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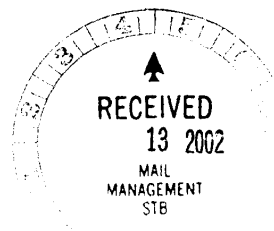
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December 13, 2002



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

ENTERED
Office of Proceedings
DEC 13 2002
Part of
Public Record

Re: Docket No. AB-279 (Sub-No. 3)
*Canadian National Railway Company – Adverse Discontinuance – Lines of Bangor and
Aroostook Railroad Company and Van Buren Bridge Company in Aroostook County,
Maine*

Docket No. AB-124 (Sub-No. 2)
*Waterloo Railway Company – Adverse Abandonment – Lines of Bangor and
Aroostook Railroad Company and Van Buren Bridge Company in Aroostook County,
Maine*

206852

Dear Sir:

I am enclosing an original and ten (10) copies of the Opposition of Fraser Papers Inc. to Trustee of Bangor and Aroostook Railroad Company's Motion to Compel or, in the Alternative, For Subpoena Duces Tecum in the above referenced dockets. Please note that a 3.5 inch diskette is also enclosed.

An additional copy of this document is enclosed which I would ask that you date-stamp and return to our messenger. If you should have any questions about this document, please don't hesitate to contact me.

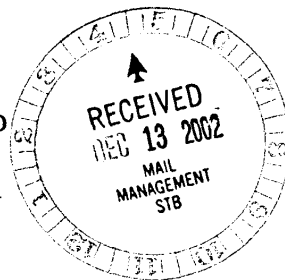
Sincerely,

Charles A. Spitulnik

Enclosure

cc: All parties on the Certificate of Service
Mr. Joseph H. Dettmar

BEFORE THE
SURFACE TRANSPORTATION BOARD



DOCKET NO. AB-279 (Sub-No. 3)

CANADIAN NATIONAL RAILWAY COMPANY
- ADVERSE DISCONTINUANCE -
LINES OF BANGOR AND AROOSTOOK RAILROAD COMPANY AND
VAN BUREN BRIDGE COMPANY
IN AROOSTOOK COUNTY, MAINE

DOCKET NO. AB-124 (Sub-No. 2)

WATERLOO RAILWAY COMPANY
- ADVERSE ABANDONMENT -
LINES OF BANGOR AND AROOSTOOK RAILROAD COMPANY AND
VAN BUREN BRIDGE COMPANY
IN AROOSTOOK COUNTY, MAINE

ENTERED
Office of Proceedings

DEC 13 2002

Part of
Public Record

**OPPOSITION OF FRASER PAPERS INC. TO
TRUSTEE OF BANGOR AND AROOSTOOK RAILROAD COMPANY'S MOTION TO
COMPEL OR, IN THE ALTERNATIVE, FOR SUBPOENA DUCES TECUM**

Pursuant to 49 C.F.R. § 1114.21(a) and 1121.4(b), Fraser Papers Inc. ("Fraser") by its undersigned attorneys hereby files this opposition to the Motion of the Trustee Of Bangor And Aroostook Railroad Company To Compel Or, In The Alternative, For Subpoena Duces Tecum to Fraser Papers Inc. ("Motion to Compel"). In support thereof Fraser states as follows:

I. Background Facts

In March of 2001, Bangor and Aroostook Railroad Company ("BAR") and its affiliate Van Buren Bridge Company granted the Canadian National Railway Company ("CN") trackage rights over approximately twenty-three (23) miles of rail line between Madawaska, Maine and

the Canadian border (the "Madawaska Line"), and provided CN subsidiary Waterloo Railway Company ("Waterloo") an overlapping freight easement.¹ Fraser owns and operates a paper mill in Madawaska ("Madawaska Mill") that is located on the Madawaska Line. The Madawaska Mill is the only facility CN has the right to serve pursuant to the trackage rights and the overlapping freight easement.

