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ENTERED
Office of the Secretary

JAN 11 2002

Part of
Public Record

January 10, 2002



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

RE: Application of Rymes Heating Oils, Inc. for certain determinations and a prescription, all related to competitive access for Petitioner to two rail carriers (Finance Docket No. 34098)

Dear Secretary Williams:

Please accept Petitioner's Supplemental Opening Statement herein per the Board's decision herein dated December 28, 2001 and served December 31, 2001.

Certain of the verified statements are facsimile transmissions of signed and notarized originals. We will deliver the signed originals to your office as soon as possible.

Respectfully submitted,

Ernest J. Ierardi, P.C. /aw
Ernest J. Ierardi, P.C.
Counsel for Petitioner

EJI:ehr

cc: All parties

R550102.1

SUPPLEMENTAL OPENING STATEMENT

Petitioner Rymes Heating Oils, Inc. will rely on its Petition filed September 11, 2001 and the accompanying five witnesses' affidavits therein, as augmented by the following:

- a) the Verifications of the five witnesses' affidavits, in accordance with the Board's regulations at 49 CFR 1112.6 and 1112.9; and
- b) the Verified Statement of Ernest J. Ierardi concerning the term "existing shippers and shippers' facilities" in the Terms and Conditions of Trackage Rights, Appendix, 6 ICC 2d 539 (1990).

These documents are attached.

January 10, 2002

Respectfully submitted,

Ernest J. Ierardi, P.C. /ew

Ernest J. Ierardi, P.C.
Nixon Peabody, LLP
Clinton Square
P. O. Box 31051
Rochester, NY 14603
Tel. (716) 263-1526

Certificate of Service

Re: Application of Rymes Heating Oils, Inc. for certain
determinations and a prescription, all related to
competitive access for Petitioner to two rail carriers
(Finance Docket No. 34098)

I, Elizabeth Whittle, certify that I have this day served copies of the within
Supplemental Opening Statement upon

Surface Transportation Board
Federal Railroad Administration
S. Mark Lindsey
Acting Deputy Administrator
Eric L. Hirschhorn, Esq.
Attorney for Springfield
Terminal Railway Company
Robert B. Culliford, Esq.
Attorney for Springfield
Terminal Railway Company
New England Central Railroad
Boston and Maine Corporation,

entities required by the Surface Transportation Board's regulations to be served in this
proceeding, by hand in the case of

Surface Transportation Board,
Federal Railroad Administration
S. Mark Lindsey
Acting Deputy Administrator and
Eric L. Hirschhorn, Esq.
Attorney for Springfield
Terminal Railway Company
and by overnight express service in the case of
Robert B. Culliford, Esq.
Attorney for Springfield
Terminal Railway Company,
New England Central Railroad and
Boston and Maine Corporation.



January 10, 2002

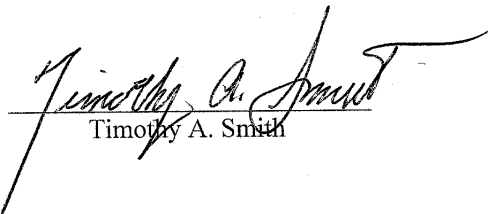
VERIFICATION

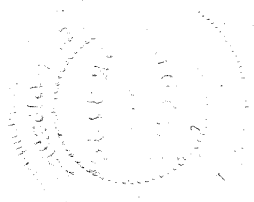
State of New Hampshire

County of Cheshire

SS:

Timothy A. Smith, being duly sworn, deposes and says that he has read his Affidavit dated September 7, 2001, knows the facts asserted in it are true and knows the same are true as stated.


Timothy A. Smith



Subscribed and sworn
to before me this 9th day
of January 2002.
Notary Public of Christine St Aubin

My Commission expires CHRISTINE ST. AUBIN, Notary Public
My Commission Expires April 19, 2005

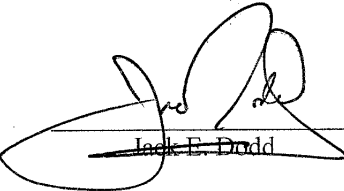
VERIFICATION

State of Vermont

County of Franklin

SS:

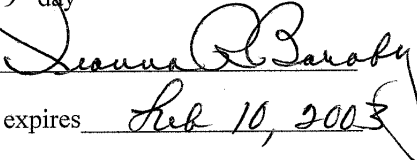
Jack E. Dodd, being duly sworn, deposes and says that he has read his Affidavit dated September 7, 2001, knows the facts asserted in it are true and knows the same are true as stated.



Jack E. Dodd

Subscribed and sworn
to before me this 9th day
of January 2002.

Notary Public of


My Commission expires Feb 10, 2003

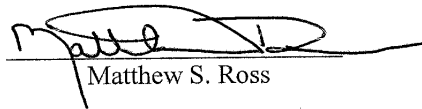
VERIFICATION

State of New Hampshire

County of Merrimack

SS:

Matthew S. Ross, being duly sworn, deposes and says that he has read his Affidavit dated September 7, 2001, knows the facts asserted in it are true and knows the same are true as stated.


Matthew S. Ross

Subscribed and sworn
to before me this 9th day
of January 2002.

