

210036

ENTERED
Office of Proceedings

FEB 09 2004

Part of
Public Record

JAMES E. HOWARD LLC
ONE THOMPSON SQUARE
SUITE 201
CHARLESTOWN, MA 02129

TEL (617) 886-9322
FAX (617) 886-9324



February 6, 2004

VIA FEDERAL EXPRESS

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

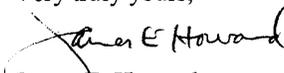
Re: Granite State Concrete Co., Inc., et al. v. Boston and Maine Corporation, et al.
Docket No. NOR 42083

Dear Secretary Williams:

Enclosed for filing in the above captioned matter are the original and 10 copies of the "Reply Statement of Granite State Concrete Co., Inc. and Milford-Bennington Railroad Co., Inc." Could you please acknowledge receipt of the Reply Statement by date stamping the extra enclosed copy of this letter and returning it to me in the self-addressed stamped envelope?

Thank you very much for your assistance. Please let me know if you need anything further.

Very truly yours,


James E. Howard

cc: Robert B. Culliford
enclosures

210036

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. NOR 42083

**GRANITE STATE CONCRETE CO., INC. and
MILFORD-BENNINGTON RAILROAD CO., INC.**

vs.

**BOSTON AND MAINE CORPORATION and
SPRINGFIELD TERMINAL RAILWAY COMPANY**



**REPLY STATEMENT OF GRANITE STATE CONCRETE CO., INC.
AND MILFORD-BENNINGTON RAILROAD CO., INC.**

**ENTERED
Office of Proceedings**

FEB 09 2004

**Part of
Public Record**

James E. Howard
One Thompson Square
Suite 201
Charlestown, MA 02129
Tel.: (617) 886-9322
Fax: (617) 886-9324
E-mail: jehoward@worldnet.att.net

Attorney for Granite State Concrete
Company, Inc. and
Milford-Bennington Railroad
Company, Inc.

DATED: February 6, 2004

TABLE OF CONTENTS

<u>DOCUMENT</u>	<u>TAB</u>
Reply Statement	
Reply Verified Statements	
Peter R. Leishman	Leishman (including Exhibits 1-3)
John G. MacLellan, III	MacLellan (including Exhibits 1-5)
Susan Madigan	Madigan
 Appendices	
Deposition Transcript - Roger Bergeron	A
Deposition Transcript - Gary S. Nault	B
Deposition Transcript - Steven Larkin	C
Deposition Transcript - Calvin R. Preston	D
 Certificate of Service	

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. NOR 42083

**GRANITE STATE CONCRETE CO., INC. and
MILFORD-BENNINGTON RAILROAD CO., INC.**

vs.

**BOSTON AND MAINE CORPORATION and
SPRINGFIELD TERMINAL RAILWAY COMPANY**

**REPLY STATEMENT OF
GRANITE STATE CONCRETE CO., INC. AND
MILFORD-BENNINGTON RAILROAD CO., INC.**

INTRODUCTION

In accordance with the procedural schedule in this case, Granite State Concrete Co., Inc. ("Granite State") and Milford-Bennington Railroad Co., ("Milford-Bennington") submit this Reply Statement in response to the Opening Statement of Boston and Maine Corporation and Springfield Terminal Railway Company (both of which are subsidiaries of Guilford Transportation Industries, Inc. and which are referred to as "Guilford"). For the reasons stated in the Opening Statement of Granite State and Milford-Bennington and below, the actions of Guilford that disrupted rail service by Milford-Bennington to Granite State entitle Granite State and Milford-Bennington to a determination by the Board that such actions were unreasonable and illegal and to an award of damages.

ARGUMENT

I. There is No Basis to Reinstate the Class Exemption for Stone.

Ignoring the Board's decision served September 15, 2003 in this case, Guilford has argued that the class exemption relating to stone products should be reinstated and applied to the transportation and service provided by Guilford in connection with the Granite State stone traffic handled by Milford-Bennington between Wilton and Milford, New Hampshire.¹ Guilford Opening Statement at 5-8. More specifically, Guilford contends that, contrary to the Board's finding, competitive truck service is available to Granite State and that revocation of the exemption was improperly based on a determination by the Board that trucking was not an option. In addition, Guilford has postulated that even if the exemption was properly revoked damages should not accrue prior to the date of the Board's decision.

As demonstrated below, Guilford's arguments are without merit. A complete response to Guilford's arguments is that they are merely belated and improper attempts to have the Board reconsider its decision to revoke the exemption to the extent necessary to decide this case. Furthermore, contrary to Guilford's contention, competitive service by truck is not available to move stone between Wilton and Milford. Finally, there is absolutely no basis to limit the recovery to damages incurred after the date of the Board's decision revoking the exemption.

¹ The Board assumed without deciding that the class exemption applied. Decision served September 15, 2003 at 7. Milford-Bennington and Granite State continue to believe that the class exemption is not applicable to Guilford's transportation and service.

A. Revocation to the "Extent Necessary" was Appropriate.

The starting point for the analysis of Guilford's argument is the decision served on September 15, 2003. Guilford had filed a motion to dismiss the complaint on the grounds that stone products, such as the material handled for Granite State between Wilton and Milford, had been exempted from regulation pursuant to a class exemption. Granite State and Milford-Bennington argued in response that the class exemption did not extend to the transportation and service provided by Guilford in the form of access to its line by means of trackage rights and, even if the class exemption did apply, there were good and sufficient grounds to revoke the exemption. Analyzing these arguments, the Board stated as follows:

Assuming, without deciding, that the exemption applies to [Guilford's] transportation and services here, revocation of the exemption, to the extent necessary to allow the Board to give consideration to [Guilford's] actions with respect to the service provided by [Milford-Bennington] to Granite State, is required to carry out the many provisions of the rail transportation policy favoring competition.

Decision served September 15, 2003 at 7 (emphasis supplied). Thus, the class exemption was revoked "to the extent necessary" to enable the Board to consider the complaint.

B. The Revocation Decision is Final and Cannot be Challenged.

If Guilford disagreed with the Board's decision denying Guilford's motion and revoking the exemption, Guilford should have appealed or moved for reconsideration. The Board's procedures provide clearly for such avenues of review of its decisions. 49 C.F.R. 1115. Moreover, the procedures establish deadlines within which the parties must act. The time for Guilford to appeal or request reconsideration has long since passed, and the determination of the Board to revoke the exemption "to the extent necessary" is a

final decision. Guilford should not be permitted to circumvent the Board's appellate procedures by attempting to reargue the decision served September 15, 2003 at this time.²

C. Even if an Appeal of the Revocation Decision Were Timely, There are No Grounds to Reverse.

Even assuming, for purposes of argument, that Guilford could at this time reopen the question whether the revocation of the class exemption was appropriate, there is no basis upon which the Board could properly reverse course. As shown below, the legal arguments raised by Guilford do not compel the reinstatement of the class exemption, and the factual basis for the Board's decision completely justified the revocation.

1. There is No Legal Basis to Reconstitute the Exemption.

Guilford contends that class exemptions should be interpreted broadly and that regulatory oversight should not be inferred, relying upon Peipscot Industrial Park, Inc. d/b/a Grimm Industries--Petition for Declaratory Order, Finance Docket No. 33989, decision served May 15, 2003, footnote 13. Guilford Opening Statement at 8. Furthermore, Guilford has referred to the decision in which the class exemption for stone products was granted and the fact that only limited retained jurisdiction concerning car service issues was specified there. In the cited footnote from the Peipscot decision, the Board discussed the extent of the exemptions that had been granted and the explicit reservations of jurisdiction in other cases. The initial scope of various class exemptions and the types of reservations in connection with such class exemptions are, however, beside the point. In this case, the Board has revoked the potentially applicable class exemption "to the extent necessary" to decide the issues raised by the complaint.

² Attempting to bolster its argument, Guilford refers several times to the September 15, 2003 decision as a "partial" revocation of the class exemption. Any attempt to characterize the revocation as "partial" or to demonstrate that some

2. Truck Competition Was Not Available.

More fundamentally, there is no basis for Guilford's argument that "discovery has shown that truck competition is available to Granite State if it chose to pursue it" and that, therefore, the class exemption should be "reinstated". Guilford Opening Statement at 6. Prior to the institution of rail service at Wilton, Granite State moved all of the stone from the excavation site by truck. MacLellan Reply V.S. at 1.³ In 1989, with the prospect for the initiation of rail service, Granite State applied for authority to install a portable rock crusher in Wilton. Id. The express purpose of the rock crusher was to reduce stone to a size that could be transported in rail cars. Id. After a lengthy debate before the Zoning Board of Adjustment, during which participants expressed opposition and concern about various aspects of the operations at the Wilton site, including truck traffic, noise, dust, hours of operation and blasting, the Zoning Board issued a 3-2 decision dated July 12, 1989 in which it granted Granite State the right to install a portable rock crusher on the condition that the "products (of the rock crusher) shall only be removed by way of railroad" and that the "rock crusher shall be removed within 180 days if the railroad ceases to operate." Id. at 2 and Exhibit 1 attached thereto. In 1989, the Planning Board of Wilton also approved a site plan confirming Granite State's ability to operate the portable rock crusher in order to "process earth product materials for transportation off-site by the existing railroad line." Id. and Exhibit 2 attached thereto.

Since the institution of rail service, all of the four inch crushed stone--the product of the rock crusher--has been moved by rail from Wilton to Milford. MacLellan Reply

portion of the exemption survived is an irrelevant exercise in semantics. The exemption was revoked "to the extent necessary" to consider the claims in this case.

³ Reply Verified Statements of John G. MacLellan, III, Peter R. Leishman and Susan Madigan are being filed herewith and are referred to as "[name] Reply V.S."]

V.S. at 3. A byproduct of the crusher is one inch crushed base, which consists of dirt, clay and small pieces of stone. Id. Crushed base is difficult to unload from rail cars, so even after rail service began crushed base was transported by truck. Id.

In the late 1990s, the Planning Board of Wilton raised with Granite State the question whether any trucking from Wilton was permissible. MacLellan Reply V.S. at 4-5. Specifically, the Planning Board took the position that trucks should not be used for any purpose, and Granite State expressed its view that the original 1989 approvals permitted crushed base--the byproduct of the rock crusher--to continue to be moved by truck. Id. As a compromise, the Planning Board and Granite State agreed in 2001 upon a clarification of the 1989 site plan that expressly recognized Granite State's right to move crushed base by truck subject to certain terms and conditions. Id. at 5 and Exhibit 4 attached thereto. The 2001 site plan also carried forward the 1989 condition that crushed stone be removed only by rail by providing that "unless and until transportation by railroad becomes unavailable or impracticable, the crushed stone products of the plant shall be transported off-site by rail." Id.

In the context of the 1989 approvals and the discussions with the Planning Board resulting in the new site plan in 2001, it was clear to Granite State and Milford-Bennington that trucking of the processed four inch crushed stone would be permitted only in the event that rail service ceased. MacLellan Reply V.S. at 5; Leishman Reply V.S. at 14-15. The use of the terminology "unavailable or impracticable" contemplated situations in which rail service provided by Milford-Bennington were discontinued due to an Act of God, such as a wash out of the track, or because Milford-Bennington went out of business without any rail carrier taking over its operations. Id. The Planning Board

would not have considered that rail service was "unavailable or impracticable" simply because Guilford decided to restrict the hours of Milford-Bennington's operations. Id. Furthermore, contrary to Guilford's contention that no prior approval of the Planning Board was required to switch to trucks, the minutes of the Planning Board meeting at which the new site plan was approved make it clear that the Planning Board, not Milford-Bennington or Granite State, would be the final arbiter of the question whether rail service was "unavailable or impracticable." MacLellan Reply V.S. at 6 and Exhibit 5 attached thereto.

Thus, Guilford's argument that subsequent to June 19, 2003 rail service was "unavailable or impracticable" is simply not based on any credible facts. The principal reason that Granite State was able to obtain approval for the rock crusher was that it would take 100 truck round trips off the streets. MacLellan Reply V.S. at 3. The Wilton Planning Board would not have permitted Granite State to operate up to 100 daily round trips with trucks from Wilton to Milford, travelling over 3.9 miles of residential streets in Wilton each way, due to the fact that Guilford was acting unreasonably by restricting the hours of Milford-Bennington's operations.⁴ Id. at 6.

Even if the foregoing analysis were ignored and it is assumed that trucks could have been used, truck service would not have been competitive with rail service. The cost of trucking stone from Wilton to Milford would have been approximately 50% higher than the cost of rail movement. MacLellan Reply V.S. at 6. Furthermore, Granite State would have been forced to incur additional expenditures for equipment to load trucks at Wilton, thereby adding an additional \$.50 per ton to transportation cost. Id.

⁴ In advancing the argument that rail service was unavailable or impracticable, Guilford may have overlooked the irony that it is acknowledging that its actions made rail service unavailable or impracticable.

Guilford disingenuously implies that it did not know until discovery in this case that truck competition was allegedly available. Guilford Opening Statement at 6. As described in the Opening Statement of Granite State and Milford Bennington, senior officers of Guilford had been aware for many years of the permitting restrictions governing operations at Wilton, and Milford-Bennington told Guilford early and often after June 19, 2003 about the restrictions. Furthermore, the permits and decisions governing operations at Wilton are matters of public record. Indeed, documents in Guilford's own files, made available in discovery in this case, included minutes of the deliberations of the Zoning Board of Adjustment and the Planning Board, as well as the decision of the Zoning Board of Appeals dated July 12, 1989. MacLellan Reply V.S. at 3 and Exhibit 3 attached thereto.⁵ Rather than a case of newly discovered evidence, this is a situation in which information that was known by or available to Guilford was ignored until it suited its convenience.

3. Guilford Abused Its Market Power.

Guilford relies on various decisions of the Board and the Interstate Commerce Commission for the proposition that exemptions should be revoked only to rectify an abuse of market power. Although this is not a classic case in which a carrier has market power in the sense of an ability to extract monopoly profits, it is nonetheless a clear example of market power that has been abused. Every rail car that moves from the Granite State facility in Wilton to its plant in Milford depends upon access at reasonable times and on reasonable conditions to the Guilford line. There can be no rail service between Wilton and Milford by Milford-Bennington without the use of the trackage

⁵ The documents in Guilford's files also refer to the restriction on operations at Wilton to the hours of 6:30 AM to 6:30 PM.

rights over Guilford. Moreover, as a result of the prohibition of trucking as an alternative, there can be no transportation service at all without access to the Guilford line. In a very real sense, therefore, Guilford has market power with respect to the stone moved for Granite State, and Guilford has abused such market power.

A review of relevant decisions does not compel any different conclusion. For example, in the case in which stone traffic was exempted, the ICC acted upon limited evidence, primarily in the form of industrywide data submitted by the Association of American Railroads. Rail General Exemption Authority--Petition of AAR to Exempt Rail Transportation of Selected Commodity Groups, 9 I.C.C. 2d 969 (1993). The Commission noted that

a significant consideration is whether the participating shippers actually seeking transportation are concerned about an abuse of market power. No shipper has expressed concern that any railroad carrying any of these 17 commodities would abuse market power or has even alleged that any carrier hauling any of this freight has any market power to abuse.

Id. at 973. The Commission went on to state, however, that it could "deal with any such abuse if evidence of abuse is presented." Id. at 975. As described above and in the Opening Statement, this is a case in which there has been a complaint about market power and in which reregulation is warranted in order to deal with the abuse of such market power.

The revocation of the exemption in this case is appropriate for another reason. As the Board is well aware, the sole remedy for an aggrieved party complaining about transportation that is exempt is to seek a revocation of the exemption. Consolidated Rail Corporation--Declaratory Order--Exemption, 1 I.C.C. 2d 895 (1986). As the Commission noted, the revocation power "ensures the usefulness of the exemption

process as a means of testing and determining the appropriate bounds of regulation in a changing transportation environment without the need for continual Congressional attention." Id. at 899. Absent a revocation, an aggrieved party has no remedy. On the other hand, a party that successfully revokes an exemption "can obtain a remedy for any proven unlawful activity from which it has suffered." Id. at 900. The exemption should be revoked in this case, because failure to do so would both deprive Granite State and Milford-Bennington of any remedy for the unreasonable and harmful conduct of Guilford and reward Guilford for such conduct.

D. Damages Began to Accrue as of June 19, 2003.

Finally, Guilford argues that damages should not accrue until the date of service of the Board's decision--September 15, 2003--revoking the class exemption. Guilford relies for this argument on the Pejepscot decision, but such reliance is misplaced.

In Pejepscot, the shipper alleged conduct by Guilford in violation of certain statutory provisions beginning at a time prior to the exemption of the commodities in question. The shipper was permitted to prove damages up until the time of the exemption, but no revocation of the exemption was either requested or granted. In this case, by contrast, the relevant exemption, assuming for the moment that it even applies, was granted years before the actions by Guilford that are complained of by Granite State and Milford-Bennington. Here, contrary to the situation in Pejepscot, the exemption has been revoked to the extent necessary to decide the case. Consequently, damages must be considered to have begun accruing as of the date that Guilford restricted Milford-Bennington's operations, or June 19, 2003.

To accept Guilford's argument and to limit the accrual of damages to the period from and after the date on which an exemption is revoked would be to reward and encourage illegal activity. The Commission has confronted and rejected a similar argument. In United States Department of Energy v. Baltimore & Ohio Railroad Co., 364 I.C.C. 969 (1981), the railroads argued that no damages should accrue against them until the date of a decision finding their practices to be unreasonable. The Commission rejected this argument, observing that the "railroads would require that the Commission first find a practice unreasonable and award reparations only to the extent the carrier thereafter continued to engage in unlawful practice. In our view such a principle would be manifestly unjust to shippers." *Id.* at 978. Similarly, in this case limiting the beginning of the accrual of damages to September 15, 2003 would reward Guilford for illegal practices prior to September 15, 2003, would be wholly contrary to the determination to revoke the exemption to the extent necessary and would undermine the principle of awarding damages to compensate for harm.

II. Guilford's Actions Were Not Reasonable Responses to Any Legitimate Safety Concerns.

Guilford has attempted to justify its unreasonable conduct by alleging that Milford-Bennington engaged in "repeated and flagrant violations of customary and mandatory safety rules, regulations and practices." Guilford Opening Statement at 13. Thus, Guilford has attempted to play the "safety card" and to argue that virtually any conduct is justified if there are "safety" concerns. An examination of the facts demonstrates, however, that there were no safety related concerns at all, much less any that were "repeated and flagrant" or that could justify or excuse Guilford's actions.

A. The Derail Was Used by Milford-Bennington Safely and Correctly.

Guilford asserts that Milford-Bennington did not properly or safely use the derail device located on Milford-Bennington's line at milepost 16.36. Guilford Opening Statement at 10-11. As demonstrated in the Opening Statement and below, Guilford's assertions are baseless.

Guilford suggests, without citing any authority, that Milford-Bennington should have issued its own bulletin in December, 2002. Contrary to Guilford's suggestion, a bulletin was not required, because the derail was within yard limits. Madigan Reply V.S. at 2. Furthermore, Milford-Bennington employees received a briefing on the location of the device and the terms and conditions of its use. *Id.* and Leishman Reply V.S. at 3.

Citing NORAC rule 104, Guilford contends that the derail was located at a "fouling point" and therefore should have been kept in the closed position when trains were not passing. Contrary to Guilford' argument, the intersection of the Guilford line and the Milford-Bennington line at milepost 16.36 was not a fouling point. Madigan Reply V.S. at 1. Furthermore, Rule 104(e) provides that a "fouling point" must be designated by yellow paint, yellow joint bars or a sign with the letters "FP". Madigan Reply V.S. at 1. No such marking was used to designate the derail at milepost 16.36. Leishman Reply V.S. at 3-4. Consequently, the derail was to be closed only when its use was required in connection with passenger operations. Madigan Reply V.S. at 2.

Notwithstanding Guilford's attempt to argue otherwise, the use of the derail was governed by the agreement and understanding of the parties to the effect that the derail should be closed only when passenger trains were operating. Milford-Bennington

complied meticulously with such agreement and took no action concerning the derail that could possibly justify Guilford's actions.

B. Guilford's Actions Were Not in Response to Any Inspection of Milford-Bennington or the Passenger Cars.

Guilford claims that the relatively steep grade on the Milford-Bennington line created a "heightened threat" that caused Guilford to look "more closely" at Milford-Bennington's operations when the "vintage" passenger cars arrived in December, 2002. Guilford Opening Statement at 2, 9-10. This argument lacks any factual basis on a number of grounds. Assuming that the reference to "heightened threat" was not a pun, it is indisputable that the grade of the line had not changed since the time that Guilford owned it and that Guilford was well aware of the grade. Leishman Reply V.S. at 2. Furthermore, Guilford did not, as it contends, look "more closely" at the line and made no analysis whatsoever of Milford-Bennington's operations that would have led anyone to conclude that a derail was necessary at milepost 16.36 for freight operations. Culliford Dep. at 26-28; Leishman Reply V.S. at 2.⁶ Furthermore, Guilford never checked the passenger cars to understand that they were not "vintage" relics but rather fully compliant with regulations permitting operation at 60 miles per hour or to see that they were protected by hand brakes and skate devices. Culliford Dep. at 10; Leishman Reply V.S. at 2. Rather than conducting any inquiry that revealed any increased threat, Guilford acted arbitrarily, and the arguments offered by Guilford are simply after the fact excuses to attempt to explain its unreasonable conduct.

⁶ Cited excerpts of deposition transcripts are referred to as "[name] Dep." and either were filed with the Opening Statement or are being submitted herewith.

C. Milford Bennington's Maintenance Work on Guilford's Line was Safe and Appropriate.

Guilford claims that at some point after July 15, 2003, it allegedly discovered that Milford-Bennington had been performing certain maintenance work on the Guilford line. Guilford Opening Statement at 4, 11-12. Guilford has implied that this discovery constituted additional evidence of a disregard for safety rules and confirmed the appropriateness of Guilford's actions. Once again, however, the facts do not support Guilford's arguments.

Contrary to Guilford's contention, Guilford management personnel and track workers had known for many years that Milford-Bennington performed remedial work on the Guilford line from time to time as necessary for safe operations, provided ties, bolts and other materials and even worked with Guilford personnel to perform repairs. Leishman Reply V.S. at 4-7. In 1994, for example, Roger Bergeron, a Guilford supervisor in the track maintenance department, wrote to Peter Leishman, President of Milford-Bennington, acknowledging that Milford-Bennington had been performing certain track work on the Guilford line.⁷ Leishman Reply V.S. at 5 and Exhibit 1 thereto. David Fink, the Chief Executive Officer of Guilford, asked Mr. Leishman in 1996 whether he was performing work on the Guilford line, and Mr. Leishman replied that he was. Leishman Reply V.S. at 6. Mr. Fink cautioned Mr. Leishman to do the work safely. Id. On a number of occasions over the last several years, John Steiniger, the son of the

⁷ This letter contradicts Mr. Bergeron's initial testimony in his deposition, in which he denied knowledge of Milford-Bennington performing work on Guilford's line but is consistent with his later testimony that he was informed recently by John Steiniger that Mr. Steiniger had observed Milford-Bennington working on the Guilford line. Mr. Steiniger allegedly did not report this "sighting" to anyone at Guilford until after the initiation of this case. Bergeron Dep. at 46, 65, 72-76.

President of Guilford, Thomas Steiniger, and an engineering officer of Guilford, observed Mr. Leishman making repairs on the Guilford line. Id. at 5.

The significance of the awareness of Guilford officials of continuing activity by Milford-Bennington to make emergency and remedial repairs as necessary is that there was a tacit, if not an explicit, understanding that such activity by Milford-Bennington was condoned by Guilford. Leishman Reply V.S. at 6. Guilford personnel understood that they often did not have sufficient resources to address track conditions and defects in a timely manner and that an acceptable alternative would be to permit Milford-Bennington to make repairs when necessary. Id.⁸

It became necessary for Milford-Bennington to make safety repairs on its own after the incident in 1992 when Milford-Bennington reported a number of track defects to Guilford. Opening Statement at 36; Leishman Reply V.S. at 6-7. In response, Guilford retaliated by "finding" alleged defects in Milford-Bennington's equipment, thereby shutting down Milford-Bennington's operations for approximately six weeks. After that, Milford-Bennington determined that it could not afford to report defects and wait for Guilford to respond or retaliate. After 1992, Milford-Bennington did not experience any derailments on the Guilford line. Leishman Reply V.S. at 7.

Any track work that has been done by Milford-Bennington on the Guilford line has been of the emergency, remedial nature. Leishman Reply V.S. at 4-7. Furthermore,

⁸ Mr. Bergeron's denial of direct knowledge that Milford-Bennington was performing work on Guilford's line is consistent with statements by Guilford track personnel. Notwithstanding the ready acknowledgement that Milford-Bennington provided track materials to Guilford without charge and that Milford-Bennington was cooperative, the Guilford employees denied knowledge that Milford-Bennington performed work. Bergeron Dep. at 30-35, 42; Nault Dep. at 10-11, 13-14, 26; Preston Dep. at 7-10; Larkin Dep. at 11-15. There are two possible explanations. First, no one wanted to create a problem with respect to Guilford's collective bargaining agreements by admitting that such work had been permitted. E.g. Nault Dep. at 10. Second, admission of cooperation with or observation of Milford-Bennington performing work on Guilford's line could have been grounds for firing. Leishman Reply V.S. at 4-5.

any such work has always been done in a safe manner. Id. Mr. Leishman is properly qualified in accordance with applicable regulations to perform track maintenance work. Id. at 4. Any such work was always done when Milford-Bennington had authority to be on the line; there was never any situation in which there was any safety risk due to the fact that a Guilford train or work crew might be in the same area at the same time. Id. at 6-7.

Guilford has charged that performance of maintenance by Milford-Bennington violated various rules, but such charges are unsupported. For example, Guilford contends that there was a violation of 49 C.F.R. 214.313(a), which provides that "[e]ach roadway worker is responsible for following the on-track safety rules of the railroad upon which the roadway worker is located." Guilford Opening Statement at 12. Guilford does not allege, nor could it in view of its position that it had no knowledge of Milford-Bennington's work on the line, that its rules were not followed. Furthermore, Guilford argues that NORAC rule 132 required written permission to perform maintenance, but rule 132 by its own terms does not apply. Madigan Reply V.S. at 3.

D. Other Alleged Safety Violations are Unfounded.

Guilford argues that its "concern was also heightened" in October, 2003 when a Milford-Bennington train requested permission to enter the Guilford line with an engineer--Wayne Wheeler--that Guilford contended was not qualified. Guilford Opening Statement at 12-13. As in the case of other alleged instances of "heightened concern", the facts belie the argument.

Mr. Wheeler is a fully licensed locomotive engineer who had passed a Guilford rules exam on March 14, 2003. Leishman Reply V.S. at 9-10. Furthermore, Mr. Wheeler

formerly operated trains over the line as an employee both of Guilford in the 1980s and more recently as an employee of Milford-Bennington. Id. As a result, he was qualified on the physical characteristics of the line. Id. On the day in question, Mr. Wheeler was accompanied by the regular Milford-Bennington engineer, David Raymond, and this fact was communicated to the Guilford dispatcher. Id. Thus, there was no basis for Guilford to deny the Milford-Bennington train access to the line on October 28, 2003 and certainly no grounds to argue that the presence of Mr. Wheeler on the train was any indication of an unsafe practice by Milford-Bennington.

III. Contrary to Its Assertion, Guilford Took Inadequate Steps to Ameliorate the Harm to Granite State and Milford-Bennington.

Raising yet another groundless explanation, Guilford has contended that it took "considerable steps to improve the efficiency of operations" on its line "despite little or no cooperation" from Milford-Bennington or Granite State. Guilford Opening Statement at 13. To the contrary, however, as described below, Guilford consistently refused to restore operations to the pre-June 19, 2003 level, notwithstanding the repeated requests by Milford-Bennington and Granite State, and did not take any other actions that were of real benefit to Milford-Bennington or Granite State.

A. Adjustments of the Operating Hours Were Inadequate.

Guilford continues to assert that it lacked information with respect to the restrictions on the operations of Granite State at Wilton and that, once informed of the restrictions, Guilford voluntarily altered the operating window so that Milford-Bennington could operate between 4 AM and 1 PM. Guilford's position ignores the evidence to the effect that Guilford knew full well for many years that operations at

Wilton was restricted to the hours of 6:30 AM to 6:30 PM.⁹ At the very least, Guilford knew of the restrictions from and after June 20, 2003 because Milford-Bennington repeatedly advised Guilford of the situation. Leishman Reply V.S. at 10-11. Guilford also glosses over the fact that it established both the 12 AM to 8 AM window and the 4 AM to 1 PM window completely unilaterally without any inquiry to Milford-Bennington or Granite State concerning their needs or desires. Opening Statement at 31-32. To be sure, the change from 12 AM-8 AM to 4 AM-1 PM on July 15, 2003 was an improvement, but it was far from adequate, and Guilford knew it. Indeed, by making the change Guilford acknowledged that the 12 AM-8 AM window was wholly unreasonable. Guilford offers no explanation whatsoever as to why it took a month to adjust the operating window.