On August 15, 2001, an involuntary bankruptcy proceeding was commenced against BAR. On April 24, 2002, the Trustee for BAR filed a petition with the Surface Transportation Board ("Board") to reopen and revoke the notices of exemptions relating to the CN trackage rights and Waterloo freight easement on the Madawaska Line. On May 10, 2002, CN filed a reply urging the Board to deny the Trustee's petition without prejudice to the Trustee's filing a formal application for adverse abandonment and discontinuance authority. On May 16, 2002, Fraser filed a petition for leave to intervene and become a Party to the revocation proceeding. In a decision served June 25, 2002, the Board granted Fraser's motion to intervene and denied the Trustee's request to reopen and revoke the exemptions. The Board ruled that the Trustee would have to file a formal application for adverse discontinuance of the trackage rights and adverse abandonment of the easement in order to obtain the requested relief. STB Finance Docket No. 34014, *et al.*, *Canadian National Ry. Co. – Trackage Rights Exemption – Bangor and Aroostook R. Co. and Van Buren Bridge Co.*, (Served June 25, 2002).

On November 14, 2002, the Trustee filed and published its Notice of Intent for Discontinuance of Trackage Rights and Abandonment of Freight Easement ("Notice of Intent"). The Notice of Intent indicates that on or about December 23, 2002, the Trustee intends to file a

¹ F.D. No. 34014, *Canadian National Ry. Co. – Trackage Rights Exemption – Bangor And Aroostook R. Co. and Van Buren Bridge Co.* (Service Date March 21, 2001); F.D. No. 34015, *Waterloo Ry. Co. – Acquisition Exemption – Bangor And Aroostook R. Co., et al.* (Service Date March 21, 2001).

formal application for the adverse discontinuance of the CN trackage rights and the adverse abandonment of the Waterloo freight easement ("Application"). On or about November 14, 2002 the Trustee served document requests ("Document Requests") and interrogatories ("Interrogatories") on Fraser. Fraser has not responded to either the Document Requests or the Interrogatories. On or about December 6, 2002, the Trustee filed a Motion to Compel, or in the Alternative, for a Subpoena Duces Tecum. Although Fraser is not yet a party to this proceeding, it is filing this opposition for the limited purpose of challenging the propriety of the discovery served by the Trustee.

II. Argument: The Trustee's Motions to Compel and for a Subpoena Duces Tecum Should Be Denied

A. Discovery in this proceeding is unnecessary and inappropriate.

This Board, like the ICC before it, does not favor the use of discovery directed to shippers or any other participants in an abandonment proceeding. Where as here a shipper has not even filed a protest, and the railroad seeks discovery on issues not necessarily germane to the focus of the Board's inquiry, the logic of the longstanding practice of preventing harassment of shippers is even more compelling. The Trustee's Motions should be denied.

The Board has repeatedly held that "in an abandonment exemption proceeding, discovery is generally dilatory, typically not productive, and consequently disfavored." *Central Railroad Company Of Indiana--Abandonment Exemption--In Dearborn, Decatur, Franklin, Ripley, and Shelby Counties, IN*, STB Docket No. AB-459 (Sub-No. 2X) (Served February 26, 1998); *SWKR Operating Co.--Abandonment Exemption--In Cochise County, AZ*, STB Docket No. AB-441 (Sub-No. 2X) (Served Feb. 14, 1997). In fact in *Central Railroad Company Of Indiana--Abandonment Exemption--In Dearborn, Decatur, Franklin, Ripley, and Shelby Counties, IN*, STB Docket No. AB-459 (Sub-No. 2X) (Served April 1, 1998) the Board stated:

...discovery in an abandonment case is typically disfavored. This is due not only to the strict time constraints imposed by Congress, **but also because only rarely can discovery be justified in an abandonment proceeding.** The railroad does not need discovery against Protestants, because the carrier has the information it needs to make its case. The issue in an abandonment is whether the line is a burden on interstate commerce, *i.e.*, whether the revenues or benefits derived from the service on the line exceed the cost or other burdens of providing that service.

Id. (emphasis added) citing *Boston and Maine Corporation--Abandonment Exemption--In Hartford and New Haven Counties, CT*, STB Docket No. AB-32 (Sub-No. 75X) (Served Dec. 31, 1996); *Tulare Valley Railroad Company-- Abandonment and Discontinuance Exemption--In Tulare and Kern Counties, CA*, STB Docket No. AB-397 (Sub-No. 5X) (Served Mar. 16, 1998). Even in an adverse abandonment proceeding, the issue remains the same and the party seeking to require another to relinquish the right to operate or provide service in interstate commerce must make the same showing. See *Chelsea Property Owners--Aban.--The Consol. R. Corp.*, 8 I.C.C.2d 773, 778 (1992), *aff'd sub nom. Consolidated Rail Corp. v. I.C.C.*, 29 F.3d 706 (D.C. Cir. 1994). (In adverse abandonment cases, where a noncarrier applicant seeks abandonment of a line of railroad over the objection of the railroad, the noncarrier applicant has the burden of establishing that the public convenience and necessity require or permit the abandonment); *Cheatham County Rail Authority "Application and Petition" for Adverse Abandonment*, ICC Docket No. AB-379X (Served Nov. 4, 1992). (The burden of proof in an adverse abandonment is on the moving party).

