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March 10, 2005



VIA HAND DELIVERY

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

Re: Boston and Maine Corporation and Springfield Terminal Railway  
Company v. New England Central Railroad, Inc.—Formal  
Complaint and Petition for Declaratory Order—Finance Docket No.  
34612

Dear Mr. Williams:

Please find enclosed an original plus eleven copies of a petition for reconsideration in the above captioned proceeding. Please receipt-stamp one copy and return it to our legal assistant.

Sincerely,

Eric L. Hirschhorn

Enclosures

cc: Louis E. Gitomer, Esq. (Counsel for New England Central Railroad, Inc.)

ENTERED  
Office of Proceedings

MAR 10 2005

Part of  
Public Record

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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

v.

**NEW ENGLAND CENTRAL RAILROAD, INC.**

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**Finance Docket No. 34612**

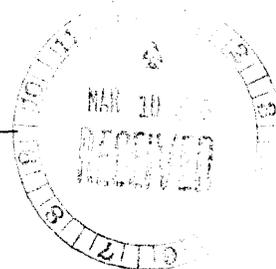
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**PETITION FOR RECONSIDERATION  
IN PART**

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The petitioners, Boston and Maine Corporation (“BM”) and Springfield Terminal Railway Company (“ST”) hereby petition for reconsideration of part of the Board’s decision in this proceeding served February 24, 2005 (“Decision”). In particular, BM and ST seek reconsideration of the Board’s decision not to interpret—by means of a declaratory order proceeding—Section 7.1 of the Trackage Rights Order (“TO”) imposed in 1990 by the Board’s predecessor, the Interstate Commerce Commission (“ICC”), in *Amtrak—Conveyance of B&M in Conn River Line in VT & NH*, 6 I.C.C.2d 539 (1990) (“*Amtrak IP*”).

The BM/ST complaint seeks damages for the July 2004 derailment of its train from the New England Central Railroad’s (“NEC”) track but it also seeks a declaratory order from the



Board as to the meaning of Section 7.1—a provision that was imposed by the Board’s predecessor, the ICC. *See id.* at 564. It may be that, as the Decision states, the courts are better able to evaluate the facts attendant upon the derailment. *See* Decision at 3, 4. It also may be that the courts are better able than the Board to handle tort and breach of contract claims. *See id.* at 1. The key *legal* issue in the dispute, however, is one that the Board, as successor to the ICC, is uniquely qualified to decide: Was Section 7.1 of the TO intended by the ICC to absolve a track owner whose track is in substandard condition due to its own gross negligence or willful misconduct from liability for a derailment resulting from the condition of that track?

In another case involving the same TO, the Court of Appeals for the First Circuit described the Board as being “*uniquely suited*” to determine the meaning of the TO, as well as to make decisions about national rail transportation policy. *Rymes Heating Oils, Inc. v. Springfield Terminal Ry. Co.*, 358 F.3d 82, 91 (1<sup>st</sup> Cir. 2004) (emphasis added); *accord Hansen v. Norfolk & W. Ry. Co.*, 689 F.2d 707, 712 (7<sup>th</sup> Cir. 1982) (noting appropriateness of primary jurisdiction referral for interpretation of ICC’s own order). In addition to being about the meaning of the TO, the dispute between BM/ST and NEC raises a significant question of transportation policy—namely, whether as a matter of public policy a track owner can absolve itself, in advance, of gross negligence and even willful misconduct in the discharge of its track safety responsibilities.

The Board previously has addressed this issue: “[P]ublic policy generally disfavors requiring one party to be responsible for another’s gross negligence or willful and wanton misconduct.” *Nat’l R. Passenger Corp.—Applic.—49 U.S.C. 24308(a)*, 3 S.T.B. 157, 162 (1998). Moreover, the TO is to be interpreted under District of Columbia law, *Amtrak II*, 6 I.C.C.2d at 567 (§ 9.9 of TO), which considers “[c]ontract provisions which appear to indemnify against willful, wanton, reckless, or intentional misconduct by the indemnitee [to be] contrary to

public policy.” *Nat’l R. Passenger Corp. v. Consolidated Rail Corp.*, 698 F. Supp. 951, 970-71 & n. 6 (D.D.C. 1988) (applying D.C. law), *vacated and remanded on other grounds*, 892 F.2d 1066 (1990); *see Wisconsin Ave. Assocs., Inc. v. 2720 Wisconsin Ave. Coop. Ass’n*, 441 A.2d 956, 964-65 (D.C. 1982) (invalidating contract provision as violative of public policy).

Moreover, this is an issue that the parties to this proceeding jointly suggested that the Board address as “a preliminary—and possibly dispositive—issue of law.” Letter from Robert B. Culliford, Corporate Counsel, BM/ST, to Vernon A. Williams, Secretary, STB (Dec. 20, 2004) (copy annexed as Exhibit 1).

The Decision states that the content of Section 7.1 was “not in dispute” in *Amtrak II*, Decision at 1. That is incorrect. The temporary trackage rights agreement that preceded the TO, *see* Decision at 1, provided for shared liability “in proportion to the respective relative fault of each [railroad] for the occurrence which gave rise to the liability.” Interim Trackage Rights Agreement Between Central Vermont Railway, Inc. and Boston and Maine Corp. §§ 7.1-7.2 (Sept. 9, 1988) (“Temporary Agreement”) (copy annexed as Exhibit 2). Thus the Temporary Agreement—a contract as to which the predecessors of BM/ST and NEC agreed—provided for apportionment of responsibility based upon negligence.

In the *Amtrak II* proceeding, NEC’s predecessor, Central Vermont Railway (“CV”), submitted the version of Section 7.1 that the ICC ultimately adopted and that is at issue here (copy of CV proposal annexed as Exhibit 3). CV’s twenty-two page brief in support of its proposed version made no mention of liability beyond the passing remark that “liability indemnification is spelled out” in the proposal. Verified Pet. of Central Vermont Railway, Inc. for Imposition of Terms and Conditions of Trackage Rights on Connecticut River Line, and for Other Relief, STB Finance Docket No. 31259, at 6 (May 18, 1989).

BM, by contrast, proposed a version of Sections 7.1 and 7.2 identical to that in the Temporary Agreement—i.e., providing for shared liability “in proportion to the respective relative fault of each [railroad] for the occurrence which gave rise to the liability” (copy of BM proposal annexed as Exhibit 4). BM’s brief also made no mention of liability issues and the parties’ subsequent responses to one another did not address liability, either.

The ICC decision addressed the issue only briefly:

CV proposes a revised section 7 to address release and indemnification in greater detail than the Interim Agreement. B&M states no objection. Because we find the revisions *will not change the essence of section 7*, we will impose as terms sections 7.1 through 7.6 as proposed by CV.

*Amtrak II*, 6 I.C.C.2d at 554 (emphasis added).

That BM did not seek judicial review of the decision imposing the TO thus is understandable and is no bar here, for no reasonable person could interpret Section 7.1 as having the limitless scope that NEC now would assign to it. The silence of the parties’ four *Amtrak II* filings on the point underscores this conclusion, as does the ICC’s statement that the CV version “will not change the essence of section 7” of the Temporary Agreement—a provision that apportioned liability based upon relative fault. Thus there can be no reasonable claim that BM agreed or acceded to NEC’s strained current interpretation of Section 7.1.

In addition to the fact that the Board is far more qualified than a court to explain the meaning of a provision ordered by the ICC, the legal issue raised by the declaratory order portion of the proceeding is one that should be uniform for all STB-imposed trackage rights. *See, e.g., Nat’l R. Passenger Corp.—Applic.— 49 U.S.C. 24308(a)*, 3 S.T.B. 157, 162 (1998) (rejecting a provision similar to § 7.1 because it would violate public policy). This is a classic instance of the utility of the primary jurisdiction doctrine. *See Pejepsco Indus. Park, Inc. v. Maine Central R. Co.*, 215 F.3d 195, 205-06 (1<sup>st</sup> Cir. 2000) (“promote uniformity”); *Hansen*, 689 F.2d at 710-11

(same). The Board should not refrain from deciding this legal issue even if it then leaves to the courts the task of finding the facts to which the Board's legal conclusions are to be applied.

WHEREFORE, BM and ST respectfully request that the Board reconsider its decision served February 24, 2005, open a declaratory order proceeding on the limited issue of whether Section 7.1 of the TO absolves NEC of liability if NEC's gross negligence or willful misconduct was a cause of the July 3, 2004 derailment, and set a briefing schedule.<sup>1</sup> BM and ST note that the parties previously had suggested that opening statements be due within thirty days after the Board's order opening a proceeding and that replies be submitted within twenty days after the service of opening statements. Letter from Robert B. Culliford, Corporate Counsel, BM/ST, to Vernon A. Williams, Secretary, STB (Dec. 20, 2004) (copy annexed as Exhibit 1).

Respectfully submitted,



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Eric L. Hirschhorn  
Winston & Strawn LLP  
1400 L Street, NW  
Washington DC 20005  
Tel. 202-371-5706

Robert B. Culliford  
Guilford Rail System  
Iron Horse Park  
North Billerica MA 01862  
Tel. 978-663-1029

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<sup>1</sup> Should the Board deny reconsideration here, BM and ST assume that it would not refuse to interpret § 7.1 were it asked to do so by the U.S. District Court that currently is hearing NEC's action against BM/ST. *See Engelhard Corp.—Petition for Declaratory Order—Springfield Terminal Railway Corp. and Consolidated Rail Corp.* STB Docket No. 42075, at 2 (served Apr. 1, 2003) (noting that “[p]etitions for issuance of a declaratory order premised on referral from a federal court are routinely accepted. *See Delegation of Authority—Declaratory Order Proceedings*, 5 I.C.C.2d 675, 676 (1989)”).

