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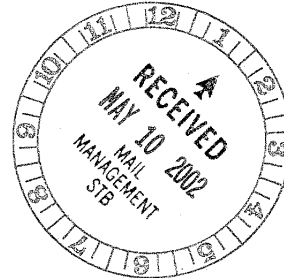
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May 9, 2002

VIA FEDERAL EXPRESS

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

ENTERED
Office of the Secretary
MAY 10 2002
Part of
Public Record



Re: **Finance Docket No. 34014** - 205 367
**Canadian National Railway Company -- Trackage Rights
Exemption -- Bangor and Aroostook Railroad Company
and Van Buren Bridge Company**

Finance Docket No. 34015 - 205 368
**Waterloo Railway Company -- Acquisition Exemption -- Bangor and
Aroostook Railroad Company and Van Buren Bridge Company**

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 Petition to Reopen and Revoke Exemptions**, dated May 9, 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,

A handwritten signature in dark ink, appearing to read "T. Litwiler".

Thomas J. Litwiler
Attorney for Canadian National Railway Company
and Waterloo Railway Company

TJL:tl

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
PETITION TO REOPEN AND REVOKE EXEMPTIONS**

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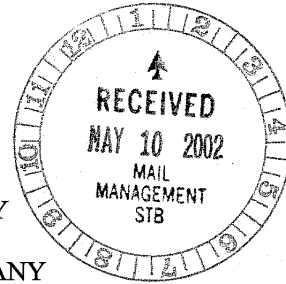
**ATTORNEYS FOR CANADIAN NATIONAL
RAILWAY COMPANY AND WATERLOO
RAILWAY COMPANY**

Dated: May 9, 2002

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
PETITION TO REOPEN AND REVOKE EXEMPTIONS**

Canadian National Railway Company ("CNR") and Waterloo Railway Company ("Waterloo" and, collectively with CNR, where appropriate, "CN") hereby file this reply to the petition of Bangor and Aroostook Railroad Company, James E. Howard, Trustee ("BAR") to revoke the exemptions obtained by CNR and Waterloo in these proceedings over a year ago. What BAR actually seeks is the forced abandonment and discontinuance of CN's rights on a line of railroad owned by BAR, and the elimination of existing competitive rail access to a significant shipper on that line. BAR's efforts to oust CN raise significant public interest issues that must be addressed in an appropriate adverse application under 49 U.S.C. § 10903. BAR's effort to shortcut this process and -- by its own admission -- evade any consideration of the public interest by revoking CN's initial exemptions is directly contrary to the Board's statutory responsibilities and applicable agency precedent. The Board should deny BAR's petition without prejudice to BAR filing a formal application under Section 10903 for adverse authority against CN.

BACKGROUND

As the Board is aware, the Bangor & Aroostook rail system, of which BAR is a part,¹ has faced serious financial difficulties for some time. In early 2001, BAR and its parent, Iron Road Railways Incorporated ("IRR") approached CN to pursue business arrangements that would result in a cash infusion for BAR. After several months of discussions, the parties agreed on an arrangement whereby:

- 1) CN would provide \$5 million in cash to IRR, as agent for BAR.
- 2) BAR would provide haulage services for CN between the large paper mill of Fraser Papers Inc. ("Fraser") at Madawaska, Maine and the connection with CNR's rail line at St. Leonard, New Brunswick, Canada. BAR would provide such haulage services over its own rail line between Madawaska and Van Buren (Canadian Junction), Maine, and over the line of its affiliate, the Van Buren Bridge Company ("VBBC"), between Van Buren and St. Leonard.
- 3) BAR and VBBC would grant CNR limited local trackage rights on the Madawaska-St. Leonard line to serve Fraser at Madawaska.
- 4) BAR and VBBC would convey to Waterloo, an affiliate of CNR, a non-exclusive freight easement on the Madawaska-St. Leonard line, allowing Waterloo to serve Fraser at Madawaska.

See Verified Statement of Clifford L. Carson, attached hereto at Tab 1 ("Carson V.S."), at 3-4.

The latter items were the subject of, respectively, a Junction Settlement Agreement (the "Haulage Agreement"), a Trackage Rights Agreement and an Easement Deed entered into by the parties (collectively, the "Agreements"). Copies of these agreements are included as Exhibits A-C of Attachment A to the BAR Petition.

¹ The other carriers in the system include the Canadian American Railroad Company, Van Buren Bridge Company, The Northern Vermont Railroad Company Inc. and Quebec Southern Railway. All of these carriers (including BAR) were controlled by Iron Road Railways Inc., which also controls the Iowa Northern Railway Company. BAR is currently in bankruptcy under U.S. law, while Quebec Southern is currently in bankruptcy in Canada. The other members of the Bangor & Aroostook rail system are not in bankruptcy.

As Mr. Carson explains, all four of these components were part of a single, integrated transaction by which CN obtained access to Fraser's mill at Madawaska and BAR received a significant cash infusion. Carson V.S. at 5. Both the Trackage Rights Agreement and the Easement Deed served to protect CN's access to Fraser's mill (and protect Fraser's competitive access to CN) over the long term in light of BAR's precarious financial position and the very real possibilities, among others, that BAR could not or would not perform under the Haulage Agreement; that BAR would enter bankruptcy; or that BAR would sell some or all of its assets to a third party. Carson V.S. at 3.

The documentation between the parties reflects this clear understanding. The Haulage Agreement, for example, provides:

In consideration of services to be provided under this agreement, CN will pay to Iron Road Railways, Inc. as agent for the Bangor & Aroostook Railway, an amount of five million dollars (\$5,000,000) in U.S. funds. This payment is contingent upon:

- The execution of this junction settlement agreement;
- The execution of the St. Leonard to Madawaska trackage rights agreement (attached);
- The execution of the grant of an easement on the property underlying the St. Leonard to Madawaska trackage, and the consent and subordination of the first lien-holder;
- The approval by the Surface Transportation Board of the Notice of Exemption for both the trackage rights and the easement.

Haulage Agreement (BAR Petition, Attachment A, Exhibit A) at 2, § 2. As indicated, the Trackage Rights Agreement was attached to the Haulage Agreement, and the rights it granted were a prerequisite to the \$5 million that BAR received and to the initiation of haulage services.

Prior correspondence from BAR and a prior letter agreement between BAR and CN are to the same effect. In a February 6, 2001 letter from BAR's President to CN, BAR explained its understanding that:

CN will also [in addition to haulage services under the Haulage Agreement] receive trackage rights to these destinations and, although their exercise is at CN's discretion, their purpose is to ensure that CN can access this traffic under all circumstances in order to retain a fair return.

Carson V.S., Attachment B at 1. Two days later, the parties executed a letter agreement (sometimes referred to as the "Term Sheet") that outlined the haulage services to be provided by BAR and then provided:

BAR to grant immediate trackage rights to CN for movements over BAR lines between St. Leonard and Madawaska, ME, such rights to be used by CN at its discretion. [BAR] shall also grant CN an easement, subject to consent of lienholders, on the property underlying the same track, so that CN's right to reach Fraser-Madawaska would also be protected in an asset sale of the company.

Carson V.S., Attachment C at 2. The February 8, 2001 Term Sheet was the basis for the Haulage Agreement, Trackage Rights Agreement and Easement Deed subsequently entered into by the parties.

On March 7, 2001, CNR filed in Finance Docket No. 34014 a verified notice of exemption pursuant to 49 C.F.R. § 1180.2(d)(7) for its acquisition of trackage rights from BAR and VBBC over the Madawaska-St. Leonard line.² On the same day, Waterloo filed in Finance Docket No. 34015 a verified notice of exemption pursuant to 49 C.F.R. § 1150.42 for its acquisition of the non-exclusive freight operating easement on the Madawaska-St. Leonard line. Both exemptions became effective on March 14, 2001. Canadian National Railway Company -- Trackage Rights Exemption -- Bangor and Aroostook Railroad Company and Van Buren Bridge Company, Finance Docket No. 34014 (STB served March 21, 2001), 66 *Fed. Reg.* 15941;

² CNR later filed an executed version of the trackage rights agreement between BAR/VBBC and CNR with the Board pursuant to 49 C.F.R. § 1180.6(a)(7)(ii). See letter from Thomas J. Litwiler, counsel for CNR, filed October 26, 2001.

Waterloo Railway Company -- Acquisition Exemption -- Bangor and Aroostook Railroad Company and Van Buren Bridge Company, Finance Docket No. 34015 (STB served March 21, 2001), 66 *Fed. Reg.* 15941.

The next day, March 15, 2001, BAR/VBBC and CN consummated the four components of this integrated transaction. Five million dollars in U.S. funds was wired to Iron Road (as agent for BAR), and all three agreements were executed and effective as of that date. BAR began providing haulage service for CN's account to and from Fraser at Madawaska. The 99-year term of the Trackage Rights Agreement began running.³ Appropriate consents for the Waterloo easement were obtained from BAR's existing lienholders (BankAustria/Creditanstalt Corporate Finance, Inc.), and the easement was subsequently duly recorded with the Aroostook County, Maine Register of Deeds. Carson V.S. at 5; BAR Petition, Attachment A, Exhibit C.

On December 4, 2001, BAR was placed into involuntary bankruptcy in the U.S. Bankruptcy Court for the District of Maine. On March 18, 2002, BAR's Trustee sought to reject the Haulage Agreement, the Trackage Rights Agreements and the Easement Deed pursuant to 11 U.S.C. § 365(a) and oust CN from the Madawaska Line.⁴ In a later filing with the Bankruptcy Court, however, the Trustee withdrew his motion to reject the Easement Deed.⁵ On April 29,

³ Article 19 of the Trackage Rights Agreement, entitled "Term," provides that "[t]his agreement shall be effective the date first written above [i.e., March 15, 2001] and shall remain in full force for 99 years." BAR Petition, Attachment A, Exhibit B at 14, § 19(a).

⁴ Because VBBC is not in bankruptcy, the Trustee's motion to reject (and its petition here) relates only to BAR's Madawaska-Van Buren rail line and CN's trackage rights and easement thereon. The rights that CN holds on VBBC's rail line between Van Buren and St. Leonard are not at issue here. We hereafter refer to BAR's rail line between Madawaska and Van Buren as the "Madawaska Line."

⁵ See Trustee's Reply to and Motion to Strike Portions of CN's Response to Trustee's Motion to Reject Executory Contracts, No. 01-11565 (Bankr. D. Me.), April 30, 2002 ("Trustee's Bankruptcy Reply"), attached hereto at Tab 2, at 2, n.1.

2002, CN file a motion to stay proceedings on the Trustee's rejection motion, pending appropriate application to and determination by the Board regarding the adverse discontinuance of CNR's trackage rights on the Madawaska Line and the adverse abandonment of Waterloo's easement on that line. As the Board would expect, CN's motion is predicated on the well-understood dictates of Thompson v. Texas Mexican Ry. Co., 328 U.S. 134 (1946) and its extensive progeny.⁶

On April 25, 2002, the BAR Trustee filed the pending petition to reopen Finance Docket Nos. 34014 and 34015 and revoke the exemptions received by CNR and Waterloo, respectively, in those matters. It is apparently the Trustee's position that revocation of the exemptions would satisfy any obligation the Trustee has under the Interstate Commerce Act, enable BAR to oust CN from the Madawaska Line, and permit a 2-to-1 reduction in intramodal competition for Fraser at Madawaska.⁷

DISCUSSION

A. Adverse Discontinuance and Abandonment Authority is Required Before CN May Be Removed From the Madawaska Line

The BAR Trustee had no trouble understanding what would be required before the STB when he initially filed his motion to reject the Agreements with the Bankruptcy Court. At the end of his various arguments regarding rejection, the Trustee was careful to inform the court that:

⁶ See Memorandum of CN in Support of Motion to Stay Proceedings on Trustee's Motion to Reject Executory Contracts, No. 01-11565 (Bankr. D. Me.), April 29, 2002 ("CN Stay Memorandum"), attached hereto at Tab 3. The CN Stay Memorandum also explained at length that BAR's bankruptcy has no effect on the applicable law where a debtor carrier seeks to force the abandonment or discontinuance of a non-debtor's rail lines or operations.

⁷ Although the relief sought by the Trustee has a direct impact on Fraser, the Trustee did not serve a copy of the Petition on Fraser.

Abandonment of railroad lines or discontinuances of trackage rights are subject to the jurisdiction of the United States Surface Transportation Board pursuant to 49 U.S.C. 10904 [sic] and 11323. The Trustee intends promptly to initiate a proceeding before the STB seeking the abandonment or discontinuance of the trackage rights of CN under the Trackage Agreement.

Trustee's Motion to Reject Executory Contracts, No. 01-11565 (Bankr. D. Me.), March 18, 2002 (BAR Petition, Attachment A) at 12, ¶ 31.

Notwithstanding that representation, of course, BAR has not invoked the adverse discontinuance process. Instead, BAR filed the pending petition to reopen and revoke. Having consummated all aspects of the March 15, 2001 transaction -- including the Trackage Rights Agreement and the Easement Deed -- and admitted CN to the Madawaska Line, BAR now seeks to force CN off of the line through revocation of CN's initial exemptions. The Board has considered precisely such arguments before, and has rejected them outright.

In Milford-Bennington Railroad Company, Inc. -- Trackage Rights Exemption -- Boston and Maine Corporation and Springfield Terminal Railway Company, Finance Docket No. 32103 (ICC served September 3, 1993) ("Milford-Bennington"), Springfield Terminal Railway Company and an affiliate ("ST") had granted trackage rights to Milford-Bennington Railroad Company ("MBR") in mid-1992. By the following year, relations between the parties had soured: ST claimed that MBR had breached the trackage rights agreement in a myriad of ways and that ST had terminated the agreement. ST petitioned the ICC to revoke MBR's prior trackage rights exemption, arguing that such action was necessary under the Rail Transportation Policy now codified at 49 U.S.C. § 10101. Milford-Bennington at 1.

The ICC's disposition of ST's revocation petition was quick and direct:

MBR's trackage rights were authorized under the Commission's class exemption at 49 CFR 1180.2(d)(7). See Railroad Consolidation Procedures -- Trackage Rights Exemption, 1

I.C.C.2d 270 (1985). Even though petitioners seek to revoke MBR's exemption, trackage rights remain in effect until the Commission either authorizes discontinuance under 49 U.S.C. 10903 or approves a new agreement. See Thompson v. Texas Mexican Ry. Co., 328 U.S. 134, 146-148 (1946); and Finance Docket No. 31281, Arkansas & Mo. RR Co. v. Mo. Pac. RR Co. (not printed) served March 17, 1989. Under the circumstances, revocation would not be sufficient to accomplish petitioners' stated goal of terminating MBR's trackage rights; petitioners must ultimately seek and obtain adverse discontinuance authority to release MBR from its common carrier obligation. See Finance Docket No. 32049, Cheatham County Rail Authority "Application and Petition" for Adverse Discontinuance (not printed), served July 21, 1992. Thus, we will dismiss this petition without prejudice to petitioners' filing an application for adverse discontinuance.

Milford-Bennington at 2 (footnote omitted).

Of course, these are exactly the circumstances of the present case. CNR's trackage rights on the Madawaska Line were authorized by the STB pursuant to class exemption under 49 C.F.R. § 1180.2(d)(7). Over a year later, BAR has become dissatisfied with the terms of that arrangement, and has sought (through its motion to reject at the Bankruptcy Court) to terminate the trackage rights agreement. Like ST, BAR has now filed a petition to revoke CNR's original trackage rights exemption in order to remove CNR from the line. Yet that is simply not an appropriate or effective way to achieve BAR's desired end: it must instead file an adverse discontinuance application under 49 U.S.C. § 10903 with respect to CNR's trackage rights.⁸

Milford-Bennington is controlling on this point, and is dispositive of the BAR Petition.