The policy disfavoring discovery is especially strong where the discovery is directed towards shippers. The Board's reasoning in *Chicago and North Western Trans. Co. -- Abandonment -- Between Palmer and Laurens in Pocahontas County, IA*, ICC Docket No. AB-1 (Sub-No. 212) (decided May 15, 1991) ("CNW Abandonment") confirms that the Trustee's

attempts to impose the burdens of responding to discovery on Fraser in this matter must be quashed.

In the *CNW Abandonment*, the railroad applicant served interrogatories on a Protestant MAPCO Gas Products, a shipper on the affected line, requesting information pertaining to the Protestant's operations, track, use of rail and motor carrier transportation, and gross sales of various categories of commodities. *Id.* Protestant did not file a response or objection to the interrogatories. *Id.* Thereafter, the railroad sent a letter to Protestant requesting answers and setting a new due date. *Id.* Protestant did not respond to the railroad's letter, and the railroad filed a motion requesting an order compelling answers to interrogatories from the Protestant. *Id.*

The motion to compel stated that the railroad wished to utilize the information sought in the discovery in its rebuttal filing. *Id.* The ICC, in denying the railroad's motion to compel stated:

...that while the extent of MAPCO's dependence upon rail transportation and the availability of alternative modes of transportation are relevant factors the Commission considers in an abandonment application, CNW's need to know this specific information has not been demonstrated. CNW knows what transportation alternatives exist at Protestant's facility...CNW does not need to know the extent to which MAPCO has used alternative transportation during the time CNW was providing service in order to argue that these alternatives are available to MAPCO if CNW abandons the line. To the extent MAPCO may introduce evidence of rail-dependent traffic in its verified statement, CNW has both the opportunity to reply and the resources to make a knowledgeable and informed reply.

The ICC also stated:

The Commission encourages the participation of shippers affected by a proposed abandonment in the abandonment process. The use of interrogatories requiring voluminous data is contrary to the Commission's goal that this process be accessible and as straight forward as possible. This type of discovery against Protestants, if granted would needlessly discourage companies from participating in abandonment proceedings.

Id. See also *Missouri Pacific Railroad Company -- Abandonment -- Between Opelousas and Church Point In St. Landry Parish and Acadia Parish, LA*, ICC Docket No. AB-3 (Sub-No. 81), (served March 28, 1989).

In the instant action, like in the *CNW Abandonment*, the Trustee seeks discovery from Fraser to establish that "the discontinuance of the trackage rights and abandonment of the easement will not adversely affect Fraser...because of the array of competitive transportation options available to Fraser at the Madawaska Mill." See *Motion to Compel* at p. 5. In other words, the Trustee is inviting this Board to substitute its judgment for that of Fraser's management as to what competitive transportation alternatives present the best mix for Fraser. The Board's cases demonstrate its reluctance to accept that invitation, and there is no reason to depart from that practice in this case.

Specifically, the Trustee seeks two categories of information:

1. The transportation options available to Fraser at its Madawaska Mill; and
2. Fraser's communications relating to the Bangor and Aroostook Railroad Company financial condition, the sale of the Bangor and Aroostook Railroad Company System and the negotiation and execution of the March 2001 transaction between Canadian National Railway Company and Bangor and Aroostook Railroad Company because such information will "likely reveal Fraser's own evaluation of its transportation options" in this instance.

