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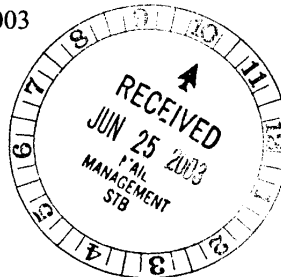
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June 23, 2003



FEDERAL EXPRESS

Mr. Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Room 700  
Washington, D.C. 20423-0001

208191

Re: STB Finance Docket No. 33989 - - Pejepscot Industrial Park d/b/a Grimmel Industries - Petition for Declaratory Order

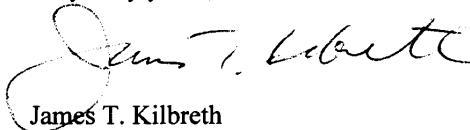
Dear Secretary Williams:

Enclosed for filing and docketing please find an original and ten copies of the Reply of Petitioner/Cross-Respondent Pejepscot Industrial Park, Inc. d/b/a Grimmel Industries to Petition of Maine Central Railroad Co., Springfield Terminal Railway Co., and Guilford Transportation Industries, Inc. for Reconsideration along with the Verified Statement of Timothy J. Garrity.

Please note that the signature page of Mr. Garrity's verified statement is being supplied in facsimile form. We will forward the original signature page shortly.

Thank you for your attention to this matter.

Very truly yours,

  
James T. Kilbreth

JTK/prf

Enclosure

cc: Timothy J. Garrity  
Service List

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

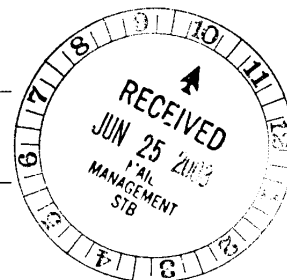
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**PEJEPSCOT INDUSTRIAL PARK, INC.  
d/b/a GRIMMEL INDUSTRIES -  
PETITION FOR DECLARATORY ORDER**



**CERTIFICATE OF SERVICE**

I, James T. Kilbreth, attorney for Pejepscot Industrial Park, Inc., d/b/a Grimmel Industries, hereby certify that I made service of one copy of the Reply of Petitioner/Cross-Respondent Pejepscot Industrial Park, Inc. d/b/a Grimmel Industries to Petition of Maine Central Railroad Co., Springfield Terminal Railway Co., and Guilford Transportation Industries, Inc. for Reconsideration by causing a copy of the same to be deposited in the United States mail, postage prepaid, first class mail on May 1, 2001, addressed to counsel of record as follows:

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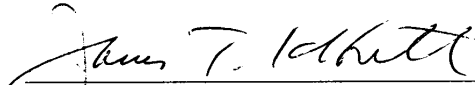
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BEFORE THE  
SURFACE TRANSPORTATION BOARD

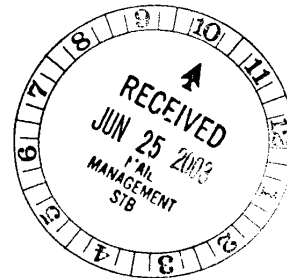
FINANCE DOCKET NO. 33989

PEJEPSCOT INDUSTRIAL PARK, INC.  
d/b/a GRIMMEL INDUSTRIES -  
DECLARATORY ORDER

ENTERED  
Office of Proceedings

JUN 25 2003

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REPLY OF PEJEPSCOT INDUSTRIAL PARK, INC.  
d/b/a GRIMMEL INDUSTRIES  
TO PETITION OF MAINE CENTRAL RAILROAD CO.,  
SPRINGFIELD TERMINAL RAILWAY CO.,  
AND GUILFORD TRANSPORTATION INDUSTRIES, INC.  
FOR RECONSIDERATION

Pursuant to 49 C.F.R. §§ 1104.13 and 1115.3, Petitioner/Cross-Respondent Pejepscot Industrial Park, Inc. d/b/a Grimmel Industries ("Grimmel") submits this Reply to the Petition for Reconsideration of Respondents Maine Central Railroad Company, Springfield Terminal Railway Co. and Guilford Transportation Industries, Inc. (collectively "Guilford").

