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December 5, 2003

VIA FEDERAL EXPRESS

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

Re: **Docket No. AB-279 (Sub-No. 3) - 209558**
Canadian National Railway Company -- Adverse
Discontinuance -- Line of Montreal, Maine & Atlantic
Railway Ltd. in Aroostook County, Maine

Docket No. AB-124 (Sub-No. 2) - 209559
Waterloo Railway Company -- Adverse Abandonment -- Line of
Montreal, Maine & Atlantic Railway Ltd. in Aroostook County, Maine

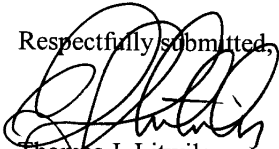
Dear Secretary Williams:

Enclosed for filing in the above-captioned proceedings are an original and ten copies of the **Motion of Canadian National Railway Company and Waterloo Railway Company for Clarification of Procedural Schedule**, dated December 5, 2003.

One extra copy of the Motion and this letter also are enclosed. I would request that you date-stamp those items to show receipt of this filing and return them to me in the provided envelope.

Please feel free to contact me should any questions arise regarding this filing. Thank you for your assistance on this matter. Kind regards.

Respectfully submitted,


Thomas J. Litwiler
Attorney for Canadian National
Railway Company

TJL:tl

Enclosures

cc: Parties on Certificate of Service

ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

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

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

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

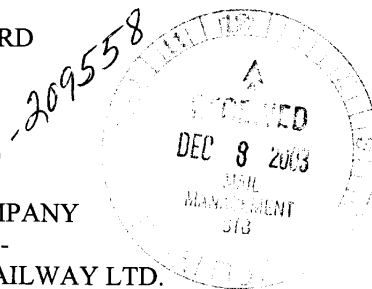
**MOTION OF CANADIAN NATIONAL RAILWAY COMPANY
AND WATERLOO RAILWAY COMPANY FOR
CLARIFICATION OF PROCEDURAL SCHEDULE**

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

Dated: December 5, 2003



-209559

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DEC 8 2003
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BEFORE THE
SURFACE TRANSPORTATION BOARD

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

CANADIAN NATIONAL RAILWAY COMPANY
-- ADVERSE DISCONTINUANCE --
LINE OF MONTREAL, MAINE & ATLANTIC RAILWAY LTD.
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DOCKET NO. AB-124 (SUB-NO. 2)

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

**MOTION OF CANADIAN NATIONAL RAILWAY COMPANY
AND WATERLOO RAILWAY COMPANY FOR
CLARIFICATION OF PROCEDURAL SCHEDULE**

Canadian National Railway Company ("CNR") and Waterloo Railway Company ("Waterloo" and, collectively with CNR, "CN") hereby seek clarification that any substantive evidence submitted during the protest and comment phase of this proceeding by Montreal, Maine & Atlantic Railway Ltd. ("MMA") should properly be considered a part of the Applicant's case-in-chief herein,¹ to which CN and protestants would be entitled to respond.

In his Application filed October 6, 2003, the Trustee of the defunct BAR seeks to adversely discontinue and abandon trackage rights and an easement held by, respectively, CNR and Waterloo on an MMA rail line between St. Leonard, New Brunswick, Canada and Madawaska,

¹ The Applicant is James E. Howard (the "Trustee"), the bankruptcy trustee for the Bangor and Aroostook Railroad Company, Debtor ("BAR"), a former rail carrier. Mr. Howard is also the bankruptcy trustee for several other defunct former rail carriers affiliated with BAR, including as relevant here the Van Buren Bridge Company ("VBBC"). References herein to BAR include VBBC unless otherwise indicated.

Maine (the "Madawaska Line") that allow CN competitive access to a mill of Fraser Papers, Inc. ("Fraser") at Madawaska. The Trustee's sole interest in this proceeding is that, if he can oust CN from MMA's former BAR rail line and render Fraser captive to MMA, MMA will pay him \$5 million. Yet the Trustee's justification for adverse abandonment has nothing to do with his corresponding interest in adverse abandonment. Instead, the Trustee's proffered justification is solely and entirely that the requested relief would supposedly be beneficial for MMA and necessary to preserve MMA's viability as a rail carrier. To that end, the Trustee's Application consists of four volumes of evidence and argument on behalf of and in the name of MMA, including an extensive abandonment analysis of two MMA rail lines that the Trustee insists MMA will have to abandon if the relief sought here is not granted.