As indicated above, the BAR Trustee was plainly prepared to act in accordance with this law -- and to file an adverse discontinuance application -- when he initially filed his

⁸ Of course, the same is equally true with respect to Waterloo's easement on the Madawaska, which involved the conveyance of a property interest to Waterloo. While not critical here, adverse abandonment -- rather than discontinuance -- authority would likely be the appropriate remedy for BAR to seek with respect to Waterloo's easement.

motion to reject with the Bankruptcy Court. While the BAR Petition gives no explanation for the Trustee's sudden shift in strategy and approach, clues to the Trustee's motivations are contained in a subsequent BAR filing at the Bankruptcy Court. There, the Trustee offered to the Bankruptcy Court this view of the required STB process:

The "exemption" process [under 49 C.F.R. § 1180.2(d)(7) used for CNR's trackage rights] is not a plenary proceeding, but rather is a practice in which the STB permits consensual trackage rights to be implemented, without any scrutiny, but subject to later revocation. 49 C.F.R. § 1180.2(d)(7). The STB made no express findings on the merits, including findings based on the public interest and other factors, regarding the CN trackage rights. . . . The Trustee on April 24, 2002 filed with the STB a request that the STB "revoke" the exemption pursuant to 49 C.F.R. § 1115.4. . . . If the STB revokes the exemptions, no further STB proceedings need occur.

CN's allegations that the STB will rule based on the "public interest" are, therefore, irrelevant and misleading. The STB did not make any such finding in the first instance and need not do so in ruling on the pending exemption [sic] request.

Trustee's Bankruptcy Reply (Tab 2 hereto) at 13-14, ¶¶ 23-24 (footnotes omitted). The Trustee went on to indicate that:

If the STB does not grant the motion to revoke, the Trustee has the right to initiate an adverse discontinuance proceeding. The Trustee believes that the exemption procedure is the most expeditious means of achieving the same result.

Trustee's Bankruptcy Reply at 14, n.8 (emphasis added).

This, then, is the true nature of what BAR now seeks in its pending petition to reopen and revoke: a short-cut around the adverse discontinuance procedures that avoids any consideration of the public interest. Indeed, according to BAR's representations to the Bankruptcy Court, the public interest is "irrelevant" to the STB's analysis -- an assertion that BAR wisely chose not to repeat before the agency itself.

BAR's explanations (to the Bankruptcy Court, at least) of the controlling regulatory principles here are just so much nonsense. The class exemption at 49 C.F.R. § 1180.2(d)(7) for trackage rights was adopted precisely because such transactions were adjudged to be in the public interest. Railroad Consolidation Procedures -- Trackage Rights Exemption, 1 I.C.C.2d 270, 275-278 (1985) ("Trackage Rights Exemption"). BAR contends that, because no "plenary" public interest analysis is undertaken under the class exemption going into trackage rights arrangements, no public interest analysis is required on the way out -- yet we read and re-read Milford-Bennington for any semblance of such a notion. See also, e.g., Trackage Rights Exemption, 1 I.C.C.2d at 277 ("[The class] exemption only frees carriers from the requirement of prior approval of a transaction; all other aspects of tracking [sic] rights operations remain subject to Commission jurisdiction.").

Of course, the public interest questions raised by BAR's desire to oust CN from the Madawaska Line are manifest. Fraser currently has access to direct rail service from two rail carriers: BAR and CN. That competitive access will, if anything, become even more important as the Trustee pursues sale of the BAR: CN believes that a purchaser of BAR may seek to economically close or restrict the St. Leonard gateway with CN in order to force Fraser's substantial traffic from the current CN routing to a southerly routing on BAR and then west on the Canadian American Railroad Company ("CDAC"). Carson V.S. at 6.⁹ Nothing in the Trackage Rights Agreement or the Easement Deed in any way precludes BAR from handling Fraser's traffic on such a routing, either today or in the future; it would simply have to compete with CN to do so. BAR's effort to remove CN from the Madawaska Line would eliminate that

⁹ The BAR Trustee has indicated in several recent newspaper articles that he desires to sell BAR as part of a package deal for the entire existing Bangor & Aroostook System, including the non-bankrupt CDAC.

competition, deprive Fraser of its existing access to rail service from CN, and render Fraser's mill at Madawaska a 2-to-1 point.¹⁰

These are precisely the kinds of issues that the Board should and would address in an adverse discontinuance proceeding brought by BAR under 49 U.S.C. § 10903. In such cases, "the primary question to be resolved is whether there exists sufficient public interest in operation of the subject line to merit continued oversight by the Board." Grand Trunk W. R. -- Adverse Discon. of Trackage Rights, 3 S.T.B. 124, 127 (1998). "[T]he function of our exclusive and plenary jurisdiction over a[n adverse] trackage rights discontinuance is to provide the public with a degree of protection against the unnecessary discontinuance, cessation, interruption, or obstruction of available rail service." The Kansas City Southern Railway Company -- Adverse Discontinuance Application -- A Line of Arkansas and Missouri Railroad Company, Docket No. AB-103 (Sub-No. 14) (STB served March 26, 1999) at 7 (citing Modern Handcraft, Inc. -- Abandonment, 363 I.C.C. 969, 972 (1981)). Given the Board's statutory duty to preserve and promote continued rail service, adverse abandonment or discontinuance applications are generally denied "if there was a potential for continued operations and the carrier [against which adverse authority is sought] had taken reasonable steps to attract traffic." Chelsea Property Owners -- Aban. -- Consol R. Corp., 8 I.C.C.2d 773, 779 (1992), aff'd sub nom. Consolidated Rail Corp. v. ICC, 29 F.3d 706 (D.C. Cir. 1994); Western Stock Show Assn. -- Aban. Exemption -- In Denver, CO, 1 S.T.B. 113, 131 (1996).

BAR, of course, may legitimately doubt whether it can meet these standards in an adverse discontinuance case against CN. But that is no basis for seeking to avoid the statutory

¹⁰ BAR summarily asserts that revocation will not harm Fraser, BAR Petition at 7, but addresses none of these issues. BAR's argument in this regard would at least appear more credible if it had served its petition to reopen and revoke on Fraser.

and regulatory obligations that apply to any rail carrier seeking to oust a trackage rights tenant. BAR has a remedy here -- one which CN agrees it has every right to invoke. The Board should deny BAR's petition to reopen and revoke and direct BAR to file a formal application for adverse discontinuance and abandonment authority under 49 U.S.C. § 10903.

B. The CN Trackage Rights and Easement Transactions Have Been Consummated

While not always clearly stated, the BAR Petition seems to rely in large part on a notion that CNR has not consummated its acquisition of trackage rights over the Madawaska Line, and/or that Waterloo has not consummated its acquisition of the easement on that line. This notion, in turn, is predicated solely on the absence to date of any actual CN train operations on the Madawaska Line. Once again, BAR's position simply ignores the governing legal principles and the facts of this case.

Whether a transaction has been "consummated" is generally a question of the rail carrier's intent. E.g., Black v. ICC, 762 F.2d 106, 112-113 (D.C. Cir. 1985). While the consummation question usually arises in the abandonment context, the ICC specifically considered the consummation of trackage rights in Brotherhood of Locomotive Engineers v. C&NW Transp. Co., 366 I.C.C. 857 (1983) ("CNW Trackage Rights"). In that case, a predecessor of the Chicago & North Western Transportation Company ("CNW") had obtained trackage rights over a line of the Indiana Harbor Belt Railroad Company ("IHB") in 1962. While CNW filed a letter of consummation for the transaction with the ICC in 1963 (in accordance with the one-year consummation requirement then imposed on trackage rights authorizations), CNW did not in fact commence any operations on the IHB line until 1977. In 1983, the ICC rejected arguments by rail labor that the trackage rights transaction had not been (and could not have been) consummated in 1963:

We reject BLE's contention that C&NW operations were unlawful because they were not commenced within 1 year of the authorization in F.D. No. 21532. The decision in F.D. No. 21532 required C&NW only to consummate the trackage rights agreement within 1 year from the effective date of the Commission's authorization. The decision did not require operations to commence within this period. Indeed, the decision recognized that C&NW would not begin operations until a substantial period of time after the transaction was approved. The parties also specified in the trackage rights agreement that operations under the agreement would be delayed.

CNW Trackage Rights, 366 I.C.C. at 859.

More recently, the Board has explained that:

Our regulations at 49 CFR 1180.4(g) require only that the carrier notify the Board of the expected date of consummation of the "transaction." We do not view this provision as requiring that we know precisely when the operational changes under a trackage rights transaction will commence or prohibiting use of contingencies or triggering events that would delay actual operations under the trackage rights until a future date.

The Kansas City Southern Railway Company -- Trackage Rights Exemption -- Gateway Western Railway Company and Gateway Eastern Railway Company, Finance Docket No. 33780 (STB served September 16, 1999) at 2, reconsideration denied (STB served June 5, 2000) at 2 ("Carriers need not specify when the operational changes under a binding trackage rights agreement will commence.").

Here, it was clearly the intent of both parties -- CN and BAR -- that CN's trackage rights over the Madawaska Line were effective and consummated on March 15, 2001, regardless of when CN might conduct operations over the line. The Trackage Rights Agreement was inextricably linked to the \$5 million payment to BAR, the Haulage Agreement and the Easement Deed. Carson V.S. at 5. The Haulage Agreement specifically made payment of the \$5 million contingent on completion of each of the remaining transactions, and attached the Trackage

Rights Agreement. Haulage Agreement (BAR Petition, Attachment A, Exhibit A) at 2, § 2. There is no dispute that the Haulage Agreement was executed and implemented on March 15, 2001, and that BAR has been providing haulage services pursuant to its terms since that time. We do not understand by what rationale the Trackage Rights Agreement -- which was attached to the Haulage Agreement, which was similarly signed and effective on March 15, 2001,¹¹ and the execution and regulatory approval of which was a specific condition of the Haulage Agreement -- was not completed and "consummated" at the same time.

That CN might not immediately conduct operations pursuant to its trackage rights -- even though those rights would vest immediately -- was also in the specific contemplation of the parties. In its February 6, 2001 letter to CN, BAR confirmed its understanding that "CN will also receive trackage rights to [Madawaska] and, although their exercise is at CN's discretion, their purpose is to ensure that CN can access this traffic under all circumstances in order to retain a fair return." Carson V.S., Attachment B at 1. The Term Sheet executed by the parties provided that BAR would "grant immediate trackage rights to CN for movements over BAR lines between St. Leonard and Madawaska, ME, such rights to be used by CN at its discretion." Carson V.S., Attachment C at 2 (emphasis added).¹²

Perhaps most revealing in this regard is the following passage from BAR's February 6, 2001 letter to CN, under the heading "Trackage rights":

¹¹ Trackage Rights Agreement (BAR Petition, Attachment A, Exhibit B) at 14, § 19(a) ("This Agreement shall be effective the date first written above [March 15, 2001] and shall remain in full force for 99 years."). See also CN October 26, 2001 letter filing (attaching executed version of Trackage Rights Agreement showing execution date of March 15, 2001).

¹² The general subject of the Term Sheet was CN's "proposal to provide financial assistance to Iron Road Railways in exchange of rate consideration and trackage rights." Carson V.S., Attachment C at 1.

After conferring with legal counsel, we believe that the trackage rights can be made effective after seven days by filing a Notice of Exemption with the STB. We would like to discuss what would be the most mutually advantageous manner to attain requisite regulatory approvals without delaying the initial payment to the B&A.

Carson V.S., Attachment B at 2. Clearly, BAR understood that CN's trackage rights would have to be in place and enforceable before BAR could receive the \$5 million from CN, and was concerned about how quickly that could happen. On March 15, 2001 -- the day after CN's trackage rights exemption became effective -- the parties did in fact consummate the contemplated transaction: BAR received its \$5 million, and (as relevant here) CN received its trackage rights. As the agency precedent discussed above demonstrates, rail operations were not necessary for CN's trackage rights transaction to be consummated; here, it was the plain intent of the parties to consummate that transaction on March 15, 2001, as part of the integrated series of transactions completed on that day.

We note that, given the current uncertainty surrounding the Haulage Agreement,¹³ CN has in fact sought during the past month to operate trains over BAR's Madawaska Line to directly serve Fraser. However, BAR has expressly refused to admit CN's trains onto the Madawaska Line. Carson V.S. at 6-7.

BAR's position is, if anything, even more difficult with respect to Waterloo's acquisition of an easement on the Madawaska Line. That was a property interest that was conveyed to Waterloo on March 15, 2001. Consents for that conveyance were obtained from BAR's existing, overseas lienholders, and the easement was recorded with the local register of

¹³ Unlike the Trackage Rights Agreement and the Easement Deed, it is not disputed that the Bankruptcy Court could authorize rejection of the Haulage Agreement and the Trustee could cease providing haulage services for CN without any action by the STB.

deeds. Besides the date of conveyance, what other "consummation" date would BAR propose to use for a rail carrier's acquisition of a rail line or an interest therein?¹⁴ Both the easement transaction and the trackage rights transaction were consummated on March 15, 2001, and BAR's effort to paint its revocation petition as addressing some kind of "pending" transaction must fail.

C. BAR Has Not Addressed, Let Alone Satisfied, the Criteria for Revocation of CN's Exemptions

As explained above, the Board need not reach the "merits" of BAR's revocation request, since it is a plainly inappropriate vehicle to obtain the adverse discontinuance of CN's rights that BAR seeks. Nonetheless, BAR's revocation arguments are fatally deficient as well.

BAR seeks reopening on the basis of "changed circumstances," and identifies two supposedly qualifying events: the bankruptcy of BAR, and the Trustee's motion in Bankruptcy Court to reject the Agreements. BAR Petition at 5. Yet the potential failure of the BAR was specifically contemplated by the parties, and indeed accounts for the fairly unusual structure of the CN/BAR transaction in which CNR's trackage rights are backed up by Waterloo's easement. Carson V.S. at 3. Far from being a "changed" circumstance, the BAR bankruptcy is virtually an "expected" circumstance, and one which the transaction documents between the parties consciously sought to address. The Trustee obviously dislikes those documents, which were crafted in part to ensure that they would survive a sale or other conveyance of BAR's assets. But the fact that a planned-for event has now occurred cannot rationally be deemed a "changed circumstance" under 49 C.F.R. § 1115.4.

¹⁴ As BAR briefly alludes to, BAR Petition at 7, its real argument is to the effect that the Easement Deed conveyed no cognizable interests under state law. That is obviously not an issue that the Board will take up, and its relevance to the petition to reopen and revoke is not immediately apparent.

The motion to reject, on the other hand, is a circumstance brought about entirely by the Trustee himself. A finding that a party can create its own changed circumstances and then seek self-serving reopening of other parties' transactions on the basis thereof would obviously present substantial administrative difficulties for the Board. The Trustee's action here is no different than a non-debtor railroad landlord terminating a trackage rights agreement and then seeking revocation of the tenant's trackage rights exemption on the basis of that "changed" circumstance. Obviously, Tex-Mex, Milford-Bennington and the plethora of other trackage rights cases in between do not allow for such a result.

If BAR's arguments for reopening are unpersuasive, its arguments for revocation are simply non-existent. In seeking to revoke a trackage rights exemption pursuant to 49 U.S.C. § 10502(d), the relevant analysis is whether the trackage rights transaction is anti-competitive. Minnesota Comm. Ry., Inc. -- Trackage Exempt. -- BN R. Co., 8 I.C.C.2d 31, 35-37 (1991) ("Minnesota Commercial"). The party seeking revocation bears the burden of proof on this issue. Id. BAR has presented no evidence of any kind on the alleged anti-competitive effects of CNR's trackage rights. Indeed, the evidence is just the opposite: that CN's trackage rights provide Fraser with direct access to two rail carriers and increases the competition for Fraser's traffic.

A party could also file a petition to revoke on the basis that an exempt transaction was a "sham" or otherwise not *bona fide*. Minnesota Commercial, 8 I.C.C.2d at 37-38. BAR makes no such claim here, nor could it. The notices of exemption filed by CNR and Waterloo accurately described the proposed transactions with BAR, and there are no allegations -- by BAR or anyone else -- that the notices were materially misleading in any manner. BAR does claim that, if the Bankruptcy Court rejects the Trackage Rights Agreement, the trackage rights between

CNR and BAR will no longer be "consensual" and thus the class exemption invoked by CNR is inappropriate. BAR Petition at 6. Yet the trackage rights indisputably were "consensual" at the time that CNR filed its notice of exemption and at the time that CNR consummated the transaction. Once again, BAR's argument that a trackage rights exemption became revocable once the underlying trackage rights agreement is terminated simply writes Tex-Mex and its 55 years of progeny out of existence.