**PREFACE AND SUMMARY OF ARGUMENT**

This matter centers upon Grimmel's sustained efforts, over many years, to obtain rail service from Guilford at Grimmel's Topsham, Maine facility. In its May 9, 2003 Decision (the "Decision") the Board found that Guilford violated its common carrier obligations to provide Grimmel with rates and service upon reasonable request as required under 49 U.S.C. § 11101. While finding the subject commodities -- scrap iron and steel, and automobile shredder residue ("ASR") to be exempt from Guilford's obligations for at least some period of time, the Board rejected Guilford's principal argument -- that economic factors justified its refusal to provide

service -- and found Guilford in violation of its obligation to provide Grimmel with rates and service with respect to ASR through May 21, 1998, when ASR became an exempt commodity.

Guilford's Petition for Reconsideration rests on the dubious foundation of the verified statement of a Guilford employee who, after reviewing the Board's decision against Guilford and recognizing the basis thereof, has now changed his testimony in a manner that directly contradicts his previous verified statement and purports to cure the basis of liability found by the Board.

This new testimony should be rejected out of hand as failing to constitute the type of "new evidence" that may warrant reconsideration.

Even if the amended testimony is considered, the fact remains that Guilford's refusal to provide service to Grimmel is undisputed. Guilford tried to justify that refusal on economic-hardship grounds, and the Board clearly rejected that excuse.

Notwithstanding Guilford's insistence to the contrary, the record clearly establishes that Grimmel made numerous requests for rates and service over a lengthy period. Thus, even if the Board accepts Guilford's new attempt to neutralize the June 18, 1996 request for service -- the request that the Board specifically found triggered Guilford's obligations -- the facts show that Grimmel requested rates and service on many other occasions, and Guilford indisputably refused to provide the same. Indeed, on the one occasion in which Guilford did provide a rate -- in May 1997, a fact that Guilford initially denied but now admits -- Guilford still refused to provide service despite Grimmel's acceptance of the rate.

Accordingly, the Board should deny the Petition.

## **BACKGROUND**

The facts of this matter are set forth in detail in Grimmel's Petition for Declaratory Order and attachments thereto, and in Grimmel's Verified Statement in Rebuttal and Reply Statement, as well as in the Board's Decision. As relevant to the Petition for Reconsideration, the Board found that following Grimmel's request for service on June 18, 1996 with respect to carriage of scrap iron and steel as well as ASR, Guilford failed to provide service in accordance with its obligations as a common carrier. Decision at 8-12. The Board found it unnecessary to determine whether other "general" requests for service triggered Guilford's obligation to provide rates and service upon request, because the response to the June 18 request was so clearly deficient. *Id.* at 9. The Board likewise made a passing reference to an instance in mid-1997 in which Grimmel alleged that Guilford did provide a rate (\$600) but then still refused to provide service; the Board found that while such an allegation would support a finding that Guilford violated its obligations, the allegation had not been shown sufficiently clearly. *Id.* at 12 n.27.

After finding that Grimmel had requested rates, the Board rejected Guilford's justification for its failure to provide service: the assertion that doing so would impose an inordinate financial burden on Guilford. Decision at 12-14. Since the failure to provide service in response to a specific request for rates and service was undisputed, Guilford was in violation of its statutory obligations.

Guilford then filed the instant Petition for Reconsideration, asserting that: (1) its own witness's previous statements regarding the June 18, 1996 quote were incorrect; and (2) despite Guilford's previous assertion to this Board that it did not provide a rate in response to the mid-1997 request, Guilford in fact did so, but Grimmel could not have accepted the rate based on the existence of various contingencies that Guilford now thinks would not have been met.

## ARGUMENT

Guilford's effort to escape the consequences of the Board's clear rejection of its economic-hardship argument -- the very core of Guilford's defense -- by changing the facts of this case, with the benefit of the Board's thinking, should be rejected.

### **I. The Board Should Reject Guilford's Self-Serving Changes to its Testimony.**

A Petition for Reconsideration may be granted only

upon a showing of one or more of the following points:

- (1) The prior action will be affected materially because of new evidence or changed circumstances.
- (2) The prior action involves material error.

49 C.F.R § 1115.3(b). In addition, "[w]hen, in a petition filed under this section, a party seeks an opportunity to introduce new evidence . . . an explanation must be given why it was not previously adduced." 49 C.F.R. § 1115.3(c).

