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March 3, 2004

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**VIA HAND DELIVERY**

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MAR 3 2004  
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Mr. Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20423-0001

**Re: Lamoille Valley Railroad Company – Abandonment and  
Discontinuance of Trackage Rights Exemption – In Caledonia,  
Washington, Orleans, Lamoille and Franklin Counties, VT,  
STB Docket No. AB-444 (Sub-No. 1X)**

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are an original and ten copies of Lamoille Valley Railroad Company's **Motion To Strike**.

If you have any questions regarding this filing, please feel free to contact me. Thank you for your assistance.

Respectfully submitted,



Tracie D. Spear

Enclosures

BEFORE THE  
SURFACE TRANSPORTATION BOARD

DOCKET NO. AB-444 (SUB-NO. 1X)

LAMOILLE VALLEY RAILROAD COMPANY  
-- ABANDONMENT AND DISCONTINUANCE EXEMPTION --  
IN CALEDONIA, WASHINGTON, ORLEANS, LAMOILLE  
AND FRANKLIN COUNTIES, VERMONT

**MOTION TO STRIKE  
THE MOTION OF TIMOTHY D. PHELPS TO STRIKE  
LAMOILLE VALLEY RAILROAD COMPANY'S REPLY IN OPPOSITION TO  
TIMOTHY D. PHELPS' PETITION FOR STAY OF ABANDONMENT EXEMPTION**

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**ATTORNEYS FOR LAMOILLE VALLEY  
RAILROAD COMPANY**

Dated: March 3, 2004

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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DOCKET NO. AB-444 (SUB-NO. 1X)

LAMOILLE VALLEY RAILROAD COMPANY  
-- ABANDONMENT AND DISCONTINUANCE EXEMPTION --  
IN CALEDONIA, WASHINGTON, ORLEANS, LAMOILLE  
AND FRANKLIN COUNTIES, VT

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**MOTION TO STRIKE  
THE MOTION OF TIMOTHY D. PHELPS TO STRIKE  
LAMOILLE VALLEY RAILROAD COMPANY'S REPLY IN OPPOSITION TO  
TIMOTHY D. PHELPS' PETITION FOR STAY OF ABANDONMENT EXEMPTION**

**I. INTRODUCTION**

Lamoille Valley Railroad Company ("LVRC") hereby submits this Motion to Strike the Motion of Timothy D. Phelps To Strike LVRC's Reply in Opposition to Timothy D. Phelps' Petition for Stay of Abandonment Exemption (the "Motion to Strike"). Mr. Phelps' Motion to Strike constitutes nothing more than an impermissible reply to LVRC's Reply to Mr. Phelps' Petition for Stay of Abandonment Exemption (the "Reply"). Mr. Phelps merely restates arguments previously made in the Petition for Stay of Abandonment Exemption (the "Petition for Stay").<sup>1</sup> Additionally, the few additional points that Mr. Phelps raises in the Motion to Strike add nothing of value to the record in this proceeding. Therefore, the Surface Transportation Board ("STB" or "Board") should strike the Motion to Strike from the record.

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<sup>1</sup> By letter dated February 17, 2004, Mr. Phelps requested that the Board consider the Petition for Stay as a petition to reopen.

## **II. BACKGROUND**

As summarized in the Reply, LVRC filed a Verified Notice of Exemption (the "LVRC Notice") on December 29, 2003, pursuant to 49 CFR Part 1152, Subpart F, in connection with the abandonment of approximately 96.78 route miles of rail line in Caledonia, Washington, Orleans, Lamoille and Franklin Counties, Vermont. The rail lines to be abandoned are: (1) a certain railroad right-of-way located between approximately milepost 0.057 (SJLC valuation station 3+00) in St. Johnsbury, Vt. and approximately milepost 95.324 (SJLC valuation station 5033+10) in Swanton, Vermont, a distance of approximately 95.26 miles; and (2) the Hardwick and Woodbury Connecting Track between approximately H&W valuation station 0+00 (Granite Junction) and approximately H&W valuation station 80+48 (Buffalo Road), a distance of approximately 1.52 miles, in Hardwick, Vermont (collectively, the "Subject Line"). On January 16, 2004, the Board served and published notice that LVRC had filed the LVRC Notice in connection with the abandonment of the Subject Line. On February 5, 2004, Mr. Phelps filed a Petition for Stay and on February 12, 2004, LVRC filed the Reply. The LVRC Notice became effective on February 17, 2004. Mr. Phelps filed the Motion to Strike on February 19, 2004. On February 23, 2004, LVRC filed a letter notifying the Board that LVRC and VTrans had reached an arrangement to convert the Subject Line into a rail-trail (pursuant to 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29).

