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January 22, 2002

**VIA HAND DELIVERY**

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

**Re: Finance Docket No. 34098—Rymes Heating Oils, Inc.**

Dear Mr. Williams:

Please find enclosed for filing in the above captioned proceeding an original and ten copies of the Respondents' Verified Reply, along with a diskette containing this document in WordPerfect 9.0. One additional copy of the package is enclosed. I would appreciate your receipt-stamping that copy and returning it to our legal assistant.

Please call me with any questions regarding this matter. Thanks for your assistance.

Sincerely,

Eric L. Hirschhorn

Enclosures

cc: Ernest Ierardi, Esq. (fax and first class mail)
New England Central Railroad (fax and first class mail)
Federal Railroad Administration (hand delivery)

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**BEFORE THE**
**SURFACE TRANSPORTATION BOARD**

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**FINANCE DOCKET NO. 34098**

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**RYMES HEATING OILS, INC.—**
**PETITION FOR DECLARATORY ORDER**

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# RESPONDENTS' VERIFIED REPLY

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*Attorneys for Respondents Boston and Maine Corp. and Springfield Terminal Railway Co.*

January 22, 2002.

**BEFORE THE**
**SURFACE TRANSPORTATION BOARD**

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**PETITION FOR DECLARATORY ORDER**

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**RESPONDENTS' VERIFIED REPLY**

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The Boston and Maine Corporation and the Springfield Terminal Railway Company (collectively "Guilford"), respondents in this proceeding, hereby reply to the initial pleading ("Petition") and supplemental opening statement made by the petitioner, Rymes Heating Oils, Inc. ("Rymes"). The Petition should be denied for five reasons:

- First, Rymes lacks standing to seek relief for alleged violations of the trackage rights order ("TRO") that was issued by the Interstate Commerce Commission ("ICC") in 1990.
- Second, although Rymes has standing to seek relief under parts 1144, 1146, and 1147 of the Board's regulations, the facts don't meet the requirements for relief under those rules.
- Third, Rymes is within the class of shippers for whom Guilford has exclusive service rights under the TRO.
- Fourth, the TRO does not contemplate deprivation of Guilford's exclusivity rights for episodic, unintended shortcomings in service but only if Guilford intentionally reduces its service below the minimum required by the TRO.

- Fifth, Guilford's service to Rymes during the 2000-01 season did not violate the requirements of the TRO.[1]

## Facts

***Genesis of the trackage rights order***

*The Conveyance Decision.* In August 1988, the ICC granted Amtrak's application under the Railroad Passenger Service Act to compel Guilford to convey the Connecticut River Line ("Conn River Line")[2] to Amtrak, which immediately reconveyed the line to the Central Vermont Railway ("CV").[3] *National R.R. Passenger Corp.—Conveyance of Boston and Maine Corp. Interests in Connecticut River Line in Vermont and New Hampshire*, 4 I.C.C.2d 761, 1988 ICC LEXIS 233 (Aug. 4, 1988) ("*Conveyance Decision*"). The *Conveyance Decision* addressed the issue of just compensation for the Conn River Line, *id.* at 773-98, concluding that the proper test was the higher of going concern value ("GCV") and net liquidation value, *id.* at 780-82. As the higher figure, GCV was ordered as the just compensation for the taking. *Id.* at 798.

GCV, said the ICC, includes the value of lost traffic, *id.* at 795 & n. 13, but that amount shouldn't be great if Guilford accepts trackage rights and hence maintains its exclusive right to carry traffic from existing shippers and existing facilities, *id.* at 795. Thus the value of Guilford's exclusive service rights expressly was *excluded* from the calculation of GCV because Guilford would be entitled to retain those rights. The ICC accordingly ordered that Guilford be granted trackage rights over the Conn River Line and the exclusive right to serve shippers and

---

[1] Guilford also notes that the exclusivity rights at issue here were a component of the ICC's just compensation calculation in 1988, when Guilford was ordered to convey the rail line in question to Amtrak. Were Guilford to be deprived of all or part of these rights, the payment of just compensation to Guilford would be required.

[2] This is an approximately 48.8-mile line between Windsor and Brattleboro VT. *Conveyance Decision* at *7.

[3] The New England Central Railroad ("NECR") acquired CV's interest in the Conn River Line in 1994, subject to Guilford's trackage rights. *Rymes Heating Oils, Inc.—Petition for Declaratory Order*, STB Finance Docket No. 34098 (STB served Dec. 31, 2001), at 3 & n. 9.

facilities on rail sidings currently being served by Guilford, "provided [Guilford] maintain[s] a minimum three day per week service along the line." *Id.* at 804. The parties were told to return to the ICC if they could not agree on the terms of a trackage rights agreement. *Id.* at 805-06.[4]

*The Trackage Rights Decision and the TRO.* Guilford and CV agreed on many but not all aspects of a trackage rights agreement and accordingly returned to the ICC. In February 1990, the ICC imposed the TRO, which establishes the terms and conditions of Guilford's trackage rights over the Conn River Line. *National R.R. Passenger Corp.—Conveyance of Boston and Maine Corp. Interests in Connecticut River Line in Vermont and New Hampshire*, 6 I.C.C.2d 539, 1990 ICC LEXIS 52 (Feb. 6, 1990) ("*Trackage Rights Decision*"). Among other issues, Guilford had noted the lack of certainty that shippers will need three-day-per-week service and accordingly had sought clarification that instead of being required to "maintain" such service, it need only "make available" such service. *Id.* at 542. Characterizing Guilford's request as "eminently reasonable," the ICC clarified that Guilford "is required only to 'make available' the minimum service, but [Guilford] must consult with the shippers and ensure their needs are met up to three-day per week service." *Id.* The Commission also agreed to CV's request to clarify the meaning of "existing shippers and shippers' facilities," the meaning of "three-day per week service," and the consequences of a failure on Guilford's part to provide such service. *Id.* at 543.

In the *Trackage Rights Decision*, the ICC returned to the issue of just compensation. In discussing a CV proposal to alter the payment caps for Guilford's trackage rights, the Commission noted that it had "used Amtrak's projections for years 1-3, as well as its figure of $75,000 per year for subsequent years, *as part of our determining just compensation for the line*." *Id.* at 547 (emphasis added). The Commission also considered a CV proposal that the cap

[4] Several courts reviewed the *Conveyance Decision* but each expressly refrained from addressing valuation issues. *See Boston and Maine Corp. v. ICC*, 911 F.2d 743, 753, 286 U.S. App. D.C. 1, 11 (D.C. Cir. 1990), *rehearing*

on Guilford's trackage rights payments established by the *Conveyance Decision* be inapplicable for any year in which Guilford's traffic exceeded 32,500 cars. *Id.* at 548. The Commission rejected CV's proposal as "contrary to our intent in developing the GCV" and possibly resulting "in charges significantly higher than the caps contained in [the *Conveyance Decision*]. As part of the quid pro quo in the forced divestiture . . . the Commission granted [Guilford] continued access over this line along with a payment cap." *Id.* Applying the per car-level as proposed by CV "would deprive [Guilford] of part of *the value it received in the forced sale and render our GCV analysis invalid.*" *Id.* (emphasis added). Elsewhere in the *Trackage Rights Decision*, the ICC rejected a CV request to add a share of its capital costs to Guilford's trackage rights payments because "the GCV that we developed precluded any additional interest-rental payment." *Id.* at 550-52.