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

Dated: March 10, 2005

**CERTIFICATE OF SERVICE**

I certify that on this 10<sup>th</sup> day of March 2005, I served a copy of the foregoing document, with exhibits, upon the respondent, New England Central Railroad, Inc., by serving its counsel of record in this proceeding, Louis E. Gitomer, Esq., by hand delivery.

  
\_\_\_\_\_  
Mary Mooney

# EXHIBIT 1



212840

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

IRON HORSE PARK  
NO. BILLENCA, MASS. 01862

LAW DEPARTMENT  
(978) 663-1029

ENTERED  
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Public Record

December 20, 2004



Mr. Vernon A. Williams  
Secretary  
United States Surface Transportation Board  
1925 K Street, N.W., Room 700  
Washington, D.C. 20423

By Federal Express

Re: **Boston and Maine Corp. and Springfield Terminal Railway Co. v.  
New England Central Railroad, Inc.—Formal Complaint and Petition  
for Declaratory Order  
STB Docket No. FD 34612**

Dear Secretary Williams:

Pursuant to 49 C.F.R. § 1111.10(a), please accept this correspondence as the proposed procedural schedule in the above referenced action, as discussed by the parties in a telephonic conference. As a result of this discussion, the parties propose that the Board establish a procedural schedule in two phases, with the first phase intended to resolve a preliminary—and possibly dispositive—issue of law in this matter, and, if necessary, a second phase to perform discovery and file additional pleadings. Particularly, the parties have agreed that the most efficient approach would have the parties first address the issue of the applicability of Section 7.1 of the Trackage Rights Order (“TRO”) to this proceeding, *see* 6 I.C.C.2d 564-65, as well as the scope of that section.

To accomplish this, the parties propose an initial procedural schedule whereby each party file an opening statement and a reply addressing solely their respective interpretations of Section 7.1 of the TRO and its applicability to this proceeding as pleaded. Opening statements would be due within 30 days following the Board’s order adopting this procedural schedule, with replies due 20 days after service of each opening statement. Once this preliminary issue is resolved, the parties will reconvene to propose a supplemental procedural schedule to resolve any remaining issues.

Thank you for your attention to this matter. Please feel free to contact me if you should have any questions or comments.

Sincerely,



Robert B. Culliford  
Corporate Counsel

cc: All Parties of Record

**CERTIFICATE OF SERVICE**

I hereby certify that true copies of the foregoing documents were served on December 20, 2004, by Federal Express upon the following parties to this action:

Louis E. Gitomer, Esquire  
Ball Janik, L.L.P.  
Metropolitan Square  
1455 F Street, N.W.  
Washington, D.C. 20005

**Dated: December 20, 2004**

  
Robert B. Culliford

# EXHIBIT 2

INTERIM  
TRACKAGE RIGHTS AGREEMENT  
BETWEEN CENTRAL VERMONT RAILWAY, INC.  
AND  
BOSTON AND MAINE CORPORATION

INTERIM AGREEMENT ("Agreement") made as of this Ninth day of September, 1988 by and between the CENTRAL VERMONT RAILWAY, INC., a corporation with its principal office at 2 Federal Street, St. Albans, Vermont 05478 (hereinafter referred to as "CV"), and the BOSTON AND MAINE CORPORATION, a corporation with its principal office at Iron Horse Park, North Billerica, Massachusetts 01862 (hereinafter referred to as "B&M").

WHEREAS, pursuant to Trackage Rights Agreements dated as of April 1, 1985 and January 1, 1930, the B&M has the right to operate over the approximately 13.4 mile segment of railroad between Windsor, Vermont and White River Junction, Vermont and the approximately 10.6 mile segment of railroad between East Northfield, Massachusetts and Brattleboro, Vermont (the "CV Lines"); and

WHEREAS, pursuant to an Order of the Interstate Commerce Commission ("ICC"), service date August 9, 1988, in Finance Docket No. 31250 (the "Order"), the B&M was required to convey to the National Railroad Passenger Corporation ("Amtrak") certain rights and interests in the 48.8 mile segment of railroad between Brattleboro, Vermont and Windsor, Vermont ("the Former B&M Line"); and

WHEREAS, CV and B&M seek to reach, but have not reached, agreement over the terms of a final arrangement to permit B&M

to operate over the Former B&M Line and over the CV Line, but desire to create an interim arrangement to permit the conveyance and upgrading of the Former B&M Line to proceed immediately, without prejudice to seeking imposition of a final arrangement by the ICC in the event further negotiations fail and without prejudice to the parties' position regarding their rights under the Order; and

WHEREAS, Amtrak is conveying the Former B&M Line to CV pursuant to an Agreement Governing Acquisition of Certain Interests in the Connecticut River Line, dated March 18, 1988; and

WHEREAS, as provided in the Order and in consideration of the sale of the Former B&M Line to Amtrak, B&M retained the right to operate over the Former B&M Line; and

WHEREAS, the parties desire to clarify and reestablish their respective rights and obligations with respect to their interim operations over the CV Lines and the Former B&M Line (for the purposes of this Agreement, the CV Lines and the Former B&M Line shall be collectively referred to as the "Line");

NOW, THEREFORE, in consideration of the promises, covenants and undertakings contained herein, the parties agree as follows:

1. GRANT OF TRACKAGE RIGHTS

1.1 Subject to the terms and conditions of this Agreement, CV hereby grants to B&M the non-exclusive right to operate B&M's trains, locomotives, cars and equipment with

B&M's own crews over the Line, as more particularly defined as follows:

All main line track and passing sidings between a point at the interlocking at East Northfield, Massachusetts (approximately B&M MP 49.67 and CV MP 110.51) to the Bank switch at the termination of B&M ownership at White River Junction, Vermont (approximately CV MP 13.40).

1.2 B&M shall have overhead running rights over the CV Lines.

1.3 B&M shall have the exclusive right to serve all existing shippers and shippers' facilities that were located on the Former B&M Line as of September 10, 1988 (the "Conveyance Date"), including any and all new shippers that locate at such existing facilities after the Conveyance Date, provided the B&M maintains a minimum three day per week service along the Line.

1.4 Except as provided in Section 1.3, CV and B&M shall each have the right to compete for and serve shippers and shippers' facilities on the Former B&M Line, and CV shall, upon request by B&M, provide reciprocal switching to permit B&M to serve such shippers and shippers' facilities. B&M shall pay to CV a per switch charge equal to the actual cost of providing such switching service, not to exceed 180% of the CV variable cost of providing such switching service.

1.5 CV and B&M shall each have the right to compete for and to interchange traffic at Bellows Falls, Vermont with the Green Mountain Railroad Corporation (or its successors and

assigns) ("GMRC"). B&M shall have the exclusive right to interchange traffic at Claremont Junction, New Hampshire with the Claremont and Concord Railway (or its successors and assigns) ("CCR") and to interchange traffic at Charlestown, New Hampshire with the Springfield Terminal Railway Company (or its successors and assigns) ("ST").

1.6 B&M shall have the right of entry over the Line for any and all B&M employees, agents or representatives, machinery, vehicles or equipment which B&M may deem necessary or convenient for the purposes of inspecting the Line, clearing any derailments or wrecks of B&M trains on the Line or otherwise conducting its operations over the Line.

1.7 B&M shall without charge to CV dispatch the interlocking CPR 50 located at East Northfield, Massachusetts until seven (7) days after CV notifies B&M that CV is prepared to assume such responsibility and all applicable regulatory requirements have been satisfied.

1.8 Except as provided herein, this Agreement does not diminish in any way CV's right to use the Line, or CV's right to lease or otherwise allow another carrier to use the Line.

## 2. TERM AND TERMINATION

2.1 The term of this Agreement shall commence as of 7:00 a.m. Eastern Time, on the Conveyance Date.

2.2 The initial terms of this Agreement shall run for a period of thirty (30) days. Upon expiration of such initial thirty (30) day term, this Agreement shall automatically and without requirement of any notice from one party to the other

continue in effect for successive terms of thirty (30) days each, pending agreement between CV and B&M on the terms of a final arrangement for B&M's operation over the Line or pending final imposition by the ICC of the terms of such an arrangement. It is hereby agreed by CV and B&M that the term of the final trackage rights agreement agreed to or imposed by the ICC shall be retroactive to the commencement date of the Agreement. It is further agreed that in the event the final trackage rights agreement is limited in scope to the Former B&M Line, the April 1, 1985 and January 1, 1930 Trackage Rights Agreements shall govern the operations of the parties over the CV Lines and such agreements shall be deemed re-executed in their current forms with respect to the CV Lines.

2.3 B&M may terminate this Agreement immediately upon notice to CV.

2.4 Notwithstanding the foregoing, the parties hereby acknowledge and agree that B&M has appealed the Order, and that in the event the Former B&M Line is reconveyed to B&M in connection with or resulting from such appeal, this Agreement shall terminate upon such reconveyance, and that thereafter the terms and conditions of the April 1, 1985 and January 1, 1930 Trackage Rights Agreements shall govern their operations over and use of the Line, and such agreements shall be deemed re-executed in their current forms.

3. COMPENSATION

3.1 CV hereby acknowledges and agrees that B&M shall have no obligation to pay for or contribute in any way towards the cost of such upgrading of the Former B&M Line.

3.2 Except as provided in Section 1.7, CV hereby acknowledges and agrees that CV shall be solely responsible for dispatching all operations over the Line and for the maintenance and repair of the Line, including the signals and the signal and dispatching system which controls operations on it. CV hereby further acknowledges and agrees that CV shall keep the Line, at all times throughout the term of this Agreement or any extensions thereof, in a state of reasonable repair and condition corresponding to the FRA Track Standard for the applicable authorized speeds, provided that CV may, but shall not be required to maintain the Line to a higher level than FRA Class III.

