

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

225-728

STB DOCKET NO. AB 32 (SUB NO. 100)

**BOSTON AND MAINE CORPORATION AND
SPRINGFIELD TERMINAL RAILWAY COMPANY
ADVERSE DISCONTINUANCE
NEW ENGLAND SOUTHERN RAILROAD CO., INC.**

**REPLY OF THE BOSTON AND MAINE CORPORATION
AND SPRINGFIELD TERMINAL RAILWAY COMPANY**

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Boston and Maine Corporation
Springfield Terminal Railway Company

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**REPLY OF THE BOSTON AND MAINE CORPORATION
AND SPRINGFIELD TERMINAL RAILWAY COMPANY**

Pursuant to the Board's decision dated July 16, 2009, the Boston and Maine and Springfield Terminal Railway Company (collectively "PAR") hereby respond to the comments submitted by the New England Southern Railway Company ("NES") and the New Hampshire Department of Transportation submitted in response to PAR's June 16, 2009 formal application (the "Application") to adversely discontinue the authority of NES to operate over the line of railroad described in the Application (the "Line").

NES Comments

At the outset, PAR encouraged that NES has elected not to contest the termination of its common carrier status on the Line, but is astounded with the cavalier manner in which NES: (a) admits that it had no intention of complying with the clear terms of its lease agreement (the "Lease"); and (b) willfully ignored the termination provisions of the Lease while continuing to operate over the Line and allow it to fall into disrepair. As it so often does, NES once again attempts to portray itself as a victim, except in this circumstance NES has no choice but to acknowledge that the statements made in PAR's

Application are correct, and that PAR had no other choice but to pursue this remedy in light of NES' deceitful stance that it had no obligation to terminate its common carrier status on its own. Leaving aside the duty of good faith and fair dealing implied in any contract, NES fails to explain how the Lease would be terminated other than with Board authority, either by way of an exemption or by formal application. Indeed, despite the protestations of NES, PAR's statements in support of the Application were correct that NES fully intended to use the Board's jurisdiction as a shield to continue to operate on the Line, while it fell into disrepair, leaving PAR with an asset that has been substantially reduced in value and that will require substantial capital investment to return it to its proper state.

Indeed, the purported rationale of NES to continue operations is patently false, as disclosed by PAR in the Application. Specifically, NES questions the authority of Springfield Terminal to operate over the Line as a basis for continuing its own operations. Needless to say, this is the first time that PAR has heard of these concerns, and in any event, in Footnote One of the Application, PAR identified the decision of the Interstate Commerce Commission giving Springfield Terminal that authority. Apparently, NES recognizes that it has no real arguments to adverse discontinuance and is therefore willing to ignore the uncontested facts proffered in the Application to find one.

Similarly, NES makes much of its willingness to pursue a less expensive means to terminate its common carrier status on the Line, but makes no mention of PAR's good faith efforts to resolve all matters between the two companies, only to be met each time with exorbitant settlement demands. Indeed, the delay in over a year in filing the

Application after receiving the Board's February 12, 2008 decision regarding PAR's request for waivers of certain filing requirements is proof enough of PAR's good faith, but is also rebuts the claims by NES that adverse discontinuance is being sought solely because of the demand by NES to be paid amounts that are in dispute. To the contrary, PAR only seeks to terminate the common carrier status of NES because the relationship with NES has become so contentious, facts which PAR did not include in the Application because they are not relevant to this analysis, as acknowledged by NES in admitting that PAR has properly terminated the Lease. In response to these good faith efforts, PAR was caught in a cat and mouse game whereby each time PAR came close to filing a formal application, NES would suggest settlement discussions. Yet each time that PAR withheld from filing, it was met with ever more egregious settlement terms that it could not accept. Rather than continue this cat and mouse game anymore, PAR is appreciative that NES is not contesting the Application, but its failure to identify any date certain for turning the Line over the PAR or to propose any sort of transition plan leads PAR to be concerned that NES is still unwilling to leave the Line voluntarily and that more litigation to evict NES may be necessary.

NES also raises concerns with future PAR service to customers on the Line and with future interchange with NES for traffic coming off the White Mountain Line that will allegedly continue to be served by NES. In response, PAR would submit that it has proposed an operating plan that will provide better service than currently exists on the Line because of the removal of the need to interchange traffic for the Line and by basing a crew at Concord, New Hampshire. PAR is committed to this operating plan, but notes that it must be contingent upon adequate service levels to support it. To mandate a

minimum level of service as suggested by NES would be inequitable and inefficient, because if PAR were required to continue to provide minimum service levels on the Line that may be unprofitable due to a lack of demand would inevitably lead to abandonment of the Line. Therefore, PAR requests that the Board decline to impose minimal service requirements as a condition of granting the Application.

Similarly, PAR notes that the concerns expressed by NES regarding interchange of traffic from the White Mountain Line are unfounded whereas the White Mountain interchange traffic volume is *de minimus* at best (approximately two (2) cars per month in 2008), and PAR is mindful of its statutory obligation to provide reasonable interchange, and will work with NES to establish conditions that support present and reasonably foreseeable traffic levels.

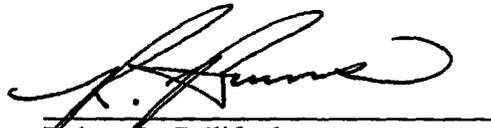
Comments of NHDOT

Similar to NES, NHDOT seeks a condition on adverse discontinuance authority that obligates PAR to provide interchange with NES at Concord Yard, which NHDOT believes is the most efficient location. However, NHDOT has never consulted with PAR regarding this location, and in fact has never operated on the Line. Therefore, PAR would suggest that it be permitted to negotiate in good faith with NES to determine an appropriate interchange point, again mindful of the statutory obligation to provide reasonable interchange facilities. Since PAR has not operated over the Line in over 20 years, it would be unreasonable for NHDOT to make such a determination before PAR had the opportunity to assess the condition of the Line and the passing siding referenced by NHDOT.

Conclusion

For all of the foregoing reasons, PAR respectfully requests that the Board allow PAR's Application for Adverse Discontinuance of NES operation of the subject line without any conditions of future minimum service requirements by PAR, and likewise allow PAR to enter into good-faith negotiations regarding Interchange Service Agreements and pursuant to its statutory obligations to provide reasonable interchange.

Respectfully submitted,



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September 14, 2009

CERTIFICATE OF SERVICE

I, Robert B. Burns, Esq., do hereby certify that the attached document(s) has been duly served on September 14, 2009, upon all parties of record by depositing a copy in the U.S. mail in a properly addressed envelope with adequate first-class postage thereon pre-paid, or by alternative, more expeditious means.

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

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