

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET No. AB-279 (SUB-NO. 3) > 209347

**CANADIAN NATIONAL RAILWAY COMPANY
— ADVERSE DISCONTINUANCE —
LINE OF MONTREAL, MAINE & ATLANTIC RAILWAY LTD.
IN AROOSTOOK COUNTY, MAINE**

DOCKET NO. AB-124 (SUB-NO. 2) > 209348

**WATERLOO RAILWAY COMPANY
— ADVERSE ABANDONMENT —
LINE OF MONTREAL, MAINE & ATLANTIC RAILWAY LTD.
IN AROOSTOOK COUNTY, MAINE**

**CANADIAN PACIFIC RAILWAY COMPANY'S RESPONSE IN
OPPOSITION TO CANADIAN NATIONAL RAILWAY COMPANY'S
MOTION TO COMPEL PRODUCTION OF DOCUMENTS BY
MONTREAL, MAINE & ATLANTIC RAILWAY, LLC AND THE TRUSTEE OF
BANGOR AND AROOSTOOK RAILROAD COMPANY**

**ENTERED
Office of Proceedings**

NOV 07 2003

**Part of
Public Record**

Marcella Szel
Paul Guthrie
Canadian Pacific Railway Company
401 9th Avenue, S.W.
Gulf Canada Square, Suite 500
Calgary, Alberta T2P 4Z4 Canada
(403) 319-6184
(403) 319-6770 (Fax)

Terence M. Hynes
Gabriel S. Meyer
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
(202) 736-8711 (Fax)

Counsel for Canadian Pacific Railway Company

DATED: November 6, 2003



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

**CANADIAN NATIONAL RAILWAY COMPANY
— ADVERSE DISCONTINUANCE —
LINE OF MONTREAL, MAINE & ATLANTIC RAILWAY LTD.
IN AROOSTOOK COUNTY, MAINE**

DOCKET NO. AB-124 (SUB-NO. 2)

**WATERLOO RAILWAY COMPANY
— ADVERSE ABANDONMENT —
LINE OF MONTREAL, MAINE & ATLANTIC RAILWAY LTD.
IN AROOSTOOK COUNTY, MAINE**

**CANADIAN PACIFIC RAILWAY COMPANY'S RESPONSE IN
OPPOSITION TO CANADIAN NATIONAL RAILWAY COMPANY'S
MOTION TO COMPEL PRODUCTION OF DOCUMENTS BY
MONTREAL, MAINE & ATLANTIC RAILWAY, LLC AND THE TRUSTEE OF
BANGOR AND AROOSTOOK RAILROAD COMPANY**

Canadian Pacific Railway Company ("CPR") submits this response in opposition to the Motion to Compel Production of Documents filed by Canadian National Railway Company ("CN") on October 28, 2003 ("CN's Motion"). For the reasons set forth below, the Board should deny CN's Motion to compel responses to CN's Document Request No. 10, addressed to Montreal, Maine & Atlantic Railway, LLC ("MM&A"), and CN's Document Request No. 9, addressed to the Trustee of the Bangor and Aroostook Railway Company ("BAR") (to the extent that it seeks a purported agreement between MM&A and CPR).

CN's Document Request No. 10 to MM&A seeks production of "[a]ll operating agreements, trackage rights agreements, joint facility agreements, voluntary coordination

agreements, most favored nation agreements, marketing agreements, or haulage agreements entered into by CP[R] and MM&A or effective between MM&A and CP[R].” See CN Motion, Exhibit A, 3rd page. This sweeping request would require MM&A to disclose to CN virtually every detail of its commercial relationship with CN’s primary competitor, CPR. CN’s Motion fails to provide any justification for sanctioning such a broad-ranging “fishing expedition.”