The TRO provides in pertinent part as follows:

> 1.3 [Guilford] shall have the exclusive right to serve all existing shippers and shippers' facilities that were located on the [Conn River Line] as of the Conveyance Date [September 9, 1988], including any and all new shippers that locate at such existing facilities after the Conveyance Date, provided that [Guilford] makes available a minimum three day per week service along the Line. [Guilford] must consult with the shippers and ensure their needs are met up to three day per week service.
>
> 1.3.1 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.
>
> 1.3.2 For purposes of this Section 1.3, "three day per week service" shall mean the provision of local set-off and pick-up service to shippers on the [Conn River Line] at least three times per week (Monday through the following Sunday) in each direction.
>
> 1.3.3 CV shall be permitted to commence service to existing shippers and shippers' facilities upon [Guilford's] failure to make available three day per

---

*denied*, 925 F.2d 427, 288 U.S. App. D.C. 196 (D.C. Cir. 1991), *rev'd*, 503 U.S. 407, 424 (1992).

week service during two weeks out of any four week period, unless such failure is excused by Section 9.6.

* * *

9.4 Miscellaneous. This Agreement . . . is not intended to inure to the benefit of any party not a party to this Agreement.

* * *

9.6 Force Majeure. No party to this Agreement shall be responsible for delays or errors in its performance . . . 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 in suppliers, derailments or failure of transportation, communication or power supply.

* * *

9.9 Governing Law. This Agreement . . . shall be governed by the laws of the District of Columbia.

***Service issues generally***

More than thirteen years have passed since CV acquired the Conn River Line and Guilford began service under the trackage rights arrangement that had been mandated by the *Conveyance Decision* and made specific by the *Trackage Rights Decision*. So far as Guilford is aware, its customers on the line generally have been satisfied with Guilford's service. Rymes is the first and only customer to complain to this or any other regulatory authority. Moreover, even Rymes' complaint focuses primarily on the winters of 1999-2000 and 2000-01 and not on the current season or on seasons prior to 1999.

Guilford makes service available on the Conn River Line via trains originating from its marshalling yards at White River Junction, Vermont and East Deerfield, Massachusetts. A portion of the Guilford system map showing the Conn River Line and all other lines relevant to this proceeding appears as Exhibit A hereto. Currently, and at all times relevant to this

proceeding, Guilford's operating plan for the Conn River Line has provided—as contemplated by the TRO—for three trains per week operating from East Deerfield to White River Junction and three trains per week operating from White River Junction to East Deerfield, with trains originating at East Deerfield and White River Junction on alternating days.[5]

Rymes sells propane to customers in southern and central New Hampshire. Petition ¶ 1. Rymes purchases its supplies of propane from Canadian and other sources, which it then has shipped to its distribution center in Claremont, New Hampshire ("Distribution Center"). *Id.* The principal method of shipment of these propane supplies is by rail, *id.*, but Rymes also receives shipments by truck. Rymes alleges that since 1995, the Distribution Center has been located on approximately 650 feet of track installed by Rymes. *Id.* ¶¶ 31-32. This length of track connects not to the Conn River Line, but to a pre-existing rail siding that in turn connects to that line. *Id.*, Exh. JTR-1, ¶ 3; Exh. JTR-2. The siding that connects to the Conn River Line, and from which Rymes' track was extended in 1995, has existed since well before 1987 and has been served continuously by Guilford since at least 1987. During the twelve-month "window" established by the TRO (September 9, 1987 through September 9, 1988), Guilford handled numerous shipments to and from Claremont Foundry, which then was located on the siding in question.

While Guilford did experience some difficulty in providing service to Rymes between late 1999 and early 2000, as well as during the winter of 2000-2001, Guilford scheduled three-day per week service on the Conn River Line throughout those periods. Moreover, in recognition of these operational issues, Guilford worked diligently to ensure that the shipping needs of its customers were being met during that difficult period. Finally, most service failures that did occur were the due to circumstances beyond the control of Guilford.

[5] No Guilford service is scheduled on Sundays.

*The sale of Conrail to CSX Transportation and Norfolk Southern.* Between mid-1999 and early 2000, Guilford, like other carriers in the northeastern United States, experienced extensive service failures arising from the division of Consolidated Rail Corporation ("Conrail") between CSX Transportation, Inc. ("CSXT") and the Norfolk Southern Railway Company ("NS"). As has been extensively reported in the media and in proceedings before this Board, significant disruptions to service, including failures to classify and interchange trains properly, misrouting of cars, inefficient allocation of locomotive power, and so forth, followed the split.

Some of the problems involved cars being lost by NS and CSXT while en route to or from Guilford. Once one of the other carriers lost a car, it was nearly impossible for Guilford to track the movement of the car or estimate when delivery would occur. For one thing, the car was not on Guilford's line, making Guilford's ability to locate the car no better than the information available from the other carrier. Due to the unanticipated difficulties that NS and CSXT encountered after the split of Conrail, these carriers were unable to provide extensive assistance in locating such cars, either. This was one cause of delays and customer dissatisfaction.

The majority of the problems, however, involved the interchange of traffic. Before the Conrail split, Guilford interchanged the majority of its inbound and outbound traffic with Conrail at Barber Station, Massachusetts and, to a lesser degree, at Springfield, Massachusetts and Rotterdam, New York. Although this meant that most Guilford-related traffic traversing Massachusetts in an east-west (or west-east) direction traveled on Conrail's line in the southern part of the state rather than Guilford's main line in the northern part, the arrangement had proven satisfactory for carriers and shippers alike.

Following the Conrail sale, CSXT became the owner of the former Conrail track to which Guilford connected at Barber, Springfield, and Rotterdam. Although NS had no direct

connection with Guilford, a haulage agreement between NS and Canadian Pacific ("CP") effectively allowed Guilford to interchange with NS at Mechanicville, New York, which is near Rotterdam. First NS and then CSXT (and, to some extent, CP as well) had operating difficulties that profoundly affected shippers and carriers (including Guilford) throughout the Northeast. These service problems typically arose from the misdirection and routing of cars (including the delivery of empty cars by Guilford only to have them mistaken for loaded cars destined to Guilford and immediately returned), as well as the improper blocking and classification of traffic moving in interchange to Guilford.

Ideally, the connecting railroad groups cars going to a particular destination in one block, thus avoiding the need for the receiving carrier to perform extensive switching to put the cars in order for efficient delivery. This was a major area of confusion after the Conrail split. Rather than reject cars received in such haphazard order, however, Guilford took upon itself the blocking and classification operations that should have been handled by the connecting carriers. While this practice reduced congestion and improved traffic flow, it required Guilford to spend substantial time correcting the order of trains so that deliveries could be reasonably fluid. Among the direct effects upon Conn River Line service were the need to perform many unplanned blocking and classification operations, which absorbed massive amounts of unanticipated time, money, and manpower at East Deerfield.

