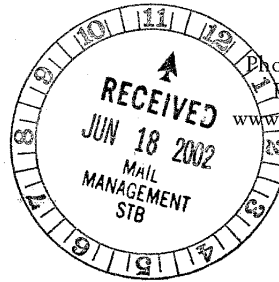


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June 17, 2002



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VIA FEDERAL EXPRESS

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 700
Washington, DC 20006

Re: **Finance Docket No. 34014**
Canadian National Railway Company -- Trackage Rights
Exemption -- Bangor and Aroostook Railroad Company
and Van Buren Bridge Company

205648

Finance Docket No. 34015
Waterloo Railway Company -- Acquisition Exemption -- Bangor and
Aroostook Railroad Company and Van Buren Bridge Company

205652

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceedings are an original and ten copies of the **Reply of Canadian National Railway Company and Waterloo Railway Company to Motion to Intervene and Comments of Montreal, Maine & Atlantic Railway and Reply of Bank Austria**, dated June 17, 2002.

One extra copy of the Reply and this letter also are enclosed. Please date-stamp those items to show receipt of this filing and return them to me in the provided envelope.

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

Respectfully submitted,

ENTERED
Office of the Secretary

JUN 18 2002

Part of
Public Record

William C. Sippel
Attorney for Canadian National Railway Company
and Waterloo Railway Company

WCS:tjl

Enclosures

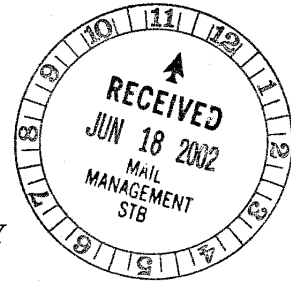
cc: Parties on Certificate of Service

ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34014

CANADIAN NATIONAL RAILWAY COMPANY
-- TRACKAGE RIGHTS EXEMPTION --
BANGOR AND AROOSTOOK RAILROAD COMPANY
AND VAN BUREN BRIDGE COMPANY



FINANCE DOCKET NO. 34015

WATERLOO RAILWAY COMPANY
-- ACQUISITION EXEMPTION --
BANGOR AND AROOSTOOK RAILROAD COMPANY
AND VAN BUREN BRIDGE COMPANY

**REPLY OF CANADIAN NATIONAL RAILWAY COMPANY AND WATERLOO
RAILWAY COMPANY TO MOTION TO INTERVENE AND COMMENTS OF
MONTREAL, MAINE & ATLANTIC RAILWAY AND REPLY OF BANK AUSTRIA**

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Office of the Secretary

JUN 18 2002

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**ATTORNEYS FOR CANADIAN NATIONAL
RAILWAY COMPANY AND WATERLOO
RAILWAY COMPANY**

Dated: June 17, 2002

BEFORE THE
SURFACE TRANSPORTATION BOARD

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MONTREAL, MAINE & ATLANTIC RAILWAY AND REPLY OF BANK AUSTRIA**

Canadian National Railway Company ("CNR") and Waterloo Railway Company ("Waterloo" and, collectively with CNR, where appropriate, "CN") hereby file this reply to the motion to intervene and comments of Montreal, Maine & Atlantic Railway LLC ("MM&A"). This filing also briefly addresses the "reply" filed on June 11, 2002 by Bank Austria Creditanstalt Corporate Finance, Inc. and Bank Austria Creditanstalt SBIC, Inc. ("Bank Austria"). While their pleadings and legal theories multiply, the Bangor and Aroostook Railroad Company, James E. Howard, Trustee ("Trustee" or "BAR") and those aligned with it continue to seek the same goal: to avoid STB consideration of the public interest -- and thus any consideration of the public interest by anyone -- in the forced removal of the competitive access that Fraser Papers Inc. in Madawaska, Maine currently has to rail service from both BAR and CN. None of the various short-cuts advocated by these parties satisfies the Board's statutory duties to protect existing rail-to-rail competition and adequate rail transportation for the shipping public.

