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February 23, 2004

VIA FEDERAL EXPRESS

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

ENTERED
Office of Proceedings

FEB 24 2004

Part of
Public Record

210139

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 "Rebuttal Statement of Granite State Concrete Co., Inc. and Milford-Bennington Railroad Co., Inc." Could you please acknowledge receipt of the Rebuttal 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,

A handwritten signature in cursive script that reads 'James E. Howard'. Below the signature is a printed name 'James E. Howard' with a circle around the 'J'.

cc: Robert B. Culliford
enclosures

210139

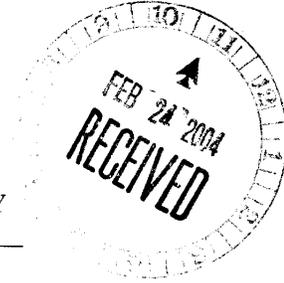
**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**



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

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Company, Inc. and
Milford-Bennington Railroad
Company, Inc.

Dated: February 23, 2004

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INTRODUCTION

The Board has before it an extensive record in this case. The record includes a number of conflicting contentions and factual issues. There are, however, certain essential facts that are unrefuted, as outlined below.

1. Until June 19, 2003, Milford-Bennington operated for eleven years during daylight hours without any restrictions on the time at which it could operate on the Guilford line.

2. Milford-Bennington operated safely and without incident on the Guilford line for eleven years.

3. Guilford and Milford-Bennington agreed that a derail would be installed at milepost 16.36 in order to prevent passenger cars that were temporarily stored there from inadvertently moving onto the Guilford line and subsequently in order to separate passenger operations on the Milford-Bennington line from Guilford and the rest of the national rail system.

4. On June 19, 2003, Guilford took the position that the derail should also be used for routine freight operations, and, because Milford-Bennington was not using the device for freight operations, Guilford restricted the hours during which Milford-Bennington could operate.

5. The "discovery" by Guilford on June 19, 2003--that Guilford allegedly learned for the first time that Milford-Bennington was not using the derail for freight operations--was the sole reason that Guilford restricted Milford-Bennington's operations.

6. On June 20, 2003, Guilford installed a derail device on its property at milepost 16.36, and this device was used for all freight operations subsequent to June 20, 2003. "Used" means that each Milford-Bennington train subsequent to June 20, 2003 stopped to open and close the derail each time it passed milepost 16.36.

7. From June 20, 2003 at the latest, Guilford knew that Granite State's operations at Wilton were limited to the hours of 6:30 AM-6:30 PM on weekdays and that the restrictions that Guilford had imposed on the operations of Milford-Bennington were preventing Milford-Bennington from providing the rail service required by Granite State.

In addition to these uncontroverted facts, Granite State and Milford-Bennington have demonstrated that the derail was used properly, that applicable regulations were followed, that Milford-Bennington's operations were safe and in accordance with applicable regulations and rules, that Guilford personnel knew about the limited hours of operation at Wilton well before June, 2003 and that Guilford had a long-standing anti-Milford-Bennington bias that motivated Guilford to punish Milford-Bennington. Guilford, of course, denies these facts.

Even if it is assumed, however, for purposes of argument, that Guilford's positions on these issues were proven, and that, to use Guilford's words, it was not an "evil empire

intent on wreaking havoc" on and engaged in a "nefarious plot" against Granite State and Milford-Bennington, the fact is that Guilford's actions were unreasonable and were completely unjustified. Even if Guilford's prior knowledge is disregarded and Guilford's intent and motivation are deemed to be innocent, restricting Milford-Bennington's operations as a result of a disagreement about the use of the derail device was an arbitrary and capricious overreaction that cannot be justified on any basis. Guilford's actions were unreasonable even if it sincerely thought that there were "safety" issues raised by the dispute concerning the use of the derail. Indeed, any reasonable railroad in a similar situation would have discussed and resolved what was at most, even viewing the facts as Guilford portrays them, a misunderstanding.

Guilford must be held accountable for its actions. Milford-Bennington and Granite State have suffered damages as a result of those actions, and they are entitled to be compensated.

ARGUMENT

I. Granite State and Milford-Bennington Have Not Raised New Theories of Liability.

Guilford argues, mistakenly, that Granite State and Milford-Bennington have alleged for the first time in their Opening Statement that Guilford refused to provide service and illegally closed a route. Both the complaint and the Board's decision served on September 15, 2003 refer to the refusal to provide service and a commercial closing. Guilford has no grounds to feign surprise and no basis to argue that the allegations should be stricken from the record.

The complaint sets out facts that are sufficient to form the basis for a claim that Guilford not only acted unreasonably but failed to provide service upon request. In its decision served on September 15, 2003, the Board stated that it was instituting a

proceeding "to consider the complaint" that Guilford had "breached a duty to provide service or committed unreasonable practices." Decision at 1. Footnote 1 on page 1 of the decision refers specifically to 49 U.S.C. 11101 (a) as the statutory citation related to the claim that Guilford breached its duty to provide service. Thus, the Board understood the complaint to raise the issue of failure to provide service.

The complaint also alleges that Guilford's actions resulted in a commercial closing of a route. Complaint at paragraph 23. In its decision served September 15, 2003, the Board recognized that Granite State and Milford-Bennington contended that Guilford's actions constituted an "illegal commercial closing of a route". Decision at 2.

II. The Goals of the Rail Transportation Policy are Furthered by a Determination that Guilford Acted Unreasonably.

Guilford argues that Granite State and Milford-Bennington have relied upon the rail transportation policy "to establish that a prohibition on the use of 'absolute blocks' is by definition necessary to further that policy." Guilford Reply Statement at 7. This argument mischaracterizes the position of Granite State and Milford-Bennington. In their Opening Statement, Granite State and Milford-Bennington noted that unreasonable practices were not defined specifically by the Commission or the Board and that the Board could draw guidance, in determining whether a practice is unreasonable, from the rail transportation policy. Opening Statement at 14-16. More specifically, the issue is whether Guilford's actions were unreasonable when evaluated in the context of the goals of the rail transportation policy. Contrary to Guilford's argument, the issue is not whether, in the abstract, actions by either side promote or derogate from the rail transportation policy. Rather, the issue is whether Guilford's restriction of the hours of operation of Milford-Bennington was an unreasonable practice when viewed in light of the rail transportation policy.

in that conversation that the derail would be used for both freight and passenger operations. To the contrary, however, both Mr. Towle's testimony in his deposition and Mr. Leishman's testimony demonstrate that the agreement was to use the derail only for passenger operations.

Mr. Towle testified that he called Mr. Leishman at the direction of Sydney Culliford when Guilford became aware that the two passenger cars were being stored at milepost 16.36. Towle Dep. at 16-21. Mr. Towle requested that a derail be installed, and Mr. Leishman agreed. Towle Dep. at 22; Leishman Rebuttal V.S. at 1.¹ Contrary to Guilford's claim that Mr. Towle requested the installation of the derail "for use in controlling both freight and passenger operations", he made no specific reference to freight service, and he had no further conversations with Mr. Leishman concerning the installation of the derail device. Towle Dep. at 22-23. Thus, the telephone conversation between Mr. Leishman and Mr. Towle is entirely consistent with the conversation on December 12, 2002 among Mr. Leishman, F. Colin Pease and Andrew Zompa. Everyone involved in the two conversations believed that the derail was to be used only to prevent passenger cars from inadvertently moving onto the Guilford line. No one in December, 2002, including Guilford personnel who were not involved in the discussions with Milford-Bennington, believed that the derail device would be used when freight operations resumed in the spring of 2003.

Guilford also argues that Mr. Leishman allegedly reacted initially in June, 2003, when the question of the use of the derail arose, by referring to the opposition of the state of New Hampshire and safety concerns as reasons not to use the derail for freight

¹ Rebuttal Verified Statements of Peter R. Leishman, John G. MacLellan, F. Colin Pease and Susan Madigan are being filed herewith and are referred to as "[name] Rebuttal V.S."

operations. According to Guilford, this demonstrates that Mr. Leishman did not really believe that the derail was to be used only for passenger operations. As shown below, however, Guilford has distorted the facts.

Beginning on June 19, 2003, Milford-Bennington and Mr. Leishman have always maintained first and foremost that the reason the derail was not used for freight service was that it was never intended or agreed that it would be used for anything other than passenger operations. Leishman Rebuttal V.S. at 4. In addition, New Hampshire had requested Mr. Leishman to remove the derail device from property owned by the state, and Mr. Leishman had, in effect, ignored the request. Leishman Opening V.S. at 17. Furthermore, Mr. Leishman and the State believed that the location of the derail, which was adjacent to a busy street and buildings, created a safety concern that would not have been present if the Guilford derail at the south end of the Wilton yard had been used instead. The position of the state of New Hampshire and the safety issue reinforced, but were not the primary factors engendering, the view of Mr. Leishman that the derail should not be used for any purpose other than passenger operations, as the parties had agreed in December, 2002.

