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April 6, 2017

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VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, DC 20423-0001

ENTERED
Office of Proceedings
April 6, 2017
Part of
Public Record

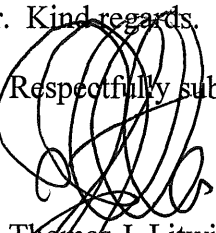
Re: **Docket No. AB-32 (Sub-No. 108)**
Boston and Maine Corporation & Springfield Terminal
Railway Company -- Adverse Discontinuance --
Milford-Bennington Railroad Company, Inc.

Dear Ms. Brown:

Attached for filing in the above-captioned proceeding is the **Reply of Milford-Bennington Railroad Company, Inc. to Petition for Waiver**, dated April 6, 2017.

Should any questions arise regarding this filing, please feel free to contact me.
Thank you for your assistance on this matter. Kind regards.

Respectfully submitted,


Thomas J. Litwiler
Attorney for Milford-Bennington
Railroad Company, Inc.

TJL:tl

Attachment

cc: Parties on Certificate of Service

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. AB-32 (SUB-NO. 108)

BOSTON AND MAINE CORPORATION &
SPRINGFIELD TERMINAL RAILWAY COMPANY
-- ADVERSE DISCONTINUANCE --
MILFORD-BENNINGTON RAILROAD COMPANY, INC.

**REPLY OF MILFORD-BENNINGTON RAILROAD
COMPANY, INC. TO PETITION FOR WAIVER**

Janet H. Gilbert
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**ATTORNEYS FOR MILFORD-BENNINGTON
RAILROAD COMPANY, INC.**

Dated: April 6, 2017

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. AB-32 (SUB-NO. 108)

BOSTON AND MAINE CORPORATION &
SPRINGFIELD TERMINAL RAILWAY COMPANY
-- ADVERSE DISCONTINUANCE --
MILFORD-BENNINGTON RAILROAD COMPANY, INC.

**REPLY OF MILFORD-BENNINGTON RAILROAD
COMPANY, INC. TO PETITION FOR WAIVER**

Milford-Bennington Railroad Company, Inc. ("MBR") hereby submits this reply to the petition for waiver of Boston and Maine Corporation and Springfield Terminal Railway Company (collectively, "Pan Am") filed in anticipation of an adverse discontinuance application to forcibly terminate MBR's longstanding trackage rights over a Pan Am line in southern New Hampshire.¹ Pan Am has failed to justify a number of the waivers and exemptions that it seeks, and its petition should be denied to the extent described below.

BACKGROUND

MBR is a Class III rail carrier which leases a rail line between Wilton and Bennington, New Hampshire that is owned by the State of New Hampshire. *Milford-Bennington Railroad Company, Inc. -- Modified Rail Certificate*, Docket No. FD 31701 (Sub-No. 1) (ICC served August 8, 1990). Since 1992, MBR has held trackage rights over a portion of Pan Am's

¹ Standard practice in adverse abandonment or discontinuance proceedings is to utilize an "AB" docket number for the railroad against which relief will be sought. Pan Am has instead utilized its own "AB" number (for Boston and Maine Corporation) in captioning its pleading. Pan Am also captioned the docket sub-number with an "X" (Sub-No. 108X), which would indicate that this is an exemption proceeding. Adverse discontinuances, however, cannot be processed as exemptions, and Pan Am's waiver request presumes that Pan Am would file an application rather than a petition for exemption in this matter.

Hillsborough Branch between Wilton and Milford, New Hampshire (the "Subject Line").² *Milford-Bennington Railroad Company, Inc. -- Trackage Rights Exemption -- Boston and Maine Corporation and Springfield Terminal Railway Company*, Docket No. FD 32103 (ICC served July 9, 1992). Those trackage rights were granted as part of an agreement that resulted in the withdrawal of MBR's feeder line application to acquire the Subject Line.³

MBR uses its trackage rights to provide rail service for Granite State Concrete Co., Inc. ("Granite State") between a quarry facility on MBR's line north of Wilton and a Granite State processing plant on the Subject Line near Milford. The forcible termination of MBR's trackage rights would require this short, shuttle-type movement to be interchanged by MBR to Pan Am for delivery, despite Pan Am's long record of inattention, if not outright hostility, to such traffic. Indeed, while Granite State's stone traffic would otherwise be subject to the commodity exemption of 49 C.F.R. § 1039.11(a), the Board has revoked that exemption as to Granite State because:

the record of this conduct [by Pan Am] shows that Granite State does merit immediate access to the Board's processes to protect the shipper from the risk of market power abuse. In particular, complainants should be able to seek prompt relief if BM/ST were to impose unworkable restrictions.