Guilford complements itself for lifting the restrictions for two days in September, 2003 and chastises Milford-Bennington for not "taking advantage" of the opportunity. Guilford Opening Statement at 4, 14. Guilford fails to note, however, that it did not notify Milford-Bennington for several days that Guilford had completed repairing several broken rails that had stopped service. Leishman Reply V.S. at 11 and Exhibit 2 attached thereto. In addition, 2 of the days of "opportunity" were Saturday and Sunday, which are days on which Granite State is prohibited from operating. Furthermore, Guilford refused the requests of Milford-Bennington on several occasions to extend the right to operate beyond 1 PM so that Milford-Bennington could complete another trip. *Id.* at 12. In each case, the decision not to allow Milford-Bennington to operate for a short period of time

⁹ As described in the Opening Statement at 31 and above at page 7, Guilford knew that no operations could occur at Wilton except between 6:30 AM and 6:30 PM. Documents in Guilford's own files confirm the restricted hours of operation.

after 1 PM was made not by the Guilford dispatcher but by senior Guilford management without any explanation. Id.

B. The Alleged Upgrading of the Line Had Minimal Impact.

Guilford states that "once the 4:00 AM to 1:00 PM operating window was put in place, Guilford also undertook a project to rehabilitate the portion of the Hillsboro Branch over which [Milford-Bennington] operates to permit speeds of up to 10 miles per hour on the line."¹⁰ Guilford Opening Statement at 14. Here, again, however, the facts do not support the rhetoric. Certain rehabilitation work, consisting primarily of the installation of ties, was done in the period of September 1 through September 5, 2003, or approximately a month and a half after the institution of the 4 AM to 1 PM window. Bergeron Dep. at 14. The work covered most of the line between milepost 13.0 and milepost 16.36, but approximately one-half mile at the end of Guilford's ownership was not repaired. Leishman Reply V.S. at 7. Even though the work was completed on September 5, 2003, Guilford did not raise the speed limit on the line from five miles per hour to 10 miles per hour until October 29, 2003, or approximately three and a half months after the 4 AM- 1 PM window was established. Bergeron Dep. at 16. Furthermore, the last half mile of the line has never been rehabilitated, and, even though Guilford chose to raise the speed limit to 10 miles per hour for the entire line, Milford-Bennington continued to operate over the last half mile at five miles per hour for safety reasons. Leishman Reply V.S. at 7.

¹⁰ Guilford offers no explanation why the rehabilitation work was apparently not considered or done prior to July 15, 2003. Perhaps Guilford understood that increasing speeds on the line would not be beneficial to Milford-Bennington if it could operate only between 12 AM and 8 AM.

C. Other Alleged Efforts Were Illusory.

Finally, Guilford contends that it "continued to explore additional alternatives to accommodate" Milford-Bennington and Granite State but received "little or no guidance" as to their actual needs. Guilford Opening Statement at 15. Despite the alleged lack of cooperation from Milford-Bennington or Granite State, Guilford again complements itself for devising the "absolute block" system that was put into effect on November 10, 2003.

These contentions are contrary to the facts in several respects. First, as described above, Milford-Bennington told Guilford early and often what the problem was and how it could be fixed. Second, Guilford never inquired of Milford-Bennington or Granite State about their needs or preferences. Leishman Reply V.S. at 11. Rather, Guilford always acted unilaterally. Finally, the absolute block system that Guilford touts as the ultimate solution is simply the unlimited hours of operation regime that existed prior to June 19, 2003 with the new condition that only one train could be between milepost 13.0 and milepost 16.36 at the same time. As described in the Opening Statement, such a restriction is unnecessary given the Guilford dispatching system and the applicable operating rules and serves only to limit operations, rather than to enhance operations or make them more efficient.

IV. Granite State and Milford-Bennington Have Properly Mitigated Damages.

The lengths to which Granite State and Milford-Bennington went to mitigate their damages are spelled out in detail in the Opening Statement. As demonstrated there and below, and contrary to Guilford's assertion that Granite State and Milford-Bennington have allegedly not "put forth much of an effort to mitigate their alleged damages"

(Guilford Opening Statement at 15), they took all appropriate and reasonable actions to limit the amount of their damages.¹¹

Notwithstanding Guilford's gratuitous suggestion, it was not possible to operate more trains than Milford-Bennington actually operated during the relevant period of time. No matter how Milford-Bennington attempted to adjust its schedule, restricting operations to the hours of 12 AM to 8 AM and then to 4 AM to 1 PM precluded Milford-Bennington from operating more trains than it actually did. Opening Statement at 32-33; Leishman Reply V.S. at 10-15.

Guilford has suggested that because there were no permitting restrictions limiting operations at the Milford processing plant additional trains could have been operated. While there are no permit restrictions as such, Granite State and its neighbors at the Milford location have, as a practical matter, reached an accommodation over the years by which Granite State has limited its hours of operation in order accommodate the desires of the town and adjacent landowners. MacLellan V.S. at 6-7; MacLellan Reply V.S. at 8. Granite State has generally tried to limit operations at Milford to daylight hours, and this practice has been appreciated for 30 years by Granite State's neighbors. *Id.* As a practical matter, therefore, it would not have been feasible to unload trains at Milford at night. *Id.*¹²

Guilford notes that the speed limit on the line was increased to 10 miles per hour on October 29, 2003 and that the 4 AM to 1 PM restriction was lifted on November 10,

¹¹ First and foremost, in an effort not only to mitigate damages but to eliminate losses completely, Milford-Bennington and Granite State sought an emergency service order pursuant to 49 U.S.C. 11123. Had the Board granted the request, there would be no damages to mitigate.

¹² Guilford notes that permit restrictions, such as those in effect at Wilton, are "generally preempted as applied to railroads." Of course, this ignores the fact that both the railroad and Granite State had to be free to operate in order to move stone from Wilton.

2003 but that Milford-Bennington made three roundtrips on only two days after November 10, 2003. As shown below, however, Guilford's actions were a case of "too little, too late". By November of any year, the days have become shorter and the temperatures have become colder, thereby naturally inhibiting the ability of Granite State and Milford-Bennington to operate three or more trains a day. Leishman Reply V.S. at 13. In fact, Milford-Bennington moved 216 cars in the period November 10-November 30, 2003, while the average number of cars that Milford-Bennington moved in the period November 9-November 30 in the 4 prior years was 218. *Id.* at 14 and Exhibit 3 attached thereto. The neighboring Pike Industries quarry closed for the season well before the end of November. Leishman Reply V.S. at 14. If Guilford had really wanted to be helpful, it would have raised the speed limit on the line and abolished the time restrictions in June or July when Milford-Bennington and Granite State could have taken full advantage of the opportunity.

Guilford has contended that its actions could have been overcome and that stone shipments could have been increased if Granite State had purchased stone from Pike Industries or used trucks. For the reasons outlined above, truck service between Wilton and Milford was not available. Purchasing stone from Pike Industries would have cost approximately \$1-2 per ton more than internally supplied stone, and Granite State has attempted to minimize damages by avoiding such purchases. MacLellan V.S. at 9. Following Guilford's suggestion would have increased--rather than mitigated--the damages.

Finally, Guilford cleverly notes that while the trackage rights agreement limits the number of cars per train it does not limit the number of trains that can be operated.

Consequently, in Guilford's view, Milford-Bennington could have acquired additional cars and locomotives and operated more trains. Guilford does not explain how the additional expense of acquiring cars and locomotives could have been met or justified, particularly given the uncertainty of operations on the line due to Guilford's actions. Furthermore, Guilford does not address the question--probably because there is no good answer--how additional trains could be accommodated on the single track line that has no adequate facilities to accommodate two or more trains shuttling between Wilton and Milford. Leishman Reply V.S. at 12-13.

The mitigation actions taken by Granite State and Milford-Bennington are more than adequate based on the cases cited by Guilford. Louisiana Railcar, Inc. v. Missouri Pacific Railroad Co., 7 I.C.C. 2d 30 (1990), establishes that a party suffering loss must do what is reasonable within limits to mitigate the loss; "the injured party is not required to make heroic efforts to prove its case for damages." Louisiana Railcar at 35. Moreover, the burden is on the party inflicting the harm to show that the injured party did not mitigate damages.

In Louisiana Railcar, Missouri Pacific assured the shipper that embargoed rail service would be restored, and, on the basis of those assurances, the shipper curtailed but did not completely close down its operations. The Commission found that the actions of the shipper constituted reasonable mitigation. In this case, by analogy, Guilford claimed from and after June 19, 2003 that Milford-Bennington should have been able to operate as many trains as usual. Guilford argues that it has made accommodations to enable Milford-Bennington to reach pre-June 19, 2003 levels of service. In response, Milford-Bennington and Granite State did their best to maximize the number of trains.

Notwithstanding their efforts, they fell short of the typical levels of prior years. Under Louisiana Railcar, therefore, Guilford has failed to meet its burden to show that there was insufficient mitigation.

CONCLUSION

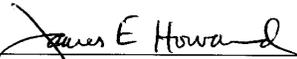
On the basis of the facts and arguments set forth in the Opening Statement and this Reply Statement, Granite State and Milford-Bennington have demonstrated that they are entitled to a determination by the Board that Guilford acted unreasonably and illegally when it arbitrarily curtailed Milford-Bennington's ability to provide service to Granite State. Guilford's actions were not reasonable responses to any legitimate concern for safety. Rather, such actions were designed to punish and harm Milford-Bennington and Granite State, and Guilford's after-the-fact attempts to rationalize or justify its actions should be rejected. In addition to a determination that Guilford acted unreasonably and illegally, damages, including interest, should be awarded to Granite State and Milford-

Bennington to compensate them for the harm caused by Guilford's actions.¹³

Respectfully submitted,

GRANITE STATE CONCRETE CO., INC.
and MILFORD-BENNINGTON RAILROAD
COMPANY, INC.

By their attorney



James E. Howard
One Thompson Square, Suite 201
Charlestown, Massachusetts 02129
Telephone: 617-886-9322
Facsimile: 617-886-9324
e-mail: jehoward@worldnet.att.net

Dated: February 6, 2004

¹³ The amount and calculation of damages are set out in the Opening Statement at pages 39-43. The method of assessing damages is a matter within the Board's discretion, and the Board is empowered to award interest. Bangor & Aroostook Railroad Company v. Interstate Commerce Commission, 574 F.2d 1096 (1st Cir. 1978); 49 C.F.R. 1114.

Leishman

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. NOR 42083

**GRANITE STATE CONCRETE CO., INC. and
MILFORD-BENNINGTON RAILROAD CO., INC.**

vs.

**BOSTON AND MAINE CORPORATION and
SPRINGFIELD TERMINAL RAILWAY COMPANY**

REPLY VERIFIED STATEMENT OF PETER R. LEISHMAN

Peter R. Leishman states as follows:

Guilford states that they were concerned over the storage of "vintage cars" on the Milford-Bennington implying that the age or condition of the cars required special precautions. The two RDC or so called Budd Cars that were purchased by the Wilton Scenic Railroad were cars that had been built in the mid-1950-s and that had been fully overhauled in the mid 1980-s. Until their purchase by Wilton Scenic they were operated in a regularly scheduled intercity passenger service by BC Rail at speeds at least 60 MPH. They were in full compliance with all Canadian safety regulations for intercity passenger equipment and, with the exception of small differences in glazing standards, Canadian regulations are just as rigorous as US standards. Significantly, the brakes on

the cars met all applicable regulations. These two cars are hardly “vintage cars” that required special attention.

Guilford suggests that in December, 2002 they woke up to the fact that the Milford-Bennington operated over a section of railroad with a significant grade that allegedly posed a “heightened threat” that cars would break free and enter Guilford’s line.

Guilford seems to forget that they owned and operated over this same line for many many years. Sydney Culliford, Guilford’s Vice President of Operations, has been with the carrier for over 45 years. For the past 11 years Guilford was fully aware that Milford-Bennington operated over a line with a grade of nearly 2 % and they were fully aware that Milford-Bennington has done it safely. Guilford’s own trains have operated over the Milford-Bennington since 1999 and their crews were qualified on the physical characteristics of the Milford-Bennington line, including its grades. To suggest that they all of a sudden had this revelation about grades is silly. Guilford also asserts that the presence of the passenger cars caused them to “look more closely at the geographic layout.” To the best of my knowledge, no one from Guilford studied the Milford-Bennington line when the passenger cars arrived in November, 2002 and no one bothered to look at the passenger cars to see that they had their brakes applied and were prevented from moving by skate devices. Finally, had Guilford made the effort to look move closely at the Milford-Bennington’s operation they would have discovered that all Milford-Bennington sidings were well protected with derail devices that were applied in accordance with NORAC rules and good operating practices to make sure the rail cars, passenger or freight, could not roll out onto the main line.

Guilford also knew that the derail devices that they provided and that were installed on the Milford-Bennington were designed to secure cars that did not move in excess of 4 miles per hour. In other words they were not designed and would have been useless to secure any car that traveled any significant distance over the Milford-Bennington down a 2% grade. That is why Milford-Bennington took very specific steps to place derails at the appropriate location on side tracks at the top of the grade so that a car could never get onto the main line.

Milford-Bennington had a job briefing to inform its crews about the existence of the derail device placed near milepost 16.36. Milford-Bennington made it clear to Milford-Bennington crews that an agreement had been made with the Federal Railroad Administration Regional Office of Safety to close the derail at milepost 16.36 on those days that the passenger equipment was operating and on days when the equipment would be positioned in the station adjacent to the derail for loading. Finally the derail was placed in a location that is under yard limit rules. Under yard limits rail crews must be prepared to stop within ½ the sight limits of derail devices. Often times Guilford crews also used this section for switching cars in the Wilton Yard after notifying Milford-Bennington that they would be using the rail line.

Guilford alleges that the derail placed at milepost 16.36 was placed at a fouling point as defined by NORAC rules. They are wrong. NORAC rules require that a fouling point be designated by yellow paint on the rail. At no time has there been any yellow paint placed

on Milford-Bennington track at or near milepost 16.36 because it has never been designated as a fouling point. Further, there is no point or location on Guilford track adjacent to or near milepost 16.36 that on or before June 20, 2003 that was marked with yellow paint designating the point as a fouling point.

Guilford complains that I maintained Guilford track without proper qualifications or approvals. The facts are just the opposite. I am fully qualified under 49 CFR 213.7 to maintain track and do so regularly on the Milford-Bennington. I am qualified by the Federal Railroad Administration to maintain track and have demonstrated my qualifications on numerous occasions to both Federal and State authorities. Finally I am also fully qualified to see a defect in Guilford track and know that such a defect is not safe to operate a train over.

No Guilford employee who was deposed in this case testified that on any occasion they observed me maintaining track even though they all expressed detailed knowledge of their track and the work that is performed on it. Guilford employees had no choice. If they had testified that over the years they saw me on occasion doing maintenance work or worked cooperatively with me they could easily have lost their job.

Guilford knew that on occasion I performed remedial repairs on their track. Guilford staff testified that on occasion I provided them with material. They are correct. In fact on numerous occasions not only did I provide Guilford crews with material essential to fix track defects, but I also worked with them when I delivered material to make the

repairs to Guilford track. The Guilford employees know this but also knew that they could not testify to these events without suffering severe retribution. I gave Guilford crews materials because they were unable to get it from Guilford and I wanted to insure that the track Milford-Bennington operated over was safe. The fact is that, at the local level, Guilford crews and I worked cooperatively over the course of many years to keep the railroad safe.

Guilford's AVP Roger Bergeron testified that John Steiniger, son of Guilford's President, observed me working on Guilford track several years ago and took no action. Bergeron Deposition at 65. In fact John Steiniger saw me working on the track several times and he never told me not to do so. Mr. Bergeron testified that he was not personally aware that I had worked on Guilford track; his own correspondence contradicts his testimony. In a letter dated August, 26, 1994, Roger Bergeron wrote to me acknowledging that he knew that I had been performing track repairs on Guilford's line. See Exhibit 1 attached.. In his letter Mr. Bergeron told me not to do any work on Guilford's line in the future, but I understood the letter to be a proforma exercise intended to enable Guilford to say to its unions that they had talked to Milford-Bennington about performing track work. The fact that for many years after receiving the letter Guilford employees worked with me to fix track defects confirmed my belief. On those occasions that I performed remedial repairs, I did the repairs to correct defects that were so serious that they could jeopardize the safety of rail operations.

After August 26, 1994 other Guilford personnel in addition to John Steiniger, saw me doing remedial work, and no one ever complained or told me not to continue with such work. In fact John Steiniger on numerous occasions in 2003 prior to June 20 and in 2002 saw me working on the track and no one complained or told me not to continue with such work. The understanding that I had with the Guilford personnel was that I could continue to repair the defects in order to operate safely and without the need to stop the train, call Guilford, and wait until Guilford could respond to fix the problem. Everyone understood Guilford did not have the resources to respond quickly and that the most practical solution was for Milford-Bennington to make remedial safety repairs when it had possession of the track.

Guilford's Chief Executive Officer, David Fink, knew I worked on his track. On one occasion in 1996, while we were in Superior Court in Nashua, New Hampshire Mr. Fink walked up to me and asked if I was working on his track. I replied I was. He looked at me and said something like, "Well then be careful." I was.

As described in my opening verified statement, Guilford shut down our operations for 6 weeks in 1992 after I reported certain track defects that Guilford was required by the trackage rights agreement to repair. After that incident, I did not take the risk of another shutdown. Instead, on occasion, when confronted with a clearly fixable condition that was clearly visible from the train I have repaired a track defect that endangered the operation of both Milford-Bennington trains as well as Guilford trains. It was always done when Milford-Bennington had been granted control of the track by the dispatcher

and was operating within yard limits. Work was always done in full compliance with road worker safety regulations. After suffering from several track related derailments in the early 1990's, Milford-Bennington has had none since. My actions were always pro safety and were done because Guilford either couldn't or wouldn't do their job.

The conditions on Guilford's track have been so deplorable for over five years that operations have been restricted to 5 mph. Guilford claims to have fully upgraded their track with work that Guilford claims was completed in early September, 2003. Guilford only upgraded about ¾ of the track between milepost 16.36 and milepost 13.5. Nearly ½ mile was never touched, was slow ordered to 5 mph for some five years and was then reclassified as 10 mph track, along with the rest of the line, on October 29, 2003 even though no work was ever done last year on this ½ mile of track. The ties that should have been installed are still lying along the right of way. Milford-Bennington refuses to operate over his section at 10 mph because it is not safe for 10 mph regardless of what Guilford says.

When asked if it's true that it's more difficult to meet FRA standards for Class 1 track than for excepted track, Guilford s AVP Engineering Roger Bergeron testified that it is not true. He also testified that under class 1 track standards a train must be walked over a rail that has a one inch head and web separation but under excepted track conditions a train can operate over the same broken rail without a person physically watching every wheel movement. Bergeron Deposition at 26-27. His testimony is at best contradictory. It also reflects the fact that Guilford knew well that by allowing their track to fall below

minimum class 1 standards they could operate under a more relaxed standard of safety. Except 100 feet from public grade crossings or on bridges there is no requirement under excepted track conditions regarding tie, rail or joint conditions. There are no standards requiring good tie conditions under joints. Under Class 1 conditions a railroad must insure that there are at least five good ties under a 39 foot section of rail and they must insure that at least one tie at a joint is a good tie. These two conditions are exceedingly important to maintain the gage of the track so that it does not become so wide that that a car simply falls off the track and to insure the integrity of a joint where two rails are joined together. Excepted track standards are less rigorous than Class 1 requirements and therefore, in my opinion, not as safe.

For years Guilford failed to maintain milepost 13 to 16.36 to a minimum class 1 standard of 10 miles per hour. Instead they allowed the track to deteriorate and hid behind an excepted track standard that assured them that FRA could not find violations for unsafe track conditions. For example if a track is designated as Class 1 FRA regulations require that there is at least one good tie under a joint and 5 good ties in 39 feet of rail. If an inspector inspected the Class 1 designated track and found it did not meet the above standard, the inspector could write a violation notice and Guilford would be subject to substantial fines. Under excepted track conditions the inspector cannot write a violation because there is no standard. The same is true for certain rail defects. Under Class 1 conditions certain types of rail defects require that a train be physically watched while each wheel passes over the defects while under excepted track conditions there is no requirement. Thus if the Guilford track was classified as Class 1 and Guilford failed to

“walk” the train over the defect they could be subject to a violation and a fine. Under excepted track conditions they would not be. While Guilford may be comfortable with that standard and may be comfortable lowering speeds to 5 mph, Milford-Bennington is not. Guilford’s track inspection reports are full of entries that clearly show track inspectors were aware of the many defects in the track. They simply were not given the resources to fix them

Guilford is also wrong when they state that engineer Wayne Wheeler was not qualified to operate over Guilford track. Wayne Wheeler had passed a Guilford NORAC rules exam on March 14, 2003. Guilford is correct that passing NORAC rules is only one step in the qualification process and that an engineer must qualify on the physical characteristics of a line of railroad that he will run over. Wayne Wheeler is a fully licensed engineer. He operated Milford-Bennington trains over the Guilford line between milepost 16.36 and MP 13 during the past several years and was an engineer for Guilford in the 1980’s on the Hillsborough branch. Also he was a signal maintainer on the Hillsborough branch until his retirement from Guilford in 1999. The day that Guilford refused to let him operate over the trackage rights line, Mr. Wheeler was accompanied by licensed engineer David Raymond who is fully qualified on the physical characteristics of the rail line. Mr. Raymond was fully qualified on the physical characteristics of the line and the Guilford dispatcher was fully aware that engineer Raymond was with Mr. Wheeler on the train.

Just as Guilford is responsible for qualifying their crews that operate over the Milford-Bennington line and most assuredly the many miles of MBTA track that Guilford runs

over, Milford-Bennington is responsible for qualifying its crews that operate over the trackage rights line on the physical characteristics of the line. When Milford-Bennington commenced operations over 11 years ago a Guilford supervisor rode with me to make sure I was qualified on the physical characteristics of the line. Since then Milford-Bennington has always qualified its own crews and at no time has Guilford found fault with or qualifications or questioned our procedures. Mr. Wheeler had been fully qualified on the physical characteristics of the line between milepost 13 and milepost 16.36. He had been fully qualified on the physical characteristics while working for the Milford-Bennington. Those qualifications didn't somehow lapse. Mr. Wheeler was fully qualified on the physical characteristics of the line and fully qualified to operate on the day that Guilford rejected him. Milford-Bennington acted safely and within the rules when it sought permission to enter Guilford track with Mr. Wheeler as the engineer. Even though Mr. Wheeler was already qualified on the physical characteristics, he was accompanied by a qualified employee on the locomotive whose qualifications were more current and who was there to assure that operations were performed safely. Guilford disqualified Mr. Wheeler, not because he was not qualified, but because Guilford was working harder to harass the Milford-Bennington than they were to work cooperatively to operate a safe rail system.

I believe that Guilford knew before June 19, 2003 that Milford-Bennington could only serve its customer Granite State at Wilton between the hours of 6:30am and 6:30 pm. On June 20, 2003 when they shut Milford-Bennington down instituting an operating window between midnight and 8 AM, I told Guilford managers Irwin Towle, Andy Zompa, John

Steiniger, Dick Miller and others on different occasions including June 20, 2003 when they were installing the derail device at milepost 16.36 that Milford-Bennington could not serve its customer during the operating window they instituted. It took Guilford nearly a month to modify the window permitting operations between 4 AM and 1PM. The new window was less restrictive but still one that imposed severe and totally unnecessary hardship on the Milford-Bennington. I made it clear to Irwin Towle, Andy Zompa, Dick Miler and others that the 4 AM to 1 PM would not allow us to provide the service that Granite State needed. Guilford knew what they were doing and that we believed that the 4 AM to 1PM window was inadequate. On each occasion when I told Guilford personnel that we could not operate with the windows they had imposed it was at my initiative. No one from Guilford ever called to ask what we needed or wanted.

Guilford asserts that in September, 2003 they allowed Milford-Bennington to operate with unrestricted hours for two days. A Guilford employee did call me and from the conversation it was my belief that Guilford had removed the operating restrictions forever, not for two days. I wrote a letter to confirm my belief. Exhibit 2 attached. On the day the restrictions were removed I had discovered not one but three broken rails. Guilford addressed one of them. I did not push the point as I believed at the time that we were returning to normal operations and it was therefore not necessary to require Guilford to work extra hours to repair the additional broken rails if Milford-Bennington was returning to normal operations. It was not until several days later Guilford informed me that the track had been placed back in service and they had allowed me only two days of unrestricted hours.

Guilford did nothing to help us operate under their imposed restrictions. On several occasions Milford-Bennington approached milepost 16.36 with a loaded train at about 12:30 PM. The Milford-Bennington crew sought a small extension of time to operate over Guilford track and approval from Guilford dispatchers to enter Guilford track with the knowledge that Milford-Bennington could not reach Granite State's processing plant by the 1:00 PM deadline. In each case the extension sought was approximately 30 minutes or less. In each case no other train would have been operating in the territory. In each case the dispatcher informed Milford-Bennington that he did not have authority to grant an extension and that he would have to ask a higher authority. In each case, after a few minutes wait while the dispatcher spoke to his superiors, Milford-Bennington's request was denied. It was not denied by the dispatcher because of some legitimate operating issue, it was denied by a higher official. After several tries it was clear that no exceptions would be made, even very small exceptions that could have enabled Milford-Bennington to deliver a second train. Guilford did not take any actions to help Milford-Bennington mitigate the impact of the operating restrictions on Milford-Bennington. On those occasions when we asked for a little extra time so that we could mitigate the impact of the operating restrictions, Guilford's managers denied our requests making the damages more severe.

Guilford alleges that Milford-Bennington could have acquired more locomotives and cars in order to run more trains and mitigate damages. Their assertion is absurd. One doesn't run down to Wal-Mart and buy or lease rail cars and locomotives. Even if more cars

could have been acquired the additional expense would have been devastating. Neither the quarry in Wilton nor the processing plant in Milford can accommodate more than ten cars at a time. Both facilities are served by a single track rail line. There are no facilities to switch or hold extra cars or to stage cars for loading or unloading. Adding additional cars, even if it were possible and it is not, would require adding locomotives and crews adding more expense while adding minimal extra revenue.

When Milford-Bennington signed the trackage rights agreement with Guilford it agreed to the operation that Guilford wanted, a small ten car train that shuttled stone between a quarry and processing plant. Guilford's suggestion that somehow the operation would be improved by limiting its hours of operation and increasing its fleet of locomotives, cars and crews is wrong.

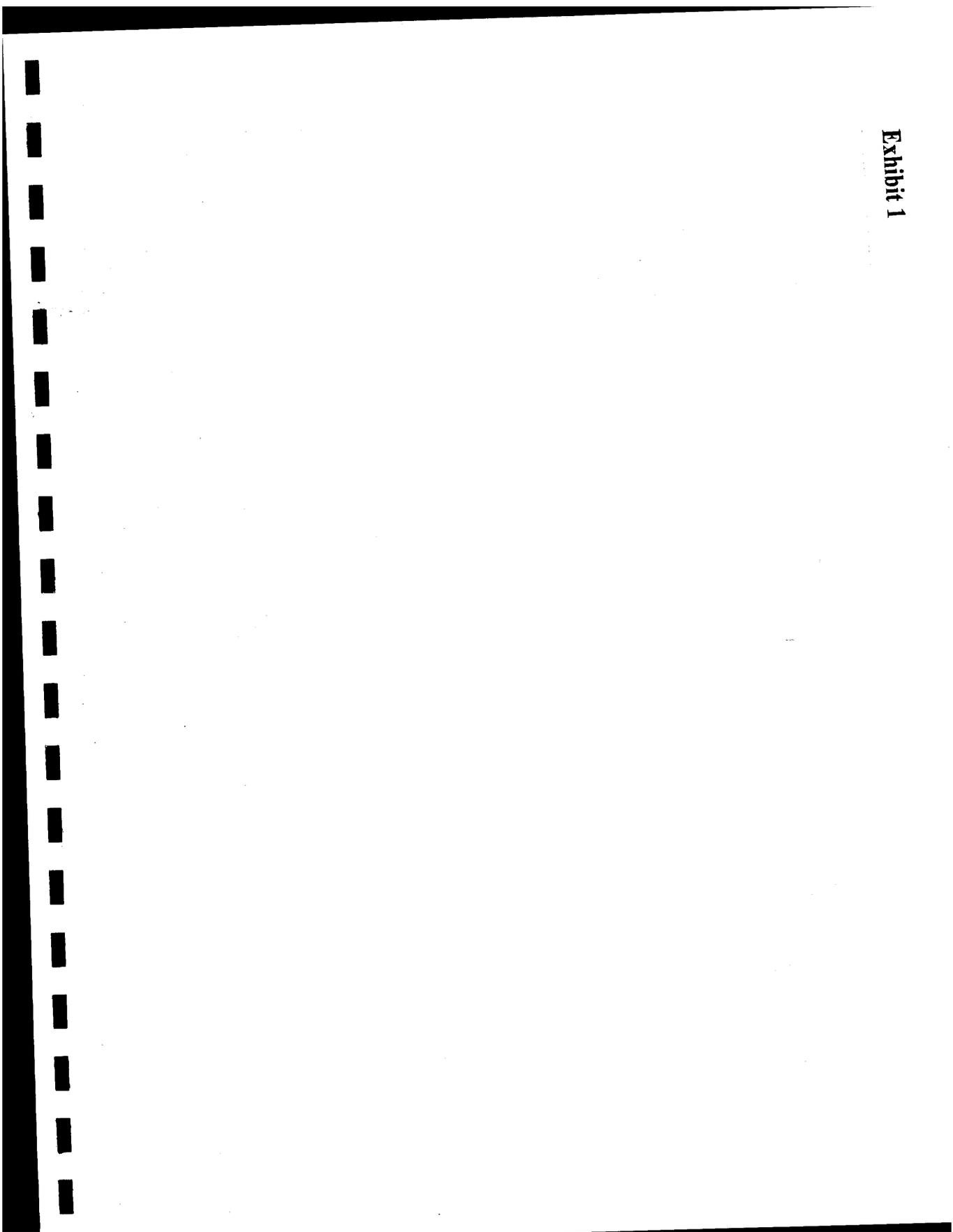
Guilford alleges that Milford-Bennington did nothing to mitigate damages once the operating window was expanded on November 9, 2003. They are wrong. Milford-Bennington operates during daylight hours because both the quarry where stone is loaded and the processing plant where stone is unloaded must operate during daylight hours. As anyone knows days in November are considerably shorter and considerably colder than during the summer months. The lack of daylight and the cold make operations considerably more difficult and slower. The cold freezes water used in the washing process at the quarry and freezes conveyor systems used to load stone. Everything takes more time.