In the debate concerning the agreement governing the use of the derail, Guilford has ignored the fact that in the spring of 2003 Guilford was fully apprised of the understanding between the Federal Railroad Administration and Wilton Scenic Railway to separate Wilton Scenic operations from the national rail system by means of the derail device. Pease Opening V.S. at 14-17; Leishman Rebuttal V.S. at 4-5. Guilford never questioned, much less objected to, this arrangement, which confirms the fact that the derail was always intended to be used only in connection with passenger service operating on the Milford-Bennington line. Consequently, contrary to Guilford's

contention that Milford-Bennington failed to inform Guilford of a "change" in the use of the derail, Milford-Bennington's actions were always consistent with the understanding of the parties.

Guilford professes not to understand the point of the argument that the derail devices were capable of dealing with cars traveling no more than four miles per hour and that this indicates that even Guilford believed that the purpose of the derail device could not possibly be to protect against freight cars that would be traveling at a much higher speed had they inadvertently and uncontrollably moved from Wilton to milepost 16.36. Opening Statement at 20-21. The point is straightforward. If passenger cars were stored at milepost 16.36 or if passengers boarded or disembarked from passenger cars at milepost 16.36, the cars would not be moving more than four miles per hour if there was an unintended and unexpected breakaway. Furthermore, the derail was used in the spring of 2003 as a physical demarcation between the passenger operations on the Milford-Bennington line and the Guilford line. The closed derail device served, in effect, as a warning to Guilford trains to stay off the Milford-Bennington line when passenger trains were operating. Thus, the derails worked for passenger operations, but they would have been wholly inadequate to stop freight cars that were filled with stone and that had been rolling downhill for 3 miles.

Guilford also misses the point concerning the NORAC rules as applied to derail devices and the bulletin issued by Guilford on December 12, 2002. As a threshold matter, the Guilford bulletin had no effect whatsoever with respect to a derail located on Milford-Bennington property. Madigan Opening V.S. at 3; Madigan Rebuttal V.S. at 1-2. Even assuming that the Guilford bulletin had some legitimate effect with respect to a derail device located on the property of Milford-Bennington, an assumption with which

Granite State and Milford-Bennington disagree, the bulletin did not provide any guidance as to the use of the derail device. Furthermore, the NORAC rules provide that derails that are not at a "fouling" point, such as the device at milepost 16.36, should be applied "only when their use is required." The parties had agreed, however, in December, 2002 that the derail would be opened and closed only for purposes of passenger operations. This agreement governed the use of the derail and defined when its use was "required." Madigan Opening V.S. at 3-6; Madigan Rebuttal V.S. at 1-2.

Guilford continues to argue that the boundary between the Guilford line and the Milford-Bennington line at milepost 16.36 was a "fouling" point. It was not. A fouling point is a location where tracks converge at a turnout or crossing; it is not an otherwise unremarkable and indiscernible boundary between the ownership of the Hillsborough branch between Milford and Wilton. Madigan Opening V.S. at 4; Madigan Reply V.S. at 1-2; Madigan Rebuttal V.S. at 2. Furthermore, the alleged fouling point was not marked in any fashion as required by NORAC rule 104 (d). Leishman Reply V.S. at 3-4.

IV. Separation of Operations Was Unnecessary and Unreasonable.

Attempting to justify the complete separation of Guilford and Milford-Bennington operations, Guilford argues that, no matter how sophisticated and professional its dispatching system, the system would be essentially useless if Milford-Bennington did not adhere to customary safety rules and practices. Guilford Reply Statement at 6-7. As demonstrated in the Opening Statement, however, Milford-Bennington has observed and operated in accordance with applicable safety rules and practices for eleven years. Milford-Bennington has never been warned, cited or fined by the FRA or New Hampshire for any operating rule or safety violation. Guilford cannot point to a single instance of unsafe operations, other than the refuted notion that Milford-Bennington did

not act safely with respect to the use of the derail, by Milford-Bennington in over 11 years of operation on the Guilford line.

Moreover, there is a critical distinction between rules and practices relating to the use of a derail device and rules and practices concerning dispatching, particularly on a line designated as yard limits. The derail device at milepost 16.36 was intended to protect against the inadvertent encroachment by passenger equipment stored there. The implication of Guilford's argument as it relates to dispatching rules and practices is that Milford-Bennington would in some fashion intentionally and advertently disregard rules and practices. There is a vast difference between the dispute concerning the use of the derail device at milepost 16.36, on the one hand, and the possibility or likelihood, as Guilford contends, on the other hand, that Milford-Bennington would consciously disobey or intentionally disregard orders of the Guilford dispatcher or safety rules or regulations concerning operations on the Guilford line. Indeed, the record in this case is clear that over eleven years there were never any such operating issues.

V. Guilford Has Failed to Rebut or Even Address Its Bias Toward Milford-Bennington and Granite State.

Guilford contends that its actions were not the result of some "nefarious plot" to destroy Granite State and Milford-Bennington and that there is no support in the record to find that its actions were motivated by "some hidden animus" towards Granite State and Milford-Bennington. Guilford Reply Statement at 10. Guilford also argues that David Fink, the Chairman and Chief Executive Officer of Guilford, was not involved in any decisions relating to the dispute between the parties.

Contrary to Guilford's contention, the record as it now stands includes the undisputed testimony of Mr. Leishman and Mr. Pease concerning a number of incidents over a period years in which Guilford, led by Mr. Fink, took actions against Milford-

Bennington that can only be described as evidence of patent animus and an intent to destroy. Opening Statement at 35-38. Indeed, Guilford acknowledges the accuracy of the charges against it by recognizing that "Mr. Pease may have some recollection of this animus." Guilford Reply Statement at 10.

Guilford's claim that Mr. Fink was not involved in the recent actions against Milford-Bennington is not credible given the history of his opposition, the publicity relating to the start of passenger operations and his hands on management style. Pease Rebuttal V.S. at 1-3. Furthermore, even if Mr. Fink's alleged lack of direct, personal involvement recently is accepted for purposes of argument, there is unrefuted, direct testimony from which the only appropriate conclusion to be drawn is that Mr. Fink's ill will toward Milford-Bennington and Granite State was well known among senior management, many of whom had been employed through the duration of the relationship between Guilford and Milford-Bennington. Pease Opening V.S. at 2-3; Pease Rebuttal V.S. at 1-2. Mr. Fink's personal views were, in effect, institutionalized at Guilford. By 2003, it was not necessary for Mr. Fink to say or do anything with respect to Milford-Bennington, because everyone in management knew the official position concerning anything related to Milford-Bennington.

VI. The Damage Calculations are Accurate and Properly the Basis for an Award of Damages.

A. Granite State and Milford-Bennington Lost 987 Carloads Due to Guilford.

In their Opening Statement, Granite State and Milford-Bennington demonstrated that Guilford's actions resulted in Milford-Bennington moving 945 fewer cars in 2003 than it had handled on average during the years 1999 through 2002. Guilford has advanced an analysis that purports to show that the difference was only 773 cars. As described below, not only is Guilford wrong, but the actual loss was 987 cars.

In calculating the effect of Guilford's actions, Milford-Bennington and Granite State did not take into account January through May of any year, because the impact of Guilford's restriction on the operation of Milford-Bennington did not occur until June, 2003. Leishman Rebuttal V.S. at 7. Consequently, Milford-Bennington and Granite State compared the average number of cars handled in each month from June through December for the years 1999 through 2002 to the actual number of cars handled from June through December in 2003. The total difference shown in the Opening Statement was 945. Due to several mathematical errors in the computation of monthly averages, which were discovered in the course of analyzing Guilford's arguments, it is clear that the loss of carloads due to Guilford was actually 987. Id. and Exhibit 4 attached thereto.

Guilford's analysis is flawed in that it has compared traffic in April and May in prior years with cars handled in April and May, 2003, before there was any restriction on Milford-Bennington's operations. April and May, 2003 were undoubtedly used by Guilford because they happened to be months in which Milford-Bennington moved more cars than they had on average in April and May during the years 1998 through 2002. Leishman Rebuttal V.S. at 7 and Exhibit 3 attached thereto. In addition, Guilford used, for purposes of comparison to 2003, a five-year average which included 1998. Id. September, 1998 was an aberration due to the fact that the rock crushing machine at Wilton was shutdown for approximately two weeks, causing carloads for the month to be only 147, as compared to the average of 405 cars for the years 1999 through 2002. Leishman Rebuttal V.S. at 7. Thus, Guilford's analysis improperly included calculations based upon April and May and included 1998 in order artificially to depress the number of cars lost due to Guilford's actions.