Finally, BAR cites to several exemption revocation cases where significant questions were raised regarding the scope, purpose and good-faith motivation of the proposed transaction.¹⁵ Simply citing those cases, however, cannot extend their taint to the transactions here. The BAR Trustee does not question the legitimate, transparent and straightforward nature of the transactions which were the subjects of the CN notices of exemption and which the parties consummated on March 15, 2001. The Trustee would just rather not be bound by those arrangements today. That is the Trustee's right, but it does not render inappropriate the exemptions previously obtained by CNR and Waterloo in these proceedings.

EXPEDITED CONSIDERATION

CN joins fully in BAR's request that the Board consider this matter in as expeditious a manner as possible, and report its findings to the Bankruptcy Court. We are concerned about what we view as the Trustee's misleading arguments to the Court about the STB's role in this matter, particularly regarding the need for adverse abandonment or discontinuance authority from the STB before the Court could oust CN from the Madawaska

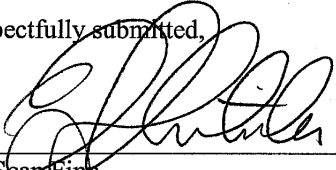
¹⁵ BAR Petition at 5-6 (citing Riverview Trenton Railroad Company -- Petition for Exemption From 49 U.S.C. 10901 to Acquire and Operate a Rail Line in Wayne County, MI Finance Docket No. 34040 (STB served February 14, 2002) and Jefferson Terminal Railroad Company -- Acquisition and Operation Exemption -- Crown Enterprises, Inc., Finance Docket No. 33950 (STB served March 19, 2001)).

Line. As the Board well knows, where relief sought in a judicial proceeding would entail adverse abandonment of a rail carrier's lines or operations, the court should stay its hand pending STB action on the adverse abandonment question. E.g., Tex-Mex; Kansas City Area Transp. Auth. v. Ashley, 555 S.W.2d 9 (Mo. 1977), cert. denied, 434 U.S. 1066 (1978); Chicago & N.W. Ry. Co. v. Chicago, M., St. P. & P. R. Co., 502 F.2d 193 (7th Cir. 1974). In accordance with this precedent, CN has sought a stay of proceedings before the Bankruptcy Court on the Trustee's motion to reject the Trackage Rights Agreement and the Easement Deed pending such adverse abandonment/discontinuance proceedings. See CN Stay Memorandum (Tab 3 hereto).

However, until such time as the Board rules that BAR's petition to reopen and revoke is an inappropriate means to oust CN from the Madawaska Line and that a formal adverse application under 49 U.S.C. § 10903 is necessary, there remains a risk of confusion and error at the Bankruptcy Court. CN thus encourages the Board to rule on the BAR Petition as soon as practicable.

WHEREFORE, CNR and Waterloo respectfully request that the Board deny BAR's petition to reopen and revoke exemptions, without prejudice to BAR's filing an appropriate adverse abandonment and discontinuance application pursuant to 49 U.S.C. § 10903.

Respectfully submitted,

By: 

Searched

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

Dated: May 9, 2002

**VERIFIED STATEMENT
OF
CLIFFORD L. CARSON**

My name is Clifford L. Carson. I am Vice President – Commercial Development for the Eastern Canada Division of Canadian National Railway Company ("CNR"). I am responsible for CNR's sales activities, and the development of product strategies to increase CNR's business, in Eastern Canada. I have been employed by CNR since 1964 and have held my present position since May, 1999. I was personally involved in the negotiations between CNR and the Bangor & Aroostook Railroad ("BAR") and its parent Iron Road Railways, Inc. ("Iron Road") which led to the current haulage arrangement between CNR and BAR, as well as the trackage rights for CNR and the freight operating easement for Waterloo Railway, a CNR affiliate ("Waterloo"), over a line of the BAR and a BAR affiliate between St. Leonard, New Brunswick and Madawaska, Maine ("the Madawaska Line").

To fully comprehend the importance of the rights at issue in this proceeding -- rights which the Trustee of the BAR now seeks to have the Board take away -- it is important to understand how and why these rights came into existence. For many years, CNR has interchanged traffic with BAR at St. Leonard, New Brunswick. St. Leonard is an intermediate terminal on CNR's main line between Montreal, Quebec and Halifax, Nova Scotia and is located across the St. John's River from Van Buren, Maine, which is served by a BAR line at the extreme northern end of BAR's rail system. BAR reaches St. Leonard and the interchange with CNR via the international rail bridge between Van Buren and St. Leonard owned by the Van Buren Bridge Company ("VBBC"), an affiliate of BAR. See map attached hereto as Attachment A.

The vast majority of the traffic interchanged between BAR and CNR at St. Leonard is traffic of Fraser Papers, Inc. ("Fraser"), the operator of a large paper mill located at

Madawaska, Maine, approximately 25 miles northwest of Van Buren. Fraser's Madawaska mill generates substantial rail traffic, including inbound shipments of raw materials such as clay and specialty chemicals and outbound shipments of paper products. BAR and CNR interchange approximately 3,900 carloads of Fraser traffic annually at St. Leonard.

Throughout the latter half of 2000, it was widely known in the rail industry that the Bangor & Aroostook rail system, of which BAR is a part, was facing serious financial difficulty. Some observers predicted that a bankruptcy or shutdown of operations was imminent. Fraser advised CNR that a loss of rail service to Fraser's Madawaska mill would likely result in a shutdown of the mill and cessation of all inbound and outbound rail traffic. Fraser also advised us that due to the interdependency of its Madawaska mill and a sister mill at nearby Edmundston, New Brunswick (on the CNR), a shutdown of the Madawaska mill would likely result in a shutdown of the Edmundston mill as well. Faced with these possibilities, CNR began discussing internally what could be done to assure continued rail service to Fraser and to protect Fraser's access to CNR over the long term.

In January, 2001, representatives of Iron Road approached CNR looking to raise up to \$25 million with which to continue operations. We were told that the Bangor & Aroostook rail system was in dire need of cash and that time was of the essence. The ensuing negotiations between CNR and Iron Road/BAR focused on CNR providing a substantial cash infusion in exchange for a haulage arrangement and CNR trackage rights over the Madawaska Line to serve Fraser.

On February 6, 2001, Robert Schmidt, President and Chief Executive Officer of Iron Road and BAR, wrote to Keith Heller, Senior Vice President of CNR's Eastern Canada Division regarding CNR's proposal to BAR:

We are favorably inclined toward this proposal Our understanding of the immediate proposal is that you are offering an arrangement whereby we would grant CN "junction settlement" haulage fees to three specific stations at rates which are less than our current divisions of revenue. A part of this additional revenue (or savings) received by CN will be in essence prepaid to B&A after allowing for CN's cost of capital and perceived risk. CN will provide the cars and be responsible for billing, settlement, loss and damage, and all traditional responsibilities of the tariff carrier, and will pay B&A on a junction settlement basis each month. CN will also receive trackage rights to these destinations and, although their exercise is at CN's discretion, their purpose is to ensure that CN can access this traffic under all circumstances in order to retain a fair return. This agreement would be for five years and CN will pay B&A US\$5 million when the STB exemption is effective.

A copy of Mr. Schmidt's letter is attached as Attachment B. In his letter, Mr. Schmidt told Mr. Heller that BAR's legal counsel had advised BAR that CNR's trackage rights could be made effective after seven days by filing a Notice of Exemption with the STB and that BAR "would like to discuss what would be the most mutually advantageous manner to attain requisite regulatory approvals without delaying the initial payment to the B&A."

In light of BAR's precarious financial position and the very real possibilities, among others, that BAR would enter bankruptcy, that BAR could sell the Madawaska Line, or that BAR would otherwise not perform under a haulage arrangement, CNR was concerned that trackage rights alone over the Madawaska Line might not adequately protect CNR's access to Fraser. Accordingly, CNR proposed, and BAR agreed, that as part of the transaction BAR would convey a non-exclusive freight operating easement over the Madawaska Line to CNR's affiliate, the Waterloo, to further secure CNR's access to Fraser's plant.

On February 8, 2001, CNR, BAR and Iron Road executed a letter agreement setting forth the material terms of their agreement (the "Term Sheet"). A copy of the February 8

Term Sheet is attached hereto as Attachment C. In addition to setting forth the terms of the haulage arrangement, the Term Sheet provided:

Iron Road/BAR to grant immediate trackage rights to CN for movements over BAR lines between St. Leonard and Madawaska, ME, such rights to be used by CN at its discretion. Iron Road/BAR shall also grant CN an easement subject to consent of lienholders on the property underlying the same track, so that CN's right to reach Fraser-Madawaska would also be protected in an asset sale of the company. This easement would contain similar terms and conditions as the trackage rights agreement, in terms of compensation to Iron Road, liability, etc.

The Term Sheet also specified that:

CN will file a Notice of Exemption with the STB, and will pay to Iron Road a lump sum of \$5 million (U.S. funds) when the STB exemption is obtained.

Approximately one month later, the agreed upon provisions of the Term Sheet were memorialized in three documents: (1) the Junction Settlement Agreement (also known as the "Haulage Agreement") among BAR, its affiliate VBBC and CNR memorializing BAR's agreement to haul CNR cars between St. Leonard and Fraser's mill at Madawaska; (2) the Trackage Rights Agreement among BAR, VBBC and CNR memorializing BAR's and VBBC's agreement to grant trackage rights to CNR over the Madawaska Line for the sole purpose of serving Fraser's mill at Madawaska; and (3) the Easement Deed among BAR, VBBC and CNR's affiliate the Waterloo memorializing BAR's and VBBC's agreement to grant Waterloo a freight operating easement over the Madawaska Line. CNR chose to use an affiliate, the Waterloo, to acquire the easement so that the acquisition would qualify for a class exemption under the STB's regulations, and thereby accommodate Iron Road's request to expedite completion of the transaction and CNR's payment of the \$5 million to Iron Road/BAR. I understand that a copy of each of these documents is attached to BAR's pending petition at the STB.

Throughout the several months of negotiations among the parties, all four components (the cash payment, the haulage agreement, the trackage rights and the easement) were negotiated together as part of a single integrated transaction by which CNR obtained access to Fraser at Madawaska and Iron Road/BAR received a significant cash infusion. The documentation between the parties confirms that the parties clearly understood this. The Haulage Agreement, for example, provides:

In consideration of services to be provided under this agreement, CN will pay to Iron Road Railways, Inc. as agent for the Bangor & Aroostook Railway, an amount of five million dollars (\$5,000,000) in U.S. funds. This payment is contingent upon:

- The execution of this junction settlement agreement;
- The execution of the St. Leonard to Madawaska trackage rights agreement (attached);
- The execution of the grant of an easement on the property underlying the St. Leonard to Madawaska trackage, and the consent and subordination of the first lien-holder;
- The approval by the Surface Transportation Board of the Notice of Exemption for both the trackage rights and the easement.

I understand that appropriate STB authority for CNR's trackage rights and Waterloo's easement became effective on March 14, 2001. The next day, March 15, 2001, BAR, VBBC and CNR consummated each of the four components of the transaction. CNR wired \$5,000,000 in U.S. funds to Iron Road (as agent for BAR), and all three documents were executed, dated and made effective as of that date. BAR began providing haulage service for CNR's account to and from Fraser's mill at Madawaska. The term of the Trackage Rights Agreement began running. Appropriate consents to Waterloo's Easement Deed were obtained from BAR's overseas lienholders and the easement was subsequently recorded by Waterloo with the Aroostook County, Maine Register of Deeds.

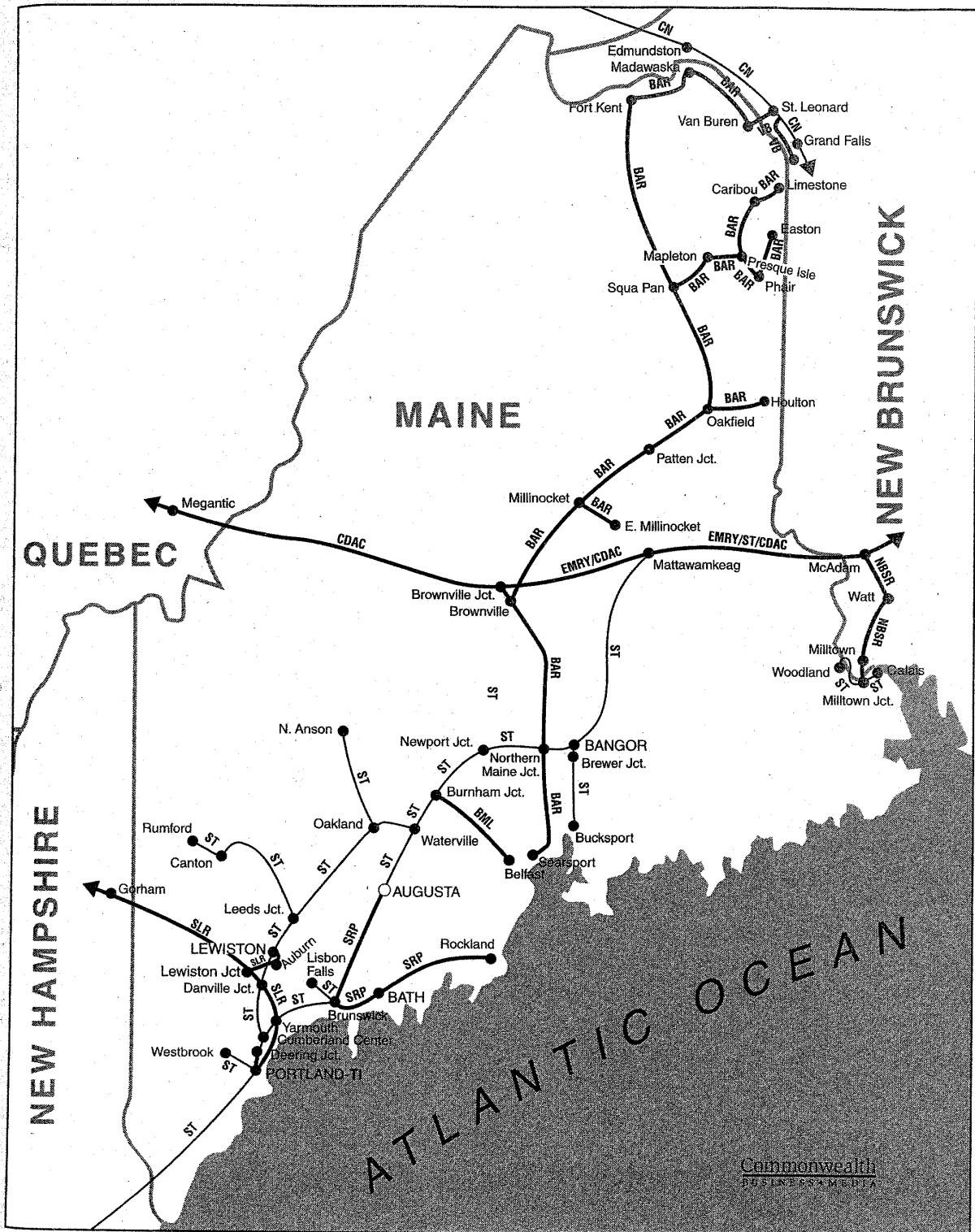
As a result of this transaction, Fraser obtained competitive rail access for its Madawaska mill, not by regulatory prescription, but by an arms-length negotiated private agreement between the railroads involved. The trackage rights and easement assured direct CNR access to the mill and long-term Fraser access to CNR regardless of the fate or disposition of the BAR. Fraser was no longer wholly dependent on BAR for rail service and Fraser and CNR were no longer vulnerable to any potential future strategy by BAR (or a successor of BAR) to economically close or restrict the St. Leonard gateway. Moreover, CNR's access to Fraser did not come at the expense of BAR access. Nothing in the transaction with CNR in any way restricts BAR's access to Fraser's mill at Madawaska or inhibits BAR from competing for Fraser's traffic for movement over other BAR routes (such as with its affiliate the Canadian American Railroad via Brownville Junction, Maine or with Springfield Terminal via Northern Maine Junction, Maine). Nothing precludes BAR from competing for Fraser's traffic via these alternate routes when the current transportation contract between CNR and Fraser expires in 2004.