There are two quarries in Wilton, one owned by Granite State and another within a mile of the Granite State facility owned by Pike Industries. In 2003 the Pike Industries quarry closed for the season on November 19 because it was simply too cold to continue. Granite State stayed open until the very end of November to try to maximize stone production even though operations were exceedingly difficult. Even with the cold conditions Milford-Bennington was able to move 216 cars of stone from November 9 to November 30 2003. For the four years prior to 2003 Milford-Bennington averaged 218 cars for the period November 9 through November 30. Exhibit 3 attached. Some years when weather conditions were warmer production was higher and some years it was lower. This year weather was particularly cold but we were still able to produce 216 loads before having to shut down for the winter.

Guilford also alleges that Granite State could have trucked stone after they forced Milford-Bennington to curtail service. They are wrong. I actively participated in hearings before the Planning Board in Wilton both in 1989 and also during the 2001 hearings. There was no doubt that the goal of the Planning Board was to eliminate even the small amount of trucking of crushed base byproducts. They did not and would not support additional trucking from the Granite State facility. Granite State's permit does include a provision that enables Granite State to seek Planning Board approval to truck crushed stone in the event rail service is not available. The provision was included in the permit to respond to events like acts of God that could force an interruption of rail service, not to accommodate an intentional act by Guilford. Even if Granite State had

decided to seek Planning Board approval to truck due to Guilford's actions, I have no doubt that the Planning Board would have denied their request.

Exhibit 1





BOSTON & MAINE CORPORATION
MAINE CENTRAL RAILROAD COMPANY
SPRINGFIELD TERMINAL RAILWAY COMPANY

IRON HORSE PARK
NO. BILLERICA, MASS. 01802

August 26, 1994

Mr. Peter Leishman
Milford Bennington RR Co.
62 Elm Street
Milford, NH 03055

RE: Track Repairs - Various Locations
Hillsboro Branch

Dear Mr. Leishman:

Confirming our telephone conversation of August 24, 1994 regarding track repairs made by the Milford & Bennington Railroad on the Hillsboro Branch. I have spoken with Mr. Stephen Larkin - General Foreman Track - Nashua and Mr. Edward Cote, Track Inspection Foreman - Manchester. Both men have assured me that at no time did they give you verbal permission to perform the track repairs. Obviously, at one point, there was a misconception.

It is my understanding that your agreement on the Hillsboro Branch is for operation purposes only. The making of such repairs exposed the B&M/ST to liability and violates even current FRA Track Safety Standards.

Please be advise that no employees of the Milford & Bennington Railroad are authorized to make any inspections nor take any corrective actions on the section of the Hillsboro Branch which you operated on.

If you have any questions, or need any additional information, please do not hesitate to call me at (508) 682-4735.

Very truly yours,


Roger D. Bergeron
Engineer of Production
and Construction

Exhibit 2

Milford-Bonnington Railroad Company, Inc.

*62 Elm Street
Milford, NH 03055
Tel. (603) 673-7181*

September 22, 2003

Warren Bostwick, General Manager
Springfield Terminal Railway
Iron Horse Park
No. Billerica, MA 01862

Re: Your Letter of September 22, 2003

Dear Warren:

We acknowledge, with strenuous objection, your letter reactivating the unjustified and arbitrary restrictions that were imposed on our use of Guilford's track pursuant to the trackage rights agreement of 1992. We reiterate our position that these restrictions are completely inconsistent with the agreement, constitute a blatant and unwarranted breach of the agreement and constitute an irresponsible breach of the public trust.

Following the receipt of the recent STB Order and our conversation of last Thursday, I was encouraged that your organization and superiors had finally committed to a good faith effort to resolve this matter. Your commitment to me in this conversation was an unambiguous and unconditional confirmation that the restrictions, (which we consider to be arbitrary and unjustified), had been removed. This was clear in our first conversation of Thursday and the complete inconsistency with that conversation and you current position, requires us to chronicle the recent events:

1. At approximately 800 hrs, on September 18, 2003, we telephoned the dispatcher at Guilford to advise him of a broken rail, following which the track was taken out of service until a track supervisor arrived on the scene to confirm the condition;
2. More than an hour passed so that our engineer was sent home since there was no clear indication of when this repair would take place.
3. At approximately 1000 hrs I responded to a page from yourself, and was informed that the track supervisor was willing to 'walk' our train over the defective rail. We were unable to implement this, however, because I was unable to recall my crew;
4. At that point, you will recall, I became involved in a multi-party conference call involving yourself, Larry Ferguson, and John Steiniger, which conversation was characterized by an abundance of good will, in which I was assured that your

Mr. Warren Bostwick

September 23, 2003

Page 2

objective was to 'work with us', 'get us up and operating', and 'get things back to normal';

5. The conversation made it eminently clear that not only would the restrictions be lifted, but that this action heralded a new and hopeful sea change in our relationship which would allow us to serve our customer with our complete capacity and your unconditional cooperation;
6. I was so encouraged by this change in events that I promptly contacted both our attorneys and Granite State to advise of this development which, in turn, resulted in Granite State reactivating their Milford and Wilton operations to full scale, with corresponding levels of commitment from our operation as well.
7. However, we were not in a position to take advantage of this new situation until we knew that the repairs were completed;
8. At no point have we ever received any official notification from Guilford that the repairs were completed and, as a consequence waited, patiently and courteously, for advice to that effect;
9. Today, Monday, September 22, 2003, we called the dispatcher to determine the state of the repairs, (which we had observed on Sunday to be complete), and to request permission to run, only to be told that the dispatcher had to call in to you for instructions, (a peculiar advice since the dispatcher would have logically been fully aware of the state of repairs), at which time I was directed to speak to you;
10. At that time you informed me, to my complete shock, that the revocation of the restrictions that was so graciously delivered on Thursday, had been revoked and that, once again, we were being subjected to the arbitrary, unjustifiable, and illegal restriction to preclude us from running beyond 1300 hrs;
11. You attempted to characterize my understanding of the earlier revocation as a 'misunderstanding' and contended that the statement, (which no one denies), was intended to deliver only a 'temporary' relief from the restrictions, a contrivance that is unworthy of you, (and, I suspect, the product of the mind of one of your superiors), and which, moreover, is incompatible with the fact that we have now learned from your own attorney's letter, that the repairs had been completed at 1600 hrs on Thursday and we were never advised of the same so that we could have, conceivably, taken some advantage of this 'temporary' window of opportunity;

At this time and in light of the foregoing events, we want to point out that throughout

Mr. Warren Bostwick

September 23, 2003

Page 3

these contentious proceedings, in which Guilford has wasted no amount of imagination creating unjustifiable and unwarranted obstacles to the reasonable delivery of service to our customers, we have continued to allow Guilford full and unrestricted access over our trackage to their customer, Pike Industries, which Mr. Culliford has affirmed constitutes an important source of ballast stone for Guilford's maintenance activities of their other operations. This brings me to the need to respond to your current letter which strains the bonds of incredulity. In that letter you imply that the easing of restrictions was intended by Guilford for Friday, (and part of Thursday) only, and that we 'elected not take advantage of these options'. Apart from the fact that Guilford's imposition of any of these conditions is a gross and unjustified breach of contract and the easing of those restrictions for any period is our legal right, you and the others with whom we spoke on that day could not have so obviously misstated a matter of such critical importance to us all. There was no misunderstanding regarding this. Your current version of this amounts to a categorical and direct change in position of such a serious nature as to constitute harassment and, moreover, makes no sense when the rest of the letter is read.

In the rest of the letter, you imply that it was our responsibility to have told you that we did not want to 'take advantage of these options' to avoid your having canceled your operation on that line that day. In the first place, this would have been the first time in the 11 years that we have operated that you would ever have had to cancel your operation to accommodate ours. More to the point, however, it would also have been the first time in 11 years that we would have had to provide you with advice that we did not choose to run on your trackage on a particular day. By contrast, any time that we had to close down our trackage to effect repairs or the like, we provided you with immediate notice to insure that it would not interfere with any possible service to Pike. When the repairs were concluded, by the way, we promptly notified you of that fact so that you would have no unnecessary interruption in service.

The reason we did not elect to 'take advantage' of the Friday operation was because you did not inform us that the repairs were concluded. We learned, (quite by accident), that the repairs were concluded when we saw the repairs, (on Sunday), with our own eyes. I never received any official notification of the same and only learned that you had them completed late Thursday when I received, from our lawyer, a copy of your lawyer's letter to our lawyer who represented therein that the repairs were concluded late Thursday.

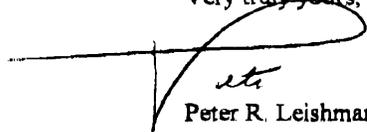
In view of the foregoing, I must conclude that the inference in your letter that we owed you the courtesy of a call on Friday is an ineffective attempt to retroactively withdraw and ignore the clear and unambiguous relaxation of restrictions that were communicated to me earlier. Clearly, you can lift those restrictions and reimpose them at your pleasure, (but also at your risk), until we obtain relief from the STB and/or the courts. However, you have always appeared to me to be an honorable individual and I must sincerely express my disappointment at the evident change in your company's position that you were so clearly required to communicate to us now.

As you must know, the continued imposition of these unjustifiable and arbitrary

Mr. Warren Bostwick
September 23, 2003
Page 4

restrictions continues to deliver substantial monetary damages to my customer, their and our employees and families, and our operation. Further, it deprives the citizens of this community of adequate and responsible rail service. As you and your company know, we will continue to hold Guilford accountable for any and all losses occasioned by their actions.

Very truly yours,



Peter R. Leishman

PRL:ps

cc: David L. Nixon, Esquire
John G. MacLellan, III, Esq.
James Howard, Esq.
F. Colin Pease

9/22/2003 14:45 FAX 9786631237

0001

September 22, 2003

Mr. Peter R. Leishman
President
Milford-Bennington Railroad Company, Inc.
62 Elm Street
Milford, New Hampshire 03055

Dear Mr. Leishman:

On September 18, 2003 I had conversation with you regarding the operation of Milford-Bennington trains on the Springfield Terminal track. Due to a broken rail on the trackage, I indicated to you our willingness to walk your train over the broken rail until it was repaired and to make adjustments to our operating window to allow Milford-Bennington the necessary time to operate past 1300 hours on Thursday. I also offered you the option of operating after the 1300 cutoff on Friday, September 19, 2003, although you apparently elected not to take advantage of these options.

The broken rail was repaired on Thursday, September 18, 2003. As of 1500 hours on Friday, September 19, 2003 there has been no request by the Milford-Bennington for permission to occupy the trackage. The courtesy of a telephone call would have been appreciated if for some reason the Milford-Bennington has had problems that precluded the operation today particularly since we cancelled the Guilford Rail System local service early to accommodate the MBRC.

Sincerely



W. J. Bostwick
General Manager
Transportation Department

Exhibit 3



Table 2
Table Comparing CAR LOADING PER TIME PERIOD - 1999 to 2003 - (Inclusive) - NOVEMBER ONLY

NOVEMBER	2003	2002	2001	2000	1999	Average	Comparison Year - 2003	Difference
11/1 - 11/9 (*)	54	144	88	90	126	112	54	
11/10 - 11/30	216	225	261	234	159	218	216	

(*) The time period from 11/1 to 11/9 reflects the portion of the month of November in 2003 when the operational time limit was in effect. In all applicable years we continued to run into November with differing results, depending on the weather. However, as noted above, in November of 2003, our productivity increased significantly, (returning to nearly normal), once the illegal and unjustifiable restrictions were lifted.

Table 3
Table Depicting NUMBER OF DAYS ON WHICH MBRX WAS ABLE TO COMPLETE THREE (3) OR MORE TRAINS PER DAY - 1999 to 2003 - (Inclusive) - NOVEMBER ONLY

NOVEMBER	2003	2002	2001	2000	1999
11/1 - 11/9 (*)	0	4	2	1	3 (**)
11/10 - 11/30	2	2	4	2	3

(*) The time period from 11/1 to 11/9 reflects the portion of the month of November in 2003 when the operational time limit was in effect. In all applicable years we continued to run into November with differing results, depending on the weather. However, as noted above, in November of 2003, our productivity increased significantly, (returning to nearly normal), once the illegal and unjustifiable restrictions were lifted.

(**) One of these three trip days actually had four trips.

MacLellan

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. NOR 42083

**GRANITE STATE CONCRETE CO., INC. and
MILFORD-BENNINGTON RAILROAD CO., INC.**

vs.

**BOSTON AND MAINE CORPORATION and
SPRINGFIELD TERMINAL RAILWAY COMPANY**

REPLY VERIFIED STATEMENT OF JOHN G. MACLELLAN, III

John G. MacLellan, III states as follows:

The primary purpose of this statement is to address the argument by Guilford to the effect that Granite State had the ability to use trucks to move stone from Wilton to Milford after Guilford's actions as of June 19, 2003 disrupted rail service. As described below, moving stone by truck to Milford was never an option.

Granite State acquired the excavation site in Wilton in 1973, and it moved stone from Wilton to the processing facility in Milford by trucks. In 1989, the state of New Hampshire acquired a portion of the rail line that connects the Granite State facilities in Wilton and Milford and contracted with Milford-Bennington to provide service on the line. Granite State saw this as an opportunity to convert from trucks to rail. In order to do so, however, we needed to be able to crush the stone at Wilton into smaller pieces so that it could be loaded into rail cars. In order to accomplish the crushing, we applied for a permit to enable us to operate a portable crusher at the excavation site.

The initial application was denied, so Granite State pursued the matter with the Zoning Board of Adjustment. The primary issue before the Zoning Board of Adjustment was whether the use of a portable crusher was a "grandfathered" accessory use or whether a variance was required. Ultimately, the Zoning Board of Adjustment of Wilton granted, by a 3-2 vote, a building permit for the installation of a portable rock crusher at the excavation site in Wilton. The permit was granted on the conditions that "1. The products (of the rock crusher) shall only be removed by way of railroad; and 2. The rock crusher shall be removed within 180 days if the railroad ceases to operate." See Exhibit 1 attached. The reference to "railroad" was to Milford-Bennington as the rail carrier having direct access to the Wilton site.

It was also necessary for Granite State to obtain a site plan approval from the Wilton Planning Board in order to use the portable crusher. There were several hearings before the Planning Board, which eventually approved a site plan which had several conditions. One condition was that operations could be conducted only between the hours of 6:30 AM and 6:30 PM on weekdays. Another condition stated that the "site plan proposal is to construct a railroad spur into the existing site operational area and install a portable plant to process earth product materials for transportation off-site by the existing railroad line." See Exhibit 2 attached.

Both before the Zoning Board of Adjustment and the Planning Board, board members and members of the public expressed various concerns and objections to the operations of Granite State in Wilton. For example, people discussed the possible impact of noise and dust from operations at the excavation site. It was clear to me that many meeting participants did not consider the excavation site to be a particularly desirable

neighbor and that approval of the use of the crusher was granted reluctantly. The main point that persuaded the Boards to grant approval was the recognition that use of the crusher and the initiation of rail service would remove 100 round trips a day by trucks on the streets of Wilton. As described above, the authorization by the Planning Board was conditioned on restricting operations to the hours between 6:30 AM and 6:30 PM Monday through Friday and to the use of rail for the movement of the stone produced by the crusher.

Minutes of various meetings before the Planning Board and the Zoning Board of Adjustment in 1989 were located in Guilford's files and were produced by Guilford in discovery in this case. These minutes described in detail the matters referred to above. The documents produced by Guilford also include the decision of the Zoning Board of Adjustment which is attached as Exhibit 1. See Exhibit 3 attached.

Beginning in 1992, after Milford-Bennington received trackage rights to operate over the Guilford line in order to reach the Granite State processing plant in Milford, and up to the present time, all 4 inch crushed stone produced by the rock crusher in Wilton has been moved by rail to Milford. No crushed stone has ever moved by truck since rail service became available. Throughout this period, however, we moved one inch crushed base, a byproduct of the rock crusher, by truck to various destinations. The crushed base includes fine dirt and clay as well as stone, and because of its consistency it cannot be moved efficiently in rail cars. The crushed base, if loaded into railcars, becomes consolidated and is almost impossible to unload. In our view, use of trucks to move the crushed base is permissible under the 1989 decision, because the crushed base is a byproduct, rather than the final product of the crusher (crushed stone) which was

restricted to rail movement. I believe that the Zoning Board of Adjustment and the Planning Board understood in 1989 that Granite State would continue to truck the crushed base and other byproducts.

Crushed base is shipped to various locations in accordance with the demand of customers. Since 1992, anywhere from 1000 to 2000 truckloads per year of crushed base was hauled from Wilton. Some truckloads moved to destinations that did not involve traveling through Wilton, but most of the trucks used Route 31, which connects the excavation site to Route 101, the principal east-west highway. Trucks exit the excavation site onto Route 31 and then move south through the town of Wilton. Route 31 extends through a residential area in Wilton for approximately 2.3 miles before it reaches downtown Wilton and an intersection with Main Street. From the intersection, the shortest distance to Route 101 is via Main Street (a distance of 6 tenths of a mile in Wilton), but trucks carrying crushed base have always traveled over Route 31, even though it is one half mile longer, in order to avoid having trucks operating on Main Street. Main Street is very narrow, and there is a significant amount of pedestrian and automobile traffic. Consequently, both the town and Granite State realized that trucks from the excavation facility should avoid Main Street and use Route 31 all the way to Route 101.

In the late 1990's the Planning Board of Wilton, prompted by public inquiry, raised a question as to whether any trucking was permitted under the 1989 decision. The Planning Board argued that Granite State should not be using trucks for any purpose, and we expressed our view that the original decision prohibited truck use for the movement of crushed stone but permitted trucking for purposes of moving other materials, including

crushed base. There were several meetings and discussions between Granite State and the Planning Board, resulting in a new site plan for the Wilton facility in 2001. The new site plan clarified the rights and limitations relating to rail and truck transportation. More specifically, the new site plan recognized that trucking of crushed base, which was referred to as unprocessed material, byproduct or material that cannot be removed by rail, could occur only during the hours of 6:30 AM to 6:30 PM and was subject to an annual limit of 3,000 loads. See Exhibit 4 attached.

The 2001 site plan also provides that "unless and until transportation by railroad becomes unavailable or impracticable, the crushed stone products of the plant shall be transported off-site by rail." It is my understanding, based upon my knowledge of and participation in the Zoning Board proceedings and discussions with the Planning Board going back to 1989, that the Planning Board would permit the trucking of processed crushed stone, as distinguished from crushed base, only if rail service ceased. As in the case of the decision in 1989, the Planning Board in 2001 understood that Milford-Bennington was the railroad providing service to the Wilton excavation site. It is my view, based on the discussions held during the various Board meetings, that the terminology "unavailable or impracticable" contemplates situations in which rail service provided by Milford-Bennington ceases due to an act of God, such as a wash out of the track, or a bridge collapse or due to Milford-Bennington going out of business without any rail carrier taking over its operations. Based upon my experience with the Planning Board, I do not believe that it would view rail service as being "unavailable or impracticable" simply because Guilford decided to restrict the hours of Milford-Bennington's operations.

In the process of considering the application for the new site plan in 2001, a question arose as to whether the railroad or the Planning Board would decide whether rail service had become "unavailable or impracticable". The Granite State representative told the Planning Board that the railroad would make that decision, but the Planning Board disagreed. See Exhibit 5 attached. The Planning Board voted to approve the new site plan only on the condition that the plan would have to be reconsidered in the event that rail transportation became unavailable or impracticable, making the Planning Board the final arbiter on the question whether rail service was unavailable or impracticable. Given the attitude of the Planning Board, which had reluctantly permitted limited trucking operations, it would have been pointless for Granite State to have requested permission from the Planning Board to use trucks to move crushed stone, putting approximately 100 round trips by trucks on the streets of Wilton each weekday, because Guilford restricted Milford-Bennington's operations. In order to move stone from Wilton to Milford, each truck would have to travel approximately 3.5 miles on the streets of Wilton through residential neighborhoods. The Planning Board would never have allowed this to happen.

Even if trucks could be used to move the 4 inch crushed stone, trucks would not be competitive with rail service. The cost of trucks is approximately 50 percent higher than the cost to Granite State to use rail service. Even if we wanted to pay a higher price for truck service, it is questionable whether there would be a sufficient number of trucks available in the short-term. Finally, railcars are loaded at Wilton by means of a semi-automated loading system utilizing conveyors and an over track loading hopper. If we were to switch to trucks, it would be necessary to acquire and use front end loaders to

handle and load the stone, which would add at least \$.50 per ton to our transportation costs.

Guilford has alleged that Granite State failed to mitigate its damages by not approaching Pike Industries to purchase stone when Guilford disrupted the rail service provided by Milford-Bennington. Pike Industries operates a quarry that is served by rail and that is within a mile of the Granite State excavation site in Wilton.

As recited in my opening verified statement, we have lost at least 128,595 tons of production during 2003 due to disrupted rail service. This loss has hurt us very badly. However, as explained in my prior statement, we were able to replace the lost production in Milford with material from another company owned production site in Lyndeborough NH.. Utilizing our own resources was the most cost effective way to replace the lost production. To purchase product from a third party would have been at a higher cost and would have only increased the damages caused by the lack of rail service.

Because we replaced the lost production in Milford with materials from Lyndeborough it has been necessary to increase purchases of materials from third party suppliers for use at our plant in Wakefield MA, where most of the Lyndeborough production would have otherwise gone. Additionally, due to the loss of the Milford production, we have been forced for the first time in many years to purchase stone for our Lowell MA plant from a local outside supplier (coincidentally a Pike Industries subsidiary). Because of the lost production in 2003 and the resultant absence of inventory stockpiles in Milford, these outside purchases will continue until production resumes in the spring. By way of mitigating damages, it is more economical to purchase material from a Pike Industries subsidiary in Dracut MA for use in Lowell MA rather

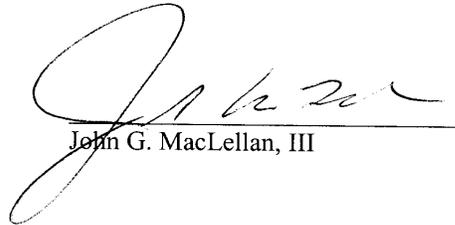
than buy the same material from Pike in Wilton NH and haul it to Lowell MA, because Dracut is approximately 5 miles from Lowell, while Wilton is over 35 miles from Lowell.

Guilford's opening statement suggests that Granite State should have operated it's Milford plant at night. As explained in my verified statement, the hours of operation in Milford are not regulated by permit or regulation. However, the past practice, for over a period of over 30 years, has been to limit operating hours generally to daylight hours. Production has never taken place at night. The community and neighbors, including a large adjacent residential area, have come to rely on this past practice. If we attempted to begin nighttime production as a result of Guilford's actions beginning on June 19, 2003, I am confident that neighbors would have complained and the Town would have been forced to initiate regulatory action. Even if Milford was able to operate at night, production would have been impossible because Milford relies on a steady supply stream of raw material from Wilton, where operations are clearly restricted to 6:30 AM through 6:30 PM.

VERIFICATION

STATE OF MASSACHUSETTS)
) ss:
COUNTY OF MIDDLESEX)

I, John G. MacLellan, III being duly sworn, depose and state that I am President of Granite State Concrete Co., Inc., that I am authorized to sign the foregoing "Verified Statement" on behalf of Granite State Concrete Co., Inc. that I have examined all of the statements contained in the "Verified Statement", and that all such statements are true and correct to the best of my knowledge and belief.



John G. MacLellan, III

Subscribed and sworn to before me
this 5th day of February 2004.



Exhibit 1





ZONING BOARD OF ADJUSTMENT
WILTON
NEW HAMPSHIRE 03086

July 12, 1989

NOTICE OF DECISION

CASE NUMBER Jul#2
July 12, 1989

You are hereby notified that the request of GRANITE STATE CONCRETE CO INC for an Appeal from an Administrative Decision regarding a building permit for the installation of a portable rock crusher at the Granite State Wilton Site IS GRANTED with the following conditions:

1. The products (of the rock crusher) shall only be removed by way of railroad; and
2. The rock crusher shall be removed within 180 days if the railroad ceases to operate.

This was granted by a vote of 3 to 2.

NOTE: Any person affected has a right to appeal this decision. If you wish to appeal, you must act within twenty days of the date on this note. The necessary first step, before any appeal may be taken to the Courts, is to apply to the Board of Adjustment for a rehearing. The motion for rehearing must set forth all the grounds on which you will base your appeal. See: New Hampshire Statutes, RSA Chapter 677, for details.

Signed: .

Thomas Mitchell
Chairman, Zoning Board
of Adjustment

TM/jke

Exhibit 2



SCALE: 1" = 100'
DATED DECEMBER 5, 1984 PREPARED BY ALLAN H. SWANSON, INC. (H.C.R.D. PLAN NO. 17388).

4. "PLAN - OF - LAND IN - WILTON, N.H. - SHOWING A RIGHT OF WAY - CONVEYED TO - JAMES W. QUINN, JR. ET AL - FROM - VERNAL C. STOWELL ET AL" SCALE: 1" = 100' DATED 2/15/66 PREPARED BY THOMAS M. QUINN C.E. (H.C.R.D. VOLUME 1870 PAGE 223).

NOTES:

1. OWNER OF RECORD IS GRANITE STATE CONCRETE CO., INC., ELM STREET, P.O. BOX 185, MILFORD, N.H. 03055. TELE. NO. 673-3327
2. DEED REFERENCE TO THE PARCEL IS VOLUME 2794 PAGE 512, TRACT TWO, DATED SEPTEMBER 16, 1980 IN THE HILLSBOROUGH COUNTY REGISTRY OF DEEDS.
3. PARCEL HAS THE BENEFIT OF A RIGHT OF WAY ACCESS TO THE PREMISES FROM FOREST ROAD (N.H. ROUTE 31) AS DESCRIBED IN STOWELL TO WRIGHT (H.C.R.D. VOLUME 1788 PAGE 457 DATED 6/16/64).
4. TOTAL AREA OF THE PARCEL IS 73.183 ACRES.
5. PARCEL IS LOT 11 ON MAP B OF THE WILTON TAX MAP.
6. ZONING FOR THE PARCEL IS RESIDENTIAL & AGRICULTURAL (R & A).
7. THE SITE PLAN PROPOSAL IS TO CONSTRUCT A RAILROAD SPUR INTO THE EXISTING SITE OPERATIONAL AREA AND INSTALL A PORTABLE PLANT TO PROCESS EARTH PRODUCT MATERIALS FOR TRANSPORTATION OFF-SITE BY THE EXISTING RAILROAD LINE.
8. RAILROAD SPUR CONSTRUCTION TO BE IN ACCORDANCE WITH BOSTON & MAINE CORPORATION STANDARDS AND SPECIFICATIONS.
9. HOURS OF OPERATION TO BE LIMITED TO MONDAY THROUGH FRIDAY 6:30 A.M. TO 6:30 P.M.
10. PORTABLE CRUSHER TO REMAIN ON THE FLOOR OF THE PIT.
11. DUST EMISSIONS FROM CRUSHER TO BE CONTROLLED BY 4 MIST SPRAYERS WITH FLOW VOLUME OF 6.7 GALLONS PER HOUR PER SPRAYER.

082

ST

Exhibit 3





ZONING BOARD OF ADJUSTMENT
WILTON
NEW HAMPSHIRE 03086

ZBA Chairman Tom Mitchell called the July 12 meeting to order at 7:35PM. Members present were Neil Faiman, George Infanti, Cindy Harris and Grayson Parker. Also attending were alternate members Roger Wellington, Steve Blanchard and Joanna K Eckstrom (secretary). Press represented by Ron Bitten and Peter Ferrand. Mitchell announced the two hearings as Granite State Concrete - Appeal from Administrative Decision and request for Variance and Gerald Mazur and Robert Manning requests for Special Exception and Variance.

Granite State Concrete Co Inc. William Drescher, Attorney for the applicant presented testimony. Drescher noted that many of the facts he wished to present to the Board related to both applications at hand - the Appeal from the Administrative Decision and the Variance. If ZBA agreed with the Building Inspector's decision to deny building permit, the Variance would be necessary. Neil Faiman suggested that Drescher present the facts relative to the Appeal from Administrative decision and then, if necessary, proceed with testimony re: variance. Consensus of Board that this would be good procedure.

Drescher introduced himself as an attorney from Milford whose client is the MacLellans and Granite State Concrete. Mssrs John G MacLellan Jr - Vice President, Phil Tuomala - Engineer and Peter MacLellan - operator of the Milford facility would also answer questions in the matter. Peter Leishman, authorized agent for the MacLellans was unable to attend, however, an affidavit from Leishman was included in the information package.

