, I
 16 believe, Mr. Howard and the state and
 17 everybody else and said the restrictions had
 18 been lifted.
 19 Q So did you hear Mr. Bostwick say that the
 20 restrictions were permanently lifted?
 21 A He said the restrictions were lifted, but he
 22 didn't use the word "permanent." He just
 23 said the restrictions have been lifted.

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1 (Whereupon the Stenographer marked as
 2 Exhibit No. 4 - Letter - 9/22/03 to Warren
 3 Bostwick, General Manager from Peter R.
 4 Leishman with Attachments.)
 5 Q Okay. Are you familiar with this document?
 6 (Indicating)
 7 A Yep.
 8 Q What is it?
 9 A Pardon?
 10 Q What is it?
 11 A It's a letter that I sent to Warren Bostwick,
 12 B-O-S-T-W-I-C-K, in response to his letter to
 13 me dated September 22nd of 2003.
 14 Q Okay. In that letter, the second paragraph,
 15 the second sentence where you state, "Your
 16 commitment to me in this conversation was an
 17 unambiguous and unconditional confirmation
 18 that the restrictions, --" "-- had been
 19 removed."
 20 Could you describe what that
 21 unambiguous and unconditional confirmation
 22 was that you're talking about there?
 23 A Well, it seemed clear when I talked to Warren

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1 Q Okay. In Paragraph No. 1 of that letter, you
 2 noticed the broken rail at 8:00 a.m. on
 3 September 18, is that correct?
 4 A Yeah.
 5 Q And then you notified Guilford; and within an
 6 hour, according to Paragraph 2, or a little
 7 over an hour, I guess, you sent your engineer
 8 home?
 9 A Let's see. You know, it was over an hour,
 10 yeah. It's probably close to two hours
 11 because I believe the dispatcher, and maybe
 12 Gary Nault had let us know it would be
 13 sometime before anyone could get out there
 14 because the patrol had headed towards Bow or
 15 something. So they're going to have to come
 16 all the way from Bow to get there. So,
 17 obviously, there would be some time involved,
 18 and so I did send him home.
 19 Q Okay. But then you say in Paragraph 3 that
 20 approximately at 10:00 a.m., you were
 21 informed that a track supervisor would be
 22 willing to walk the train over the broken
 23 rail?

Granite State, et al vs. Boston & Maine, et al Peter R. Leishman

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1 Q My question is simply: You say, "All
2 operating employees have successfully passed
3 Guilford rules classes." Have you passed a
4 roadway worker class?
5 A I don't know if you -- I don't know the
6 answer there because we've never been
7 invited. We don't know if you give those.
8 Q Okay. Who is Wayne Wheeler?
9 A He's worked for you folks. He was a signal
10 maintainer for 20 some odd years. He's
11 worked for the New Hampshire Northcoast as an
12 engineer, worked for the New England
13 Southern. He's NORAC qualified. He was
14 there at our meeting Wednesday with Andy
15 Zompa, took the test. He's involved with the
16 Willton Scenic. He's a licensed electrician.
17 That pretty much gives a good biography of
18 him.
19 Q Prior to last Wednesday, was it, was he
20 qualified to work on Guilford?
21 A Yes, absolutely.
22 Q When was he qualified?
23 A He passed the -- He produced for Andy his

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1 NORAC Rules Book which was signed by Andy
2 sometime in April of this year even, his last
3 test. So he was NORAC Rules qualified on
4 Guilford as late as April of this year, and
5 then he took the test again last Wednesday
6 and passed that.
7 Q Let me be more specific. Was he qualified to
8 operate on the Hillsboro branch?
9 A He's operated on the Hillsboro branch in the
10 past for us with permission of the
11 dispatcher, not as recently as this past
12 year; but prior to that, he has.
13 Q The question was: Was he qualified to
14 operate on the Hillsboro branch?
15 A As of Wednesday or now?
16 Q Prior to Wednesday?
17 A He had been, yes. My answer is yes.
18 Q Okay. Just a couple more follow-up questions
19 if I could.
20 MR. CULLIFORD: And if this could be
21 marked as Exhibit 6?
22 (Whereupon the Stenographer marked as
23 Exhibit No. 6 - Letter - 7/16/03 to Mr. Peter

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1 R. Leishman from E.R. Towle.)
2 Q Are you familiar with this document?
3 (Indicating)
4 A Yeah. It looks familiar. I'll read it real
5 quick. (Reviewing document) Yep.
6 Q The last -- The second to the last sentence
7 says, "It has now been reported that this
8 derail has been removed, however, you have
9 not notified us of that fact and as a result
10 the provisions of Supplemental Bulletin Order
11 No. 3-012B are still in effect." Is that an
12 accurate statement to the best of your
13 knowledge?
14 A No, it is not. I certainly notified --
15 Everybody was aware that it was gone. It's
16 now been reported. Someone obviously
17 reported, and I reported it several occasions
18 that -- Andy Zompa had been up there and
19 observed it was gone. Guilford's crews had
20 been over the track and observed that it was
21 gone. The day it derailed, it was gone that
22 day; it had been removed. Everybody was
23 aware. To my knowledge, it was gone.

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1 Q Did you notify anyone that you had removed
2 the derail?
3 A Verbally, yes.
4 Q Who?
5 A Like I said, Andy Zompa, Erwin Towle.
6 Q Did you notify Erwin Towle prior to July
7 16th?
8 A Yes. As a matter of fact, when I talked to
9 Erwin about this, he informed me that he was
10 going back out in the ranks and would like to
11 try to clear this whole thing up before he
12 left. So he said he was going to send me a
13 letter on the matter; but that day we spoke,
14 I said, you know, "I just got to send you a
15 letter on it."
16 Q If he knew, why would you send a letter; did
17 you discuss that?
18 A No. I assumed that someone is -- probably to
19 cover themselves, but we didn't discuss
20 why -- Simply, if I had said the derail was
21 removed, I don't think a letter was required.
22 I never received a letter that it had to be
23 put on or what the conditions for that

I

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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 ROGER D. BERGERON, 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 11:58 a.m.	1 INDEX 2 DEPONENT DIRECT REDIRECT CROSS RECROSS 3 ROGER D. BERGERON 4 By Mr. Howard 5 72 5 By Mr. Culliford 60 -- 6 7 EXHIBITS 8 EXHIBIT NO. DESCRIPTION PAGE NO. 9 1 Memo - 8/29/03 to Roger Bergeron, 4 AVP-Engineering, GRS from Jim Patterson, VP-Eng./Mech. 10 2 Verified Statement of Roger D. 4 Bergeron in Support of Motion to Dismiss and Reply of the Boston and Maine Corporation and The Springfield Terminal Railway Company 11 3 Verified Statement of Roger D. 4 Bergeron 12 4 Verified Statement of Roger D. 4 Bergeron in Support of Surreply of the Boston and Maine Corporation and The Springfield Terminal Railway Company 13 5 Response of the Boston and Maine 5 Corporation and the Springfield Terminal Railway Company to First Discovery Requests of Granite State Concrete Co., Inc., and Milford-Bennington Railroad Co., Inc. 14 15 16 17 18 19 20 21 22 23

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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	1 2 3 (Deposition of Roger D. Bergeron 4 commencing at 11:58 a.m.) 5 6 The following exhibits were premarked 7 per Attorney Howard: 8 9 (Whereupon the Stenographer marked as 10 Exhibit No. 1 - Memo - 8/29/03 to Roger 11 Bergeron, AVP-Engineering, GRS from Jim 12 Patterson, VP-Eng./Mech.) 13 (Whereupon the Stenographer marked as 14 Exhibit No. 2 - Verified Statement of Roger 15 D. Bergeron in Support of Motion to Dismiss 16 and Reply of the Boston and Maine Corporation 17 and The Springfield Terminal Railway 18 Company.) 19 (Whereupon the Stenographer marked as 20 Exhibit No. 3 - Verified Statement of Roger 21 D. Bergeron.) 22 (Whereupon the Stenographer marked as 23 Exhibit No. 4 - Verified Statement of Roger

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1 and that was how the decision was made?
 2 A That's correct.
 3 Q All on his own; he didn't have any help from
 4 somebody saying, "Why we don't we raise it to
 5 ten?", or, "Please raise it to ten.", or,
 6 "Take a look at this and see if it can be
 7 raised to ten."?
 8 A The dialogue that I initiated last week was
 9 the fact that the work was substantially
 10 completed that would allow for those -- for
 11 the condition to go back to ten miles an
 12 hour.
 13 The answer that I got is that all the
 14 conditions were basically met and that there
 15 may have been some confusion as to why the
 16 track didn't go back up, but there was an
 17 inspection, and there was an assurance that
 18 the conditions were completed, and the speed
 19 was lifted.
 20 Q Okay. Let me ask you to take a look at what
 21 has been marked as Exhibit 2, please?
 22 (Indicating)
 23 A Okay.