Due to the uncertainties created by the filing of the Trustee's motion with the Bankruptcy Court to reject the Haulage Agreement, CNR in March, 2002 began planning for the operation of CNR trains to Fraser's Madawaska mill pursuant to the Trackage Rights Agreement. By letter dated April 29, 2002, CNR informed BAR of its intent to begin operating trains over the Madawaska Line to serve Fraser. See letter of Alain Thauvette to Frederic W. Yocum, President of BAR, attached hereto as Attachment D. However, later that day, Mr. Yocum orally advised CNR that BAR would get back to CNR as to whether BAR would permit such operations. See letter of Alain Thauvette to Frederic W. Yocum confirming BAR's response, attached hereto as Attachment E. On May 8, 2002, BAR advised CNR that it would not allow

CNR trackage rights operations over the Madawaska Line. See letter of Frederic W. Yocum to Alain Thauvette, attached hereto as Attachment F.

CNR's trackage rights and Waterloo's easement over BAR's Madawaska Line provide a significant competitive rail option to Fraser and assure that Fraser will have continued access to CNR's routes and service over the long term, without diminishing whatsoever Fraser's continued access to BAR and the alternative routes available via BAR and its other connections. The forced discontinuance of CNR's and Waterloo's rights as sought by the Trustee would remove this competitive option from Fraser and would make Fraser and CNR vulnerable to service uncertainties and potential changes in pricing strategy or routing policy by BAR or a successor. That a prospective purchaser of BAR's assets would pay more for those assets if the competition from CNR were eliminated is hardly surprising. CNR legitimately negotiated these rights for substantial compensation in a transaction that provided significant benefits to BAR, Fraser and CNR. It would indeed be ironic if the benefits of competitive access achieved through private agreement were to be undone by regulatory order as BAR has requested.

CARSON V.S.
ATTACHMENT A



**IRON ROAD
RAILWAYS**
INCORPORATED

February 6, 2001

Mr. Keith Heller
Senior Vice President
Eastern Region
Canadian National
895 de La Gauchetiere Street West
Montreal, Quebec H3B 2M9

Dear Mr. Heller,

Thank you for your letter of February 2, outlining a proposed commercial and operating relationship with three of our operating railroads, The Bangor & Aroostook Railroad, (BAR), The Canadian American Railroad, (CDA), and the Quebec Southern Railway, (QSR). As you know, these are the three principal operating subsidiaries of our Bangor & Aroostook System (B&A).

We are favorably inclined toward this proposal. As stated in the meeting with Cliff Carson, Francois Hebert, Dale Williams, and Cristina Circelli, we believe that such an alliance will be beneficial for our mutual customers through offering them better transportation alternatives for reduced costs, while allowing both of us to enjoy market share growth and synergies.

Our understanding of the immediate proposal is that you are offering an arrangement whereby we would grant CN "junction settlement" haulage fees to three specific stations at rates which are less than our current divisions of revenue. A part of this additional revenue (or savings) received by CN will be in essence prepaid to B&A after allowing for CN's cost of capital and perceived risk. CN will provide the cars and be responsible for billing, settlement, loss and damage, and all traditional responsibilities of the tariff carrier, and will pay B&A on a junction settlement basis each month. CN will also receive trackage rights to these destinations and, although their exercise is at CN's discretion, their purpose is to ensure that CN can access this traffic under all circumstances in order to retain a fair return. This agreement would be for five years and CN will pay B&A US\$5 million when the STB exemption is effective.

Mr. Keith Heller
February 6, 2001
Page 2

Based on detailed analysis of your proposal, we have identified a limited number of issues which require further development as follow:

Economic Points:

- Analysis of current traffic at Madawaska reveals that considerably more traffic has changed to CN's account than was evident to us during initial discussions. As this derives from very recent significant diversions in your favor, we would like to be sure that it is taken into account in both our analysis and yours.
- We have applied the proposed rates to the above traffic which originates and terminates from these stations. Based on these calculations the annual gross revenue reduction to B&A (cost savings to CN) would be approximately \$2.5 million per year.
- Our analysis has determined that the Internal Rate of Return for CN from this arrangement is much higher than we had anticipated, particularly in view of the trackage rights securing access to the traffic. We believe this is due to the fact that the carload base which we are using is much greater than that which was initially provided to CN, and consequently, our respective rate of return analyses may not be representative of the current traffic. We have attached our analysis, which we would like to discuss further.
- As a possible alternative, we would also like to table the suggestion that we agree on a fair rate of return to CN for the \$5 million paid to B&A. We could then agree on the specific average value received per move and monitor the number of carloads handled through this haulage agreement. When the \$5 million plus the appropriate return was satisfied, the agreement would terminate – whether it takes more than five years or less. Although we believe this would be an equitable way to ensure CN's return, there may be other ways.

Trackage rights:

- After conferring with legal counsel, we believe that the trackage rights can be made effective after seven days by filing a Notice of Exemption with the STB. We would like to discuss what would be the most mutually advantageous manner to attain requisite regulatory approvals without delaying the initial payment to the B&A.
- In order to ensure survivability, we have been informed by counsel that it may be necessary that the per car minimum (which would be invoked St. Leonard to Madawaska) be clearly compensatory. We should discuss whether the \$35 per car charge would meet that test.

Mr. Keith Heller
February 6, 2001
Page 3

- The route for the Madawaska trackage rights is acceptable as proposed. With respect to Brookport and Magog we would be prepared to give our consent to the rights requested subject, however, to the continued existence of the Quebec Southern Railway lease and its restrictions. (This lease/purchase is amortizing over the next estimated 36 months or may be settled by lump sum payment at any time).
- Finally, we assume that a trackage rights agreement will have traditional industry standard language which calls for capital expenditures costs to be divided on a wheelage basis, and which addresses liability, loss and damage, and labor issues which may arise.

Again, I would like to reiterate that we are appreciative of your proposal. We are favorably inclined with the concept and would be prepared to consider expanding its scope. This letter has attempted to clarify certain points and we look forward to discussing this with you at your earliest convenience.

Sincerely,



Robert T. Schmidt
President & CEO



Canadian National

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Senior Vice President
Eastern Canada Division

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TRANSMISSION BY FAX

February 8, 2001

Mr. Robert T. Schmidt
President and CEO
Iron Road Railways Inc.
44 Canal Center Plaza, Suite 303
Alexandria, VA 22314

Dear Mr. Schmidt,

This letter is in response to yours of February 6, regarding CN's February 2 proposal to provide financial assistance to Iron Road Railways in exchange of rate consideration and trackage rights.

Your February 6 letter states that you have analysed CN's proposal, in light of recent traffic diversions in CN's favour, and have concluded that the revenue impact of CN's offer is greater than you had originally assumed. You have also advised that certain contractual restrictions contained in the Quebec Southern Railway lease would prevent Iron Road from immediately granting CN trackage rights over these lines.

In light of these new developments, CN is prepared to amend its offer of February 2 as follows:

- For traffic that is routed via CN from and to Madawaska, ME, CN is prepared to offer Iron Road / BAR a "junction settlement" rate of \$500 (U.S. funds) per loaded car for movements between Madawaska, ME and St. Leonard, NB. CN will assume responsibility for car ownership and per diem, and for the establishment of rates, routes and divisions. *This agreement would have a term of 5 years, renewable by mutual consent at the end of this term.*
- CN is prepared to pay to Iron Road a trackage rights fee of 35 cents per car mile, but not less than \$50 (U.S. funds) per round trip (loaded and empty) for local trackage rights between Madawaska, ME and St. Leonard, NB, to serve Fraser Paper. This new minimum is compensatory. CN also accepts your proposal that this trackage rights agreement should be consistent with industry practice in such matters as (e.g.) liability, labour protection, loss and damage, and the pro-rata sharing of the cost of future capital investment.
- CN is prepared to drop its request for enhanced junction settlement rates and associated trackage rights for movements to Brookport and Magog.
- All other terms of my February 2 proposal remain unchanged, ie:
 - Junction settlement rates to be in effect for 5 years; rates to be escalated annually by a percentage equal to the annual percent change in the Rail Cost Adjustment Factor (RCAF-U);

Mr. Robert T. Schmidt
Page 2
February 8, 2001

- Iron Road / BAR to grant immediate trackage rights to CN for movements over BAR lines between St. Leonard and Madawaska, ME, such rights to be used by CN at its discretion. Iron Road/BAR shall also grant CN an easement on the property underlying the same track, so that CN's right to reach Fraser-Madawaska would also be protected in an asset sale of the company. This easement would contain similar terms and conditions as the trackage rights agreement, in terms of compensation to Iron Road, liability, etc.

subject to consent of iron holders

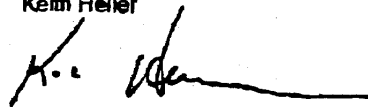
- CN will file a Notice of Exemption with the STB, and will pay to Iron Road a lump sum of \$5 million (U.S. funds) when the STB exemption is obtained. The trackage rights agreement would be perpetual, and thus would survive beyond the five-year term of the junction settlement rate agreement, subject to adjustment of its economic terms prior to or upon expiration of the junction settlement rate agreement.

We believe that this is a fair and reasonable offer. While we are prepared to provide any clarification or greater detail that you may require, you should be aware that CN is not prepared to grant any further concessions to Iron Road in this matter. The preceding offer is subject to CN and Iron Road reaching a full agreement. If you concur to these terms, we would be prepared to draft such an agreement in short order.

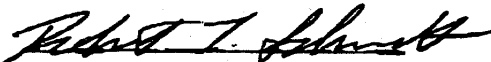
I look forward to receiving your earliest response.

Yours sincerely,

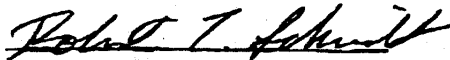
Keith Heller



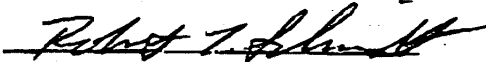
I concur,



Mr. Robert T. Schmidt
President and CEO,
Iron Road Railways Inc.



Mr. Robert T. Schmidt
President and CEO,
Bangor & Aroostook Railway



Mr. Robert T. Schmidt
President and CEO,
Quebec Southern Railway



**CARSON V.S.
ATTACHMENT D**

Canadien National
Division de l'Est du Canada

Canadian National
Eastern Canada Division

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Directeur général principal

Senior General Manager

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VIA FACSIMILE AND OVERNIGHT COURIER

April 29, 2002

Mr. Frédéric W. Yocum, Jr.
President
Bangor & Aroostook Railroad Company
RR2, Box 45 - North Maine Junction
Bangor, ME 04401-9602

Re: Trackage Rights Agreement ("Trackage Rights Agreement") dated March 15, 2001
among Bangor & Aroostook Railway Company ("BAR"), Van Buren Bridge Company
("VBB") and Canadian National Railway Company ("CN")

Dear Mr. Yocum:

On April 30, 2002, CN intends to operate a train pursuant to the Trackage Rights Agreement from MP 0.00 at Madawaska, ME to MP 22.72 Canadian Junction Madawaska Subdivision and MP 0.0 Canadian Junction (over the line owned by the Van Buren Bridge Company and operated by BAR) to the Point of convergence with CN (MP 0.70 at St. Leonard, N.B.) ME to receive and deliver local traffic from and to the Fraser/Nexfor facility in Madawaska, ME. Pursuant to Section 11(c) of the Trackage Rights Agreement, CN requests that BAR furnish a pilot for the movement, at CN's expense. Please advise your dispatchers accordingly to facilitate the service to the Fraser facility.

Sincerely,

Alain Thauvette
Senior General Manager

Cc: Austin Durant - Fraser/Nexfor
Cliff Carson
Normand Gagnon



Canadien National
Division de l'Est du Canada

Alain Thauvette
Directeur général principal

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VIA FACSIMILE AND OVERNIGHT COURIER

April 30, 2002

Mr. Frederic W. Yocum, Jr.
President
Bangor & Aroostook Railroad Company
RR2, Box 45 - North Maine Junction
Bangor, ME 04401-9602

Re: Trackage Rights Agreement ("Trackage Rights Agreement") dated March 15, 2001 among Bangor & Aroostook Railway Company ("BAR"), Van Buren Bridge Company ("VBB") and Canadian National Railway Company ("CN")

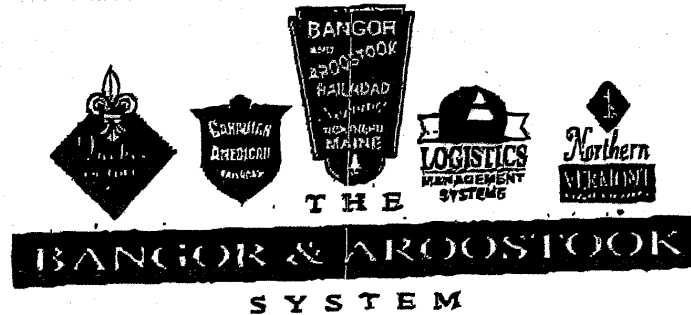
Dear Mr. Yocum:

I understand that you received my letter of April 29, 2002 with CN's request to operate a train pursuant to the Trackage Rights Agreement. You have indicated to superintendent, Normand Gagnon, that BAR does not intend to permit CN to exercise its rights under the Trackage Rights Agreement today, but will consider the request and advise us accordingly. If we do not receive a response from BAR before the close of business on May 2, 2002, CN will assume that BAR will not honor the Trackage Rights Agreement with CN.

Sincerely,

Alain Thauvette
Senior General Manager

Cc: Cliff Carson
Normand Gagnon



VIA FACSIMILE AND MAIL

May 8, 2002

Mr. Alain Thauvette
Senior General Manager
Canadian National
895 de La Gauchetiere Street West
4th Floor
Montreal, Quebec, Canada
H3B 4G1

Dear Mr. Thauvette:

I must deny your demand to operate over BAR and Van Buren Bridge Company property between Madawaska, Maine and St. Leonard, New Brunswick for four primary reasons.

First, the Trustee's attorneys have advised me that your demand is an attempt to exercise control over property of the bankruptcy estate and violates the automatic stay imposed by the U.S. Bankruptcy Code. Accordingly, the demand is void.

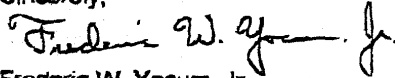
Second, as you know, the Trustee has asked the U.S. Bankruptcy Court for the District of Maine for authority to reject the trackage rights agreement you now belatedly seek to exercise. The Judge stated that he will hold hearings on the matter on May 15 and will attempt to decide the issues on that same day. The Trustee has also moved the Surface Transportation Board to revoke the Notices of Exemption your counsel filed concerning the trackage rights. I am sure your counsel will advise you that the Board made no affirmative order or finding concerning the trackage rights in those exemption matters, but rather merely decided not to initiate its regulatory process. In other words, it left CN to other legal relief, precisely that now pending in the Bankruptcy Court. The matter is now properly before the Judge.

Third, CN did not attempt to initiate trackage rights operations before the Trustee moved to reject the agreement. Indeed, in your Notice of Exemption filed with the Board, CN

stated that it did not plan to do so, but would leave the physical operations as they were before the agreement was created, with BAR performing all the physical operations between Madawaska and St. Leonard. Only after the Trustee initiated his actions before the Court and Board did CN demand physical access. This was obviously a maneuver designed to create some sort of advantage in litigation.

Fourth, and related to the automatic stay violation, to accede to your demand would place unnecessary burdens on us as we are doing our best to manage the reorganizing railroad. Our service to the Fraser Paper Company remains a matter of high importance, and we have continued to meet the shipper's needs. To now create a duplicative train service between Madawaska and St. Leonard merely to bolster your legal arguments is inappropriate.

Sincerely,



Frederic W. Yocum, Jr.

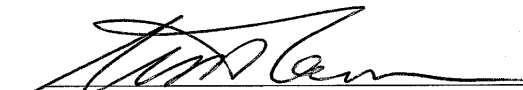
Cc: Austin Durant
James Howard
Roger Clement
Charles White
Cliff Carson
Normand Gagnon

P:\Bankr\32715\JmYocum\Letter to CN 5-7-02.DOC

VERIFICATION

I, Cliff L. Carson, verify under penalty of perjury under the laws of the United States that the foregoing statement is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on May 8, 2002.


Cliff L. Carson

Hearing Date: 05/01/2002
Hearing Time: 11:00 a.m.
Hearing Location: Portland

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re:

BANGOR & AROOSTOOK RAILROAD COMPANY,

Debtor.