As the Board’s prior orders in this case indicate, the discoverability of the agreements sought by CN’s Document Request No. 10 “turns on whether the information requested would be likely to affect the outcome of these proceedings” by helping the Board to determine whether adverse discontinuance of CN’s trackage rights access to Fraser’s facility near Madawaska, ME would promote or harm the public interest.¹ CN’s Motion does not demonstrate that forced disclosure of MM&A’s confidential commercial agreements with CPR is necessary to enable CN to respond meaningfully to the Trustee’s application, nor does it show that the particulars of those agreements are likely to affect the Board’s analysis of the Trustee’s application.

The central public interest question before the Board in this case is whether discontinuance of CN’s trackage rights on the Madawaska line would adversely affect the competitive options available to the sole shipper (Fraser) currently served by CN.² CN takes the position that, because the Trustee’s application “touts” MM&A’s route with CPR via Brownville Junction, ME as “a significant alternative” to the service provided pursuant to CN’s haulage

¹ See Decision served May 6, 2003 (granting in part Trustee’s motion to compel Fraser Papers, Inc. to respond to discovery requests) (“*Fraser Discovery Order*”) at 3; Decision served May 6, 2003 (granting in part Trustee’s motion to compel CN to respond to discovery requests) (“*CN Discovery Order*”) at 3.

² Approval of the Trustee’s discontinuance application would not eliminate the MM&A-CN routing. Rather, it would result in a return to the pre-bankruptcy arrangement between the BAR

rights, CN “is entitled to explore the exact scope and nature of the agreements covering that route.” CN Motion at 5. However, the mere mention of the MM&A-CPR route as one of several rail routing options available to Fraser does not, as CN suggests, justify forced disclosure of literally every business arrangement between the participants in that route — neither of which is a party to the Trustee’s application. To the contrary, the Board’s prior orders in this case establish that compelled discovery should be limited to information which is “reasonably sharply focused on the ability of a competing mode [or route] to serve Fraser.” *Fraser Discovery Order* at 4.

For example, the Board limited the scope of its order compelling Fraser to respond to the Trustee’s requests for information regarding its use of truck transportation. Specifically, Fraser was required to produce only that data which identified the volumes shipped, and rates paid by Fraser, for truck shipments involving the same origin-destination pairs between which Fraser ships traffic via the MM&A-CN rail route. *Fraser Discovery Order* at 4, Appendix at 1. The Board deemed that information sufficient to enable the Trustee (and the Board) to assess the availability and economics of truck service as a competitive alternative to MM&A-CN service for Fraser’s traffic. *Id.* at 4. The Board denied the Trustee’s request to compel Fraser to produce other information regarding its use or ownership of trucks. *Id.*

The Board similarly circumscribed the scope of the information that CN was required to produce in response to the Trustee’s discovery requests. The Trustee sought to compel CN to disclose not only the actual rates that Fraser pays for CN rail service to/from Madawaska, but also all documents reflecting communications regarding those rates. The Board held that production of the rates themselves was “sufficient” to enable the parties to assess the

and CN, pursuant to which Fraser’s traffic moved on an interline basis (rather than via MM&A haulage of cars for CN’s account).

extent of the competition resulting from CN's direct access to Fraser's Madawaska facility. *CN Discovery Order* at 4. The Board denied the Trustee's requests for disclosure of documents relating to (i) communications about CN's rates, and (ii) the March 2001 transaction in which CN acquired trackage rights and haulage rights to Madawaska from BAR. The Board determined that the Trustee failed to demonstrate that such information would be relevant to the Board's assessment of the public interest. *Id.*

CPR understands that, in response to other discovery requests, MM&A has already produced to CN a substantial amount of information regarding the traffic that MM&A handles via its routes with both CPR and CN. For example, CPR understands that CN has already obtained copies of all BAR/MM&A contracts with Fraser, as well as BAR/MM&A tariffs, rate quotations and related documents reflecting the rates that Fraser pays for rail services provided by MM&A. In addition, MM&A has produced to CN data identifying all of the traffic — not just Fraser's traffic — that moves over the MM&A-CPR route via Brownville Junction, ME. This data includes the revenues earned by MM&A and by other carriers (including CPR) who participate in the movement of such traffic. Thus, CN already has been given access to more data regarding the traffic and rates associated with the MM&A-CPR route than the Board previously required Fraser — or CN itself — to produce in response to the Trustee's motions to compel. That information is clearly sufficient to enable CN (and the Board) to assess the extent to which the MM&A-CPR route offers a viable competitive option to the MM&A-CN haulage routing for Fraser's traffic.