See *Motion to Compel* at p. 6. The Trustee's discovery requests seek information relating to Fraser's dependence upon rail transportation and other transportation options, which are subjects that this Board has specifically stated in *CNW Abandonment* are not proper subjects for discovery. According to *CNW Abandonment*, while Fraser's dependence upon rail transportation and the availability of alternative modes of transportation are relevant factors in the abandonment proceeding, the Trustee does not need to know the extent to which Fraser has used

alternative transportation during the time BAR was providing service on the line in order to argue that the alternatives are available if CN is no longer able to serve the plant directly. If Fraser introduces evidence in a protest, the Trustee has both the opportunity to reply and the resources to make a knowledgeable and informed reply.

The Board's decision in *Illinois Central R. Co.--Abandonment--In Jackson, Hinds County, MS*, STB Docket No. AB-43 (Sub-No. 162) (served September 1, 1995) ("*Illinois Abandonment*") further supports Fraser's refusal to respond. In *Illinois Abandonment* the railroad served discovery on certain shippers and ultimately filed a motion to compel answers to interrogatories from them. *Id.* The interrogatories sought information about the shippers' rail and truck shipments and the availability of transportation alternatives. *Id.* In denying the railroad's motion to compel the ICC stated:

The Commission looks with disfavor upon an applicant's serving interrogatories on a shipper in an attempt to develop its case or discourage participation. Such action is contrary to the Commission's goal of making the abandonment process accessible and straightforward.

*Id.*² Specifically the Board noted that the railroad, as the applicant:

.... bears the burden of proving that the present or future public convenience and necessity require or permit the abandonment. The applicant should have in its possession all the information it needs to meet that burden...To the extent that transportation alternatives available to shippers are placed in issue by the applicant, shippers will have the opportunity to offer their own evidence or information to refute IC's assertions. Rather than requiring shippers to make available specific requested information, it can be left to shippers to present whatever information they believe they need to support their assertions. Applicant then may refute or rebut such assertions and information in its reply statement.

Id.

² See also *Chicago and North Western Transportation Company--Abandonment--Between Palmer and Laurens in Pocahton County, IA*, ICC Docket No. AB-1 (Sub-No. 212) (Served May 16, 1991), *reconsideration denied*, Footnote continued on next page

Similarly, the Trustee bears the burden of proving that the present or future public convenience and necessity require or permit the abandonment. As the individual managing and in control of BAR's operations, the Trustee should have in his possession all the information needed to meet that burden. This information is available to the Trustee, notwithstanding the fact that this is an adverse abandonment proceeding, because BAR operated this line and served this shipper and the line at issue for many years. Based on that service and experience BAR and its Trustee possess detailed knowledge of transportation that originates from or terminates on the line and at the Madawaska Mill, including transportation options and/or alternative available to shippers. Moreover, to the extent that the Trustee places transportation alternatives available to Fraser in issue, Fraser will have the opportunity to offer its own evidence or information to refute the Trustee's assertions. The Trustee bears the burden here, not Fraser, and the Trustee's attempts to shift that burden are contrary to the Board's practice. The Motion should be denied.

B. The Trustee has failed to meet the Board's requirements for contested discovery in abandonment cases

Congress has directed the Board to expedite its decision making process in general, and its decisions in abandonment cases in particular. *SWKR Operating Co.--Abandonment Exemption--In Cochise County, AZ*, STB Docket No. AB-441 (Sub-No. 2X), slip op. at 2 (Served Feb. 14, 1997). Discovery, which can hold up the Board's processes, may be necessary in some cases, even in those, such as rate cases, that involve statutory decisional deadlines. *Id.* In abandonment cases, however, discovery is not typically productive, and as a result is not typically pursued. *Id.* Contested discovery may be granted under appropriate circumstances in particular abandonment proceedings, but only when the party seeking discovery shows that the

August 2, 1991; *Missouri Pacific Railroad Company--Abandonment--In Woodson County, KS*, ICC Docket No. AB-3 (Sub-No. 112) (Served Feb. 16, 1994).

information sought is relevant and might affect the result of the case, and that it ought to be obtained through discovery rather than some other means. *Id. See also The Kansas City Southern Railway Company--Adverse Discontinuance Application--A Line Of Arkansas And Missouri Railroad Company*, STB Docket No. AB-103 (Sub-No. 14) (Served January 19, 1999).