)
)
) Chapter 11
) Case No. 01-11565
)
)
)

**TRUSTEE'S REPLY TO AND MOTION TO STRIKE PORTIONS OF
CANADIAN NATIONAL RAILWAY COMPANY'S
RESPONSE TO TRUSTEE'S MOTION TO REJECT
EXECUTORY CONTRACTS (SERVICE AND TRackage AGREEMENTS)**

NOW COMES James E. Howard, the Trustee in the above-captioned Chapter 11 case (the "Trustee"), by and through his attorneys, and submits this reply ("Reply") to the response ("Response") of Canadian National Railway Company ("CN") to the Trustee's motion to reject executory contracts ("Motion"), as follows:

I. INTRODUCTION

1. The Junction Agreement and the Trackage Agreement are executory contracts subject to rejection by the Trustee. Both are service/usage agreements, and neither Agreement creates any "possessory rights." The exercise of the Trustee's business judgment to reject is proper in this case not only because the Agreements are substantial burdens to the estate, but also because the Trustee estimates, based on revenue experience prior to the implementation of the Junction Agreement and on volumes experienced during the first quarter of 2002, that rejection will bring between \$160,000 and \$220,000 in additional revenue each month, and will increase the purchase price for sale of the railroad by \$5,000,000. This Court may immediately rule upon the Motion based on the undisputed and unambiguous Agreements in the record, which are

matters of law that must be decided without resort to any extrinsic evidence, and no delay pending any STB ruling is warranted or required under the Code. Finally, although section 365 requires no finding that rejection is in the "public interest", for all of the reasons set forth below, rejection is completely consistent with the public's interest in ensuring continued operations while maximizing creditor recovery.

II. PROCEDURAL BACKGROUND

2. On March 18, 2002, the Trustee filed the Motion, seeking authority to reject the "Junction Agreement" and "Trackage Agreement" (both as defined in the Motion) (collectively, the "Agreements").¹

3. Immediately prior to hearing held on April 3, 2002, CN filed its Response. At the April 3 hearing, the Court ruled only that discovery had begun but did not fix a deadline for discovery, and continued the matter generally until May 1, 2002. To date, CN has conducted no discovery.²

4. CN seeks to block the Trustee's rejection of the Agreements by pointing to extraneous facts and documentation underlying the execution of those Agreements and arguing that (1) the Agreements are not executory, (2) the Trustee cannot satisfy the business judgment test, and (3) the matter should be stayed pending action by the STB. Each of these arguments

¹ The Trustee in the Motion further requested rejection of the "Ancillary Agreement." The Trustee no longer seeks rejection of the Ancillary Agreement as an executory contract. Rather, in light of CN's contention that the Ancillary Agreement conveys "property rights," the Trustee will be commencing an Adversary Proceeding against Waterloo Railway Company, seeking a finding that rejection of the Agreements will render the Ancillary Agreement a nullity.

² CN in its response raised issues relating to this Court's power to rule upon the Motion concurrently with the pending ruling of the Surface Transportation Board ("STB"). To dispel any uncertainty concerning the Court's power to adjudicate the Motion prior to any ruling by the STB, the Trustee has included below a limited discussion of the timing issues raised by CN. The Trustee reserves the right to supplement this discussion in responding, if necessary, to CN's Motion to Stay filed on April 29, 2002.

fails, and the extrinsic evidence CN relies upon is inadmissible due to the Agreements' unambiguous integration clauses.

5. CN also strains to construe the Agreements as a "lease or sale" of "property rights" that somehow rise to the level of "possessory rights" under Code sections 365(h), (i), and (j). This argument will not withstand even a cursory review of the Agreements' operative provisions. Neither the Junction Agreement nor the Trackage Agreement come close to conveying any "possessory rights" whatsoever. To the contrary, because both Agreements plainly contemplate continuous and on-going future performance by both parties, this Court may find the Agreements executory as a matter of law without resort to any factual matter concerning either the extent of previous performance or the alleged (but inadmissible and irrelevant) negotiations and documents preceding execution of the Agreements.

III. MOTION TO STRIKE

6. As suggested by the Court at the April 3, 2002 hearing, CN's Response is based on unsupported and inadmissible "averments". See Response at 2-5, Exh. A & B. The Trustee hereby moves to strike Response Exhibits A & B and all unsupported, irrelevant and inadmissible factual allegations averred on pages 2 through 5 of the Response. F.R. Evid. 402-403. To rule upon the Trustee's Motion, this Court need only consider the Agreements already in the record, the execution of which has not been disputed and which contain clear, unequivocal and unambiguous integration clauses precluding consideration of any extrinsic evidence concerning any negotiations, understandings, or documents alleged to have preceded the execution of the Agreements. See, e.g., Handy Boat Service, Inc. v. Professional Services, Inc., 1998 ME 134, ¶12, 711 A.2d 1306, 1309 (unambiguous integration clause precludes consideration of extrinsic evidence); see also General Electric Capital Corp. v. Ford Motor

Credit Co., 149 B.R. 229, 232 (D. Me. 1993) (Carter, J.) (parol evidence rule excludes all extrinsic evidence offered to contradict unambiguous, integrated contract).

7. The Junction Agreement unambiguously provides: “This agreement constitutes the entire understanding between the parties hereto with respect to the subject matter hereof and supersedes all negotiations, representations, prior discussions and preliminary agreements between the parties hereto relating to the subject matter hereof.” Junction Agreement at 7. Similarly, the Trackage Agreement unequivocally states “This agreement contains the entire understanding of the parties hereto.” Junction Agreement at 17, Article 23(b). The Court must therefore exclude any and all evidence proffered by CN concerning the alleged understandings underlying the execution of the Agreements, including without limitation, the so-called “term sheet” and “letter.” Handy Boat, 1998 ME 134 at ¶12, 711 A.2d at 1309; Response Exh. A & B. CN’s attempt to shift the Court’s focus away from the unambiguous language of the executory Agreements fails.³

8. In examining the plain language of each Agreement, this Court can only conclude that (1) the Agreements are executory and subject to rejection, and (2) CN’s transparent efforts to construe the Agreements as a “sale or lease” creating possessory rights does not withstand analysis.

IV. REBUTTAL TO CN’S RESPONSE

A. The Junction Agreement Is An Executory Contract

9. Nothing on the face of the Junction Agreement supports by any stretch the notion that it may be construed as a “sale or lease” entitling CN to any “possessory” rights, and CN cites no such provisions. To the contrary, as stated in more detail in the Motion, the Junction

³ In the event the Court decides to consider the extrinsic evidence proffered by CN, the Trustee reserves the right to proffer additional evidence demonstrating, as does the evidence proffered by CN, that the Agreements are executory insofar as they remain substantially unperformed by all parties.

Agreement contemplates continuing services to be rendered by BAR in exchange for continuing payments by CN. The Junction Agreement can only be characterized as an executory contract capable of rejection, a contract "under which the obligation[s] of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other." Gallivan v. Springfield Post Road Corp., 110 F.3d 848, 851 (1st Cir. 1997) (quoting In re Columbia Gas System, Inc., 50 F.3d 233, 239 (3d Cir. 1995)). In particular, the Junction Agreement contemplates payments that are directly related and linked to future haulage services to be provided by the Debtor to CN on an ongoing basis, in exchange for which future payments were to be made. See Junction Agreement at 1-3. The Junction Agreement is clearly executory under Gallivan and subject to immediate rejection by the Trustee.

B. The Trackage Agreement Is Also Executory

10. The Trackage Agreement also contemplates continuing future performance by the Debtor and CN. In addition to its many other unperformed obligations under the Trackage Agreement, CN remains obligated to continue payments based solely on the extent of usage. At the same time, the Debtor's future ongoing obligations and burdens under the Trackage Agreement are numerous and extensive. See, e.g., N.L.R.B. v. Bildisco and Bildisco, 104 S.Ct. 1188, 1194 n.6 (1984) (contract is executory if "performance is due to some extent on both sides"); In re Access Beyond Technologies, Inc., 237 B.R. 32, 43 (Bankr. D.Del. 1999) (mere duty to refrain from suing, because on-going, is sufficient to satisfy standard); Gallivan v. Springfield Post Road Corp., 110 F.3d at 851 (obligations so far unperformed as to entitle claim of breach by other party). In addition to those unperformed and burdensome obligations specifically identified in the Motion, the Trackage Agreement imposes the following duties,

obligations and rights upon the Debtor, many of which, if not rejected, would require the Debtor to police -- on a regular basis -- CN's contemplated use of the track:

- In general, the Trackage Agreement provides for continuing use of BAR's track, in exchange for ongoing payments based on the extent of such usage. See Articles 1-3.
- Articles 1 through 3 specifically and extensively restrict usage of the tracks and require the Debtor to ensure that CN complies with these use restrictions, see, e.g. Article 1 (any and all trackage rights are subject to the express terms and conditions of the Agreement); Article 2(d) (CN not permitted to use trackage for purpose of switching storage or servicing cars or equipment); Article 2(e) (BAR retains exclusive control of management and operation of trackage); Article 3(d) (except as otherwise provided, CN cannot change crews on the subject trackage); Article 3(e) (CN not permitted to use for third party haulage, or third party carrier access to, or use of, trackage rights).
- Article 4 (imposing communication obligations upon CN).
- Article 5 (providing for ongoing payment obligations, ongoing billing by BAR and ongoing accounting obligations).
- Article 6 (providing for annual revision of charges based on inter alia, "increase or decrease in the cost of [BAR's] labor").
- Article 7 (imposing billing and payment obligations on CN and contemplating the provision of further labor and services by BAR).
- Article 8 (imposing maintenance repair and renewal obligations on BAR).
- Article 9 (imposing obligations on BAR to provide future labor and materials concerning the construction, maintenance and/or removal of additional connections to the rail).
- Article 10(b) (contemplating additions and betterments to the subject trackage to be made by BAR in exchange for payment by CN for expenses incurred in such additions and betterments).
- Article 11 (providing, inter alia, that CN in using the subject trackage shall comply in all respects with the safety rules, operating rules and other regulations of BAR, and that the movement of CN's trains, locomotives, cars and equipment over the subject trackage shall at all times be subject to the orders of the transportation officers of BAR). Article 11 further contemplates that BAR will "furnish pilots" to CN and provide training

and/or approve qualifications of any CN employees. See Article 11(c).

- Article 11(h) (permitting BAR to regulate speed limits on the track and providing that BAR will furnish assistance to CN in exchange for reimbursement by CN for costs involved in rendering such assistance).
- Article 11(i) (contemplating “work” to “be done by BAR” in exchange for reimbursements by CN).
- Article 13 (contemplates future performance by BAR in the form of maintenance repair and restoration services).
- Article 14 (purports to allocate liabilities among the parties).
- Article 14(f) (contemplates the furnishment of pilots by BAR).
- Article 14(g) (further allocates liability based on work to be performed by BAR).
- Article 16 grants BAR the right to terminate use of the tracks absent compliance with relevant restrictions.
- Article 19 calls for BAR “to assign its interests in this agreement” to any assignee or transferee of “the subject trackage,” and permits CN to terminate after notice.

11. All of the above provisions and sundry other provisions in the Trackage Agreement are unequivocally executory and contemplate additional and future services to be rendered by BAR, none of which have been performed --or, are even capable of advance performance. Nor can it be disputed that CN has not made a single of the payments contemplated by Article 5 of the Trackage Agreement. Virtually every section of the Trackage Agreement imposes extensive use restrictions and payment and reimbursement obligations on CN on the one hand, and, on the other hand, provides for BAR to ensure continuous compliance in an interactive manner on a regular basis. Cf. Motion at 8 (citing “license” cases). The Trackage Agreement is an executory contract susceptible to rejection, and the Agreements are no more than “mere licenses” that bestow no rights to “possession.”

C. Neither Agreement Creates Any “Possessory Rights” Or Is Entitled To Protection Under Sections 365(h), (i), or (j).

12. CN attempts to avoid or limit the impact of section 365 by suggesting that the Junction and Trackage Agreements are real property leases, entitling CN to the protection of section 365(h), (i), and/or (j). CN is grasping at straws, however, because neither the Junction Agreement nor the Trackage Agreement is a lease of real property. See e.g., Junction Agreement at 1-3 (future “services” in exchange for future payments); see also Trackage Agreement Article 19 (contemplating “assignment” obligations of the Debtor and “termination” powers of CN); Id at 16 (providing remedies for breach); Id. at 14 (allocating liabilities based on services to be performed); Cf. Thompson v. Texas Mexico Rwy. Co., 328 U.S. 134, 140 (1946) (“It is argued that the rights granted Brownville under that agreement are property rights; . . . But the trackage agreement created only a personal obligation and did not purport to grant Brownville any estate in the property of Tex-Mex. . . . It was an executory contract subject to termination on a specified notice.”) (citations omitted). Neither the Trackage Agreement nor the Junction Agreement contains any indicia of a sale/lease or otherwise bestows “possessory rights” on CN. Each Agreement creates a “mere personal obligation” and Sections 365(h), (i), and (j) are inapplicable.

13. CN attempts to distinguish the “license” cases cited by the Trustee, see Motion at 8, by arguing that these cases are applicable only to “intellectual property” rights where Code section 365(n) would be implicated. This is a distinction without a difference, however, and section 365(n) has no application to this case. First, virtually all of the cited cases stand for the fundamental proposition that a contract or license is “executory” if it imposes on-going, unperformed obligations on the Debtor. See, e.g., Gallivan, 110 F.3d at 851 (obligations so far unperformed as to entitle claim of breach by other party); see also Norton Bankr. L. & Prac. 2d

§151:35 at 9412 (any contract containing maintenance, support, service, training, indemnity, royalty and/or accounting obligations is “quite likely” executory). Second, this proposition extends well beyond the so-called “intellectual property” cases, and section 365(n) has no relevance to this case. See, e.g., In re Greenfield Dry Cleaning & Laundry, Inc., 249 B.R. 634, 640 (Bankr. E.D. Pa. 2000). In Greenfield Dry Cleaning, the Pennsylvania court found that a contract creating rights to operate a laundromat for a fixed term was akin to a “license” rather than a lease. This case is no different: the Trackage Agreement purports only to create “usage” rights subject to extensive, interrelated restrictions enforceable only by the Debtor. In short, the Trackage Agreement is no more of a “lease” than was the license at issue in Greenfield Dry Cleaning.

14. CN cannot overcome the fact that no provision of either Agreement even remotely suggests a “lease” or “sale” bestowing upon CN any “possessory rights” whatsoever. Given the sophistication of the parties here, one may presume that they surely recognized that the Trackage Agreement, which is standard in the industry, creates no possessory rights and that they would have executed “sale or lease” documents had an outright property conveyance been desired or contemplated. None was executed. The Agreements are executory “contracts” subject to rejection, and are not properly construed as creating § 365(h), (i), or (j) rights to “possession.”

15. Had the 3 agreements constituted a “financing” transaction, as CN suggests, presumably the parties would have executed, filed and/or recorded necessary loan and security documents. CN has come forward with no financing or security documents, however, simply because there are none. As demonstrated above, the Agreements contain numerous unperformed obligations, making them executory. There is no basis to recharacterize the Agreements.

16. Moreover, CN's reliance on Code section 365(e)(2)(B) for the proposition that loans are not executory contracts is completely misplaced because subsection (e)(2)(B) is an exception to the general "ipso facto provision ban" set forth in section 365(e)(1). See, e.g., 11 U.S.C. 365(e)(1); Summit Inv. & Dev. Corp. v. Leroux, 69 F.3d 608, 612-13 (1st Cir. 1995); Collier's ¶365.07; Norton Bankr. L & Prac. §39:22. The Trustee is not here relying on any "ipso facto" termination provision. The general rule does not apply, so there is simply no reason to consider the subsection (e)(2)(B) "exception." Stated otherwise, subsection (e)(2)(B) serves to permit termination notwithstanding the subsection (e)(1) "ipso facto provision ban." See, e.g., 124 Cong Rec H11093 (daily ed. Sept. 28, 1978); S17409-10 (daily ed. Oct. 6, 1978); remarks of Rep. Edwards and Sen. DeConcini), reprinted at 8 Norton Bankr. L & Prac. 2d, 11 U.S.C. §365, at 10822-10823 ("Section 365(e)(2)(B) expands the section to permit termination of an executory contract or unexpired lease of the debtor if such contract is a contract to make a loan . . ."). CN's invocation of (e)(2)(B) is a red herring and makes no sense.