Also, Guilford experienced problems relating to the receipt of cars at the wrong interchange point, most frequently when cars identified for interchange at Barber inadvertently were delivered to Springfield. When this occurred, Guilford had to move these cars to East Deerfield and there block and classify them. These activities further contributed to the congestion at East Deerfield and delays throughout the Guilford system.

*Guilford's new service plan—long term gains for shippers, but not without some short term headaches.* In July 2000, in an effort to ameliorate these difficulties, Guilford changed the focus of its interchange operations from Barber to Rotterdam. This offered two immediate benefits: First, cars traveling east and west were transported by Guilford over its own line (the main line, traversing northern Massachusetts) for a longer portion of the trip than previously. This reduced transit times because Guilford retained control over the traffic for longer periods. Second, making Rotterdam the principal interchange point for Guilford traffic simplified the interchange of traffic with CSXT, allowing CSXT to transport these cars to its nearby Selkirk yard without further movement on the CSXT system.

This change also enabled Guilford and its customers to take advantage of the competition created by the Conrail split because at Rotterdam (and nearby Mechanicville), Guilford can interchange with three carriers—CSXT, CP, and (via its haulage agreement with CP) NS—instead of one. This improves customer choice and fosters competition for rates and service among these three Class One carriers, which was a principal goal underlying the split of Conrail.

An additional benefit is that full trains can move the traffic from Maine to Guilford's yard at East Deerfield, which Guilford has improved to handle the additional burden. At East Deerfield, the full train can simply be divided into cars going to CSXT at Rotterdam or to NS/CP at Mechanicville. In short, the new arrangement allows Guilford to reduce the time needed to block and classify trains at such other yards as Lawrence or Ayer, Massachusetts. This in turn results in more fluid traffic flow over the eastern portion of the Guilford system.

To summarize, despite Guilford's efforts to assist NS and CSX in integrating their respective portions of the Conrail system into their pre-existing operations, their continuing service failures (particularly during 1999-2000) had an adverse effect throughout the Guilford

system, including the Conn River Line. These service disruptions had a direct effect on Guilford's operations at East Deerfield, which is the largest marshalling yard in the Guilford system. Similarly, because East Deerfield also is the marshalling yard for some traffic, and for all the locomotive power, on the Conn River Line, the adverse effects of the Conrail split directly affected Guilford's ability to serve that line.

The change to Guilford's operating plan was designed to provide long-term benefits but the initial implementation of the plan had its problems. These arose in large measure from a shortage of locomotive power and available crews. The shift of traffic from CSXT's Selkirk-Barber line to the Guilford main line required more locomotives, due to the increased traffic load and the increased power needed to haul longer and heavier freight trains over the Berkshire Mountains in western Massachusetts. More crews also were needed because of the amount of time required to traverse the extra distance. Guilford also performed extensive track maintenance to increase speeds for traffic moving over this portion of the Guilford main line.

To address these issues, Guilford purchased twenty additional locomotives in early 2001 and invested significant capital in improving its main line between East Deerfield and the western gateways during the 2000 and 2001 construction seasons, with the goal of improving transit times for traffic moving via these interchange points. Guilford also hired and trained new crews to operate these trains. The result is that today, transit times over the Guilford system are significantly better than in early 2000, and service to customers—including service to Rymes and other Guilford customers on the Conn River Line—is at its highest levels since the Conrail split.

Thus, although the change to Rotterdam as Guilford's principal interchange point is providing significant long-term benefits for customers throughout the Guilford system, short term difficulties arose from the fact that additional locomotive power and crews are required to

move traffic to Rotterdam. The change required that Guilford transport heavier trains over longer distances, which in turn affected the availability of locomotives throughout the Guilford system. In essence, Guilford now was moving trains over approximately one hundred additional miles, much of which is mountainous. Because of the increased tonnage and number of trains moving within the system, Guilford was required to devote more locomotives and crews to these movements. Under the Hours of Service Act, the operating hours of crews are limited. *See* 49 U.S.C. §§ 21101-21108 (1994). Until additional crews could be hired and trained, crews (as well as locomotives) were stretched thinner on the Guilford system than Guilford would have liked. Finally, the additional traffic at Guilford's East Deerfield yard led to some congestion initially, though it has been cleared up.

***Service to Rymes***

Service to Rymes during the 1999-2000 and 2000-2001 seasons was less than ideal. The causes, however, largely were beyond Guilford's control and in at least one major instance were due to Rymes' own inaction. Moreover, and perhaps more important, Guilford's service to Rymes during the current (2001-2002) season has been exemplary and Guilford is committed to keeping it that way.

*Rymes' own attitude toward rail service.* Ironically, Rymes' own filing demonstrates that by far the most significant service problem during the 2000-2001 season was the fault of Rymes, not Guilford. Rymes makes much of how closely its business is tied to the heating season, describing the fourth calendar quarter as "the period in which Rymes business is most dependent on prompt deliveries and the efficient return of empty cars." Petition ¶ 20. On November 15, 2000, according to Rymes, the slate essentially was clean: There were no loaded cars for Rymes at East Deerfield or White River Junction, and two empty cars were released by Rymes to

Guilford. Rymes Exh. JED-4, third page. The next day, a "track-spreading incident" caused Rymes to take the siding out of service. Rymes Exh. JED-9, third page n. 2. Then—during "the period in which Rymes' business is most dependent on prompt deliveries and the efficient return of empty cars," Petition ¶ 20—*three weeks* passed before Rymes restored the siding to service on December 4. Rymes Exh. JED-9, third page n. 2. By that time, no less than eighteen loaded cars were stacked up at White River Junction awaiting delivery to Rymes, with seven empties at Rymes' facility awaiting release to Guilford. Rymes Exh. JED-4, third page.

Once the embargo imposed by Rymes was lifted, Guilford *immediately* delivered eleven of the eighteen cars that had been sitting at White River Junction and picked up *all seven* empties. *See* Rymes Exh. JED-4, fifth page. (Typical Rymes deliveries are of one or two cars, and almost never more than four. *See* Rymes Exh. JED-4, *passim.*) Guilford delivered the remaining seven loaded cars the following day. *Id.*, fifth page. Guilford's extraordinary push to clear the backlog caused by *Rymes'* cavalier approach to repairing the siding hardly suggests a lack of effort by Guilford to "ensure [Rymes'] needs are met." *See* TRO § 1.3.3.

*Guilford's access to the Conn River Line.* Two related sets of circumstances, each beyond Guilford's control, affect Guilford's service to Rymes. The first is the substantial amount of traffic on the Conn River Line and Guilford's relative lack of influence in securing sufficient time and priority on the line. Under the TRO, Amtrak trains are entitled to priority over freight traffic. TRO § 5.1. Within the hierarchy of freight traffic, "[t]rains performing local work . . . are not entitled to priority over trains that are not performing such work." *Id.* Finally, the New England Central Railroad ("NECR"), which is the successor to CV, dispatches the line. *Id.* § 3.2. Although NECR is required to set its schedules "with due regard" to Guilford's needs, *id.* § 5.1, in practice a dispatching carrier's traffic receives priority.