Here, the Trustee has failed to demonstrate that the information he is seeking, particularly the detailed nature and scope of the information, is relevant and might affect the result of the case.³ For example, some of the information the Trustee seeks in the Document Requests includes:

1. Any and all Communications between CN and Fraser relating to the Effective Rates applicable to transportation that originates from or terminates at the Madawaska Mill, including without limitation any such transportation provided by or on behalf of CN (as origin, destination and/or intermediate carrier) with respect to rail traffic destined to or originating from the Madawaska Mill but excluding waybills and bills of lading.
....
3. Any and all Communications between and among any employees, directors, officers, representatives, or other agents of Fraser (including without limitation any analyses, studies, reports or other documents prepared by such persons) relating to the Effective Rates applicable to transportation that originates from or terminates at the Madawaska Mill, including without limitation any such transportation provided by or on behalf of CN (as origin, destination and/or intermediate carrier) with respect to rail traffic destined to or originating from the Madawaska Mill but excluding waybills and bills of lading.
4. Any and all Communications between Fraser and any person or entity other than CN relating to the Effective Rates applicable to transportation that originates from or terminates at the Madawaska Mill, including without limitation any such transportation provided by or on behalf of CN (as origin, destination and/or intermediate carrier) with respect to rail traffic destined to or originating from the Madawaska Mill but excluding waybills and bills of lading.

³ Fraser is simply citing a few examples of the Trustee's overly broad requests and does not waive its right to object to any or all of the other requests to the extent it becomes necessary in the future. One of several bases for these objections will be that the Trustee has already secured waiver of the requirement to provide information requested in Document Requests Numbered 1, 2, 4, 5, 7 and 8 and Interrogatories 2, 4 and 7.

5. Any and all Communications between and among any employees, directors, officers, representatives, or other agents of Fraser (including without limitation any analyses, studies, reports or other documents prepared by such persons) relating to the March 2001 Transaction, the proposed abandonment of the Waterloo freight easement and proposed discontinuance of the CN trackage rights on the railroad line between Madawaska and Van Buren, the proposed acquisition of substantially all of the BAR System by MM&A, the viability of the BAR or the BAR System, and the consequences of financial distress, bankruptcy, dissolution or other events that might affect service provided by BAR to, from or at the Madawaska Mill.

....

10. Any and all Communications between and among any employees, directors, officers, representatives or other agents of Fraser (including without limitation any analyses, studies, reports or other documents prepared by such persons), or between Fraser and any person or entity, relating to the cost and feasibility of constructing, expanding or rehabilitating loading docks and other improvements and facilities used in connection with truck transportation to, from or at the Madawaska Mill

The information the Trustee seeks in the Interrogatories includes:

1. Describe each type of Inbound Material that is not or has not been transported to the Madawaska Mill exclusively by rail. Your description should include, without limitation, the STCC codes applicable to such Inbound Material.
2. Describe the Effective Rates applicable to the transportation to the Madawaska Mill of each type of Inbound Material (including without limitation those Inbound Materials that are transported exclusively by rail but excluding (i) any transportation of Inbound Material exclusively over BAR or the BAR System, (ii) any transportation of Inbound Material exclusively over CN, and (iii) any transportation of Inbound Material exclusively over BAR and CN or the BAR System and CN) during each of calendar years 1999, 2000, and 2001, and during the period from January 1, 2002 through the present. If the Effective Rates changed during any applicable period, describe the changes and when they occurred. Your response should include without limitation the following information for each time period:
 - (i) the Effective Rates applicable to each type of Inbound Material by origin(s), mode(s), carrier(s), routing(s) and volume transported (in tons, carloads, truckloads or other relevant measure);
 - (ii) the different components of such Effective Rates, including without limitation the standard rate or charge applicable to each shipment of Inbound Material, the nature and amount or percentage of any volume or other credits, discounts, rebates or reclaims, and any other adjustments that affected such Effective Rates; and

- (iii) the nature and amount or percentage of any division of such Effective Rates among or between different carriers if more than one carrier was involved in the transportation to the Madawaska Mill of such Inbound Material.

....