Yet, CN now asks the Board to compel MM&A to produce "all" of its operating, trackage rights, haulage, joint facility, marketing, coordination or most favored nation agreements with CPR. This request — which is anything but "reasonably sharply focused"

(*Fraser Discovery Order* at 4) — would require MM&A to reveal to CPR’s primary competitor the details of confidential commercial arrangements that have little (if any) bearing upon the public interest issues in this case. For example, CPR has granted MM&A trackage rights in the Montreal terminal area for the purpose of facilitating the MM&A-CPR interchange at Montreal. The precise terms upon which CPR granted those rights to MM&A are clearly not likely to affect the outcome of the Board’s public interest analysis. Likewise, MM&A/CPR agreements relating to matters such as car blocking, the exchange of locomotives, or the provision of haulage services in connection with traffic for customers other than Fraser are utterly irrelevant to the issues raised by the Trustee’s application. CN’s Motion proffers no persuasive reason why any — much less “all” — confidential commercial arrangements between MM&A and CPR are relevant, and its overreaching request for compulsory disclosure of such agreements should be rejected.

CN’s Motion makes specific reference to only one purported MM&A-CPR agreement — a “coordinated marketing and operating agreement” that was mentioned in passing in a Verified Statement accompanying the Trustee’s application. *See* CN Motion at 7, Exhibit E (attaching page 18 of the Verified Statement of James Howard).³ But CN fails to demonstrate that such an agreement (if it exists) has any relevance to the issues in this case. Indeed, the excerpt cited by CN as the basis for its Motion discusses an east-west movement of gypsum wallboard for Westroc Industries from McAdam, NB to various destinations beyond Montreal. (*See* CN Motion, Exhibit E, V.S. Howard at 17-18.) CN does not contend that it does (or could) handle this traffic via its rights over the Madawaska line, which are restricted to the movement of

³ CN also seeks to compel the Trustee to produce a copy of this purported agreement as a “workpaper.” CN Motion at 7. For the reasons set forth in this Response, CN’s Motion to compel a response to Document Request No. 9 addressed to the Trustee should also be denied.

Fraser's traffic. Neither the Westroc movement, nor the details of any commercial arrangements under which MM&A and CPR handle it, has any relevance to the merits of the Trustee's application. Accordingly, the reference relied upon by CN provides no grounds for forced disclosure of any "coordinated marketing and operating agreement" that may exist between MM&A and CPR.

CN's Motion also refers to "a suggestion" (supposedly gleaned from other documents produced during discovery) that CPR may be offering MM&A "incentives" to solicit Fraser traffic for movement via the MM&A-CPR route. CN Motion at 5. CN's Motion does not articulate the substance of this "suggestion," nor does it identify the document(s) which contain it. Based solely upon this (unidentified) "suggestion," CN asks the Board to compel disclosure of literally every marketing, haulage or coordination agreement between MM&A and CPR, so that CN can assess the impact of such arrangements on Fraser's "current competitive options," and the possibility that MM&A might "disadvantage" MM&A-CN joint routings if CN's trackage rights are terminated. *Id.* at 5-6.

