

Kirkpatrick & Lockhart LLP

November 13, 2003

BY HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
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209416
Re: **Finance Docket No. AB-279 (Sub-No. 3)
Canadian National Railway Company -- Adverse
Discontinuance -- Line of Montreal, Maine & Atlantic
Railway Ltd. in Aroostook County, Maine**

209417
**Finance Docket No. AB-124 (Sub-No. 2)
Waterloo Railway Company -- Adverse Abandonment --
Line of Montreal, Maine & Atlantic Railway Ltd. in
Aroostook County, Maine**

Dear Secretary Williams:

On behalf of James E. Howard, Chapter 11 Trustee of the Bangor and Aroostook Railroad Company, Debtor, we hereby submit an original and ten copies of this **Reply In Opposition To Canadian National Railway Company and Fraser Papers, Inc. Joint Motion For Extension of Time To File Comments.**

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

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Public Record

Respectfully submitted,

Edward J. Fishman

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

Enclosures

cc: Parties on Certificate of Service

DC-605434 v1 0230220-0901

BOSTON ■ DALLAS ■ HARRISBURG ■ LOS ANGELES ■ MIAMI ■ NEWARK ■ NEW YORK ■ PITTSBURGH ■ SAN FRANCISCO ■ WASHINGTON

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



TRUSTEE OF BANGOR AND AROOSTOOK RAILROAD COMPANY'S REPLY IN
OPPOSITION TO CANADIAN NATIONAL RAILWAY COMPANY AND FRASER
PAPERS, INC. JOINT MOTION FOR EXTENSION OF TIME TO FILE COMMENTS

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

Dated: November 13, 2003

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

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

**TRUSTEE OF BANGOR AND AROOSTOOK RAILROAD COMPANY'S REPLY IN
OPPOSITION TO CANADIAN NATIONAL RAILWAY COMPANY AND FRASER
PAPERS, INC. JOINT MOTION FOR EXTENSION OF TIME TO FILE COMMENTS**

James E. Howard, Chapter 11 Trustee of Bangor and Aroostook Railroad Company, Debtor (the "Trustee"),¹ hereby submits this Reply in Opposition to the Motion for Extension of Time to File Comments filed by Canadian National Railway Company ("CN") and Fraser Papers, Inc. ("Fraser").² The joint request for three (3) additional weeks to prepare responses to the Trustee's Application should be denied because CN and Fraser have failed to provide sufficient reasons for departing from the 45-day response period mandated by 49 C.F.R. § 1152.26(a) and have failed to file the extension request itself within the 10-day period required by 49 C.F.R. § 1104.7(b).

¹ James E. Howard is acting in his capacity as the Chapter 11 Trustee for the Bangor and Aroostook Railroad Company and certain affiliated railroads.

² The joint motion filed by CN and Fraser shall be referred to herein as the "Extension Request."

Background

The Trustee filed its Application in this proceeding on October 6, 2003. By Board regulation, any comments and protests in response to the Application (including the entire opposition case in chief) must be filed within forty-five (45) days of the filing of the Application. 49 C.F.R. § 1152.26(a). In this proceeding, the Board's regulations require CN, Fraser and any other interested parties to file such comments and protests by November 20, 2003.³

On November 12, 2003, more than a month after the Application was filed and merely eight (8) days prior to the applicable response date, CN and Fraser filed with the Board a motion seeking an additional twenty-one (21) days in which to respond to the Application.⁴ CN and Fraser claim that the additional three (3) weeks are needed because of the "voluminous nature" of the Application and the alleged failure of the Trustee and the Montreal Maine & Atlantic Railway Ltd. ("MMA") to comply with certain discovery requests issued recently by CN. See Extension Request at 2.

Argument

There are several reasons why the Extension Request should be denied. First, the November 20th response date is mandated by a Board regulation (49 C.F.R. § 1152.26(a)) that requires comments and protests to be filed within forty-five (45) days of the filing of the Application. Neither CN nor Fraser has articulated any compelling reason why that 45-day rule should not apply in this proceeding.

³ See also Canadian National Railway Company – Adverse Discontinuance – Lines of the Bangor and Aroostook Railroad Company and Van Buren Bridge Company in Aroostook County, ME, Docket No. AB-124 (Sub-No. 2) et al. (STB served Oct. 24, 2003)(specifying November 20th as the applicable response date).

⁴ The Extension Request was sent by facsimile and overnight mail to the Board on November 10, 2003, but was not received by and filed with the Board until

Second, CN and Fraser have failed to comply with the Board's rules on extension requests. Under the Board's regulations, requests for extension of time must be filed "not less than 10 days before the due date." 49 C.F.R. § 1104.7(b). In this case, CN and Fraser filed their Extension Request with the Board less than ten (10) days before the November 20th due date for Application responses. CN and Fraser have not provided any justification for their failure to comply with this requirement. They have had the Application for more than a month and never gave any indication until now that they might be seeking additional time to respond.