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1 Q That's a verified statement that you made in
 2 this case. Do you recall that document?
 3 A Yes, I do.
 4 Q Now, if you can take a look at Paragraph 4 on
 5 Page 2, please, you say there that, "If the
 6 MBR were performing maintenance on this line,
 7 the MBR would be required to contact the
 8 Guilford dispatcher to obtain permission to
 9 occupy the track." Do you see that?
 10 A Yes, I do.
 11 Q And then you say that, "Guilford has no
 12 record of any such permission being requested
 13 or granted."
 14 What inquiry or investigation did you
 15 make to determine that there was no record?
 16 A I spoke with the -- what we call our District
 17 No. 2 Train Operations Manager that has
 18 authority over that line and asked him if
 19 there was any -- any request ever come in to
 20 maintain the track rather than the operation
 21 of the Milford-Bennington.
 22 Q What's his name?
 23 A It was -- I think it was Mike Moretto that I

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1 spoke to.
 2 Q Did you talk to anybody else?
 3 A I spoke with Larry Ferguson about -- who is
 4 our supervisor for the dispatchers, and asked
 5 him if he knew of any such request, and he
 6 didn't personally know of any.
 7 Q How about Mr. Moretto?
 8 A Mr. Moretto didn't recollect any time when
 9 the Milford-Bennington ever requested to do
 10 track maintenance on the line.
 11 Q Did you -- Was that the extent of your
 12 investigation then?
 13 A That was the extent of my investigation.
 14 Q Now, in the next Paragraph 5 there, you say
 15 that anybody performing maintenance on
 16 Guilford's property would have to be trained
 17 and qualified pursuant to the FRA's Roadway
 18 Worker Rules and that no one from
 19 Milford-Bennington ever received training or
 20 qualification from Guilford under those
 21 rules. Do you see that?
 22 A Yes, I do.
 23 Q Are the FRA Roadway Worker Rules the same for

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1 all railroads?
 2 A To the best of my knowledge, they are.
 3 Q Okay. And is it possible for
 4 Milford-Bennington, in your experience, to
 5 qualify under those FRA Roadway Worker Rules
 6 on its own rather than be trained by
 7 Guilford?
 8 A On their properties, they could be, not on
 9 ours.
 10 Q And that's a provision of the railway or the
 11 Roadway Worker Rules?
 12 A That is correct.
 13 Q Do you know which provision that is?
 14 A It's in the 214 which is the Roadway Worker,
 15 Subtitle 49 CFR 214. It requires the
 16 railroad to ensure the on-track safety
 17 programs.
 18 Q Has any Guilford union or union
 19 representative, to your knowledge, complained
 20 or said anything about Milford-Bennington
 21 personnel doing work on the Guilford line?
 22 A Any union to me? No. No, not at all.
 23 Q You're not aware of any complaint?

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1 A Not to me directly, no.
 2 Q You're aware of something indirectly?
 3 A Well, other than the dialogue that I heard
 4 last Tuesday when we were down in -- up in
 5 Manchester on that; but other than that, I
 6 wasn't aware of anybody.
 7 Q Well, let me be more specific. In Paragraph
 8 6 of this statement that we're looking at
 9 says that, in effect, that your collective
 10 bargaining agreements give your employees the
 11 right to perform maintenance, and performance
 12 of maintenance by MBR employees on Guilford
 13 property would be a violation of these
 14 agreements. Do you see that?
 15 A I see that.
 16 Q Are you aware of any union complaining that
 17 Milford-Bennington employees are violating
 18 the collective bargaining agreements?
 19 A I'm not personally aware of any union
 20 employees complaining.
 21 Q Well, personally, you mean -- What do you
 22 mean by personally?
 23 A I mean if there was a -- if there was a

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1 complaint lodged against the
 2 Milford-Bennington for maintaining tracks
 3 that the Brotherhood of Maintenance of Way
 4 has an agreement with us to maintain, we
 5 would see that advanced either in what they
 6 call claims conference when they talk
 7 about -- this would be a subject of a time
 8 claim, and this would either be mentioned in
 9 the claims conference, and conferences that I
 10 attend, probably 80 percent of those, or it
 11 would be a direct time claim which is a
 12 formal declaration and a written declaration
 13 asking us to pay this person for that time
 14 that somebody else was doing the work, and I
 15 don't know of -- I've never heard it in the
 16 claims conference, and I have no recollection
 17 of seeing a claim advanced from the
 18 Milford-Bennington working.
 19 Q Okay. In Paragraph 7, you're saying that you
 20 might be -- Guilford might be subject to
 21 liability under the FRA's track safety
 22 standards if Milford-Bennington employees
 23 performed work from which they were not

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1 properly qualified, and I'm paraphrasing
 2 that.
 3 You haven't -- Guilford hasn't had any
 4 claim by the FRA that there's been a
 5 violation of the track safety standards as a
 6 result of anything Milford-Bennington was
 7 doing, right?
 8 A No, I have not.
 9 Q Okay. Are you aware of any instances over
 10 the last -- well, since the beginning of the
 11 trackage rights agreement between Guilford
 12 and Milford-Bennington, any instances where
 13 Milford-Bennington has brought to Guilford's
 14 attention track problems or track defects?
 15 A Yes, I am.
 16 Q When was that, do you recall?
 17 A Not specifically, no.
 18 Q More than five years ago?
 19 A Could be five. It could have been, you know,
 20 -- in those conference calls that we have, we
 21 have two per day with the engineers of the
 22 territory and myself. The topics of what's
 23 going on with the crews and the track

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1 supervisors under their jurisdiction goes on
 2 through that, and it hasn't been uncommon if
 3 I heard that, you know, the Milford-Bennington
 4 may have complained about this condition, and
 5 we have people up there working. So, in that
 6 case, I know that that's -- I've heard that
 7 three or four times on those -- in the
 8 afternoon calls.
 9 Q Okay. Three or four times over 13 years
 10 or --
 11 A Over the past, maybe -- since we've been
 12 doing the conferences. Maybe about two to
 13 three years since we've been doing the
 14 conference calls.
 15 Q Are you aware of any instance prior to that
 16 time when Milford-Bennington reported track
 17 problems or defects?
 18 A Yeah. I think Milford-Bennington has been
 19 good about telling us if they see a condition
 20 that they thought needed to be looked at.
 21 Q Are you aware of a time when
 22 Milford-Bennington reported a fairly
 23 substantial number of defects and Guilford

J



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 STEVEN LARKIN, 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 3:03 p.m.

NEAL A. SALLOWAY - COURT REPORTERS
FIVE CARDIGAN ROAD
WEST PEABODY, MA 01960
781-581-3993 - 978-535-0313 - FAX 978-536-3142

1 A Yeah, a couple. There was an instance that
2 when I was putting in ties, Peter said that
3 he had a lot of plates. If I ever needed a
4 few plates to come out and help myself to the
5 plates, and I told him that if I did take any
6 plates it was because I needed a few extra to
7 complete the job or put a couple extra ties
8 in that weren't marked, and I always tried to
9 go a little bit more than, you know, put in
10 five ties, I'd put in six or seven. If I
11 needed extra plates, he said to come and get
12 them, and I said -- and that's how we did it.