Drescher said the info package contains an affidavit from John MacLellan which sets forth Granite State's position for the case, a site plan prepared by Tuomala; photo exhibits; aerial photos; letters from previous employees/users of the Wilton facility etc. The information package was presented to the Board and has become part of the permanent record. Photo and plans were posted for Board and audience.

Drescher said Granite State is (and has been) engaged in earth removal/excavation and processing business with several operations in NH and Mass. They have owned the Wilton site since 1973. It was purchased from Lovell Wright and MacKay who operated the gravel pit from 1965 to 1973. Wright and MacKay also owned the Milford plant which Granite State now owns. Drescher insisted that the site had always been and still is a gravel operation.

The parcel is 73 acres without road frontage. It is accessed via private road from Route 31. Property does have approximately 1100' railroad frontage on boundary of property. All rock removed from site has been via trucks which pass through railroad underpass, past PVA-EPVA onto 31 south. Trucks, Drescher said aren't pleasant but they are fact of life. Railroad has come to Town via Peter Leishman. State of NH has bought the land (tracks) and Leishman's business is

Milford-Bennington railroad. It doesn't pay to have railroad without customers. Paper mill in Bennington is not enough to make railroad profitable; but Granite State could put it into black. They can not ship big stones, boulders in railroad cars because hopper can't have stones larger than 3". Drescher continued, State is very excited about railroad. Leishman has signed lease contingent upon being able to service Granite State. Granite State needs crusher to reduce size of material to make it usable in railroad cars.

Drescher emphasized not here for permission to run a business they have legally engaged in since 1973 (they are grandfathered). They're here for rock crusher. (If crusher is denied, Granite State's business will continue - removing material from site by trucks).

Wilton Town Counsel, Silas Little presented several opinions to the Planning Board in the matter, Drescher said. The law allows for some flexibility regarding pre-existing non-conforming uses. Wilton Building Inspector denied the permit on May 14 and referred the matter to the Planning Board. Planning Board, Drescher said, discussed the issue of variance. Little's opinion said the laws are unclear. There are cases both for and against allowing rock crusher. One side says (addition of) rock crusher is not expansion of use; others argue it is. Wilton Planning Board insisted a variance was necessary and through motion by David Stein, that Board agreed that Granite State's use of property was not grandfathered. Drescher quoted from the minutes of the May 17 Planning Board meeting. Drescher said if Planning Board decision was not challenged, Granite State would not be able to operate at all. This is reason for their suit, to protect their rights to appeal, and continue their business. Drescher said the Town did not present any evidence against Granite State's claims during its hearing. They had to sue the town so they would not lose their right to appeal. Granite State believes firmly that the rock crusher is a legitimate extension of its business therefore ask that the Building Inspector's decision be over-ruled. He cited RSA 6:47 and FN83, Anderson's law of zoning and Hawkins vs Talbot as two contrary opinions. One allows pre-existing non-conforming use of gravel pit to put in rock crusher without (its) being considered an unreasonable expansion of the use. Another says the rock crusher would be allowed as long as the original nature and purpose of the undertaking remains unchanged. Granite State believes the nature and purpose of the original use will be unchanged by the rock crusher, therefore do not believe variance would be necessary. Drescher gave another example, Hampton vs Bruce in which a video parlor was the subject of discussion. Re: diminishing assets such as gravel, Drescher said there are three approaches: one says the operation can only go deep (within the confines of the original dig); another says you can expand within the property bounds; and finally the approach that allows reasonable expansion relative to the nature and purpose of the original use.

Roger Wellington asked if rock crusher would expand size of operation. Drescher said no. It's same in nature and purpose to original use. Rocks, gravel, sand gets mined there already.

They would only be reducing size of material (for loading railroad cars).

Tom Mitchell asked how much material (aggregates) removed from site now. John MacLellan said 3000 tons a day. Will rock crusher increase amount of material removed from site. MacLellan - no.

Howard Gotham, Curtis Farm Rd resident asked if rock crusher would take trucks off road. All of Granite State's trucks (now removing rock to Milford plant) would be off road.

Marie Louise St Onge, Curtis Farm Road didn't see how crusher would take trucks off road. Drescher replied that the train will happen. The crusher isn't needed for the trucks but it's needed for train. If the railroad doesn't come, then trucks will continue to remove the material from site.

Norm Charette, PVA an abutter, noted problems with concrete. Asked if crusher there would they be selling aggregate (for concrete) from that site. Drescher and MacLellan said no, material would go to Milford plant, as it already does, for further processing. The Milford site is the primary crushing site.

Anthony Perfito, Isaac Frye Hwy did not agree that this case was same as video parlor. He argued that this will be processing material, therefore an expansion of use. Drescher responded he used case of video parlor for its language "nature and purpose of the use".

Neil Faiman said the Minnesota case was more applicable here than the Mass one with respect to expansion of use. But he didn't see how the case relates to earth extraction. Drescher said they contend that rock crusher is not unreasonable expansion. That it is permissible change in non-conforming use that has not altered the nature and purpose.

Patricia Henderson, Curtis Farm Rd, said noise is very disturbing to her. Drescher said that noise will be dealt with in the variance part of the hearing. Mitchell confirm that noise in issue to be addressed within the five criteria for variance.

Richard Greeley, citizen, felt that since crusher would not be making a finished product, would only be reducing material to utilize railroad, then this is not expansion.

Tom Newbold, Curtis Farm Rd, said he believes this is clearly expanded use, that it is processing, not removal. Felt issue should be deferred to the Courts rather than have this Board decide.

Steve Blanchard asked how many trucks used now. John MacLellan said about fifteen trucks, one hundred round trips a day to move 3000 tons to Milford plant. How many trains (trips) would it take. Peter MacLellan thought same material could be moved by train with 10 to 15 cars, 1 to 2 round trips a day.

Roger Wellington asked what was "original nature and purpose" of this operation. Drescher said gravel, rocks, blasting, quarrying since 1975. Statements from Wright and Mackay show that blasting pre-dates current operations.

Tom Mitchell asked when MacLellans did any blasting after 1966. MacLellan said in the early 80s.

Alec MacMartin, Vice Chairman of Planning Board, said that in interrogatories, MacLellan said they blasted in 1983.

Minot Ring Planning Board member saw two questions to issue: 1. How did grandfathered (gravel) activity become a mining operation blasting up bedrock. And 2, assuming the rock crusher may be accessory, isn't there a substantial change in use when you blast aggregate out of bedrock. He thought they're engaged in gravel operation; that you "scoop" it out of ground. Sees them as running into rock, then blasting.

Drescher replied that material that you blast is not distinguished between "earth", "rock", "gravel" - it's all earth material. He quoted the Town's and the State's definition of "earth removal" which are the same. He added that the same activity has gone on at this site since 1966.

Ring argued that this was expanded use.

Lura Provost, abutter, agreed with Ring. Said the level of activity has increased. There is expansion she said, now it's mining. She questioned zoning and how this activity is allowed there.

Drescher responded that it is and always has been residential and agricultural zone.

Ms Provost continued that at Planning Board meeting some board member, she thought, suggested Granite State was running out of gravel. Response was that they had 73 acres and not running out. She asked why do you blast if you're not running out? Why was there no activity when she went up to see site?

(Review of minutes of Planning Board 5/17, show that question was asked by abutter Elizabeth Raymond, directed to and responded by Peter Leishman re: running out of gravel. Leishman emphatically stated they weren't running out, they had 73 acres there.)

Mitchell directed proceeding back to matter at hand, to determine whether or not Building Inspector made error in denying permit.

Marie Louise St Onge asked MacLellan if a boulder is the same same after its been crushed. Said it may be question of semantics, but she feels crusher is an additional activity at the site.

Mitchell addressed Ms St Onge saying that what they want to do is facilitate movement of the material (by the crusher). This Board must decide if this new thing (crusher) is indeed an expansion of use.

Patricia Henderson said Wilton voters spoke clearly and emphatically when given the option of rezoning this area to industrial.

Tom Newbold saw pressure because work had begun on railroad, locomotive already in town. Begged that Board not be influenced by the conditions, pressures placed on it. He asked which of us was an expert in railroads to determine whether or not indeed the railroad equipment must have material crushed.

Faiman asked Drescher if he could and would present evidence that the crusher is incidental, customary use on the site.

Drescher said he'd spoken with people at length. He insisted that all Granite State wants to do is render stone to a size that is usable by railroad. The cars they intend to use are the

only kind available to them. He added that they will continue to remove what material is there; if they don't have the crusher, they won't have the railroad. Trucks will continue to be used.

Grayson Parker had some experience in railroad/freight. Said the technology is available and cars exist which can be picked up and overturned to dump their loads. But this equipment is expensive.

Mitchell asked MacMartin what transpired at Planning Board. MacMartin said they were there with Site Plan. Planning Board did not feel it was appropriate to address site plan at the time without a variance. Mitchell's impression was that Planning Board intent was to remove Granite State's grandfathered rights to conduct its business. (He referred to minutes of 5/17, "Stein moved that () be required to file for permit" and "that () obtain variance." MacMartin said it was not Board's intent to deny GS it's rights to do business. Relative to the site plan, Granite State had permission to do some things, but relative to the new excavation ordinance Granite State needed to "register" within the 6 month time frame.

Andrew Neilson, Captain Clark Rd, felt they are changing operation to improve extraction efficiency. Asked what would prevent them from coming back next year for something else?

Speaking for Granite State, John MacLellan said he has owned property since 1973. The site has been used to supply his own company's needs for sand, gravel, etc. The business was and is gravel, stone, earth products. the reason for the rock crusher in Wilton is to remove trucking. Trucking is probably the most intrusive part of their operation. they do not intend to change Wilton operation to retail. They only want to change their method of transportation. Their retail is in Milford. The same amount of material being removed from site now by truck will be removed by rail.

Mitchell advised Neilson that should Granite State want to do anything different in the future, the same process would apply - building permit, ZBA, Planning Board, etc, depending on the application.

Steve Blanchard said that recently the Planning Board concluded that a screen was incidental to the gravel operation being considered. He sees Granite State's application similarly.

Wellington asked what life expectancy of pit was. MacLellan said 20 years, possibly more.

Mitchell closed discussion to the audience so Board could discuss and decide whether Building Inspector's decision was good. In defense of Building Inspector, Faiman suggested that since decision made in good faith, Board decide whether or not decision should be over-ruled.

Mitchell saw question of expanded use a very gray area. Building Inspector was within jurisdiction to deny.

Parker concurred that what is expanded use is cloudy.

Faiman noted courts go both ways. Where crusher has been determined to be illegal (expansion) has been when commercial processing goes where it has never previously existed. In this case, crusher should be seen not only as accessory to gravel pit but also to transportation.

Cindy Harris said this is case of extreme accessory use, particularly with respect to noise.

Mitchell and Blanchard argued with Ms harris that the same amount of material is coming out. Blanchard added he has a gravel pit where the screen makes far more noise than crusher.

Faiman countered that a rock crusher isn't that noisy. Truck noise is worse.

Harris also noted blasting. Parker said they're not expanding. Harris continued that since it's so gray Board should get advice of Town Counsel.

Joanna K Eckstrom thought this was advance in technology, not expanded use. Cited push lawn mower versus gas powered or ride-upon. This is not expanded use if same goal is accomplished.

Wellington thought it would be easier to expand use with railroad there. Also added that since town voted against zoning this industrial, doesn't this indicate it doesn't want industrial use there. This may be the case, but Town can not prohibit someone from continuing his business because of zoning changes.

Mitchell agreed the only reason for rock crusher is to utilize train.

Faiman saw this as accessory to excavation and transportation. Suggests approval be conditional that if railroad goes, so does crusher. He was asked to put this in form of motion.

Cindy Harris moved to continue deliberations until Board had Town Counsel opinion. There was no second.

Faiman moved to reverse decision of Building Inspector and grant building permit conditional that products (of the crusher) only be removed by rail and that upon cessation of the railroad, the crusher would be removed within 180 days. George Infanti seconded. For clarification, the motion was read back by the secretary.

Vote on the motion: Infanti - yes, because the original meaning and purpose of use the same; Cindy Harris - no, this is change to non-conforming use; Faiman - yes - this is clearly incidental to the combined processes of extraction and transportation, and not expanded use in his opinion; Mitchell - yes - not an expanded use; only purpose for crusher is to facilitate transportation of material; and Parker - no - this is expanded use, an illicit extension of use and new enterprise. Vote was 3 to 2 in favor of reversing Building Inspector decision.

Mitchell advise abutters and audience of their right to appeal the decision within 20 days. Said new evidence (something not available at this hearing) or technical error would be necessary to rehear the case.

Ms St Onge invited anyone to come for coffee regarding noise from the site. Felt it inappropriate for Board to disallow discussion of noise by audience when it discussed it amongst themselves.

Andy henderson said if there isn't anymore noise, there'd be no problem, but he was concerned that noise was not discussed during hearing.

Mitchell advised that noise was not germane to discussion re: overruling Building Inspector; this would be discussed in site plan review. He advised that Planning Board was forum for that. Secretary announced that case is on agenda for 7/19 meeting.

Tom Provost argued that Faiman used noise in his discussion and that Faiman said it's ok to discuss noise on the Appeal. Mitchell defended Faiman and the Board saying it may have been discussed but it was not used as basis for decision. The case was concluded.

Manning and Mazur was called. Alec MacMartin represents applicants request for variance and Special Exception. Original proposal was for two back lots, two fronts lots but because of wetland constraints only one back lot would be created. The variance request was for frontage - required is 450 feet; they have 449. Special exception was for siting driveway (private) to serve the lots. Required is 200 between drives; they have 140 feet.

Faiman asked why drives were being placed as shown. MacMartin responded they didn't want to adversely impact on one lot. The driveways will be somewhat staggered rather than perpendicular to others in area.

Abutter Harry Dailey cited his on-going lawsuit with the Town re: his driveway. The court says his driveway is legal.

MacMartin cited the five criteria relative to the variance. There'd be no diminution of property values; there are three houses there now. Public interest would be served because productive use would be made of vacant land and they're creating lot in substantial compliance with ordinance. Hardship is that they're 1 foot short of req'd 450 ft. Also lot is narrow.

Abutter Andrew Neilson pointed out error in property ownership on the maps presented and said abutter Robert Willett had not been notified. After some investigation, it was determined that indeed all abutters had not been notified and the hearing was rescheduled until August by which time all abutters shall have been notified. The abutters present, Neilson, Dailey and Ralph Chapman, did not see any problem with plan as presented but will return in August.

Board briefly discussed upcoming applications in light of recent decision or clarification by Planning Board in Question 2 of ordinance.

Minutes of previous meeting were unanimously approved. Faiman suggested that language in notice to abutters needed some improvement grammatically. Eckstrom noted that verbiage is taken from sample format in ZBA red book.

Motion to adjourn at 10:15 unanimous.

Respectfully,

Joanna K. Eckstrom

Joanna K Eckstrom

Tom Provost argued that Faiman used noise in his discussion and that Faiman said it's ok to discuss noise on the Appeal. Mitchell defended Faiman and the Board saying it may have been discussed but it was not used as basis for decision. The case was concluded.

¶ insert (see below)

Manning and Mazur was called. Alec MacMartin represents applicants request for variance and Special Exception. Original proposal was for two back lots, two fronts lots but because of wetland constraints only one back lot would be created. The variance request was for frontage - required is 450 feet; they have 449. Special exception was for siting driveway (private) to serve the lots. Required is 200 between drives; they have 140 feet.

Faiman asked why drives were being placed as shown. MacMartin responded they didn't want to adversely impact on one lot. The driveways will be somewhat staggered rather than perpendicular to others in area.

Abutter Harry Dailey cited his on-going lawsuit with the Town re: his driveway. The court says his driveway is legal.

MacMartin cited the five criteria relative to the variance. There'd be no diminution of property values; there are three houses there now. Public interest would be served because productive use would be made of vacant land and they're creating lot in substantial compliance with ordinance. Hardship is that they're 1 foot short of req'd 450 ft. Also lot is narrow.

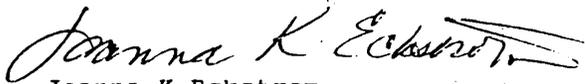
Abutter Andrew Neilson pointed out error in property ownership on the maps presented and said abutter Robert Willett had not been notified. After some investigation, it was determined that indeed all abutters had not been notified and the hearing was rescheduled until August by which time all abutters shall have been notified. The abutters present, Neilson, Dailey and Ralph Chapman, did not see any problem with plan as presented but will return in August.

Board briefly discussed upcoming applications in light of recent decision or clarification by Planning Board in Question 2 of ordinance.

Minutes of previous meeting were unanimously approved. Faiman suggested that language in notice to abutters needed some improvement grammatically. Eckstrom noted that verbiage is taken from sample format in ZBA red book.

Motion to adjourn at 10:15 unanimous.

Respectfully,



Joanna K Eckstrom

¶ insert text - Drescher reassured audience that ZBA was not the final step in approval process. Said Granite State would need to go to Planning Board for Site Plan approval. Noise issue would be germane at Planning Board reviews.



ZONING BOARD OF ADJUSTMENT
WILTON
NEW HAMPSHIRE 03086

July 12, 1989

NOTICE OF DECISION

CASE NUMBER Jul#2
July 12, 1989

You are hereby notified that the request of GRANITE STATE CONCRETE CO INC for an Appeal from an Administrative Decision regarding a building permit for the installation of a portable rock crusher at the Granite State Wilton Site IS GRANTED with the following conditions:

1. The products (of the rock crusher) shall only be removed by way of railroad; and
2. The rock crusher shall be removed within 180 days if the railroad ceases to operate.

This was granted by a vote of 3 to 2.

NOTE: Any person affected has a right to appeal this decision. If you wish to appeal, you must act within twenty days of the date on this note. The necessary first step, before any appeal may be taken to the Courts, is to apply to the Board of Adjustment for a rehearing. The motion for rehearing must set forth all the grounds on which you will base your appeal. See: New Hampshire Statutes, RSA Chapter 677, for details.

Signed: .

Thomas Mitchell
Chairman, Zoning Board
of Adjustment

TM/jke

4/19/89 7

GRANITE STATE CONCRETE CORP NON RESIDENTIAL SITE PLAN PRELIMINARY. Peter Leishman, Tom McClellan and Phil Tuomala present application. Leishman described this as a "project with major benefits to Wilton and Milford". Plan to move material by rail. Material moved by truck now, taking 200 RTs per day. Will use "portable" rock crusher to reduce material to size movable by rail, less than 3". Once moved to Milford, rock will be further processed into other aggregates. Long term, all earth materials including those from Quinn Bros would be moved by rail. Rail line hopefully will extend to Bennington to service Monadnock Paper and other enterprises.

Leishman said Wilton Building Inspector was misquoted in newspaper account of application. Rock crusher would not operate 24 hours a day but would operate within limits set by Board. Added that railroad employees can't work more than 12 hours daily. Arrangements are being made to lease 10 cars. This means 3 round trips a day to move what takes 200 RT truck trips.

Rene Houle asked about upgrades to track, specifically clearing brush trackside and potential fire hazards. Leishman said State, new owners of track, will upgrade to spec.

Leishman outlined sequence of events to date.

3/14 applied for building permit

3/21 opinion of building inspector that site plan review necessary

3/29 site plan review application filed

4/3 heard from Julie Cummings, NRPC that ZBA approval may be needed; Bill Drescher, legal counsel for Granite State consulted. His opinion that this is pre-existing operation, ZBA not needed.

4/5 met with NRPC

4/9 Leishman spoke with Wilton Town Counsel Silas Little. Silas told him to proceed with Planning Board, in as much as hearing had been scheduled.

MacMartin asked status of building permit. It was "not approved". Neither was it outrightly denied. MacMartin said Town Counsel should have been aware of this application from the beginning.

Glines if there was documentation that use is grandfathered. McClellan said the business has operated the same for at least 15 years.

Abutter Pierre Provost asked is blasting excavation? Feels strongly that rock crusher is change of use. The application should be evaluated according to Town's ordinance.

Lura Provost abutter said being at back side of operation she's not as concerned about truck traffic as she is about the blasting and noise from a rock crusher. Granite State has "not been a good neighbor" in this respect. Allowing a crusher would increase noise.

Davidson asked wording of building permit application. Permit was for portable rock crusher and rail spur.

Leishman said site planned for crusher is well suited for noise reduction.

Frank Millward, Building Inspector and abutter, concerned about railroad cars. Fears there'll be more blasting to fill the cars. Crusher noise also concern. PVA now has to shut down its computers when blasting occurs. This is okay if blast time well defined, but if there's delay or increase in blasting, PVA could be down for a long time.

McClelland insisted there's no intent to increase blasting or production. Said they've been careful in selecting blasting companies and in last year have had no complaints from abutters. They've taken precaution in locating crusher to reduce noise factor. Sees blasting as being reduced. With rock crusher on site, they won't have to use as large charge as in past as there'll be less need for smaller rocks. Crusher will do job of blasting.

Provost said he didn't buy this idea at all. If rail is involved, it

4/19/89

wouldn't economical not to increase production.

Whitehill suggested need for opinion by Town Counsel. Glines agreed. Inquiry was made about the status of a court case involving a cease and desist against Granite State. Selectmen Greeley and Bohosiewicz agreed the case had been dropped. No cease and desist exists now. McClelland confirmed.

Bohosiewicz saw two issues: is this gravel or quarry operation and is a rock crusher an expanded use. He said he thought moving material by rail was a better solution than by trucks.

Leishman asked Boards' feeling as to benefit to Town. He relayed a message from John McClelland Sr vis a vis blasting. McClelland/Granite State "will adhere to the requirements set forth in the blasting ordinance that was recently before Town meeting, even though this ordinance was defeated." Leishman said he felt McClelland was willing to put this in writing and had discussed this with Planning Board Secretary Joanna K Eckstrom during a recent conversation. For now, the message is recorded in the minutes.

Ring asked how many hours it would take to remove this material on a daily basis. Leishman replied that existing rails restrict them as to how much can be removed at any one-time. There are sidings and spots along the line that can't take more than 10 cars. Insisted that rail service would do the same as the trucks in far less trips.

Stuart Draper asked if rail needs Site Plan Review. Leishman said rail is exempt from local Planning. included in application because spur goes in Granite State's property and goes with request for rock crusher.

Whitehill advised that Board must seek Counsel to determine whether proposal constitutes expanded use; is this grandfathered use; is ZBA hearing necessary, before it can make any decision on the request.

McClelland asked status of building permit. Until Town Counsel opinion rendered, permit can't be issued.

Silas will be consulted and Leishman will be advised of opinion. Asked if too late for ZBA. Some thought ZBA met "as needed" however, this is not so. ZBA meets regularly on the second Wednesday. ZBA met last week, but Leishman is in time to file application for May 10 ZBA meeting if Little responds and Leishman applies before 4/29. Case continued without decision.

CELESTE AND PETER OBERG NON-RESIDENTIAL SITE PLAN REVIEW PRELIMINARY. Peter Oberg said request for Special Exception to operate day care at 17 Prince St denied by ZBA. Major objection was parking; however, what was adequate was not clearly defined. Plan presented to ZBA had been prepared for Planning Board upon recommendations made by NRPC. Julie's recommendation was for 11 spaces for day care. Obergs had 16 spaces on their plan.

Julie clarified parking requirements. Obergs thought, as did some on this Board question, that number of parking spaces was defined by State law. Julie said guideline referred to in her review is used in many applications.

Obergs have requested rehearing by ZBA. Secretary confirmed; ZBA to meet on Thursday April 20.

Because of time factors they are facing Obergs wanted to keep Planning Board meeting tonight to be "ahead" in the event that rehearing results are favorable. State must license before legal advertising can begin. To be ready for September, June is their deadline. Day Care is needed in the community Oberg said.

Whitehill said he wasn't willing to second guess the ZBA. Ms Eckstrom suggested Obergs were here because the ZBA application and regs state that Site Plan Review may come before or after ZBA,; but no specific order set in ordinance.

5/7/89

use? How did forefathers mean for this to be interpreted? Glines asked who'd be responsible in the event of an accident on the ROW. Sullivan responded that those involved would be responsible, not land owners, in the case of speeding or reckless intent. The police could be called in in the matter of traffic (parking) violations in the ROW, however.

Whitehill said he can't visualize running a business with only one parking space.

Rockwood asked if there was water to the building. Not yet. Montello said they'd run water off the General Store's service and sewer would be pumped back. These utilities would be common to the lot. Expense of the service would be borne by Hill and Montello; work would be done privately and would not involve Town. Mcgettigan has been contacted regarding this. Also, the sprinkler system, if needed at a later date, would be self-contained and would not need to be tied into Town services.

There was no other discussion. macmartin moved not to approve the application due to inadequate parking. Second by Rockwood. Motion not to approve carried 5-1-1. Voting in favor of denial were MacMartin, Ring, Glines, Whitehill and Rockwood. Davidson voted no (not in favor of denial). Stein abstained.

Montello asked Board how many spaces specifically would he need to allow his business. Said he's in Catch 22 situation. Board did not respond.

GRANITE STATE CONCRETE CO INC - Non-Residential Site Plan - continuing. Peter Leishman is agent for the McClellans. Spoke with Si Little re: crusher. Si says some parties consider crusher a conforming use; others say no, it's an expansion. Granite State's job is to prove this is conforming use. Board has to prove this is intensified use. leishman said property was purchased by McClellan in 1973. Blasting occurred with previous owners. They have found receipts to document blasting activities at site as early as '63. He's met with Selectmen to tell them about the proposal. Goal is to get trucks off road and use rail to move material to Milford. Abutter PVA had been concerned about dust (from trucks) and they feel rail would be better. Also using rail relieves the Town of some liability as far as roads and truck traffic are concerned.

Whitehill said all agree that rail would be better. Planning Board must decide whether use there is grandfathered or is what is there now covered by Wolfeboro decision. Is the crusher a non-conforming?

MacMartin recapped his discussion with Si. The (Town's) 1985 case involved the issue of grandfathered use. Was blasting into bedrock a pre-existing, grandfathered activity? Granite State acknowledged the activity was State controlled, said Stein, but the necessary permits (149.8A) have never been applied for. Granite State has told the Town it was in process of doing so since 85 yet nothing happened.

Whitehill said Board's feeling is that burden of proof is on Granite State. Board feels use is not grandfathered. Board must determine whether crusher is escalation/intensification of activity.

Leishman replied they can prove they comply with terms of

Eckstrom confirmed that a request for re-hearing had been received in Town Hall on 7/19, however, ZBA had not yet acted on this request. There was no second to his motion. Alec MacMartin commented that because of size of this project, Board would not be making final decision on this application tonight.

Present for Granite State are Peter Leishman, John MacLellan - vice president, Peter MacLellan - operator of Milford plant and Phil Tuomala engineer. Leishman said they have approved appeal of administrative decision (by Building Inspector and Planning) from ZBA and that they have their building permit. Many members of Planning Board felt that building permit had been issued in error and asked Millward why permit was issued. He responded that he felt obligated to issue permit within 72 hours of ZBA decision. Eckstrom read from ZBA minutes citing the motion in favor of reversing Inspector's decision and to issue permit. Millward was further questioned on procedure he follows when issuing building permit under normal circumstances.

Leishman said that site plan is within domain of Planning Board and that is reason for their being here tonite. Said Millward had visited Milford crusher and he thought rock crusher makes less noise than screen. Leishman continued, he'd spoken with Philbricks, the nearest abutters and their concern is for hours of operation. Philbricks complained to Leishman that another operation starts at 5:30 and they hope this would not be case with Granite State. Leishman had asked for their suggesting of hours and 6:30 to 6:30 seemed agreeable. Leishman said the Planning Board should consider such things as hours of operation, drainage, and actual siting of the crusher. Permit they have is legal. Eleven acres are disturbed by the operation now. Between the floor of excavation now to top of hill its 85'. Top of crusher is only 21', far below top of hill. Crusher will go in the hole as will the rail. The reclamation plan has been filed with the State, Leishman said, even though they are not required to do so. He added Granite State is not required to file with Town. Town has authority with grandfathered pits. Leishman insisted that Granite State wants to work with the Town and its people. Suggests having same hours of operation as Quinn, 6:30 to 6:30. He continued, rail will take Granite State's trucks off road and that question of grandfathered/permitted use has been answered.

Minot Ring asked if Granite State has registered with Town. Leishman said not yet, but deadline for all is Sept 14. Also a new law will come into effect 8/4 which will negate Town's "authority". Ring asked if modified excavation plan filed. Phil Tuomala, engineer for Granite State has plans for this and aerial photos of site were shown.

Neil Faiman, ZBA, said that ZBA had accepted Granite State activity as grandfathered by accepting the existing non-conforming use. ZBA made no assertions about removing Planning Board review in the matter, however.

Leishman confirmed that Granite State always made it known that it felt Planning Board review was in order.

Tony Perfito said neighbor makes noise and that Granite State will add to it. Says crusher is needed to facilitate removal. Is the crusher going to guarantee that size (3-5") so that a

7/19/89 pg 2

scrainer would not be required. Peter MacLellan explained how crusher works, that there are stops on it to ensure a 3-5" size.

Norman Stimson, Curtis Farm Rd, asked what recourse the neighbors had if hours of operation weren't followed. Noted that Quinn starts at 5:30.

Dick Greeley said that if there are complaints, they should be addressed to the Selectmen. Any complaints he's aware of about Maclellan operation have been resolved.