Granite State Concrete Co. v. Boston and Maine Corp., 7 S.T.B. 834, 838 (2004) ("*Granite State v. B&M*"), *aff'd sub nom. Granite State Concrete Co, Inc. v. STB*, 417 F.3d 85 (1st Cir. 2005). As

² The Subject Line is owned by Boston and Maine Corporation and leased to Springfield Terminal Railway Company.

³ See *Milford-Bennington Railroad Company, Inc. -- Feeder Line Acquisition -- Boston and Maine Corporation Hillsborough Branch*, Docket No. FD 31701 (ICC served July 6, 1992). That proceeding had featured an unsuccessful attempt by Pan Am to file a competing feeder line application against itself. *Acquisition of Boston and Me. Corp. Reversionary Inter.*, 8 I.C.C.2d 807 (1992).

Pan Am acknowledges, Granite State will oppose any application to adversely discontinue MBR's trackage rights on the Subject Line. Pan Am Petition at 3.

Pan Am has previously sought -- unsuccessfully -- to terminate MBR's ability to operate over the Subject Line and service Granite State. *Milford-Bennington Railroad Company, Inc. -- Trackage Rights Exemption -- Boston and Maine Corporation and Springfield Terminal Railway Company*, Docket No. 32103 (ICC served September 3, 1993). It later tried to impose significant restrictions on service to Granite State, triggering the *Granite State v. B&M* proceeding referenced above. While complaining about the expiration of the original trackage rights agreement between the parties, Petition at 3, Pan Am has refused to enter into a new agreement with MBR and fails to even reference a recent New Hampshire state court proceeding in which Pan Am's contractual arguments were rejected.

It is against this background that Pan Am blithely downplays the importance of this proceeding, insisting that service to Granite State can be entrusted to it as the future exclusive operator of the Subject Line. Petition at 3-4.⁴ Other interested parties will not be so easily assured. The Board must carefully scrutinize Pan Am's effort to terminate trackage rights that are not only in active use and preferred by the affected shipper, but are a necessary bulwark against the demonstrated and repeated deficiencies of Pan Am's conduct and attitude toward the Subject Line and Granite State. Pan Am's attempt to bypass important notice and informational requirements of the Board's abandonment/discontinuance regulations should be similarly subject to close examination and caution.

⁴ MBR notes that, within the space of three sentences in its petition, Pan Am makes the contradictory assertions that "Pan Am currently operates over the Subject Line [so] it is familiar with its demands" and "Pan Am has never served Granite State Concrete" Petition at 4.

As a final preliminary matter, Pan Am ambiguously -- and perhaps ominously -- states that "[p]ending the approval of its application and consummation of the discontinuance of service, Pan Am will control all rail operations along the Subject Line." Petition at 3. Whatever Pan Am intended that statement to mean, regardless of the status of the contractual arrangements between the parties MBR's trackage rights operations on the Subject Line must be allowed to continue at least until and unless the Board finds that they may be terminated. *E.g., Arkansas & Missouri R. Co. v. Missouri Pacific R. Co.*, 6 I.C.C.2d 619, 622 (1990) ("[T]rackage rights that have been approved by this agency remain in effect until we either approve a new agreement or permit discontinuance. It does not matter that the agreement has expired by its own terms. A&M's argument that it has no [continuing] legal obligation to provide MP trackage rights and that it may therefore deny MP use of its property is incorrect. A&M must obtain discontinuance authority before it can exclude MP." (citations omitted)).

DISCUSSION

A number of Pan Am's waiver and exemption requests are unpersuasive and should be denied.

For example, Pan Am seeks waiver of the newspaper publication requirement of 49 C.F.R. § 1152.20(a)(4) and exemption from the companion statutory requirement at 49 U.S.C. § 10903(a)(3)(C). Petition at 6-7. But as the Board has explained in the adverse discontinuance context, "newspaper publication is not onerous and ensures that all persons and entities with an interest in the line are given notice and the opportunity to participate in any proceedings." *Paulsboro Refining Company LLC -- Adverse Abandonment -- In Gloucester County, NJ*, Docket No. AB-1095 (Sub-No. 1) (STB served July 26, 2012) at 4. Pan Am should be aware of this, as its same request in prior adverse discontinuance proceedings against a tenant was rejected.