A. Montreal, Maine & Atlantic

As CN previously advised the Board, CN May 31, 2002 Supplement at 4-6, MM&A has signed an asset purchase agreement to acquire the rail lines of BAR and its various affiliates. CN cannot object to MM&A's general intervention as an interested party in this proceeding. Yet rather than attempting to support BAR's pending petition to reopen and revoke CN's exemptions herein, MM&A seeks its own, separate form of relief -- essentially a declaratory order that no Board review or action of any kind is necessary for the BAR bankruptcy court to forcibly terminate the STB-approved trackage rights which CNR holds on BAR's rail line between Van Buren and Madawaska, Maine (the "Madawaska Line").¹ MM&A's proposed new "silver bullet" is the latest attempt to quickly remove CN as a competitive presence on the Madawaska Line without the adverse discontinuance proceeding and public interest review plainly required by the STB's legal responsibilities.

While unrelated to its legal argument, MM&A discusses as "Background" the perceived burden it faces in competing with CN at Madawaska, and hints broadly of dire consequences if, because the CNR trackage rights were allowed to remain in place, "the BAR system were unable to prosper after bankruptcy" MM&A Comments at 3-4. Yet MM&A's filing is unverified, and MM&A offers no evidence of any kind to demonstrate or suggest that CNR's trackage rights somehow render the BAR rail system unviable. Indeed, MM&A knew about CNR's trackage rights all along and -- as it specifically acknowledges, MM&A Comments at 3, n.3 -- negotiated to pay a reduced purchase price to the Trustee if CN's rights remain in

¹ MM&A's arguments and new request for relief thus significantly broaden the issues raised in this proceeding -- one of the standard criteria used to determine whether intervention is appropriate. See 49 C.F.R. § 1112.4(a)(2).

place.² MM&A uses vague language to imply that it will still be in a worse position if CN is not ousted from the line,³ but there is no logical reason why this would be -- as experienced and astute railroad entrepreneurs, MM&A's owners made what they obviously considered a viable, sustainable offer for BAR's rail lines, appropriately discounted to reflect factors such as CNR's trackage rights. MM&A cannot now question its own business judgment in an effort to scare the Board into ignoring its statutory duty to protect competition.

MM&A also complains that "CN will be able to operate over the trackage rights lines at bargain rates," MM&A Comments at 3, but this is also wrong. The trackage rights fees (like the remainder of the BAR-CNR/Waterloo arrangements) were negotiated extensively between the parties, CN Reply, Carson V.S. at 2-5, and are not "bargain rates." Moreover, as the Board well knows, if CNR's trackage rights remain in place and the bankruptcy court rejects the trackage rights agreement,⁴ the Board would set compensation for the trackage rights if the parties could not agree on new terms. E.g., Thompson v. Texas Mexican Ry. Co., 328 U.S. 134,

² MM&A does not indicate what that purchase price reduction is, but the Trustee has previously identified it as \$5 million -- not coincidentally the price that CN paid in connection with its receipt of the trackage and other rights in March, 2001. CN Supplement at 5. MM&A is thus wrong to say that "it will not benefit from the \$5 million payment" because "[t]he money is gone." MM&A Comments at 3. With the commensurate reduction in the purchase price, MM&A is in no different economic position then if BAR still had the \$5 million as an asset and MM&A was paying a "full" purchase price for BAR's assets.

³ MM&A Comments at 3, n.3 ("[T]he lower purchase price does not *guarantee* that MMA will be able to maintain the BAR system intact or *grow its business* to the same extent as would be *possible* if the trackage rights are rejected.") (emphasis added).

⁴ The bankruptcy court has properly understood the Trustee's current motion to reject as seeking the ouster of CN from the Madawaska Line rather than just a termination of the existing contract. May 15, 2002 Hearing Transcript (CN Supplement, Exhibit B) at 10-12. CN does not dispute that, as long as CN's trackage rights themselves remain in place, the bankruptcy court could authorize rejection of the trackage rights agreement without Board authority or action. Since the Trustee presumably would be unwilling to negotiate a new agreement, it would then fall to the Board to set terms and conditions to govern CNR's trackage rights.

146-168 (1946). Those terms would compensate MM&A for all direct and indirect expenses incurred as a result of CNR's trackage rights and provide a reasonable rate of return on the value of MM&A's assets. MM&A would face no risk of being "short-changed" in the trackage rights fees it receives.