17. As set forth above, both Agreements are, prima facie, usage agreements or "licenses" contemplating future usage and future services in exchange for future payments based on such usage and services; neither grants any rights to "possession." Once all of BAR's obligations and burdens of policing compliance with the restrictions on CN's use of the track are eliminated, nothing remains of either Agreement because each is so integrally tied to future services, and extensive usage restrictions and conditions. See, e.g., In re Greenfield Dry Cleaning, 249 B.R. at 640 (license is personal privilege to use land, "but not to exercise exclusive possession and enjoyment for a term specified") (citations omitted). Cf. City of Waterville v. Kelleher, 141 A. 70, 72, 127 Me. 32 (1928) (licensee is not a tenant, and does not

enjoy possessory rights of tenant); Reed v. A.C. McLoon & Co., 311 A.2d 548, 552 n.7 (Me. 1973) (license creates no interest in land).

18. In short, rejection of the Agreements and BAR's obligations and duties thereunder will leave intact no "possessory rights" both because none was created in the first instance and because all usage is so integrally connected to future participation and services to be rendered by BAR. Neither Agreement has any of the indicia of a typical lease or sale document, neither bestows possessory interests on CN or grants CN the right to exclude others, and both are replete with provisions unique to executory "contracts". See, e.g., Greenfield Dry Cleaning, 249 B.R. at 640 (lease includes right to "exclude" others, license does not). Sections 365(h), (i), and (j) simply do not apply to the Agreements.

**D. The Trustee's Decision to Reject
Is A Proper Exercise of His Business Judgment**

(i) The Agreements Are Burdensome to the Estate

19. As set forth in more detail above, both the Junction Agreement and the Trackage Agreement saddle the Debtor with substantial burdens, including, inter alia, (1) future repair, maintenance, billing and other service obligations, and (2) the burden to police and enforce continuing compliance by CN with the many extensive restrictions imposed on CN's use of the track. Even without considering the substantial and continuing diminution in revenue realized by the estate due to the continued operation under the Junction Agreement,⁴ and the costs that BAR would suffer by remaining bound by the Trackage Agreement, the significant obligations to control, monitor and provide labor and services in relation to the use of the track by CN are burdensome to the estate and may be rejected by the Trustee for that reason alone. Compare Matter of Minges, 602 F.2d 38, 41 (2d Cir. 1979) ("business judgment test" evolved to address

⁴ As established in the Motion, the revenues received by BAR under the Agreements are approximately one-half the amount received historically until the Agreements were executed in March 2001.

difficulties in some cases of showing a concrete burden; rejection is warranted where such a showing can be made) with 2 Norton Bankr. L. & Prac. 2d §39:16, at 39-49 (1994) (rejection approved upon a “mere showing that the action will benefit the estate”). In this case, continued operation under either of the Agreements would significantly burden the estate; rejection will also provide a significant and quantifiable benefit.

(ii) **Benefits of Rejection**

20. The rejection of the contracts will provide substantial benefits to the estate. As shown in the cash collateral budget filed by the Trustee,⁵ the estate’s estimated cash loss for 2002 is \$3.5 million. Rejection of the Agreements will increase the cash flow by approximately \$160,000 to \$220,000 per month, thereby providing a much needed infusion of working capital. In addition, a buyer with whom the Trustee has been negotiating to buy the Debtor’s business has offered to pay an additional \$5,000,000 in the event the parties are returned to the status quo ante, before the Agreements were executed. For all of the above reasons, the Court must defer to the Trustee’s business decision, given that (1) immediate rejection is expected to permit BAR to resume handling traffic for Fraser at approximately double the rate currently being paid by CN to BAR; and (2) at least one of the prospective buyers of the railroad has offered a \$5,000,000 purchase premium in the event the Agreements are rejected.

21. In sum, this Court must defer to the decision of the Trustee, in the exercise of his business judgment, that rejection will both eliminate a burden on the estate and provide a quantifiable benefit. Absent a showing by CN that the Trustee’s business decision is the product of bad faith, whim, or caprice, rejection must be authorized. Lubrizol Enterprises v. Richmond Metal Finishers, Inc. (In re Richmond Metal Finishers, Inc.), 756 F.2d 1043, 1047 (4th Cir.

⁵ See Final Consent Order Approving Trustee’s Continued Use of Cash Collateral dated April 1, 2002.

1985), cert. denied, 475 U.S. 1057 (1986)). CN has not met -- and cannot meet -- this burden.

The Motion must be granted.

**E. This Court Should Not Delay Ruling on the Motion;
No Stay is Required**

22. The Trustee is providing a limited rebuttal to CN's "jurisdictional" smoke screen to assist the Court in understanding the parallel proceedings now pending before this Court and the STB.⁶ All of CN's arguments in favor of a stay fail because all are based upon the flawed premise that the Trustee in the Motion somehow seeks authority from this Court to "abandon" a line of railroad. The Trustee as stated previously is not in any manner asking this Court to rule upon any "abandonment" issues; rather, the Trustee in the Motion merely seeks "authority" to reject the Agreements pending completion of any necessary STB proceedings. CN's transparent attempt to recharacterize the 365 Motion as an "abandonment" motion should not be permitted to divert this Court's attention from the routine section 365 bankruptcy issues now before the Court.

23. When the Trackage Agreement was executed, CN filed a "notice of exemption" with the STB. Attached hereto as Exhibit A is a copy of the relevant STB exemption notice (the "Exemption Notice"). The "exemption" process is not a plenary proceeding, but rather is a practice in which the STB permits consensual trackage rights to be implemented, without any scrutiny, but subject to later revocation. 49 C.F.R. §1180.2(d)(7). The STB made no express findings on the merits, including findings based on the public interest and other factors, regarding the CN trackage rights. Rather, CN used the exemption notice process based on the consensual nature of the Trackage Agreement. The Trustee on April 24, 2002 filed with the STB

⁶ Trustee reserves the right to supplement this response to CN's argument that this Court does not have the power to rule absent a prior STB ruling, including any matter raised in CN's Motion to Stay which was filed with the Court as this Reply went to press.

a request that the STB "revoke" the exemption pursuant to 49 C.F.R. §1115.4. ("Revocation Request", attached hereto as Exhibit B). As described in the Revocation Request, the reorganization proceedings and the Trustee's Motion to reject the Agreements substantially change the consensual circumstances under which the exemption procedure was based. These changed circumstances alone are established grounds for revoking the exemption under STB practice. If the STB revokes the exemptions, no further STB proceedings need occur.⁷

24. CN's allegations that the STB will rule based on the "public interest" are, therefore, irrelevant and misleading. The STB did not make any such finding in the first instance and need not do so in ruling on the pending exemption request. In fact, no "adverse discontinuance" proceeding is pending before the STB, and none will be required if the STB grants the pending revocation request.⁸

25. More importantly, an order of this Court granting the Trustee authority to reject under section 365 would be relevant to the STB's determination and would assist the STB in expeditiously ruling on the revocation proceeding now pending before that Board. In particular, this Court's ruling on rejection will assist the STB in determining the extent to which the Agreements are no longer in force, and whether revocation of the exemption is warranted. At the same time, were this Court to delay its ruling on the executory contract issues now before it, an unnecessary "chicken-and-egg" problem would result. This, in turn, would improperly permit CN to delay and hinder the Trustee's efforts to rid the estate of the burdensome and costly executory Agreements, and to realize the substantial benefits of rejection. In short, simultaneous

⁷ CN also filed a notice of exemption regarding the easement, and the Trustee has filed a petition to revoke that exemption as well as the trackage rights exemption.

⁸ If the STB does not grant the motion to revoke, the Trustee has the right to initiate an adverse discontinuance proceeding. The Trustee believes that the exemption procedure is the most expeditious means of achieving the same result. In any event, no matter which STB procedure is dispositive, this Court's ruling concerning the Trustee's authority to reject will assist the Trustee in limiting costs and be relevant to the STB decision.

action by both the Court and the STB is necessary to avoid the delay and cost of sequential proceedings.

F. The Code Does Not Require that the STB “Rule First”

26. Congress, in enacting the Code, purposefully eliminated this type of ping-pong match between the Bankruptcy Court and the Interstate Commerce Commission (“ICC”, predecessor to STB). See Wheeling-Pittsburgh Steel Corp. v. McCune, 836 F.2d 153, 159-160 (3d Cir. 1987). As the Third Circuit explains in Wheeling-Pittsburgh, prior to the enactment of the Code, Section 77 of the former Bankruptcy Act governed a railroad’s bankruptcy proceeding. See id. at 159. The statute resulted from the impact of the Great Depression on railroads. Ecker v. Western Pacific R. Corp., 318 U.S. 448, 469 (1943). It was based upon the principle of debtor rehabilitation by adjustment of creditors’ claims, as ordinary bankruptcy liquidation or judicial sales were impossible because of the size of their indebtedness and the desirability of continuing their operations in the public interest. Id. Because railroads could not take advantage of the Bankruptcy Act, their financial adjustments had been carried out in equity receiverships under judicial control, which were cumbersome and costly, and inadequately addressed public interest concerns. Id.

27. Section 77 placed the railroad’s reorganization under the leadership of the ICC, subject to a degree of participation by the reorganization courts. Id. at 468. The ICC held public hearings regarding a proposed plan for reorganization and approved the plan upon its determination that the plan was “compatible” with the public interest. Reconstruction Finance Corp. v. Denver & R.G.W.R. Co., 328 U.S. 495, 509 (1946). After approval of a plan, the ICC submitted it to the court for its approval, and if approved, an order was entered and sent to the

ICC. Id. Upon receipt, the ICC submitted the plan to affected creditors and thereafter certified to the court the results of such submission. Id.

28. The Bankruptcy Reform Act of 1978⁹ implemented Sections 1161 through 1174 to govern railroad reorganizations, and the provisions significantly departed from the law contained in Section 77. See Collier on Bankruptcy ("Collier") § 1165.LH. Most notably, the ICC (now the STB) no longer plays a crucial role in railroad reorganizations. The STB does not control the reorganization plan, and although it may participate as a party-in-interest in the bankruptcy proceedings, it cannot appeal bankruptcy court decisions. 11 U.S.C. § 1164.

29. In short, to remove serious impediments to the railroad reorganization process, Congress eliminated the prior dual and duplicative jurisdictional scheme and shifted responsibility for adjudicating reorganization questions and Code-based disputes to the bankruptcy court, where they belong. See Wheeling-Pittsburgh, 836 F.2d at 159-160.

30. CN's statement that "under Section 1166 . . . the Trustee and the Court are required to defer" to the STB, Response at 2, misses the train because the "Court" is not even mentioned in Section 1166. Rather than requiring "deference" to the STB, Section 1166 merely provides that STB orders and applicable regulations are not nullified by the fact of a bankruptcy filing. Nothing in § 1166 even remotely suggests that this Court's adjudicatory powers are in any way impinged by the pendency of any STB matters, and nowhere does Section 1166 provide that the STB must rule first. A plain reading of § 1166 demonstrates that no stay of the bankruptcy proceedings is either required or warranted pending STB approval. The Trustee's request in the Motion for "authority" to reject the Agreements pending revocation of the exemption by the STB is, therefore, perfectly appropriate, and in complete harmony with both section 1166 and Congressional intent. Section 1166 contemplates parallel and concurrent

⁹ The Bankruptcy Code, 11 U.S.C. § 101 et seq. Public Law 95-598, Nov. 6, 1978, 92 Stat. 2549.

proceedings by both the Bankruptcy Court and the STB. CN cannot be permitted to derail either of those proceedings or this bankruptcy reorganization by reverting back to the “ping-pong match” that existed under the prior Act.

31. CN cites to In re New York, S. & W. R.Co., 160 F.2d 29, 34 (3d Cir. 1946) cert denied 331 (U.S. 844 (1947)) (“Susquehanna”) as authority for the proposition that this Court must defer to the STB prior to ruling on the section 365 rejection issues. CN’s reliance on the Susquehanna case and related case is, however, completely misplaced, given that those cases were all decided long before the Bankruptcy Reform Act of 1978 eliminated the requirement to obtain plan approval from both the Court and the ICC. See Wheeling-Pittsburgh, 836 F.2d at 159-160. CN’s reliance on Thompson v. Texas Mexico Rwy. Co., 328 U.S. 134, 142, 143 (1946) (“Tex-Mex”), is also misplaced. There, the Supreme Court deferred to the ICC because of its primary responsibility for formulating plans of reorganization under section 77 of the Act. Under the Act, no other result was warranted.

32. In enacting the Code, however, Congress purposefully eliminated any need of bankruptcy courts to “defer” to, or wait for rulings from, the STB before ruling on bankruptcy issues: this “contraction” of the ICC’s role was intended to address concerns “that unnecessary delays were occasioned by duplicative hearings and appeals by virtue of the I.C.C.’s role and the high cost of conducting reorganization litigation in more than one forum and geographic location.” Wheeling-Pittsburgh, 836 F.2d at 160 (citing Report of the Commission of the Bankruptcy Laws of the United States, July 1973, 93d Aug., 1st Sess. H.R. Doc. No. 137, reprinted in *Collier on Bankruptcy* App. 2, at 1-1). For this Court and the STB to adjudicate their respective issues simultaneously is completely consistent with both the Code’s “contraction” of the STB’s role in bankruptcy reorganizations and section 1166’s direction that

the Trustee not be deemed exonerated from STB rulings simply because a bankruptcy has been filed. Congress in its wisdom struck a proper balance between the STB and the Court, and this Court should not upset that balance by delaying the bankruptcy process, as CN would have it.

33. In short, the Motion poses no conflict between the Court and the STB, given that the Court will determine the executory contract issues before it while the STB will determine only the exemption revocation issues now pending. Even if a plenary proceeding were before the STB, there would be no such conflict because, as CN concedes, the "STB in such cases is not concerned with the Trustee's business judgment," response at 10, or the remaining executory contracts issues on which the Trustee seeks a ruling from this Court. By the same token, this Court need not concern itself with issues that lie solely in the STB's domain. This Court should not delay ruling on the Motion pending the STB's decision or for any other reason.

G. "Public Interest"

34. CN insists that rejection cannot be accomplished by the Trustee absent a showing that such rejection is in the "public interest" under Code Section 1165, relying on the First Circuit's pre-Code decision in In re Boston & Maine Corp., 455 F.2d 1205, 1207-1208 (1st Cir. 1972). Congress in enacting the Code codified the "public interest" standard. Under the Act, the ICC held public hearings to determine the extent to which plans were compatible with the "public interest" of continued rail operations. Reconstruction Finance Corp. v. Denver & R.G.W.R. Co., 328 U.S. 495, 509 (1946). This was subject to a degree of participation by bankruptcy courts. Ecker v. Western Pacific R. Corp., 318 U.S. 448, 469 (1943). As stated above, Congress in enacting the Code constricted ICC involvement in the reorganization process, and codified certain "public interest" requirements in section 1165, which requires the

Bankruptcy Court and the Trustee to take into account the “public interest” in the preservation of the debtor’s rail service. See S.R. No. 95-989, 95th Cong. 2d Sess. 133 (1978).

35. Specifically, Section 1165 states: “In applying sections 1166, 1167, 1169, 1170, 1171, 1172, 1173, and 1174 of this title, the court and the trustee shall consider the public interest in addition to the interests of the debtor, creditors, and equity security holders.” Nowhere is section 365 mentioned. By and large, this public interest consideration mandated by section 1165 only significantly impacts Section 1174, which governs liquidations.¹⁰ Code sections 1170 (abandonment of a line of railroad) and 1173 (plan confirmation) include their own specific public interest requirements. Section 365 does not. The Trustee here does not seek to “abandon” any line of railroad or to confirm a plan, but only seeks to adjust the debtor-creditor relationship by rejecting a burdensome contract to enable it to serve Fraser Paper on the same basis that existed for years prior to March, 2001. The Trustee is not seeking authority to “abandon a line of railroad” or to discontinue any service either in this Court or before the STB; only the trackage rights of CN are affected. Accordingly, this Court need not make any “public interest” findings in adjudicating the 365 Motion.

36. At least one court has held that Congress intended that the public interest be considered in railroad reorganizations, but only in applying the specific sections outlined in Section 1165. In re Chicago, Mo. & W. Ry. Co., 109 B.R. 308, 314-315 (N.D. Ill. 1989), appeal dismissed, 899 F.2d 17 (7th Cir. 1990). In that case, the district court reversed a decision of the bankruptcy court (which had held that the public interest trumped the adequate protection requirement of Section 364(d)), finding that there was an unavoidable conflict between the public interest standard, as applied in Section 77 cases, and Section 364(d) of the Bankruptcy

¹⁰ Collier, § 1165.03. Collier notes that two of the sections referenced (1170 and 1173) contain specific requirements that the court make a finding that a contemplated action is in the public interest, while the other sections either contemplate no court action or allow little room for the public interest consideration. Id.