None of those requirements have been or can be met in this case.

As noted above, the Board found that on June 18, 1996, Grimmel made a specific request for rates for carriage of scrap metal and ASR, and that Guilford failed adequately to respond -- thus violating its common carrier obligations. In making that finding, the Board cited the Verified Statement of Kenneth Berg, which Guilford attached to its Reply Statement and Cross-Petition ("Berg V.S."). In relevant part, Mr. Berg had stated, "[o]n June 18, 1996, Tim Garrity of Grimmel requested a rate for carriage of scrap metal *and automobile shredder residue* from Topsham to Steelton, Pennsylvania." Berg V.S. at ¶ 6 (emphasis added).

Now, Guilford purports to submit "new evidence": the "amended" testimony of Mr. Berg -- i.e., another verified statement flatly contradicting his previous testimony. Mr. Berg now states that upon reviewing his notes, he "realizes" that his previous verified statement

“inadvertently” stated that Mr. Garrity’s request for quotes related to ASR, when in fact it only related to scrap -- a commodity that the Board has found was exempt at that time. Verified Statement of Kenneth Berg in Support of Petition for Reconsideration ("Amended Berg V.S.") at ¶¶ 2-3. Mr. Berg and Guilford unabashedly acknowledge that Mr. Berg’s “realization” was prompted by his review of this Board’s May 9, 2003 Decision. Amended Berg V.S. at ¶ 2 ("Upon reviewing the decision . . . I realized that any Reply V.S. inaccurately stated the substance of my conversations with Grimmel. . . ."). That is, Mr. Berg: (1) received the Decision, (2) recognized the basis of the ruling against Guilford, (3) “reviewed” his notes, (4) “realized” that his previous verified statement had “inadvertently” made a clear and unambiguous -- and, the Board is asked to believe, incorrect -- statement, and (5) therefore “amended” his testimony.

The Board should reject this effort to change Mr. Berg’s testimony after the fact, with the benefit of knowing the Board's thinking. The parties had ample time to prepare their cases, and the importance of the written record was clear from the beginning given that this case would be decided on written submissions. Indeed, Mr. Berg’s original verified statement meticulously recited his version of the facts, and cited -- and attached -- documents. See Berg V.S. at ¶¶ 8-12. Clearly, substantial time went into preparing Mr. Berg's statement before he, “being duly sworn, depose[d] and sa[id] that he ha[d] read the foregoing statement, and that to the best of his knowledge, the facts asserted there [we]re true and the same [we]re true as stated.” Berg V.S. at 7. In his amended verified statement -- which contains the same verification as the original one - - Mr. Berg gives no insight as to why the document upon which he now relies was not consulted, reviewed and attached previously. Likewise, Mr. Berg does not explain why, if it is so obvious

that Steelton, Pennsylvania is not an ASR site, see Amended Berg V.S. at ¶ 5, he did not realize that earlier.

Regardless of the inherent and obvious problem of whether anything that Mr. Berg says can now be considered reliable<sup>1</sup>, at a minimum the parties and this Board could have saved substantial time and avoided considerable expense had the facts that are now asserted to be true been correctly stated the first time around. Proceedings such as this are intended to be resolved in a just, speedy and inexpensive manner, 49 CFR § 1100.3, and Guilford's conduct -- submitting, after the fact, an amended verified statement of its employee purporting to dramatically change the testimony on which the Board relied -- flies in the face of that mandate.

Perhaps more importantly, this is not "new evidence" at all. See, e.g., Removal, Revision, and Redesignation of Miscellaneous Regulations, STB Ex Parte No. 572 (Sub-No. 1) (Served January 24, 2002) ("The fact that [the party seeking reconsideration] did not request the underlying documents until after our August Decision does not make this new evidence *that was not previously available to it*. Nothing prevented [that party] from obtaining those documents prior to its original appeal in this proceeding.") (emphasis added); Big Stone-Grant Industrial Development and Transportation, L.L.C. -- Construction, Exemption -- Ortonville, MN and Big Stone City, S.D., STB Finance Docket No. 32645 (Served September 23, 1999) (relevant decision of federal district court, issued 16 months before decision but not available in federal supplement volume until after decision, was not "new evidence").<sup>2</sup>

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<sup>1</sup> Indeed, the Board has already expressed skepticism about Mr. Berg's credibility, noting that while Mr. Berg concluded his original verified statement "by claiming, without supporting evidence, that he provided quotes which included rates for carriage from Grimmel's facility at Topsham . . . [t]hese bald assertions are belied by the specific facts attested to earlier in [his] testimony." Decision at 12 n. 25.