The Conn River Line is a single-track line that is about fifty miles long. On a typical day Amtrak runs two trains over the line—a southbound train that leaves White River Junction, Vt., around 10:40 a.m. and is due in Brattleboro, Vt. around 12:06 p.m., and a northbound train that leaves Brattleboro around 4:50 p.m. and is due in White River Junction around 6:20 p.m. NECR runs three trains—a northbound train that leaves Brattleboro around 8:30 a.m. and (if no local switching occurs) is due in White River Junction around 11:30 a.m., a southbound train that leaves White River Junction around 6:30 p.m. and (if no local switching occurs) is due in Brattleboro around 9:30 p.m., and a local switching train that operates southbound from White River Junction during the night. Guilford runs one train, traveling northbound and southbound on alternate days. The northbound train leaves Brattleboro around 9:00 p.m. and is due in White River Junction around midnight; the southbound leaves White River Junction around 4:00 p.m. and is due in Brattleboro around 7:00 p.m. Local switching, when required, can add between two and three hours to the trip. Thus the level of traffic on the line is considerable, time is at a premium, and Guilford's trains—especially those serving local customers such as Rymes—are at the bottom of the pecking order. *See* TRO §§ 3.2, 5.1.

The second set of circumstances complicating service to Rymes involves the configuration of the switch connecting the Conn River Line to the siding shared by Rymes and Eastern Bridge.[6] This siding has existed at least since 1987. As can be seen from a diagram of the switch configuration, which is annexed hereto as Exhibit B, the switch point faces south toward East Deerfield. When loaded cars are coming from White River Junction, the delivery to Rymes is relatively quick and uncomplicated: The loaded cars destined for Rymes typically are close to the front of the train. The locomotive stops just north of the switch, where the non-

[6] In the mid-1980s, the customer in the current Eastern Bridge facility was known as Claremont Foundry. Various other companies have used the facility since then.

Rymes cars behind the Rymes cars are uncoupled and left on the line. The locomotive and the Rymes cars then pull forward past the switch, the switch is thrown, the locomotive pushes the Rymes cars into the siding, the loaded cars are uncoupled, and any empty cars are coupled to the locomotive. The locomotive and the empty cars pull forward out of the siding onto the line. The switch then is thrown, the locomotive and the Rymes empty cars back up to the non-Rymes cars on the line, those cars are recoupled to the train, and the locomotive with Rymes empties and non-Rymes cars proceeds southbound to its next stop. This process typically takes between thirty and forty-five minutes from start to finish. (A similar procedure is employed when Rymes has empty cars to be picked up but no loads to be delivered.)

For loaded cars coming from East Deerfield, though, matters are considerably more complicated and deliveries/pick-ups take a far greater amount of time. In this maneuver, the loaded cars destined for Rymes are placed near the *rear* of the train. The entire train proceeds past the switch for the Rymes-Eastern Bridge siding and pulls into a "runaround"[7] about a mile to the north. There, the locomotive is uncoupled from the train and proceeds back onto the line via the runaround's northern entrance. The locomotive (which in effect has two "front" ends) then travels back southward on the line and enters the runaround via the switch at the southern end. Then the Rymes-bound cars in the rear (southern end) of the train are uncoupled from the remainder of the cars and coupled to the locomotive. The locomotive re-enters the main line at the southern entrance of the runaround and pulls the loaded Rymes cars down the line until the locomotive and cars have passed the Rymes-Eastern Bridge switch. The locomotive then backs the loaded cars into the Rymes-Eastern Bridge siding and drops off the loaded cars. If space and time permit, the locomotive picks up any empties and reverses the process. (If there are no

[7] A "runaround" is a passing siding, parallel to the line and connected thereto by a switch at each end.

loaded cars to be delivered, but empties to be picked up, the same procedure would obtain.) Unlike the procedure when loaded cars are coming from White River Junction, or the train coming from White River Junction is to retrieve empties, the procedure going in the opposite direction takes approximately two hours.

The problem is obvious. There are only twenty-four hours in a day. Time on the Conn River Line is at a premium and Guilford's trains performing local service have the lowest priority. Because of the short window in which Guilford must operate on the line, therefore, the result usually is that when loaded Rymes-bound loaded cars are delivered by connecting carriers to East Deerfield, Guilford must take them *past Rymes* to White River Junction and then deliver the cars—using the less time-consuming procedure for southbound traffic described above—on the train that runs southward from White River Junction the following day.

Thus Guilford's limited access to the Conn River Line and the configuration of the switch connecting that line with the Rymes-Eastern Bridge siding combine to complicate service to Rymes. Neither circumstance is within Guilford's control.

*Communication between Guilford and Rymes.* The TRO requires that Guilford consult with shippers to ensure their needs are met up to three-day per week service. TRO § 1.3. Guilford personnel regularly were and are in communication with Rymes when cars for Rymes arrive at White River Junction or East Deerfield, and when empty cars were released for pick-up from the Distribution Center. Additionally, Guilford personnel alert customers as a matter of course if there are any foreseeable service problems, in part to ascertain whether a potentially delayed delivery or pick-up will cause problems for the customer.[8] Also, Rymes was and is in

[8] Sometimes these communications may have led to misunderstandings on the part of Rymes. This is because the clerk advising Rymes of the situation would know that a loaded car had arrived and was on the "switch list" but would not know—and could not then know—that a later-arising problem, such as unavailability of a locomotive or (usually due to Hours of Service Act limitations) a train crew, would prevent delivery that night.

frequent and regular contact with the Guilford clerk handling movements on the Conn River Line to inquire about the location of rail cars that have not yet been interchanged to Guilford by connecting carriers. These Rymes personnel did not indicate that delayed deliveries were causing problems for Rymes.

In addition, the Guilford marketing representative for the Rymes account attempted to maintain regular contact with the customer to develop business and address any issues that might arise. These contacts, however, largely were limited to discussions about rates charged to Rymes' propane suppliers or possible short-term rates for summertime shipments to the Distribution Facility. At no time during these conversations did Rymes indicate that the service being provided was not meeting Rymes' needs.

Rymes' own papers do not appear to support its claims of non-communication. They describe numerous discussions with Guilford, some initiated by Guilford and others by Rymes, about service. *E.g.*, Petition ¶ 10; Rymes Exh. JED-3, ¶¶ 6, 8; Rymes Exh. JLJ-1, ¶ ¶ 3-5; Rymes Exh. MSR-1, ¶ 3. For example, Rymes' Fleet Maintenance Coordinator/Bulk Coordinator, Jodi Jones, states that Guilford's customer service staff "generally initiated contact with me on rail service matters" and did so "one or two times per week" during the winter season. Rymes Exh. JLJ-1, ¶ 3. And Rymes Controller, Matthew Ross, states that sometimes Guilford personnel contacted him and sometimes the reverse was the case. Rymes Exh. MSR-1, ¶ 3. Moreover, Ms. Jones and Mr. Ross readily concede that Guilford's customer service staff were forthcoming with them. Rymes Exh. JLJ-1, ¶ 5; Exh. MSR-1, ¶ 5.