13 Q You did that from time to time?

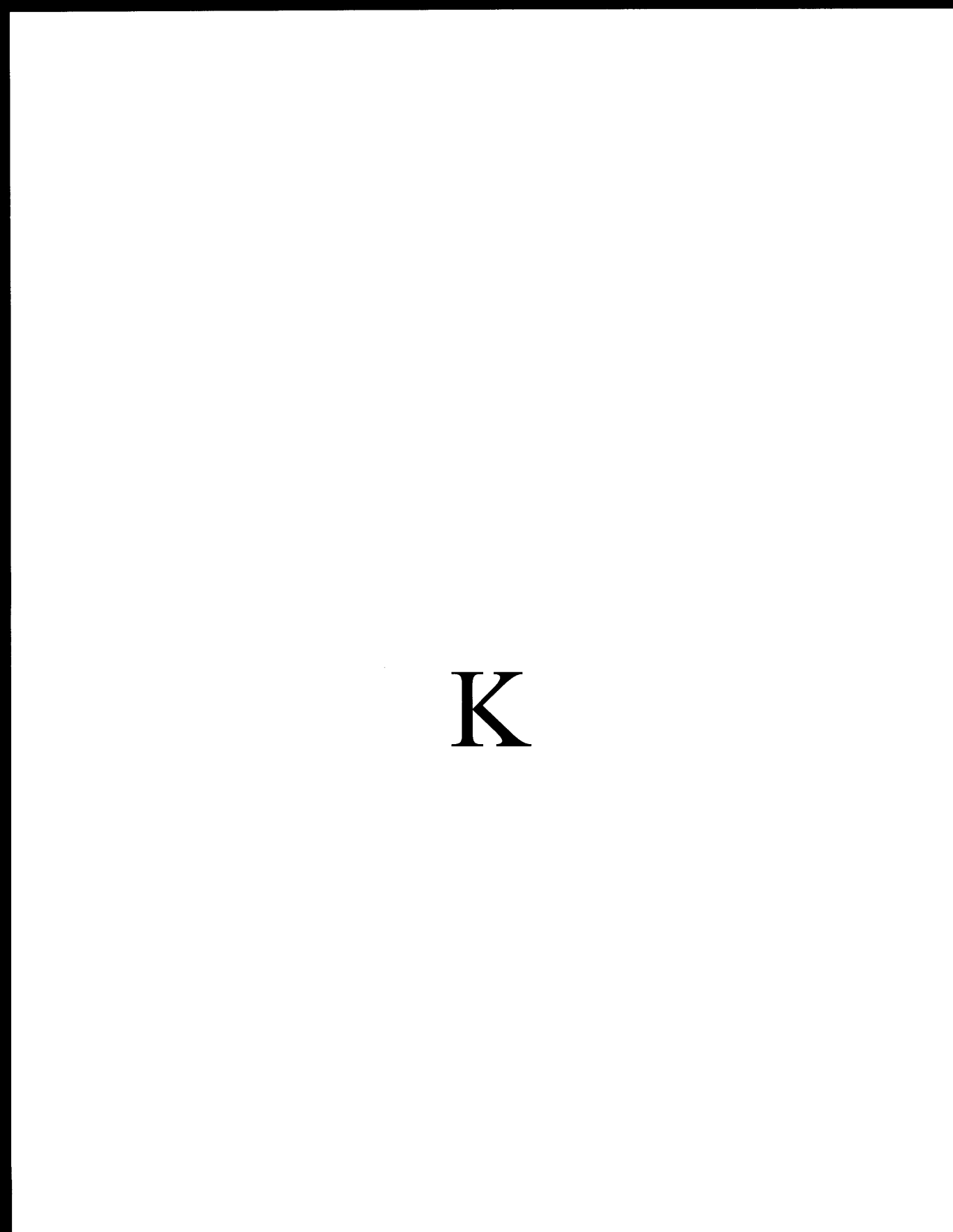
14 A Not a lot.

15 Q But you did it?

16 A If I ran out and I wasn't going to put a tie
17 in without a plate, and he said that we could
18 do it; and so, yeah, he did give a few
19 plates, yeah.

20 Q Now, were there any times that you were aware
21 that Milford-Bennington was doing work on the
22 Guilford line between Milepost 13 and the end
23 of the line?

1 A I never knew that he was doing any work up
2 there. Okay?
3 Q You never knew at the time, but you know now,
4 or you never knew?
5 A I hear that, you know, he's suggesting that
6 he did a lot of work up there.
7 Q You never saw him out there?
8 A I never saw Peter, and I never gave him
9 permission to work on the track.
10 Q Okay.
11 A Absolutely not.
12 Q I take it, though, based on what you said so
13 far, that you had a cooperative relationship
14 with Milford-Bennington?
15 A Yes. Oh, yeah.
16 Q Keeping the track in good shape or as good as
17 possible?
18 A Yeah.
19 Q Are you aware of the condition of the end of
20 that line today, 13 to the end of the line?
21 A No idea. I've been away from there for three
22 years, two months, and I have too much to do
23 where I am now. I don't get involved with



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BEFORE THE
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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 GARY S. NAULT, 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 2:27 p.m.

NEAL A. SALLOWAY - COURT REPORTERS
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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 GARRITY, 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 3:45 p.m.

NEAL A. SALLOWAY - COURT REPORTERS
FIVE CARDIGAN ROAD
WEST PEABODY, MA 01960
781-581-3993 - 978-535-0313 - FAX 978-536-3142

1 when Milford-Bennington provided materials
2 for you to use on the Guilford line?

3 A Not to my knowledge.

4 Q Okay. When you say not to your knowledge,
5 have you heard from other people that
6 Milford-Bennington has provided materials?

7 A I have not. As far as I know, you know, the
8 materials we have always supplied on our own
9 jobs.

10 Q Okay. Are you aware of any instances when
11 Milford-Bennington personnel have been on the
12 Guilford line doing any kind of maintenance
13 work?

14 A I don't know of any such occasion.

15 Q Never saw anything?

16 A No.

17 Q Never heard from anybody else that they were
18 out there?

19 A No. Any time I've been up there for
20 maintenance, I've been up there doing the
21 work with, you know, the people I work with.
22 I haven't been up there and witnessing them
23 doing any other work.

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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 CALVIN R. PRESTON, 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 3:19 p.m.

NEAL A. SALLOWAY - COURT REPORTERS
FIVE CARDIGAN ROAD
WEST PEABODY, MA 01960
781-581-3993 - 978-535-0313 - FAX 978-536-3142

1 Q You've worked with him then over the years?

2 A I've known him for quite awhile. He used to

3 work for us.

4 Q Were there ever any times that you observed

5 Mr. Leishman or any other Milford-Bennington

6 employees on the Guilford line between

7 Milepost 13 and the end of the line doing any

8 kind of maintenance work?

9 A No.

10 Q Never saw anybody out there?

11 A I never saw them doing any track work.

12 Q Did you ever hear from anybody else that they

13 had seen Milford-Bennington people out there

14 doing any work?

15 A No.

16 Q How would you describe the working

17 relationship between you and

18 Milford-Bennington?

19 A Between me, personally?

20 Q Yes.

21 A No problems.

22 Q Now, were there times when you were out there

23 working, and this is now, again, between

M

N



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 MICHAEL S. MORETTO, 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 1:13 p.m.

NEAL A. SALLOWAY - COURT REPORTERS
FIVE CARDIGAN ROAD
WEST PEABODY, MA 01960
781-581-3993 - 978-535-0313 - FAX 978-536-3142

1 dispatcher, what they're doing out there?

2 A Yeah.

3 Q Has there ever been a time in your
4 recollection when you were notified by
5 Milford-Bennington that they were on the
6 Guilford line doing maintenance work?

7 A No.

8 Q Nobody has ever told you that they were
9 stopping to tighten a bolt or --

10 A Not on our track, no.

11 Q Never at all?

12 A No.

13 Q Do you understand you're under oath here?

14 A Yeah. I don't recall them ever saying to me
15 that they're doing maintenance work on our
16 track.

17 Q If they haven't called, have you been aware
18 that they have been doing maintenance work?

19 A Not on that track, no.

20 Q You're not aware of that?

21 A No.

22 Q Nobody else has told you that?

23 A No.

1 Q No other dispatcher has ever said to you that
2 they have had calls from Milford-Bennington
3 indicating that they're on the track doing
4 work?

5 A No.

6 Q Okay. Thank you very much. That's all I
7 have.

8

9 CROSS EXAMINATION

10 Q (By Mr. Howard) Milford-Bennington has
11 contacted you when they're going to do
12 maintenance on Milford-Bennington's track, is
13 that correct?

14 A They have told me that they're doing
15 maintenance on their side, yes, on their side
16 of the track, not our side which is --

17 Q As a Guilford dispatcher, you have no control
18 over --

19 A Yeah. I have no control over what they do on
20 their side.

21 MR. CULLIFORD: That's it.

22 (Whereupon the deposition of Michael

23 S. Moretto concluded at 1:15 p.m.)

O

AGREEMENT

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.

(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

PURCHASE AND SALE AGREEMENT

PURCHASE AND SALE AGREEMENT made as of this day of
 , 1992 by and between the **BOSTON AND MAINE**
CORPORATION, a Delaware corporation with a place of business at
Iron Horse Park, North Billerica, Massachusetts (the "Seller") and
the party hereinafter identified in paragraph 1(b) (the "Buyer").

WITNESSETH:

1. The following terms shall have the meanings specified whenever used in this Agreement:

(a) SELLER:

Boston and Maine Corporation
c/o Guilford Transportation Industries, Inc.
7 Executive Park Drive
Merrimack, NH 03054
Attention: Leonard A. Lucas, V.P.-Real Estate

Send a copy of any notice to:

Boston and Maine Corporation
c/o Guilford Transportation Industries, Inc.
7 Executive Park Drive
Merrimack, NH 03054
Attention: Philip R. Tremblay-Jean

(b) BUYER:

Milford-Bennington Railroad Company, Inc.

Send a copy of any notice to:

(c) **PREMISES:** Approximately 5.58 miles of railroad right-of-way of the Seller's "Hillsborough Branch" so-called situated between mile post 10.78 (centerline engineering station 518+65.7+/-), Milford, New Hampshire and milepost 16.36 (centerline engineering station 814+54.2+/-), Wilton, New Hampshire, all within the County of Hillsborough, New Hampshire and shown on valuation section V17, maps 10-16.