Marie Louise St Onge and Pat Henderson of Curtis Farm Rd supported Stimson's concern for enforcement of hours.

Whitehill said that this was first time complaint about Quinn had been heard by this Board. Also, hours set by Board for Quinn's operation concerned asphalt plant only, not other activities there.

Abutter Lura Provost said she had used a sound meter to take readings. She got 65 dbs at corner 31 and PVA.

Dick Rockwood asked if this had been verified. Ms Provost said machine calibrated, can get statement. She said noise at 65 db was without cars going by.

Tom Newbold, Curtis Farm Rd an extended abutter, urging the Board and Granite State to negotiate arrangements with the residents of area. Mostly Quinn's scrainer is a problem and abutters are indeed angry. Board should be sensitive to neighbors in the valley regarding noise.

Leishman argued Maclellan wouldn't want to start at 5:30; insisted 6:30 to 6:30 is reasonable.

Dave Glines asked about hours now. Peter Maclellan said trucks leave Milford at 6:30 to load in Wilton at 7.

Whitehill asked what kind of noise the crusher makes. Leishman described it as thump/thump. Said there's no wash towers and no screens. The only water used will be to keep dust down and this is mist. The Wilton operation will not be same as Milford.

Ms Provost asked if crusher was portable enough to be moved (closer to her property). Leishman described movement of crusher as going deeper into hole. Provost asked about material to be used for reclamation. Leishman said State specifies material. Whitehill added that there is bonding required to ensure that reclamation is done.

Tony perfito said he lives facing the operation. This could become "hatch shell". Leishman said berms will be used (as suggested by the building Inspector). The railroad is elevated and goes down into pit. Perfito wanted to know if Board could set noise level limit? He was concerned about his (and neighbors) quality of life to hear that much noise.

John MacLellan said that State does spot checks, regulates and inspects sites. Crusher max is 95 db and if it goes higher, State can shut down operation.

Norm Charette, PVA representative, said it's concern was not so much with noise as with blasting and dust. they have to shut down computers when blasting occurs and this causes financial loss. Also the dust gets into ventilation system of that plant and causes problems.

Leishman said PVA is more than 1000 from crusher site. Dust

7/19/89 pg 3

from crusher, he insisted, will be none. MacLellan added that State also regulates dust controls. Site will have mist spray system as required by State.

Charette asked chance of trains going down to Lowell. Yes. If to Lowell, will production increase.

Pat Henderson asked about water from sprayer possibly going into Stoney Brook. John MacLellan said this is mister, doesn't puddle water. It is not washer for stone, he said.

Henderson continued that people get the idea that absolutely all trucks will be gone from site. Board and Leishman saw that there would still be need for trucks, ie fuel trucks, etc.

Abutter Pierre Provost said Granite State has been blasting. Leishman argued they had done no blasting this year. Whitehill asked procedure followed when blasting may occur. John MacLellan says seismograph readings are taken and are within tolerable limits. Blasting should not effect equipment that is inside buildings. As courtesy, Granite State has contacted PVA when blasting so they can shut equipment down.

Dick Greeley said first blaster may have been irresponsible. (MacLellan admitted they now use a different firm.) Sees this complaint about Granite State as vendetta. Where was PVA when Quinn wanted asphalt plant. It didn't voice any complaints then.

MacLellan said he thought they get along well with PVA, that they are working out any problems.

Leishman said they don't have to notify anyone when blasting but have chosen to notify the Town when so doing (according to the defeated blasting ordinance terms). Leishman said he'd been in contact with Ms Eckstrom on this, which she acknowledges, and that MacLellan Sr has written statement to this effect forthcoming. Leishman added that Granite State's major concern and reason for this project was to get trucks off road, thereby reducing not only their own liabilities on Town roads but Town's as well.

Lura Provost said that many abutters were present during the asphalt plant hearings. The bad guy changes with each. Thought big companies could figure out some way to keep dust, noise etc from becoming problems.

MacMartin reminded the Board that with grandfathered activities you can't solve all the problems overnight.

Whitehill confirmed that another Board saw the activity as grandfathered. As such, Planning Board can only handle placement of crusher.

Pierre Provost said abutters play musical boards. There's no continuity of care with abutters.

Whitehill said the ordinances and State statutes dictate how things go through town process. State, federal government and town regulate, not abutters. He added that as of 8/4 the Town's excavation ordinance doesn't mean much.

Marie Louise St Onge said we have to live with this (blasting). MacLellan said if something Granite State did caused damaged, lawsuit wouldn't be necessary to settle. That's why they have insurance. All of Granite State's operations try to take greatest care not to "harm" abutters. That's one reason

7/19/89 pg 4

Howard Gotham, Curtis Farm Rd, said that maybe the activity is grandfathered, but he does not believe blasting is part of that grandfathered activity. MacMartin said he'd spoken with Silas Little, Town Counsel, questioning whether blasting is part of the grandfathered activity. He said the ZBA would not have granted its approval without considering blasting as part of the grandfathered activity.

Norm Stimson asked who inspects installation. Building Inspector (and then site is subject to spot checks by State regulators).

George Infanti, ZBA member, defended his vote at ZBA saying that Atty Drescher had presented several affidavits regarding blasting. His decision and Board's he said was based on legal documents. MacMartin rebutted that different data was presented to ZBA than was presented in the interrogatories.

Tony Perfito asked about noise when material being dumped into empty railroad cars. Leishman said big rocks in the trucks make more noise.

Dick Rockwood asked Granite State, why, if they had Building Permit, were they even here at Planning Board.

MacMartin expressed his concerns about water to be used at site. Wanted to know if silt would settle out. Sees need for detention beds. Sees potential on loading for silt getting into brook. What measures would be taken to prevent this.

Phil Tuomala said addition of crusher would have negligible impact on water in area. Said they have site specific approval from State. Will be graded so drainage will go to grassy swales on either side of tracks, swales to be 34 x 250 and 34 x 100. Both sides of spur will have grassy swales in accordance with State regs. MacMartin asked about clean out over time. Tuomala said they'd need to be cleaned out.

Whitehill asked about the vet area pond. Tuomala said this was intentionally left there, not part of plan. Felt it best to leave as is because it has grown in. They're trying to stay away from the older areas on site. Plan calls for keeping impact on drainage at absolute minimum.

Howard Gotham said he felt drainage problems would increase.

Dave Glines asked what green area was on plans. That shows path of crusher and its generator as operation progresses.

Whitehill asked about the generator and its fuel. This is diesel and there'll probably be 1000 gal storage tank. Whitehill also asked about provisions for fencing. Leishman said they could put a new gate at access.

MacMartin asked about water requirements for misting. Peter MacLellan not exactly sure of requirement but felt it minimal. He said water to be used doesn't slurry. John MacLellan described it as similar to mist from fertilizer spray can. MacMartin insisted that gallon per hour figure necessary.

In review Whitehill said Town engineers will review drainage calculations. Crusher should stay on floor. Hours (6:30 to 6:30 livable said John MacLellan) Mon through Friday.

Mike Davidson said Wilton should consider itself lucky; some plants he deals with start at 4 am.

Tom Newbold asked if Granite State will typically operate 12 hrs a day. John MacLellan said 8 to 10 is normal; a good day is

7/19/89 pg 6

10; 12 is unusual (but can occur if equipment breaks down ie).

Rockwood said approval should be conditional that crusher stays on floor.

Glines asked about fuel storage tanks. Said there should be more details for building inspector and details should be on plat.

Phil Tuomala said changes will be incorporated on plans that will be reviewed by Town engineer.

Tom Newbold asked if generator muffled. Yes. Dave Glines said generators make much less noise than loaders.

MacMartin said board must determine level of use that's grandfathered. Rockwood asked for documentation proving 3000 tons a day. Rockwood challenged claim of 100 trucks a day. John MacLellan said they have records back 15 years. MacLellan said crusher can do 300 tons an hour; based on 10 hr summer day, that's 3000 tons a day.

Ms St Onge asked about independent haulers. Would they still be using site.

Bart Hunter asked that Leishman contact Milford Area Communications when trains moved so that ambulance responding to calls won't be blocked waiting for train to go by. Leishman said trains will only occupy crossing for seconds; by time MAC is notified, train will have passed through.

Newbold asked if Granite State will have a train schedule. Yes.

Restrictions and instructions to Granite State reviewed. Case continued to August.

Roger Clapp - Subdivision continuing - Barry Greene represents Mr Clapp. Said easement to NET exists. Tom Newbold followed case, says bounds in place and that he saw remnants of poles on site. Asked about future plans for the site, Greene said there are none. There were no abutters present for comment.

Glines moved to approve; second Davidson; motion carried unanimously. Fees due are \$22 for NRPC and \$24 for mylar to be paid to secretary.

Charlie Mcgettigan - Subdivision - continuing - plans shown; Greeley moved to approve; second by Ring; motion carried unanimously. Fees due are \$24 for mylar and \$14 for easements (2 pages) to be paid to secretary.

Ann Johnson - Subdivision - continuing. Dick Rockwood steps off Board as he represents Ms Johnson and is replaced by Tom Newbold.

MacMartin asked if Johnson has gone to ZBA for driveway. Rockwood replied that driveway is existing. Glines said language for driveway should be shown.

Rockwood said he found problems with ordinance relative to this application. One place says 2 acres of dry land necessary; another says 5 acres excluding wetland and floodplain and another says 10 acres for duplex with no mention of wetland. Macmartin advised Rockwood that one has to relate to other

7/17/87 Pg 7

TOWN OF WILTON
PLANNING BOARD

MINUTES AUGUST 16, 1989

Chairman Mark Whitehill called the meeting to order at 7:32 PM. Members present were Alec MacMartin, Minot Ring, Alternate Pam Ellis, David Glines, Dick Rockwood, Mike Davidson, David Stein - Selectmen's representative, Julie Cummings - NRPC and Secretary Joanna K Eckstrom. Press coverage was provided by Peter Ferrand of the Telegraph as well as reporters from the Cabinet and Union Leader. Whitehill reminded all of the new protocol for hearings stating that meeting would adjourn at 11 and no new business would be opened after 10:30. The minutes of the previous meeting were deferred until later. Whitehill called the first case.

RICHARD S KAHN - SUBDIVISION, continuing and final - Alec MacMartin stepped down and is replaced by Alternate Pam Ellis. Kahn says all information needed for approval for his plan has been provided. Ms Eckstrom noted that State approval for septic and subdivision had been received.

Stein moved to approve the subdivision plan pending Silas Little's favorable review of easement language. Second by Davidson. Vote on motion in favor unanimously. Language (for easement) is to be forwarded to Little. Fees of \$22 for NRPC, \$24 for mylar and \$14 for documents (total \$60) was paid to secretary. Case closed. Ellis steps down and MacMartin resumes seat on Board.

MONAHAN AND PROLMAN, NOTTINGHAM - Cluster Site Plan Review preliminary, continuing - not present.

GRANITE STATE CONCRETE CO INC - Non Residential Site Plan Review continuing. Peter Leishman presents for GSC and company is also represented by their attorney William Drescher, their Vice President John MacLellan Jr, and Phil Tuomala, their engineer from Monadnock Survey.

Leishman noted that all concerns mentioned by the Board at the last meeting had been met. Regarding hours of operation, note 9 states hours will be 6:30 AM to 6:30 PM. Another says rock crusher will be located at floor of operation. Concern for volume of water and misters (4) is cited in note 11. Fuel storage tank is addressed on page 1 and generator location is shown as well as crusher on plans. Plan shown tonite, Leishman says, shows best locations and grassy swales, as requested by Weston, are also indicated. Regarding the question of tonnage, output of facility, Leishman said the Maclellan's would abide by 3000 T per day, if they had to, but would challenge this in court.

Whitehill asked if the crusher location had been changed. Leishman said it had adding that the best locations for crusher and rail were now shown on the plans.

MacMartin asked what the "arms" were on the conveyor belts. These are noted to be the four misters or sprayers that will be used to keep dust down.

Leishman said that complete site specific drainage and reclamation plans are available and have been submitted. Whitehill noted that the letter received from Weston addresses the four sprayers (nozzles) and the Board was concerned about swales and drainage of water on site. Said letter doesn't really address those items Board wanted given more consideration.

Phil Tuomala - have the site specific approval of the State for Section Section 1. Overall parcel is 70+ acres and Section 1 encompasses approximately 16 acres. Drainage has been specifically designed for Section 1, he said. Drainage calculations based on Section 1 are larger than plan shown tonite. Agrees that Weston's letter infers swales needed (shown) for entire site and not just area around four sprayers.. He added that when regrading is done (anywhere) you must redesign and the swales shown have been planned for a specific site.

Glines agreed that the plans shown look like twice the actual area under consideration.

MacMartin criticized Leishman saying he'd put the cart before the horse. Usually when an applicant goes to Weston, the Planning Board has put together its "laundry list" of things it wants Weston to look at. Leishman did not do this. He personally delivered the plans to Weston and spent the better part of the afternoon in Concord while they reviewed the plans.

Tuomala said the plan had been to take the rock out of the north corner, but now removal would be at northeast end to minimize on-site trucking.

Rockwood said the reason he had asked for figures substantiating GSC's claim of 3000 T per day was so Board would have good idea what it was dealing with, especially if there is (or may be) expansion in the future.

MacMartin said Silas Little suggested Board put 3000 T per day in their approval as a benchmark. Added that GSC represented that they do 3000 T/day.

Rockwood repeated that the Board was merely trying to establish what's there.

Bill Drescher said that GSC's application is for placement of a crusher. His client says this machine could do 3000 T per day. And they are only asking for this one machine. He is concerned that if GSC agrees to 3000 T per day and they had a day when equipment broke down or the train wasn't going to be there, that they'd be prohibited from removing more than 3000 T on a subsequent day. Rockwood said he didn't think that was what the Board meant.

Asking MacLellan for confirmation Drescher continued stating that the machine GSC intends to place on site is capable of 3000 T per day with a maximum output of 3500 T per day. Drescher said if the machine could do 10K T a day, they'd be lying and if they were to consider one of that size (now or later) they'd be back before the Board for it, or for the different machine.

MacMartin says this has been an ongoing problem for the Town. Feels Planning Board has opportunity now to make approval of plan less objectionable to applicant and Town by citing the machine's average capabilities.

*INCLUSION OF
OUTPUT REQ.
PART 01*

and meet the Town's interests.

Stein asked if we were assuming the operation is grandfathered. MacMartin replied that ZBA was implicit in ~~its~~ decision that the operation is grandfathered. Stein thought according to SB67 one needed to know the current level so that we could talk about expansion.

Drescher argued that "expansion" relates to new areas of excavation, not his clients proposal. Based on the scope of the operation, he could envision that limit of 3000 T day could have a terrible impact on the neighborhood.

Stein said that cease and desist orders issued against GSC have been to no avail. He wants to establish criteria to protect the neighborhood as well as the applicant.

Rockwood said what the Board was told (about capacity) was somewhat different than what's being discussed now.

Davidson said that Board needs a distinction over what's been shipped.

Stein added that ZBA's approval was given saying that they were only changing their means of transportation (via rail instead of truck).

Richard Greeley, speaking from the audience, said that what Stein failed to note in determining impact on the neighborhood is that there's two excavation businesses up there. And the Board hasn't determined which one is causing the problems.

Leishman and MacLellan attended a meeting today with PVA. PVA has alleged that damaged was caused this year by GSC's blasting. GSC has not blasted at all this year. Both MacLellan and Leishman stressed that they have been working with PVA, not against them, and PVA now realizes it wasn't GSC doing the blasting.

Minot Ring asked about seismographs being placed at site when blasting occurs. He wanted to know at what point have you gone over safe levels? MacLellan insisted that readings from companies' they've used show there has been no adverse impact.

MacMartin asked for clarification regarding GSC's exemption from local zoning relative to 155E-2. Drescher said that their activity is exempt from local zoning, but that it is not exempt from site plan review, nor have they ever represented any exemption from site plan review. ZBA says they're grandfathered. They have been prepared to comply (with site plan review) even before any notification from the Planning Board had been given. Drescher asked if GSC was entitled to site plan approval.

Whitehill repeated the question of why GSC doesn't have to comply with zoning. Drescher replied because it has been determined that theirs is a legitimate expansion of a use.

Neil Faiman, ZBA member present in the audience, said he questions reasoning ZBA may have said use was grandfathered. But concurs that 155E and SB67 do take away regulatory authority from ZBA.

Glines said that issuance of the Building Permit (improperly) set the path that has been followed.

MacMartin said that bonding was an issue to be discussed prior to any approval.

August 16, 1989

Page 4

Drescher said they're in a time bind; have been here (or before some other Board) since March. Said there's a lease for railroad with NHDOT that is contingent upon Leishman's getting GSC as a customer. Said lease could be lost if this goes on much longer. He requested the Board's acceptance and approval conditional upon satisfying Weston and a bond. He repeated the time constraints.

Glines said it was too bad that a railroad tied into such a sensitive issue as a rock crusher. He said he was tired of hearing complaints about the Planning Board holding up the railroad. Insisted that it was not this Board's fault. Whitehill agreed it wasn't Planning Board fault.

Drescher asked again that Board be mindful of GSC.

Davidson asked if there was enough info presented for acceptance?

Stein moved to accept. Julie Cummings said she had not seen these plans until tonight, no chance to review them. Leishman said plans had been here since last week and were available for NRPC to look at today. Whitehill added that Weston's letter doesn't address drainage swales. MacMartin thought approval could be handled conditionally.

Stein moved to accept subject to Weston's review and bonding; second by Glines. Motion carried 6 to 1, with Ring voting no.

Stein asked why it was necessary to have two separate bonds. MacMartin said this was for two different things. Whitehill agreed that separate bonds can be required per ordinance. Drescher said they'd agree to bonding for erosion control.

Greeley said he hoped that Lesihman didn't just pay \$5000 for what may be a \$10 letter as far as engineering review is concerned.

Tuomala will prepare figures for erosion control bond but noted time constraints.. Leishman said that drainage work and track work should be done by Sept. Hope is that railroad would be operating by fall. Leishman disagreed about railroad being tied to GSC project. Said if GSC doesn't go, neither will the railroad. Whitehill asked when lease would be forfeited. Lesihman said he has paid the State for the lease, which is expired now.

Condition for approval is that if bonding figures aren't forthcoming approval would be withdrawn.

MacMartin moved to approve the Non-Residential Site Plan conditional upon 1. a favorable review of the sedimentation and erosion control plans by Weston; 2 a favorable review of and posting of bond within 30 days, failing of which this approval would be withdrawn; 3. subject to the conditions listed on revised 8/15/89 plans, notes 1 through 11; 4 that approval is for a machine capable of output of 3000 T per day, maximum of 3500 T per day, which is the sole machine to be placed on site per this approval. Davidson seconded. The motion carried by vote of 5 yeas, 2 abstentions. Ring and Stein abstained. Fees of \$110 for NRPC are due and will be paid to Secretary.

Pennuci said that State says there should be minimum of 4 identifiable points per acre. Whitehill replied that Board is asking for markers to be placed.

Prolman repeated question on flagging. Macmartin suggested asap so that Weston would know what to look for too.

Pennuci asked if the erosion control plan would be available for public inspection. Yes.

Glines suggested it would be a good idea for entire Board to view this site.

Prolman or Leonard will see Secretary re: escrow and forms for same were given to them. Board will begin to review plans at upcoming work session; prepare items for Weston review.

GRANITE STATE CONCRETE CO INC. - Non-Residential Site Plan Review. response to conditional approval. Secretary advised that escrow had been set up for engineering review and Leishman presented the Corporate Resolutions that are part of escrow agreement to Ms Eckstrom for delivery to the Bank.

Leishman said they've made a site specific application to the State. He distributed new plans for the Board.

Glines asked what was different about these from last time. Leishman noted that Weston's review had cited 13 changes or recommendations. These are now on plans. He said the State's letter deals specifically with Phase I of plans. Town requires a reclamation plan to be filed and this will be done within time requirement.

There had been a difference of opinion over the amount of bond. Tuomala of Monadnock Survey had estimated \$21179 and Weston \$24489. A bond of \$25000 via irrevocable letter of credit is forthcoming if Board agreed with this. In meantime, Leishman had letter from Shawmut confirming sufficient credit for same.

He noted that removal has been concentrated on site where crusher was to be located; spur soon to be hooked and actually laid next week. Work on crossing had been done.

Weston wanted more rip-rap. This is shown on plans.

Whitehill noted that in review process, Tuomala was commenting on a changed plan. ie, Weston did not have same info.

Pam Ellis asked again what specifically is different.

Leishman said the plans shown tonight have been reviewed by Weston, the only disagreement is amount of bonding.

Whitehill reviewed the items per Weston's recommendations. 1 - 13. Per Weston, drainage swale at SE of crusher would handle drainage from stockpile. It is noted that left side drops 9 feet from west to east. Until rip-rap stabilized, they recommend adding a geo-textile mesh. Whitehill asked Board if it had questions.

MacMartin said to make sure there were provision for renewal of bond.

Whitehill asked where is it listed specifically that Phil (Tuomala) said he listed (-). This was shown.

Leishman asked Board's preference re: letter of credit. Treasurer Barry Greene suggested that an irrevocable letter of credit is easiest if language okay.

Glines moved to extend response period by 30 days. second by Davidson. Vote on motion, 6 in favor, 1 abstension (Stein).

10/18/89

2.

a residential area.

Considerable discussion was held on commercial parking in a residential area; angular parking; whether a variance is needed (it was felt they had a good argument to go to the Z.B.A.) since the residential area belongs to Mr. Bussey (and only defined by an invisible line); the depth from the property line (150' or 250' from the center line). Mr. Bussey decided to find out exactly where the line is before going any further. Chairman Whitehill requested a few plans be left for consideration at the Board's work session.

Granite State Concrete Co., Inc. / Non-Residential Site Plan Review / Response to Conditional Approval

Peter Leishman stated that Chairman Whitehill received a fax letter from the bank on the Irrevocable Letter of Credit. Mr. Leishman invited anyone to "come and visit the site to see what has been done" - site work has been done for the location of the crusher. He indicated the check received by the Town was incorrect and the correct one should be received the next day. Mr. Stein question exactly what was the Board waiting for from Granite State? (Correct plats, check and Letter of Credit.) Mr. MacMartin indicated he would like to see the Irrevocable Letter of Credit revised to reference the proper set of plans and he also indicated he would like to talk to Town Counsel about the expiration date referenced on the plans.

In response to Mr. Stein's question regarding why Granite State started all the work without having the plans, etc. complete, Mr. Leishman said most of the work on the spur was done on State property, most of the site work was material removal except for the gate which the Irrevocable Letter of Credit covered. Mr. Leishman indicated to the Board that to date he had received no complaints about blasting. There was also discussion on what the Letter of Credit should include such as reference to the package of plans, correct date, provision for renewal of a bond, etc.

Mr. Stein stated that several months before, in a working session, granting of conditional approval was discussed and now it has to be extended still another month for simple paperwork ... "this puts the Town in a bad light" since the paperwork was still not finished. Chairman Whitehill pointed out nothing has been signed, they have not gone ahead since they can't put the crusher in until everything is finished and the only clout the Board had was holding back the final approval.

Mr. Leishman stated that they hadn't dragged their feet ... if the letter said September 15th instead of September 20th, they would have been all set.

Mr. Glines moved to extend the conditional approval for 30 days, seconded by Alec MacMartin, all in favor with Mr. Stein opposing.

Robert Manning & Gerald Mazur / Abbot Hill Road / Subdivision Site Plan Review / Continuing Preliminary

Mr. MacMartin stepped down from the Board.

Mr. Manning presented his three lot subdivision with the relocation of the septic system. Soil survey plan has been certified and signed. Mr. Whitehill questioned the driveway crossing the wetlands to access the back lot. Mr. Manning reported it has been sent onto Concord for approval. Ms. Cummings also questioned exactly where the driveway was going? Mr. Manning indicated he was just going to sell the land, not put in a driveway.

Mr. Glines moved to accept the plan, seconded by Mr. Ring, all in favor.

With no questions from abutters, Chairman Whitehill indicated to Mr. Manning that he should have a Dredge & Fill Permit, septic approvals (already filed), should have all the variances ; and all the bounds are in (all but three are in - Mr. Whitehill will walk them.) There was discussion on the amount of setback footage on the back lot; whether indication of the driveway to the back lot could be shown so it avoids the wetlands? Mr. Whitehill stated the Board could request the plan show access to the lot then it would be up to the Building Inspector to say that it doesn't turn into the wetlands. He felt the Board didn't have a say now, since it was within the setback.

Proctor, Greene & Frye / Mason Road / Subdivision Site Plan Review / Lot Line Adjustment / Response to a Conditional Approval

Mr. Greene presented the Board with a plan which included Item Number Nine and an additional \$72.00 Check had been issued.

Mr. Stein moved the conditions were satisfied, seconded by Mr. Glines, all in favor.

Regional Urban Development Co., Inc. / Intervale Road / Subdivision Site Plan Review/ Preliminary / Lot Line Adjustment

Mr. Joseph Lemire presented: The parcel is the first lot on the left as your turn onto Intervale Road; They have a building permit to construct a duplex and have dug the cellar hole; since it is in a residential area on Town water and Town sewer, thought two duplexes or four units could be built since they have the density on one acre, however, since the change in March at Town Meeting he didn't know if this could be applied here. Chairman Whitehill pointed out it couldn't be done with the Planning Board but it have to be approved by the Z.B.A. After brief discussion of several other issues, Ms. Cummings stated everything looked all right.

MOTION: Mr. Ring moved to accept the road plan as it is. Mr. Davidson seconded the motion.

DISCUSSION: Chairman Whitehill states that an agreement has been reached between M&P and the Town that the Board will wait for the review from the State on the intersection of 101 and AHR rather than have our engineers review it.

MOTION: Mr. MacMartin moves to amend the motion on the floor to be limited to the internal intersections and grades as proposed by the M&P plan. Mr. Rockwood seconds the motion. Amendment motion passed unanimously. Chairman Whitehill calls for vote on original motion and adds amended language to include "accepting internal intersections, road layout and grades" of M&P proposal, subject to State review of the AHR and 101 intersection.

DISCUSSION: Mr. Leonard clarified that M&P understand that the State has to review the intersections with AHR and they understand that the Board does not mean to affect what the State has to say. It is also understood by M&P and the Board that internal intersections, road layout and grades may be affected by whatever the State mandates. Further, the developers understand that whatever the State mandates re: external roads may have internal ramifications on the plan. Stan Shultz raises concern about sewer plans not being done at the proper time, ie with internal road plans.

MOTION: Chairman Whitehill again calls for vote on amended original motion. Motion passed unanimously.

Mr. Leonard presents further items for discussion. M&P and Mr. April agree that high intensity soil survey not needed.

Mr. MacMartin points out that Mr. April says a high intensity soil survey is not needed for the entire site but additional soil information may be required once ground work begins. M&P agree to this.

M&P and Mr. April agree on passive recreation design.

Mr. MacMartin would like to see some open areas that do not co-exist with detention and drainage areas in order to provide recreation areas for children. M&P have no problem with this request.

Mr. Leonard handed out impact study. Julie Cummings of NRPC has reviewed. Will be discussed at next meeting.

TO BE CONTINUED.

GRANITE STATE CONCRETE CO., INC.
CONTINUING NON-RESIDENTIAL SITE PLAN REVIEW
RESPONSE TO CONDITIONAL APPROVAL

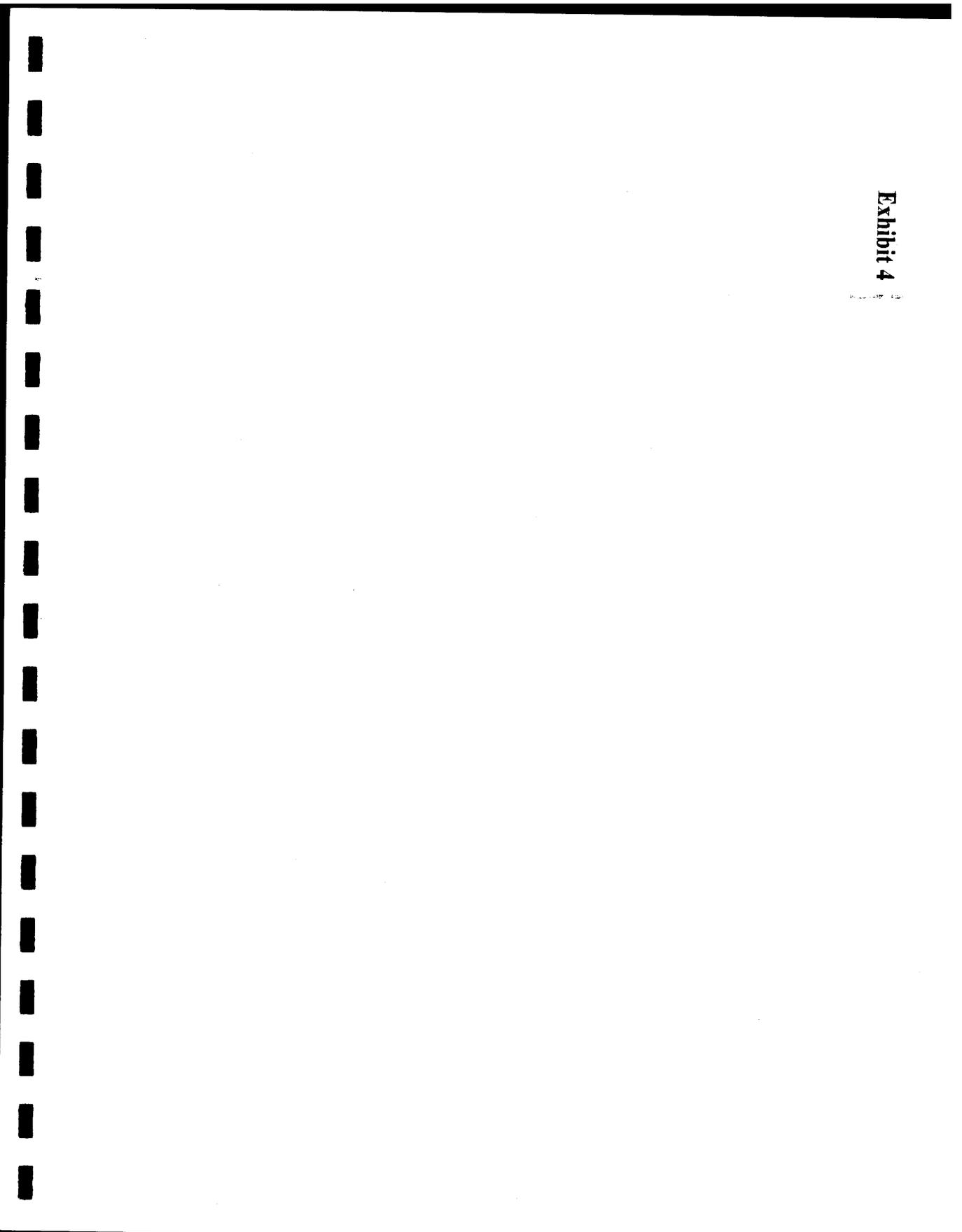
Represented by Peter Leishman who recaps problem last meeting with Irrevocable Letter of Credit. Town counsel reviewed situation and suggested providing cash, to save time, instead of ILC. A passbook acct. has been opened in the Town of Wilton's name, agent for Granite State. The appropriate language has been reviewed by Mr. MacMartin and Town Counsel. This is a cash bond vs. an ILC. There are provisions for an extension for a year after the expiration of the bond, should Granite State not meet it's conditions.