3.3 In full satisfaction of any and all obligations of B&M to pay for the trackage rights provided herein or contribute towards the costs of dispatching, maintenance and repair of the Line (including the maintenance, repair and operation of the signals and the signal and dispatching system which controls operations on it), B&M shall pay to CV \$.19 per car mile (whether loaded or empty) of traffic actually operated by B&M over the Line. Notwithstanding the foregoing, the sum of such payments in respect of the Former B&M Line shall not exceed one hundred thousand dollars (\$100,000) during the first three years this Agreement is in

force and shall not exceed seventy-five thousand dollars (\$75,000) in any year thereafter; provided, however, that the foregoing limitation shall not apply if the annual gross traffic volume on the Former B&M Line attributable to B&M's overhead or local service, including traffic for interchange to GMRC, CCR or ST, exceeds 32,500 carloads. In any year that the amount of traffic attributable to B&M on the Former B&M Line exceeds 32,500 carloads, B&M shall pay CV as additional compensation \$.19 per car mile for all cars in excess of 32,500 cars, whether loaded or empty.

3.4 All payments to be made by B&M and CV under this Agreement (other than the caps set forth in Section 3.3) shall be adjusted March 31, 1989, and semi-annually thereafter, for price level changes beginning July 1, 1988, (using Second Quarter 1988) based on the relationship of the most recent quarter's Association of American Railroads (AAR) Eastern District, Quarterly Indices of Chargeout Prices and Wage Rates (Table C) - "Material prices, wage rates and supplements combined (excluding fuel)" to comparable indices of the quarter six months previous. The first adjustment to be made shall be based on the comparison of the Fourth Quarter 1988 index value to the Second Quarter 1988.

3.5 B&M shall have responsibility for and shall report and pay directly to the owner of the cars, all mileage, car hire and other charges accruing on cars in B&M's trains on the Line.

4. ADDITIONS AND ALTERATIONS

4.1 CV shall pay for and be responsible for the construction, maintenance, repair and renewal of any additional connections to the Line which it may require.

4.2 If B&M determines that changes in or additions and betterments to the Line, including changes in communication, dispatching or signal facilities as they existed immediately prior to the Conveyance Date, are required to accommodate B&M's operations beyond that required by CV to accommodate CV's and Amtrak's operations over the Line, B&M shall pay for the construction of such additional or altered facilities, including the annual expense of maintaining, repairing, and renewing such additional or altered facilities.

Notwithstanding the foregoing, CV shall have the right to approve of any such addition or alteration prior to its construction, which approval shall not be unreasonably withheld, and such addition or alteration shall be constructed in such a manner as to minimize interference with CV's or Amtrak's operations over the Line.

5. SCHEDULING OF TRAINS AND MAINTENANCE; OPERATING RULES

5.1 The trains, locomotives, cars and equipment of B&M, CV, Amtrak and any other present or future user of the Line or any portion thereof, shall be operated without prejudice or partiality to any party to this Agreement or any such other user and in such a manner as will result in the most economical and efficient manner of movement of all traffic; provided, however, that CV shall give priority to intercity

rail passenger trains of Amtrak to the extent required by Section 402 of the Rail Passenger Service Act.

Notwithstanding the foregoing, B&M shall have the right, in consultation with CV, to establish the schedules of B&M's trains over the Line. It is understood that trains performing local work, whether B&M, CV or otherwise, are not entitled to priority over trains that are not performing such work. CV shall establish CV's train schedules with due regard to the trains to be operated by B&M. Each party shall use reasonable efforts to provide thirty (30) days notice of changes in its traffic and operating patterns and procedures which may affect the Line. B&M acknowledges that the upgrading work will require a twelve (12) hour work block scheduled for between 7:00 AM and 7:00 PM. CV hereby agrees to coordinate with B&M and to use its best efforts in scheduling the work required for the upgrading of the Former B&M Line and any future maintenance or repair of the Line to minimize any interference with or disruption of B&M's operations over the Line.

5.2 CV hereby acknowledges and agrees that any and all training that may be required to qualify B&M operating personnel as to CV's operating rules (after the initial training of such personnel, which will be provided by CV) shall be performed by B&M, and that the determination as to whether such operating personnel are qualified under CV's operating rules shall be made in the discretion of B&M (giving consideration to any comments or recommendations of

CV). CV shall train, and periodically recertify in accordance with CV's operating rules, B&M operating personnel who act as instructors for B&M personnel regarding CV's operating rules. CV hereby further agrees to provide, for a period not to exceed 14 days at CV's sole cost and expense, pilot crews as may be necessary, during the initial training of B&M operating personnel as to CV's operating rules to accommodate any and all B&M trains operating over the Line.

5.3 CV operating rules shall govern all operations over the Line, and CV shall report to B&M any incidents of violation of such rules by a B&M employee. B&M thereupon shall investigate the matter promptly pursuant to B&M's normal procedures. If CV does not accept B&M's decision as to penalty or sanction (if any) against such B&M employee, CV may exclude such employee from the Line, in which event CV will be liable for any compensation lost or denied to such employee if CV's action ultimately is not sustained by applicable labor board.

5.4 In the event that any dispute arises as to the interpretation of any operating rules, the interpretations of the Standard Code, as amended, adopted by the Association of American Railroads shall govern.

6. CLEARING OF DERAILMENTS AND WRECKS

6.1 In the event of any derailment or wreck of a B&M train, B&M hereby agrees to clear the Line to allow for the passage of other trains within a reasonable time. B&M hereby further agrees to perform any rerailling, wrecking or wrecking

train service as may be required in connection with such derailment or wreck, in accordance with its customary practices. Except as provided in Sections 7.1 and 7.2, the cost, liability, and expense of the foregoing, including, without limitation, loss of, damage to, or destruction of any property whatsoever and injury to or death of any person or persons whomsoever resulting therefrom, shall be the responsibility of B&M. In the event that B&M does not clear the Line for passage of trains within a reasonable time, CV may clear the Line for passage of trains, and B&M shall reimburse CV for all reasonable costs CV incurs in performing such service.

7. RELEASE AND INDEMNIFICATION

7.1 B&M hereby agrees to indemnify, defend, protect and hold CV and its officers, agents, representatives and employees harmless from and against any and all liability, cost or expense (including expenses described in Section 6.1, above) which relate to or arise out of any loss of, damage to, or destruction of any property whatsoever, or any injury to or death of any person or persons whomsoever, when such liability, cost or expense arises out of the operation of B&M trains on the Line, including local freight or any overhead service (including movement of traffic for interchange to GMRC, CCR or ST). Notwithstanding the foregoing, CV and B&M shall each share in the responsibility for any liability, cost or expense described in the preceding sentence which is caused in part by the fault, failure, negligence, misconduct,

nonfeasance, or misfeasance of CV or its officers, agents, representatives or employees, in proportion to the respective relative fault of each for the occurrence which gave rise to the liability, cost or expense.

7.2 CV hereby agrees to indemnify, defend, protect and hold B&M and their officers, agents, representatives and employees harmless from and against any and all liability, cost or expense (including expenses described in Section 6.1, above) which relate to or arise out of any loss of, damage to, or destruction of any property whatsoever, or any injury to or death of any person or persons whomsoever, when such liability, cost or expenses arises out of the operation of CV or Amtrak trains on the Line, including local freight service (including movement of traffic for interchange to GMRC), or any maintenance or repair of the Line. Notwithstanding the foregoing, B&M and CV shall each share in the responsibility for any liability, cost or expense described in the preceding sentence which is caused in part by the fault, failure, negligence, misconduct, nonfeasance or misfeasance of B&M or its officers, agents, representatives or employees, in proportion to the respective relative fault of each for the occurrence which gave rise to the liability, cost or expense.

7.3 In every case of death or injury suffered by an employee of either B&M or CV, when compensation to such employee or employee's dependents is required to be paid under any workmen's compensation, occupational disease, employer's liability or other law, and either of said

parties, under the provisions of this Agreement, is required to pay such compensation, if such compensation is required to be paid in installments over a period of time, such party shall not be released from paying such future installments by reason of the expiration or other termination of this Agreement prior to any of the respective dates upon which any such future installments are to be paid.

8. DEFAULT

8.1 In the event of a material breach by B&M of the terms and conditions of this Agreement which continues for a period of forty-five (45) days after notice thereof from CV, CV shall have the right to terminate this Agreement upon ninety (90) days notice.

9. GENERAL PROVISIONS

9.1 No Waiver. Waiver of any provision of this Agreement, in whole or in part, in any one instance shall not constitute a waiver of any other provision in the same instance, nor any waiver of the same provision in another instance, but each provision shall continue in full force and effect with respect to any other then existing or subsequent breach.

9.2 Notice. Any notice required or permitted under this Agreement shall be given in writing to the parties at their respective addresses specified above, or at such other address for a party as that party may specify by notice as provided herein, by (i) (A) delivery in hand or by postage prepaid, United States first class mail and (B) registered or

certified mail, return receipt requested, or (ii) Federal Express or other form of expedited mail that provides for delivery to the sender of a signed receipt, or (iii) telegram. Notice so sent shall be effective upon receipt.

9.3 Integration. Except for the Order and the documents executed in pursuance thereof, this Agreement constitutes the entire agreement of the parties with respect to its subject matter, superseding all prior oral and written communications, proposals, negotiations, representations, understandings, courses of dealing, agreements, contracts and the like between the parties in such respect. Except for any and all obligations incurred or causes of action accrued thereunder prior to or as of the Conveyance Date, and except as provided in Sections 2.2 and 2.4 hereof, the Trackage Rights Agreements by and between B&M and CV dated as of April 1, 1985 and January 1, 1930 are hereby terminated. Any provisions of any other agreement(s) between CV and B&M which are not inconsistent with the provisions of this Agreement shall remain in effect until cancelled according to the terms of such other agreement(s).