(d) **PURCHASE PRICE:** Intentionally omitted.

(e) **DEPOSIT:** Intentionally omitted.

(f) **CLOSING DATE:** Intentionally omitted.

(g) **EXHIBITS:** The following exhibits are hereby incorporated by this reference into this Agreement;

(i) Exhibit "A": Deed.

2. **PURCHASE AND SALE.** In consideration of the mutual covenants and promises contained in this Agreement, and other good and valuable consideration received by each party, the Seller hereby agrees to sell and the Buyer agrees to purchase the Premises, upon the terms and conditions hereinafter set forth.

3. **TITLE.** The Premises shall be conveyed by a release deed running tot he Buyer in a form substantially identical to that annexed hereto and marked Exhibit "A" (the "Deed"). The Deed shall contain no warranties or covenants of title whatsoever and shall convey all of the Seller's right, title and interest in the Premises, subject to the following:

- (a) Provisions of existing building, land use, subdivision control and zoning laws;
- (b) Such real property taxes for the then current tax year as are not yet due and payable on the Closing Date;
- (c) Any liens for municipal betterments assessed after the date of this Agreement;
- (d) Such agreements, leases, licenses, easements, restrictions and encumbrances, if any, as may appear of record, or otherwise; and
- (e) The provisions, conditions and covenants set forth in the Deed and hereby expressly incorporated by reference. The Buyer agrees to signify acceptance of such provisions, conditions and covenants contained in the Deed by executing the Deed at closing.

4. **ADJUSTMENTS TO PURCHASE PRICE.** Water rates, rents, real estate and other property taxes and sewer charges (collectively, the "Taxes") shall be apportioned as of the Closing Date and the net amount thereof shall be added to or deducted from, as the case may be, the Purchase Price payable by the Buyer. If the amount of Taxes is not known at the closing Date, they shall be apportioned on the basis of the Taxes for the applicable preceding period and reapportioned as soon as verified current information can be obtained. The latter provision shall survive the delivery of the Deed.

5. **FEES, COSTS, AND TRANSFER TAXES.** The Buyer agrees to pay all recording fees and real estate transfer taxes of any description imposed on either the Buyer or Seller on account of this transaction by any government or governmental authority.

6. **CLOSING.** The Deed shall be delivered and the Purchase Price less the Deposit shall be paid by certified or bank cashier's check (and not otherwise) at Seven Executive Park Drive, Merrimack, New Hampshire at 10 o'clock a.m. on the Closing Date, unless the parties otherwise agree beforehand in writing. It is agreed that time is of the essence in all respects to this transaction.

7. **POSSESSION.** The Seller shall deliver possession of the Premises to the Buyer on the Closing Date, subject only to the provisions of paragraph 3 hereof, the Premises then being in the same condition as they now are, reasonable wear and tear expected.

8. **SELLER'S DEFAULT.** In the event that the Seller is unable to give title or make conveyance of the Premises to the Buyer in accordance with the terms of this Agreement for any reason, then any payments made by the Buyer shall be refunded, the obligations of the parties shall cease, this Agreement shall be void and neither party shall have further recourse against the other.

9. **REMOVAL OF ENCUMBRANCES.** The Seller may use the Purchase Price paid by the Buyer at the time of the delivery of the Deed, or any portion thereof, to clear the title of any mortgage or other title encumbrance not in accordance with the terms hereof, provided that any instrument so procured is recorded as soon as reasonably practical after the delivery of the Deed.

10. **ACCEPTANCE OF DEED.** The Buyer's acceptance of the Deed shall be deemed to be a full performance and discharge of every agreement or obligation of the Seller herein contained, except for such as are, by the terms hereof, to be performed after the delivery of the Deed.

11. **BROKER.** The parties represent and warrant to each other that neither has dealt with any broker in respect to this transaction or the Premises. The Buyer and Seller each agree to indemnify and hold harmless the other party from and against all other claims for brokerage or commission on account of this transaction.

12. **DEPOSIT.** The Deposit shall be held by the Seller subject to the terms of this Agreement and shall be duly accounted for at time of delivery of the Deed. The parties agree that the Deposit shall not bear interest.

13. **WARRANTIES.** The Buyer acknowledges that the Buyer has not been induced to enter into this Agreement, and the transaction contemplated herein, in reliance upon any warranties or representations of any party not set forth herein. The Buyer hereby expressly waives any claims against the Seller for any matters of public record or matters which a physical inspection of the Premises would reveal. This paragraph shall survive the delivery of the Deed.

14. **BUYER'S DEFAULT.** In the event the Buyer fails to fulfill any one or more of the Buyer's performances under this Agreement, the Seller shall retain the Deposit as liquidated damages. The parties expressly acknowledge that the Seller's damages owing to the Buyer's default hereunder are difficult to ascertain and agree that the Deposit represents a reasonable estimate of the Seller's damages.

15. **APPROVALS, RELEASES.** The Seller's obligations under this Agreement are conditioned upon the Seller obtaining any necessary releases, approvals or permits relating to the sale of the Premises by the Seller from any state or federal government or governmental authority having jurisdiction over the Premises. The Seller agrees to proceed with reasonable diligence to obtain any such approvals. In no event, however, shall the Seller be required to obtain subdivision approval from any governmental authority. If subdivision approval is required by applicable law, the Buyer shall obtain it or shall indemnify the Seller from all loss, costs, damage, and expense arising in any way out of the conveyance of the Premises without first having obtained the same.

16. **HAZARDOUS WASTE.** The Buyer hereby acknowledges that the Buyer is purchasing the Premises "as is", "with all faults" and subject to the possible existence of hazardous materials, petroleum products and/or pollutants regulated by law. Notwithstanding the foregoing, the Buyer, for itself, its successors, assigns and grantees hereby irrevocably waives, gives up and renounces any and all claims or causes of action against the Seller in respect of any claims, suits, and/or enforcement actions, including any administrative or judicial proceedings and any remedial, removal, or response actions ever asserted, threatened, instituted, or requested by any person (including any government agency) on account of: (a) any release of oil or hazardous materials (as those terms are defined in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601, et seq.) or any applicable state law) on, upon, or into the Premises; and (b) any and all damage to real or personal property, natural resources, and/or harm to persons alleged to have resulted from such release of such oil hazardous materials upon the Premises. This provision shall survive the delivery of the deed.

17. **NOTICES.** Any notice or other communication in connection with this Agreement shall be deemed given when received (or upon attempted delivery if delivery is not accepted). Such notices shall be in writing and delivered by hand or sent either (a) by registered or certified mail (return receipt requested) with the United States Postal Service; or (b) by Federal Express or other similar overnight mail carrier furnishing evidence of receipt to the sender, at the address set forth in paragraph 1 of this Agreement. Either party may change the address at which notices are to be received by notice given as set forth above.

18. **CONFIDENTIALITY.** The Buyer agrees and acknowledges that Information (hereinafter defined) concerning the Premises obtained by the Buyer in connection with the transaction contemplated in this Agreement (the "Transaction") is unique and confidential to the Seller. If the Transaction does not take place, for any reason whatsoever (including, but not limited to, breach of this Agreement by either party), the Buyer agrees, in addition to the provisions of paragraph 14 hereof, to turn over to the Seller all (i) plans, (ii) surveys, (iii) reports, (iv) site assessment and environmental reports of any description, (v) soil, vegetation, water, air and other samplings collected at the premises and the fruits of any research, testing, experimentation or study conducted with the same, and (vi) all plans or other information or documents furnished by the Seller to the Buyer (collectively, the "Information"). Furthermore, in the event the Transaction does not take place, the Buyer warrants to the Seller that all Information has been paid for and is free of any and all liens, and that the Buyer, its officers, agents, employees, directors, shareholders and affiliates shall not disclose the Information to any person, entity or government. The Buyer acknowledges and agrees that the Seller may, in addition to all other remedies available to it, obtain injunctive relief against the Buyer for any breach of threatened breach of the provisions of this paragraph.

19. **RECORDING.** The parties agree that neither this Agreement nor any memorandum thereof shall be recorded at the registry of deeds and that any such recording by the Buyer shall constitute a default by Buyer.

20. **AUTHORITY OF SIGNATORY.** If the Buyer executes this Agreement by agent or representative, such agent or representative hereby warrants and represents to the Seller that he is authorized to execute, acknowledge and deliver this Agreement on behalf of the Buyer and to thereby bind the Buyer to the same. This warranty shall survive the delivery of the Deed.

21. **ASSIGNMENT.** The Buyer may not assign this Agreement, or any interest herein, without the prior written consent of the Seller, which consent shall not be unreasonably withheld.

22. **SEVERABILITY.** If any term of this Agreement or the application thereof to any person or circumstance shall at any time or to any extent be deemed invalid or unenforceable, the remainder of this Agreement and the application of such term to persons or circumstances other than those as to which it is held invalid or unenforceable shall not be affected.