Thus it is undisputed that there was significant communication between Guilford and Rymes at multiple levels. Given this, it is difficult to credit Rymes' allegation that Guilford has failed to consult with this customer regarding its service needs.

*The current (2001-2002) season.* As of mid-December 2001, Guilford had delivered twenty-four cars to Rymes' Claremont facility during the current heating season. Rymes alleged in a December 14, 2001 filing in this proceeding that the delayed arrival of a single car out of these twenty-four demonstrated pervasively inadequate service on the part of Guilford. Petitioner's Motion to Expedite Procedural Schedule, etc. ("Expedition Motion"), at 1-2. Rymes alleged that it had expected this lone car to arrive November 5 but that the car did not arrive until November 9. *Id.* at 2. Interestingly, the Expedition Motion did not allege that the delay was Guilford's fault. Perhaps this was because Rymes knew that the fault was not that of Guilford, but of NECR, the very carrier that Rymes wishes to use in place of Guilford. Guilford believes that the car to which the Expedition Motion referred was one bearing reporting mark PROX 98989. This car was scheduled to be delivered by the NECR to Guilford on November 4, 2001 but in fact was not received from NECR until November 8.

Even had Rymes' contention been well founded, this lone incident was inconsistent with the high level of service that Guilford has provided to Rymes during the current heating season. In toto this season, Rymes has received thirty-two cars at the Distribution Center. Twenty-nine were shipped via White River Junction, Vermont and three via Danville Junction, Maine. Guilford delivered the twenty-nine White River cars no later than three days (and in most instances less) after receiving the cars in interchange from the NECR. Apparently due in part to a waybill error by Rymes' vendor, the remaining three cars were erroneously routed *by the Canadian National* ("CN"), not by Guilford, via Danville Junction. Upon learning of this error, Guilford made appropriate accommodations, at a concessional rate, to move the cars over its system to Claremont, thereby saving Rymes the far greater time and expense of having the cars returned to the CN for redelivery via Montreal to White River Junction.

Rymes' December filing also advanced a hearsay claim that "cars" (Rymes didn't say how many, or when they were in Guilford's possession) were not returned to their owner on a timely basis. Expedition Motion at 2. Guilford regularly picks up empty cars when delivering loads, thereby minimizing the dwell times of these empty cars at the Distribution Center. Thus far this season, nineteen cars have been returned by Rymes. The median time lapsed from Rymes' notification to Guilford that the empty car was available for pickup ("release") until Guilford picked up the car, transported it to the interchange point, and completed the interchange ("delivered in interchange") to another railroad was three days. For the sixteen cars released to the NECR at Brattleboro, the median time was just under two days.[9]

Since Rymes filed the Expedition Motion, Guilford has learned of several additional instances where Rymes claims mishandling by Guilford of Rymes traffic. As Rymes is well aware, however, two of these instances were due to errors by NECR and the third had no effect on Rymes' ability to conduct its operations.

In the first and second supposed instances, Rymes claims that Guilford mistakenly interchanged two loaded cars bound for Rymes—one to Brattleboro and one to the Claremont and Concord Railroad ("CCR"), which interchanges traffic with Guilford near Rymes' facility. The errors, though, were committed by NECR, not Guilford. The cars came to White River Junction, from which Guilford ordinarily would have brought them to Rymes. NECR then made not one but two errors: First, NECR took the cars from White River Junction, though they were Guilford traffic. Second, NECR misdelivered the cars to Brattleboro and the CCR instead of to Rymes' facility.

[9] Because the interchange point with the St. Lawrence & Atlantic Railroad ("SLR") is substantially farther from Rymes' Claremont facility than the interchange with the NECR (approximately 275 miles as opposed to twenty miles, including movements in three separate through trains), the three cars interchanged with the SLR took six days each from release until delivery in interchange.

Finally, Rymes contends that Guilford delivered loaded cars to Rymes' "storage" track instead of Rymes' "unloading" track. This allegedly hampered Rymes in unloading propane. In fact, delivery to either of Rymes' tracks is acceptable because Rymes has a trackmobile that easily can move loaded and empty cars within Rymes' facility regardless of the track on which they originally are placed.

One additional issue has arisen in the past several days. A loaded car destined for Rymes, PROX 31472, was on Guilford's January 16, 2002 train from White River Junction but could not be unloaded due to ice and snow on the switch for the Rymes-Eastern Bridge siding. Although NECR is responsible for maintenance on the switch, Guilford personnel attempted unsuccessfully to clear it so that the delivery could be made. The car ultimately was delivered to the siding on January 18.

* * *

In effect, Rymes blames Guilford for all the service shortcomings experienced in the 1999-2000 and 2000-01 seasons, when in fact most of the fault lay elsewhere—some with other carriers and some even with Rymes and its vendors. This is akin to blaming one's letter carrier for delays in receiving mail from the other end of the country. It hardly is grounds for depriving Guilford of the right to serve Rymes exclusively, particularly given that service now is excellent.

## Argument

### I. Rymes does not meet the applicable criteria, which are not those of the trackage rights order but of parts 1144, 1146, and 1147 of the Board's regulations.

#### A. Rymes lacks standing to enforce the trackage rights order.

Rymes' case is premised on its view that it has the right, presumably as a third-party beneficiary, to claim directly the benefits of the TRO. *See* Petition ¶¶ 4, 5, 22, 24. The TRO, however, expressly disclaims any intent to benefit parties other than Guilford and CV. TRO §

9.4. As a final order of the ICC under the Interstate Commerce Act ("ICA"), section 9.4 is binding and preempts any contrary state or local law. *See* 49 U.S.C. § 10501(b) (Supp. V 1999).

Moreover, even were "state" law (in this instance, that of the District of Columbia, *see* TRO § 9.6) applicable, third-party beneficiary status is available to a nonparty only if the parties to the agreement *intended* that person to benefit from it. *Fields v. Tillerson*, 726 A.2d 670, 672 (D.C. 1999).[10] Where—as here, *see* TRO § 9.4—"two contracting parties expressly provide that some third party who will be benefited by performance shall have no legally enforceable right, the courts should effectuate the expressed intent by denying the third party any direct remedy." 4 Arthur Linton Corbin, Corbin on Contracts, § 777, at 25 (1951); *accord SEC v. Prudential Securities, Inc.*, 136 F.3d 153, 159 (D.C. Cir. 1998); *see also New England Central R.R.—Acquisition and Operation Exemption—Lines Between East Alburg, VT and New London, CT*, Finance Docket No. 32432 (STB served Dec. 21, 2001) (denying standing to third-party complainant where applicable statute limits enforcement of trackage rights to Amtrak). "The [TRO] permits only [NECR]—which has not complained to us—to institute actions to redress [alleged violations of the TRO]." *New England Central R.R.*, at 3. Accordingly, Rymes has no rights under the TRO in respect of Guilford's service.[11]

**B. Rymes is not entitled to relief under part 1144, 1146, or 1147.**

Rymes may have potential avenues of relief under the ICA and the Board's regulations, but only if Rymes meets the criteria for such relief. Rymes is not seeking damages, or even improved service, from Guilford. Instead, Rymes demands the drastic remedy of divesting

[10] "Incidental" beneficiaries of an agreement don't have the right to claim benefits thereunder. *See Western Union Tel. Co. v. Massman Construction Co.*, 402 A.2d 1275, 1277 (D.C. 1979).