9.4 Miscellaneous. This Agreement: (i) may be executed in any number of counterparts, each of which when executed by both parties to this Agreement shall be deemed to be an original, and all of which counterparts together shall constitute one and the same instrument; (ii) may be amended, modified, or terminated, and any right under this Agreement may be waived in whole or in part, only by a writing signed

by both parties; (iii) contains headings only for convenience, which headings do not form part of and shall not be used in construction of this Agreement; and (iv) is not intended to inure to the benefit of any party not a party to this Agreement.

9.5 Availability of Equitable Relief. The obligations imposed by this Agreement are unique. Breach of any of such obligations would injure the parties to this Agreement; such injury is likely to be difficult to measure; and monetary damages, even if ascertainable, are likely to be inadequate compensation for such injury. The parties to this Agreement, therefore, acknowledge and agree that protection of the respective interests provided herein would require equitable relief, including specific performance and injunctive relief, in addition to any other remedy or remedies that the parties may have at law or under this Agreement.

9.6 Force Majeure. No party to this Agreement shall be responsible to the other for delays or errors in its performance or other breach under this Agreement occurring by reason of circumstances beyond its control, including acts of civil or military authority, national emergencies, fire, major mechanical breakdown, labor disputes, flood or catastrophe, acts of God, insurrection, war, riots, delays of suppliers, or failure of transportation, communication or power supply.

9.7 Trains, Locomotives, Cars or Equipment. As used in this Agreement, whenever reference is made to the trains,

locomotives, cars or equipment of, or in the account of, one of the parties hereto, such expression means the trains, locomotives, cars and equipment in the possession of or operated by one of the parties and includes such trains, locomotives, cars and equipment which are owned by, leased to, or in the account of such party. Whenever such trains, locomotives, cars or equipment are owned or leased by one party to this Agreement and are in the possession or account of, or under the control of the other party to this Agreement, such trains, locomotives, cars and equipment shall be considered those of the other party.

9.8 Assignment. This Agreement shall bind and inure to the benefit of the parties and their respective legal representatives, successors and assigns. CV hereby acknowledges and agrees that B&M shall have the right to assign any or all of B&M's rights and obligations under this Agreement to any affiliate of B&M, following consultation with CV. CV further acknowledges and agrees that B&M shall have the right to assign any or all of B&M's rights and obligations under this Agreement to any other person with CV's prior consent, which shall not be withheld unreasonably.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as a sealed instrument as of the date first set forth above by their duly authorized representatives.

BOSTON AND MAINE CORPORATION

By: *Sydney B. Culliford*  
Sydney B. Culliford  
Vice President - Transportation

CENTRAL VERMONT RAILWAY, INC.

By: *R. A. Walker*  
Name: Robert A. Walker  
Title: Vice President

# EXHIBIT 3

TERMS AND CONDITIONS OF TRACKAGE RIGHTS  
IMPOSED BY THE INTERSTATE COMMERCE COMMISSION  
GOVERNING USE BY BOSTON AND MAINE CORPORATION  
OF CERTAIN LINES OF CENTRAL VERMONT RAILWAY, INC.

IT IS ORDERED:

0. DEFINITIONS

As used herein, the following capitalized terms have the following meanings (other capitalized terms being defined in context hereafter):

0.1 "Agreement" means the terms and conditions of trackage rights as a whole set forth herein, as though the instant terms and conditions had been contractually agreed to by B&M and CV.

0.2 "Amtrak" means the National Railroad Passenger Corporation.

0.3 "B&M" means Boston and Maine Corporation, a corporation with its principal office at Iron Horse Park, North Billerica, Massachusetts 01862.

0.4 "CV" means Central Vermont Railway, Inc., a corporation with its principal office at 2 Federal Street, St. Albans, Vermont 05478.

0.5 "Conveyance Date" means September 9, 1988, the date on which B&M conveyed the Former B&M Line to Amtrak, and on which Amtrak conveyed the same to CV, pursuant to the Order.

0.6. "CV Lines" means the approximately 13.4-mile rail line between White River Junction, Vermont and Windsor, Vermont, and the approximately 10.6-mile rail line between

Brattleboro, Vermont and East Northfield, Massachusetts, both of which have belonged to CV since before the Conveyance Date.

0.7 "Former B&M Line" means the approximately 48.8-mile rail line between Windsor, Vermont and Brattleboro, Vermont, conveyed by B&M to Amtrak, and by Amtrak to CV, on the Conveyance Date pursuant to the Order.

0.8 "Interim Agreement" means the interim trackage rights agreement temporarily governing B&M's use of the Line, executed by B&M and CV on the Conveyance Date.

0.9 "Line" means the CV Lines and the Former B&M Line together.

0.10 "Order" means the decision of the Commission dated August 4, 1988, and served August 9, 1988, ordering, inter alia, the conveyance of the Former B&M Line from B&M to Amtrak pursuant to 45 U.S.C. § 562(d), and permitting its conveyance from Amtrak to CV.

1. GRANT OF TRACKAGE RIGHTS

1.1 Subject to the terms and conditions of this Agreement, B&M is hereby granted the non-exclusive right to operate B&M's trains, locomotives, cars and equipment with B&M's crews over the Line, as more particularly defined as follows:

All main line track and passing sidings between a point at the interlocking at East Northfield, Massachusetts (approximately B&M MP 49.67 and CV MP 110.51) to the Bank switch at the termination of B&M

ownership at White River Junction, Vermont  
(approximately CV MP 13.40).

1.2 B&M shall have only overhead running rights over the CV Lines.

1.3 B&M shall have the exclusive right to serve all existing shippers and shippers' facilities that were located on the Former B&M Line as of the Conveyance Date, including any and all new shippers that locate at such existing facilities after the Conveyance Date, provided that B&M maintains a minimum three day per week service along the Line. CV shall have the exclusive right to serve all other shippers located on or which locate on the Former B&M Line.

1.3.1 For purposes of this Section 1.3, "existing shippers and shippers' facilities" shall mean industries and facilities at rail sidings which received or tendered rail shipments during the twelve months immediately prior to the Conveyance Date.

1.3.2 For purposes of this Section 1.3, "three day per week service" shall mean the provision of local set-off and pick-up service to shippers on the Former B&M Line at least three times per week (Monday through the following Sunday) in each direction.

1.3.3 CV shall be permitted to commence service to existing shippers and shippers' facilities upon B&M's failure to provide three day per week service during two weeks out of any four week period, unless such failure is excused by Section 9.6.

1.4 Except as provided in Section 1.3, CV and B&M shall each have the right to compete for and serve the following shippers and shippers' facilities on the Former B&M Line:

- (a) shippers and shippers' facilities located on the Former B&M Line which have not received or tendered rail shipments during the twelve months immediately prior to the Conveyance Date;
- (b) any other new shippers;
- (c) any existing shippers and shippers' facilities to which B&M does not provide a minimum three day per week service, as specified in Section 1.3.

1.4.1 CV shall, upon request by B&M, provide reciprocal switching to permit B&M to serve such shippers and shippers' facilities as B&M may serve hereunder. CV shall not be required to switch cars on B&M's behalf at shippers' facilities which CV serves by virtue of B&M's failure to maintain a minimum three day per week service along the Line as specified by Section 1.3, but B&M shall retain the right to provide service directly to such shippers and shippers' facilities. B&M shall pay to CV a per switch charge not greater than 180% of the CV variable cost of providing such switching service computed using CV's costs computed in accordance with formulas generally used or accepted in ICC proceedings.

1.5 CV and B&M shall each have the right to compete for and to interchange traffic at Bellows Falls, Vermont

with the Green Mountain Railroad Corporation (or its successors and assigns) ("GMRC"), and at Claremont Junction, New Hampshire with the Claremont and Concord Railway (or its successors and assigns) ("CCR"). B&M shall have the exclusive right to interchange traffic at Charlestown, New Hampshire with the Springfield Terminal Railway Company (or its successors and assigns) ("ST").

1.6 B&M shall have the right of entry over the Line for any and all B&M employees, agents or representatives, machinery, vehicles or equipment which B&M may deem necessary or convenient for the purposes of inspecting the Line, clearing any derailments or wrecks of B&M trains on the Line or otherwise conducting its operations over the Line.

1.7 B&M shall without charge to CV dispatch the interlocking CPR 50 located at East Northfield, Massachusetts until seven (7) days after CV notifies B&M that CV is prepared to assume such responsibility and all applicable regulatory requirements have been satisfied.

1.8. Except as provided herein, this Agreement does not diminish in any way CV's right to use the Line, or CV's right to lease or otherwise allow another carrier to use the Line.

2. TERM AND TERMINATION

2.1 The term of this Agreement shall commence as of 7:00 a.m. Eastern Time, on September 10, 1988.

2.2 The initial term of this Agreement shall run for a period of twenty (20) years. Upon expiration of such initial twenty (20) year term, this Agreement shall automatically and without requirement of any notice from one party to the other continue in effect for successive terms of one (1) year each, unless terminated by either party upon ninety (90) days' notice prior to the end of that term or in accordance with Section 8 of this Agreement.

2.3 If B&M ceases rail operations over the Line, it may terminate this Agreement immediately upon notice to CV.

2.4 Notwithstanding the foregoing, it is acknowledged that B&M has appealed the Order, and in the event the Former B&M Line is reconveyed to B&M in connection with or resulting from such appeal, this Agreement shall terminate upon such reconveyance, and it is agreed that thereafter the terms and conditions of the April 1, 1985 and January 1, 1930 Trackage Rights Agreements shall govern their operations over and use of the Line, and such agreements shall be deemed re-executed in their current forms, except that each shall be deemed to be amended to include a covenant that the owner shall maintain its line at not less than FRA Class II condition.