If Guilford's five-year analysis is used, but September, 1998 is adjusted to reflect the fact that operations at Wilton were shut down for two weeks and to eliminate April and May, the result is that, even according to Guilford's presentation, Milford-Bennington handled 985 fewer cars in 2003 than it did on average in the 5 prior years. Leishman Rebuttal V.S. at 7 and Exhibit 3 attached thereto. Thus, under either approach, assuming that proper assumptions are used and appropriate adjustments are made, the loss attributable to Guilford is at least 985 cars.

B. No Additional Cars Could Have Been Moved After June 20, 2003.

Guilford contends that Milford-Bennington and Granite State could have taken various steps to move additional cars in order to overcome the damage inflicted by Guilford. As explained below, however, Guilford is wrong. Milford-Bennington and Granite State took every action open to them to move as many cars as possible in 2003. Whether Guilford's argument is viewed as an effort to deny causation or as an allegation of failure to mitigate, it has no factual support.

Guilford claims that on Thursday and Friday, September 18 and 19, 2003, it lifted the 4 AM-1 PM operating window, allowing Milford-Bennington to operate without restriction, but that Milford-Bennington did not take advantage of Guilford's offer. The truth is that the line had been taken out of service on September 17, 2003 due to several broken rails. Leishman Rebuttal V.S. at 8; Leishman Reply V.S. at 11. Guilford did not notify Milford-Bennington that repairs had been made or that the track was back in service until the following Monday, September 22, 2003. *Id.* Furthermore, Milford-Bennington believed that on September 17, 2003, Guilford had decided to remove any restrictions permanently, and such a development, if true, made it far less important whether Milford-Bennington operated on September 18 or 19. *Id.* On September 22,

2003, however, Guilford advised Milford-Bennington that it had not really meant what it said on September 17 about removing the restrictions. Id.

Guilford also criticizes Milford-Bennington for not operating 4 round trips per day after November 10, 2003 when Guilford removed the hourly restrictions and instituted the "absolute block" system. The criticism is misplaced for a number of reasons. By November of any year, including November, 2003, the number of daylight hours has diminished considerably compared to the summer months. Leishman Rebuttal V.S. at 6; Leishman Reply at 13-14. The weather is significantly colder, which makes loading and unloading trains slower and more difficult. Id. Because a constant flow of water is necessary to operate the Granite State facilities both at Wilton and Milford, the possibility of freezing and ice in November increases dramatically compared to earlier months, making operations much more difficult or impossible. Id.; Peter MacLellan Rebuttal V.S. at 2-4.

Notwithstanding the challenges of operating in November, Milford-Bennington performed at approximately the same level after November 10, 2003 as it had in prior years. In fact, between November 10 and November 30, 2003, Milford-Bennington moved a total of 225 cars, while the average for the same period in the years 1999 through 2002 was 220 cars. Leishman Rebuttal V.S. at 6.

Finally, Guilford argues that December, 2003 was a "mild month, and there were at least 23 days during which temperatures were above freezing and apparently allowing for some operations at Milford." Guilford Reply Statement at 14. Once again, the facts belie the Guilford argument. According to the National Oceanic & Atmospheric Administration, the average high temperature in December, 2003 at Jaffrey, New Hampshire, the closest weather station to Wilton and Milford, was 38 degrees and the

average low was 18 degrees. Peter MacLellan Rebuttal V.S. at 2 and Exhibit 1 attached thereto. During the first 7 days of December, the high temperatures were between 25 and 42 degrees and the low temperatures were between 3 and 30 degrees. Id.

It is difficult if not impossible to operate at the Granite State facilities in Wilton or Milford with temperatures like those experienced in December, 2003. Peter MacLellan Rebuttal V.S. at 2-5. As noted above, water must be used at both locations. With temperatures below freezing at night, water pipes freeze, and water coming in contact with stone, conveyor belts or machinery will also freeze, making it very difficult and dangerous to attempt to operate. Id. Even if temperatures rise during the day, it takes time for frozen water to thaw and for machinery to operate properly. Id. By the time it is possible to operate, there generally is very little daylight left. For all of these reasons, Granite State concluded that it was prudent to shutdown operations as of December 4, 2003. Id.

It is not feasible, as Guilford suggests, to operate for a day or two at the time during the winter if the weather warms up for a few days. Peter MacLellan Rebuttal V.S. at 2-5. Attempting to restart equipment that has not been used for several days or weeks runs the risk of damage to the equipment. Id. at 4-5. It is also difficult to have employees available on short notice, because many of them take other jobs during the winter. Id.

C. Milford-Bennington's Damages are Properly Calculated.

Guilford attempts to take Milford-Bennington to task on its calculation of damages. Specifically, Guilford argues that Milford-Bennington seeks to recover lost revenues and that there has been no attempt to describe the costs of performing service.

The calculation of Milford-Bennington's damages has properly taken into account the costs of performing the service. There can be no doubt that the revenue that Milford-Bennington lost is properly measured by the number of cars that it was prevented from handling due to Guilford's actions multiplied by its revenue per car. Milford-Bennington did everything feasible to eliminate costs after June 19, 2003, and the savings in costs were meticulously calculated and deducted from the loss of gross revenue for purposes of determining damages. Leishman Opening V.S. at 25-26; Opening Statement at 40-41. There would be no point in attempting to undertake an independent cost per car analysis, because the end result would be the same.

D. Granite State Has Accurately Portrayed Its Lost Profits and Increased Costs.

Guilford takes issue with the damage calculation for Granite State primarily on the basis of the unsubstantiated allegation that "Granite State cannot point to one lost sale resulting from the decreasing carloads received at Milford, instead simply assuming that they will sell all of their product." Guilford Reply Statement at 12. To the contrary, however, Granite State has always sold everything that it could produce at Milford, and it would have sold everything if Milford had produced as much stone this year as it had in prior years. John MacLellan Rebuttal V.S. at 1-3. Indeed, the demand at Milford consistently exceeds its production capacity, even when that capacity is not limited due to Guilford's disruption of rail service. *Id.*

While Guilford argues about the magnitude of the sales lost at Milford, Guilford apparently accepts and does not challenge the essential elements of the Granite State damage claim. For example, Guilford does not question the use of lost profits as an appropriate measurement of damages. Guilford does not challenge the calculation or use of Granite State's average profit per ton of \$.90. While Guilford purports to question

whether Granite State sells everything it produces at Milford, Guilford has produced no evidence to contradict the fact that Granite State does in fact sell all of its products at Milford every year. Finally, Guilford does not challenge the fact that Granite State had increased trucking costs in order to move stone from Lyndeborough to Westford and Lowell in order to replace the stone that would have been shipped from Milford had Guilford not disrupted rail service in 2003.

Guilford professes not to understand how Granite State can claim damages for sand and crushed base, as distinguished from 4" minus stone, that were not produced and sold in 2003. The logic is, however, compelling and straightforward, and it was explained in the Opening Statement (at 41-43 and MacLellan Opening V.S.). Apparently, however, it bears repeating.

All of the stone produced by Granite State at Wilton is shipped to Milford for further processing into finished products. John MacLellan Rebuttal V.S. at 1. In order to create finished products at Milford, the stone is crushed into smaller sizes and is combined with sand at the ratio of 37 percent sand compared to stone. MacLellan Opening V.S. at 8. Consequently, for each ton of stone produced at Wilton and sold at Milford, .37 tons of sand is produced and sold. Each ton, whether stone or sand or some combination, generates on the average a profit of \$.90. Id. at 9. Likewise, each ton of stone produced at Wilton generates .14 tons of crushed base byproduct which can, in turn, be sold at an average profit of \$.90 per ton. Id.; John MacLellan Rebuttal V.S. at 2. Consequently, every ton of stone that could not be crushed at and shipped from Wilton to Milford, due to the actions of Guilford, resulted in an additional .51 tons (.37 tons of sand and .14 tons of crushed base) of product that could not be sold.

Prior to 2003, most of the finished products at Milford were sold “internally” to Granite State cement producing facilities at Westford and Lowell, Massachusetts, thereby meeting most but not all of the needs at Westford and Lowell. John MacLellan Rebuttal V.S. at 1-3. When rail service was disrupted in 2003, Granite State decided to supplement the stone required at Lowell and Westford from a Granite State facility at Lyndeborough, New Hampshire. Id. at 3. The alternative to using Lyndeborough would have been to purchase additional stone at Westford and Lowell from outside sources, but that would have required the payment of higher prices estimated to be in the range of \$1-2 per ton or \$168,000-\$285,000 in total for 2003. MacLellan Opening V.S. at 10; John MacLellan Rebuttal V.S. at 3. Lyndeborough is farther from Lowell and Westford than is Milford, and therefore Granite State incurred trucking expenses that were \$1.05 more per ton than it would have incurred to make the same deliveries from Milford. MacLellan Opening V.S. at 9.