In fact, in the Motion to Compel that CN filed on October 29, CN asked for expedited consideration of its request for certain documents "so that CN can provide its comments to the Trustee's [Application] on November 20, 2003, in accordance with the Board's Order in this proceeding, served October 24, 2003." CN Motion to Compel at 1.⁵ In the Extension Request, CN never explains why it was prepared to respond by November 20th at the time it filed its Motion to Compel but has now determined, merely two (2) weeks later, that it is not able to do so.

Third, CN and Fraser have failed to justify their request for nearly doubling the response time mandated by the Board's rules. Fraser never explains why it would need three (3) additional weeks to refute what it calls the "numerous unfounded allegations made in the Application." Extension Request at 2. Although Fraser claims that it has been "diligently working" to prepare its comments, Fraser waited almost a month after receiving the Application before asking the Trustee to provide copies of certain

⁵ November 12, 2003 because of the Veteran's Day holiday. In that same motion, CN asked the Board to require the Trustee and MMA to respond within seven (7) days and produce the requested documents by November 14 "in order to provide CN with adequate time to prepare its comments to the

Application workpapers that the Trustee had produced to CN. This was the first time that Fraser had asked the Trustee or CN for any discovery materials in this proceeding.

Similarly, it is unclear why CN would need three (3) additional weeks to respond to an Application that it describes as "not necessarily substantive." Extension Request at 2. CN claims that it needs more time in order to obtain and review additional discovery materials from the Trustee. It claims that the Trustee has been "slow in responding to discovery" and has failed to produce "hundreds of pages" of workpapers. See Extension Request at 3. As explained below, these claims are overstated and replete with inaccuracies.

CN's claim that the Trustee has been "slow in responding" to the discovery "served" by CN on August 19, 2003 is misleading.⁶ As CN admits in a footnote, the parties agreed that the Trustee would not have to respond to the CN discovery until October 7, 2003. See Extension Request at 3 note 2. This agreement was struck as part of the settlement of outstanding discovery disputes between CN and the Trustee. The Trustee produced 570 pages of documents on October 7, 419 pages of documents on October 8, 3347 pages of documents on October 9, 588 pages of documents on October 16 and an additional page on October 17. In total, the Trustee produced 4925 pages of documents to CN, 4336 of which were produced within two (2) days of the agreed upon production date and all of which were produced within eight (8) days of filing the Application.⁷

Application." CN Motion to Compel at 8.

⁶ To the best of the Trustee's knowledge, CN never actually "served" discovery on the Trustee. Instead, CN forwarded proposed, unsigned discovery requests that the Trustee eventually agreed to answer in part in exchange for CN's agreement to respond to certain discovery requests that the Trustee had served on CN.

⁷ Although CN complains that the Trustee did not complete its production on the

CN's claim that the Trustee has failed to produce "hundreds of pages" of workpapers used by Mr. Heller and Mr. Howard in preparing their Verified Statements is nonsense. The Trustee has fully responded to CN's requests for workpapers. CN's allegation about Mr. Howard's workpapers relates to a specific document that is the subject of CN's pending Motion to Compel. As the Trustee has indicated to CN and to the Board, Mr. Howard does not have a copy of that document and did not review a copy of that document in preparing his Verified Statement.

The Trustee also has responded fully to CN's more recent inquiry about certain workpapers of Mr. Heller. In a letter faxed after the close of business this past Friday, exactly one (1) month after it received the Application, CN asked about "numerous references in Mr. Heller's statement" to certain Fraser documents and a separate reference to "MMA correspondence" in footnote 91 of the Heller Verified Statement.⁸ On Monday, the Trustee produced the referenced Fraser documents to CN.⁹ On Tuesday, the Trustee informed CN that the Trustee had already produced all available workpapers related to footnote 91 of the Heller Verified Statement.¹⁰ Although the Trustee and CN continue to disagree as to whether CN should have asked Fraser

stipulated date, CN itself failed to produce all documents in response to the Trustee's discovery requests by the agreed upon September 22, 2003 date and took more than four (4) months to produce certain effective rate information compelled by the Board's May 6, 2003 discovery order.

⁸ A copy of that letter is attached to the Extension Request.

⁹ See November 10, 2003 letter from Edward Fishman to Myles Tobin, attached hereto as Exhibit A. In that letter, the Trustee expresses surprise that CN had not sought or obtained copies of these documents (which were produced in May 2003) from Fraser and had taken more than a month to realize that it did not have such documents.