23. **NO WAIVER.** No delay or omission on the part of the Seller in exercising its rights under this Agreement shall constitute a waiver of such right or any other right under this Agreement. Also, no waiver of any such right on one occasion shall be construed as a waiver of it on any other occasion.

24. **APPLICABLE LAW.** This Agreement shall be governed by and construed in accordance with the laws of the state wherein the Premises lie.

25. **ENTIRE AGREEMENT.** This Agreement constitutes the entire agreement between the parties relating to the subject matter hereof, supersedes all prior oral or written offers, negotiations, agreements, understandings and courses of dealing between the parties relating to the subject matter hereof and is subject to no understandings, conditions, or representations other than those expressly stated herein. This Agreement may only be modified or amended by a writing which states that it modifies or amends this Agreement and which is signed by all parties.

26. **SECTION HEADINGS.** The section headings contained in the Agreement are for reference and convenience only and in no way define or limit the scope and contents of this Agreement or in any way affect its provisions.

27. **MISCELLANEOUS.** This Agreement shall take effect as a sealed instrument and be binding upon and inure to the benefit of the parties and their respective successors, heirs, administrators and assigns.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement in two counterparts, effective as of the day and year first above written.

SELLER
BOSTON AND MAINE CORPORATION

Witness

By: _____
David A. Fink, President

Approved for execution
by the Boston and Maine Corporation

BUYER
MILFORD-BENNINGTON RAILROAD
COMPANY, INC.

Witness

By: _____
Name: _____
Title: _____

Witness

EXHIBIT A

RELEASE DEED

BOSTON AND MAINE CORPORATION, a corporation duly organized and existing under the laws of the State of Delaware, with offices at Iron Horse Park, North Billerica, Middlesex County, Massachusetts (the "Grantor") in consideration of -----

-----(\$-----)
Dollars paid to it by Milford-Bennington Railroad Co., Inc. a New Hampshire corporation with a place of business at -----

(the "Grantee") hereby grants to the Grantee all the Grantor's right, title and interest, without any warranties or covenants of title whatsoever, in a certain parcel of land, and the buildings, bridges, structures, crossings, fixtures and improvements thereon and appurtenances thereto, if any, situated in Milford and Wilton, Hillsborough County, New Hampshire -----
----- (the "Premises") described as follows:

SEE EXHIBIT "A" ATTACHED HERETO AND MADE A
PART HEREOF BY THIS REFERENCE.

This conveyance is subject to the following reservations, conditions, covenants and agreements:

1. This conveyance is made without granting any right of way, either by necessity or otherwise, over any remaining land or location of the Grantor.
2. The Grantor hereby reserves a permanent, exclusive right of way an easement in, on, over, under, across and through the Premises for the purpose of accessing, constructing, installing, operating, maintaining, modifying, repairing, replacing, relocating and removing a telecommunications system for transmission of intelligence or information by any means, whether now existing or hereafter devised, including such poles, pipes, wires, fibers, fiberoptic cables, repeater stations, attachments, appurtenances, structures or other equipment and property of any description necessary or useful for the same (the "Telecommunications Easement"). The Grantor further reserves the right to freely lease, license, mortgage, assign, pledge and otherwise alienate the Telecommunications Easement. The Grantee hereby covenants with the Grantor to recognize the Telecommunications Easement and, without the payment of any further consideration, to execute, acknowledge and deliver such instruments suitable for recording with the registry of deeds as the Grantor may reasonably require to acknowledge title to the Telecommunications Easement in the Grantor. The Grantor covenants to reasonably repair and restore the surface of the easement area after any work.

3. The Grantor excepts from this conveyance any and all advertising signs and/or billboards located upon the Premises which are not owned by the Grantor. Furthermore, this conveyance is subject to the right of the owners of said signs and/or billboards to go upon the Premises and remove them within ninety (90) days from the date of delivery of this deed.
4. By the acceptance of this deed and as part consideration therefor, the Grantee hereby assumes any and all agreements, covenants, obligations and liabilities of the Grantor in respect to any underground facilities, drainage culverts, walls, crossings and/or other structures of any nature and description located in whole or in part within the Premises.
5. By the acceptance of this deed and as part consideration therefor, the Grantee agrees to irrevocably waive, give up and renounce any and all claims or causes of action against the Grantor in respect of claims, suits and/or enforcement actions (including any administrative or judicial proceedings and any remedial, removal or response actions) ever asserted, threatened, instituted or requested by any person and/or governmental agency on account of: (a) any release of oil or hazardous materials or substances of any description on, upon or into the Premises in contravention of any ordinance, law or statute (including, but not limited to, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. Section 9601, et seq., as amended); and (b) any and all damage to real or personal property, natural resources and/or harm or injury to persons alleged to have resulted from such release of oil or hazardous materials or substances.
6. By the acceptance of this deed and as part consideration therefor, the Grantee hereby agrees to build and forever maintain fences (together with any necessary gates), suitable to the Principal Engineering Officer of the Grantor, along the boundaries of the Premises which are common to remaining land or location of the Grantor ("Fences"), if Fences are ever required in the sole and reasonable opinion of said Principal Engineering Officer. If the Grantee fails to install, maintain, repair or replace the Fences within sixty (60) days after having been requested or ordered to do so by the said Principal Engineering Officer of the Grantor, then the Grantor shall have the right to so install, maintain, repair or replace the Fences. The Grantee further covenants and agrees that, upon the rendering of a bill for the expense of such installation, maintenance, repair or replacement of the Fences, the Grantee shall pay said bill in full within thirty (30) days from the date of

receiving it. The Grantee further covenants and agrees that if said bill is not paid within thirty (30) days, it shall become subject to a finance charge computed at a periodic rate of 1.5% per month applied to the previous balance after deducting any current payment. If said finance charge is not lawful, then then finance charge shall then be the highest lawful amount which does not exceed said 1.5% per month charge. If the Grantee, for any reason whatsoever, fails to pay said bill and finance charges, if applicable) the Grantee shall pay all Grantor's costs of collection, including reasonable attorneys' fees and expenses.

7. This conveyance is subject to the following restriction for the benefit of other land or location of the Grantor, to wit: that from the date of delivery of this deed, the Grantor shall not be liable to the Grantee or any lessee or user of the Premises (or any part thereof) for any damage to any buildings or property upon them caused by fire, whether communicated directly or indirectly by or from locomotive engines of any description upon the railroad operated by the Grantor, or otherwise.
8. By the acceptance of this deed and as part consideration therefor, the Grantee hereby agrees to make no use of the Premises which, in the sole and reasonable opinion of the Principal Engineering Officer of the Grantor, adversely affects, increases or decreases drainage to, from, upon or in any remaining land or location of the Grantor. The Grantee agrees to indemnify and save the Grantor harmless from and against any and all loss, costs, damage or expense including, but not limited to, the cost of defending all claims and/or suits for property damage, personal injury or death arising out of or in any way attributable to any breach of the foregoing covenants.
9. The Grantor excepts from this conveyance any and all overhead, surface or underground signal and communication line facilities of the Grantor located within the limits of the Premises and this conveyance is subject to the Grantor's use of any such facilities in their present locations and entry upon the Premises from time to time to maintain, repair, replace, renew, relay or remove such facilities.
10. Whenever used in this deed, the term "Grantor" shall not only refer to the BOSTON AND MAINE CORPORATION, but also its successors, assigns and affiliates and the term "Grantee" shall not only refer to the above-named Grantee, but also the Grantee's successors, assigns and grantees, as the case may be.

11. The several exceptions, reservations, conditions, covenants and agreements contained in this deed shall be deemed to run with the land and be binding upon the Grantee forever. In addition to the acceptance and recording of this deed, the Grantee hereby signifies assent to the said several exceptions, reservations, conditions, covenants and agreements, by joining in its execution.

IN WITNESS WHEREOF, the said BOSTON AND MAINE CORPORATION has caused this release deed to be executed in its name and its corporate seal to be hereto affixed by David A. Fink, its President, thereunto duly authorized this _____ day of _____, 1992.

GRANTOR:
BOSTON AND MAINE CORPORATION

By: _____
David A. Fink, President

GRANTEE:
MILFORD-BENNINGTON RAILROAD
COMPANY, INC.

By: _____

Witness

Witness

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

_____, 1992

Then personally appeared the above-named David A. Fink, the President of the BOSTON AND MAINE CORPORATION and acknowledged the foregoing release deed to be his free act and deed and the free act and deed of said BOSTON AND MAINE CORPORATION, before me.

Notary Public
My Commission Expires:

STATE OF NEW HAMPSHIRE

Hillsborough, ss.

_____, 1992

Then personally appeared _____, the _____ of MILFORD-BENNINGTON RAILROAD COMPANY, INC. and acknowledged the foregoing release deed to be his/her free act and deed and the free act and deed of said Corporation, before me.