[11] NECR, which as the successor to CV is a party to the TRO, is not a petitioner in this proceeding.

Guilford of its grandfathered service rights to existing shippers and locations[12] on the Conn River Line. Because Rymes is not entitled to invoke the TRO, *see supra* at 20-21, Rymes' rights are those prescribed by parts 1144 (Intramodal Rail Competition), 1146 (Expedited Relief for Service Emergencies), and 1147 (Temporary Relief Under 49 U.S.C. 11705 and 11102 for Service Inadequacies) of the Board's rules. Rymes never has disclosed which set of regulations it seeks to invoke, instead picking and choosing elements of each in an effort to construct a framework that fits the allegations it makes. In the interest of completeness, Guilford addresses each set of regulations separately below.

*Part 1144.* The test for relief under part 1144 is whether Guilford "has engaged in anticompetitive conduct" by either using market power to extract unreasonable terms or "because of its monopoly position show[ing] a disregard for the shipper's needs by rendering inadequate service." *Review of Rail Access and Competition Issues*, Ex Parte No. 575 (STB served Apr. 17, 1998). Part 1144 relief, as to which the petitioner has the burden of proof, *Intramodal Rail Competition*, Ex Parte No. 445 (Sub-No. 1), 1 I.C.C.2d 822, 1985 ICC LEXIS 112, *24, is not a general panacea for any and all alleged rate and service shortcomings but is limited to those "demonstrating anticompetitive conduct." *Midtec Paper Corp. v. Chicago & N.W. Transp. Co.*, 3 I.C.C.2d 171, 183, 1986 ICC LEXIS 42, *6, *26 (1986), *aff'd sub nom. Midtec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988). That is why petitioners are required to submit evidence of revenues, rates, efficiency, and the like. *See* 49 C.F.R. § 1144.5(a)(1) (2001). Rymes has submitted no such evidence, nor any evidence that Guilford is motivated by monopoly or market-power considerations. The existence of disputes between shipper and

[12] I.e., those at rail sidings receiving or tendering rail shipments in the twelve months preceding September 9, 1988 (the Conveyance Date). *See* TRO § 1.3.1.

carrier is not, without considerably more, a basis for the drastic relief Rymes seeks. *See Midtec*, 3 I.C.C.2d at 174, 1986 ICC LEXIS 42, *6.

Finally, a prerequisite to filing for relief under part 1144 is that the prospective petitioner, at least five days before filing, "seek to engage in negotiations to resolve its dispute with the prospective defendants." 49 C.F.R. § 1144.2(a) (2001). Rymes made no offer, request, or proposal to negotiate its grievance before filing. Indeed, Guilford has made several overtures to Rymes in the four months since the Petition was filed but all have been rejected summarily.

Guilford, on the other hand, has shown that any service shortcomings largely have been due to circumstances beyond Guilford's control, *see supra* at 6-17, and that service currently is of high quality, *see supra* at 17-20.[13] Moreover, Rymes' use of motor carriage for some of its deliveries—which is omitted from Rymes' pleadings—is relevant to whether Rymes even would be susceptible to anticompetitive conduct by a rail carrier. *See Midtec*, 857 F.2d at 1513-14. Finally, Guilford here restates its commitment—insofar as it is within Guilford's power—to maintain service at the current high level. Rymes thus has not met the part 1144 criteria.

*Parts 1146 and 1147.* Relief under parts 1146 and 1147 is strictly temporary in nature and "designed only to address serious ongoing service disruptions." *Expedited Relief for Service Inadequacies*, Ex Parte No. 628, (STB served Dec. 21, 1998). Rymes cannot succeed under part 1146 or 1147 merely by showing occasional service shortcomings in the past but only by demonstrating—as it has not and cannot—that Guilford *currently* (1) is falling down dramatically on the job and (2) is unlikely to restore adequate service in the foreseeable future. *See, e.g.,* 49 C.F.R. §§ 1146.1 ("substantial, measurable deterioration" with "incumbent carrier . .

[13] The ICC in *Midtec* expressly noted that conditions had improved since the period complained of. *See Midtec*, 3 I.C.C.2d at 182, 1986 ICC LEXIS 42, *23, *29; *accord Amstar Corp. v. Alabama Great S. R.R.*, No. 38239S, 1988 ICC LEXIS 147, *3 (May 10, 1988).

. unlikely to restore adequate rail service . . . within a reasonable period of time"), 1147.1 (same) (2001). Guilford's service in past seasons, which is only marginally relevant under parts 1146 and 1147, is discussed above. Suffice it to say that although there have been shortcomings in the past, they largely have been beyond Guilford's control and in any event no longer obtain. *See supra* at 6-20.

Today, Guilford is meeting its service commitments on the Conn River Line and is providing excellent service to Rymes. *See supra* at 17-20. Guilford's service to the Distribution Center during the past four months has been exemplary, due at least in part to Guilford's purchase of twenty locomotives during the past year and the completed integration of through route service via Guilford's Rotterdam interchange with CSXT and CP (under its haulage agreement with NS). These improvements have significantly enhanced service on the entire Guilford system. Thus there is no basis for any complaint by Rymes about Guilford's current service, let alone cause for invoking part 1146 or 1147.

## II. Even if Rymes had standing to enforce the trackage rights order, Rymes meets neither criterion for service by New England Central.

### A. Rymes is shipping from a siding that received or tendered shipments during the twelve months preceding the Conveyance Date and hence is subject to section 1.3 of the trackage rights agreement.

Rymes contends that "neither is Rymes an existing shipper nor are its facilities . . . existing shippers' facilities" within the meaning of the TRO. Petition ¶ 29. This is so, argues Rymes, because the Distribution Center and the 650 feet of track immediately adjacent thereto did not exist before 1995. *Id.* ¶ 31-32. Rymes then proffers the *ipse dixit* that "the term 'existing . . . shippers' facilities' refers to buildings and structures occupied by a shipper and not to any rail trackage by which such buildings and structures are served." *Id.* ¶ 33.