Code. Id. Relying on the legislative history, the court concluded that the bankruptcy court improperly considered the public interest in considering whether to grant a section 364(d) loan. Id. at 314.

37. The same reasoning clearly applies to section 365. Expressio unius est exclusio alterius. Had Congress intended to make the public interest applicable to a decision to reject non-debtor rights to use trackage, it would have included reference to section 365 when it codified the “public interest” standard in section 1165.

38. For all of the foregoing reasons, CN’s reliance on the First Circuit’s pre-Code decision in B&M is misplaced. Not only did the Code alter the public interest standard, but the B&M court itself only required consideration of the “public interest” because that case did not involve rejection of an executory contract under Code Section 365, but rather the abandonment of a railroad line of the debtor (now, Code § 1170). Again, the Trustee does not seek to abandon any “line of railroad,” or to discontinue or abandon the debtor’s rights over any track area. Cf. 11 U.S.C. §§ 1165, 1170 (“abandonment of railroad line” must be “consistent with the public interest”). The Motion merely seeks the rejection of executory contracts, pure and simple. This Court in ruling upon the 365 Motion need not consider the “public interest” any more than the STB need consider Trustee’s “business judgment,” which CN concedes will not occur.

39. For all of the above reasons, CN’s reliance on Tex-Mex, 328 U.S. at 137, is also flawed. There, a non-debtor sought to eliminate debtor’s rights to use tracks; here, the converse is true: the Trustee in the Motion seeks the rejection of Agreements that would otherwise permit non-debtor parties to continue the use of certain tracks, all at considerable cost, expense, and on-going revenue loss to the estate. Even were this Court to conclude that the public interest is somehow relevant to some section 365 Motions, it is clear that the public interest is not

implicated here, where the Trustee does not seek rejection of a contract entitling the Debtor railroad to use tracks, but rather, seeks only to reject a burdensome contract permitting a non-debtor to use a small portion of the Debtor's track.¹¹

40. Finally, even if the Court finds that the "public interest" applies across the board despite Congress's omission of reference in section 1165 to section 365, the Trustee is entitled to deference on the "public interest" issue. See New Haven Inclusion Cases, 399 U.S. 392, 420-421 (1969) (trustee and court alike are given broad authority and charged with goal of preserving railroad in public interest). Deference to the Trustee on the public interest issue is especially warranted where, as here, the objective is to both preserve an operating railroad and conserve value for the benefit of creditors, rather than abandon the debtor's line of railroad. Id. at 421; New York, New Haven and Hartford Railroad Company, First Mortgage 4% Bondholders' Committee v. United States, 305 F. Supp. 1049, 1055-1056 (S.D.N.Y. 1969). The Trustee has determined that rejection is consistent with the public interest for the simple reason that rejection will (1) enable the Trustee to sell the railroad as a going concern with the best possible return for creditors, and (2) eliminate Agreements substantially burdensome to the estate. In short, rejection is consistent with both the business judgment test and the public interest and must, therefore, be authorized.

V. CONCLUSION

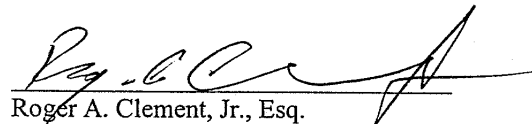
41. This Court need not wait for any STB rulings and should rule immediately on the 365 Motion, based on the unambiguous Junction and Trackage Agreements. The Trustee has properly exercised his business judgment by deciding to reject the executory usage Agreements,

¹¹ CN invokes, without support, extraneous facts to buttress its argument that the Debtor merely seeks to eliminate competition. These factual matters need not be considered because the public interest is not implicated in section 365. Moreover, upon information and belief, Fraser continues to pay CN the same rates under the Agreements as Fraser paid the Debtor prior to March 2001. The alleged "competition" would have served to benefit only CN but not Fraser Paper.

which create no "possessory" rights under section 365(h) or otherwise. No further discovery is warranted in relation to the Motion, and the Court may authorize rejection based on the existing record.

WHEREFORE, the Trustee respectfully requests that this Court rule upon the issues before it without delay, and GRANT the Trustee's Motion for authority to reject the Junction and Trackage Agreements.

Dated: April 30, 2002


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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MAINE

In re:	)	
	)	
BANGOR & AROOSTOOK RAILROAD	)	Chapter 11
COMPANY,	)	Case No. 01-11565
	)	
Debtor.	)	

**MEMORANDUM OF CANADIAN NATIONAL RAILWAY COMPANY
AND WATERLOO RAILWAY COMPANY IN SUPPORT OF
MOTION TO STAY PROCEEDINGS ON TRUSTEE'S MOTION TO
REJECT EXECUTORY CONTRACTS (SERVICE AND TRackage AGREEMENTS)**

Canadian National Railway Company ("CNR") and Waterloo Railway Company ("Waterloo") (collectively, where appropriate, "CN"), by and through counsel, submit this memorandum in support of their Motion to Stay Proceedings on Trustee's Motion to Reject. While this Court has jurisdiction over certain contracts between CN and the Debtor, and would have jurisdiction over the abandonment of a rail line *of the Debtor*, it does not have the authority to grant the ultimate relief sought in Trustee's Motion: the involuntary abandonment or discontinuance of lines of railroads of *other* common carriers, namely CN. The abandonment of a non-debtor's rail lines or the discontinuance of a non-debtor's rail service pursuant to trackage rights is subject to the exclusive jurisdiction of the Surface Transportation Board ("STB") -- a point initially conceded by the Trustee's Motion and acknowledged again this week by a Trustee filing at the STB. Furthermore, this Court cannot effectively consider the other aspects of the Trustee's Motion until the STB determines whether the termination of CN's common carrier rights sought by the Trustee is consistent with the public interest.

Prior STB consideration of this matter will accommodate that agency's jurisdictional mandate and permit a rational, informed decision on Trustee's Motion by this

Court. Accordingly, the Court should stay all proceedings on Trustee's Motion until after the Trustee makes appropriate application to the STB and the STB renders its decision.

I. BACKGROUND

In early 2001, Bangor & Aroostook Railroad Company ("BAR" or the "Debtor") and its parent, Iron Road Railways Incorporated ("IRR"), entered into an arrangement with CN pursuant to which: 1) CN gave \$5 million to IRR as agent for BAR; and 2) the parties executed the three agreements -- the Junction Settlement Agreement, the Trackage Rights Agreement and the Easement Deed (collectively, the "Agreements") -- that the Trustee now seeks to reject.

The Junction Settlement Agreement, among BAR, its non-debtor affiliate Van Buren Bridge Company ("VBBC") and CNR, provides for BAR's provision of certain haulage services for the account of CNR between Madawaska, Maine and St. Leonard, New Brunswick, Canada at a specified rate. The Trackage Rights Agreement, among BAR, its non-debtor affiliate VBBC and CNR, granted CNR the non-exclusive right to use BAR's tracks between Madawaska and Van Buren (Canadian Junction), Maine, a distance of approximately 23 miles, and VBBC's tracks between Van Buren and St. Leonard, a distance of approximately 1 mile, for 99 years in order to provide rail service to a facility of Fraser Paper Company at Madawaska. Proprietary trackage of CNR connects with the VBBC tracks at St. Leonard.

The Easement Deed, among BAR, its non-debtor affiliate VBBC and CNR's affiliate Waterloo, conveyed to Waterloo an easement on the property underlying the Madawaska-St. Leonard trackage and the right to use the track in the manner specified in the Trackage Rights Agreement, a property interest that would run with the land.

CNR and Waterloo obtained appropriate authority from the Surface Transportation Board ("STB") for both CNR's acquisition of trackage rights over and Waterloo's

acquisition of an easement on the Madawaska-St. Leonard line. *Canadian National Railway Company -- Trackage Rights Exemption -- Bangor and Aroostook Railroad Company and Van Buren Bridge Company*, Finance Docket No. 34014 (STB served March 21, 2001), 66 *Fed. Reg.* 15941; *Waterloo Railway Company -- Acquisition Exemption -- Bangor and Aroostook Railroad Company and Van Buren Bridge Company*, Finance Docket No. 34015 (STB served March 21, 2001), 66 *Fed. Reg.* 15941.

In his pending Motion, the Trustee seeks to reject the Agreements and fully oust CN from the Madawaska-Van Buren trackage owned by the Debtor. Such action would effect a forced discontinuance and abandonment of a "line of railroad" of CN, and terminate the common carrier rights and obligations bestowed by the STB on CNR and Waterloo with respect to the Madawaska-Van Buren line.

Initially, the Trustee represented that he would institute a proceeding at the STB "seeking the abandonment or discontinuance of the trackage rights of CN" on the Madawaska-Van Buren line. Trustee's Motion at 12, ¶ 31. This past Wednesday, April 24th, however, the Trustee instead filed with the STB a cursory petition to reopen and "revoke" the exemption authority that CNR and Waterloo received from the STB over a year ago in Finance Docket Nos. 34014 and 34015. That petition is a plainly inappropriate effort to bypass the normal STB abandonment and discontinuance procedures that govern this matter, and CN will address that issue before the STB. The merits of that particular agency debate, however, are not dispositive here, since either way what the Trustee seeks is ouster of CN from the Madawaska-Van Buren line. Proceedings on Trustee's Motion before this Court should be stayed until the STB takes action -- in the form the agency determines appropriate -- on the public interest questions associated with the Trustee's desire to forcibly remove CN.

II. ARGUMENT

A. Debtor Seeks an "Adverse Abandonment" Unrelated to Any Abandonment of Debtor's Own Rail Lines

This is not a proceeding that involves any abandonment of the Debtor's own rail lines. The Trustee's Motion does not seek authority for the Debtor itself to abandon its Madawaska-Van Buren line, or indicate that the Debtor has any intention of or interest in abandoning that line. Such abandonment of the lines of a debtor rail carrier would be subject to 11 U.S.C. § 1170 and the approval of this Court.

Here, by contrast, the Trustee's Motion is directed to the rail lines and operations of other, non-bankrupt carriers. Pursuant to the Trackage Rights Agreement, CNR obtained trackage rights on BAR's Madawaska-Van Buren line for the purpose of providing rail service to Fraser Paper. Appropriate authority for those rights was obtained from the STB. As the Supreme Court established 70 years ago, such trackage rights constitute a "line of railroad" of the *tenant carrier*, subject (as relevant here) to the abandonment provisions of what is now 49 U.S.C. § 10903. *Transit Commission v. United States*, 289 U.S. 121, 128-129 (1933); *see, e.g., Chicago & Alton R. Co. v. Toledo, P. & W. Ry. Co.*, 146 I.C.C. 171, 181 (1928) ("[T]he operation of or over a railroad under a [trackage rights] arrangement such as that here considered has the effect of extending the rails and service of the tenant line. In the public interest we can and do take hold of the establishment of such an arrangement, and in the same interest we can and should take hold of its discontinuance.").¹

¹ Pursuant to the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 ("ICCTA"), the former Interstate Commerce Commission was abolished effective January 1, 1996, and certain remaining rail functions were transferred to the new STB. Existing statutory provisions regarding rail abandonments and trackage rights were transferred to the STB without substantive change. *See* 49 U.S.C. §§ 10903, 11323. Section 204 of the ICCTA provides that prior orders or determinations relating to the "performance of any function that is transferred by this Act" remain in effect until otherwise modified or revoked by the STB. Accordingly, Commission and other precedent on abandonment and jurisdictional matters cited herein is applicable to the instant case.

Thus, while the Madawaska-Van Buren route is a "line of railroad" of the debtor BAR, in that it owns the line, it is also a "line of railroad" of CN pursuant to CNR's trackage rights and Waterloo's easement property interest on the route. Normally, a rail carrier seeks authority to abandon its *own* line of railroad, arguing generally that the burden of continuing to operate the line outweighs any harm to shippers and the public from cessation of service. That is not the situation here, since the Debtor does not seek to abandon its own Madawaska-Van Buren line of railroad and CN similarly has not sought to withdraw from the route.

Instead, the Trustee's Motion seeks to forcibly remove CN from the Madawaska-Van Buren line -- and thus compel the abandonment and discontinuance of CN's common carrier interests in that line of railroad.² It is the rights of CN, rather than those of the Debtor, which are at issue. If STB regulatory authority is required for an abandonment and discontinuance of CN's rights, it is CN that must receive such authority. And if (as here) CN does not intend to seek such abandonment or discontinuance authority, the Trustee would itself need to procure that authority from the STB, in the name of and on behalf of CN. This scenario -- where a request for abandonment of a rail carrier's line, or for discontinuance of its trackage rights, is made by a party other than the carrier -- is rare but not unprecedented, and is generally referred to as an "adverse abandonment" or an "adverse discontinuance." Where a third party has a legitimate interest in the rail lines or operations at issue, it may directly institute such an adverse proceeding at the STB. *Thompson v. Texas Mexican Ry. Co.*, 328 U.S. 134, 145-146 (1946).³

² In the common STB lexicon, an ownership interest in a line of railroad (such as Waterloo's easement) is "abandoned," while trackage rights such as those held by CNR are "discontinued." The distinction is not significant in the present motion, and we have in places used the terms interchangeably herein.

³ CN does not dispute here that the Trustee would have sufficient interest to seek adverse discontinuance of CNR's trackage rights on the Madawaska-Van Buren line and/or adverse abandonment of Waterloo's easement in that line.

While subject to the same statutory criteria as other abandonments, see 49 U.S.C. § 10903, adverse abandonments are analyzed in a significantly different manner by the STB. Normally, the STB balances the potential harm to affected shippers and communities from a proposed abandonment against the burden that continued operations would impose on the railroad and on interstate commerce. *Colorado v. United States*, 271 U.S. 153 (1926). In adverse abandonment and discontinuance proceedings, the scope is narrower and the bar is higher: "the primary question to be resolved is whether there exists sufficient public interest in operation of the subject line to merit continued oversight by the Board." *Grand Trunk W. R. -- Adverse Discon. of Trackage Rights*, 3 S.T.B. 124, 127 (1998). The Board's role in an adverse trackage rights discontinuance is to "provide the public with a degree of protection against the unnecessary discontinuance, cessation, interruption, or obstruction of available rail service." *Western Stock Show Assn. -- Aban. Exemption -- In Denver, CO*, 1 S.T.B. 113, 131 (1996) (citing *Modern Handcraft, Inc. -- Abandonment*, 363 I.C.C. 969, 972 (1981)). The Board has a statutory duty to preserve and promote continued rail service, and generally denies adverse abandonment or discontinuance applications "if there was a potential for continued operations and the carrier [against which adverse authority is sought] had taken reasonable steps to attract traffic." *Chelsea Property Owners -- Aban. -- Consol R. Corp.*, 8 I.C.C.2d 773, 779 (1992), *aff'd sub nom. Consolidated Rail Corp. v. ICC*, 29 F.3d 706 (D.C. Cir. 1994).

As these standards show, the purpose of adverse abandonment proceedings (unlike "normal" abandonment proceedings) is not to relieve a rail carrier of its unduly burdensome rail lines or operations. Indeed, in adverse cases the carrier *opposes* abandonment, and does not claim that the lines or operations are burdensome. In such cases, the STB instead

seeks simply to protect from third-party abandonment efforts rail service in which there remains a legitimate public interest.

**B. 11 U.S.C. § 1170 Does Not Apply to the
Adverse Abandonment of CN's Rights**

11 U.S.C. § 1170 provides that a bankruptcy court may "authorize the abandonment of all or a portion of a railroad line" upon making certain findings. An attempt to force the adverse abandonment or discontinuance of a line of railroad of a non-bankrupt carrier, however, involves a subject matter outside of the scope of 11 U.S.C. § 1170 and regulatory issues inappropriate for consideration thereunder.