G.S. also paid to the Town money owed for the engineering review - approx. \$700 in addition to \$1000 that was put into an escrow acct. Town treasurer, Barry Green will be responsible for the holding of these funds.

MOTION: Mr. MacMartin moves to state that Granite State Concrete Co., Inc. has met the conditions of approval as per the Board's minutes of 10/18/89 meeting. Mr. Davidson seconded the motion. Motion passed unanimously.

Exhibit 4

1



2/15/89
Approved
4/15/91

NOTES

- 1) PROPERTY BOUNDARIES FROM PLAN ENTITLED "SITE BOUNDARY PLAN, EARTH REMOVAL OPERATION ON LOT B-11, PREPARED FOR GRANITE STATE CONCRETE CO., INC., WILTON, NEW HAMPSHIRE," DATED 6/1/89, REVISED 9/15/89, BY MONADNOCK SURVEY, INC.
- 2) BASE TOPOGRAPHY FROM PLAN ENTITLED "SITE RECLAMATION PLAN FOR REMOVAL OPERATION ON LOT B-11, PREPARED FOR GRANITE STATE CONCRETE CO., INC., WILTON, NEW HAMPSHIRE", DATED 12/16/88, REVISED 9/15/89, BY MONADNOCK SURVEY INC.
- 3) EXISTING PROCESSING FACILITY LOCATIONS BY NORTH AMERICAN RESERVE, FROM AERIAL PHOTOGRAPHY DATED AUGUST, 2000, BY HORIZON AERIAL PHOTOGRAPHY.
- 4) OWNER OF RECORD IS GRANITE STATE CONCRETE CO., INC., ELM STREET, P.O. BOX 185, MILFORD, NH 03055.
- 5) DEED REFERENCE TO THE PARCEL IS BOOK 2794, PAGE 512, TRACT TWO, DATED SEPTEMBER 16, 1980 RECORDED IN THE HILLSBOROUGH COUNTY REGISTRY OF DEEDS.
- 6) PARCEL HAS THE BENEFIT OF A RIGHT OF WAY ACCESS TO THE PREMISES FROM FOREST ROAD (NH ROUTE 31) AS DESCRIBED IN STOWELL TO WRIGHT (HCRD BOOK 1788, PAGE 457, 6/16/64). ROAD ACCESS TO SITE IS PROVIDED BY STATE HIGHWAY AND PRIVATE RIGHT-OF-WAY. ACCESS BY TRAVEL OVER TOWN ROADWAYS IS NOT REQUIRED.
- 7) TOTAL AREA OF THE PARCEL IS 73.183 ACRES.
- 8) PARCEL IS TAX LOT 11 ON TOWN OF WILTON TAX MAP B.
- 9) THE PARCEL IS LOCATED IN THE INDUSTRIAL DISTRICT ZONE. PARCEL WAS PREVIOUSLY ZONED RESIDENTIAL-AGRICULTURAL WHEN SITE PLAN FOR PORTABLE PLANT/RAILROAD SPUR ORIGINALLY APPROVED IN 1989.
- 10) HOURS OF OPERATION: MONDAY THROUGH FRIDAY 6:30 AM TO 6:30 PM. TRUCKING SHALL NOT OCCUR OUTSIDE THE APPROVED HOURS OF OPERATION.
- 11) PORTABLE CRUSHER TO REMAIN ON PIT FLOOR.
- 12) EXCAVATION OPERATION SHALL BE CONDUCTED PURSUANT TO THE OPERATIONAL STANDARDS OF RSA 155-E:4-a.
- 13) DUST EMISSIONS FROM THE CRUSHER TO BE CONTROLLED BY 4 MIST SPRAYERS WITH FLOW VOLUME OF 6.7 GALLONS PER HOUR PER SPRAYER.
- 14) FUELING AND MAINTENANCE OF EXCAVATION AND EARTHMOVING EQUIPMENT SHALL CONFORM TO THE BEST MANAGEMENT PRACTICES DESCRIBED IN NHDES ENVIRONMENTAL FACT SHEET WD-WS-22-6.
- 15) SOIL TYPE FOR THE SITE AREA IS 143D : MONADNOCK STONY FINE SANDY LOAM, 15 - 35% SLOPES AS MAPPED IN THE SOIL SURVEY OF HILLSBOROUGH COUNTY, NH - WESTERN PART, DATED OCTOBER 1985 BY THE USDA SOIL CONSERVATION SERVICE.
- 16) ORIGINAL 1989 SITE PLAN APPROVED CONSTRUCTION OF A RAILROAD SPUR INTO THE EXISTING SITE'S OPERATIONAL AREA AND THE INSTALLATION OF A PORTABLE PLANT TO PROCESS EARTH PRODUCT MATERIALS.
- 17) UNLESS AND UNTIL TRANSPORTATION BY RAILROAD BECOMES UNAVAILABLE OR IMPRACTICABLE, THE CRUSHED STONE PRODUCTS OF THE PLANT SHALL BE TRANSPORTED OFF-SITE BY RAIL. APPLICANT MAY EMPLOY TRUCKING FOR THE LIMITED PURPOSES OF HAULING UNPROCESSED MATERIAL, HAULING BY-PRODUCT OR MATERIAL THAT CANNOT BE REMOVED BY RAIL, OR FOR BLASTING, DRILLING, MAINTENANCE OR SERVICE-RELATED EQUIPMENT.
- 18) "UNPROCESSED MATERIAL" SHALL MEAN EARTH AND ROCK NOT PROCESSED THROUGH THE PORTABLE PLANT. "BY-PRODUCT OR MATERIAL THAT CANNOT BE REMOVED BY RAIL" SHALL MEAN CLAYS, FINES, MIXED FINES OR SCREENINGS GENERATED BY THE PORTABLE PLANT THAT CAN CLOG THE RAILCARS. "BLASTING, DRILLING, MAINTENANCE OR SERVICE-RELATED EQUIPMENT" SHALL MEAN THE ADMINISTRATIVE AND OPERATIONAL ACTIVITIES OF APPLICANT NOT DIRECTLY RELATING TO THE HAULING OF MATERIAL.
- 19) UNLESS AND UNTIL TRANSPORTATION BY RAIL BECOMES UNAVAILABLE OR IMPRACTICABLE, APPLICANT SHALL LIMIT ITS TRUCK TRAFFIC TO 3,000 LOADS PER EXCAVATION YEAR OF "UNPROCESSED MATERIAL" AND "BY-PRODUCT OR MATERIAL THAT CANNOT BE REMOVED BY RAIL".
- 20) APPLICANT SHALL ANNUALLY SUPPLY TO THE TOWN DOCUMENTATION OF ITS TRUCK TRAFFIC BY MAY 15th FOR THE PRECEEDING EXCAVATION YEAR.
- 21) THIS PLAN SHALL SUPERCEDE THE 1989 SITE PLAN REGARDING TRANSPORTATION.

530 ---

545 ---

Exhibit 5



WILTON TOWN HALL

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46

Board Members in Attendance: Matt Higgins, NRCP, Selectman David Glines, Betsy Castro, Dick Rockwood, Bruce Johnson, Neil Fairman, Mark Whitehill, Alec MacMartin.
Alternates attending: Michael Davidson and David Holder.

Meeting called to order 7:35pm by chairman Bruce Johnson.

MINUTES

Mr. Whitehill moved to approve February 17, 2001 minutes and Mr. Rockwood seconded to approve minutes as written. Mr. Rockwood abstained. Motion carried.

Mr. Whitehill moved to approve minutes from March 21, 2001 as presented and Mr. Rockwood seconded.

Comments: Page 2, line 42 change "James Quinn" to "Tom Quinn".
Page 3, regarding New Spartan it should read Revision 7 dated 12/21/2000 was approved.
Mr. MacMartin moved to amend minutes and Mr. Rockwood seconded. Motion carried.
Unanimous.

CONTINUED BUSINESS

Granite State Concrete

Represented by Attorney Ari Pollock. His comments were as followed:

- 1. Mr. Rockwood suggestion of 155e sec 4A is now referenced in note 12
- 2. Per Mr. Whitehill added definition in note 19 as gone through definition in item 18 so made change.
- 3. Note 20 changed to "records be submitted annually".
- 4. Mr. Pollock submitted hauling records to the Board.

Two changes were zoning changes due to life of site plan is noted in item 9. This plan "supercedes" and Matt Higgins commented on this item.

Mr. Johnson questioned note 17 and 19. "unless railroad becomes impractical or unavailable", wanted to know who makes that decision.

Mr. Pollock: The railroad would make that decision, we will always want to go by rail. That is if there is no railroad available through the property. We would not have functionality if we don't have the railroad service.

Mr. Higgins Suggested to add note that if rail service is unavailable Granite State needs to come back to the board.

Mr. Pollock will make suggested note

Ms. Castro: Would like to see updated note say "reopen site plan".

Discussion of board

Mr. Rockwood wants to have a separate piece of paper to come before the Board if this is impractical and need an updated site plan he thinks it would be buried in the notes.

Pollock agreed.



7-18-01

1 Mr. Faiman: The Board should also readdress the issue of the crusher if this happens.

2

3 Abutter Mr. Matt Fish from Curtis Park Road.

4 Wanted to know if an Acoustical Engineer could be available to help reduce noise
5 problems. Also questioned hours of operation.

6 Mr. John McLellan: We did study noise issues and made changes. Closed generator and
7 added sound proof enclosure, now use rubber screens instead of metal and put screens
8 around the area.

9 Mr. Rockwood commented that Granite State is blasting towards the highway to
10 minimize noise towards homes. It will take some time to change the cut of the stone.

11 Chairman Johnson asked Granite State if there is a policy to hear complaints from
12 abutters. Mr. McLellan said abutters could approach the company with comments and
13 they will respond to them.

14

15 Carol Roberts expressed concern about the reduction of removal of "stone dust" by truck
16 and Mr. Rockwood said the plans allows them to remove 3,000 truck loads/year but it
17 appears they have been running less than.

18

19 Road Agent Chris Carter expressed concern about truck traffic on Main Street when
20 trucks should be using Rt. 31 exit. He said it appears to be the "hired trucks" not Granite
21 State's fleet. Board discussion followed.

22 Mr. McLellan: I'll remind them not to go through Main Street, they won't work here
23 anymore if they continue.

24 John Shepardson what are the hours of operation of the crusher.

25

26 *Vote:*

27 Motion by Mr. Faiman To approve the site plan conditional of receiving letter
28 indicating the site plan is to be reconsidered in event of train transportation
29 becomes unavailable or impractical. Mr. Rockwood seconded. Motion carried.

30

31 Mr. Whitehill made motion to accept the application. Mr. Faiman seconded and
32 motion carried unanimously.

33

34 Mr. Faiman moved to approve application that was brought up earlier which stated
35 To approve the site plan conditional of receiving letter indicating the site plan is to
36 be reconsidered in event of train transportation becomes unavailable or impractical
37 Mr. Rockwood seconded. Approved. No one abstained. Motion carried.

38

39 Signatures added to site plan.

40

Robert E. Bragdon

42 Waiting on approved easement language that was sent to Si Little

43



Madigan

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. NOR 42083

**GRANITE STATE CONCRETE CO., INC. and
MILFORD-BENNINGTON RAILROAD CO., INC.**

vs.

**BOSTON AND MAINE CORPORATION and
SPRINGFIELD TERMINAL RAILWAY COMPANY**

REPLY VERIFIED STATEMENT OF SUSAN MADIGAN

I have reviewed the Opening Statement filed by Guilford. The purpose of this Reply Verified Statement is to respond to certain points made by Guilford.

Guilford has referred to NORAC rule 104 (d), which states that derails at the fouling points of a main track are to be kept in the derailing position, except when removed to permit movements. Guilford also contends that the demarcation of the Guilford line and the Milford-Bennington line at milepost 16.36 is a fouling point. I disagree: it is the point where ownership of the single main track is delineated. Rule 104 (e) states that the "fouling point of a main track" is indicated by a yellow stripe painted on the rails, or yellow joint bars, or a sign displaying the letters "FP". As stated in my opening Verified Statement, the fouling point of a track is the convergence of two or more tracks at a turnout or crossing. By using any of the aforementioned methods to indicate the fouling point of the track, one knows that placing equipment on an adjacent track beyond that fouling point will prevent equipment from movement on the other.

When equipment is placed beyond the fouling point (“out to foul”), that equipment will prevent movement on the other track. Because milepost 16.36 is not a fouling point, the derail must be presumed to be used for purposes other than to indicate a fouling point and, as such, need only be applied when its use is required.

Guilford argues that Milford-Bennington should have issued its own bulletin after Guilford issued its bulletin indicating that the derail had been placed in service on the Milford Bennington line. In my view, Milford-Bennington was not required to publish a bulletin. According to Mr. Leishman of Milford-Bennington, the location of the derail at milepost 16.36 was within designated yard limits established by Milford-Bennington. Therefore, crews had to be able to stop, in accordance with rules 80 and 93, within one-half the distance of their range of vision short of objects such as derails set in the derailing position. In addition, it is my understanding from Mr. Leishman that Milford-Bennington personnel had received a job briefing on the location of the device and the terms and conditions relating to its use.

Although Guilford's point is not exactly clear, it also argues that Milford-Bennington permitted its crews to operate pursuant to a bulletin that was either incorrect or was not being followed and that this was a violation of rules 1 and 104 (d). Presumably, the bulletin to which Guilford is referring is the one that Guilford issued in December, 2002. The bulletin provided no information concerning the use of the device, and NORAC Rule 1 merely requires employees to familiarize themselves with, comply with, and carry a copy of Bulletin Orders in effect. As a result, I disagree that there was any violation of any rules.

Guilford has taken the position that if Milford-Bennington were performing any maintenance on the Guilford line they would be required to obtain verbal permission from the dispatcher to occupy the track and, in addition, a written "Form D" to perform maintenance, citing rules 93 and 132. For several reasons, I do not think that rule 132 is applicable to the work done by Milford-Bennington, as described in Mr. Leishman's reply Verified Statement. Rule 132 provides that permission of the employee in charge of a track is required if work will create a condition interfering with the safe passage of trains. Work was done by Milford-Bennington only when it had permission for its trains to occupy the track and, therefore, there would be no condition interfering with the safe passage of trains. In addition, rule 132 requires a Form D only on tracks where ABS DCS, or Interlocking rules are in effect. None of these rules was in effect on the Guilford line between the points where Mr. Leishman is alleged to have performed track maintenance.

A

Vol. 1 - 1

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34381

GRANITE STATE CONCRETE COMPANY, INC., and
MILFORD BENNINGTON RAILROAD COMPANY, INC.

vs.

BOSTON AND MAINE CORPORATION and
SPRINGFIELD TERMINAL RAILWAY COMPANY

DEPOSITION OF ROGER D. BERGERON, taken
pursuant to Notice on behalf of Granite State
Concrete Company, Inc., and Milford Bennington
Railroad Company, Inc., before Simonne J. Elwood,
R.P.R. and a Notary Public in and for the
Commonwealth of Massachusetts, at the office of
Guilford Rail System, Iron Horse Park, North
Billerica, Massachusetts, commencing on Monday,
November 3, 2003 at 11:58 a.m.

Vol. 1 - 3

INDEX

1				
2	DEPONENT	DIRECT	REDIRECT	CROSS
3	ROGER D. BERGERON			
4	By Mr. Howard	5	72	
5	By Mr. Culliford	60	--	
6				
7	EXHIBITS			
8	EXHIBIT NO.	DESCRIPTION		PAGE NO.
9	1	Memo - 8/29/03 to Roger Bergeron, AVP-Engineering, GRS from Jim Patterson, VP-Eng./Mech.		4
10	2	Verified Statement of Roger D. Bergeron in Support of Motion to Dismiss and Reply of the Boston and Maine Corporation and The Springfield Terminal Railway Company		4
11	3	Verified Statement of Roger D. Bergeron		4
12	4	Verified Statement of Roger D. Bergeron in Support of Surreply of the Boston and Maine Corporation and The Springfield Terminal Railway Company		4
13	5	Response of the Boston and Maine Corporation and the Springfield Terminal Railway Company to First Discovery Requests of Granite State Concrete Co., Inc., and Milford-Bennington Railroad Co., Inc.		5
14				
15				
16				
17				
18				
19				
20				
21				
22				
23				

Vol. 1 - 2

APPEARANCES:

JAMES E. HOWARD, ESQ.
JAMES E. HOWARD LLC
ONE THOMPSON SQUARE - SUITE 201
CHARLESTOWN, MA 02129
REPRESENTS GRANITE STATE CONCRETE
COMPANY, INC., and MILFORD BENNINGTON
RAILROAD COMPANY, INC.

ROBERT B. CULLIFORD, ESQ.
CORPORATE COUNSEL
GUILFORD RAIL SYSTEM
IRON HORSE PARK
NORTH BILLERICA, MA 01862-1692
REPRESENTS BOSTON AND MAINE CORPORATION
and SPRINGFIELD TERMINAL RAILWAY
COMPANY

Vol. 1 - 4

1
2
3 (Deposition of Roger D. Bergeron
4 commencing at 11:58 a.m.)
5
6 The following exhibits were premarked
7 per Attorney Howard:
8
9 (Whereupon the Stenographer marked as
10 Exhibit No. 1 - Memo - 8/29/03 to Roger
11 Bergeron, AVP-Engineering, GRS from Jim
12 Patterson, VP-Eng./Mech.)
13 (Whereupon the Stenographer marked as
14 Exhibit No. 2 - Verified Statement of Roger
15 D. Bergeron in Support of Motion to Dismiss
16 and Reply of the Boston and Maine Corporation
17 and The Springfield Terminal Railway
18 Company.)
19 (Whereupon the Stenographer marked as
20 Exhibit No. 3 - Verified Statement of Roger
21 D. Bergeron.)
22 (Whereupon the Stenographer marked as
23 Exhibit No. 4 - Verified Statement of Roger

Vol. 1 - 13

1 few days, but I do believe I have seen this
 2 before.
 3 Q Okay. Well, it relates to work being done on
 4 the Hillsboro branch between Milepost 13 and
 5 Milepost 16 in September of this year. Are
 6 you familiar with any work that was done in
 7 September of this year?
 8 A Yes, I am.
 9 Q Were you in charge of that?
 10 A Yes, I was.
 11 Q Was work done -- Well, let me ask this: What
 12 kind of work was done?
 13 A Cross-tie installation, grade crossing
 14 upgrade and surfacing and some rail
 15 changeout.
 16 Q How many ties were put in, approximately, do
 17 you know?
 18 A Approximately, in the vicinity of 1,000.
 19 Q Okay. And where, precisely, did the work
 20 start?
 21 A I believe it started -- There was work done
 22 on the line segment coming up; but,
 23 specifically, between 13 and 16.36, probably

Vol. 1 - 15

1 work. It will be done -- It's being done
 2 now, and it will continue on until we're
 3 completed with it.
 4 Q Do you have crews out there now doing it?
 5 A Specifically, I don't know right now, but it
 6 is work that they have to get done before the
 7 end of this year.
 8 Q And is it the same type of work that's been
 9 done so far?
 10 A Yeah. Cross-tie installation, that's
 11 correct.
 12 Q Is there a -- Do you have a written record of
 13 the work that has been done in September on
 14 that portion of the line?
 15 In other words, is there something
 16 that shows how many ties installed, how many
 17 feet surfaced and that sort of thing?
 18 A Yeah. There would be -- There is that type
 19 of record but not as such. There's a --
 20 There is a record kept of day-to-day
 21 production with certain crews and also
 22 surfacing, and that goal, it would be tracked
 23 that way through production records.

Vol. 1 - 14

1 right at 13 it started.
 2 Q Okay. And have you completed that work?
 3 A Most of it has been completed, yes.
 4 Q Okay. Well, isn't there approximately a mile
 5 at the end of the line that hasn't been
 6 completed?
 7 A There's about 800 or 900 feet left over that
 8 has to be addressed.
 9 Q No more than 800 or 900 feet?
 10 A No, no more than 800 or 900 feet.
 11 Q When was the work that was started in
 12 September at Milepost 13 completed?
 13 A I believe four working days after they
 14 started work.
 15 Q Which would be when, do you know?
 16 A According to this Exhibit No. 1, it would
 17 probably be in the vicinity of September 5th,
 18 but I can't say that for a certainty.
 19 Q Okay. Is there any plan to do the work on
 20 that portion where the work hasn't been done?
 21 A Oh, yes.
 22 Q When is that going to be done, do you know?
 23 A It will be done with on-going maintenance

Vol. 1 - 16

1 It's kept over the line segment how
 2 much work is done in each particular area of
 3 the railroad.
 4 Q Okay. So if someone wanted to know how many
 5 ties were installed and how many miles were
 6 surfaced starting at Milepost 13, those
 7 records would be in your gang reports or the
 8 gang production reports?
 9 A Yes. We can get them from the gang reports,
 10 that's correct.
 11 Q Now, what is the speed limit on the line now
 12 from Milepost 13 to the end?
 13 A It's accepted track to a speed up to ten
 14 miles an hour.
 15 Q When was it changed and -- Well, when did it
 16 become ten miles an hour?
 17 A I believe it was last Wednesday, whatever
 18 date that was, approximately, last Wednesday.
 19 Q Okay. And it was five miles an hour before
 20 that?
 21 A That is correct.
 22 Q Okay. It was five miles an hour when you
 23 started the work in September?

Vol. 1 - 17

1 A That is correct.
 2 Q Who made the decision to change the speed
 3 limit from five miles to ten miles?
 4 A It was -- It's not a decision. It was done
 5 by the engineer of the track.
 6 Q It was done by the engineer?
 7 A The engineer of track lifted the speed upon
 8 the completion of the work.
 9 Q Well, you just told me the work hasn't been
 10 completed, is that right?
 11 A The work necessary to keep it in compliance
 12 has been completed. There is still work that
 13 we had on that project of the tie
 14 installation that has to be done.
 15 Q Okay. Now, is there a process that -- a
 16 formal process that is followed when the
 17 speed limit on that line is changed?
 18 A Yes and -- I don't understand the question.
 19 Q Well, there was some work done in September
 20 on this line; and when the work started, the
 21 speed limit was five miles an hour; and last
 22 Wednesday, the speed limit was changed to ten
 23 miles an hour.

Vol. 1 - 18

1 I'm asking: Is there some formal
 2 procedure that people go through at Guilford
 3 to say -- to evaluate a line to say we should
 4 change the speed limit here?
 5 A There's a -- There's a formal evaluation when
 6 you post a speed to a timetable speed limit.
 7 Okay. From the timetable speed limit, track
 8 inspectors are authorized to go ahead and
 9 place the applicable speed for the conditions
 10 that they found at the completion of their
 11 inspections; and then when that work that was
 12 necessary to satisfy that condition was
 13 corrected, then it can go back up to whatever
 14 speed the person that made the repair brings
 15 it up to.
 16 Q Okay. So last Wednesday, who was it that
 17 made the decision to bring the speed up to
 18 ten miles an hour?
 19 A The engineer of the territory, engineer of
 20 track.
 21 Q What's his name?
 22 A Lenny O'Loughlin.
 23 Q O'Loughlin?

Vol. 1 - 19

1 A Yeah. O-L-O-U-G-H-L-I-N. Excuse me. O
 2 apostrophe.
 3 Q Does he consult with anybody in making that
 4 decision?
 5 A Other than his records of inspection and all
 6 those things there, and he converses with me
 7 twice a day as a matter of -- as a matter of
 8 practice. We have two conference calls per
 9 day with all the engineers on the Guilford
 10 Rail System.
 11 Q Did he discuss with you the decision to raise
 12 the speed to ten miles an hour?
 13 A Yes. I discussed it with him, yes.
 14 Q Okay. What was the substance of the
 15 conversation?
 16 A The fact that the work had satisfied all the
 17 conditions that had kept it at five miles an
 18 hour no longer required it to remain at five
 19 miles an hour. He was going to lift that
 20 speed.
 21 Q Okay. You told him that, or he told you
 22 that?
 23 A That was the discussion. I mean, it was, you

Vol. 1 - 20

1 know, --
 2 Q Did you call him, -- For example, when you
 3 were talking with him, did you say that you
 4 wanted him to lift the speed limit to ten?
 5 A No. I just asked what the requirements might
 6 have been that kept it down below ten and
 7 that if bills were met, was he in a position
 8 to lift it.
 9 Q And what was his answer?
 10 A He had no problem with lifting it.
 11 Q Now, I think you just said a minute ago that
 12 most of the work was done, as I understand
 13 it, in mid-September?
 14 A It appeared to be early September based upon
 15 this memo, and my recollection would be
 16 sometime early September.
 17 Q Well, why wasn't the speed limit raised
 18 earlier than mid-September when the work was
 19 completed?
 20 A It would be up to the engineer of track, the
 21 inspector or the track supervisor to lift
 22 that. This would have been a production or a
 23 maintenance crew that would have done the

Vol. 1 - 25

1 A Basically, no additional work according to
2 Track Safety Standards. You inspected it in
3 accordance with the 213 for Class 1.
4 Q Okay. So why is the Hillsboro branch listed
5 as an accepted track as opposed to Class 1
6 track?
7 A In any class of track, it only has to be safe
8 and efficient to meet the demands of the
9 service, and accepted status gives you some
10 latitude as far as the repairs and the
11 response time necessary to make certain
12 remedial actions.
13 Q So, in other words, the FRA jurisdiction and
14 oversight is less strenuous if you're
15 accepted as opposed to Class 1, right?
16 A Less strenuous to the point that there are
17 some subjectivity in the track safety
18 standards in its entirety, yeah.
19 Q Well, put it this way: If you're trying not
20 to be hassled by the FRA and you're better
21 off with accepted track as opposed to Class 1
22 track, isn't that right?
23 A No. It's not hassling with the FRA, no.