<sup>2</sup> See also Jost v. Surface Transportation Board, 194 F.3d 79, 84 (D.C. Cir. 1999) (applying definition set forth in Interstate Commerce Commission v. Brotherhood of Locomotive Engineers, 482 U.S. 270 (1987) of "new evidence" as "'facts which through no fault of [the petitioner's], the original proceeding did not contain,'" to context of petition to reopen STB proceedings); Friends of Sierra Railroad, I.C.C., 881 F.2d 663, 667 (9<sup>th</sup> Cir. 1989) (petition

There is no legitimate reason -- and none is asserted -- why Mr. Berg could not have given an accurate statement the first time around, and his "amended" testimony does not constitute "new evidence". The Petition should be denied without further consideration.

**II. Even if the June 18, 1996 Request Did Not Cover ASR, Guilford Failed to Provide Rates and Service to Grimmel.**

Even if Mr. Berg's newfound version of the facts is considered and accepted, the record establishes that Guilford still failed to provide Grimmel with rates and service upon Grimmel's requests for the same. Accordingly, the outcome of this proceeding should not change.

**A. Guilford Has Never Provided Service.**

"[I]t is undisputed that no rail service was ever provided directly from Grimmel's facility." Decision at 9; see also id. at 2 ("No traffic has moved over the Lewiston Lower in more than a decade."). Indeed, Guilford's principal argument in this proceeding was that it could not be required to provide service to Grimmel absent Grimmel's being required to bear the costs of rehabilitating the Lewiston Lower. Id. at 5 (Guilford asserted that it "ha[s] no obligation to provide rail service at a loss, and that, despite [its] efforts to meet petitioner's service needs in other ways, Grimmel has acted unreasonably by demanding that MEC bear all or most of the line's rehabilitation costs."); id. at 9 ("Instead of establishing rates and providing service, the railroad offered a number of explanations as to why it should not have to do so."); id. at 12 ("We will now turn to respondents' principal argument: that, under the particular facts of this case,

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to reopen I.C.C. proceeding, based on alleged failure of exemption notice to disclose certain facts, "does not suggest that this is newly discovered evidence; the essence of [petitioner's] argument is that the evidence was already available. Although [the] Petition to reopen may have raised this evidence for the first time in these proceedings, *newly raised* evidence is not the same as *new* evidence.") (emphasis original); Farmers Export Co. v. U.S., 758 F.2d 733, 738 (D.C. Cir. 1985) ("The fluctuation of interest rates was before the Commission at the time of its initial decision. The continuing fluctuation of rates alleged by petitioner here is not new evidence or sufficient to substantially change the circumstances of this case.").

they were excused from complying with the provisions of section 11101 that otherwise would have required them to supply rates and provide service upon request.").

Thus, Guilford has never denied that it did not provide service, but has simply argued that it never failed to provide service "upon reasonable request" pursuant to 49 U.S.C. § 11101(a). See Guilford Verified Reply Statement and Cross-Petition at 12-14.

The Board has resoundingly rejected Guilford's "economic hardship" excuse. See May 9 Decision at 12-13 ("We disagree. Respondents cannot lawfully make fulfilling their statutory obligations contingent upon whether they think it is 'worth it' to do so. Rather, a carrier must adhere to its statutory obligations even if it suffers hardship in so doing.").

Accordingly, the only question is whether, apart from the June 18, 1996 request for service upon which the Board previously relied, Grimmel requested rates and service.