3. COMPENSATION

3.1 B&M shall have no obligation to pay for or contribute in any way towards the cost of the initial upgrading work on the Former B&M Line to FRA Class III

standards as specified by the Rehabilitation Agreement between CV and Amtrak dated March 18, 1988.

3.2 Except as provided in Section 1.7, CV shall be solely responsible for dispatching all operations over the Line and for the maintenance and repair of the Line, including the signals and the signal and dispatching system which controls operations on it. CV shall keep the Line, at all times throughout the term of this Agreement or any extensions thereof, in not less than FRA Class II condition.

3.3 In full satisfaction of any and all obligations of B&M to pay for the trackage rights provided herein or contribute towards the costs of dispatching, maintenance and repair of the Line (including the maintenance, repair and operation of the signals and the signal and dispatching system which controls operations on it), B&M shall pay to CV \$.21 per car mile (whether loaded or empty including locomotives, cabooses and work equipment) of traffic actually operated by B&M or its assignee over the Line. Notwithstanding the foregoing, after the expiration of three Years of Operations under this Agreement the payments made by B&M or its assignee, with respect to traffic on the Former B&M Line and not with respect to traffic on the CV Lines, shall not exceed seventy-five thousand dollars (\$75,000) per year (the "Cap"); provided, however, that the foregoing Cap shall not apply in a Year of Operations in which the annual gross traffic volume on the Former B&M Line attributable to B&M's overhead or local service, including

traffic for interchange to GMRC, CCR or ST, exceeds 125 percent of the 1985 annual traffic volume on the Former B&M Line ("Traffic Ceiling"). In any year that the amount of traffic attributable to B&M or its assignee on the Former B&M Line exceeds 125 percent of the 1985 annual traffic volume, B&M shall pay CV \$.21 per car mile for all cars transported over the Former B&M Line, whether loaded or empty, including locomotives, cabooses and work equipment. There shall be no cap at all for payments by B&M for traffic on the CV Lines. For the purposes of this Agreement a "Year of Operations" runs from October 1 through September 30 of the following calendar year.

3.4 All payments to be made by B&M and CV under this Agreement (including the Cap set forth in Section 3.3) shall be adjusted effective March 31, 1989, and semi-annually thereafter, for price level changes from July 1, 1988, (using Second Quarter 1988) based on the relationship of the most recent quarter's Association of American Railroads (AAR) Eastern District, Quarterly Indices of Chargeout Prices and Wage Rates (Table C) - "Material prices, wage rates and supplements combined (excluding fuel)" to comparable indices of the quarter six months previous. The first adjustment to be made shall be based on the comparison of the Fourth Quarter 1988 index value to the Second Quarter 1988.

3.5 B&M shall have responsibility for and shall report and pay directly to the owner of the cars, all

mileage, car hire and other charges accruing on the cars in B&M's trains on the Line.

3.6 CV shall issue its bill to B&M for the payments specified by Sections 1.4 and 3.3 by the fifteenth (15) day of each month for the traffic transported during the preceding calendar month, based on B&M's actual mileage for such preceding calendar month. B&M shall pay to CV the amount shown on such bill by the last day of the month in which such bill is issued. Payments not received by CV by such last day of the month in which the bill is issued will accrue interest at the rate of one and one-half (1.5%) percent per month for each month or portion of a month by which the payment is late.

3.7 Commencing with the fourth (4) Year of Operations under the Agreement, and during each succeeding Year of Operations, B&M shall not be required to pay mileage charges attributable to its operations over the Former B&M Line once payments made in the preceding months of that year in respect of those operations equal the Cap as adjusted in accordance with Section 3.4. Unless the Traffic Ceiling has been exceeded, the same procedure will be followed during each Year of Operations thereafter. If during any Year of Operations commencing on or after October 1, 1991, the traffic volume exceeds the Traffic Ceiling, B&M or its assignee shall pay the difference between the charges which would have been paid without the Cap and the charges actually paid, in three equal installments with the regular

monthly payments for November, December and January of the next Year of Operations . If this Agreement is terminated during or at the end of any Year of Operations in which the Traffic Ceiling is exceeded, B&M or its assignee shall pay any such charges on the effective date of termination of the Agreement.

3.8 CV estimates that the capital programs required to preserve the Line to the agreed standards (i.e., FRA Class II) will cost an average of \$4,343 per mile for rail, ties and surfacing beginning in the sixth Year of Operations under this Agreement. During any Year of Operations in which CV actually conducts such capital projects, B&M or its assignee shall pay a proportionate share of the expenditures actually made by CV for these capital projects based upon the percentage of the total car miles on the Line attributable to B&M's (or its assignee's) traffic during the preceding twelve (12) month period. CV shall provide B&M with the capital budget for work to be performed during the following work season on the Line by March 1 of the year in which the work will be performed.

3.9 In the event that CV is required to undertake any major capital projects which may become necessary due to changes in applicable local, state or federal statutes, ordinances or regulations, or by catastrophic occurrences on the Line, including but not limited to floods or destruction of bridges, B&M or its assignee shall pay its proportionate share of the expenditures actually made by CV for such

capital projects based upon the percentage of total car miles on the Line attributable to B&M's (or its assignee's) average traffic volume during the preceding five (5) year period. If CV proposes any such projects, and if B&M does not agree that the project is required to preserve the Line to FRA Class II standards, B&M must seek the determination to that effect from an arbitrator in accordance with Section 9.9 of this Agreement. Pending the ruling of the arbitrator, B&M shall pay to CV B&M's share of the amount expended by CV on the project. In the event the arbitrator determines that CV is not entitled to receive the amount paid by B&M, the amount owed to B&M shall be paid within thirty (30) days of the arbitrator's ruling with interest from the date of payment by B&M at a rate of one and one-half percent per month compounded monthly.

4. ADDITIONS AND ALTERATIONS

4.1 CV shall pay for and be responsible for the construction, maintenance, repair and renewal of any additional connections to the Line which it may require.

4.2 If B&M determines that changes in or additions and betterments to the Line, including changes in communication, dispatching or signal facilities as they existed immediately prior to the Conveyance Date, are required to accommodate B&M's operations beyond that required by CV to accommodate CV's and Amtrak's operations over the Line, then CV alone shall construct, and B&M shall pay CV for the construction of, such additional or altered

facilities. B&M shall also reimburse CV for the annual expense of maintaining, repairing, and renewing such additional or altered facilities. Notwithstanding the foregoing, CV shall have the right to approve of any such addition or alteration prior to its construction, which approval shall not be unreasonably withheld, and such addition or alteration shall be constructed in such a manner as to minimize interference with CV's or Amtrak's operations over the Line.

5. SCHEDULING OF TRAINS AND MAINTENANCE; OPERATING RULES

5.1 The trains, locomotives, cars and equipment of B&M, CV, Amtrak and any other present or future user of the Line or any portion thereof, shall be operated without prejudice or partiality to any party to this Agreement or any such other user and in such manner as will result in the most economical and efficient manner of movement of all traffic; provided, however, that CV shall give priority to intercity rail passenger trains of Amtrak to the extent required by Section 402 of the Rail Passenger Service Act. Notwithstanding the foregoing, B&M shall have the right, in consultation with CV, to establish the schedules of B&M's trains over the Line. Trains performing local work, whether B&M, CV or otherwise, are not entitled to priority over trains that are not performing such work. CV shall establish CV's train schedules with due regard to the trains to be operated by B&M. Each party shall use reasonable efforts to provide five (5) days' notice of changes in its

traffic and operating patterns and procedures which may affect the Line.

5.2. Any and all training that may be required to qualify B&M operating personnel as to CV's operating rules (after the initial training of such personnel, which will be provided by CV) shall be performed by B&M, and the determination as to whether such operating personnel are qualified under CV's operating rules shall be made in the discretion of B&M (giving consideration to any comments or recommendations of CV). CV shall train, and periodically recertify in accordance with CV's operating rules, B&M operating personnel who act as instructors for B&M personnel regarding CV's operating rules.

5.3 CV operating rules shall govern all operations over the Line, and CV shall report to B&M any incidents of violation of such rules by a B&M employee. CV may at its option exclude such employee from the Line.

5.4 In the event that any dispute arises as to the interpretation of any operating rules, the interpretations of the Uniform Code of Operating Rules, as amended, shall govern.

6. CLEARING OF DERAILMENTS AND WRECKS

6.1 In the event of any derailment or wreck of a B&M train, B&M shall clear the Line to allow for the passage of other trains within a reasonable time. B&M shall perform any rerailling, wrecking or wrecking train service as may be required in connection with such derailment or wreck, in

accordance with its customary practices. Except as provided in Section 7 of this Agreement, the cost, liability, and expense of the foregoing, including, without limitation, loss of, or damage to, or destruction of any property whatsoever and injury to or death of any person or persons whomsoever resulting therefrom, shall be the responsibility of B&M. In the event that B&M does not begin rerailling operations for passage of trains over the Line within twelve (12) hours of an occurrence or does not complete the process of clearing the Line within a reasonable time, CV may clear the Line for passage of trains, and B&M shall reimburse CV for all reasonable costs CV incurs in performing such service.

7. RELEASE AND INDEMNIFICATION

7.1 Save as herein otherwise provided, each party hereto shall be responsible for and shall assume all loss, damage or injury (including injury resulting in death) to persons or property, including the cost of removing any wreckage, repairing trackage and correcting environmental damage, which may be caused by its engines, cars, trains or other on-track equipment (including damage by fire originating therefrom) whether or not the condition or arrangement of the trackage contributes in any manner or to any extent to such loss, damage or injury, and whether or not a third party may have caused or contributed to such loss, damage or injury, and for all loss or damage to its engines, cars, trains or other on-track equipment while on

said trackage from any cause whatsoever, except in the case of collision, in which event the provisions of the following Paragraph 7.2 shall apply.