One would expect that the party on whose behalf an entire adverse abandonment application is predicated would be the applicant. But MMA is not, despite the fact that it plainly is the real rail transportation party-in-interest under the Trustee's theory of the case. Nor is MMA a co-applicant, or (apart from a witness statement from an MMA officer²) otherwise a party to or participant in the Trustee's application. Because MMA, for whatever reason, is not postured as an applicant, technically it would be allowed to file in support of the Application on the same date that protestants' entire cases are due (currently December 11, 2003). But if MMA were to appear now and offer evidence or argument allegedly supporting a grant of relief for MMA's own benefit -- in essence, filing comments on its own case -- such a submission would plainly be an element of the case-in-chief for the adverse abandonment request to which CN and other parties should be

² That statement, from Edward A. Burkhardt, MMA's non-executive chairman, is included in Volume 2 of the Trustee's application and does not refer to or rely upon any of the other evidence provided in the application. Volume 2 also includes a verified statement from Frederic W. Yocum, Jr., who now serves as vice-chairman of MMA. Mr. Yocum's statement, however, is limited to addressing earlier matters regarding BAR, of which Mr. Yocum served as president and director from 2001 to 2003.

entitled to respond. Any other outcome would permit an improper bifurcation of the applicant's actual case here and would "sandbag" protestants with evidence that, in an adverse abandonment proceeding such as this, should have been provided in the application.

CN is filing this motion in lieu of a motion to dismiss the Trustee's application for lack of proper standing. Numerous aspects of the application and the course of this proceeding to date suggest that the wrong party has filed this case. Rather than engage in what might be perceived as delaying procedural tactics, however, CN has chosen not to challenge here the posture of the case which the Trustee has elected to pursue. If MMA does not have anything to say in this proceeding, the weight and credibility of the Trustee's evidence on matters relating directly and solely to MMA -- that is to say, the entirety of the Trustee's case -- is seriously compromised. If MMA makes a tardy effort to say something in support of relief requested for its sole benefit, at the very least CN and other parties should have a right to respond.

DISCUSSION

The Board is well acquainted with the background and general parameters of this matter from its previous decision in Canadian National Railway Company -- Trackage Rights Exemption -- Bangor and Aroostook Railroad Company and Van Buren Bridge Company, Finance Docket No. 34014, et al. (STB served June 25, 2002) ("Revocation Decision"). There, the Board denied the Trustee's petition to revoke the exemptions pursuant to which CNR obtained its trackage rights on what was then BAR's Madawaska Line and Waterloo obtained its easement on the line. The Board recognized that the Trustee sought to eliminate CN's rights on the Madawaska Line simply because "their rejection will result in a higher purchase price being paid by the buyer of the estate's assets," and held that the Trustee's desire to "command a higher sale price" was not "adequate justification" for Board action under the relevant rail transportation

policy criteria of 49 U.S.C. § 10101. Revocation Decision at 3, 7. Indeed, the Board found that the Trustee was seeking relief "on grounds that have nothing to do with the RTP." Revocation Decision at 7, n.12.

The Trustee was directed to file an adverse abandonment application under 49 U.S.C. § 10903 if he wanted to allege more relevant public interest grounds for evicting CN from BAR's Madawaska Line. Sixteen months later, the Trustee has now finally done so.