Vol. 1 - 26

1 It's trying to meet the requirements of the
2 FRA. It's not a hassle.
3 Q Okay. But let me ask it that way then. If
4 it's Class 1 track, it's more difficult to
5 meet the FRA standards than if it's accepted
6 track, right?
7 A No, that isn't true.
8 Q Okay. Well, why isn't this Class -- why
9 isn't this track Class 1 rather than
10 accepted?
11 A I guess to clear it up, I suppose it's
12 probably best to give an example.
13 A small head and web separation of
14 less than one inch by the FRA track safety
15 standards was a piece broken out on a rail
16 head. A person has to physically watch each
17 and every wheel movement over that broken
18 rail.
19 In accepted track, as long as the
20 person is qualified under 213.7B or A and he
21 thinks it's safe enough for the train to get
22 over that trail, and I'm talking about an
23 inch head and web separation, then he does

Vol. 1 - 27

1 not have to physically walk every train over.
2 It allows for efficient movement of the
3 operation.
4 Q Okay. So if it were Class 1, though, you
5 would have to fix that separation before a
6 train could go over it, right?
7 A No. You would have to physically walk every
8 train over. A person qualified under 213.7
9 has to walk a train over.
10 Q If it's accepted track, you could run over
11 that without anybody walking over it?
12 A That is correct.
13 Q Okay. Well, over the last ten years, has
14 there been any consideration given to putting
15 the Hillsboro branch in Class 1 condition?
16 A It is in Class 1 condition.
17 Q Okay. Has there been any consideration to
18 classify it as Class 1?
19 A To remove it from its accepted status?
20 Q Right.
21 A The efficiency of operation of trains up
22 there is the same in Class 1 and accepted.
23 It hasn't come to me that they needed to

Vol. 1 - 28

1 remove it from accepted status.
2 Q Okay. That's not a decision that you make.
3 That's an operating decision?
4 A It's a decision that I make, and I'm required
5 if I remove a track out of accepted status to
6 notify the FRA administrator ten days prior
7 to its removal. The efficiency is a
8 transportation cause such as if they had
9 to -- if they had a movement that had more
10 than five placard hazardous cars to go over
11 the line segment and needed to be in
12 compliance, then, therefore, that would be a
13 reason to remove it from accepted status.
14 You know, if there was a purpose like that,
15 then that would be given to me by
16 transportation.
17 Q Just to make sure I understand: When the
18 speed limit was raised last week to ten miles
19 an hour, did anybody tell you or direct you
20 what caused that to happen?
21 A Direct me, no, they did not.
22 Q So this -- Your testimony is that Mr.
23 O'Loughlin thought that it was appropriate

Vol. 1 - 29

1 and that was how the decision was made?
 2 A That's correct.
 3 Q All on his own; he didn't have any help from
 4 somebody saying, "Why we don't we raise it to
 5 ten?", or, "Please raise it to ten.", or,
 6 "Take a look at this and see if it can be
 7 raised to ten."?
 8 A The dialogue that I initiated last week was
 9 the fact that the work was substantially
 10 completed that would allow for those -- for
 11 the condition to go back to ten miles an
 12 hour.
 13 The answer that I got is that all the
 14 conditions were basically met and that there
 15 may have been some confusion as to why the
 16 track didn't go back up, but there was an
 17 inspection, and there was an assurance that
 18 the conditions were completed, and the speed
 19 was lifted.
 20 Q Okay. Let me ask you to take a look at what
 21 has been marked as Exhibit 2, please?
 22 (Indicating)
 23 A Okay.

Vol. 1 - 30

1 Q That's a verified statement that you made in
 2 this case. Do you recall that document?
 3 A Yes, I do.
 4 Q Now, if you can take a look at Paragraph 4 on
 5 Page 2, please, you say there that, "If the
 6 MBR were performing maintenance on this line,
 7 the MBR would be required to contact the
 8 Guilford dispatcher to obtain permission to
 9 occupy the track." Do you see that?
 10 A Yes, I do.
 11 Q And then you say that, "Guilford has no
 12 record of any such permission being requested
 13 or granted."
 14 What inquiry or investigation did you
 15 make to determine that there was no record?
 16 A I spoke with the -- what we call our District
 17 No. 2 Train Operations Manager that has
 18 authority over that line and asked him if
 19 there was any -- any request ever come in to
 20 maintain the track rather than the operation
 21 of the Milford-Bennington.
 22 Q What's his name?
 23 A It was -- I think it was Mike Moretto that I

Vol. 1 - 31

1 spoke to.
 2 Q Did you talk to anybody else?
 3 A I spoke with Larry Ferguson about -- who is
 4 our supervisor for the dispatchers, and asked
 5 him if he knew of any such request, and he
 6 didn't personally know of any.
 7 Q How about Mr. Moretto?
 8 A Mr. Moretto didn't recollect any time when
 9 the Milford-Bennington ever requested to do
 10 track maintenance on the line.
 11 Q Did you -- Was that the extent of your
 12 investigation then?
 13 A That was the extent of my investigation.
 14 Q Now, in the next Paragraph 5 there, you say
 15 that anybody performing maintenance on
 16 Guilford's property would have to be trained
 17 and qualified pursuant to the FRA's Roadway
 18 Worker Rules and that no one from
 19 Milford-Bennington ever received training or
 20 qualification from Guilford under those
 21 rules. Do you see that?
 22 A Yes, I do.
 23 Q Are the FRA Roadway Worker Rules the same for

Vol. 1 - 32

1 all railroads?
 2 A To the best of my knowledge, they are.
 3 Q Okay. And is it possible for
 4 Milford-Bennington, in your experience, to
 5 qualify under those FRA Roadway Worker Rules
 6 on its own rather than be trained by
 7 Guilford?
 8 A On their properties, they could be, not on
 9 ours.
 10 Q And that's a provision of the railway or the
 11 Roadway Worker Rules?
 12 A That is correct.
 13 Q Do you know which provision that is?
 14 A It's in the 214 which is the Roadway Worker,
 15 Subtitle 49 CFR 214. It requires the
 16 railroad to ensure the on-track safety
 17 programs.
 18 Q Has any Guilford union or union
 19 representative, to your knowledge, complained
 20 or said anything about Milford-Bennington
 21 personnel doing work on the Guilford line?
 22 A Any union to me? No. No, not at all.
 23 Q You're not aware of any complaint?

Vol. 1 - 33

1 A Not to me directly, no.
 2 Q You're aware of something indirectly?
 3 A Well, other than the dialogue that I heard
 4 last Tuesday when we were down in -- up in
 5 Manchester on that; but other than that, I
 6 wasn't aware of anybody.
 7 Q Well, let me be more specific. In Paragraph
 8 6 of this statement that we're looking at
 9 says that, in effect, that your collective
 10 bargaining agreements give your employees the
 11 right to perform maintenance, and performance
 12 of maintenance by MBR employees on Guilford
 13 property would be a violation of these
 14 agreements. Do you see that?
 15 A I see that.
 16 Q Are you aware of any union complaining that
 17 Milford-Bennington employees are violating
 18 the collective bargaining agreements?
 19 A I'm not personally aware of any union
 20 employees complaining.
 21 Q Well, personally, you mean -- What do you
 22 mean by personally?
 23 A I mean if there was a -- if there was a

Vol. 1 - 34

1 complaint lodged against the
 2 Milford-Bennington for maintaining tracks
 3 that the Brotherhood of Maintenance of Way
 4 has an agreement with us to maintain, we
 5 would see that advanced either in what they
 6 call claims conference when they talk
 7 about -- this would be a subject of a time
 8 claim, and this would either be mentioned in
 9 the claims conference, and conferences that I
 10 attend, probably 80 percent of those, or it
 11 would be a direct time claim which is a
 12 formal declaration and a written declaration
 13 asking us to pay this person for that time
 14 that somebody else was doing the work, and I
 15 don't know of -- I've never heard it in the
 16 claims conference, and I have no recollection
 17 of seeing a claim advanced from the
 18 Milford-Bennington working.
 19 Q Okay. In Paragraph 7, you're saying that you
 20 might be -- Guilford might be subject to
 21 liability under the FRA's track safety
 22 standards if Milford-Bennington employees
 23 performed work from which they were not

Vol. 1 - 35

1 properly qualified, and I'm paraphrasing
 2 that.
 3 You haven't -- Guilford hasn't had any
 4 claim by the FRA that there's been a
 5 violation of the track safety standards as a
 6 result of anything Milford-Bennington was
 7 doing, right?
 8 A No, I have not.
 9 Q Okay. Are you aware of any instances over
 10 the last -- well, since the beginning of the
 11 trackage rights agreement between Guilford
 12 and Milford-Bennington, any instances where
 13 Milford-Bennington has brought to Guilford's
 14 attention track problems or track defects?
 15 A Yes, I am.
 16 Q When was that, do you recall?
 17 A Not specifically, no.
 18 Q More than five years ago?
 19 A Could be five. It could have been, you know,
 20 -- in those conference calls that we have, we
 21 have two per day with the engineers of the
 22 territory and myself. The topics of what's
 23 going on with the crews and the track

Vol. 1 - 36

1 supervisors under their jurisdiction goes on
 2 through that, and it hasn't been uncommon if
 3 I heard that, you know, the Milford-Bennington
 4 may have complained about this condition, and
 5 we have people up there working. So, in that
 6 case, I know that that's -- I've heard that
 7 three or four times on those -- in the
 8 afternoon calls.
 9 Q Okay. Three or four times over 13 years
 10 or --
 11 A Over the past, maybe -- since we've been
 12 doing the conferences. Maybe about two to
 13 three years since we've been doing the
 14 conference calls.
 15 Q Are you aware of any instance prior to that
 16 time when Milford-Bennington reported track
 17 problems or defects?
 18 A Yeah. I think Milford-Bennington has been
 19 good about telling us if they see a condition
 20 that they thought needed to be looked at.
 21 Q Are you aware of a time when
 22 Milford-Bennington reported a fairly
 23 substantial number of defects and Guilford

Vol. 1 - 41

1 case. It's been marked as Exhibit No. 4. Do
 2 you recall this verified statement?
 3 (Indicating)
 4 A Yes, I do.
 5 Q Do you see in Paragraph 3 there, you're
 6 saying that, "Guilford maintenance crews are
 7 also regularly on the Branch --," and we're
 8 talking there about the Hillsboro branch,
 9 "-- several days per week performing
 10 inspections and maintenance."
 11 A I see that, yes.
 12 Q Okay. How many times a week is the line
 13 inspected between Milepost 13 and the end of
 14 the line?
 15 A At a minimum, once.
 16 Q And is it generally inspected more than once?
 17 A It could be, yes.
 18 Q How many times are there, generally, crews
 19 out there working in that area?
 20 A Okay. Now we're talking 13 to 16.36?
 21 Q Right.
 22 A They're regularly out there. You know, I
 23 don't know how often you can say that they're

Vol. 1 - 42

1 in that section.
 2 Q Are you aware of any instance in which
 3 Guilford track workers have been in that area
 4 at the same time as Milford-Bennington
 5 trains, any instances where there was any
 6 kind of safety problem?
 7 A To the best of my knowledge, no, I don't.
 8 Q Do you know whether Milford-Bennington has
 9 ever provided ties or other material to
 10 Guilford for installation on the line between
 11 Milepost 13 and the end of the line?
 12 A I do believe they have provided some
 13 material, yeah.
 14 Q What's the basis of your understanding?
 15 A Other than reading some of these documents, I
 16 do know that, on occasion, the guys have been
 17 saying they had to borrow certain like joint
 18 bars and things of that nature in completing
 19 one of their assignments up around Wilton.
 20 Q Okay. And Milford-Bennington has been
 21 cooperative in providing that material?
 22 A To the best of my knowledge, very
 23 cooperative, to the best of my knowledge.

Vol. 1 - 43

1 Q And in connection with providing material, is
 2 there any instance of which you're aware of
 3 Milford-Bennington also helped the Guilford
 4 crews with the installation?
 5 A Not to my knowledge, no.
 6 Q Nobody has ever reported that to you?
 7 A No one has ever reported that to me.
 8 Q The next document I'm handing you has been
 9 marked as Exhibit 5, and this is a document
 10 that's called "Response of the Boston and
 11 Maine Corporation and the Springfield
 12 Terminal Railway to First Discovery Requests
 13 of Granite State Concrete Co., Inc. And
 14 Milford-Bennington Railroad Co., Inc."
 15 For the record, let me say that this
 16 is probably misnamed. It should be the
 17 second discovery requests, but that's what
 18 the document says.
 19 Are you familiar at all with this
 20 document, Mr. Bergeron? (Indicating)
 21 A I believe I've read through most of this
 22 document or a few things in here that I
 23 hadn't seen, but I have read through most of

Vol. 1 - 44

1 this document, yes.
 2 Q Okay. Well, take a look on Page 9. Is that
 3 your signature there?
 4 A Yes, it is.
 5 Q Okay. Now, if you go back to Page 4, there's
 6 a -- starting in the middle of the page where
 7 it says, "Response," it says, "So far as
 8 Guilford is aware to date, Milford-Bennington
 9 has violated the following rules and safety
 10 practices." And then there are
 11 eight-numbered paragraphs or sentences.
 12 A I see that, yes.
 13 Q If you start with 4, can you tell me -- and
 14 go through 8, can you tell me whether you're
 15 familiar with the alleged violation that's
 16 listed there; and if so, what's the basis of
 17 the allegation that there was a violation?
 18 A (Reviewing document) Okay. Basically, on
 19 4, -- Do you want to do it that way? We'll
 20 go right through it.
 21 Q Yes.
 22 A On Item 4, the first basis on that is under
 23 213.5 is that -- and that the owner of the

Vol. 1 - 45

1 property is that I'm responsible for the
2 inspection and maintenance of the carrier's
3 property.
4 Under 213.4, which is Roadway Worker,
5 I'm also responsible as the engineering
6 officer to make sure that the Roadway Worker
7 Regulations are complied with and are in
8 place on the property. To that, I have never
9 had Milford-Bennington in a class or anything
10 like that. So, in 1, we had never gone over
11 their Roadway Worker protection and whether
12 that was acceptable on Guilford Rail System's
13 property.
14 On 2, is that under 213.5, we never
15 assigned the responsibility to maintain to
16 anybody other than ourselves. So that's the
17 premise behind that.
18 Q All right. But does that also assume that
19 Milford-Bennington is out there on your
20 property doing maintenance?
21 A That would have to assume that they're on our
22 property doing maintenance and inspection,
23 that is correct.

Vol. 1 - 46

1 Q Okay. And you said that you're not aware of
2 anybody who has ever -- Well, let me ask you
3 this: Are you aware of -- Have you,
4 personally; seen or have you heard from
5 anybody that Milford-Bennington people were
6 on your line doing maintenance?
7 A I've never seen -- I have never seen anybody
8 out there doing maintenance or inspection.
9 Q Has any Guilford employee informed you that
10 they have seen somebody from
11 Milford-Bennington on your line?
12 A No Guilford employee has ever told me that.
13 Q Okay. So the basis then that -- your
14 assumption, I take it, is Mr. Leishman's
15 statements that he's been out there doing
16 work?
17 A That is correct.
18 Q Okay. All right. No. 5.
19 A Okay. Again, 213.5 says that we're the
20 people responsible for maintenance of the
21 track and keeping it in compliance. In doing
22 so, the people that we have listed under
23 213.7, the FRA requires me to document who

Vol. 1 - 47

1 the people are that can inspect track and who
2 the people are that can maintain track.
3 I have to keep a record of the reasons
4 why I made them responsible for inspecting
5 and maintaining, and no one from the
6 Milford-Bennington is on my list of being
7 authorized to make any inspection or repair.
8 Q And, again, this assumes that
9 Milford-Bennington was on the Guilford line
10 doing maintenance work, right?
11 A That is correct, yes.
12 Q Okay. How about No. 6?
13 A No. 6 is that assuming there was a defective
14 condition on the property, Milford-Bennington,
15 in its training on the NORAC as it applies to
16 our line, says that any defect in the
17 property has to be reported immediately to
18 the dispatcher. If there was a defective
19 condition or alleged track condition, that
20 should have been advanced through that chain
21 through a dispatcher, and the dispatcher
22 notifies the Engineering Department.
23 Q Okay. How about trespassing on private

Vol. 1 - 48

1 property, No. 7?
2 A If, in the conduct of your work, you're not
3 doing something that's authorized to be
4 there, and you're in that track during the
5 time of railroad operations, then in
6 engineering, that's considered a trespass, a
7 trespasser, a person unauthorized to be on
8 the property.
9 Q So if somebody stepped off of
10 Milford-Bennington's locomotive or car and
11 onto the track, that would be trespassing in
12 your view?
13 A Not if he stepped off of his locomotive onto
14 the track. That would be covered under the
15 agreement that we have between the parties;
16 but other than that, he would have no
17 authority to do anything other than the
18 operation.
19 Q Okay. This trespass concept is not stated in
20 the Track Safety Standards or the Roadway
21 Worker Regulations, I take it?
22 A The Roadway Worker, no. The term "trespass"
23 does not appear there to the best of my

Vol. 1 - 65

1 the same time?
 2 A To the best of my knowledge, that's what it's
 3 there for.
 4 Q Now, there was some discussion during the
 5 course of your testimony about making an
 6 assumption that the Milford-Bennington was
 7 maintaining Guilford's property, and I
 8 believe you were asked: Has anyone told you
 9 that Milford-Bennington was maintaining
 10 Guilford's property, and I believe that you
 11 answered in the negative. And I'll ask you
 12 this: Have you ever had a conversation with
 13 John Steiniger regarding Milford-Bennington's
 14 maintenance of Guilford's property?
 15 A Yes, I have.
 16 Q And what was the nature of that conversation?
 17 A The nature of the conversation that, on a
 18 driveby, he had witnessed Peter Leishman
 19 working from a truck from a highway, not on a
 20 high-rail vehicle, but from a truck in making
 21 a repair to putting and installing a bolt.
 22 Q Okay. You also recalled during the course of
 23 this proceeding a verified statement

Vol. 1 - 66

1 submitted by Peter Leishman in which he made
 2 a statement somewhere along the line that
 3 said he installed hundreds of ties upon
 4 Guilford's property.
 5 A Yes, I have.
 6 Q So is your answer that you have been informed
 7 that Milford-Bennington is performing
 8 maintenance on Guilford's property?
 9 A I have been informed in reading that
 10 document.
 11 Q Now, if we could go back to the discovery
 12 requests of your answer.
 13 On the trespassing issue, to the best
 14 of your knowledge, has anyone from Guilford,
 15 either via the trackage rights agreement,
 16 orally or in writing or in another form, ever
 17 authorized anyone from Milford-Bennington to
 18 be on Guilford property for the purposes of
 19 performing inspection and maintenance?
 20 A Nobody to the best of my knowledge has
 21 authorized that.
 22 Q All right. Also, with respect to trespassing
 23 and FRA regulation of railroads, is it true

Vol. 1 - 67

1 that FRA has established model trespassing
 2 rules for distribution to states for
 3 enactment that would apply to all railroads?
 4 A That is true.
 5 Q Is it safe to say that trespassing is an
 6 important issue to FRA?
 7 A That is safe to say, that's correct.
 8 Q Okay. Let's see. As far as the useful life
 9 of a 75-pound or an 85-pound rail, is all the
 10 rail on the Hillsboro branch today the same
 11 rail that was installed in the 1920s, the
 12 early 19th Century?
 13 A Are we talking about the -- Is this all the
 14 branch line from Nashua to Wilton, or is
 15 this --
 16 Q I'll rephrase the question for you.
 17 A -- 13 to 16?
 18 Q Have we ever changed any rails on the
 19 Hillsboro branch?
 20 A Changed rails? We're constantly changing
 21 rails.
 22 Q So when we talk about the useful life of the
 23 rail, it's not necessarily all 80- to

Vol. 1 - 68

1 100-year old rail out there?
 2 A That is correct.
 3 Q And, in fact, if rail does exhibit signs of
 4 wear and tear, it is generally replaced
 5 eventually, is that correct?
 6 A That is correct.
 7 Q Okay. Now, as far as traffic on the line,
 8 when Guilford was operating to the Quinn
 9 Quarry, there was more activity and heavier
 10 weight on the line than there is today, is
 11 that correct?
 12 A There was a considerable amount of activity
 13 on the line at the time.
 14 Q And that stone was being moved for Guilford's
 15 use in the Nepra Project, was it not?
 16 A That is correct.
 17 Q Did Guilford do a substantial -- or any
 18 significant rehabilitation to the line to
 19 support the additional traffic coming out of
 20 the Quinn Quarry?
 21 A No, we did not.
 22 Q Why not?
 23 A We maintained the line in compliance with the

Vol. 1 - 69

1 regulations and made it safe and efficient
 2 for the services that it needed.
 3 Q Okay. Now, I guess the other question is I
 4 know the goal on Guilford is to rate all of
 5 its lines for 286,000-pound cars, is that
 6 correct?
 7 A Yeah.
 8 Q Today, is the Hillsboro branch rated for
 9 263,000-pound cars, do you know? Do you know
 10 what it is rated for?
 11 A I believe that's the rating of the Hillsboro
 12 branch is 263.
 13 Q So Milford-Bennington, if allowed by the
 14 trackage rights and by its car ownership,
 15 could ship cars up to 263,000 pounds on the
 16 line?
 17 A That's correct. Well, let me -- could ship
 18 cars that have the capacity to handle up to
 19 and not to exceed that.
 20 Q Okay. So, in your opinion, is the use of the
 21 line by Milford-Bennington, in keeping with
 22 the manner it's maintained, consistent with
 23 the manner it's maintained?

Vol. 1 - 70

1 A I don't understand the question.
 2 Q Me either.
 3 A Okay.
 4 Q Okay. Within Guilford, who has the authority
 5 to establish rules under which inspection or
 6 maintenance can be performed on Guilford
 7 property?
 8 A I do.
 9 Q Okay. Within Guilford, who has responsibility
 10 for maintaining Guilford's tracks and
 11 instructions?
 12 A I do.
 13 Q By what authority?
 14 A By authority of the Board of Directors and
 15 the management of Guilford.
 16 Q Is there also a regulatory that makes you
 17 responsible for the maintenance of Guilford's
 18 tracks?
 19 A I'm not following that.
 20 Q Does FRA have a regulation that endows you
 21 with responsibility for maintaining
 22 Guilford's track instructions?
 23 A No. The FRA doesn't have --

Vol. 1 - 71

1 Q What does 49 CFR 213.5 establish?
 2 A 49 CFR Part 213.5 establishes that the
 3 carrier has the responsibility to maintain
 4 its tracks and facilities in compliance with
 5 the regulations.
 6 Q So there is a regulatory provision for
 7 responsibility for maintaining Guilford's
 8 track?
 9 A There's a regulatory provision to maintain
 10 the track but not to me.
 11 Q Well, that's right. Can Guilford delegate
 12 its authority under -- or responsibility
 13 under Part 213.5 without notifying the
 14 Federal Railroad Administration?
 15 A No, not without notifying the FRA.
 16 Q Has Guilford ever delegated and/or notified
 17 FRA of the delegation of authority to
 18 maintain the Hillsboro branch?
 19 A Not the Hillsboro, no.
 20 Q So, essentially, absent authority from you or
 21 another authorized Guilford representative in
 22 notification to the FRA, would
 23 Milford-Bennington have the authority to

Vol. 1 - 72

1 inspect and maintain Guilford track?
 2 A No.
 3 Q Okay.
 4 MR. CULLIFORD: This involves -- If we
 5 can go off the record real quick.
 6 (Whereupon an off-the-record
 7 discussion took place.)
 8 MR. CULLIFORD: Back on the record.
 9 That's all I have. Do you have anymore
 10 questions?
 11 MR. HOWARD: Yes, I do, actually.
 12
 13 REDIRECT EXAMINATION
 14 Q (By Mr. Howard) You said that John Steiniger
 15 had told you that he saw Mr. Leishman working
 16 on the Guilford line, is that right?
 17 A That is correct.
 18 Q When did he tell you this?
 19 A Last Wednesday, maybe.
 20 Q And did he tell you when he saw Mr. Leishman
 21 on the line?
 22 A Not specifically time frame. He said it was
 23 a few years back.

Vol. 1 - 73

1 Q Did he tell you -- Did Mr. Steiniger tell you
 2 anything else?
 3 A No. I questioned Mr. Steiniger about whether
 4 he seen him. It was -- His response was to
 5 my question.
 6 Q Okay. And he said, yes, he had on one
 7 occasion?
 8 A Yes.
 9 Q Okay. And did you ask Mr. Steiniger what he
 10 did, if anything, having seen Mr. Leishman
 11 out there?
 12 A Yes, I did.
 13 Q And what did he say?
 14 A He said when he first approached him, he did
 15 not know who he was at first, when he first
 16 approached him and said discourage the
 17 trespassing issue and get off the property
 18 and didn't know if he was stealing material,
 19 and then he was immediately introduced to
 20 Peter. Peter introduced himself to him, and
 21 then to the best -- what he told me was that
 22 he discouraged Peter from working out there
 23 because of the problems that we would have

Vol. 1 - 75

1 Q What's Mr. Steiniger's position?
 2 A Presently?
 3 Q Yes. Well, presently.
 4 A Presently, he's Assistant Chief Engineer of
 5 Track.
 6 Q Okay. And two years ago whenever he saw Mr.
 7 Leishman, what was his position?
 8 A I think he was a construction supervisor.
 9 Q Is it possible that he thought that it was --
 10 I'll withdraw that.
 11 So as far as you know then, there was
 12 at least one Guilford employee, John Steiniger,
 13 who saw Mr. Leishman working on the track two
 14 or three years ago, and this is -- last week
 15 was the first time you ever knew anything
 16 about it?
 17 A To the best of my knowledge, that's correct.
 18 Q And so far as you are aware, nobody else knew
 19 anything about it, nobody else at Guilford?
 20 A Knew anything about that incident?
 21 Q Yes.
 22 A About that incident, other than John, no.
 23 Q So John kept this secret for all this time?

Vol. 1 - 74

1 with the union should they find him working
 2 out there.
 3 Q Discouraged him, but did Mr. Steiniger report
 4 this incident to anybody at that time?
 5 A I don't know who he -- at that time, I don't
 6 know.
 7 Q Or ever?
 8 A Other than answering my question of sometime
 9 last Wednesday, to the best of my knowledge,
 10 no.
 11 Q It was a surprise to you, I take it, that
 12 somebody had seen Mr. Leishman on the line?
 13 A Yes, it was.
 14 Q And wouldn't it have been -- if it was a
 15 problem from Mr. Steiniger's perspective,
 16 wouldn't he have said something to somebody
 17 before this?
 18 A I could see where he wouldn't, you know.
 19 Q Why wouldn't he?
 20 A I'm not -- All the people associated with
 21 maintaining the railroad's facilities and all
 22 that are aware of all the agreements relative
 23 to the properties.

Vol. 1 - 76

1 A I guess, yes.
 2 Q All right.
 3 MR. HOWARD: I have no more questions.
 4 MR. CULLIFORD: No more questions.
 5 (Whereupon the deposition of Roger D.
 6 Bergeron concluded at 1:21 p.m.)
 7
 8
 9
 10
 11
 12
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23

B

Vol. 1 - 1

BEFORE THE
SURFACE TRANSPORTATION BOARD
FINANCE DOCKET NO. 34381

GRANITE STATE CONCRETE COMPANY, INC., and
MILFORD BENNINGTON RAILROAD COMPANY, INC.

vs.

BOSTON AND MAINE CORPORATION and
SPRINGFIELD TERMINAL RAILWAY COMPANY

DEPOSITION OF GARY S. NAULT, taken
pursuant to Notice on behalf of Granite State
Concrete Company, Inc., and Milford Bennington
Railroad Company, Inc., before Simonne J. Elwood,
R.P.R. and a Notary Public in and for the
Commonwealth of Massachusetts, at the office of
Guilford Rail System, Iron Horse Park, North
Billerica, Massachusetts, commencing on Friday,
October 31, 2003 at 2:27 p.m.

Vol. 1 - 2

APPEARANCES:

JAMES E. HOWARD, ESQ.
JAMES E. HOWARD LLC
ONE THOMPSON SQUARE - SUITE 201
CHARLESTOWN, MA 02129
REPRESENTS GRANITE STATE CONCRETE
COMPANY, INC., and MILFORD BENNINGTON
RAILROAD COMPANY, INC.

ROBERT B. CULLIFORD, ESQ.
CORPORATE COUNSEL
GUILFORD RAIL SYSTEM
IRON HORSE PARK
NORTH BILLERICA, MA 01862-1692
REPRESENTS BOSTON AND MAINE CORPORATION
and SPRINGFIELD TERMINAL RAILWAY
COMPANY

Vol. 1 - 3

INDEX

2 DEPONENT DIRECT REDIRECT CROSS RE CROSS

3 GARY S. NAULT

4 By Mr. Howard 4 --

5 By Mr. Culliford 27 --

EXHIBITS

11 EXHIBIT NO. DESCRIPTION PAGE NO.

12 1 Springfield Terminal Railway
Track Inspection Report 21
8/8/03

14 2 Milford-Bennington Railroad
Inspection and Repair Report 26

Vol. 1 - 4

(Deposition of Gary S. Nault
commencing at 2:27 p.m.)

GARY S. NAULT

A witness called on behalf of the
Granite State Concrete Company, Inc., and
Milford Bennington Railroad Company, Inc.,
first having been duly sworn, under oath,
deposes and says as follows:

DIRECT EXAMINATION

15 Q (By Mr. Howard) Mr. Nault, you're employed
16 by Springfield Terminal, I take it?
17 A Yes, that's correct.
18 Q What's your position?
19 A I and R foreman in Nashua, New Hampshire.
20 Q And what does I and R stand for?
21 A Inspect and repair track.
22 Q So you work on the track?
23 A Right. Track department.