Rymes thus effectively concedes the fallacy of its argument, for its view would be valid only if one ignored the words "rail sidings" in section 1.3.1 of the TRO. But the rules of legal interpretation presume that each word of a statute, regulation or contract is intended to have meaning, and accordingly require that each word be given meaning if at all possible. *Duncan v. Walker*, 121 S. Ct. 2120, 2125 (2001). Moreover, absent clear evidence to the contrary, a qualifying phrase (here, "which received or tendered rail shipments during the twelve months immediately prior to the Conveyance Date") modifies its immediate antecedent (here, "rail sidings"). *National Coalition for Students v. Allen*, 152 F.3d 283, 288 n. 6 (4th Cir. 1998); *Wilshire Westwood Assocs. v. Atlantic Ridgefield Corp.*, 881 F.2d 801, 804-05 (9th Cir. 1989); 2A Norman J. Singer, Statutes and Statutory Construction § 47:33 (6th ed. 2000). Hence if a siding received or tendered rail shipments during the twelve-month window, any shipper or facility on that siding is within the exclusivity provisions of section 1.3 of the TRO. The siding here in question falls into that category.

While it is true that the track immediately adjacent to the Distribution Center did not exist in 1987-88, the siding that connects to the Conn River Line existed, and was served by Guilford, during the twelve months preceding the Conveyance Date. All that Rymes did in 1995 was to *extend* that siding to reach the Distribution Center. This should not allow Rymes to avoid the TRO's intent to preserve Guilford's exclusivity in respect of business on existing rail sidings connected to the Conn River Line.

**B. The trackage rights order does not authorize deprivation of Guilford's exclusive service rights for episodic, unintentional service shortcomings.**

Rymes has not alleged—and could not demonstrate—that Guilford has failed to *offer* three-day per week service. Guilford has scheduled trains six days per week (three in each direction) at all relevant times since the TRO was imposed. Guilford has failed to run a train

only when an external cause—such as a shortage of locomotive power, unexpected delays elsewhere that caused crews to exceed their maximum allowable work periods, general difficulties of access to the busy Conn River Line, and the particular configuration of the switch connecting that line to the Rymes-Eastern Bridge siding—has intervened.

When the ICC considered the trackage rights issue in early 1990, CV proposed that Guilford be required to "maintain" three-day per week service, while Guilford asked that it be required to "make available" such service. *See Trackage Rights Decision*, 6 I.C.C.2d at 542, 1990 ICC LEXIS 52, *7-*8. The dispute, which the Commission decided in Guilford's favor, thus had to do with Guilford's scheduling of, and Guilford's intentions regarding, such service, not with occasional and unintentional service shortcomings that might occur.

The TRO does not contemplate divestiture of Guilford's exclusive service rights unless Guilford ceases *offering* three-day per week service to a particular customer or location. Here, that is not the case, expressly or impliedly, and Rymes hasn't alleged that such is the case. The worst that can be said is that Guilford offered such service but that there were individual instances (mostly due to circumstances beyond Guilford's control) where the service was not what Guilford intended it to be. Those kinds of unintentional shortcomings are not the stuff of which deprivation of Guilford's rights is made.

### C. Guilford has not failed to provide the service required by the trackage rights order.

The TRO requires Guilford to make available three-day per week service, TRO § 1.3, but excuses any nonperformance "occurring by reason of circumstances beyond [Guilford's] control," *id.* §§ 1.3.3, 9.6. Here, of course, most of the difficulty was occasioned by circumstances beyond Guilford's control. Most notable were the spillover effects of the problems experienced by CSXT and NS as they struggled to digest their respective portions of

Conrail.[14] *Supra* at 7-9. Other problems included short-term difficulties arising from Guilford's own efforts to provide a long-term, more competitive solution for the CSXT-NS situation, *supra* at 9-11, Rymes' failure to repair its own siding for three critical weeks, *supra* at 11-12, the constraints on Guilford's access to the Conn River Line, *supra* at 13-14, and the particular configuration of the switch at the Rymes-Eastern Bridge siding, *supra* at 14-16. Thus even if Rymes had standing to enforce the TRO, no basis for revoking Guilford's exclusive right to serve Rymes has been shown.

## III. Divestiture of Guilford's exclusive service rights under the trackage rights order would entitle Guilford to just compensation.

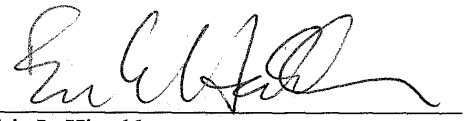
The requirements that Guilford have trackage rights over the Conn River Line and the exclusive right to serve shippers and facilities at active sidings were part of the ICC's just compensation calculus. *See Conveyance Decision*, 4 I.C.C.2d at 795 & n. 13, 1988 ICC LEXIS 233 at *66-*68 & n. 13, *73-*74, *95, *106-*107. This of course, is required by the Constitution, U.S. Const. amend. V, as well as by the Rail Passenger Service Act, 45 U.S.C. § 562(d)(1) (1988) (current version at 49 U.S.C. § 24311 (1994)). A divestiture of this right likewise would require the payment to Guilford of just compensation.

## Conclusion

For the reasons set forth above and in Guilford's previous filings in this proceeding, Rymes' application should be denied in all respects.

[14] "When elephants fight it is the grass that suffers." Kikuyu proverb, *quoted in* Bartlett's Familiar Quotations 784 (16th ed. 1992) (J. Kaplan, gen. ed.).

Respectfully submitted,



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*Attorneys for Respondents Boston and Maine Corp. and Springfield Terminal Railway Co.*

January 22, 2002.

**243431.5**

**VERIFICATION**

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

Richard M. Willey, being duly sworn, deposes and says that he is the Senior Vice President of Marketing and Sales for respondents Boston and Maine Corporation and Springfield Terminal Railway Company, that he has read the foregoing statement, and that to the best of his knowledge, the facts asserted therein are true and the same are true as stated.

Signed Richard M. Willey

Subscribed and sworn to before me this 21st day of January, 2002.