**B. Grimmel Requested Rates and Service on Numerous Occasions Other Than June 18, 1996 and the Spring of 1997.**

The record clearly establishes that Grimmel requested rates and service from Guilford on many occasions. This Board found that "[t]he record is replete with references to various conversations in which Grimmel and/or its trading partners discussed in general with MEC the prospect of service from Topsham. Clearly, MEC knew that Grimmel wanted service." Decision at 9. Likewise, the Board found that Guilford's "unresponsive rate quote of June 26, 1996 [following the June 18 request] thus is the *first instance* in the record where respondents clearly failed to establish a rate for service from Topsham after a specific request. . . . [I]t does not appear that respondents have ever issued a rate or rate quote at any time thereafter applicable

to service directly from Topsham, *even though Grimmel continued to seek such rates.*" *Id.* at 12 (emphasis added) (footnote omitted).<sup>3</sup>

The Verified Statement of Timothy J. Garrity of Grimmel, Exhibit C to Grimmel's Petition for Declaratory Order (the "Garrity V.S."), establishes that Grimmel invested "over five years of almost continuous effort . . ." in trying to get service from Guilford. Garrity V.S. at 2. Mr. Garrity has documented his efforts and Guilford's various responses, *e.g.*, that the track was deficient; that Guilford did not have cars available; that Grimmel should truck to Portland; that Grimmel should make improvements at the Portland facility; that Grimmel should build a new transload facility at Grimmel's expense; and that Grimmel should pay \$250,000 to repair the track *and* pay for a crew to serve the Topsham facility. *Id.* at 3-4. In addition, Mr. Garrity confirms Grimmel's efforts again in his Third Verified Statement, stating that in the time period leading up to Guilford's request to abandon the Lewiston Lower, he was on the phone repeatedly with Guilford, asking that Guilford either provide service or abandon the line. Verified Statement of Timothy J. Garrity, attached hereto ("Third Garrity V.S.") at ¶ 2.

Clearly, Grimmel's efforts were being made in an attempt to obtain rates and service. The chain of events that Mr. Garrity recounts establishes "Guilford's demonstrated aversion to providing service on the line, including providing no rail service on the line for at least 10 years, [and] *refusing our repeated requests for service . . .*" *Id.* at 6 (emphasis added). Thus, "Guilford's refusal to provide service has been ongoing since 1994. . . . The refusal in the late spring of 1997 was simply the continuation of a pattern since 1994 and . . . continued throughout

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<sup>3</sup> In footnote 26 following the quoted sentence, the Board noted that on or about May 22, 1997, Grimmel contacted Mr. Berg of Guilford, requesting rates for transport of scrap and ASR from Topsham. Mr. Berg "note[d] without further explanation that '[n]o rates were ever published as a result of this contact.'" Decision at 12 n. 26 (quoting Berg V.S. at 5). The May 22 request is addressed below.

1997 and 1998.” Verified Statement of Timothy J. Garrity filed as an attachment to Grimmel's Verified Statement in Rebuttal and Reply Statement (the "Garrity Reply V.S.") at ¶ 12.

The Verified Statement of Allan Bartlett of the Maine Department of Transportation confirms Mr. Garrity's version of events. See Verified Statement of Allan H. Bartlett, Exhibit D to Grimmel's Petition for Declaratory Order ("Bartlett V.S.") at 4. Mr. Bartlett notes that in early 1997 he was contacted by Grimmel, which “had been seeking rail service from Guilford for some time but, despite having been passed up to successively higher levels of Guilford's corporate structure, had not had any success. At the time [Mr. Bartlett] first spoke with Grimmel's representative, Guilford had not even provided rate quotes in response to Grimmel's continued requests for service.” Id.

Guilford itself concedes that “Grimmel and its business associates bombarded Guilford with requests for rate quotes from numerous points of origin to numerous destinations.” Guilford Cross-Petition at 6. The verified statement of Guilford employee F. Colin Pease references Mr. Berg and John Black of Grimmel as individuals who “generally” held discussions concerning rates -- confirming that there was a substantial number of such discussions. See Verified Statement of F. Colin Pease, attached to Guilford Reply Statement and Cross-Petition ("Pease V.S.") at ¶ 3. That the discussions took place and were cited in Guilford's earliest submissions in this proceeding confirms that Guilford's essential position has been that it should not have to provide service -- not that no requests for service were made.

In its Petition for Reconsideration and supporting amended verified statement of Mr. Berg, Guilford attempts to evade these facts by asserting that “[a]fter the June 18<sup>th</sup> [1996] Request, Mr. Berg did not receive any request for rates for the shipment of ASR from Grimmel or any other broker acting on its behalf until May 22, 1997.” Petition for Reconsideration at 3.