The absence of any direct economic harm to MM&A highlights its real motive here: to avoid having to compete with CN for Fraser's traffic at Madawaska. It may very well be that MM&A's franchise would be worth more if it could eliminate CN as a direct competitor at Madawaska. By that measure, it would no doubt help MM&A "prosper" if it could eliminate *all* of the competition it faces from other transportation modes in Maine. That hardly makes such efforts a legitimate enterprise for this Board. If MM&A really wants to argue that fair competition with CN at Madawaska is a situation that MM&A cannot handle, it should be required to do so in an adverse discontinuance proceeding with appropriate evidence and support. Without such exercise of this agency's regulatory authority, there will never be any public interest analysis of the anti-competitive relief which BAR and its supporters seek.

Like the Trustee before it, MM&A's *legal* argument is predicated on the notion that CN has not consummated its trackage rights on the Madawaska Line.⁵ MM&A insists that trackage rights cannot be consummated unless a train has operated -- declining to address or even acknowledge agency precedent holding precisely the opposite. Compare MM&A Comments at 4-5 and CN May 9, 2002 Reply at 12-13 (citing Brotherhood of Locomotive Engineers v. C&NW Transp. Co., 366 I.C.C. 857 (1983)). MM&A does cite to Wisconsin & Southern Railroad Company -- Lease and Operation Exemption -- Soo Line Railroad Company,

⁵ MM&A seems at pains to avoid the word "consummation," but does finally indicate in a footnote its view that "consummation requires operation in this context." MM&A Comments at 5, n.4.

Finance Docket No. 32706 (ICC served August 2, 1995) ("WSOR"), claiming it establishes that discontinuance authority is not needed for CNR's trackage rights in this case.

Yet WSOR simply reaffirms the accepted notion that STB authority or exemption is permissive. In that case, the owner of the rail line in question disputed that it had entered into any contract or otherwise agreed to the lease proposed by the petitioner. The STB confirmed that its exemption, standing alone, did not force the owner to grant access to the petitioner or otherwise create any contractual rights. WSOR at 3. The exemption was permissive, and could be consummated only if the petitioner had the legal right to do so. Here, of course, it is undisputed that CNR and BAR entered into a binding, written trackage rights agreement, effective as of March 15, 2001, and that CNR obtained trackage rights on the Madawaska Line pursuant to that consensual agreement and the permissive exemption obtained by CNR from the Board. WSOR has no guidance to offer on such a situation.

Ultimately, MM&A's position is that, had CNR run a single locomotive and single car to Madawaska on a single day in March of 2001, CNR's trackage rights on the Madawaska Line would now be unassailable.⁶ Such a form over substance approach to important questions of competitive access is unworthy of the Board's statutory duties, unwise precedent for future cases, and unwarranted in light of the clear intention of the parties to consummate the trackage rights as of March 15, 2001. See CN Reply at 13-15. MM&A specifically admits that "[i]f CN cannot use the trackage rights, Fraser will lose the two-carrier service it obtained [] when CN struck its deal with BAR." MM&A and its allies would like to achieve that result with no consideration of the public interest by the Board. The Board should decline that invitation.

⁶ As the record reveals, CNR has tried to initiate trackage rights operations, but BAR has refused to allow CNR onto the line. CN Reply, Carson V.S. at 6-7 and Attachments D-F.

B. Bank Austria

Bank Austria insists that its most recent reply is necessary to address arguments regarding Bank Austria in the CN Supplement. Yet if one reads the five paragraphs of the CN Supplement dealing with Bank Austria, CN Supplement at 6-8, and then the twelve pages of Bank Austria's response, it is hard to see any relationship between the two. Bank Austria spends a number of pages, for example, arguing that CNR had not consummated its trackage rights -- even though Bank Austria addressed that issue in its initial reply and CN did not further discuss the subject in its Supplement. The Bank Austria filing serves mostly to reargue points previously made, and to adopt the "new" legal theory recently put forward by MM&A. Once again, the result is an ever-changing myriad of arguments, all intended to avoid in any manner possible an STB public interest analysis of the important competitive issues at stake here.