These vague assertions provide no support for the overreaching discovery CN seeks. The impact of the services offered by MM&A and CPR on Fraser's "current competitive options" can readily be determined from the traffic, rate and revenue data already produced by MM&A (which discloses both the extent to which Fraser currently utilizes MM&A-CPR service, and the rates that Fraser pays for such service). CN's purported concern that "incentives" offered by CPR might encourage MM&A to "disadvantage" interline routings with CN ignores the fact that the shipper (Fraser) — and not the origin carrier (MM&A) — controls the routing of its traffic. Fraser's routing decisions will ultimately be determined by the rates available for rail service via the competing MM&A-CN and MM&A-CPR routes, not by the manner in which the

carriers participating in those routes agree to divide revenues earned on interline traffic. In essence, CN seeks to compel MM&A to reveal the details of its divisions arrangements with CPR. But CN's Motion fails to make any showing that disclosure of such commercially sensitive information to CPR's chief rail competitor is necessary to assist the Board in deciding this case.

The Board's regulations provide that discovery of commercially sensitive information may properly be denied where "it would be unduly burdensome in relation to the likely value of the information sought."⁴ CN's sweeping demand for production of literally every marketing and operating agreement between MM&A and CPR could be extremely harmful to CPR's (and MM&A's) commercial interests.⁵ CPR and CN compete vigorously for Fraser's traffic, and for substantial volumes of other traffic moving to and from MM&A's service territory. In fact, CPR and CN are currently engaged in competitive bidding for the very Fraser traffic that is at issue in this case (as well as for traffic from the former Great Northern Paper plants at Millinocket and East Millinocket, ME, which may reopen under the ownership of Fraser's affiliate, Brascan). In these circumstances, forced disclosure to CPR's primary competitor (CN) of every detail regarding the operation, pricing and marketing of the MM&A-CPR routes that provide such competition to CN — even if limited to CN's outside counsel and consultants — is not justified by the flimsy grounds proffered in CN's Motion.

⁴ 49 C.F.R. § 1114.21 (c). See *Fraser Discovery Order* at 3; *CN Discovery Order* at 3.

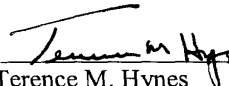
⁵ CN's offer to obtain discovery of confidential MM&A-CPR agreements pursuant to a protective order is beside the point — CN has simply not met its burden of showing that compulsory production of the requested agreements is necessary to further the Board's public interest analysis.

Conclusion

For all of the foregoing reasons, CPR respectfully requests that the Board deny CN's Motion to Compel with respect to Document Request No. 10 addressed to MM&A, and Document Request No. 9 addressed to the Trustee (to the extent that it seeks production of agreements between MM&A and CPR).

Respectfully submitted,

Marcella Szel
Paul Guthrie
Canadian Pacific Railway Company
401 9th Avenue, SW
Gulf Canada Square, Suite 500
Calgary, Alberta T2P 4Z4 CANADA
(403) 218-7474


Terence M. Hynes
Gabriel S. Meyer
Sidley Austin Brown & Wood
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Canadian Pacific Railway Company

DATED: November 6, 2003

CERTIFICATE OF SERVICE

I hereby certify that, on this 6th day of November, 2003, I served the foregoing Canadian Pacific Railway Company's Response in Opposition to Canadian National Railway Company's Motion to Compel Production of Documents by hand-delivery to:

Charles L. Eisen
Kevin M. Sheys
Edward J. Fishman
Kirkpatrick & Lockhart LLP
1800 Massachusetts Avenue, N.W., Suite 200
Washington, D.C. 20036

Charles A. Spitulnik
McLeod, Watkinson & Miller
One Massachusetts Avenue, N.W., Suite 800
Washington, D.C. 20001

Michael L. Rosenthal
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

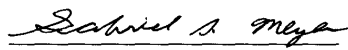
and by overnight delivery to:

Charles H. White, Jr.
Attorney at Law
1200 Britania Lane
Annapolis, Maryland 21403

And by first class mail, postage prepaid, to:

John P. Borgwardt
Fraser Papers, Inc.
70 Seaview Avenue
Stamford, CT 06902

William A. Mullins
David C. Reeves
Baker & Miller
2401 Pennsylvania Avenue, N.W., Suite 300
Washington, D.C. 20037


Gabriel S. Meyer