7.2 In the event of a collision between CV's and B&M's engines, cars, trains or other on-track equipment while on the Line, the apportionment of liability between the parties hereto for all loss, damage or injury (including injury resulting in death) to any person (including CV's or B&M's employees, agents or representatives) or property shall be governed by the following provisions:

7.2.1 If the employees of one party are solely at fault, that party shall be responsible for all such loss, damage or injury including the cost of removing wreckage, repairing trackage, and correcting environmental damage.

7.2.2 If the employees of both parties hereto are at fault, or if the cause of the accident is so concealed that it cannot be determined whose employees are at fault, each party shall bear and pay all such loss, damage or injury which its own engines, cars, trains or other on-track equipment and their contents or property in its custody, or its employees or others claiming for them may have suffered by reason or in consequence of the accident. Responsibility for all other such loss, damage or injury shall be apportioned equally between the parties hereto.

7.2.3 The words "all other such loss, damage or injury" referred to in this Section 7.2 shall be deemed to include but not be limited to the cost of removing wreckage,

repairing trackage, correcting environmental damage, and third party claims.

7.2.4 As between the parties hereto, the foregoing provisions of this Section 7.2 shall be applicable whether or not a third party may have caused or contributed to the accident.

7.2.5 The words "trackage" referred to in this Section 7 shall be deemed to include but not be limited to all tracks, structures or facilities pertaining to operation of the Line.

7.3 Without in any way restricting the terms of this Section 7, in the case of a collision or accident between the train of either party to this Agreement and the property of a third person or other entity, including any action done in the process of trying to avoid an accident or a collision, such party shall save harmless and indemnify the other party forthwith for all damages suffered by the other party including damages to equipment and structures or injuries (including death) to the employees or agents of the other party and including also the results of those actions done in the process of avoiding a collision or accident, and in any way resulting from such collision or accident, irrespective of negligence of either party or such third person or other entity, and with a right of subrogation in favor of such party against any such third person or other entity.

7.4 Each party hereto shall forever indemnify and save harmless the other party, from and against all claims, liability or judgments by reason or on account of any injury to or death of any person or of any loss or damage to property, the liability for which is herein assumed by such first mentioned party, and such first mentioned party agrees to pay and discharge any judgment that may be obtained by reason thereof, and all costs, charges, and expenses payable thereunder, including legal counsel fees.

7.5 The parties shall settle, as between themselves, any claim for loss or damage according to the terms of this Agreement, notwithstanding any judgment or decree of any court or other tribunal in a proceeding brought by other parties. In case a suit or proceeding shall be commenced by any person or corporation against either party hereto for or on account of any loss, damage or injury for which the other party hereto is liable under the provisions of this Agreement, the party so sued or proceeded against shall give to the other party reasonable notice, in writing, of the pendency of such suit or proceeding and thereupon the other party shall assume the defense of such suit or proceeding or shall save and hold the party so sued harmless from all loss and costs by reason thereof. Neither party hereto shall be bound by any judgment against the other party unless it shall have reasonable notice that it is so required to defend and has reasonable opportunity to make such defense. When such notice and opportunity has been given, the party

notified shall be bound by the judgment as to all matters that could have been litigated in such suit or proceeding.

7.6 In every case of death or injury suffered by an employee of either B&M or CV, when compensation to such employee or employee's dependents is required to be paid under any workmen's compensation, occupational disease, employer's liability or other law, and either of said parties, under the provisions of this Agreement, is required to pay such compensation, if such compensation is required to be paid in installments over a period of time, such party shall not be released from paying such future installments by reason of the expiration or other termination of this Agreement prior to any of the respective dates upon which any such future installments are to be paid.

8. DEFAULT; PAYMENT DELINQUENCY

8.1 In the event of a material breach by B&M of the terms and conditions of this Agreement which continues for a period of forty-five (45) days after notice thereof from CV, CV shall have the right to terminate this Agreement upon ninety (90) days notice.

8.2 In the event B&M becomes delinquent in payment of any amount by more than fourteen (14) days under the terms of Section 3.6, CV shall be entitled to receive advance payment from B&M for each B&M train seeking access to the Line until B&M satisfies such delinquency in full. In the event B&M fails to tender such advance payment, CV shall be further entitled to exclude and eject B&M from the Line

until B&M satisfies such delinquency in full. CV shall be entitled to such remedies for delinquencies in any amount billed to B&M, notwithstanding that B&M may have disputed such billed amount by invoking arbitration or otherwise. During the pendency of any such exclusion or ejection, CV shall nevertheless accept B&M cars for interchange at any point on the Line.

9. GENERAL PROVISIONS

9.1 No Waiver. Waiver of any provision of this Agreement, in whole or in part, in any one instance shall not constitute a waiver of any other provision in the same instance, nor any waiver of the same provision in another instance, but each provision shall continue in full force and effect with respect to any other then existing or subsequent breach.

9.2 Notice. Any notice required or permitted under this Agreement shall be given in writing to the parties at their respective addresses specified above, or at such other address for a party as that party may specify by notice as provided herein, by (i)(A) delivery in hand or by postage prepaid, United States first class mail and (B) registered or certified mail, return receipt requested, or (ii)(A) telefax and (B) registered or certified mail, return receipt requested, or (iii) Federal Express or other form of expedited mail that provides for delivery to the sender of a signed receipt, or (iv) telegram. Notice so sent shall be effective upon receipt.

9.3 Integration. Except for the Order and the documents executed in pursuance thereof, this Agreement constitutes the entire agreement of the parties with respect to its subject matter, superseding all prior oral and written communications, proposals, negotiations, representations, understandings, courses of dealing, agreements, contracts and the like between the parties in such respect. Except for any and all obligations incurred or causes of action accrued thereunder prior to or as of the Conveyance Date, and except as provided in Sections 2.4 and 9.3.1 hereof, the Trackage Rights Agreements by and between B&M and CV dated as of April 1, 1985 and January 1, 1930 are hereby terminated. Any provisions of any other agreements(s) between CV and B&M which are not inconsistent with the provisions of this Agreement shall remain in effect until cancelled according to the terms of such other agreement(s).

9.3.1 The provisions of Section 8, Freight Haulage, of the January 1, 1930 Trackage Rights Agreement between CV and B&M, as amended from time to time, shall remain in effect until cancelled by either party upon ninety (90) days prior written notice to the other.

9.4 Miscellaneous. This Agreement: (i) may be amended, modified, or terminated, and any right under this Agreement may be waived in whole or in part, only by a writing signed by both parties; (ii) contains headings only for convenience, which headings do not form part of and

shall not be used in construction of this Agreement; and (iii) is not intended to inure to the benefit of any party not a party to this Agreement.

9.5 Availability of Equitable Relief. The obligations imposed by this Agreement are unique. Breach of any of such obligations would injure the parties to this Agreement; such injury is likely to be difficult to measure; and monetary damages, even if ascertainable, are likely to be inadequate compensation for such injury. Therefore, subject to the mandatory arbitration provisions of section 9.9, protection of the respective interests provided herein shall include equitable relief, including specific performance and injunctive relief, in addition to any other remedy or remedies that the parties may have at law or under this Agreement.

9.6 Force Majeure. No party to this Agreement shall be responsible for delays or errors in its performance or other breach under this Agreement occurring by reason of circumstances beyond its control, including acts of civil or military authority, national emergencies, fire, major mechanical breakdown, labor disputes, flood or catastrophe, acts of God, insurrection, war, riots, delays in suppliers, derailments or failure of transportation, communication or power supply.

9.7 Trains, Locomotives, Cars or Equipment. As used in this Agreement, whenever reference is made to the trains, locomotives, cars or equipment of, or in the account of, one

of the parties hereto, such expression means the trains, locomotives, cars and equipment in the possession of or operated by one of the parties and includes such trains, locomotives, cars and equipment which are owned by, leased to, or in the account of such party. Whenever such trains, locomotives, cars or equipment are owned or leased by one party to this Agreement and are in the possession or account of, or under the control of the other party to this Agreement, such trains, locomotives, cars and equipment shall be considered those of the other party, except where the cars or equipment are being transported under the Haulage Agreement referred to in Section 9.3.1 of this Agreement.

9.8 Assignment. This Agreement shall bind and inure to the benefit of the parties and their respective legal representatives, successors and assigns. B&M shall have the right to assign any or all of B&M's rights and obligations under this Agreement to any affiliate of B&M, following consultation with CV. B&M shall have the right to assign any or all of B&M's rights and obligations under this Agreement to any other person with CV's prior consent, which shall not be withheld unreasonably. In the event of an assignment of all or a part of B&M's interests in this Agreement, the number of carloads attributable to the assignee's operations over the Line shall be included in the number of cars attributable to B&M's operations for the purposes of Section 3.3 of this Agreement.

9.9 Arbitration. Any difference whatsoever which may arise between the parties hereto under this Agreement, either as to its construction or as to its carrying out, according to the true intent and meaning hereof, shall, if it cannot be amicably adjusted by the parties hereto, be submitted to arbitration. As a consequence, once the dispute contemplated has arisen, the party desiring arbitration shall give notice thereof to the other party of its intention to refer to arbitration; such other party shall, within thirty (30) days from receipt of such notice, appoint an arbitrator on its behalf, and the party desiring arbitration shall appoint an arbitrator on its own behalf; the two arbitrators so appointed or selected shall select a third one within ten (10) days from the date of the appointment of the second arbitrator. Should the party notified to appoint an arbitrator fail to do so within thirty (30) days, or should the two arbitrators appointed fail to appoint a third one within ten (10) days from the date of the appointment of the second one, or should the parties fail to agree as to what the objects of the dispute are, the party desiring the arbitration will apply to a Judge of the United States District Court for the District of Columbia for the appointment of the arbitrator or arbitrators, as the case may be, and to state the object in dispute, if necessary. The award of the said three arbitrators, or a majority of them made after due notice to both parties of the time and place of hearing the party or

parties which may attend, shall be final and binding on both parties hereto, which hereby expressly agree to abide thereby.