Prior to the disruption of rail service in 2003, Granite State had planned to use Lyndeborough to supply stone to a newly acquired cement facility at Wakefield, Massachusetts. MacLellan Opening V.S. at 8-9; John MacLellan Rebuttal V.S. at 3. Because most of the production at Lyndeborough was diverted to Lowell and Westford, it was not possible to supply Wakefield. Id. Consequently, Wakefield purchased stone from third party sources at a total cost of approximately \$67,000 more than it would have cost if Granite State had been able to operate normally at Wilton and Milford. John MacLellan Rebuttal V.S. at 3.

Incredibly, Guilford also argues that Granite State’s income per ton in 2003 was the best since 1999, somehow demonstrating that notwithstanding Guilford’s actions adversely affecting rail service “Granite State is more profitable than ever.” Guilford

Reply Statement at 15. For the fiscal year ending February 28, 2003, or approximately four months before Guilford disrupted rail service, Granite State earned \$.93 per ton. John MacLellan Rebuttal V.S. at 4. In the fiscal year ending February 28, 2004, based upon information available thus far, Granite State expects to earn approximately the same amount per ton that it has for the last 5 years. Because Granite State took actions to reduce costs when Guilford disrupted rail service, costs per ton did not increase and net profit per ton remained about the same. Id. More significantly, while income per ton is interesting, the multiplier to determine total profits lost and damages--the number of tons produced--was indisputably reduced by approximately 130,000 tons due to Guilford.

E. Guilford Must Be Required to Compensate Granite State and Milford-Bennington for the Damages Incurred.

Based upon a loss of 987 cars due to Guilford's actions, the damages incurred by Milford-Bennington and Granite State may be summarized as shown below. The Board is respectfully requested to enter judgment for Milford-Bennington and Granite State in the amounts shown and to award interest on such amounts.

MILFORD-BENNINGTON

Lost revenue

987 cars x \$75/car = \$74,025 lost revenue

Expenses avoided

Wages	\$21,800
Track rights payments	12,400
Fuel	<u>2,400</u>
Total	\$36,600

Total Milford-Bennington loss

\$ 74,025	lost revenue
- <u>36,600</u>	expenses avoided
<u>\$ 37,425</u>	Total

GRANITE STATE

Lost profit

987 cars x 90 tons/car = 88,830 tons
88,830 tons x .37 sand = 32,867 tons
88,830 tons x .14 crushed base = 12,436 tons
134,133 total tons

134,133 tons lost x \$.90 average profit per ton = \$120,720 lost profit

Increased truck expense

121,697 tons trucked from Lyndeborough to Westford
and Lowell x \$ 1.05 per ton increased truck cost = \$127,782 increased expense

Increased material expense

Higher cost of stone purchased at Wakefield = \$ 67,000 increased expense

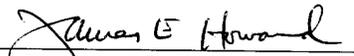
Total Granite State loss

\$ 120,720	lost profit
127,782	increased truck expense
<u>67,000</u>	increased material expense
<u>\$ 315,502</u>	Total

Respectfully submitted,

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

By their Attorney,



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

Dated: February 23, 2004

Leishman

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. NOR 42083

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

VS.

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

REBUTTAL VERIFIED STATEMENT OF PETER R. LEISHMAN

Peter R. Leishman states as follows:

In their reply dated February 9, 2004 Guilford references a telephone conversation that took place between me and Erwin Towle prior to December 12, 2002. A day or two before December 12 I did receive a telephone call from Mr. Towle. I have referenced this call in prior statements. In that conversation Mr. Towle told me that Guilford had some concern about the Wilton Scenic Railroad passenger equipment that was being stored on the Milford-Bennington Railroad at approximately milepost 16.36. He told me that Guilford wanted Milford-Bennington to agree to place a derail device at milepost 16.36 to keep the passenger cars from inadvertently rolling onto Guilford property. Mr. Towle asked if I would talk with Andy Zompa about installation of the derail and to work out any necessary details. Our conversation was friendly and lasted only a few minutes. We did not discuss any specific details about the derail as those issues were to be left to Mr. Zompa. Mr. Towle did not mention any need for a derail for freight operations.

I agreed to meet with Mr. Zompa and soon after talking to Mr. Towle I did receive a telephone call from Mr. Zompa and met with him in Wilton on the afternoon of December 12. At no time during my conversation with Mr. Towle or during my conversation and meeting with Mr. Zompa was there any discussion whatsoever about the need to use a derail device at milepost 16.36 to protect Guilford from freight cars rolling down Milford-Bennington's main line. The only discussion I had with any official from Guilford was about their concern over the passenger cars that were being stored for the winter in Wilton and the possibility that the passenger cars could somehow roll onto Guilford's property.

After meeting with Mr. Zompa on December 12, 2002 I did install a portable derail device supplied by Mr. Zompa, at approximately milepost 16.36 and I kept the derail device in the closed and locked position throughout the winter. The derail device remained in place until early spring, 2003, when the passenger cars were moved to a Milford-Bennington rail siding approximately three miles from milepost 16.36. The siding was protected by two derail devices that were at all times kept in the closed and locked position so that the cars could not possibly inadvertently roll from the siding onto Milford-Bennington's main line and ultimately onto Guilford track three miles away. After the passenger cars were relocated and properly secured with two derail devices, I removed the portable derail from the main line track at milepost 16.36.

Beginning in early April Milford-Bennington commenced freight operations and operated throughout the spring of 2003. In addition Guilford trains on several occasions operated over Milford-Bennington track in accordance with a trackage rights agreement between Milford-Bennington and Guilford. At no time during the spring of 2003 until late May were any cars, freight or passenger, stored adjacent to milepost 16.36 and there was no need for a derail device at that location. No Guilford train crew, inspector or official took any exception to these operations or the lack of a derail at milepost 16.36 between early April and late May 2003.

In late May 2003 the two passenger cars were placed into scenic rail service by the Wilton Scenic Railroad requiring that on occasion the two passenger cars be placed on the Milford-Bennington line in Wilton near milepost 16.36 where a small station boarding platform had been built. At the time the Wilton Scenic only operated on weekends and thus did not interfere with weekday freight operations. Prior to the initiation of passenger service Milford-Bennington reinstalled the derail device at milepost 16.36 and at all times when passenger cars were operating on Milford-Bennington's line the derail was maintained in the closed or derailing position and it was locked. Milford-Bennington took these actions as they were in accordance with an agreement reached with the Federal Railroad Administration and they were in accordance with Milford-Bennington's understanding with Guilford. In early June Milford-Bennington replaced the portable device with a permanent derail device that was supplied by Guilford. The permanent device was also closed at all times during passenger

operations. The derail was never used between late May and June 19, 2003 for freight operations.

On June 19, 2003 when I encountered several officials from Guilford, including Mr. Sydney Culliford, Vice President-Operations, examining the derail on Milford-Bennington property I told Mr. Culliford that the device was used only for passenger operations in accordance with the understanding with Guilford. I also told him that at no time had I had any discussion with any Guilford official about using the device for freight operations. Mr. Culliford told me that he wanted the device closed at all times so that it would control both passenger and freight operations. At that time I told Mr. Culliford that the New Hampshire Department of Transportation, the owner of the track, did not want the derail device there at all as they considered it to be unsafe. Mr. Culliford told me that he didn't care what the State of New Hampshire wanted, he wanted the device closed at all times, both during passenger and freight operations and I disagreed with his position because it was completely inconsistent with the understanding reached in December 2002.

Soon after Mr. Culliford left I was informed that my operations were shut down and that I could not operate over Guilford at all. While I was very upset over Guilford's actions, I immediately wrote them and said that it was essential that I continue to serve my customer and that I would agree to their terms for the use of a derail device at milepost 16.36. My letter had no impact on their actions even though I agreed to all of their unreasonable demands. See Exhibit 1 attached.