Notary Public
My Commission Expires:

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 34381

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

vs.

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

**VERIFIED STATEMENT OF SYDNEY B. CULLIFORD IN SUPPORT OF THE
OPENING STATEMENT OF THE BOSTON AND MAINE CORPORATION and
THE SPRINGFIELD TERMINAL RAILWAY COMPANY**

Sydney B. Culliford states as follows:

1. I am the Vice President of Transportation for the Boston and Maine Corporation and the Springfield Terminal Railway Company (collectively "Guilford"). I make this statement in support of Guilford's Opening Statement in this matter in response to the Formal Complaint filed by Granite State Concrete Company, Inc. ("Granite State") and Milford-Bennington Railroad Company, Inc. ("MBR").

2. When MBR first informed Guilford of its intention to institute passenger service on MBR lines, Guilford requested that MBR install a derail device on its property.

3. This request was made for two reasons. First, Guilford was concerned with the possibility that the passenger cars stored on MBR property might break free and roll inadvertently onto Guilford's property. Second when Guilford looked closely at the physical layout of the MBR, it recognized that the .75 to 1.5% grade leading into Wilton

Yard created the potential for both freight and passenger cars to break free with little or no advance warning.

4. Sometime after the derail was installed, Guilford received a request to participate in the development of a plan to address the operations of MBR, Guilford and the proposed passenger service on the lines of MBR, and myself and several Guilford representatives traveled to Wilton on June 19, 2003 to view the location where these operations would intersect.

5. Upon arriving at this location—which is the same location where MBR and Guilford agreed to locate the derail device—we noticed that the derail device was not applied properly, despite the fact that a freight train had recently passed the area and the derail was left in the non-derailing position.

6. When I questioned the President of MBR—Mr. Peter Leishman—as to why the derail device was not applied properly, Mr. Leishman stated that the State of New Hampshire—the owner of the line upon which MBR operates—had objected to its use and that MBR was in a difficult position trying to maintain the derail in light of this opposition.

7. When Guilford realized that MBR was not willing to abide by its agreement to properly maintain the derail device and to disregard standard safety rules and practices without notice, Guilford elected to separate the operations of MBR and Guilford in order to minimize the potential for an incident when MBR was operating on Guilford's line. became apparent that the MBR had willingly disregarded established safety and operating rules on a regular basis.

8. To accomplish complete separation of the two railroads, separate operating

windows were established on Guilford's lines, with MBR being allowed to operate on Guilford's line from 12:00 am to 8:00 am.

9. This operating window was selected to allow MBR maximum operating time without the need to clear the track to allow Guilford inspection and maintenance personnel to perform their duties during the day, and to also allow Guilford to perform track maintenance and inspection during daylight hours, as well as to serve its customers.

10. Once Guilford became aware of the permitting restrictions at the Granite State \ Wilton facility, Guilford voluntarily altered the operating window to allow MBR to operate from 4:00 am to 1:00 pm daily.

11. Subsequently, Guilford also became aware that MBR had been maintaining Guilford's lines without any authority from Guilford.

12. Once the 4:00 am to 1:00 pm operating window was in place, Guilford also undertook a project to rehabilitate the portion of the Hillsboro Branch over which MBR operates to permit speeds of up to 10 miles per hour on the line.

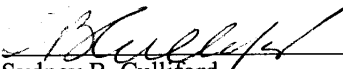
13. This project was undertaken to permit MBR to conduct its operations at higher speeds and to improve the efficiency of Guilford's operations.

14. Guilford has not been compelled to take similar actions with its other connecting carriers, for the simple reason that to the best of our knowledge those carriers comply with their agreements and standard safety rules and practices.

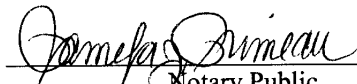
VERIFICATION

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

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

Signed 
Sydney B. Culliford

Subscribed and sworn to before me this 7th
day of January 2004.


Notary Public

My commission expires March 12, 2010

**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 ANDREW D. ZOMPA IN SUPPORT OF
THE OPENING STATEMENT OF THE BOSTON AND MAINE CORPORATION
AND SPRINGFIELD TERMINAL RAILWAY COMPANY**

Andrew D. Zompa states as follows:

1. I am the Director of Operating Rules for the Springfield Terminal Railway Company.

I make this Verified Statement in support of the Opening Statement of the Boston and Maine Corporation and Springfield Terminal Railway Company (collectively "Guilford") to the Formal Complaint of Milford-Bennington Railroad Co., Inc. ("MBR") and Granite State Concrete Co., Inc. ("Granite State").

2. In response to Guilford's request that a derail device be installed on the property of MBR to prevent freight and passenger cars from breaking free and inadvertently traveling onto Guilford's property with little or no notice, MBR agreed to install a derail device, which was installed on December 12, 2002. This derail device was installed at the intersection of the lines of Guilford and MBR, and was therefore located at a "Fouling Point" as that term is used in the NORAC Rules.

3. Immediately after delivering the derail device to MBR, Guilford issued a bulletin notifying its crews and the crews of MBR of the change in physical characteristics of the MBR line. A copy of this bulletin—which does not distinguish between freight and passenger operations—is appended hereto as Attachment A.

4. Prior to Guilford's discovery on June 19, 2003 that the derail device was not being applied properly, no one from MBR had contacted Guilford to inform them of this fact or to contest the bulletin issued by Guilford.

5. Recognizing that MBR did not intend to properly utilize the derail device in the agreed upon manner, on the afternoon of June 19th Guilford undertook to install a derail device on its own property, and issued a bulletin alerting both Guilford and MBR crews to its existence.

6. Since June 19, 2003, Guilford has continued to review the operating window put in place to separate the operations of Guilford and MBR, and has ultimately come to the conclusion that an alternative means to ensure safety on Guilford's line would be to maintain an "absolute block" whereby only one movement would be permitted on the line at any one time.

7. In other words, only one train or one maintenance/inspection crew would be permitted on the line at any one time, and all other movements would be kept out until the line was clear.

8. Once this conclusion was reached, Guilford implemented this new plan on November 10, 2003, thereby discontinuing the use of operating windows with set hours of operation. A copy of the bulletin instituting this new operating plan is appended hereto as Exhibit B.

9. This new operating plan permitted MBR to conduct its operations in a manner similar to those performed prior to the imposition of the operating window.

10. NORAC General Rule C requires that any person operating on a line of railroad be

qualified annually to operate on that particular line, and also be familiar with the physical characteristics of that line. On October 28, 2003, Wayne Wheeler was not qualified to operate over the Hillsboro Branch.

VERIFICATION

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

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

Signed

Andrew Zompa

Subscribed and sworn to before me this 7th
 day of January 2004.

Joseph J. Dumeau
 Notary Public

My commission expires March 12, 2010

A

TRUADZ DSP65
2/02 11:30:29

DOCUMENT: T00100308

PAGE: 1 OF 1

SPRINGFIELD TERMINAL RAILWAY
SUPPLEMENTAL BULLETIN ORDER
NO 3-012B

IN EFFECT 1500 THURSDAY, DECEMBER 12, 2002

HILLSBORO BRANCH
WILTON, NH

A 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

B



**SPRINGFIELD TERMINAL RAILWAY
SUPPLEMENTAL BULLETIN ORDER
NO. 3-011A**

EFFECTIVE: 0001 MONDAY, NOVEMBER 10, 2003

1) HILLSBORO BRANCH.

S.I. 93.1 IS ADDED TO PAGE 117C OF TIMETABLE NO. 3

**PERMISSION TO OPERATE WITHIN YARD LIMITS BETWEEN
WILTON MILEAGE 16.36 AND MP 13 WILL BE RESTRICTED TO
ONE MOVEMENT AT A TIME.**

**ALL OTHER PROVISIONS OF RULE 93 (OPERATION WITHIN YARD
LIMITS) WILL APPLY.**

**W.J. BOSTWICK
GENERAL MANAGER**

**E.J. REARDON
ASST. GENERAL MANAGER**

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. NOR 42083

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

vs.

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

**VERIFIED STATEMENT OF WARREN BOSTWICK IN SUPPORT
OF THE OPENING STATEMENT OF THE BOSTON AND MAINE
CORPORATION AND SPRINGFIELD TERMINAL RAILWAY COMPANY**

Warren Bostwick states as follows:

1. I am the General Manager for the Springfield Terminal Railway Company. I make this Verified Statement in support of the Opening Statement of the Boston and Maine Corporation and Springfield Terminal Railway Company (collectively "Guilford") to the Formal Complaint of the Milford-Bennington Railroad Co., Inc. ("MBR") and Granite State Concrete Co., Inc. ("Granite State").
2. On September 18, 2003, MBR reported a broken rail on the portion of the Guilford tracks over which MBR operates to serve Granite State. Noting that this broken rail would hamper the ability of MBR to serve its customer, myself, John Steiniger and Larry Ferguson contacted Mr. Leishman to discuss the situation.
3. During this discussion, I informed Mr. Leishman that Guilford was dispatching personnel

to repair the broken rail, and that in the interim a Guilford employee would be made available to walk the MBR trains over the broken rail to permit MBR to continue its operations. I also informed Mr. Leishman that MBR would be permitted to provide service to Granite State outside the existing 4 a.m. to 1 p.m. operating window on Thursday and Friday and through the weekend to make up for any time lost due to the broken rail. At no time did I indicate that the 4 a.m. to 1 p.m. operating window had been permanently discontinued, nor did Mr. Leishman ask whether that was the case.