In the meantime, however, the Trustee has sold all of BAR's rail lines -- including the Madawaska Line -- to MMA, and BAR has ceased to be a rail carrier or to conduct any rail operations.³ The Trustee's remaining function is apparently simply to wind up the affairs of the bankrupt BAR estate. The Trustee thus no longer has any direct interest in the Madawaska Line or in rail transportation in northern Maine in general. Any public interest considerations of rail service and competition on the Madawaska Line implicate MMA -- now the common carrier owner of the line -- rather than the Trustee. His sole remaining interest here is identical to that which the Board found so unpersuasive in the prior revocation proceedings -- a \$5 million increase in the purchase price for the BAR assets that the Trustee could collect from MMA if CN is evicted from the Madawaska Line and Fraser is made captive to MMA.⁴

³ See Montreal, Maine & Atlantic Railway, LLC -- Acquisition and Operation Exemption -- Bangor & Aroostook Railroad Company, Canadian American Railroad Company, The Northern Vermont Railroad Company Inc., Newport & Richford Railroad Company and Van Buren Bridge Company, Finance Docket No. 34110 (STB served September 29, 2002 and December 28, 2002). MMA consummated its acquisition of the former BAR lines on January 9, 2003, a full nine months before the Trustee filed his adverse abandonment application herein.

⁴ The Trustee attempts to argue that he has an obligation under the Bankruptcy Code to protect the public's interest in the future viability of MMA's rail operations. Application at 10; Howard V.S. at 2 (Application, Vol. 2 at 3). The idea that a bankruptcy trustee is responsible for overseeing a non-debtor's future operation of assets acquired from a bankrupt estate is odd to say the least, and we are aware of no support for it. The Trustee relies solely on a partial quotation of 11 U.S.C. § 1165 as requiring the Trustee to "consider the public interest in addition to the interests of the debtor, creditors and equity security holders." Howard V.S. at 2. But Section 1165 governs the bankruptcy

CN has expressed for over a year the problematic nature of the Trustee pursuing an adverse abandonment application once the BAR rail lines were sold out of bankruptcy to MMA. An October, 2002 CN pleading in this proceeding stated that:

CNR notes for the record the standing and mootness issues that may arise in this proceeding upon completion of the Trustee's sale of BAR's rail lines to [MMA]. . . . Upon completion of the sale -- which seems likely to occur long before the conclusion of proceedings in this matter -- the Trustee will apparently cease to have any interest in the rail lines subject to the CNR trackage rights and the Waterloo easement and MM&A will be the owner of those lines.

. . . It is [] unclear what role MM&A, as the owner of the involved rail lines, must or should play in the proceeding at that point, whether as applicant, defendant or participant. . . . While such issues cannot definitively be addressed now, CNR specifically reserves its right to seek rejection of any application filed by the Trustee to the extent it may be rendered moot or inappropriate by sale of the BAR rail system to MM&A.

CN Reply to Trustee Petition for Reconsideration, filed October 19, 2002, at 3-4.

The Trustee's application as filed confirms the continuing validity of these concerns. One searches that application almost in vain for any reference to the Trustee's only real interest in the relief he seeks here -- the \$5 million he stands to gain for the BAR estate and its creditors if CN's rights on the Madawaska Line are eliminated. The first mention of that \$5 million potential gain does not come until page 8 of the application, in the last of a listing of six items. Apart from a passing reference on page 10 and in a *footnote* on page 34, the five million

court and trustee only "[i]n applying sections 1166, 1167, 1169, 1170, 1171, 1172, 1173 and 1174 of this title," i.e., the "railroad reorganization" provisions of the Bankruptcy Code. None of those bankruptcy provisions are at issue here. With his disposition of the BAR rail assets to MMA, the Trustee is obviously no longer involved in reorganizing an operating railroad; he is simply liquidating the remaining assets of a former railroad. And the federal court presiding over the BAR bankruptcy recently confirmed that this adverse abandonment proceeding is before the STB under 49 U.S.C. § 10903, not under 11 U.S.C. § 1170 or any other provision of the Bankruptcy Code. See Trustee November 24, 2003 letter filing (attaching court decisions).

dollars is never mentioned again in the 69-page body of the adverse abandonment application. All but the most diligent of readers would likely have no rational idea why the Trustee is pursuing this case or even cares about these matters.

The Trustee's effort to mask his potential \$5 million private gain is perhaps not surprising, given the STB's unfavorable disposition of the Trustee's similar motivations in the Revocation Decision. Instead, the Trustee has constructed an entire case -- four volumes and 550 pages in length -- based almost exclusively on what the Trustee contends are MMA's interests in the adverse abandonment and discontinuance of CN's rights and the ouster of CN from MMA's Madawaska Line. That case includes, among many other things related to MMA, a (purportedly) complete abandonment analysis of two other MMA rail line segments, a lengthy review of the routing options that MMA provides to its shippers, and extensive argument on the extent to which MMA and CN compete for Fraser's traffic. What remains unclear is why the Trustee -- and not MMA itself -- is making all of these arguments. If removal of CN from MMA's Madawaska Line is as critical to MMA as the application would contend, it should logically be MMA which is pursuing that application.