- 4. Describe the Effective Rates applicable to the transportation from the Madawaska Mill of each type of Outbound Product (including Without limitation those Outbound Products that are transported exclusively by rail but excluding (i) any transportation of Outbound Product exclusively over BAR or the BAR System, (ii) any transportation of Outbound Product exclusively over CN, and (iii) any transportation of Outbound Product exclusively over BAR and CN or the BAR System and CN) during each of calendar years 1999, 2000, and 2001, and during the period from January 1, 2002 through the present. If the Effective Rates changed during any applicable period, describe the changes and when they occurred. Your response should include without limitation the following information for this period:
 - (i) the Effective Rates applicable to each type of Outbound Product by destination, mode(s), carrier(s), routing(s) and volume transported (in tons, carloads, truckloads or other relevant measure);
 - (ii) the different components of such Effective Rates, including without limitation the standard rate or charge applicable to each shipment of Outbound Product, the nature and amount or percentage of any volume or other credits, discounts, rebates or reclaims, and any other adjustments that affected such Effective Rates; and
 - (iii) the nature and amount or percentage of any division of such Effective Rates among or between different carriers if more than one carrier was involved in the transportation from the Madawaska Mill of such Outbound Product.
- 5. For each type of Inbound Material transported to the Madawaska Mill and for each type of Outbound Product transported from the Madawaska Mill (but excluding (i) any such transportation exclusively over BAR or the BAR System, (ii) any such transportation exclusively over CN, and (iii) any such transportation exclusively over BAR and CN or the BAR System and CN), describe: (1) the average transit times applicable to such transportation (by applicable origin, mode, routing and destination); and (2) the person or entity that supplies the railcars, trucks or other equipment used in such transportation, the person or entity that is responsible for car hire, rental or other charges relating to the use of such equipment and the nature and amount or percentage of such car hire, rental or other charges (by applicable origin, mode, routing and destination) unless and to the extent such equipment is supplied by CN, BAR or the BAR System (in which case no response as to such equipment arrangements is required). If the average transit times or equipment arrangements changed during any applicable period, describe the changes and when they occurred.

These request are objectionable for several reasons. They are not limited in time. They are overly broad. To a large extent they are irrelevant. Clearly, they are not sharply focused. While the Motion includes allegations that the requested information is necessary to establish Fraser's dependence upon rail transportation and other transportation options, the Board's decisions make clear that this is not a valid objective for discovery. The Trustee has not met its burden to justify why this information is necessary to present its case for abandonment. *Central R. Co. Of Indiana--Abandonment Exemption--In Dearborn, Decatur, Franklin, Ripley, and Shelby Counties, IN*, STB Docket No. AB-459 (Sub-No. 2X) (Served April 1, 1998) (Given the nature of abandonment cases and the need to decide them promptly the Board requires that discovery requests be sharply focused and clearly justified.)

Furthermore, the Trustee has failed to demonstrate that the information it seeks in discovery ought to be obtained through discovery rather than some other means. The Trustee simply makes the general assertion that he does not have rate or service information on other transportation options available to Fraser with respect to Madawaska Mill and that "Fraser has possession and control over all this information." *Motion to Compel* at p. 10. As noted previously, the Board's cases confirm that the shipper is typically not in sole possession of these data – the serving railroads typically have access to this information as well. Without more than a general unsupported statement to the contrary, the Board cannot assume that the Trustee, who has access to all of the books and records of the railroads, cannot find this information elsewhere.

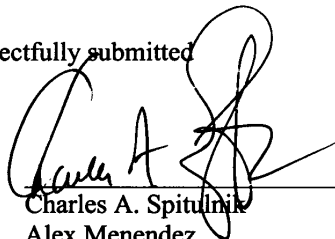
III. Conclusion

The long-standing practice of this Board, like the ICC before it, has been to protect the parties in abandonment proceedings from discovery. The Trustee has provided no valid reason

for this Board to depart from that precedent. For the foregoing reason Trustee's Motion to Compel or, in the Alternative, for a Subpoena Duces Tecum, should be denied.

Respectfully submitted

By:



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Attorneys for Fraser Papers Inc.

Dated. December 13, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of December 2002, a copy of the foregoing Opposition of Fraser Papers Inc. to Trustee Of Bangor And Aroostook Railroad Company's Motion To Compel Or, In The Alternative, For Subpoena Duces Tecum was served by hand delivery (for the persons in Washington, D.C.) or Federal Express (for those persons outside of Washington, D.C.) upon:

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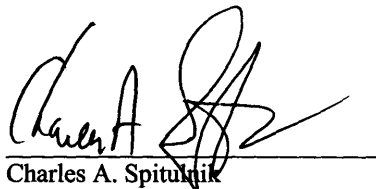
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