9.9.1 In the case of death or refusal or inability to act as an arbitrator, or if for any cause the office of any arbitrator becomes vacant, his successor shall be appointed in the same manner as is provided for his appointment in the first instance, unless the parties otherwise agree. Each party shall pay half the costs of and incidental to any such arbitration.

9.9.2 CV and B&M hereby acknowledge and agree that this mandatory arbitration provision entails waiver by the parties of their right to appeal or challenge the substance of any decision or award of the arbitrator, any challenges being limited to those matters relating to arbitrator qualifications and partiality which are specifically allowed to be challenged under the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq.

9.10 Governing Law. This Agreement is imposed and entered into in, and shall be governed by the laws of, the District of Columbia.

BY THE COMMISSION:

Noreta R. McGee  
Secretary

1807G

# EXHIBIT 4

**TERMS AND CONDITIONS OF TRACKAGE RIGHTS  
IMPOSED BY THE INTERSTATE COMMERCE COMMISSION  
GOVERNING THE USE BY BOSTON AND MAINE CORPORATION  
OF CERTAIN LINES OF CENTRAL VERMONT RAILWAY, INC.**

IT IS ORDERED:

0. DEFINITIONS

As used herein, the following capitalized terms have the following meanings (any other capitalized terms being defined in context hereafter):

0.1 "Agreement" means the terms and conditions of trackage rights as a whole set forth herein, as though the instant terms and conditions had been agreed to contractually by B&M and CV.

0.2 "Amtrak" means the National Railroad Passenger Corporation.

0.3 "B&M" means Boston and Maine Corporation, a corporation with its principal office at Iron Horse Park, North Billerica, Massachusetts 01862.

0.4 "CCR" means Claremont and Concord Railway (including its successors and assigns).

0.5 "Conveyance Date" means September 9, 1988, the date on which B&M conveyed the Former B&M Line to Amtrak, and on which Amtrak conveyed the same to CV, pursuant to the Order.

0.6 "CV" means Central Vermont Railway, Inc., a corporation with its principal office at 2 Federal Street, St. Albans, Vermont 05478.

0.7 "CV Lines" means the approximately 13.4-mile rail line between White River Junction, Vermont and Windsor, Vermont, and the approximately 10.6-mile rail line between Brattleboro, Vermont and East Northfield, Massachusetts, both of which have belonged to CV since before the Conveyance Date.

0.8 "Former B&M Line" means the approximately 48.8-mile rail line between Windsor, Vermont and Brattleboro, Vermont, conveyed by B&M to Amtrak, and by Amtrak to CV, on the Conveyance Date pursuant to the Order.

0.9 "GMRC" means the Green Mountain Railroad Corporation (including its successors and assigns).

0.10 "ICC" means the U.S. Interstate Commerce Commission.

0.11 "Line" means the CV Lines and the Former B&M Line together.

0.12 "Order" means the decision of the ICC in National Railroad Passenger Corporation--Conveyance of Boston and Maine Corporation Interests in Connecticut River Line in Vermont and New Hampshire, dated August 4, 1988, served August 9, 1988 and published at pages 761 through 817 of volume 4 of the ICC Reports, Second Series.

0.13 "ST" means the Springfield Terminal Railway Company (including its successors and assigns).

1. GRANT OF TRACKAGE RIGHTS

1.1 Subject to the terms and conditions of this Agreement, B&M shall have the non-exclusive right to operate B&M's trains, locomotives, cars and equipment with B&M's own crews over the Line, as more particularly defined as follows:

All main line track and passing sidings between a point at the interlocking at East Northfield, Massachusetts (approximately B&M MP 49.67 and CV MP 110.51) to the Bank switch at the termination of B&M ownership at White River Junction, Vermont (approximately CV MP 13.40).

1.2 B&M shall have overhead running rights over the CV Lines.

1.3 B&M shall have the exclusive right to serve all existing shippers and shippers' facilities that were located on the Former B&M Line as of the Conveyance Date, including any and all new shippers that locate at such existing facilities after the Conveyance Date, provided the B&M makes available a minimum three day per week service along the Line.

1.4 Except as provided in Section 1.3, CV and B&M shall each have the right to compete for and serve shippers and shippers' facilities on the Former B&M Line, and CV shall, upon request by B&M, provide reciprocal switching to permit B&M to serve such shippers and shippers' facilities. B&M shall pay to CV a per switch charge equal to the actual cost

of providing such switching service, not to exceed 180% of the CV variable cost of providing such switching service.

1.5 CV and B&M shall each have the right to compete for and to interchange traffic at Bellows Falls, Vermont with GMRC. B&M shall have the exclusive right to interchange traffic at Claremont Junction, New Hampshire with the CCR and to interchange traffic at Charlestown, New Hampshire with the ST.

1.6 B&M shall have the right of entry over the Line for any and all B&M employees, agents or representatives, machinery, vehicles or equipment which B&M may deem necessary or convenient for the purposes of inspecting the Line, clearing any derailments or wrecks of B&M trains on the Line or otherwise conducting its operations over the Line.

1.7 B&M shall without charge to CV dispatch the interlocking CPR 50 located at East Northfield, Massachusetts until seven (7) days after CV notifies B&M that CV is prepared to assume such responsibility and all applicable regulatory requirements have been satisfied.

1.8 Except as provided herein, this Agreement does not diminish in any way CV's right to use the Line, or CV's right to lease or otherwise allow another carrier to use the Line.

## 2. TERM AND TERMINATION

2.1 The term of this Agreement shall commence as of 7:00 a.m. Eastern Time, on the Conveyance Date.

2.2 Except as provided in Section 2.3, and subject to the provisions of this section, the term of this Agreement shall be perpetual. After 20 years from the Conveyance Date, either party to this Agreement may seek modifications from the other and, if satisfactory modifications are not agreed to after a reasonable period for negotiation, may apply to the ICC for modifications. Nothing in this section shall authorize the ICC to impose arbitration requirements upon either party to this Agreement.

2.3 B&M may terminate this Agreement immediately upon notice to CV.

2.4 Notwithstanding the foregoing, the parties hereby acknowledge and agree that B&M has appealed the Order, and that in the event the Former B&M Line is reconveyed to B&M in connection with or resulting from such appeal, this Agreement shall terminate upon such reconveyance, and that thereafter the terms and conditions of the April 1, 1985 and January 1, 1930 Trackage rights Agreements shall govern their operations over and use of the line, and such agreements shall be deemed re-executed in their current forms.

### 3. COMPENSATION

3.1 CV hereby acknowledges and agrees that B&M shall have no obligation to pay for or contribute in any way towards the cost of such upgrading of the Former B&M Line.

3.2 Except as provided in Section 1.7, CV hereby acknowledges and agrees that CV shall be solely responsible for dispatching all operations over the Line and for the maintenance and repair of the Line, including the signals and the signal and dispatching system which controls operations on it. CV hereby further acknowledges and agrees that CV shall keep the Line, at all times throughout the term of this Agreement or any extensions thereof, in a state of reasonable repair and condition corresponding to the FRA Track Standard for the applicable authorized speeds, provided that CV may, but shall not be required to maintain the Line to a higher level than FRA Class III.

3.3 In full satisfaction of any and all obligations of B&M to pay for the trackage rights provided herein or contribute towards the costs of dispatching, maintenance and repair of the Line (including the maintenance, repair and operation of the signals and the signal and dispatching system which controls operations on it), B&M shall pay to CV \$.19 per car mile (whether loaded or empty) of traffic actually operated by B&M over the Line. Notwithstanding the foregoing, the sum of such payments in respect of the Former B&M Line shall not exceed one hundred forty-two thousand dollars (\$142,000) during the first three years this Agreement is in force and shall not exceed seventy-five thousand dollars (\$75,000) in any year thereafter; provided, however, that the foregoing limitation

shall not apply if the annual gross traffic volume on the Former B&M Line attributable to B&M's overhead or local service, including traffic for interchange to GMRC, CCR or ST, exceeds 32,500 carloads. In any year that the amount of traffic attributable to B&M on the Former B&M Line exceeds 32,500 carloads, B&M shall pay CV as additional compensation \$.19 per car mile for all cars in excess of 32,500 cars, whether loaded or empty.

3.4 All payments to be made by B&M and CV under this Agreement (other than the caps set forth in Section 3.3) shall be adjusted March 31, 1989, and semi-annually thereafter, for price level changes beginning July 1, 1988, (using Second Quarter 1988) based on the relationship of the most recent quarter's Association of American Railroads (AAR) Eastern District, Quarterly Indices of Chargeout Prices and Wage Rates (Table C) - "Material prices, wage rates and supplements combined (excluding fuel)" to comparable indices of the quarter six months previous. The first adjustment to be made shall be based on the comparison of the Fourth Quarter 1988 index value to the Second Quarter 1988.

3.5 B&M shall have responsibility for and shall report and pay directly to the owner of the cars, all mileage, car hire and other charges accruing on cars in B&M's trains on the line.

4. ADDITIONS AND ALTERATIONS

4.1 CV shall pay for and be responsible for the construction, maintenance, repair and renewal of any additional connections to the Line which it may require.