But MMA is not an applicant or a co-applicant in these proceedings, and has not sought to join the application. Apart from Mr. Burkhardt's statement, MMA does not sponsor or endorse, and apparently did not review, the Trustee's wide-ranging evidence and argument offered in MMA's name. It's not clear that MMA even saw the completed application until it was filed and served on MMA. MMA has owned and operated the Madawaska Line for over nine months, and certainly had the ability and opportunity to seek and justify adverse abandonment relief here if it felt its interests so warranted. Instead, relief supposedly for the benefit of MMA -- and supposedly justified by MMA's interests -- is sought by the bankruptcy trustee of a

non-carrier debtor estate long since removed from the rail transportation industry. Apparently unconvinced that its own case would be persuasive, the Trustee has elected to file someone else's case instead.

As the Board is well aware, this convoluted and unprecedented presentation of an adverse abandonment case in the third person rather than in the first person creates extraordinary difficulties and oddities in considering this matter. See decision served November 14, 2003 (ordering MMA and/or Canadian Pacific Railway Company ("CP") to produce in discovery a document relied on by the Trustee in his verified statement but neither in the possession of nor reviewed by the Trustee). While the Trustee insists, for example, that MMA will abandon other line segments on its system if the Board does not grant the Trustee's application, MMA's Mr. Burkhardt expressly indicates that MMA "has not prepared a formal analysis of potential abandonments." Burkhardt V.S. at 9 (Application, Vol. 2 at 177). The Trustee insists that MMA does not try to compete with CN for Fraser traffic at Madawaska, but MMA apparently could not even see the Trustee's analysis on this issue (which was filed under seal), let alone endorse it.⁵ The Trustee's case simply assumes that MMA is currently in a position to afford a \$5 million lump-sum payment to the Trustee, even though Mr. Burkhardt states that MMA's most critical need is to obtain "adequate revenues in the near term" and even though under the Trustee's own analysis it would be several years before MMA could earn that \$5 million back once CN was

⁵ Volume 4 of the Trustee's application, containing the verified statement of James N. Heller (an outside expert witness retained by the Trustee) and addressing competitive issues, was filed under seal and designated as "highly confidential" in its entirety. The corresponding parts of the body of the application were nearly entirely redacted as well. Application at 46-65 (public version). In a decision served December 4, 2003, the Board ordered the Trustee to provide a "confidential" version of the Heller statement to Fraser -- apparently the first time that any part of Mr. Heller's analysis will be shared with in-house personnel of any party. Mr. Heller is left to speculate broadly about MMA's efforts to win Fraser traffic from CN to long-haul MMA-CP routings, e.g., Heller V.S. at 31 (Application, Vol. 4 at 32) -- speculations that, of course, MMA cannot see and that we could not describe in any further detail here without having to file this footnote under seal.

ousted from the Madawaska Line.⁶ And the Trustee's evidence and assertions are (as CN will detail in its forthcoming protest) consistently contradicted or undermined by MMA's own business plan and MMA's agreements with other parties -- documents produced to CN by MMA in discovery under a highly confidential designation and apparently not previously seen by the Trustee or used to inform his application.

The time for MMA to address these and many other similar issues and gaps in the Trustee's case, or to otherwise use its own information and evidence to substantiate and support a case for adverse abandonment, would have been in the application itself. For MMA to do so in any substantive fashion now would simply be a re-presentation of the case-in-chief by the real party-in-interest that should have done so in the first instance. Such action would raise a myriad of concerns,⁷ but at the very least other parties to this proceeding -- who by that time will have already submitted their protests and evidence on the Trustee's putative adverse abandonment case -- should have the right to respond to any such filing. The Board should, as necessary, so clarify.