Notary Public of MERRIMACK NH

My Commission expires 12/1/04


Nancy B. Rondeau

JAN-10-2002 15:52
JAN 10 2002 15:52

NIXON PEABODY LLP

716 263 1600 P.02

JAN-10-2002 THU 02:58 PM RYMES HEATING OILS

FAX NO. 8035883401

P. 02

VERIFICATION

State of New Hampshire

County of Hillsborough

SS:

James T. Rymes, being duly sworn, deposes and says that he has read his Affidavit dated September 7, 2001, knows the facts asserted in it are true and knows the same are true as stated.


James T. Rymes

Subscribed and sworn
to before me this 9th day
of January 2002.

Notary Public of Merrimack, NH.

My Commission expires 12/1/04

Nancy P. Lonsdale

R549122.1

JAN-10-2002 15:52
JAN 10 00:00 01:11

NIXON PEABODY LLP

716 263 1600 P.03
P. 03

JAN-10-2002 THU 02:59 PM RYMES HEATING OILS

FAX NO. 8035883401

VERIFICATION

State of New Hampshire

County of Hillsborough

SS:

Jodi L. Jones, being duly sworn, deposes and says that she has read her Affidavit dated September 7, 2001, knows the facts asserted in it are true and knows the same are true as stated.

Jodi L. Jones
Jodi L. Jones

Subscribed and sworn
to before me this 9th day
of January 2002.

Natary Public of MERRIMACK NH

My Commission expires 12.1.04

Nancy B. Landon

RS19113.1

Verified Statement of
Ernest J. Ierardi

In its Petition herein, Rymes Heating Oils, Inc. ("Rymes") contends that the Terms and Conditions of Trackage Rights ("T.R. T&C") which the Interstate Commerce Commission imposed in its decision in Finance Dockets Nos. 31250 and 31259¹ are referring to buildings and structures occupied by a shipper when they use the term "existing . . . shippers' facilities." That term is important to the Second Claim in the Petition which essentially maintains that, if the Board finds that Petitioner cannot be awarded the relief it seeks under its First Claim, the Board should find that Respondent Springfield Terminal Railway Company ("ST") is not entitled to an exclusive right to serve Rymes since Rymes neither is an existing shipper nor does it occupy existing facilities as those terms are used in the provision of the T.R. T&C affording ST exclusive service rights.

Buildings and structures occupied by a shipper comprise "existing . . . shippers' facilities" in the T.R.T&C because of the language of Section 1.3.1 of the T.R.T&C. That section provides:

For purposes of this Section 1.3, "existing shippers and shippers' facilities" shall mean industries and facilities at rail sidings which received or tendered rail shipments during the twelve months immediately prior to the Conveyance Date.

In this formulation, "existing shippers" plainly refers to "industries" and "existing . . . shippers' facilities" to "facilities" making shipments that predate the Conveyance Date, a term defined in T.R. T&C section 0.5 as September 9, 1988.² The facilities which Rymes occupies at Claremont are the Distribution Center described in Section 1 of the Petition. Rymes never made shipments from any building or structure before the Conveyance Date, nor did it make shipments other than in connection with its Distribution Center once it was built in the mid-1990s. Exhibit JTR-1.

Under Section 3.1 of the T.R. T&C, ST's exclusive right to serve on the Conn River Line extends only to (1) existing shippers and shippers' facilities located on that

¹ Finance Docket No. 31250: The National Railroad Passenger Corporation - Conveyance Of Boston And Maine Corporation Interests In Connecticut River Line In Vermont And New Hampshire. Finance Docket No. 31259: Central Vermont Railway, Inc. - Petition For Exemption - Acquisition And Operation Of Certain Interests In Rail Lines From The National Railroad Passenger Corporation, 6 I.C.C. 2d 539, 1990 ICC LEXIS 52 (February 6, 1990).

² That Rymes is not an "existing shipper" is established by section 30 of the Petition, supported by Exhibit JTR-1, especially paragraph 4. The Verification submitted herewith attests to the accuracy of Exhibit JTR-1.

line as of the Conveyance Date and (2) after that, new shippers located at such existing facilities, i.e., facilities dating from the Conveyance Date. Since Rymes does not qualify under either (1) or (2), the ST exclusive does not apply to it. Rather, Rymes is entitled to the competition described in Section 1.4(a) and (b) of the T.R. T&C.

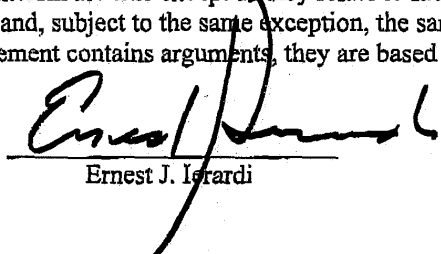
VERIFICATION

State of New York

County of Monroe

SS:

Ernest J. Ierardi, being duly sworn, deposes and says that he has read the foregoing statement, knows the facts stated therein are true except as they relate to facts stated in this proceeding by another witness and, subject to the same exception, the same are true as stated. To the extent that the statement contains arguments, they are based only on those facts.


Ernest J. Ierardi

Subscribed and sworn
to before me this 10th day
of January 2002

Notary Public of STATE OF New YorkMy Commission expires 2/08/03

FRANCES MOORE
Notary Public, State of New York
No. 01MO4677931
Qualified in Ontario County
Certificate Filed in Ontario County
Commission Expires Feb. 28, _____