Notary Public

My commission expires 10/6/06

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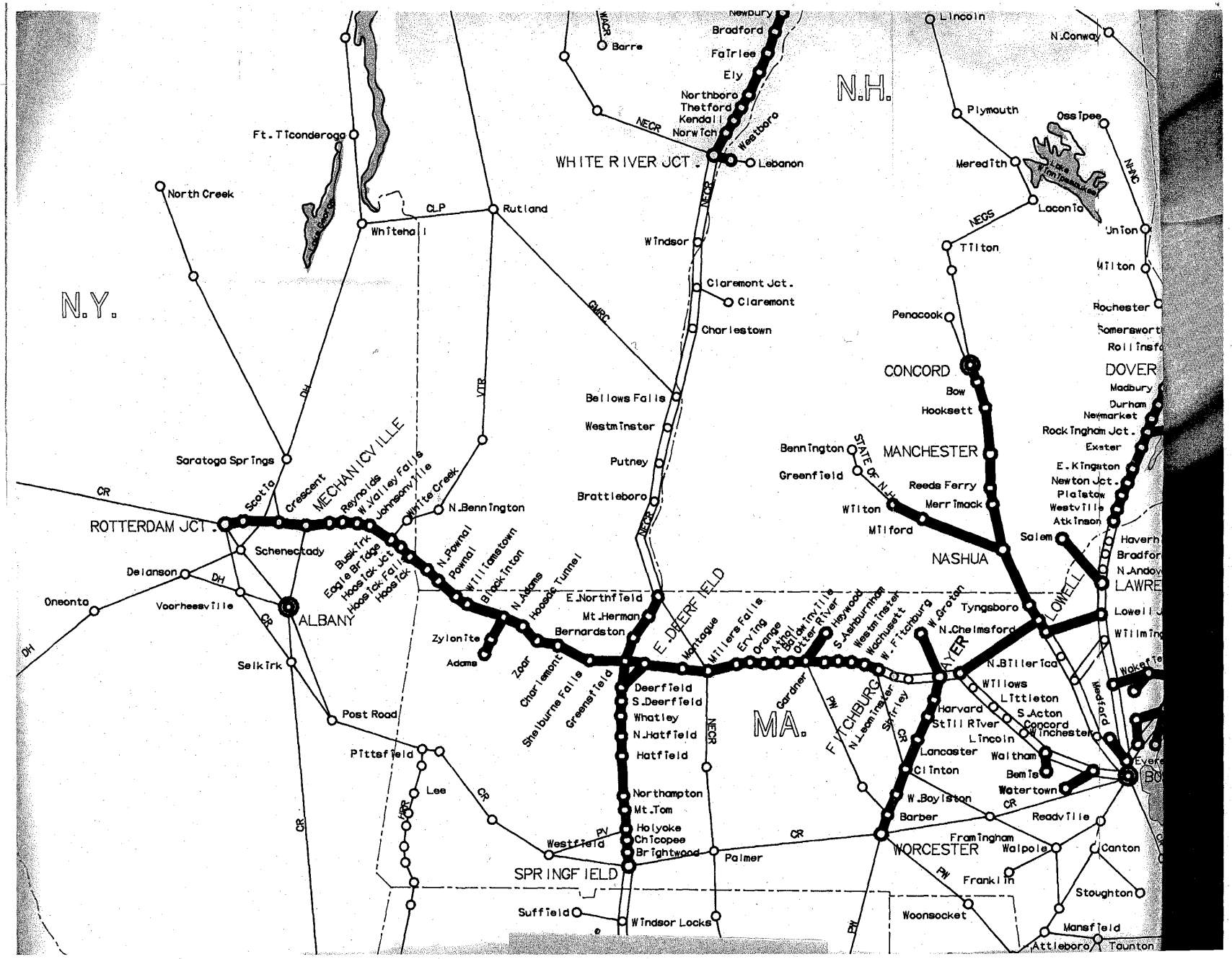
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Thetford
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Charlestown
Bellows Falls
Westminster
Putney
Brattleboro
Ft. Ticonderoga
North Creek
Whitehall
Rutland
Saratoga Springs
Scotia
Crescent
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N. Bennington
Schenectady
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Selkirk
Post Road
Pittsfield
Lee
Buskirk
Eagle Bridge
Hoosick Jct.
Hoosick Falls
Hoosick
N. Pownal
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Williamstown
Blackinton
N. Adams
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Shelburne Falls
Greenfield
E. Northfield
Mt. Herman
Bernardston
Deerfield
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Whatley
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Hatfield
Northampton
Mt. Tom
Holyoke
Chicopee
Brightwood
Westfield
Palmer
Suffield
Windsor Locks
Montague
Millers Falls
Erving
Orange
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Baldwinville
Otter River
Gardner
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Westminster
Wachusett
W. Fitchburg
W. Groton
N. Leominster
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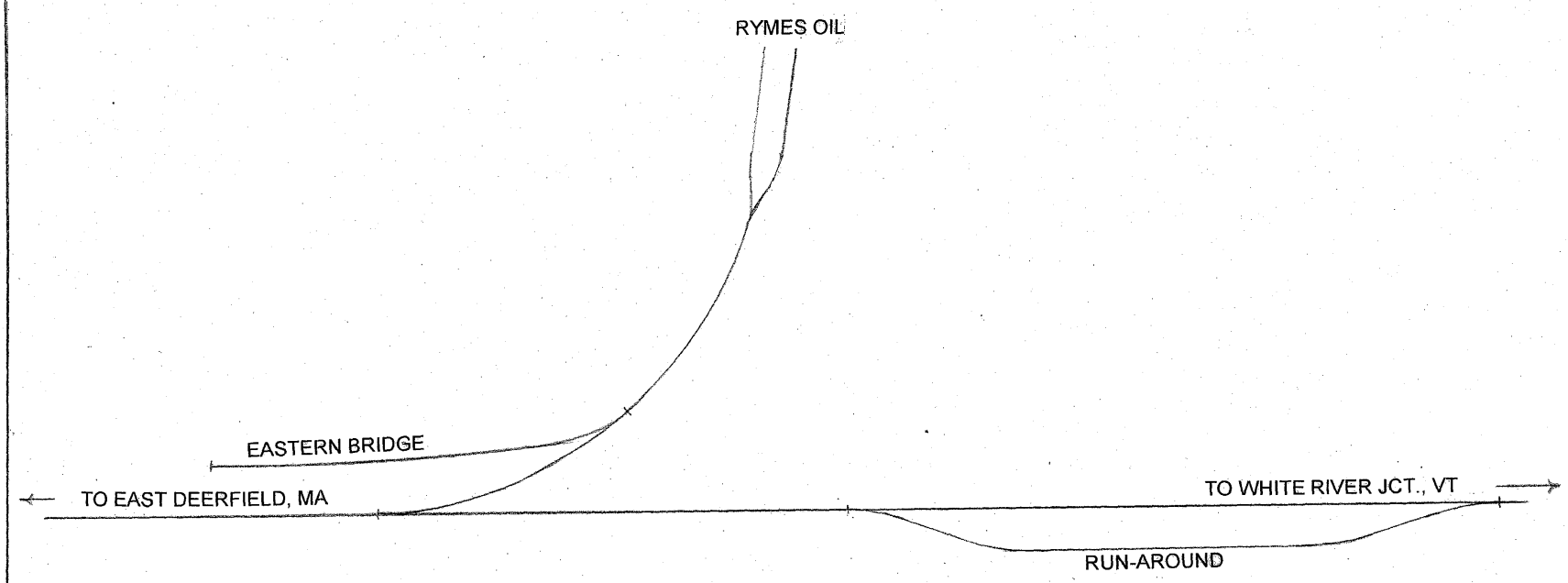


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| MAINE CENTRAL R.R. CO. | | |
| OFFICE OF THE VICE PRESIDENT-ENGINEERING | | |
| RYMES OIL<br>CLAREMONT JCT., NH | | |
| LINE: CONN. RIVER MAIN LINE | | |
| V.S MAP | | MILE POST |
| SCALE: NOT TO SCALE | | DATE: 01/21/02 |
| DRAWN BY: FOM | CHECKED BY: | APPROVED: |

## CERTIFICATE OF SERVICE

I certify that I have this 22nd day of January 2002 served copies of the foregoing document upon all parties of record in this proceeding, as follows:

1. Ernest J. Ierardi, P.C., counsel for Rymes Heating Oils, Inc., by facsimile and first class mail.

2. Federal Railroad Administration, by hand delivery.

3. New England Central Railroad, by facsimile and first class mail.

Bonnie J. Boling

Bonnie J. Boling