4. After noting that MBR had not yet asked for clearance to enter the Guilford line as of 9:30 a.m. on September 22, 2003, after not having operated at during the remainder of September 18th, or the 19th through the 21st, I sent a letter to Mr. Leishman to confirm that the operating window had only been temporarily suspended.

5. Apparently, Mr. Leishman did not understand the nature of our discussion on September 18th, and believed that the operating window had been permanently discontinued despite that fact that I clearly stated that the window was *temporarily* discontinued for September 18th and 19th only. A copy of Mr. Leishman's letter is attached hereto as Attachment A.

6. MBR did not resume operations until Monday, September 22, 2003.

VERIFICATION

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

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

Signed Warren Bostwick
Warren Bostwick

Subscribed and sworn to before me this 7th
day of January 2004.

Janet A. Dumeau
Notary Public

My commission expires March 12, 2010

A

Millford-Bennington Railroad Company, Inc.

*62 Elm Street
Millford, NH 03055
Tel. (603) 678-7181*

September 22, 2003

Warren Bostwick, General Manager
Springfield Terminal Railway
Iron Horse Park
No. Billerica, MA 01862

Re: Your Letter of September 22, 2003

Dear Warren:

We acknowledge, with strenuous objection, your letter reactivating the unjustified and arbitrary restrictions that were imposed on our use of Guilford's track pursuant to the trackage rights agreement of 1992. We reiterate our position that these restrictions are completely inconsistent with the agreement, constitute a blatant and unwarranted breach of the agreement and constitute an irresponsible breach of the public trust.

Following the receipt of the recent STB Order and our conversation of last Thursday, I was encouraged that your organization and superiors had finally committed to a good faith effort to resolve this matter. Your commitment to me in this conversation was an unambiguous and unconditional confirmation that the restrictions, (which we consider to be arbitrary and unjustified), had been removed. This was clear in our first conversation of Thursday and the complete inconsistency with that conversation and you current position, requires us to chronicle the recent events:

1. At approximately 800 hrs, on September 18, 2003, we telephoned the dispatcher at Guilford to advise him of a broken rail, following which the track was taken out of service until a track supervisor arrived on the scene to confirm the condition;
2. More than an hour passed so that our engineer was sent home since there was no clear indication of when this repair would take place.
3. At approximately 1000 hrs I responded to a page from yourself, and was informed that the track supervisor was willing to 'walk' our train over the defective rail. We were unable to implement this, however, because I was unable to recall my crew;
4. At that point, you will recall, I became involved in a multi-party conference call involving yourself, Larry Ferguson, and John Steiniger, which conversation was characterized by an abundance of good will, in which I was assured that your

Mr. Warren Bestwick

September 23, 2003

Page 2

objective was to 'work with us', 'get us up and operating', and 'get things back to normal';

5. The conversation made it eminently clear that not only would the restrictions be lifted, but that this action heralded a new and hopeful sea change in our relationship which would allow us to serve our customer with our complete capacity and your unconditional cooperation;
6. I was so encouraged by this change in events that I promptly contacted both our attorneys and Granite State to advise of this development which, in turn, resulted in Granite State reactivating their Milford and Wilton operations to full scale, with corresponding levels of commitment from our operation as well.
7. However, we were not in a position to take advantage of this new situation until we knew that the repairs were completed;
8. At no point have we ever received any official notification from Guilford that the repairs were completed and, as a consequence waited, patiently and courteously, for advice to that effect;
9. Today, Monday, September 22, 2003, we called the dispatcher to determine the state of the repairs, (which we had observed on Sunday to be complete), and to request permission to run, only to be told that the dispatcher had to call in to you for instructions, (a peculiar advice since the dispatcher would have logically been fully aware of the state of repairs), at which time I was directed to speak to you;
10. At that time you informed me, to my complete shock, that the revocation of the restrictions that was so graciously delivered on Thursday, had been revoked and that, once again, we were being subjected to the arbitrary, unjustifiable, and illegal restriction to preclude us from running beyond 1300 hrs;
11. You attempted to characterize my understanding of the earlier revocation as a 'misunderstanding' and contended that the statement, (which no one denies), was intended to deliver only a 'temporary' relief from the restrictions, a contrivance that is unworthy of you, (and, I suspect, the product of the mind of one of your superiors), and which, moreover, is incompatible with the fact that we have now learned from your own attorney's letter, that the repairs had been completed at 1600 hrs on Thursday and we were never advised of the same so that we could have, conceivably, taken some advantage of this 'temporary' window of opportunity;

At this time and in light of the foregoing events, we want to point out that throughout

Mr. Warren Bonwick

September 23, 2003

Page 3

these contentious proceedings, in which Guilford has wasted no amount of imagination creating unjustifiable and unwarranted obstacles to the reasonable delivery of service to our customers, we have continued to allow Guilford full and unrestricted access over our trackage to their customer, Pike Industries, which Mr. Culliford has affirmed constitutes an important source of ballast stone for Guilford's maintenance activities of their other operations. This brings me to the need to respond to your current letter which strains the bonds of incredulity. In that letter you imply that the easing of restrictions was intended by Guilford for Friday, (and part of Thursday) only, and that we 'elected not take advantage of these options'. Apart from the fact that Guilford's imposition of any of these conditions is a gross and unjustified breach of contract and the easing of those restrictions for any period is our legal right, you and the others with whom we spoke on that day could not have so obviously misstated a matter of such critical importance to us all. There was no misunderstanding regarding this. Your current version of this amounts to a categorical and direct change in position of such a serious nature as to constitute harassment and, moreover, makes no sense when the rest of the letter is read.

In the rest of the letter, you imply that it was our responsibility to have told you that we did not want to 'take advantage of these options' to avoid your having canceled your operation on that line that day. In the first place, this would have been the first time in the 11 years that we have operated that you would ever have had to cancel your operation to accommodate ours. More to the point, however, it would also have been the first time in 11 years that we would have had to provide you with advice that we did not choose to run on your trackage on a particular day. By contrast, any time that we had to close down our trackage to effect repairs or the like, we provided you with immediate notice to insure that it would not interfere with any possible service to Pike. When the repairs were concluded, by the way, we promptly notified you of that fact so that you would have no unnecessary interruption in service.

The reason we did not elect to 'take advantage' of the Friday operation was because you did not inform us that the repairs were concluded. We learned, (quite by accident), that the repairs were concluded when we saw the repairs, (on Sunday), with our own eyes. I never received any official notification of the same and only learned that you had them completed late Thursday when I received, from our lawyer, a copy of your lawyer's letter to our lawyer who represented therein that the repairs were concluded late Thursday.

In view of the foregoing, I must conclude that the inference in your letter that we owed you the courtesy of a call on Friday is an ineffective attempt to retroactively withdraw and ignore the clear and unambiguous relaxation of restrictions that were communicated to me earlier. Clearly, you can lift those restrictions and reimpose them at your pleasure, (but also at your risk), until we obtain relief from the STB and/or the courts. However, you have always appeared to me to be an honorable individual and I must sincerely express my disappointment at the evident change in your company's position that you were so clearly required to communicate to us now.

As you must know, the continued imposition of these unjustifiable and arbitrary

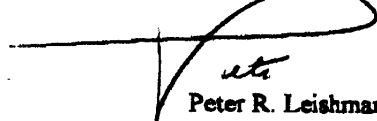
Mr. Warren Bestwick

September 23, 2003

Page 4

restrictions continues to deliver substantial monetary damages to my customer, their and our employees and families, and our operation. Further, it deprives the citizens of this community of adequate and responsible rail service. As you and your company know, we will continue to hold Guilford accountable for any and all losses occasioned by their actions.

Very truly yours,



Peter R. Leishman

PRL:ps

cc: David L. Nixon, Esquire
John G. MacLellan, III, Esq.
James Howard, Esq.
F. Colin 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 JOHN STEINIGER IN SUPPORT
OF OPENING STATEMENT OF THE BOSTON AND MAINE CORPORATION
AND SPRINGFIELD TERMINAL RAILWAY COMPANY**

John Steiniger states as follows:

1. I am Chief Engineer of Track for the Springfield Terminal Railway Company.

I make this Verified Statement in support of the Opening Statement of the Boston and Maine Corporation and Springfield Terminal Railway Company (collectively "Guilford") to the Formal Complaint of Milford-Bennington Railroad Co., Inc. ("MBR") and Granite State Concrete Co., Inc. ("Granite State").