Only one, completely erroneous assertion by Bank Austria warrants a response here. Bank Austria has somehow obtained the notion that, in granting trackage rights to CNR to serve Fraser at Madawaska, BAR somehow removed itself from being able to serve that plant. Bank Austria Reply at 11-12 (CN is "attempting to remain the sole service provider to Fraser Paper CN wants Fraser to remain captive to it"). Bank Austria must be litigating some other case. As CN has repeatedly stressed, its haulage and trackage rights agreements with BAR place no restriction on BAR's ability to serve Fraser's Madawaska plant and to compete with CN-direct routings for any and all business to and from that facility. CN Reply at 10-11, Carson V.S. at 6. Indeed, a significant portion of Fraser's Madawaska traffic moves today via BAR-Guilford interline service over Northern Maine Junction, Maine. Subject to existing transportation contracts, BAR (and its presumptive successor, MM&A) is free to handle any Fraser traffic -- it will simply have to compete with CN to do so. It is that existing intramodal competition which

Fraser will lose if Bank Austria prevails in its position here. And it is the public interest in that competition that must be appropriately considered in this proceeding and any subsequent adverse discontinuance proceedings which are necessary. Next time, Bank Austria should not "call a spade a spade," Bank Austria Reply at 12, until it has looked at the cards.

C. The Waterloo Easement

Finally, we note that neither MM&A nor any other party has provided any argument or reasoning that would support revocation of Waterloo's separate easement over the Madawaska Line, or allow a "declaratory" finding that the bankruptcy court may terminate that easement without STB approval. The easement was a property interest that was conveyed to Waterloo on March 15, 2002 for value and that was subsequently recorded with the local register of deeds. Bank Austria specifically consented to the conveyance of the easement. CN Reply at 2-5; BAR Petition, Attachment A, Exhibit C.⁷ It is a completed transaction involving property rights, not an executory contract -- as the Trustee recognized in withdrawing his motion at the bankruptcy court to "reject" the easement. CN Reply, Tab 2 at 2, n.1. There is no issue as to whether and when the easement conveyance was "consummated" -- that consummation occurred on March 15, 2002, and Waterloo has been "holding out" to provide service to Fraser at Madawaska ever since.

Thus, while the arguments of the various parties in these proceedings -- including those of CN -- have focused on CNR's trackage rights, that cannot obscure the fact that a second, independent analysis is necessary before the Board could issue any of the revocation or declaratory relief sought with respect to the Waterloo easement. That easement is a separate interest, held by a separate rail carrier, not even subject to any motion to reject at the bankruptcy

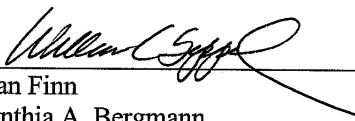
⁷ As the Board knows, it was also the subject of a separate Notice of Exemption filed by Waterloo in a separate proceeding at the agency.

court, and -- like any real property interest -- consummated as of the date of its conveyance. It was designed specifically to protect the pro-competitive access that Fraser currently has to CN rail service in the event that CNR's trackage rights were somehow insufficient. Regardless of how the Board rules with respect to CNR's trackage rights, it must deny the requested relief as it relates to the Waterloo easement.

WHEREFORE, CNR and Waterloo respectfully request that the Board accept this reply, deny the declaratory-type relief sought by MM&A, and deny BAR's petition to reopen and revoke exemptions, without prejudice to BAR or MM&A filing an appropriate adverse discontinuance application pursuant to 49 U.S.C. § 10903.

Respectfully submitted,

By:


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**ATTORNEYS FOR CANADIAN NATIONAL
RAILWAY COMPANY AND WATERLOO
RAILWAY COMPANY**

Dated: June 17, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of June, 2002, a copy of the foregoing **Reply of Canadian National Railway Company and Waterloo Railway Company to Motion to Intervene and Comments of Montreal, Maine & Atlantic Railway and Reply of Bank Austria** was served by overnight delivery upon:

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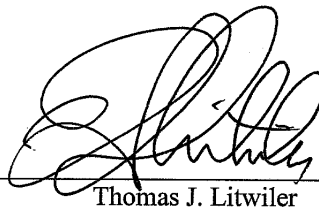
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