Whether MMA actually intends to file anything on the December 11th protest and comment date is unclear. In seeking and obtaining intervention in this proceeding, MMA asserted that it "has a strong interest in this proceeding" and wanted to "protect its right to participate fully in this proceeding" MMA Motion to Intervene, filed September 22, 2003,

⁶ Burkhardt V.S. at 9 (Application, Vol. 2 at 177). The fact that this subject is never discussed or even referenced in any part of the application is probably not surprising, given the Trustee's efforts discussed above to avoid mentioning the potential \$5 million private gain that comprises his sole interest in this proceeding.

⁷ See, e.g., 49 C.F.R. § 1152.21; CSX Transportation, Inc. -- Discontinuance -- At Memphis, In Shelby County, TN, Docket No. AB-55 (Sub-No. 618) (STB served October 28, 2002) at 2 (explaining that "[o]ur abandonment regulations specifically require applicant to include its entire case for abandonment in its application" and striking applicant's evidence improperly submitted as rebuttal).

at 2. If MMA does not seek to participate further in this proceeding, CN's motion here is moot and can be dismissed.

In that case, however, the troublesome nature of the Trustee's posture in this case becomes even more starkly evident. The Board and its predecessor have consistently held that a person may institute an adverse abandonment proceeding "[s]ubject to establishing a proper interest in an abandonment proposal" Modern Handcraft, Inc. -- Abandonment, 363 I.C.C. 969, 971 (1981). The \$5 million that the Trustee stands to gain if CN is ousted from the Madawaska Line may be a sufficient interest under that test, and CN has never claimed otherwise. But it is that interest that provides the Trustee with standing here -- not the channeled or hypothesized interests of other, non-applicant parties.⁸ And a party's arguments supporting or warranting the relief it seeks should have something to do with the interest that allows the party to seek the relief in the first place. The Trustee's arguments here do not. Indeed, among the Trustee's voluminous imputed arguments regarding MMA's purported interests, it is virtually impossible to discern the Trustee's true interest in this case or any explanation why that interest justifies the relief that the Trustee seeks.

We note that this confusion has been passed on to MMA shippers, who have been solicited by the Trustee to support his adverse abandonment application. See Exhibit A hereto (October 20, 2003 letter from Trustee to MMA shipper⁹). That letter nowhere discloses that the Trustee stands to reap a \$5 million benefit if CN is ousted from the Madawaska Line. Instead, it tries to frighten MMA shippers into believing that CN's rights threaten imminent doom to MMA.

⁸ E.g., Modern Handcraft, 363 I.C.C. at 971 ("Handcraft, as an adjacent landowner with a legitimate claim under Missouri law to a reversionary interest in abandoning rail property, and Authority, as a bi-state transportation authority with firm development plans for mass transit use of the right-of-way, have established a proper interest in securing abandonment authorization for the [subject] line.").

⁹ We have redacted the name of the specific shipper who received this copy of the Trustee's letter.

Those shippers could be forgiven for failing to notice that these musings are solely those of the Trustee -- not of MMA: "If CN retains its trackage rights, I believe MMA would be compelled out of economic necessity to reduce service levels to most if not all customers or to rationalize the MMA rail system by abandoning some of its lines." "I believe parties interested in the continuation of rail service at current levels and, in particular, on the line between Madawaska and Portage and/or the line between Brownville Junction and the U.S./Canada border west of Lowellton, ME should support the effort to eliminate CN's trackage rights."¹⁰ If any of this were remotely true, it is once again inconceivable why it would not be MMA itself taking this case to its own shippers.

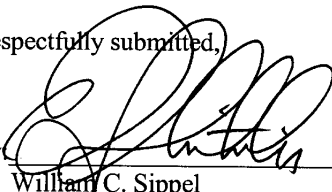
Given the sixteen months it took the Trustee to get this far with its adverse abandonment application and the long procedural history of this matter before both the Board and federal bankruptcy and district courts in Maine, candor compels the conclusion that the time has probably come for a decision on the merits of this long-standing dispute. CN has accordingly not sought to dismiss the Trustee's adverse abandonment application, notwithstanding the substantial standing and evidentiary concerns it raises. Those concerns significantly undermine -- if not eviscerate completely -- the weight and credibility of the evidence in the Trustee's application, and thus presumably can be addressed adequately by CN and other parties in their protests and by the Board in its ruling on the merits. In the meantime, however, parties should be entitled to respond to any additional elements of what is properly considered the Trustee's case-in-chief that MMA may submit.