However, this statement is misleading in its implication that Mr. Berg alone -- as opposed to anyone else at Guilford -- would have been the recipient of such a request. Indeed, as noted above, Mr. Pease's verified statement referred to Mr. Berg as the Guilford employee who "generally" was involved in rate discussions -- acknowledging that Guilford employees other than Mr. Berg discussed rates with Grimmel. In addition, Mr. Garrity's Reply V.S. clearly establishes that

[i]n my dealings with Guilford on arranging rail service *and discussing prices*, I dealt primarily with Colin Pease, Richard Willey or Robert Farley, *not Kenneth Berg*.

Garrity Reply V.S. at ¶ 2 (emphasis added).<sup>4</sup>

The record thus clearly establishes Grimmel's ongoing and continuous requests for rates and service from its Topsham facility -- the only facility that Grimmel has operated during the time period at issue. As the Board has found, Guilford clearly knew that Grimmel wanted service from Topsham. While in light of the June 18, 1996 request the Board viewed Grimmel's other requests as "general" and declined to determine whether such requests were sufficient to trigger Guilford's obligations, in the circumstances of this case there can be no doubt that Guilford's obligations -- which it has indisputably failed to meet -- were properly triggered. Guilford should not be allowed to benefit from its own intransigence over the course of many years, by now escaping liability on the basis that Grimmel's ongoing requests for rates and service were too "general".<sup>5</sup>

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<sup>4</sup> To the extent that Mr. Pease states that discussions of broader issues than rates were "typically" held between himself and Mr. Garrity of Grimmel, it bears emphasis that by its plain terms this statement is not inconsistent with Mr. Garrity's assertion that he discussed prices with, among others, Mr. Pease. The caveat that discussion between Mr. Garrity and Mr. Pease "typically" focused issues other than rates expressly indicates that such discussions at times involved rates.

<sup>5</sup> Similarly, even in its Petition for Reconsideration Guilford has not tried to claim that any of these requests other than the June 18, 1996 request were limited to scrap as opposed to ASR.

**C. While Guilford Now Admits That It Quoted a Rate in the Spring of 1997, Guilford Still Failed to Provide Service Even Though Grimmel Accepted the Quote.**

Grimmel asserted earlier in this proceeding that the one occasion on which Guilford provided a quote for service from Topsham was in the spring of 1997. Garrity Reply V.S. at ¶¶ 4-6. At that time, Guilford provided a \$600 rate quote. Id. While that quote was high, Grimmel accepted it. Id. Guilford nevertheless still refused to provide service. Id.

Guilford denied that it ever provided the \$600 quote. In fact, in its Cross Petition Guilford referred to this “supposed quote”; admonished Grimmel for not stating in the Petition or Amended Complaint who at Guilford provided the quote or what the destination was to be; stated that Guilford did not publish this rate; asserted that Mr. Berg’s recollections and records did not indicate that he was involved even on informal basis in providing such a quote; and referred to “a \$600 quote from Topsham [as] quite far-fetched . . .” Guilford Cross-Petition at 6 (citing Berg V.S. at ¶ 14).

The Board found that to the extent that Grimmel asserted that it had accepted a rate quote from Guilford between April and June 1997, but that Guilford had still refused to provide service, Grimmel had offered

few details about this alleged rate quote, and [Guilford] dispute[d] that it was ever made. Grimmel, in our view, has not demonstrated that such a quote was made. Of course, such a quote, if clearly shown to have been made, could form the basis of a claim for failure to provide service under section 11101(a).

Decision at 12 n. 27.

Now, notwithstanding its previous insistence to the contrary, Guilford inexplicably changes its version of the facts again and asserts that Mr. Berg *did* provide a rate quote in response to Mr. Black’s May 22, 1997 inquiry. Thus, there is no longer any question whether Grimmel’s contentions with respect to having been provided a rate in this time frame are true.

Given that no service was ever provided, the liability that the Board previously found *might* exist *does* exist.