¹⁰ See November 11, 2003 letter from Edward Fishman to Myles Tobin, attached hereto as Exhibit B.

rather than the Trustee for copies of Fraser discovery materials,¹¹ the bottom line is that CN now has all of those Fraser documents and can no longer rely on an alleged lack of workpapers as an excuse for more time.¹²

CN also claims that it needs more time to prepare its response in order to obtain and review additional discovery materials from MMA. CN waited until August 28, 2003 to serve its initial set of discovery requests on MMA, despite CN's knowledge since January 9, 2003 that MMA now owns and operates the railroad lines at issue and therefore might have information relevant to this proceeding. As MMA has explained in its opposition to CN's Motion to Compel, Canadian Pacific Railway Company ("CP") has objected to the production of one particular document sought by CN on confidentiality grounds and the other documents sought by CN from that initial set of discovery requests are not relevant to this proceeding. CN waited until October 23, 2003 to serve a second set of discovery requests on MMA. It is not surprising that MMA and CN are still negotiating over the scope of MMA's response to that discovery. CN fails to explain in its Extension Request how MMA's failure to respond to that "limited" set of discovery requests to date will prevent it from filing an adequate response to the Application. CN should not be rewarded for failing to review the Application and serve its discovery requests in a timely manner.

Finally, the assertion by CN and Fraser that the Application is "voluminous" and that the Trustee "has apparently been working on it for quite a long time" do not justify the requested extension. The Board's rules mandate that CN, Fraser and other

¹¹ See November 11, 2003 letter from Myles Tobin to Edward Fishman, attached hereto as Exhibit D; November 13, 2003 letter from Edward Fishman to Myles Tobin, attached hereto as Exhibit E.

¹² It is ironic that Fraser is joining with CN to request an extension based in part of

interested parties file their responses to the Application within forty-five (45) days. The fact that the Trustee spent considerable time and effort in preparing the Application and developing the case in chief does not in any way justify the three-week extension request. The Trustee has the burden of proof in this case and has put substantial evidence in the record to support its discontinuance and abandonment case. CN and Fraser need only point out alleged deficiencies in the Trustee's case. CN and Fraser should not be given extra time to respond to the Trustee's evidence because the Trustee has done a thorough job. CN and Fraser are required under the Board's rules to prepare their responses by November 20th regardless of how long it took the Trustee to develop its case.¹³

Conclusion

For the foregoing reasons, the Extension Request filed by CN and Fraser should be denied. CN and Fraser should be required to comply with the November 20th response date mandated by the Board's regulations. The Extension Request also should be denied because it fails to comply with 49 C.F.R. § 1104.7(b).

Respectfully submitted

By:



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Kevin M. Sheys

¹³ CN's supposed inability to obtain Fraser documents.
In addition to prejudicing the Trustee, this 11th hour extension request by CN and Fraser will prejudice other parties that intend to comment on the due date by giving CN and Fraser the potential opportunity to address such comments in their responses.

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**ATTORNEYS FOR TRUSTEE OF BANGOR &
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AL.**

Dated: November 13, 2003

Exhibit A

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November 10, 2003

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**VIA FACSIMILE (WITHOUT ENCLOSURES) AND
FEDERAL EXPRESS**

Myles L. Tobin
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29 North Wacker Drive
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**Re: 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**

Dear Myles:

I am writing in response to your letter of November 7, 2003, which we received after close of business here this past Friday. In that letter, you state that the Heller Verified Statement contains numerous references to "Document Nos. FR 000016 - FR 000259" and claim that such documents have not been provided to CN. You also ask about the reference to "MMA correspondence" in the last sentence of footnote 91 of the Heller Verified Statement.

The "FR 000016 - FR 000259" documents, as should be obvious from their designation, are documents that Fraser produced to the Trustee pursuant to the Board's May 6, 2003 discovery order in this proceeding. We are surprised that you have asked the Trustee, rather than Fraser, for copies of these documents. You have known since May that Fraser was required to produce certain documents to the Trustee. You could easily have picked up the phone and asked Fraser's counsel for a copy of these documents over the last six (6) months.

We also are surprised that you have waited this long to ask for copies of these documents from the Trustee. You have had a copy of the Heller Verified

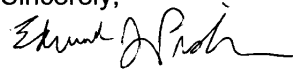
Kirkpatrick & Lockhart LLP

Statement, which contains numerous references to the Fraser documents and explicitly states that Mr. Heller relied upon materials produced in discovery by Fraser (see Heller Verified Statement at 4 and footnote 5), since October 7, 2003. Apparently, you have not taken any steps to obtain copies of these documents from Fraser or from the Trustee until now.

Nonetheless, in order to avoid additional delay in this proceeding, we are enclosing herewith a full set of the Fraser documents. These documents were designated by Fraser as "FR 000001 – FR 000259" and are Highly Confidential documents subject to the Protective Order. Fraser's counsel has indicated that he has no objection to our production of these materials to CN.