Guilford states that I failed “to note that the Federal Railroad Administration (“FRA”) had approved the use of the derail provided by Guilford to separate the operations of the Wilton Scenic from the general railroad system” They are wrong. As described at page 16 of my Opening Verified Statement, the FRA approved the use of the device as a means of establishing a physical barrier between the operations of Guilford and Wilton Scenic. The use of the closed derail, something that Guilford was fully aware of and did not object to, was to insure that Guilford would not operate beyond milepost 16.36 on days when Wilton Scenic was operating and also to insure that Wilton Scenic would not operate on Guilford track. In fact, in July, 2003, a Guilford train encroached on Milford-Bennington property without clearance. Fortunately, passenger operations were not taking place on that day. See Exhibit 2 attached. At the time the use of the derail was viewed as a temporary measure until all three railroads could devise an operating plan and particularly a dispatching plan that would be acceptable to FRA and the railroads. See Exhibit 2 attached to the Opening Verified Statement F.Colin Pease. On numerous occasions I proposed that Guilford and Milford-Bennington use the services of the FRA to resolve any issues between us so that normal operations could be restored and at all times Guilford refused.

The derail was adequate to protect against passenger cars that might be stored at milepost 16.36 because they would not be moving more than 4 miles per hour in the unlikely event that they broke loose. The derail would not be adequate to protect against a runaway freight car.

Guilford alleges that after Guilford removed any operating restrictions against Milford-Bennington on November 10, 2003 that Milford-Bennington had 16 days prior to Granite State's shutdown for the season in which it could have operated 4 trips per day. Again Guilford is wrong. The available daylight hours in late November and early December are significantly less than in the summer months. In addition the weather is significantly colder making loading and unloading of trains considerably slower. Conveyor belts freeze; stone, because it is wet from water applied during crushing freezes and must be broken up; and unloading systems at the Milford processing system work considerably less efficiently. In fact on its last two days of operations on December 3 and 4 Milford-Bennington was only able to operate one round trip.

A review of years 1999-2002 reveals that Milford-Bennington moved on average 112 cars in the period November 1-November 9. Between November 1 and November 9, 2003 Milford-Bennington was only able to move 54 cars due to Guilford's operating restrictions or 58 cars fewer than during average normal operations. During the period November 10 – November 30, 2003 after the time restrictions were removed and the "absolute block" was substituted, Milford-Bennington moved a total of 225 cars vs. an average of 220 during the same period in the years 1999-2002. Operations by Milford-Bennington after November 10, 2003 were consistent with past years. The only factor that seriously depressed Milford-Bennington car loadings were restrictions applied by Guilford. See Exhibit 3 attached to my Reply Verified Statement.

After May of 2003, Milford-Bennington handled 985 fewer cars than it did on average from June 1 to December 31 in the years 1999-2002. Guilford's alleges that Milford-Bennington moved 773 fewer cars than the average numbers moved over the past years. Guilford's methodology is flawed because Guilford included April and May in the comparison even though services were not affected in April and May, 2003. Guilford also uses 1998 in their calculations so that they can take advantage of an unusually low car count for September 1998. In September 1998 Granite State's crusher was out of service for over two weeks due to serious mechanical difficulties and as a result the railroad did not operate.

Utilizing Guilford's 5 year average, however, and including an adjustment for September 1998 so that the month reflects a normalized operation and excluding April and May, Milford-Bennington's lost business attributable to Guilford's actions equal a total of 985 carloads. See Exhibit 3 attached. When using the years 1999-2002 as shown on Guilford's chart and not including the months of April and May since they were months that were not affected by Guilford's actions Milford-Bennington's carload losses attributable to Guilford's actions also equal 987 carloads. Exhibit 4 attached. In reviewing this issue I discovered that the chart on which we had relied to conclude that the difference was 945 cars contained several mathematical errors in the 4 years averages. When the correct averages are used, the difference is 987 cars that were lost due to Guilford's actions.

Finally Guilford alleges that Milford-Bennington failed to take advantage of Guilford's offer to operate on Thursday and Friday September 18 and 19 when Guilford states the operating restrictions were removed. Guilford has failed to provide a key fact. On September 17, 2003 Guilford took the rail line between milepost 16.36 and milepost 13 out of service because Milford-Bennington had notified Guilford that there were several broken rails on the line that created unsafe operating conditions. They did not notify Milford-Bennington on September 17, 18 or 19 that the track had been placed back into service. It is customary for the railroad taking the track out of service to provide notice when the track is placed back in service. Milford-Bennington could not operate on September 18 or 19 as under any interpretation of standard safety procedures the Guilford track was out of service.

On September 17 a Guilford supervisor did telephone Milford-Bennington and notified Milford-Bennington that the 4 AM – 1 PM operating restrictions were being removed. The supervisor did not tell Milford-Bennington that such restrictions were only being removed for two days and it was Milford-Bennington's belief that normal operations were being restored. It was not until Monday, September 22, 2003 that Milford-Bennington was told that restrictions had only been removed for two days. Had Guilford, in fact, removed the operating restrictions and permitted normal operations commencing on September 22, 2003 Milford-Bennington would have resumed normal operations and significantly reduced the number of lost carloads due to Guilford actions. Milford-Bennington was never given that opportunity.

EXHIBIT 1

Milford-Bennington Railroad Company, Inc.
62 Elm Street
Milford, New Hampshire 03055
(603) 673-7181
June 20, 2003

Robert B. Culliford
Corporate Counsel
Guilford Rail System
Iron Horse Park
No. Billerica, MA 01862

Sent via fax: 978-663-1213

Dear Mr. Culliford

Approximately 8 weeks ago employees of the Springfield Terminal Railway, apparently under the direction of Mr. David Fink, insisted that a permanent derail device be installed on track that is operated by the Milford-Bennington Railroad and owned by the State of New Hampshire. The derail was installed without the approval of the property owner. At the time I did not want to "fight" Guilford, as I knew that opposing this action would attract some form of retribution. I told your employees that the derail was opposed by the State of New Hampshire. I explained that the derail, located on the main line of my railroad served absolutely no purpose other than one of harassment.

Yesterday a team of your managers came to Wilton and ordered me to keep the derail that you insisted be placed on state owned property "or else". There was no explanation of why the derail was necessary or what purpose it serves. I refused. Later in the day a Milford-Bennington train approached the end of our line and sought permission from Guilford dispatchers to enter Guilford property in Wilton in order to operate over trackage rights secured from you and approved by the Interstate Commerce Commission some 11 years ago. Our train crew was operating in exactly the same manner they have operated, without incident, for approximately 11 years. Your dispatchers, I believe on orders from Mr. Fink, refused to allow our train to proceed, seriously impacting the Milford-Bennington Railroad from serving its customer and seriously impacting our customer's ability to run his business efficiently. I was told by you and by others in your management team that I would not be allowed to run unless I agreed to keep and use the derail that you demanded be installed on a railroad you don't own.

The Milford-Bennington serves two customers. We operate over our own line from milepost 16.36 to a quarry owned by Granite State Concrete at milepost 18.50. At the quarry cars are placed on a siding that is protected by a derail device. Should cars roll from the siding they will be stopped from entering the main line by the derail that is kept

closed. The only other customer on our rail line is a quarry located at milepost 19.00 that is owned by Pike Industries. This customer is served by your railroad. Two derail devices protect the siding that serves Pike Industries. The device is kept in the closed position so that in the unlikely event cars were to roll down the siding towards the main line they would be derailed before they can access the main line. In Wilton just past milepost 16.36 where my railroad meets your main line your company owns a small two-track yard. At the end of this yard both tracks are secured by a derail. Both derails will protect your main line, as cars will be prohibited from leaving the yard by the derails.

Last night a sizable contingent of Springfield Terminal employees installed another derail device approximately 100 feet along the main line from the derail that you insisted I install on the main line of the Milford-Bennington Railroad two months ago. This derail, like the one installed on state owned property is near a building such that if they were to derail a train it is highly possible they could derail the train into an adjacent building. I have now been told that the Milford-Bennington will not be permitted to operate unless both the derails, the one on state owned property and the one installed last night are kept in the closed and locked position.

Following yesterday's incident, I telephoned the Federal Railroad Administration office of safety for advice and guidance. The office had sent an inspector to our property about two weeks ago and performed a joint inspection of the whole line with me, and representatives from the State of New Hampshire. None of the inspectors could understand what purpose the first derail serves and certainly couldn't understand the purpose of the second.

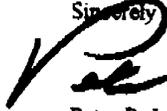
The actions your company has taken has disrupted my rail operation and has impacted my ability to serve my customer. You have required me to take actions, which are inconsistent with the way you treat every other shortline and regional railroad that connects with your railroad, and I am writing to tell you that I object strongly to your actions. It is my intent to explore whatever legal options are available to me to remedy this situation.

However, I cannot simply refuse to do what you have demanded and shut down my railroad and its service to Granite State. Therefore, I am writing to inform you that I will maintain the derail that you insisted be placed on state property in the locked position except when our trains are moving across the derail unless and until we obtain relief from this requirement by an authority with appropriate jurisdiction, and we expressly reserve our right to pursue any available legal remedy. I will also unlock and relock the new derail that you installed on your railroad approximately 100 feet from the first derail and I will do so with the understanding that such actions should in no way be considered an acceptance of your actions and that they in no way constitutes a waiver of any legal remedy available to us.