Vol. 1 - 9

1 Q But it didn't -- It wasn't sufficient to
2 raise the speed limit on the line?
3 A No. It was just put in ties where it needed.
4 Q Just to maintain the five miles an hour?
5 A Right, just to maintain it.
6 Q Do you -- You inspect the line once a week, I
7 take it?
8 A Right, at least once. Sometimes if I have
9 more time, I'll do, you know, part of it a
10 little more, you know. Sometimes I'll do --
11 like on a Friday, I'll go back up and do a
12 little bit more, you know, that way you can
13 always do a little bit more work if you have
14 more time on the track.
15 Q So it's not necessarily inspecting; you --
16 A No. I don't have to do a report more than
17 once, right. I do my report once a week.
18 Q Do you know Mr. Peter Leishman of
19 Milford-Bennington?
20 A Yes, I do.
21 Q How long have you known him?
22 A I've known -- about the same time of time
23 since I've been up there, you know, in the

Vol. 1 - 10

1 last five years.
2 Q Okay. And are there times when you've worked
3 together with him to take care of that track?
4 A Never. I wouldn't let him work on my track.
5 I'm a union, and I don't let management, and
6 I wouldn't let anybody work. I've told
7 anybody to stay away from my track. It's not
8 in the union, you know. Like if you came,
9 you know. Believe me, I have friends that
10 are laid off, and I'm not going to have
11 somebody else working.
12 Q Okay. Are you aware of any instances when
13 Milford-Bennington has provided materials for
14 use on the line?
15 A I believe, yeah, he's given me some spikes
16 before and a few bolts, but he's never done
17 any work with me.
18 Q So you take the material and install it
19 yourself?
20 A Yeah, yeah. Or he's left it there or
21 whatever, you know, just left it there.
22 Q Okay. Have you ever observed anybody from
23 Milford-Bennington working on the line

Vol. 1 - 11

1 between Milepost 13 and the end of the line?
2 A No. I never have, no.
3 Q Have you ever talked to anybody who has said
4 that they've observed Milford-Bennington
5 working on the line?
6 A No, I never have.
7 Q You never heard that from anybody?
8 A Never heard, no.
9 Q Do you have -- Based on your inspections and
10 familiarity, do you have an idea of how many
11 trains a day -- I'm talking only between 13
12 and 16.36, how many trains a day
13 Milford-Bennington generally runs and how
14 many trains Guilford runs?
15 A Well, I know we run right now probably three
16 times a week up there all the way, but I'm
17 not even sure how much they're going all the
18 way up there now because I go when they're
19 not running, but I think that they're running
20 between two and three trains a day.
21 Q Milford-Bennington?
22 A Milford-Bennington. Us, I think we just go
23 up, you know, once. Our last switch, I

Vol. 1 - 12

1 think, is -- they just probably go up and
2 run-around, you know, up at the run-around.
3 Q Where is the run-around?
4 A It's up at Milepost 16.
5 Q At Wilton?
6 A Yeah, and I don't know if they've been up
7 there for awhile now. I haven't seen our
8 train up there in months.
9 Q Okay. So have you been out on that line
10 between Milepost 13 and the end of the line,
11 either inspecting or working, at times when
12 Milford-Bennington trains have also been on
13 the line?
14 A Not in the past. I can't, you know, not in
15 the past five months, I haven't even seen
16 them at all; and before, we couldn't go on
17 before this new -- well, now, they have
18 exclusive rights. Until 1:00 o'clock, we
19 can't even go next to there until 1:00
20 and then make my phone call at 1:00 o'clock, and
21 then I do my patrol and if there's any work
22 needed.
23 Q Okay. But before the time when the exclusive

Vol. 1 - 13

1 rights were in effect, --
 2 A Right. Before that?
 3 Q Were there times when you were out there
 4 inspecting or working and when the
 5 Milford-Bennington trains were operating?
 6 A No. Well, I'd have to get the track, and
 7 they'd wait until I called clear, and they'd
 8 wait at Howard Street. You know, they'd wait
 9 right there; and then as soon as I was clear
 10 of -- What's the name of that crossing? It's
 11 below the Granite Street, and they would -- I
 12 would have to be called clear with the
 13 dispatcher below a certain -- below Milepost
 14 13, and then they could come by.
 15 Q Okay. So the dispatcher ensured that while
 16 you were out there, that Milford-Bennington
 17 trains were not --
 18 A Right. It was all verbal permission, yeah.
 19 Q And that system worked satisfactorily to your
 20 knowledge?
 21 A Yeah, yeah.
 22 Q Was there ever any time when you were out
 23 there working that you felt that it was

Vol. 1 - 15

1 Q But you've observed the work that's been
 2 done?
 3 A Oh, yeah. Yeah.
 4 Q And is my understanding correct that of the
 5 approximately three miles between Milepost 13
 6 and the end of the line, maybe two miles has
 7 been done, but there's still a mile to be
 8 done?
 9 A Yeah, probably less than a mile. There's a
 10 curve there that's there's ties laid out that
 11 still needs to be put in.
 12 Q When was -- The first two miles, when was
 13 that completed, do you know?
 14 A Oh, it took four days, and it was --
 15 Q Sometime in September?
 16 A Yeah, sometime. I'm not sure of the exact
 17 date. I'd have to look at my logs.
 18 Q Do you know why the last portion of the work
 19 has not been done?
 20 A No, I don't.
 21 Q Do you have any knowledge of the speed on the
 22 track; and I'm talking again about Milepost
 23 13 to the end of the line; the speed being

Vol. 1 - 14

1 unsafe, or you felt concerned for your
 2 safety?
 3 A No, I didn't feel unsafe out there.
 4 Q You mentioned that Mr. Leishman had provided
 5 you with materials from time to time. How
 6 would you describe your relationship with him
 7 and Milford-Bennington, generally, good?
 8 A Yeah. As much as I seen him, it was all
 9 right, you know. I didn't know him great,
 10 but I would see him once in awhile.
 11 Q Have you ever observed Milford-Bennington
 12 doing anything that you thought was unsafe on
 13 that line?
 14 A No.
 15 Q Are you familiar with the work that was done
 16 in September of this year between Milepost 13
 17 and the end of the line?
 18 A Oh, yeah. Yeah.
 19 Q Were you involved in that?
 20 A I was on the -- We were working, and they
 21 switched us to nights for -- I think it was
 22 like three days, but I wasn't on the tie job.
 23 I was just on the job I'm on now.

Vol. 1 - 16

1 raised to ten miles an hour?
 2 A No, I don't.
 3 Q Would it surprise you if the speed were
 4 raised to ten miles an hour?
 5 A It would, yeah, because I didn't do it. You
 6 know, I would just say I didn't do it. I
 7 mean, I'm not -- I mean, other people can go
 8 and inspect it, other supervisors and raise
 9 it if they want to, you know.
 10 Q Well, if --
 11 A As long as it's before I go patrolling it
 12 again, you know, I'll know. You know, it
 13 wasn't as of Tuesday as far as I knew, you
 14 know.
 15 Q Well, normally, if a decision is made to
 16 raise the speed limit from five miles to ten
 17 miles, would you be consulted on that?
 18 A If they want me to do the raising, they
 19 would. You know, if they wanted me to raise
 20 it, they'd consult me. But if someone else,
 21 if another supervisor wants to raise it
 22 himself, he could raise it on his own, you
 23 know, --

Vol. 1 - 25

1 A Right.
 2 Q Related to accepted track?
 3 A Uh-huh. It's a long thing. That's why it's
 4 hard to describe.
 5 Q Well, I understand that; but correct me if
 6 I'm wrong, but it looks to me like if you
 7 actually do something, you write it down
 8 under remedial action like you tightened a
 9 joint; but if you don't do anything, you
 10 write down 213.9, and you talk to somebody
 11 else about it?
 12 A Yeah. It means that we're going to reinspect
 13 it or fix it within the next month, too.
 14 Q You can do it that way because it's accepted
 15 track, is that right?
 16 A You can do that on Class 1 track also. So,
 17 in the yards, we'll do that. You know, if
 18 it's anything in Class 1, if it's -- if we
 19 don't -- as an inspector, if we feel that
 20 it's something a train can run over and we're
 21 going to get, you know, like we have like 13
 22 tracks to do in the yard and, you know, like
 23 let's say we find 15 defects, you've got to

Vol. 1 - 26

1 go in order the ones you fix, the priorities,
 2 you know, you've got to fix the ones that are
 3 going to derail the trains, you know.
 4 Q Let me ask you one more question: How many
 5 times, approximately, in the five or so years
 6 you've been working on the Hillsboro branch,
 7 how many times has Milford-Bennington
 8 provided you with materials or assistance out
 9 there?
 10 A Never assistance.
 11 Q Materials?
 12 A For me, I won't take it most of the time
 13 because I've told them before if this company
 14 can't provide it, I just as soon not do the
 15 work. That's the way I am. I don't know
 16 about other people. But maybe I would say
 17 three times.
 18 Q Okay. I have no further questions. Thank
 19 you.
 20 MR. CULLIFORD: Just a couple quick
 21 questions if I could.
 22 This will be Exhibit 2, please.
 23 (Whereupon the Stenographer marked as

Vol. 1 - 27

1 Exhibit No. 2 - Milford-Bennington Railroad -
 2 Inspection and Repair Report.)
 3
 4 CROSS EXAMINATION
 5 Q (By Mr. Culliford) To the best of your
 6 knowledge, is anyone who works for
 7 Milford-Bennington Railroad qualified under
 8 the FRA's track safety standards to inspect
 9 and maintain Guilford's track?
 10 A Not that I know of, no.
 11 Q If a person is not qualified under the FRA
 12 regulations, maybe you should explain what
 13 being qualified under the FRA regulations
 14 means?
 15 A Oh, well, they should have one year's
 16 supervisory experience and at least -- or a
 17 foreman, be a foreman for at least one year.
 18 Q Okay. If you could tell me what the document
 19 in front of you looks like, anyway?
 20 A I've never seen a report like that.
 21 Q Is that a Guilford report?
 22 A No, it's not a Guilford report. I don't know
 23 what -- Well, it says, "Milford-Bennington

Vol. 1 - 28

1 Railroad" up on top.
 2 Q Okay. And on that report, it seems to
 3 indicate, as I read it, correct me if I'm
 4 wrong, that there are certain mileposts where
 5 inspections -- where this report pertains to?
 6 A Yes. It says from Milepost 14.15 to 14.25.
 7 Q Right.
 8 A I mean, --
 9 Q And that is Guilford property, correct?
 10 A It's Guilford property, right. So it
 11 shouldn't be anyone except another supervisor
 12 from this company, you know, patrolling it.
 13 Q Now, also, down the bottom where it says,
 14 "work done on patrol," it seems to be saying
 15 that two ties were added and tamping was
 16 done. Is that how you read that?
 17 A Yeah. GTI.
 18 Q To the best of your knowledge, at Milepost
 19 14, within these mileposts, did Guilford add
 20 ties or do any tamping on or about
 21 September --
 22 A Yeah. They did several, more than two ties.
 23 Q On April 16th of 2003?

C

Vol. 1 - 1

BEFORE THE
SURFACE TRANSPORTATION BOARD
FINANCE DOCKET NO. 34381

GRANITE STATE CONCRETE COMPANY, INC., and
MILFORD BENNINGTON RAILROAD COMPANY, INC.

vs.

BOSTON AND MAINE CORPORATION and
SPRINGFIELD TERMINAL RAILWAY COMPANY

DEPOSITION OF STEVEN LARKIN, taken
pursuant to Notice on behalf of Granite State
Concrete Company, Inc., and Milford Bennington
Railroad Company, Inc., before Simonne J. Elwood,
R.P.R. and a Notary Public in and for the
Commonwealth of Massachusetts, at the office of
Guilford Rail System, Iron Horse Park, North
Billerica, Massachusetts, commencing on Friday,
October 31, 2003 at 3:03 p.m.

Vol. 1 - 3

I N D E X

1				
2	DEPONENT	DIRECT	REDIRECT	CROSS RECROSS
3	STEVEN LARKIN			
4	By Mr. Howard	4	--	
5	By Mr. Culliford		--	--
6				
7				
8				
9	E X H I B I T S			
10	EXHIBIT NO.	DESCRIPTION	PAGE NO.	
11	(No exhibits)			
12				
13				
14				
15				
16				
17				
18				
19				
20				
21				
22				
23				

Vol. 1 - 2

APPEARANCES:

JAMES E. HOWARD, ESQ.
JAMES E. HOWARD LLC
ONE THOMPSON SQUARE - SUITE 201
CHARLESTOWN, MA 02129
REPRESENTS GRANITE STATE CONCRETE
COMPANY, INC., and MILFORD BENNINGTON
RAILROAD COMPANY, INC.

ROBERT B. CULLIFORD, ESQ.
CORPORATE COUNSEL
GUILFORD RAIL SYSTEM
IRON HORSE PARK
NORTH BILLERICA, MA 01862-1692
REPRESENTS BOSTON AND MAINE CORPORATION
and SPRINGFIELD TERMINAL RAILWAY
COMPANY

Vol. 1 - 4

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

(Deposition of Steve Larkin commencing
at 3:03 p.m.)

STEVEN LARKIN

A witness called on behalf of the
Granite State Concrete Company, Inc., and
Milford Bennington Railroad Company, Inc.,
first having been duly sworn, under oath,
deposes and says as follows:

DIRECT EXAMINATION

15 Q (By Mr. Howard) Mr. Larkin, you're employed
16 by Guilford, right?
17 A That's correct.
18 Q And what's your position?
19 A I am track supervisor stationed out of Dover,
20 New Hampshire.
21 Q How long have you been with Guilford?
22 A Approximately 29 years.
23 Q Okay. And have you always been in the track

Vol. 1 - 9

1 on what I determined to be priority.
 2 Priority is the spot that I went to. I
 3 always had priorities.
 4 Q Okay. So one way or the other, from 1990 to
 5 1997, were you generally familiar with the
 6 condition of the Hillsboro branch?
 7 A Fairly familiar, yeah.
 8 Q Okay. Was it accepted track all during that
 9 period of time?
 10 A During that period, yes.
 11 Q Do you recall what the limits, the speed
 12 limits were?
 13 A I would say during that time, it varied on
 14 the Hillsboro branch to ten to five, nothing
 15 over.
 16 Q Okay. Now, do you recall any particular
 17 capital programs that were done on the
 18 Hillsboro branch during this period of time?
 19 A Yeah, several.
 20 Q What did --
 21 A We did two tie jobs, two outstanding tie
 22 jobs.
 23 Q Did that cover the whole line?

Vol. 1 - 10

1 A No, no. The end from milepost -- from Nashua
 2 to Milepost 5, it didn't have to do -- that
 3 was in halfway decent shape. So, again,
 4 priority. We attacked the areas that needed
 5 it, and it wasn't a set point and go. It's
 6 what I determined that needed it most to get
 7 the freight on and keep Peter running and
 8 ours at the same time.
 9 Q So some of the work was between Milepost 13
 10 and the end of the line?
 11 A Yeah. We did some work for Peter up there.
 12 Q Any rail programs during the time when you
 13 were there?
 14 A I can't tell you when, but I would change a
 15 lot of rail.
 16 Q Just change broken rails, or was there --
 17 A Yeah, broken rails. No installing anything,
 18 a higher-pound rail.
 19 Q Okay. So whatever work you did, though, you
 20 basically kept it at five to ten miles an
 21 hour; it didn't improve it?
 22 A I kept it at accepted or Class 1, depending.
 23 Q Okay. Now, when you were out there between

Vol. 1 - 11

1 1990 and 1997, were there any times when you
 2 received material from Milford-Bennington
 3 that you used on the line, up at the northern
 4 end of the line?
 5 A Yeah.
 6 Q Ties, bolts?
 7 A Once that I can recall, Peter gave us 35 to
 8 50 ties, and that was known throughout the
 9 railroad. Everyone knew we were up there
 10 doing ties, putting ties in, and he stated
 11 that he had a certain amount of ties that he
 12 would give us if we would put them in that
 13 area, and we obliged.
 14 Q Okay. And you say that was known throughout
 15 the railroad?
 16 A Well, that was not my -- that wasn't a deal
 17 that I cut with Peter.
 18 Q Right.
 19 A As a matter of fact, actually, I think that
 20 was probably after I demoted myself that we
 21 did that.
 22 Q Okay. Any other instances where
 23 Milford-Bennington provided materials?

Vol. 1 - 12

1 A Yeah, a couple. There was an instance that
 2 when I was putting in ties, Peter said that
 3 he had a lot of plates. If I ever needed a
 4 few plates to come out and help myself to the
 5 plates, and I told him that if I did take any
 6 plates it was because I needed a few extra to
 7 complete the job or put a couple extra ties
 8 in that weren't marked, and I always tried to
 9 go a little bit more than, you know, put in
 10 five ties, I'd put in six or seven. If I
 11 needed extra plates, he said to come and get
 12 them, and I said -- and that's how we did it.
 13 Q You did that from time to time?
 14 A Not a lot.
 15 Q But you did it?
 16 A If I ran out and I wasn't going to put a tie
 17 in without a plate, and he said that we could
 18 do it; and so, yeah, he did give a few
 19 plates, yeah.
 20 Q Now, were there any times that you were aware
 21 that Milford-Bennington was doing work on the
 22 Guilford line between Milepost 13 and the end
 23 of the line?

Vol. 1 - 13

1 A I never knew that he was doing any work up
 2 there. Okay?
 3 Q You never knew at the time, but you know now,
 4 or you never knew?
 5 A I hear that, you know, he's suggesting that
 6 he did a lot of work up there.
 7 Q You never saw him out there?
 8 A I never saw Peter, and I never gave him
 9 permission to work on the track.
 10 Q Okay.
 11 A Absolutely not.
 12 Q I take it, though, based on what you said so
 13 far, that you had a cooperative relationship
 14 with Milford-Bennington?
 15 A Yes. Oh, yeah.
 16 Q Keeping the track in good shape or as good as
 17 possible?
 18 A Yeah.
 19 Q Are you aware of the condition of the end of
 20 that line today, 13 to the end of the line?
 21 A No idea. I've been away from there for three
 22 years, two months, and I have too much to do
 23 where I am now. I don't get involved with

Vol. 1 - 15

1 everybody was safe?
 2 A Not only the dispatcher, we communicate. We
 3 would call Peter's train and make sure and
 4 let them know where we're working, know our
 5 limits. We'd talk. We communicated. And I
 6 believe that when I was there, he would move
 7 four trains a day, and we could do tie jobs,
 8 change rails and everything. It was all
 9 timed. It was a pretty good schedule. I
 10 don't think he has any -- I don't think Peter
 11 will bitch one bit when --
 12 Q He hasn't about that. Everything worked
 13 pretty well, right?
 14 A Yeah. I think we worked pretty well.
 15 Q Are you familiar with the difference between
 16 accepted track as compared to Class 1 track?
 17 A Uh-huh.
 18 Q Do you know why this Hillsboro branch has
 19 been accepted track forever?
 20 A That's totally up to the people in this
 21 building. I have nothing to do with
 22 accepted, class, whatever they want to run
 23 it, whatever they want to do with it. I

Vol. 1 - 14

1 it.
 2 Q Are you aware of -- Do you recall any actions
 3 by Milford-Bennington during the years when
 4 you were out there that you would consider
 5 unsafe or that had you concerned for your
 6 safety?
 7 A I live by the book. If the track is unsafe,
 8 it's out of service, period. If the train
 9 ran yesterday, it can run today. No. If
 10 there's anything unsafe, it's a broken rail,
 11 it's out of service.
 12 Q But as a person out there, possibly on the
 13 track with Milford-Bennington trains possibly
 14 operating the same area, did they do anything
 15 that had you concerned for your own safety?
 16 A Not at all.
 17 Q No?
 18 A Nope.
 19 Q I take it there were times when your crews
 20 were out there working and Milford-Bennington
 21 trains were operating?
 22 A That's correct.
 23 Q And the dispatcher, I assume, made sure that

Vol. 1 - 16

1 comply to what's in the book, and I make sure
 2 that the trains can run under that class.
 3 Q I'm assuming, Mr. Larkin, that you're not
 4 familiar with the work that was done on the
 5 line in September of this year?
 6 A Not at all.
 7 Q Okay. I think that does it. Thank you very
 8 much.
 9 A You're welcome.
 10 MR. CULLIFORD: No questions.
 11 (Whereupon the deposition of Steven
 12 Larkin concluded at 3:16 p.m.)
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23

D

Vol. 1 - 1

BEFORE THE
SURFACE TRANSPORTATION BOARD
FINANCE DOCKET NO. 34381

GRANITE STATE CONCRETE COMPANY, INC., and
MILFORD BENNINGTON RAILROAD COMPANY, INC.

vs.

BOSTON AND MAINE CORPORATION and
SPRINGFIELD TERMINAL RAILWAY COMPANY

DEPOSITION OF CALVIN R. PRESTON, taken
pursuant to Notice on behalf of Granite State
Concrete Company, Inc., and Milford Bennington
Railroad Company, Inc., before Simonne J. Elwood,
R.P.R. and a Notary Public in and for the
Commonwealth of Massachusetts, at the office of
Guilford Rail System, Iron Horse Park, North
Billerica, Massachusetts, commencing on Friday,
October 31, 2003 at 3:19 p.m.

Vol. 1 - 3

INDEX

1				
2	<u>DEPONENT</u>	<u>DIRECT</u>	<u>REDIRECT</u>	<u>CROSS</u> <u>RECROSS</u>
3	CALVIN R. PRESTON			
4	By Mr. Howard	4	20	
5	By Mr. Culliford	18	--	
6				
7				
8				
9				
10	<u>EXHIBITS</u>			
11	<u>EXHIBIT NO.</u>	<u>DESCRIPTION</u>	<u>PAGE NO.</u>	
12	1	Springfield Terminal Railway Track Inspection Report 5/15/03	12	
13				
14	2	Handwritten Document Attn. J.B.	15	
15				
16				
17				
18				
19				
20				
21				
22				
23				

Vol. 1 - 2

APPEARANCES:

JAMES E. HOWARD, ESQ.
JAMES E. HOWARD LLC
ONE THOMPSON SQUARE - SUITE 201
CHARLESTOWN, MA 02129
REPRESENTS GRANITE STATE CONCRETE
COMPANY, INC., and MILFORD BENNINGTON
RAILROAD COMPANY, INC.

ROBERT B. CULLIFORD, ESQ.
CORPORATE COUNSEL
GUILFORD RAIL SYSTEM
IRON HORSE PARK
NORTH BILLERICA, MA 01862-1692
REPRESENTS BOSTON AND MAINE CORPORATION
and SPRINGFIELD TERMINAL RAILWAY
COMPANY

Vol. 1 - 4

(Deposition of Calvin R. Preston
commencing at 3:19 p.m.)

CALVIN R. PRESTON

A witness called on behalf of the
Granite State Concrete Company, Inc., and
Milford Bennington Railroad Company, Inc.,
first having been duly sworn, under oath,
deposes and says as follows:

DIRECT EXAMINATION

15 Q (By Mr. Howard) Mr. Preston, you're employed
16 by Springfield Terminal or Guilford, I take
17 it?

18 A That's correct.

19 Q How long have you been employed here?

20 A 26 years.

21 Q Okay. And what is your job title at this
22 time?

23 A IR Foreman, Dover.

Vol. 1 - 5

1 Q Okay. And Dover is -- Well, let me go back.
 2 How long have you been in the
 3 maintenance-of-way track area?
 4 A 26 years.
 5 Q Are you familiar with the Hillsboro branch?
 6 A Yes.
 7 Q Is that part of the Dover jurisdiction now?
 8 A No.
 9 Q Okay. So you don't work on the Hillsboro
 10 branch at this time?
 11 A No.
 12 Q When did you work on the Hillsboro branch?
 13 A I left that area the end of May of this year.
 14 Q Okay. And how long did you work on the
 15 Hillsboro branch?
 16 A Off and on for a good many years.
 17 Q Okay. Back into the 1990s?
 18 A Yes.
 19 Q Were you there on the Hillsboro branch when
 20 Milford-Bennington started operating?
 21 A When they first started, I probably was.
 22 Q Okay. What's the general condition of the
 23 line as far as you know?

Vol. 1 - 7

1 Q Any rail programs?
 2 A Other than changing broken rails, no, there
 3 has not been an upgrade of rails, not in --
 4 by upgrade, I mean in size of rail.
 5 Q Right. So the only rail work on the line is
 6 when there's a broken rail that needs to be
 7 replaced?
 8 A Other than the area around Route 3, that
 9 was -- there's a mile there that was upgraded
 10 a few years ago. It was part of the bridge
 11 project over the highway.
 12 Q What milepost is that, do you recall?
 13 A That is 3 to 4.
 14 Q Okay. Now, when you were working on the line
 15 and, in particular, when you were between
 16 Milepost 13 and the end of the line, were
 17 there ever occasions when Milford-Bennington
 18 provided materials for your use on that line,
 19 ties or other materials?
 20 A They did lay some ties out for us to use.
 21 Q Okay. How many times, do you recall?
 22 A No, I don't. I think the majority of what he
 23 laid out are still there.

Vol. 1 - 6

1 A It's accepted track. Its maintained to Class
 2 1 standards.
 3 Q It is maintained to Class 1 standards?
 4 A Yes.
 5 Q Do you know any reason why it's not
 6 classified as Class 1?
 7 A You have to ask the people upstairs here.
 8 Q Okay. But in your view, it could be Class 1?
 9 A Yes.
 10 Q And is that true throughout the period that
 11 you were working on the branch?
 12 A Yes.
 13 Q Did you ever have any conversation with
 14 anybody as to why it wasn't Class 1?
 15 A No.
 16 Q Do you recall any kind of capital programs
 17 that were done on the Hillsboro branch while
 18 you were working on it?
 19 A Over the years, yes.
 20 Q What kind of programs?
 21 A I remember, in 1976, there was a tie crew,
 22 and there's been tie crews since then on
 23 Hillsboro.

Vol. 1 - 8

1 Q Never were used?
 2 A Oh, some of them we put in, yeah, but not all
 3 of them.
 4 Q Okay. Are they still there along the
 5 right-of-way?
 6 A I haven't been there since May.
 7 Q But they were there in May?
 8 A There were some.
 9 Q Do Milford-Bennington ties have plates on the
 10 ends?
 11 A I couldn't say.
 12 Q Okay.
 13 A Some of ours do, and some of ours don't.
 14 Q In addition to ties, did Milford-Bennington
 15 provide any other materials for use on that
 16 line?
 17 A If we needed plates or joint bars, didn't
 18 have any with us on the truck, we were
 19 allowed to take some from their pile.
 20 Q And who gave you that permission?
 21 A Peter Leishman.
 22 Q Do you know Peter?
 23 A Yes.

Vol. 1 - 9

1 Q You've worked with him then over the years?
 2 A I've known him for quite awhile. He used to
 3 work for us.
 4 Q Were there ever any times that you observed
 5 Mr. Leishman or any other Milford-Bennington
 6 employees on the Guilford line between
 7 Milepost 13 and the end of the line doing any
 8 kind of maintenance work?
 9 A No.
 10 Q Never saw anybody out there?
 11 A I never saw them doing any track work.
 12 Q Did you ever hear from anybody else that they
 13 had seen Milford-Bennington people out there
 14 doing any work?
 15 A No.
 16 Q How would you describe the working
 17 relationship between you and
 18 Milford-Bennington?
 19 A Between me, personally?
 20 Q Yes.
 21 A No problems.
 22 Q Now, were there times when you were out there
 23 working, and this is now, again, between

Vol. 1 - 11

1 Q When you got to the end of the line, which is
 2 Milepost 16.36, I believe, that's Howard
 3 Street, is it not?
 4 A Uh-huh.
 5 Q Could you see a derail device on the
 6 Milford-Bennington line right across Howard
 7 Street? Did you ever notice one there?
 8 A Yes, yes.
 9 Q Okay. And what did you notice about it, if
 10 anything?
 11 A There was a derail; and in my mind, there was
 12 no sense in it being there because
 13 approximately 100 yards south of there, there
 14 was a derail on each of the two tracks in
 15 Wilton Yard.
 16 Q Did you ever notice whether the derail on the
 17 Milford-Bennington line was opened or closed?
 18 A I really wouldn't take any notice of it.
 19 Q Okay. Did you ever see any trains go by that
 20 derail when you were there?
 21 A No, I don't think so because the derail
 22 hadn't been there very long.
 23 Q Okay. So there was never a time when you

Vol. 1 - 10

1 Milepost 13 and the end of the line, when
 2 Milford-Bennington trains were also in the
 3 area?
 4 A Yes.
 5 Q Okay. And were there ever any problems that
 6 had you concerned for your safety when you
 7 were out working on the track because of
 8 their trains being in the area?
 9 A No. The trains are no different than our
 10 trains.
 11 Q So all of that was controlled by the
 12 dispatcher, and the people knew where you
 13 were?
 14 A Yes, and common sense.
 15 Q Are you familiar with the work that was done
 16 on the Hillsboro branch in September of this
 17 year?
 18 A No.
 19 Q By that time, you had transferred?
 20 A Yes.
 21 Q Now, you inspected that line as a regular
 22 part of your job, right?
 23 A That's correct.

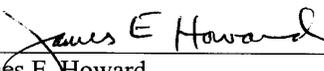
Vol. 1 - 12

1 were there as a train was going by?
 2 A Not that I recall.
 3 Q Okay.
 4 MR. HOWARD: I ask the reporter to
 5 mark this as Exhibit No. 1, please.
 6 (Whereupon the Stenographer marked as
 7 Exhibit No. 1 - Springfield Terminal Railway
 8 - Track Inspection Report - 5/15/03.)
 9 Q Mr. Preston, the document that's been marked
 10 as Exhibit 1 is a track inspection report.
 11 Does that look familiar to you? (Indicating)
 12 A Oh, yeah. I do them every day just about.
 13 Q Okay. Is that your signature there in the
 14 upper right-hand corner?
 15 A Yes, it is.
 16 Q And I take it under the mileage column there,
 17 that shows the location on the Hillsboro
 18 branch where you were inspecting the --
 19 A Uh-huh.
 20 Q Now, under the remedial action column where
 21 it says 213.9b, do you see those?
 22 A Uh-huh.
 23 Q What does that mean?

CERTIFICATE OF SERVICE

I hereby certify that the foregoing "Reply Statement of Granite State Concrete Co., Inc. and Milford-Bennington Railroad Co., Inc. was served this 6th day of February, 2004 by sending a copy by Federal Express to counsel for the defendants, as follows:

Robert B. Culliford
Corporate Counsel
Guilford Rail System
Iron Horse Park
N. Billerica, MA 01862


James E. Howard