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January 6, 2003

BY HAND DELIVERY

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



Edward J. Fishman
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Re: **Docket No. AB-279 (Sub-No. 3)** *207004*
**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) *207005*
**Waterloo Railway Company -- Adverse Abandonment -- Lines of
Bangor and Aroostook Railroad Company and Van Buren Bridge
Company in Aroostook County, Maine**

Dear Secretary Williams:

I am enclosing an original and ten copies of the **Trustee of Bangor and Aroostook Railroad Company's Reply to the Canadian National Railway Company and Waterloo Railway Company Opposition to the Trustee's Motion to Compel**, dated January 6, 2003, for filing in the above-captioned proceeding.

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

Respectfully submitted,

Edward J. Fishman

Attorney for Trustee of Bangor and Aroostook
Railroad Company, et al.

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Office of Proceedings

JAN 07 2003

Part of
Public Record

Enclosures

cc: Parties on Certificate of Service

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

**TRUSTEE OF BANGOR AND AROOSTOOK RAILROAD COMPANY'S REPLY TO
THE CANADIAN NATIONAL RAILWAY COMPANY AND WATERLOO RAILWAY
COMPANY OPPOSITION TO THE TRUSTEE'S MOTION TO COMPEL**

Charles H. White, Jr.
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ENTERED
Office of Proceedings

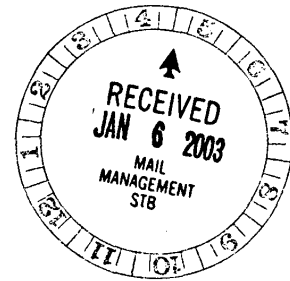
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Part of
Public Record

**ATTORNEYS FOR TRUSTEE OF BANGOR
AND AROOSTOOK RAILROAD COMPANY,
ET AL.**

Dated: January 6, 2003



BEFORE THE
SURFACE TRANSPORTATION BOARD

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

CANADIAN NATIONAL RAILWAY COMPANY
--ADVERSE DISCONTINUANCE --
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**TRUSTEE OF BANGOR AND AROOSTOOK RAILROAD COMPANY'S REPLY TO
THE CANADIAN NATIONAL RAILWAY COMPANY AND WATERLOO RAILWAY
COMPANY OPPOSITION TO THE TRUSTEE'S MOTION TO COMPEL**

I. INTRODUCTION

James E. Howard, Chapter 11 Trustee of Bangor and Aroostook Railroad Company, Debtor (the "Trustee")¹ hereby files this reply to the Opposition filed by Canadian National Railway Company and Waterloo Railway Company ("CN Opp.") to the Trustee's Motion to Compel responses to Document Requests and Interrogatories (collectively "Discovery Requests"). This reply is necessary because CN blatantly mischaracterizes the case law pertaining to the availability of discovery in adverse abandonment cases, and grossly overstates its alleged burden of complying with the

¹ James E. Howard is acting in his capacity as the Chapter 11 Trustee for the Bangor and Aroostook Railroad Company, Van Buren Bridge Company, Canadian American Railroad Company, Northern Vermont Railway Company and Newport & Richford Railroad Company. These railroads along with the Quebec Southern Railway Company, Ltd. ("QSR") are referred to herein collectively as the "BAR System." James E. Howard is not the Chapter 11 Trustee of QSR.

Discovery Requests. This reply addresses only these items, without repeating the points in the Trustee's Motion to Compel.

II. ARGUMENT

A. Discovery Is Available And Necessary In Adverse Abandonment Cases Such As This One

CN asserts that "[t]his Board and its predecessor, the ICC, have consistently rejected the use of discovery in abandonment proceedings." See CN Opp. at 3. This assertion contradicts the Board's discovery regulations and applicable precedent, including cases cited by CN. See 49 C.F.R. § 1141.21(a); see, e.g., Chicago and North Western Transportation Company – Abandonment – Between Palmer and Laurens in Pocahontas County, IA, ICC Docket No. AB-1 (Sub-No. 212) (ICC served July 26, 1991) ("C&NW – Ab. – Palmer") (party "incorrectly ascribes to the Commission a policy of denying discovery to railroads in abandonment proceedings"); SWKR Operating Company – Abandonment Exemption – In Cochise County, AZ, STB Docket No. AB-441 (Sub-No. 2X) (STB served February 14, 1997) ("[c]ontested discovery may be granted ... when the party seeking discovery shows that the 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").

Contrary to CN's suggestion (CN Opp. at 4 n.1), there is applicable precedent for compelling discovery in an abandonment proceeding. See Chelsea Property Owners – Abandonment – Portion of the Consolidated Rail Corporation's West 30th Street Secondary Track in New York, NY, ICC Docket No. AB-167 (Sub-No. 1094) (ICC served November 16, 1989) (Conrail was compelled to respond to discovery requests submitted by adverse abandonment applicant).

CN argues that the Trustee is not entitled to discovery on the availability of Fraser's transportation alternatives because the Trustee has all relevant information in its possession to attempt to meet its burden of proof. See CN Opp. at 5, 12-14. CN relies on three cases to support this assertion. Illinois Central Railroad Company – Abandonment – in Jackson, Hinds County, MS, STB Docket No. AB-43 (Sub-No. 162) (STB served September 1, 1995) ("IC – Ab. – Hinds County"); C&NW – Ab. – Palmer; and Missouri Pacific Railroad Company – Abandonment – Between Opelousas and Church Point and St. Landry Parish and Acacia Parish, LA, ICC Docket No. AB-3 (Sub-No. 81) (ICC served March 28, 1989). Each of these cases involves an abandonment where the applicant was the railroad abandoning the line in question and therefore had information about its own operations, and could reasonably be expected to meet its burden of proof based upon its own information, without discovery. These cases are distinguishable on their face from the present case, and therefore, provide no support for CN's assertion that the Trustee is not entitled to discovery. The Trustee is not seeking authority to abandon or discontinue its own operations. CN's assertion that "BAR is in possession of all of the information necessary to attempt to meet its burden of proof" is completely unsubstantiated. The fact that BAR owns the Madawaska Line and operates (under the Junction Settlement Agreement) as a haulage carrier on traffic to or from the Madawaska Mill via CN clearly does not mean the Trustee (or BAR) has the relevant information regarding Fraser's transportation options. See CN Opp at 5.