It is the intention of the Milford-Bennington Railroad to operate trains today and based on the verbal representations of several of your managers, it is my understanding that you will issue instructions to your dispatchers to permit the movement of trains over the

Springfield Terminal Railway in accordance with our trackage rights agreement and the authority of the Surface Transportation Board.

Sincerely



Peter R. Leishman

Cc: Stuart Draper
John G. MacLellan
Christopher Morgan

EXHIBIT 2



Milford-Bennington Railroad Co., Inc.
62 Elm Street
Milford, New Hampshire 03055
(603) 673-7181
July 11, 2003

Mr. Thomas Steiniger
President
Springfield Terminal Railroad
Iron Horse Park
North Billerica, MA 01862

Tom
Dear Mr. Steiniger:

This morning I was conducting an inspection of our railroad and was moving towards Wilton in my hi-rail truck. I left the hi-rail truck on the north side of Br. 16.42 and I was proceeding on foot across the bridge several hundred feet before milepost 16.36, the location where Guilford ownership begins and ownership by the state of New Hampshire ends, I observed a Guilford train operating onto the Milford-Bennington main line towards me. The train consisted of a locomotive (MEC 309), a ballast car (MEC 1331) and 3 freight cars. I stopped in the middle of the bridge and reversed my direction. Fortunately, the Guilford train also stopped at a location near where a new passenger platform has been constructed for boarding Wilton Scenic Railroad passenger cars.

At no time did anyone from your organization contact the Milford-Bennington to secure permission to operate beyond milepost 16.36, a clear requirement of the operating rules for both of our railroads. I spoke with your crew and notified Dick Miller of the incident. I also notified the New Hampshire Department of Transportation, the track owner. Within an hour of my calling Mr. Miller a team from N. Billerica arrived on the scene.

I am writing you to ask that you insure your organization conducts a full investigation of this incident and that you provide me with a copy of your investigation. I don't need to review the correspondence of the past few weeks but I do think that it is relevant that your organization has clearly not followed any of the procedures that you have established for operations between our two railroads.

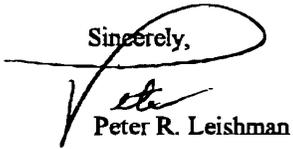
Today your railroad appears to have violated a number of various serious operating rules critical to the safe operation of rail service. In addition it appears that you derailed a car in exactly the same location that you derailed a plastics car on May 16, 2003 raising the question whether the defect that caused the May 16, 2003 derailment was ever repaired.

I believe the trackage rights agreement between our two organizations that gives you the right to operate over the Milford-Bennington Railroad provides for joint hearings for incidents occurring when you are operating on our track. It is appropriate that a joint

hearing be held regarding today's incident and I am requesting that your hearings officer contact me so that we can agree on a mutually agreeable time and format for the hearing.

I look forward to your response.

Sincerely,



Peter R. Leishman

EXHIBIT 3

MILFORD-BENNINGTON CARLOADS BY MONTH
1998 TO 2003

	2003	2002	2001	2000	1999	1998	5 YEAR AVERAGE '98-'02	2003 VS 5 YEAR
JAN	0	36	0	153	0	21	DNR	NA
FEB	0	0	0	0	0	0	DNR	NA
MAR	0	0	0	333	0	0	DNR	NA
APR	401	252	279	423	245	357	311	NA**
MAY	486	609	357	270	483	357	415	NA**
JUN	360	470	279	405	462	315	386	(26)
JUL	225	520	407	522	252	476	435	(210)
AUG	216	350	459	540	546	371	453	(237)
SEP	225	328	387	522	385	405*	405*	(180)*
OCT	261	441	405	423	363	483	423	(162)
NOV	279	369	358	324	279	327	331	(52)
DEC	54	0	324	180	124	231	172	(118)
TOTAL	2,507	3,375	3,255	4,095	3,139	3,343	3,331	(985)

*ADJUSTMENT TO REFLECT 2 WEEK OUT OF SERVICE DUE TO CRUSHER BREAKDOWN

**DELETED FROM CALCULATION OF LOST CARS BECAUSE NOT IMPACTED BY GUILFORD ACTIONS

EXHIBIT 4

MILFORD-BENNINGTON CARLOADS BY MONTH
1999 TO 2003

	2003	2002	2001	2000	1999 ('98-'02)	4 YEAR AVERAGE	2003 VS 4 YEAR
JAN	0	36	0	153	0	DNR	NA
FEB	0	0	0	0	0	DNR	NA
MAR	0	0	0	333	0	DNR	NA
APR	401	252	279	423	245	311	NA
MAY	486	609	357	270	483	415	NA
JUN	360	470	279	405	462	404	(44)
JUL	225	520	407	522	252	425	(200)
AUG	216	350	459	540	546	474	(258)
SEP	225	328	387	522	385	406	(181)
OCT	261	441	405	423	363	408	(147)
NOV	279	369	358	324	279	333	(54)
DEC	54	0	324	180	124	157	(103)
TOTAL	2,507	3,375	3,255	4,095	3,139	3,333	(987)

J. 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**

**REBUTTAL VERIFIED STATEMENT OF
JOHN G. MACLELLAN, III**

John G. MacLellan, III states as follows:

Guilford has argued that there is no evidence that Granite State has lost any sales as a result of Guilford's interference with the rail service provided by Milford-Bennington. Guilford is wrong, for the reasons described in my Opening Verified Statement and below.

All of the stone produced by Granite State at Wilton is shipped to Milford for further processing and to be combined with sand in order to make products that are sold from Milford. Most of the finished products at Milford are sold "internally" to Granite State concrete producing facilities at Milford NH, Westford and Lowell, Massachusetts. In fact, the demand at Milford, Westford and Lowell exceeds the ability of Milford to meet the demand. Each year, stone is purchased from outside sources so that Westford and Lowell can meet customers' demands for concrete. Typically, each winter as

inventories in Milford decrease, minimal stockpiles are left in reserve in Milford to supply the Milford concrete plant and outside customers while Westford and/or Lowell can be supplied from outside sources. The sales from Milford to Westford and Lowell are, in effect, wholesale sales that are at prices that are approximately \$1-\$2 per ton less than sales to outside third parties.

Milford also makes sales to third parties. We have found that it is good business to make such sales on a retail basis to third parties in order to maintain a broad customer base.

As a byproduct of the crushing process at Wilton, Granite State produces one inch crushed base. This product is also sold to third parties, and it is shipped by truck from Wilton directly to the buyers. As previously stated, the volume of production of crushed base is directly related to the volume of production of 4" stone (historically 14% of 4" stone). To the extent that stone is not crushed at Wilton, there is a shortfall of four inch crushed stone shipped from Wilton, and there is less one inch crushed base produced, sold and shipped to other buyers.

Because the Lowell and Westford concrete production sites could consume more stone than Milford is capable of producing, and because Granite State continues to sell products from Milford to outside third parties, there is no doubt that all of the production at Milford is completely sold every year. This year, unlike previous years, as early as December we were forced to haul material to Milford from Lyndeborough to maintain concrete production and sales to outside customers. There has never been a year in my memory when the Milford production has not been completely sold out. There is no

reason to believe that had Milford produced stone in the same volume in 2003 as it did in prior years that all of the stone would be sold.

When rail service was interrupted in 2003, we had to make a decision concerning how to supply stone to Lowell and Westford in order to enable those facilities to continue to produce concrete. We also had to decide how to supply a new concrete production facility at Wakefield, Massachusetts, that was acquired in 2002. We could have purchased stone from outside sources to supply Lowell and Westford, but that would have required the payment of higher prices and an increased total cost in the range of \$168,000-\$285,000, as stated in my Opening Verified Statement. Instead, we chose to minimize increased costs by supplying Lowell and Westford from Lyndeborough, New Hampshire, which is a facility owned by Granite State and which had been inactive in 2002, to supplement the stone that had in prior years been sold by Milford to Westford and Lowell. Milford produced what it could, given the restricted rail service from Wilton, at a lower cost than had we decided to buy stone from outside sources in order to keep Milford producing at historic levels. In fact, Milford's sales for the period of June 2003 through January 2004 were 57% lower than for the period June 2002 through January 2003.

We had intended to supply the new concrete facility at Wakefield in 2003 with material produced at Lyndeborough. This was not possible, however, because substantially all of the output from Lyndeborough was diverted to Westford and Lowell. As a result, we had to purchase material for Wakefield from third party sources at a cost of approximately \$67,000.00 more than it would have cost had we been able to use

material produced at Lyndeborough. This increase in costs was directly attributable to the actions of Guilford.