Boston and Maine Corporation and Springfield Terminal Railway Company -- Adverse Discontinuance -- New England Southern Railroad Co., Inc., Docket No. AB-32 (Sub-No. 100) (STB served February 12, 2008) at 5. MBR already knows of numerous local entities that have an interest in this proceeding, and Pan Am's naked assertion that only MBR and "perhaps" Granite State are likely to object to adverse discontinuance is not entitled to any credence.

Pan Am also seeks waiver of all other requirements to file and serve a Notice of Intent under 49 C.F.R. § 1152.20(a), and instead asks that its petition for waiver serve as the Notice of Intent. But Pan Am's petition contains little of the procedural and public participation information required by 49 C.F.R. § 1152.21, and, as reviewed above, discusses few of the relevant background facts with respect to the trackage rights that Pan Am seeks to adversely discontinue. The better practice is to propose modifications to the prescribed form of the Notice of Intent in 49 C.F.R. § 1152.21 that account for the unique attributes of an adverse discontinuance but ensure "substantial compliance" with the regulatory requirements. *E.g.*, *Paulsboro* at 3 & n.7. A form of the Notice of Intent will have to be prepared for Pan Am to publish the required newspaper notice in any event. Pan Am's request for a blanket waiver of the Notice of Intent requirements should be denied.⁵

Pan Am's requests for waiver of the requirements of 49 C.F.R. § 1152.22(c) and (e), relating to service on the line and rural and community impact, should likewise be denied.⁶ The Board has recognized that "[u]nder 49 U.S.C. 10903(d), the Board is required to consider

⁵ MBR does not object to a waiver of 49 C.F.R. § 1152.20(a)(3) and an exemption from 49 U.S.C. § 10903(a)(3)(B), regarding posting of the Notice of Intent at agency stations on the line or through which traffic for the line is received or forwarded.

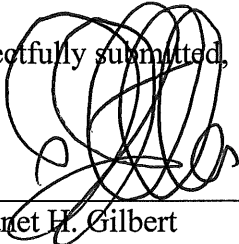
⁶ MBR notes that Pan Am does not seek a waiver of 49 C.F.R. § 1152.22(b), which requires a detailed description of the current physical condition of the line. As Pan Am is the owner of the Subject Line, it is obviously well-positioned to provide this information.

adverse impacts on rural and community development, which may arise in both adverse and traditional abandonments." *Paulsboro* at 5. Information on transportation alternatives, 49 C.F.R. § 1152.22(e)(3), is particularly important, given the Board's prior revocation of the commodity class exemption otherwise applicable to Granite State and its finding that "Granite State's truck service options are severely restricted." *Granite State v. B&M*, 7 S.T.B. at 838. It is also incumbent on Pan Am to address the differences in the service that MBR currently provides and the service that Pan Am would attempt to provide if it successfully ousted MBR from the Subject Line. Pan Am makes no claim that it is unaware of MBR's service and traffic levels, and extensive information on those subjects was produced in the recent state court litigation between the parties.

To the extent that Pan Am's other requests for waiver and exemption are granted, Pan Am has acknowledged and the Board has long reiterated that an adverse discontinuance applicant nonetheless "retains the burden the support its case with relevant evidence." *CSX Corporation and CSX Transportation, Inc. -- Adverse Abandonment -- Canadian National Railway Company and Grand Trunk Western Railroad, Inc.*, Docket No. AB-31 (Sub-No. 38) (STB served March 2, 2001) at 4; *see* Petition at 7.

WHEREFORE, MBR respectfully requests that Pan Am's petition for waiver be denied as discussed above.

Respectfully submitted,

By: 

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**ATTORNEYS FOR MILFORD-BENNINGTON
RAILROAD COMPANY, INC.**

Dated: April 6, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of April, 2017, a copy of the foregoing **Reply of Milford-Bennington Railroad Company, Inc. to Petition for Waiver** was served by electronic mail and first class mail, postage prepaid, upon:

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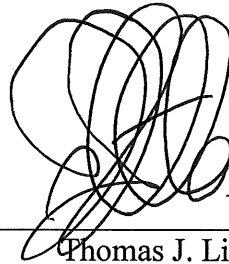
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A handwritten signature in black ink, appearing to be 'Thomas J. Litwiler', written over a horizontal line.

Thomas J. Litwiler