Finally, we are in the process of determining whether the "MMA correspondence" referred to in the last sentence of footnote 91 of the Heller Verified Statement has been provided to CN. We will apprise you of our findings in this regard as soon as possible.

Sincerely,



Edward J. Fishman

Enclosures

cc: Chuck Spitulnik (w/o enclosures)

Kirkpatrick & Lockhart LLP

Exhibit B

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November 11, 2003

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VIA FACSIMILE

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**Re: Docket No. AB-279 (Sub-No. 3)
Canadian National Railway Company -- Adverse Discontinuance --
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Maine**

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

Dear Myles:

Following up on my letter of yesterday, I am writing to provide further information in response to your inquiry about the reference to "MMA correspondence" in the last sentence of footnote 91 of the Heller Verified Statement. It is our understanding that the CP rebate amount referenced in footnote 91 was provided to Mr. Heller in a telephone discussion with MMA personnel. This CP rebate amount is reflected in "BAR 004702", a document that was produced to CN (along with certain other workpapers of Mr. Heller) on October 16, 2003. This CP rebate amount also is set forth in Table 5 of the Heller Verified Statement itself. Mr. Heller does not have any other workpaper that reflects this CP rebate amount.

Sincerely,



Edward J. Fishman

cc: Charles Spitulnik
Michael Rosenthal

Exhibit C

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November 11, 2003

VIA FACSIMILE (202/778-9100) AND U.S. MAIL

Mr. Edward J. Fishman
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Re: **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

Dear Ed:

I received your letter of November 10, 2003, in response to my November 7th inquiry regarding outstanding discovery workpapers. I was, to say the least, disappointed in this response. By stipulation, the parties had agreed that on October 7, 2003, the Trustee would produce documents responsive to our Document Production Requests, including, but not limited to, the workpapers utilized in preparing the Application and attached Verified Statements. Indeed, by letter dated October 16, 2003, you represented to me that the Trustee has produced all available documents responsive to the CN Document Requests (including all workpapers). You reiterated that representation in your October 27, 2003 letter. I had therefore quite reasonably relied upon your representation that all workpapers were included in the materials sent to me, and I presumed that they had merely been remarked from an "FR" designation to a "BAR" designation.

Notwithstanding your purported "surprise", the discrepancy only came to light when pointed out by our independent consultant who is reviewing the workpapers and Mr. Heller's Verified Statement.

This is the second instance in which we have uncovered evidence of workpapers which have not been provided, notwithstanding your unequivocal representation (and stipulation) that

FLETCHER & SIPPEL LLC

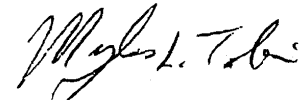
Mr. Edward J. Fishman
November 11, 2003
Page 2

such documents would be provided. I can only be left to wonder what other workpapers exist that you have not provided, despite your representations to the contrary.

Ed, I understand that mistakes can happen, and had you identified this as a simple mistake in failing to provide documents, then that omission could be forgiven. But it is disingenuous to attempt to shift responsibility for obtaining those documents to us, when you and Mr. Heller are the only ones who could legitimately know what workpapers he relied upon.

Again, if there is any other missing data responsive to our Discovery Requests, please forward it as soon as possible.

Very truly yours,



Myles L. Tobin

MLT:kib

Exhibit D

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November 13, 2003

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VIA FACSIMILE

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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**

Dear Myles:

I received your letter of November 11, 2003. I am hesitant to prolong the record on this matter, but must point out that we continue to have differences of opinion in several respects. Although in hindsight we probably should have confirmed whether CN had obtained copies of the "FR" documents from Fraser, we remain surprised that CN had not already received them due to the apparent coordination between CN and Fraser. More importantly, we remain surprised that it took more than a month for CN to figure out that it did not have the Fraser documents. The Heller Verified Statement is replete with references to Fraser data derived from "FR" documents, which have been available from Fraser since May. In addition, we strongly disagree with your allegation that this is the "second instance" in which documents have not been provided to CN. We can only assume that you are referring in the first instance to the CP-MMA agreement referenced in the Howard Verified Statement, a document that the Trustee does not have and did not review in preparing its Application.

Sincerely,



Edward J. Fishman

CERTIFICATE OF SERVICE

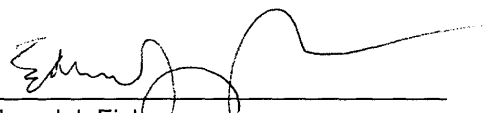
I hereby certify that on this 13th day of November, 2003, a copy of the foregoing
Reply in Opposition to Canadian National Railway Company and Fraser Papers,
Inc. Joint Motion For Extension of Time to File Comments was served by facsimile
and first-class mail upon:

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