As described in my Opening Verified Statement, the total amount of stone that could not be produced at Wilton, processed and combined with sand at Milford and sold, together with the amount of crushed base that was not produced as a byproduct of stone at Wilton and could not be sold to third parties, was 128,595 tons. As described above, all of this stone and crushed base could have been sold had it been produced at Wilton. Therefore, Granite State lost sales of 128,595 tons of stone, and these lost sales have not been and cannot be replaced. Based upon our average profit per ton over the last five years of \$.90, the total amount of the loss was \$115,735.50. In addition, transportation costs relating to the replacement of the Milford lost production equals \$101,983.35.

Guilford argues that 2003 was our most profitable year since 1999 and that we should not complain about Guilford's actions. The 2003 year that Guilford refers to is the period of March 2002 to February 2003 which is essentially our 2002 production year. The income per ton for the fiscal year ended February 28, 2003 was \$.93. That fiscal year ended prior to Guilford's actions. In addition, Guilford overlooks the fact that it was responsible for a loss of sales of 128,595 tons that has nothing to do with the amount of profit per ton.

Guilford, as a final note, suggests that because their actions resulted in decreased operations in Wilton that Granite State should have "achieved some savings" which "provided a benefit to Granite State". While it is true that we made every attempt to minimize labor costs in relation to reduced production, our cost per ton did not decrease. If we did not reduce our costs to reflect production it would have only inflated the

damages suffered. In fact, our projected fiscal year profit per ton for the year ending February 2004 appears to be close to our historical average profit per ton. Because we are seeking damages relating to our lost profit per ton any cost factors are already reflected in that amount.

Pease

**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**

REBUTTAL VERIFIED STATEMENT OF F. COLIN PEASE

F. Colin Pease states as follow:

Guilford has argued that there was no animosity among Guilford's top management toward Milford-Bennington and that over the years Guilford and Dave Fink, its President paid little or no attention to Mr. Leishman or the operations of the Milford-Bennington.

When I worked for Guilford there were numerous occasions when top managers approached me simply because they had been called by Mr. Leishman on matters that would otherwise have been purely routine, matters that would never have been brought to my attention as Executive Vice President. On all occasions I mentioned whatever those issues might have been to Mr. Fink because I was aware that Mr. Leishman was someone who was not liked. There was no one in our top management who was not aware of Mr.

Fink's views and therefore highly sensitized to any issues involving Mr. Leishman and the Milford-Bennington.

In the fall of 2002 I was hired to help with the creation of and start up of the Wilton Scenic Railroad. When I took the job I knew well Guilford's views in opposition to scenic rail operations and passenger services in general. I personally represented Guilford in negotiations for the start up of Amtrak passenger services working for several years to negotiate the operating and trackage agreements between Guilford, the State of Maine and Amtrak.

Knowing Guilford's views I made special efforts to keep Guilford informed of Wilton Scenic's progress and our plans. Every effort was made to work cooperatively with Guilford throughout the start up process. I did it in part to make sure the process went forward without incident and because I knew that the creation of the railroad would be well reported in local newspapers that I had every reason to believe would be read by Mr. Fink. Mr. Fink lives in a neighboring town to Wilton. The Wilton Scenic Railroad's owner made a point of writing Mr. Fink at his home inviting him to participate in the process.

In his deposition Mr. Steninger testified that he talked to Mr. Fink on a daily basis. That should be no surprise as Mr. Fink always managed with a hands on style in which he at all times was intimately familiar with the operations of the railroad. It would be highly unlikely that issues such as the creation of a scenic railroad, an event that was well

covered in local newspapers, in a town neighboring Mr. Fink's on a railroad operated by Mr. Leishman wouldn't be discussed with Mr. Fink. I knew the history involving Mr. Leishman and I knew the views held by Mr. Fink about scenic rail operations. Even though Mr. Fink and others at Guilford have claimed that Mr. Fink has not been involved in the dispute with Milford-Bennington, I think it is likely that he has been heavily involved and that others in Guilford management have acted to carry out his anti Milford-Bennington attitude.

VERIFICATION

STATE OF MASSACHUSETTS)
)ss
COUNTY OF MIDDLESEX)

I, F. Colin Pease, being duly sworn, depose and state that I have examined all of the statements contained in this "Rebuttal Verified Statement", and that all such statements are true and correct to the best of my knowledge and belief.



F. Colin Pease

Subscribed and sworn to before me
This 21st day of February, 2004



Notary Public

REBECCA P. PALMA
Notary Public, Middlesex County

My Commission Expires: Commission Expires October 2, 2009

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**

**REBUTTAL VERIFIED STATEMENT OF
SUSAN MADIGAN**

Susan Madigan states as follows:

Guilford has argued that my testimony concerning the use of the derail device at milepost 16.36 was wrong. I continue to believe that I am correct and that Guilford has misconstrued or misunderstood my testimony.

As set forth in my Opening Verified Statement, the use of a derail may be governed by any of the following: the controlling railroad's Bulletin Orders or special instructions, by the NORAC operating rules, or by an agreement between the parties operating on that track. In the case of the derail located on Milford-Bennington property at milepost 16.36, there was no Milford-Bennington issued bulletin order or applicable special instructions. Furthermore, since the device was not placed on the tracks at a fouling point, the NORAC rules provide that the derail should be applied only when its use is necessary. Therefore, the parties' agreement governed the use of the derail.

The Guilford bulletin issued on December 12, 2002 was not effective to cover any operations on Milford-Bennington's line. One railroad cannot issue a bulletin order to govern operations on another railroad or a portion thereof over which they do not exercise control. The bulletin orders issued by the controlling railroad, however, are effective to govern ALL operations of the territory they control: passenger and freight, foreign and home railroads. Even though the Guilford-issued bulletin order had no legitimate authority over operations on the Milford-Bennington line, the Guilford bulletin did not provide any information or instructions concerning the use of the derail. The Guilford bulletin said simply that the derail was placed in service. Thus, even though the Guilford bulletin was issued, the only relevant information concerning the use of the derail device was the agreement between the parties.

Guilford also contends that I have ignored NORAC rule 1, which provides that employees should be notified of changes in the physical characteristics of the line on which they operate and that the notice is "generally given by means of a bulletin." Milford-Bennington apparently issued no written bulletin relating to the derail device, but according to Mr. Leishman all Milford-Bennington employees were advised of the device, its location and that its purpose was for passenger operations so that there was no misunderstanding or confusion, and, more importantly, there was no unsafe condition even though there was no written bulletin concerning the derail device.

Guilford also takes issue with the definition of "fouling point", continuing to argue that the property line between Guilford ownership and Milford-Bennington ownership at milepost 16.36 was a fouling point. A fouling point is a term recognized in the railroad industry as the point where two tracks converge, such as a sidetrack and a

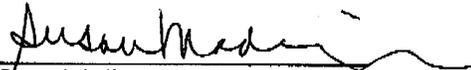
main track. For example, as noted in the glossary of Railroad Operating Terms as published on the CSX website the following definition of terms are as follows:

“Fouling Point -The location on a turnout back of the frog at which insulated joints or derails are placed at or beyond clearance point” and Fouling Section as “The section of track between the switch points and the fouling point in the turnout”. In addition, a fouling point must be recognized and marked, pursuant to the NORAC rules (rule 104) by yellow stripe painted on the rails or yellow joint bars or a sign displaying the letters “FP”. Further, FRA regulations at 49 CFR Sections 236.58 and 236.799 refer to fouling sections (“The section of track between the switch points and the clearance point in a turnout”). The boundary between Guilford's ownership and Milford-Bennington's ownership of the Hillsboro branch at milepost 16.36 was not a fouling point according to any definition of the term and was not marked as a fouling point.

VERIFICATION

COMMONWEALTH OF MASSACHUSETTS)
) ss:
COUNTY OF MIDDLESEX)

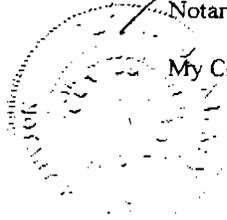
I, Susan Madigan, being duly sworn, depose and state that I have examined all of the statements contained in the "Rebuttal Verified Statement"; and that all such statements are true and correct to the best of my knowledge and belief.


Susan Madigan

Subscribed and sworn to before me
this 22nd day of February, 2004.


Notary Public

My Commission Expires: 10/28/05



GLORIA J. KIRKEY
Notary Public
My Commission Expires
October 28, 2005

P. MacLellan

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. NOR 42083

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

VS.