In similar fashion, CN relies on other clearly distinguishable cases. Both of the decisions from the Central R. Co. of Indiana – Abandonment Exemption – in Dearborn, Decatur, Franklin, Ripley and Shelby Counties, IN cases involve a protestant's discovery request. The Board denied the discovery, because the protestant did not have the burden of proof in the case and the discovery would have made it difficult for

the Board to adhere to the statutory deadline for the abandonment decision. Neither of these considerations is relevant in the present case. In the IC – Ab. – Hinds County and C&NW – Ab. – Palmer cases, the applicant carriers sought discovery about shipper transportation alternatives after filing their applications. The ICC found that such discovery was unnecessary because the applicants were required to establish their “case in chief” for abandonment in their application.² Here, the Trustee seeks such discovery prior to filing the Application and in order to support its case in chief.

A significant number of the Discovery Requests served on CN seek information about the rates and other service terms applicable to transportation to or from the Madawaska Mill. See Interrogatories 2, 3, 5, 6 and 7; Document Requests 1, 3, 4, 7 and 8. In CN’s view, the Board can skip the public interest analysis because the discontinuance of the trackage rights would reduce Fraser’s rail transportation options by one. Therefore, CN purports not to see the relevance of this information. CN Opp. at 12. The public interest analysis will not be as simple as CN suggests.

In balancing the harm of retaining the trackage rights with the harm of discontinuing the trackage rights, the Board will, among other things, need to evaluate Fraser’s transportation options with and without the trackage rights. To do so, the Board will need to understand and evaluate the different rate and service terms applicable to the transportation of various commodities to and from the Madawaska Mill by different modes. The information sought by the Trustee from CN is relevant to evaluating Fraser’s ability to choose among its alternative transportation options on inbound and outbound moves.

² CN’s reliance on Salt Lake City Corp. – Adverse Abandonment – in Salt Lake City, UT, STB Docket No. AB-33 (Sub-No. 183) (STB served January 11, 2002) and The Kansas City So. Ry. Co. – Adverse Discontinuance. – A Line of Arkansas and Missouri R. Co., STB Docket No. AB-103 (Sub-No. 14) (STB served January 19, 1999) is flawed for the same reason.

B. CN Grossly Overstates Alleged Burden Of Complying With Discovery Requests

CN grossly overstates the alleged burden of complying with the Discovery Requests, which focus on CN's interactions and arrangements with a single shipper (Fraser) at a single location (Madawaska) over a limited period (four years, and in many cases, less).

CN does not make any specific burden argument with respect to Interrogatory 8, which seeks information on whether CN has passed on any additional revenue savings from the March 2001 transaction to Fraser. If CN has not passed along, shared, credited or otherwise distributed the additional revenue to Fraser since the March 2001 transaction, CN's answer to this question clearly would not be burdensome. If CN has in fact passed on any additional revenue from the March 2001 transaction, it should not be difficult for CN to explain the savings enjoyed by Fraser.

CN erroneously asserts that Document Requests 7 and 10 are not limited in time or scope. CN Opp. at 14. Document Request 7 seeks agreements between CN and Fraser relating to Madawaska Mill transportation for the last four years. Document Request 10 seeks CN internal communications during the last four years relating to diversion of Fraser transportation between rail and non-rail modes.

CN also overstates the alleged burden of complying with the Discovery Requests that relate to the rates applicable to rail transportation to and from the Madawaska Mill. See Interrogatories 2, 3, 5 and 6; Document Requests 1, 3, and 4. CN claims that responding to these Discovery Requests would "require the devotion of hundreds of employee hours to a special study analyzing each carload and each rate over a four-year period." CN Opp. at 11 (emphasis added). These Discovery Requests do not ask CN to perform any such study. The Document Requests seek only existing

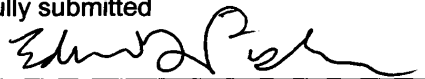
communications. The Interrogatories seek a description of applicable rates by commodity, routing and other relevant factors. It is the Trustee's understanding that there is one confidential transportation agreement between CN and Fraser that contains all or substantially all of the negotiated rates. It would not be burdensome for CN to produce this agreement and the Trustee has tendered a draft Protective Order to protect the agreement from public disclosure. To the extent the Discovery Requests seek information about rates not contained in that agreement, CN should be able to provide the Trustee with traffic tapes, pricing matrices or other readily available information relating to such rates in whatever form CN keeps such information.

III. CONCLUSION

For the foregoing reasons, the Board should grant the Trustee's Motion to Compel.

Respectfully submitted

By:



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**ATTORNEYS FOR TRUSTEE OF BANGOR &
AROOSTOOK RAILROAD COMPANY, ET.
AL.**

Dated: January 6, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of January, 2003, a copy of the foregoing **Trustee Of Bangor And Aroostook Railroad Company's Reply To The Canadian National Railway Company And Waterloo Railway Company Opposition To The Trustee's Motion To Compel** was served by facsimile and regular mail upon:

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