## **III. ARGUMENTS**

### **A. The "Motion To Strike" Is An Impermissible Reply To A Reply**

Pursuant to 49 C.F.R. § 1104.13(c), "a reply to a reply is not permitted." The Board has held that replies to replies that merely seek to get in the last word are not

permitted. See FMC Wyoming Corp. and FMC Corp. v. Union Pacific R.R. Co., Docket No. 42022, Slip op. (STB served Jan. 8, 1999).

In the Motion to Strike, Mr. Phelps essentially attempts to refute certain arguments made and facts presented by LVRC in the Reply by reiterating assertions made in the Petition for Stay. This is obvious from the format of Mr. Phelps's Motion to Strike, which is a point-by-point response to the Reply. As such, the Motion to Strike serves no real purpose but to do exactly what the Board prohibits – give Mr. Phelps the last word. Therefore, the Board should strike the Motion to Strike from the record in this proceeding.

**B. The Few Additional Points Raised In Mr. Phelps' Motion To Strike Add Nothing Of Value To The Record In This Proceeding**

The Board has held that “in appropriate circumstances, we construe [49 C.F.R. § 1104.13(c)] liberally to allow pleadings where they will contribute to a complete record without prejudicing any party or delaying the proceeding.” See Reading Blue Mountain and Northern R.R. Co. – Lease and Operation Exemption – Norfolk Southern Ry. Co. and Pennsylvania Lines LLC, Finance Docket No. 34048 (STB served August 1, 2001). This is not an appropriate circumstance. The Board should strike Mr. Phelps' Motion to Strike from the record because the few additional points that Mr. Phelps raises in the Motion to Strike add nothing of value to the record in this proceeding.

1. Mr. Phelps' Assertion Concerning The Removal Of Bridges 13 And 27A Is Misplaced And Add Nothing of Value To The Record In This Proceeding

Mr. Phelps alleges that in the Reply, LVRC attributes the removal of Bridges 13

and 27A directly to the 1995 floods.<sup>2</sup> Mr. Phelps argues that Bridges 13 and 27A were not removed because of 1995 flood damage and provides his rendition of the factual background behind the removal of such bridges.

The Reply does not attribute the removal of Bridges 13 and 27A directly to the 1995 flood damage. Rather, the Reply clearly states that safety problems were created at both locations after the Subject Line's continuity had been interrupted by the 1995 flood damage. See Reply at 8-9. As stated in the Reply, given that the Subject Line already had been severed, VTrans could not justify the expenditure of public funds to reconstruct grade-separation structures that might never again be used by freight equipment. Id.

2. Mr. Phelps' Assertion Regarding Freight Service To Frye Quarry In 1995 Adds Nothing Of Value To The Record In This Proceeding

In connection with arguments made regarding the removal of Bridges 13 and 27A, Mr. Phelps asserts that revenue freight service did not end in April 1989. Instead, Mr. Phelps claims that LVRC provided freight service to Frye Quarry in 1995.

In the Reply, LVRC states that freight service "effectively" ended in 1989. See Reply at 7. LVRC never claims that all freight movements over the Subject Line ceased as of April 1989. Although LVRC may have provided limited freight service to Frye Quarry in 1995, LVRC's justification for the removal of Bridges 13 and 27A remains valid; safety concerns that existed after the Subject Line suffered severe flood damage necessitated removal of Bridges 13 and 27A. More importantly, even if LVRC provided freight service over the Subject Line in 1995, LVRC still meets the criteria for an

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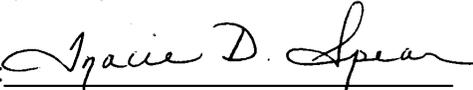
<sup>2</sup> Mr. Phelps also points out that on page 8 of the Reply, LVRC references the removal of Bridge No. 14. This was a mere typographical error. The correct reference should have been to Bridge No. 13.

abandonment exemption under 49 CFR 1152, Subpart F because no rail traffic has moved over the Subject Line over the past two years and there have been no complaints by shippers on the Subject Line about the lack of rail service.

**IV. CONCLUSION**

For the foregoing reasons, Mr. Phelps' Motion to Strike LVRC's Reply In Opposition To Timothy D. Phelps' Petition For Stay Of Abandonment Exemption should be stricken from the record in this proceeding.

Respectfully submitted,

By: 

Edward J. Fishman, Esq.

Tracie D. Spear, Esq.

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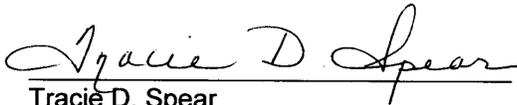
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**ATTORNEYS FOR LAMOILLE VALLEY  
RAILROAD COMPANY**

**CERTIFICATE OF SERVICE**

I hereby certify that on this 3<sup>rd</sup> day of March, 2004, a copy of this **Motion to Strike** was served by first class mail, postage prepaid, on Mr. Timothy D. Phelps at the following address:

Mr. Timothy D. Phelps  
P.O. Box 67  
East Hardwick, Vermont 05836

  
Tracie D. Spear  
Attorney for Lamoille Valley Railroad  
Company