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

REBUTTAL VERIFIED STATEMENT OF PETER MACLELLAN

Peter MacLellan states as follows:

I have been employed by Granite State Concrete Company over 20 years. I am responsible for production and maintenance. I am familiar with the Granite State facilities at Wilton and Milford and their operations

Guilford states that December 2003 was a mild month and Granite State did not need to discontinue operations on December 4. They are wrong. In fact Granite State continued operations at its Wilton site for two full weeks longer than a neighboring quarry owned by Pike Industries. Pike closed on November 19, 2003 because of winter weather conditions. We extended our operations in order to produce as much product as feasibly possible in order to make up for production that was lost because Guilford prohibited us from moving necessary volumes of stone during the period after June 19, 2003.

Guilford's statements about operating our excavation facility in Wilton and our

processing plant in Milford were clearly written by someone who has never been in the stone quarrying and crushing business.

The weather in Milford and Wilton New Hampshire in early December was cold.

According to the National Oceanic & Atmospheric Administration (NOAA) the high temperatures in Jaffrey, New Hampshire, the closest and most relevant weather station, for the first 7 days of December were 42, 30, 27, 28, 28, and 25 degrees respectively and the lows for the same seven days were 30, 12, 8, 8, 3, 3, 19 degrees respectively. For all but one day the highs were below freezing and lows were well below freezing. While later in the month there were several warm days, particularly on Christmas Eve and Christmas day and just before New Years the average low for the month of December was 18 degrees and the average high, including the very warm days around Christmas was only 38 degrees. Exhibit 1 attached. It was not a warm mild December at our excavation site in Wilton or at our processing plant in Milford.

Both the Wilton excavation site and the Milford processing plant require the use of water in their processes. Both sites utilize long conveyor belts for moving stone. In Wilton stone is mined in a process requiring drillers and blasters to blast stone from a rock face. After blasting on the face, stone is moved to a crusher where it is processed to a size that can be moved in a rail car. As it is processed it is necessary due to site regulations imposed by Wilton, to spray the stone with a constant mist to eliminate dust. Water is moved to the crusher facility via above ground pipes using above ground pumps. When temperatures are below freezing the water pipes freeze. Because temperatures during the

night were well below freezing water will freeze on contact with stone, conveyor belts and on machinery, including areas where workers must walk. When the conveyor belts freeze it is nearly impossible to move stone from the crusher to the rail loading area and into rail cars. On the last day of operations temperatures were so cold that loading could not take place until after 9:00 AM and the loading process took 2 hours, a process that normally takes 30 minutes. It was necessary on numerous occasions for a worker to go into the conveyor area with a pick and break up large chunks of frozen stone. On December 3 and 4 the railroad was able to deliver only one train load of stone per day to Milford because of these conditions.

In Milford water is also used extensively. When stone is crushed it must be washed. Water is moved to the site in above ground pipes. Pumps to pump the water are also all above ground and subject to freezing. Large quantities of water are used to wash finished product that is moved over a screen where water is sprayed through a system of spray bars that are outside and subject to freezing up when temperatures drop below 32 degrees. Waste water is removed to settling ponds and also subject to freezing on the ground throughout the crushing plant. When temperatures drop well below freezing at night the plant is literally frozen in the morning and even if temperatures rise above freezing during the day, we may not achieve sufficient thawing to commence operations. The use of water at or near freezing temperatures results in the creation of ice everywhere, on machinery, on gates, on belts and on walkways used by our workers making conditions extremely hazardous. During the final few days of operations in Milford in December 2003 processing the stone was nearly impossible because of the subfreezing conditions. In such conditions the facility became coated with ice making operations impossible and

conditions dangerous for our employees. Finally when temperatures drop to freezing or sub freezing temperatures machinery is difficult to start and operations become extremely difficult.

In late November and early December it is nearly impossible to work more than 8 hours because days are short. Further, while we may experience a high temperature that is higher than freezing, it is not likely that we will achieve that high temperature until after mid day and even then temperatures are not likely to be sufficiently high to melt the ice. Operations become virtually impossible and when machinery, belts, gates and the surrounding area becomes coated with ice operations become dangerous and that is a condition we will not operate under.

In 2003 Granite State pushed its operations as late in the season as it could possibly operate. We operated two weeks longer than other quarries in the area and even with the cold temperatures and short days were able to stockpile some additional stone. By December 4 there was no other responsible or safe choice but to discontinue operations for the winter.

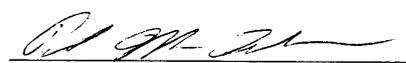
It is not feasible to operate for a day or two at a time in the winter if the weather gets warmer for a few days. If we try to start up the equipment after it has not been used for days or weeks, there is a significant risk that the equipment will not perform well or even break down. Also, winter is the only time we have to repair and maintain the equipment which is difficult if we are trying to use it to operate if the temperature is up for a few

days. Even if the temperature rises above freezing during a day or two, the ground is frozen and it is likely that pipes will also freeze. Another problem of trying to operate sporadically in winter is having employees available on short notice. Many of our employees take other jobs in the winter and are not available to us.

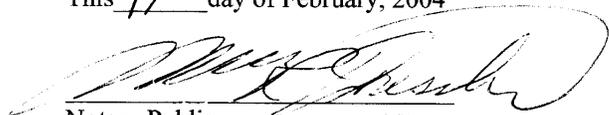
VERIFICATION

STATE OF NEW HAMPSHIRE)
)ss
COUNTY OF HILLSBOROUGH)

I, Peter MacLellan, being duly sworn, depose and state that I have examined all of the statements contained in this "Rebuttal Verified Statement", and that all such statements are true and correct to the best of my knowledge and belief.


Peter MacLellan

Subscribed and sworn to before me
This 19th day of February, 2004

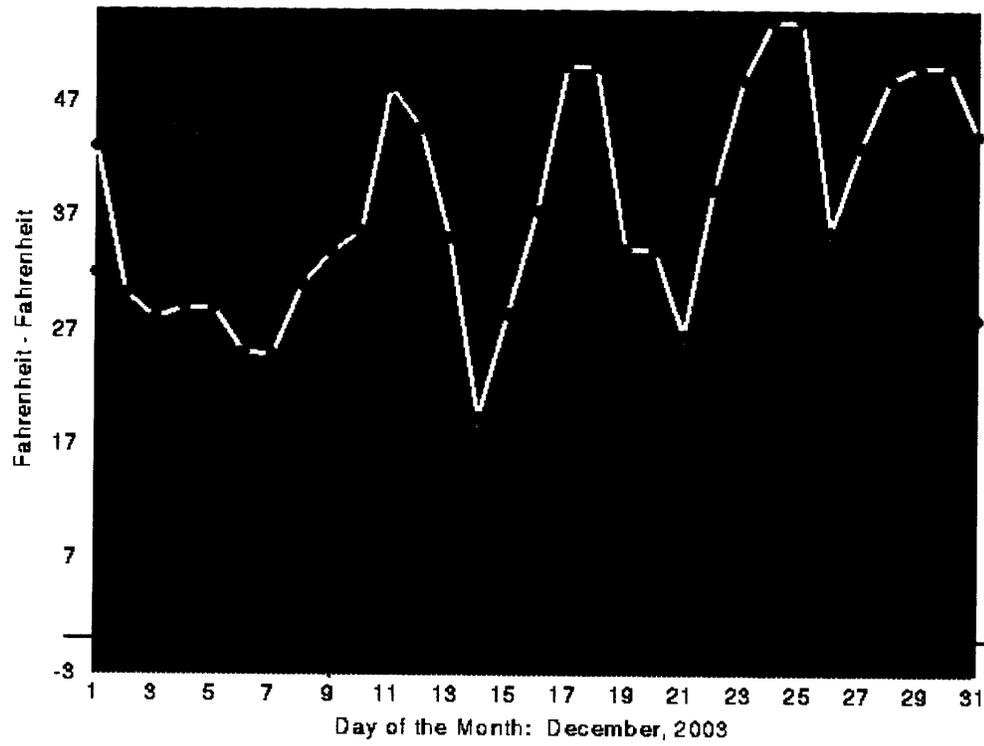

Notary Public

My Commission Expires **My Commission Expires 6/25/08**

EXHIBIT 1

Wed Feb 11 10:22:40 200

JAFFREY MUNICIPAL New Hampshire

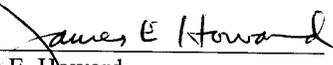


- Maximum Temperature
- Minimum Temperature

CERTIFICATE OF SERVICE

I hereby certify that the foregoing "Rebuttal Statement of Granite State Concrete Co., Inc. and Milford-Bennington Railroad Co., Inc. was served this 23^d 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