¹⁰ The Trustee apparently contemplates that other parties will file comments supporting its application on December 11th. See decision served November 26, 2003. To the extent such comments are prompted by Trustee scare tactics like the October 20th letter to shippers, it is difficult to see how they would be entitled to any weight in this proceeding.

WHEREFORE, CN respectfully requests that the Board clarify as necessary that any substantive evidence submitted during the comment phase of this proceeding by MMA is properly considered a part of the Trustee's case-in-chief, to which CN and other protestants would be entitled to respond.

Respectfully submitted,

By


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

Dated: December 5, 2003

**James E. Howard
Trustee For Bangor & Aroostook Railroad Company
One Thompson Square - Suite 201
Charlestown, MA 02129
(617) 886-9322
(617) 886-9324 fax**

October 20, 2003

Dear

I am the Bankruptcy Trustee for the Bangor and Aroostook Railroad Company ("BAR") and its affiliated railroads (collectively, the "BAR System"). On January 9, 2003, the Montreal, Maine & Atlantic Railway Ltd. ("MMA") acquired substantially all of the railroad lines of the former BAR System. Among many other customers, MMA provides rail service to Fraser Papers at Madawaska, Maine. Canadian National Railway Company ("CN") also has the right to provide rail service to Fraser Papers pursuant to trackage rights over the MMA rail line between Madawaska and Van Buren, Maine.

In my capacity as Bankruptcy Trustee, I authorized the filing of an Adverse Application for Discontinuance of Trackage Rights and Abandonment of Easement with the Surface Transportation Board ("STB") on October 8, 2003. The purpose of the Application is to obtain STB approval for the discontinuance of CN's right to provide direct service to Fraser Papers at Madawaska, Maine. I seek elimination of CN's trackage rights because I believe that those rights were granted imprudently, due to severe financial distress, prior to BAR's bankruptcy and, if not eliminated, will cause a long-term, substantial revenue loss for MMA. If CN retains its trackage rights, I believe MMA would be compelled out of economic necessity to reduce service levels to most if not all customers or to rationalize the MMA rail system by abandoning some of its lines. In particular, I believe that the MMA line between Madawaska and Portage, ME and the MMA line between Brownville Junction and the U.S./Canada border are substantially at risk of abandonment. Although those abandonments (as well as any other abandonments) would require separate STB approval, I believe parties interested in the continuation of rail service at current levels and, in particular, on the line between Madawaska and Portage and/or the line between Brownville Junction and the

October 20, 2003

Page 2

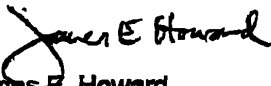
U.S./Canada border west of Lowellton, ME should support the effort to eliminate CN's trackage rights.

I have enclosed a copy of the Application, together with the Verified Statements filed by me and by Edward A. Burkhardt, the Chairman of the Board of MMA. These documents explain in detail the basis for my view that elimination of the CN trackage rights is required by the public interest. A summary of the matter is found on pages 3 through 9 of the Application. (Please note that some of the information contained in the Application is not available for public review. That information is not included in the enclosed materials.)

If you are interested in obtaining additional information or how you can support my efforts in this proceeding, please contact one of my attorneys, listed below:

Tracie D. Spear
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Phone: (202) 778-9390
Fax: (202) 778-9100
Email: tspear@kl.com.

Sincerely,


James E. Howard
Trustee

Enclosure

NOV 03 2003

CERTIFICATE OF SERVICE

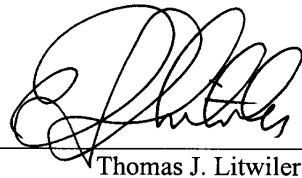
I hereby certify that on this 5th day of December, 2003, a copy of the foregoing
**Motion of Canadian National Railway Company and Waterloo Railway Company for
Clarification of Procedural Schedule** was served by overnight delivery upon:

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