Guilford nevertheless contends now that Grimmel did not accept the \$600 rate quote. Of course, Guilford concedes that the quote was conditioned on Grimmel having access to the Lewiston Lower -- the purported economic justification for refusing to provide service that the Board has already rejected. Nevertheless, says Guilford, even if Grimmel had accepted the quote and even if the access issue were resolved, Grimmel would not have been able to avail itself of Guilford's service because: (1) sufficient rail cars would not be "readily available", and (2) Grimmel would have been required to obtain pre-approval for dumping ASR at the subject destination -- "something that Grimmel did not indicate had been -- or could be -- done."

These contentions are all specious. First, the record establishes that Grimmel *did* accept the quote:

- After April 1997, "for the first time, [Guilford] quoted us an all-rail rate from our Topsham facility. Although the rate was high, it was cheaper than the all-truck rates and the transload rates. So, we accepted it and requested service." See Garrity V.S. at 4;
- "[W]hen we accepted Guilford's rates in 1997, they nonetheless refused to provide service." Garrity Reply V.S. at ¶ 4;
- "Although we accepted the offer, Guilford refused to provide service because of the cost of rehabilitating the track . . .". Garrity Reply V.S. at ¶ 5;
- "Although in my view the quoted rate of \$600 is unreasonable and extraordinarily inflated, we nonetheless accepted it because overall it still was more economical and efficient for us than trucking to a rail shipment point . . .". Garrity Reply V.S. at ¶ 6;
- "Tim Garrity of Grimmel Industries phoned on 6/9/97 to advise that [Guilford] had provided his company for a rate quote for service to Pejepscot (\$600/car). He commented that the rate was a little high but was still better than the current rail shipments being made from Auburn." Ex. 1 to Garrity Reply V.S., June 13, 1997 Memorandum from Allan H. Bartlett, State of

Maine Department of Transportation;

- “By the latter part of June 1997, Guilford had quoted Grimmel a rate of \$600 per car . . . but Guilford continued to refuse to provide service. . . .” Bartlett V.S. at 4.

Indeed, Mr. Garrity has again confirmed that Grimmel *never* rejected a rate quote from Guilford. Third Garrity V.S. at ¶ 4.

Second, Guilford’s argument that Grimmel could not have taken advantage of the service at issue even if it had accepted the quote is unavailing.

At the outset, Guilford’s position amounts to wholesale speculation; Guilford is essentially claiming that even if it had not improperly refused to provide service after Grimmel accepted Guilford’s quote, Grimmel would not have been able to avail itself of Guilford’s service because other things -- Grimmel having access to the proper size rail cars and having pre-approval for shipment of ASR to the subject destination -- might or might not have happened. Of course, whether those things would have happened will never be known, precisely *because Guilford refused to provide service*. Guilford cannot be allowed to benefit from this refusal by citing possible facts that never had the chance to play out. Indeed, if the case is to be decided on the basis of speculation, then it is just as reasonable to assume that the proper size rail cars were available, and that Grimmel could and did have pre-approval to dump ASR.

Moreover, Guilford is simply wrong on both points. Mr. Garrity confirms that such cars could have been obtained from a number of different sources without difficulty. Third Garrity V.S. at ¶ 5. Likewise, Mr. Garrity confirms that pre-approval to dump ASR was obtained from other Ohio facilities on other occasions and could also have been obtained at the subject destination. *Id.* at ¶ 6. Indeed, Exhibit B to the New Berg V.S., a form documenting Mr. Black’s

May 22, 1997 rate request for shipment of ASR, contains the following handwritten notation among others:

Prolerizer

Tried ➔

Was successful

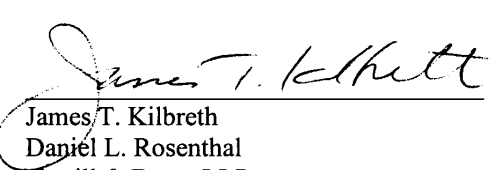
Ex. B. to New Berg V.S. Prolerizer is a competitor of Grimmel's, engaging in similar activities, e.g., shipment and dumping of ASR. Id. at ¶ 7. The notation, "tried ➔", followed by "[w]as successful" on the next line, indicates that Prolerizer tried to ship ASR to the subject destination and was successful in doing so. Id.

#### **CONCLUSION**

For the foregoing reasons, Grimmel respectfully requests that the Petition for Reconsideration be denied.

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Respectfully submitted,



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