Historically, under the former Bankruptcy Act, a bankrupt railroad required ICC approval for abandonment of its lines. *E.g., Palmer v. Massachusetts*, 308 U.S. 79, 88 (1939) ("The power of the district courts to permit abandonments is specifically conditioned on authorization by the Commission."). In adopting Section 1170 in 1978 as part of the new Bankruptcy Code, Congress transferred primary responsibility for the abandonment of a debtor's rail lines or the discontinuance of a debtor's trackage rights from the ICC to the bankruptcy court, with the ICC (now the STB) playing an advisory role. This change was intended to avoid previous situations where a bankrupt railroad was unduly burdened with its own money-losing rail lines and operations because the ICC was unwilling or unable to process the debtor's abandonment requests in a timely manner. *See* S. Rep. No. 989, 95th Cong., 2d Sess. 12, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5798 ("In the case of a railroad being administered under title 11 the necessity to stem the bankrupt carrier's cash drain requires expeditious treatment of abandonment applications. The subchapter provides that the court rather than the Commission has the authority to authorize abandonments or discontinuances of rail service.").

There is no indication that the legislation was intended to or could cover the abandonment of rail lines and operations of *other*, non-bankrupt rail carriers -- common carriers whose STB-derived trackage and operating rights exist wholly independently of the debtor and form no part of the estate over which the bankruptcy court possesses control.⁴ Unlike the difficulties bankrupt carriers faced in abandoning their own lines -- a dominant issue during the many rail bankruptcies of the 1970s⁵ -- the ouster of other railroads from a debtor's lines had not been a serious concern. The most recent such case of which we are aware dated from 1946. *See New York, S. & W. R. Co.*, 160 F.2d 29 (3d Cir. 1946), *cert. denied*, 331 U.S. 884 (1947) (discussed *infra*). Bankruptcy court jurisdiction over the abandonments of non-bankrupt railroads was a non-existent issue, and granting such authority would have, *sub silentio*, effected a major realignment of the relations between solvent and debtor railroads. Such a result plainly was not contemplated.

The language of 11 U.S.C. § 1170 is admittedly broadly drawn -- it addresses the abandonment of "all or a portion of a railroad line," without adding the words "of the debtor." Prior and subsequent iterations of that statutory provision, however, confirm its intended reach to the lines of railroad of a bankrupt carrier only.

11 U.S.C. § 1170, like much of the remainder of the Bankruptcy Code, did not initially apply to pending railroad bankruptcies under Section 77 of the former Bankruptcy Act. Two large-scale and troublesome bankruptcies -- involving the Chicago, Milwaukee, St. Paul &

⁴ This is not to say that the Trackage Rights *Agreement* -- to which BAR is a party -- does not fall within the jurisdiction of the bankruptcy court for purposes of rejection under 11 U.S.C. § 365. As discussed further below, however, even where an underlying trackage right agreement has terminated by its terms or by operation of law, the trackage rights themselves remain in effect until and unless discontinuance is authorized by the STB. An adverse discontinuance of such STB-approved rights held by a non-bankrupt railroad cannot be approved under 11 U.S.C. § 1170.

⁵ *E.g., In re Penn Central Transp. Co.*, 384 F. Supp. 895, 921-922 (Sp. Ct. R.R.R.A. 1974).

Pacific Railroad Company (the "Milwaukee Road") and the Chicago, Rock Island & Pacific Railroad Company (the "Rock Island") -- were pending in 1978, and Congress soon decided that authority over their abandonments also should be transferred to the bankruptcy courts. In the Milwaukee Railroad Restructuring Act, Pub. L. 96-101, 93 Stat. 736 (1979) ("MRRA"), the power to approve abandonments pursuant to 11 U.S.C. § 1170 was granted to the bankruptcy court in the Milwaukee Road proceeding, and separately to bankruptcy courts in any other railroad proceedings pending under the Bankruptcy Act. See 45 U.S.C. §§ 904(a), 915(a).

The language of 45 U.S.C. § 904(a) is instructive. It provides that "the bankruptcy court may authorize the abandonment of lines *of the Milwaukee Railroad* pursuant to Section 1170 of Title 11." (emphasis added). See also H.R. Conf. Rep. No. 583, 96th Cong., 1st Sess. 17, reprinted in 1979 U.S. Code Cong. & Admin. News 1742, 1749 ("Section 4 of the House amendment [substantially adopted in the MRRA as enacted] allows the Bankruptcy Court to authorize the abandonment *of lines of the Milwaukee Railroad . . .*") (emphasis added). Congress plainly intended simply to *extend* 11 U.S.C. § 1170 to the Milwaukee Road proceeding, without modification of its existing meaning.⁶ The express language used to do so in 45 U.S.C. § 904(a) confirms the scope of Section 1170 as encompassing abandonments and discontinuances of the *debtor's* line of railroad.

Before enactment of the Bankruptcy Code, abandonments by bankrupt railroads were governed by Section 77(o) of the Bankruptcy Act. That section provided that:

The trustee or trustees, from time to time, shall determine what *lines or portions of lines of railroad* and what other property *of the debtor*, if any, should be abandoned or sold during the pendency of the proceedings in the interest of the debtor's estate and of ultimate reorganization but without unduly or adversely affecting the public

⁶ See H.R. Rep. No. 97, 97th Cong., 1st Sess. 45, reprinted in 1981 U.S. Code Cong. & Admin. News 4480, 4527 ("[T]he Milwaukee Railroad Restructuring Act made Section 1170 of Title 11 (the new Bankruptcy Code) applicable to cases pending under Section 77 of the Old Bankruptcy Act.").

interest, and [trustee may consummate abandonment or sale] upon order of the judge . . . authorizing such abandonment or sale, but only with the approval and authorization of the Commission when required by the Interstate Commerce Act

11 U.S.C. § 205(o) (1976) (repealed) (emphasis added). The Bankruptcy Code, of course, shifted ultimate responsibility for such abandonments to the bankruptcy court, but otherwise "the wording and intent of that section [Section 77(o) of the Bankruptcy Act] are almost identical to section 1170 of the Code." *In re Eureka Southern R., Inc.*, 72 B.R. 813, 818 (Bankr. N.D. Calif. 1987). As former Section 77(o) confirms, the subject matter of 11 U.S.C. § 1170 is "lines of railroad of the debtor" -- not those of other, non-bankrupt rail carriers.

The ICC itself confirmed this analysis in one of its first significant "advisory" abandonment decisions under the provisions of 11 U.S.C. § 1170. There, the debtor railroad (the Rock Island) sought to abandon its entire rail system. As part of its application, the Rock Island requested permission to abandon two non-wholly owned rail carrier subsidiaries. In considering that aspect of the application, the ICC explained:

[W]here the subsidiary is jointly owned, . . . neither we nor the Bankruptcy Court can permit their abandonment, since the subsidiary railroads are not considered bankrupt. Our jurisdiction over abandonment of these railroads can only be effectuated by the filing of an application under 49 U.S.C. 10903. The Bankruptcy Court, on the other hand, has no jurisdiction over [these railroads], since neither is bankrupt or a wholly owned subsidiary of Rock Island.

Chicago, R.I. & P. R. Co. Abandonment, 363 I.C.C. 150, 170-171 (1980). As the ICC's holding indicates, abandonments and discontinuances of service by non-bankrupt carriers -- no matter by whom sought -- are subject to the ICC's jurisdiction under 49 U.S.C. § 10903 rather than the bankruptcy court's jurisdiction under 11 U.S.C. § 1170.⁷

⁷ *Rock Island* did not involve an "adverse" abandonment in the relevant meaning of that term. We are aware of no case since the adoption of current 11 U.S.C. § 1170 in 1978 in which a bankrupt railroad has sought adverse abandonment or discontinuance of lines or trackage rights held by other, non-bankrupt railroads.

Further analysis would be needed only if the Trustee was himself seeking to abandon BAR's Madawaska-Van Buren line, over which CN possesses its trackage and easement rights. In that case, a bankruptcy court might ask whether asserting jurisdiction over the discontinuance of CN's rights was necessary to ensure timely and effective consideration of BAR's own abandonment application under 11 U.S.C. § 1170. This Court need not reach that issue, however, since the Trustee has not sought to abandon any of debtor's own lines or discontinue any of debtor's own operations.

Finally, we note that the Trustee apparently concedes that 11 U.S.C. § 1170 is inapplicable here and that jurisdiction lies with the STB. Trustee's Motion at 12, ¶ 31 ("Abandonment of railroad lines or discontinuances of trackage rights are subject to the jurisdiction of the [STB] pursuant to 49 U.S.C. 10904 [sic] and 11323."). As noted above, the Trustee has this week submitted a perfunctory filing to the STB, but contrary to the Trustee's prior statements it does not seek authority for abandonment or discontinuance under 49 U.S.C. § 10903. Instead, the Trustee seeks to revoke under 49 U.S.C. § 10502(d) the exemptions that CNR and Waterloo initially obtained for the trackage rights and easement at issue. While that is a misguided effort, it is entirely consistent with the Trustee's prior concession that STB action is necessary before this Court can act on the rejection petition.

C. The STB Has Exclusive Jurisdiction Over the Adverse Abandonment and Discontinuance Sought by the Trustee

Given the inapplicability of 11 U.S.C. § 1170 to the Trustee's Motion, only the STB can order the adverse abandonment and discontinuance that the Trustee seeks as relief in that motion. The jurisdiction of the STB over "transportation by rail carriers" and rail line abandonments and discontinuances is both exclusive and plenary. 49 U.S.C. §§ 10501(b), 10903; *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981). As part of

"[one of] the most pervasive and comprehensive of federal regulatory schemes," Congress granted to what is now the STB "plenary authority to regulate, in the interest of interstate commerce, rail carriers' cessations of service on their lines." 450 U.S. at 318, 323. A carrier's line of railroad may be abandoned only upon a determination by the STB that abandonment is consistent with "present or future public convenience and necessity." 49 U.S.C. § 10903(d). Such exit requirements apply equally to the discontinuance of a railroad's trackage rights over another railroad. *E.g., Arkansas & Missouri R. Co. v. Missouri Pacific R. Co.*, 6 I.C.C.2d 619, 622 (1990) ("[T]rackage rights that have been approved by this agency remain in effect until we either approve a new agreement or permit discontinuance [under 49 U.S.C. § 10903].").

Whenever -- as here -- third parties have sought to assert a right or remedy that would compel the abandonment of a carrier's rail line or the discontinuance of a carrier's trackage rights, courts have consistently declined to act in the absence of appropriate abandonment authority from the STB/ICC. In the seminal case of *Thompson v. Texas Mexican Ry. Co.*, 328 U.S. 134 (1946) ("*Tex-Mex*"), a landlord rail carrier terminated its trackage agreement with a bankrupt tenant carrier and subsequently sought both an injunction against the tenant's operations on the line and damages for the tenant's continued use of the line. The Supreme Court held that, even if the agreement had been terminated, the tenant's trackage rights operations "must continue" until discontinuance authorization was obtained from the ICC. 328 U.S. at 145, 147. The Court accordingly directed that the court below should have "stayed its hand" until the parties had submitted the abandonment question to the ICC for determination. 328 U.S. at 151.⁸

⁸ See also, *e.g., Kansas City Area Transp. Auth. v. Ashley*, 555 S.W.2d 9 (Mo. 1977), *cert. denied*, 434 U.S. 1066 (1978) (dismissing governmental agency's attempt to condemn a railroad's right-of-way on the basis that ICC had not yet approved abandonment); *Mobile & Gulf R. Co. v. Crocker*, 455 So.2d 829 (Ala. 1984) (dismissing for lack of subject matter jurisdiction action seeking declaratory judgment that rail carrier had abandoned its right-of-way easement where ICC had not authorized abandonment of rail line at issue); *Trustees of the Diocese of Vermont v. State*, 145 Vt. 510, 496 A.2d 151 (1985) (same); *Chicago & N.W. Ry. Co. v. Chicago, M., St. P.*

In a prior instance in which a debtor sought to reject a trackage rights agreement and remove the trackage rights tenant, the U.S. Court of Appeals for the Third Circuit ruled that the bankruptcy court should take *no* action on the request to reject until the matter had been adjudicated before the ICC. *In re New York, S. & W. R. Co.*, 160 F.2d 29, 34 (3d Cir. 1946) ("[T]he rejection of trackage rights even under a plan of reorganization must also rest with the Commission and if the trustee [is] to gain relief [it] must procure it not by way of disaffirmance of contracts to be conditioned on the decision of the highest court before which the matter may come but from the Commission by the exercise by that body of the power conferred on it by Congress."), *cert. denied*, 331 U.S. 844 (1947). This Court should adopt a similar response to the Trustee's motion to reject.

**D. Even if 11 U.S.C. § 1170 Applies, the Court Should
Stay Proceedings Pending Action by the STB**

1. An STB Proceeding is Necessary in Any Event

If, in spite of the foregoing, the relief sought in the Trustee's Motion is deemed to fall within the scope of 11 U.S.C. § 1170, the statute still requires that the STB have an opportunity to comment on the proposed adverse abandonment and discontinuance. Section 1170(b) provides that where a trustee's abandonment would, in the absence of a bankruptcy proceeding, require STB approval, the trustee must file an application for the abandonment at the agency. As the Trustee acknowledged -- at least initially -- at a minimum such action is required here. *See* Trustee's Motion at 12, ¶ 31 ("The Trustee intends promptly to initiate a proceeding

& P. R. Co., 502 F.2d 193 (7th Cir. 1974) (in suit by rail carrier to declare trackage rights agreement terminated and to enjoin further operations by trackage rights tenant, ICC adjudication of issues was necessary before court could act); *cf. Arkansas & Missouri, supra*, 6 I.C.C.2d at 622 ("A&M's argument that it has no [continuing] legal obligation to provide MP trackage rights and that it may therefore deny MP use of its property is incorrect. A&M must obtain discontinuance authority before it can exclude MP.").

before the STB seeking the abandonment or discontinuance of the trackage rights of CN under the Trackage Agreement.").

Under Section 1170(c), the STB must issue its report on the proposed abandonment (or the time set by the bankruptcy court for the STB to provide a report must expire) *before* the court can act on the trustee's request. The STB's role is to represent the public interest in the proceedings before the court. S. Rep. No. 989, 95th Cong., 2d Sess. 12, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5798. This Court, of course, will be required to consider and balance that public interest in ruling on the Trustee's Motion. 11 U.S.C. §§ 1165, 1170(a)(2).

2. The Trustee's Motion Cannot Be Rationally Analyzed
Without Knowing What Action the STB Will Take

In the absence of an initial proceeding before the STB, this Court cannot meaningfully consider *any* of the various elements of the Trustee's motion to reject under 11 U.S.C. § 365. The Trustee's motion makes clear that he seeks a single result: complete ouster of CN from the Madawaska-Van Buren line. *See* Trustee's Motion at 4, ¶ 14 (claiming a benefit to the estate if the arrangements between BAR and CN "are restored to the pre-March 2001 status."). The "business judgment" justifications offered in support of the motion to reject are predicated entirely on this sweeping outcome, and do not even purport to support rejection of the contracts individually. Indeed, the Trustee has expressly recognized that rejection of the Junction Settlement Agreement would be largely meaningless if the Trackage Rights Agreement is not rejected, and has asked this Court to reject those agreements together. Trustee's Motion at 5, ¶ 15. Neither of those rejections, in turn, is effective for the Trustee's purposes unless Waterloo's easement is eliminated as well.

The Trustee's motion -- and the alleged business judgment supporting it -- is thus an "all or nothing" proposition, one that cannot be approved in any part if it cannot be approved

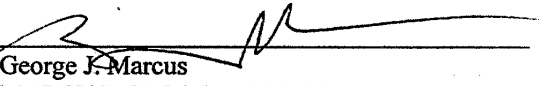
completely. Yet whether the Trustee should be allowed to forcibly remove CN -- and the competitive transportation options it offers -- from the Madawaska-Van Buren line is an question that must be heard and determined by the STB. Until that occurs, this Court has no rational basis on which to entertain any individual aspect of the Trustee's motion or apply the business judgment and other standards of 11 U.S.C. § 365.

III. CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in the Motion for Stay, this Court should stay proceedings on the Trustee's Motion to Reject Executory Contracts (Service and Trackage Agreements) pending Trustee's appropriate application to, and a decision of, the Surface Transportation Board.

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Dated: April 26, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of May, 2002, a copy of the foregoing **Reply of Canadian National Railway Company and Waterloo Railway Company to Petition to Reopen and Revoke Exemptions** was served by overnight delivery upon:

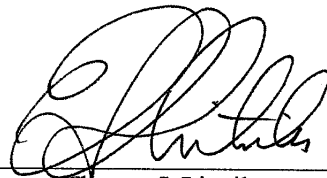
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