4.2 If B&M determines that changes in or additions and betterments to the Line, including changes in communication, dispatching or signal facilities as they existed immediately prior to the Conveyance Date, are required to accommodate B&M's operations beyond that required by CV to accommodate CV's and Amtrak's operations over the Line, B&M shall pay for the construction of such additional or altered facilities, including the annual expense of maintaining, repairing, and renewing such additional or altered facilities. Notwithstanding the foregoing, CV shall have the right to approve of any such addition or alteration prior to its construction, which approval shall not be unreasonably withheld, and such addition or alteration shall be constructed in such a manner as to minimize interference with CV's or Amtrak's operations over the Line.

5. SCHEDULING OF TRAINS AND MAINTENANCE; OPERATING RULES

5.1 The trains, locomotives, cars and equipment of B&M, CV, Amtrak and any other present or future user of the line or any portion thereof, shall be operated without prejudice or partiality to any party to this Agreement or any such other user and in such a manner as will result in the most economi-

cal and efficient manner and movement of all traffic; provided, however, that CV shall give priority to intercity rail passenger trains of Amtrak to the extent required by Section 402 of the Rail Passenger Service Act. Notwithstanding the foregoing, B&M shall have the right, in consultation with CV, to establish the schedules of B&M's trains over the Line. It is understood that trains performing local work, whether B&M, CV or otherwise, are not entitled to priority over trains that are not performing such work. CV shall establish CV's train schedules with due regard to the trains to be operated by B&M. Each party shall use reasonable efforts to provide thirty (30) days notice of changes in its traffic and operating patterns and procedures which may affect the Line. B&M acknowledges that the upgrading work will require a twelve (12) hour work block scheduled for between 7:00 AM and 7:00 PM. CV hereby agrees to coordinate with B&M and to use its best efforts in scheduling the work required for the upgrading of the Former B&M Line and any future maintenance or repair of the line to minimize any interference with or disruption of B&M's operations over the Line.

5.2 CV hereby acknowledges and agrees that any and all training that may be required to qualify B&M operating personnel as to CV's operating rules (after the initial training of such personnel, which will be provided by CV) shall be performed by B&M, and that the determination as to whether such

operating personnel are qualified under CV's operating rules shall be made in the discretion of B&M (giving consideration to any comments or recommendations of CV). CV shall train, and periodically recertify in accordance with CV's operating rules, B&M operating personnel who act as instructors for B&M personnel regarding CV's operating rules. CV hereby further agrees to provide, for a period not to exceed 14 days at CV's sole cost and expense, pilot crews as may be necessary, during the initial training of B&M operating personnel as to CV's operating rules to accommodate any and all B&M trains operating over the Line.

5.3 CV operating rules shall govern all operations over the Line, and CV shall report to B&M any incidents of violation of such rules by a B&M employee. CV may at its option, for good cause shown, exclude such employee from the Line.

5.4 In the event that any dispute arises as to the interpretation of any operating rules, the interpretations of the Standard Code, as amended, adopted by the Association of American Railroads shall govern.

6. CLEARING OF DERAILMENTS AND WRECKS

6.1 In the event of any derailment or wreck of a B&M train, B&M hereby agrees to clear the Line to allow for the passage of other trains within a reasonable time. B&M hereby further agrees to perform any rerailing, wrecking or wrecking train service as may be required in connection with such de-

railment or wreck, in accordance with its customary practices. Except as provided in Sections 7.1 and 7.2, the cost, liability, and expense of the foregoing, including, without limitation, loss of, damage to, or destruction of any property whatsoever and injury to or death of any person or persons whomsoever resulting therefrom, shall be the responsibility of B&M. In the event that B&M does not clear the Line for passage of trains within a reasonable time, CV may clear the Line for passage of trains, and B&M shall reimburse CV for all reasonable costs CV incurs in performing such service.

7. RELEASE AND INDEMNIFICATION

7.1 B&M hereby agrees to indemnify, defend, protect and hold CV and its officers, agents, representatives and employees harmless from and against any and all liability, cost or expense (including expenses described in Section 6.1, above) which relate to or arise out of any loss of, damage to, or destruction of any property whatsoever, or any injury to or death of any person or persons whomsoever, when such liability, cost or expense arises out of the operation of B&M trains on the Line, including local freight or any overhead service (including movement of traffic for interchange to GMRC, CCR or ST). Notwithstanding the foregoing, CV and B&M shall each share in the responsibility for any liability, cost or expense described in the preceding sentence which is caused in part by the fault, failure, negligence, misconduct, nonfeasance, or

misfeasance of CV or its officers, agents, representatives or employees, in proportion to the respective relative fault of each for the occurrence which gave rise to the liability, cost or expense.

7.2 CV hereby agrees to indemnify, defend, protect and hold B&M and their officers, agents, representatives and employees harmless from and against any and all liability, cost or expense (including expenses described in Section 6.1, above) which relate to or arise out of any loss of, damage to, or destruction of any property whatsoever, or any injury to or death of any person or persons whomsoever, when such liability, cost or expenses arises out of the operation of CV or Amtrak trains on the Line, including local freight service (including movement of traffic for interchange to GMRC), or any maintenance or repair of the Line. Notwithstanding the foregoing, B&M and CV shall each share in the responsibility for any liability, cost or expense described in the preceding sentence which is caused in part by the fault, failure, negligence, misconduct, nonfeasance or misfeasance of B&M or its officers, agents, representatives or employees, in proportion to the respective relative fault of each for the occurrence which gave rise to the liability, cost or expense.

7.3 In every case of death or injury suffered by an employee of either B&M or CV, when compensation to such employee or employee's dependents is required to be paid under any

workmen's compensation, occupational disease, employer's liability or other law, and either of said parties, under the provisions of this Agreement, is required to pay such compensation, if such compensation is required to be paid in installments over a period of time, such party shall not be released from paying such future installments by reason of the expiration or other termination of this Agreement prior to any of the respective dates upon which any such future installments are to be paid.

8. DEFAULT

8.1 In the event of a material breach by B&M of the terms and conditions of this Agreement which continues for a period of forty-five (45) days after notice thereof from CV, CV shall have the right to terminate this Agreement upon ninety (90) days notice.

9. GENERAL PROVISIONS

9.1 No Waiver. Waiver of any provision of this Agreement, in whole or in part, in any one instance shall not constitute a waiver of any other provision in the same instance, nor any waiver of the same provision in another instance, but each provision shall continue in full force and effect with respect to any other then existing or subsequent breach.

9.2 Notice. Any notice required or permitted under this Agreement shall be given in writing to the parties at their respective addresses specified above, or at such other address

for a party as that party may specify by notice as provided herein, by (i) (A) delivery in hand or by postage prepaid, United States first class mail and (B) registered or certified mail, return receipt requested, or (ii) Federal Express or other form of expedited mail that provides for delivery to the sender of a signed receipt, or (iii) telegram. Notice so sent shall be effective upon receipt.

9.3 Integration. Except for the Order and the documents executed in pursuance thereof, this Agreement constitutes the entire agreement of the parties with respect to its subject matter, superseding all prior oral and written communications, proposals, negotiations, representations, understandings, courses of dealing, agreements, contracts and the like between the parties in such respect. Except for any and all obligations incurred or cause of action accrued thereunder prior to or as of the Conveyance Date, and except as provided in Sections 2.2 and 2.4 hereof, the Trackage Rights Agreements by and between B&M and CV dated as of April 1, 1985 and January 1, 1930 are hereby terminated. Any provisions of any other agreement(s) between CV and B&M which are not inconsistent with the provisions of this Agreement shall remain in effect until cancelled according to the terms of such other agreement(s).

9.4 Miscellaneous. This Agreement: (i) may be executed in any number of counterparts, each of which when executed by

both parties to this Agreement shall be deemed to be an original, and all of which counterparts together shall constitute one and the same instrument; (ii) may be amended, modified, or terminated, and any right under this Agreement may be waived in whole or in part, only by a writing signed by both parties; (iii) contains headings only for convenience, which headings do not form part of and shall not be used in construction of this Agreement; and (iv) is not intended to inure to the benefit of any party not a party to this Agreement.

9.5 Availability of Equitable Relief. The obligations imposed by this Agreement are unique. Breach of any of such obligations would injure the parties to this Agreement; such injury is likely to be difficult to measure; and monetary damages, even if ascertainable, are likely to be inadequate compensation for such injury. The parties to this Agreement, therefore, acknowledge and agree that protection of the respective interests provided herein would require equitable relief, including specific performance and injunctive relief, in addition to any other remedy or remedies that the parties may have at law or under this Agreement.

9.6 Force Majeure. No party to this Agreement shall be responsible for delays or errors in its performance or other breach under this Agreement occurring by reason of circumstances beyond its control, including acts of civil or military authority, national emergencies, fire, major mechanical break-

down, labor disputes, flood or catastrophe, acts of God, insurrection, war, riots, delays of suppliers, or failure of transportation, communication or power supply.

9.7 Trains, Locomotives, Cars or Equipment. As used in this Agreement, whenever reference is made to the trains, locomotives, cars or equipment of, or in the account of, one of the parties hereto, such expression means the trains, locomotives, cars and equipment in the possession of or operated by one of the parties and includes such trains, locomotives, cars and equipment which are owned by, leased to, or in the account of such party. Whenever such trains, locomotives, cars or equipment are owned or leased by one party to this Agreement and are in the possession or account of, or under the control of the other party to this Agreement, such trains, locomotives, cars and equipment shall be considered those of the other party.

9.8 Assignment. This Agreement shall bind and inure to the benefit of the parties and their respective legal representatives, successors and assigns. CV hereby acknowledges and agrees that B&M shall have the right to assign any or all of B&M's rights and obligations under this Agreement to any affiliate of B&M, following consultation with CV. CV further acknowledges and agrees that B&M shall have the right to assign any or all of B&M's rights and obligations under this

Agreement to any other person with CV's prior consent, which shall not be withheld unreasonably.

BY THE COMMISSION:

Noreta R. McGee  
Secretary