2. Guilford undertook rehabilitation of that portion of the Hillsboro Branch upon which MBR operates in an effort to increase speeds on this line to 10 miles per hour.

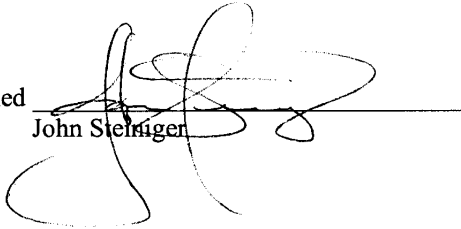
3. These repairs were completed on October 29, 2003 and the speed on this line was increased to 10 miles per hour.

VERIFICATION

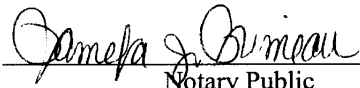
Commonwealth of Massachusetts)
County of Middlesex) ss.:

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

Signed


John Steiniger

Subscribed and sworn to before me this 7th
day of January 2004.


Notary Public

My commission expires March 12, 2010

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. NOR 42083

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

vs.

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

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

Larry L. Ferguson states as follows:

1. I am the Director of Train Operations for the Springfield Terminal Railway Company.

I make this Verified Statement in support of the Opening Statement of the Boston and Maine Corporation and Springfield Terminal Railway Company (collectively "Guilford") to the Formal Complaint of Milford-Bennington Railroad Co., Inc. ("MBR") and Granite State Concrete Co., Inc. ("Granite State").

2. Since the operating window was altered by Guilford—first to 4:00 am to 1:00 pm then to an "absolute block"—and the speeds on that portion of the Hillsboro Branch over which MBR operates were increased to 10 miles per hour, there has been no appreciable increase in the number of round trips performed by MBR each day.

3. More particularly, Guilford's records indicate that since the speeds were increased on

October 29, 2003, MBR continued to operate approximately 1.5 round trips per day. Similarly, between the date that the “absolute block” was put in place on November 10, 2003 until MBR discontinued operations on December 8, 2003, MBR only performed 3 round trips on only two occasions. A spreadsheet indicating the number of round trips performed by MBR since June of 2003 is appended hereto as Attachment A.

4. On October 28, 2003, MBR requested permission to enter the Guilford line and identified the engineer and conductor on the MBR train, as is customary.

5. When Guilford checked its records to confirm that the MBR crew was qualified to operate on Guilford’s track, it was discovered that the engineer—Wayne Wheeler—had not received the proper qualifications.

VERIFICATION

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

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

Signed Larry L. Ferguson
Larry L. Ferguson

Subscribed and sworn to before me this 7th
day of January 2004.

Camille Chimeau
Notary Public

My commission expires March 12, 2010

B

**MILFORD BENNINGTON RAILROAD
MONTH OF JUNE 2003**

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

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

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

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

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

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

**MILFORD BENNINGTON RAILROAD
MONTH OF AUGUST 2003**

NORTHBOUND				SOUTHBOUND	
# TRIPS	DATE	LOAD	EMPTY	LOAD	EMPTY
1.5	8/1	0	9	9	0
		0	9		
1.5	8/4	0	9	9	0
				9	0
2	8/5	0	9	9	0
		0	9	9	0
1	8/6	0	9	9	0
1	8/7	0	9	9	0
1	8/8	0	9	9	0
0.5	8/11	0	9		
0.5	8/12			9	0
0.5	8/22			9	0
2	8/25	0	9	9	0
		0	9	9	0
0.5	8/26	0	9		
1.5	8/27	0	9	9	0
				9	0
2	8/28	0	9	9	0
		0	9	9	0
2	8/29	0	9	9	0
		0	9	9	0

Number of 1/2 trips = 4
 Number of 1 round trips = 3
 Number of 1-1/2 trips = 3
 Number of 2 round trips = 4
 Number of 3 round trips = 0
 Number of days did not operate = 17

**MILFORD BENNINGTON RAILROAD
MONTH OF SEPTEMBER 2003**

# TRIPS	DATE	NORTHBOUND		SOUTHBOUND	
		LOAD	EMPTY	LOAD	EMPTY
1.5	9/2	0	9	9	0
		0	9		
1.5	9/3	0	9	9	0
				9	0
2	9/4	0	9	9	0
		0	9	9	0
1	9/5	0	9	9	0
2	9/8	0	9	9	0
		0	9	9	0
2	9/9	0	9	9	0
		0	9	9	0
1.5	9/10	0	9	9	0
		0	9		
1.5	9/11	0	9	9	0
				9	0
2	9/16	0	9	9	0
		0	9		
		0	9	9	0
0.5	9/18			9	0
0.5	9/22	0	9		
1.5	9/23	0	9	9	0
				9	0
1.5	9/24	0	9	9	0
		0	9		
1.5	9/25	0	9	9	0
				9	0
1.5	9/26	0	9	9	0
		0	9		
0.5	9/27			9	0
0.5	9/28	0	9		
0.5	9/29			9	0
1	9/30	0	9	9	0

Number of 1/2 trips = 5
 Number of 1 round trips = 2
 Number of 1-1/2 trips = 8
 Number of 2 round trips = 4
 Number of 3 round trips = 0
 Number of days did not operate = 11

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

# TRIPS	DATE	NORTHBOUND		SOUTHBOUND	
		LOAD	EMPTY	LOAD	EMPTY
2	10/1	0	9	9	0
		0	9	9	0
1.5	10/2	0	9		
		0	9		
1.5	10/3	0	9	9	0
				9	0
1.5	10/6	0	9	9	0
		0	9		
1	10/7	0	9	9	0
1.5	10/8	0	9	9	0
		0	9		
1	10/9	0	9	9	0
1.5	10/10	0	9	9	0
		0	9		
1.5	10/13	0	9	9	0
				9	0
1.5	10/14	0	9	9	0
		0	9		
0.5	10/15			9	0
1	10/16	0	9	9	0
1.5	10/20	0	9	9	0
		0	9		
1	10/21	0	9	9	0
1.5	10/22	0	9	9	0
				9	0
1	10/24	0	9	9	0
1.5	10/27	0	9	9	0
		0	9		
0.5	10/28			9	0
1.5	10/29	0	9	9	0
		0	9		
1.5	10/30	0	9	9	0
				9	0
1.5	10/31	0	9	9	0
		0	9		

Number of 1/2 trips = 2
 Number of 1 round trips = 5
 Number of 1-1/2 round trips = 13
 Number of 2 round trips = 1
 Number of days did not operate = 10

**MILFORD BENNINGTON RAILROAD
MONTH OF NOVEMBER 2003**

# TRIPS	DATE	NORTHBOUND		SOUTHBOUND	
		LOAD	EMPTY	LOAD	EMPTY
1.5	11/3	0	9	9	0
				9	0
1	11/4	0	9	9	0
1.5	11/5	0	9	9	0
		0	9		
1.5	11/6	0	9	9	0
				9	0
1	11/7	0	9	9	0
1	11/10	0	9	9	0
2	11/12	0	9	9	0
		0	9	9	0
2	11/13	0	9	9	0
		0	9	9	0
3	11/14	0	9	9	0
		0	9	9	0
		0	9	9	0
3	11/17	0	9	9	0
		0	9	9	0
		0	9	9	0
2	11/18	0	9	9	0
		0	9	9	0
2	11/19	0	9	9	0
		0	9	9	0
2	11/20	0	9	9	0
		0	9	9	0
1	11/21	0	9	9	0
2	11/24	0	9	9	0
		0	9	9	0
2	11/25	0	9	9	0
		0	9	9	0
1	11/26	0	9	9	0

Number of 1/2 trips = 0
 Number of 1 round trips = 5
 Number of 1-1/2 round trips = 3
 Number of 2 round trips = 7
 Number of 3 round trips = 2
 Number of days did not operate = 13

**MILFORD BENNINGTON RAILROAD
MONTH OF DECEMBER 2003**

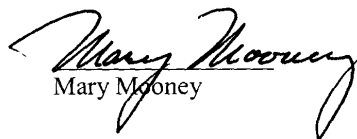
# TRIPS	DATE	NORTHBOUND		SOUTHBOUND	
		LOAD	EMPTY	LOAD	EMPTY
2	12/1	0	9	9	0
		0	9	9	0
2	12/2	0	9	9	0
		0	9	9	0
1	12/3	0	9	9	0
1	12/4	0	9	9	0

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

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served on January 8, 2004, by Federal Express, postage prepaid, on counsel for the plaintiffs, as follows:

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


Mary Mooney

January 8, 2004