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SERVICE DATE - MAY 3, 2004

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-124 (Sub-No. 2)

WATERLOO RAILWAY COMPANY  
– ADVERSE ABANDONMENT –  
LINES OF BANGOR AND AROOSTOOK RAILROAD COMPANY AND VAN BUREN  
BRIDGE COMPANY IN AROOSTOOK COUNTY, MAINE

STB Docket No. AB-279 (Sub-No. 3)

CANADIAN NATIONAL RAILWAY  
– ADVERSE DISCONTINUANCE –  
LINES OF BANGOR AND AROOSTOOK RAILROAD COMPANY AND VAN BUREN  
BRIDGE COMPANY IN AROOSTOOK COUNTY, MAINE

Decided: April 30, 2004

The Surface Transportation Board is denying the application of the trustee of the bankruptcy estate of the Bangor and Aroostook Railroad Company, et al. (BAR), who had sought a Board finding that the public convenience and necessity (PC&N) require or permit the termination of the rights of the Canadian National Railway Company (CN) and its subsidiary Waterloo Railway Company (Waterloo) to operate over a segment of track currently owned by the Montreal, Maine & Atlantic Railway, Ltd. (MMA), BAR's successor.

BACKGROUND

The CN/Waterloo operating rights over MMA were created in a transaction entered into by CN and BAR on March 15, 2001 (the March 2001 Transaction). In the March 2001 Transaction, CN gave BAR's financially ailing parent company \$5 million in return for:

(a) CN's receipt of trackage rights to serve the plant of Fraser Papers, Inc. (Fraser), at Madawaska, ME, over the line at issue, a 23-mile segment then owned by BAR and a subsidiary, the Van Buren Bridge Company (VBBC) (the Madawaska line);<sup>1</sup>

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<sup>1</sup> Madawaska is in northern Maine, across the St. John River from Edmunston, New

(continued...)

(b) Waterloo's receipt of a locally recorded easement to conduct operations over the same line; and

(c) a haulage agreement (part of the so-called "Junction Settlement Agreement"), whereby CN, without using its trackage rights, deals directly with Fraser concerning rate and service matters, and BAR or its successor performs the physical transportation for Fraser as a contractor for CN.

The trackage rights and the easement allow CN to provide service only to Fraser. They were approved under the agency's class exemption procedures.<sup>2</sup> Haulage agreements do not require Board approval.

On August 15, 2001, an involuntary bankruptcy petition was filed against BAR. On January 9, 2003, MMA purchased the BAR system railroads, including the Madawaska line, from the estate of the bankrupt BAR. MMA thereby assumed BAR's rights and obligations under the March 2001 Transaction. By decision served on September 25, 2003, the Board granted MMA's petition to intervene in these proceedings.

CN has not yet exercised its right under the trackage rights agreement to serve Fraser with its own crews and equipment, and instead deals with Fraser under the haulage agreement. Pursuant to the haulage agreement, MMA, as the successor to BAR, receives a flat fee per car for hauling Fraser cars to and from interchange with CN at St. Leonard, Canada.

BAR's trustee (the Trustee) previously sought to terminate CN's right to serve Fraser under the pre-bankruptcy March 2001 Transaction on a different basis. Canadian National Railway Company – Trackage Rights Exemption – Bangor and Aroostook Railroad Company and Van Buren Bridge Company, STB Finance Docket No. 34014, et al. (STB served June 25, 2002). The Board denied the Trustee's request to vacate the exemptions approving the trackage rights and easement created in the March 2001 Transaction. In doing so, the Board noted that the Trustee had failed to justify revocation under 49 USC 10502(d). Moreover, the Board pointed

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<sup>1</sup>(...continued)

Brunswick, Canada. The Madawaska line runs for approximately 23.03 route miles in Aroostook County, ME, between Madawaska, ME, and the Canadian border. Before its acquisition by MMA, VBBC owned the .31-mile portion of this line between Van Buren (Canadian Junction) and a rail bridge across the St. John River at the United States - Canada border. The VBBC portion extends into Canada, where it connects with CN at St. Leonard.

<sup>2</sup> The Board served separate notices of the trackage rights and operating easement exemptions on March 21, 2001, and published them in the Federal Register at 66 FR 15941 (March 21, 2001), in STB Finance Docket Nos. 34014 and 34015, respectively.

out that revocation simply wasn't the proper vehicle for the relief the Trustee sought. Once trackage rights were in place, they could be removed only by the Board's grant of discontinuance authority under 49 USC 10903, and the Trustee had failed to support such a grant. The Board ruled that, if the Trustee sought to pursue termination of CN's rights, he would have to file applications for adverse (involuntary) discontinuance and abandonment under 49 U.S.C. 10903.

On October 6, 2003, the Trustee filed an application under 49 U.S.C. 10903 seeking: (1) the adverse discontinuance of trackage rights acquired by CN from BAR and VBBC;<sup>3</sup> and (2) the adverse abandonment of the operating easement acquired by CN subsidiary Waterloo over the same line.<sup>4</sup> The Trustee seeks a determination that would permit the termination of CN's authority to serve Fraser over the Madawaska line using its own crews and equipment pursuant to the trackage rights and Waterloo easement. Because the haulage agreement is not subject to Board jurisdiction, the Trustee has sought to terminate that agreement in court. Termination of the trackage rights and haulage agreement would leave MMA as the only carrier with authority to serve Fraser over the Madawaska line. MMA has neither formally joined in the Trustee's application nor commented separately upon it, although the Trustee's filings include testimony given by MMA Chairman Burkhardt.

The Trustee argues that termination of CN's authority to serve Fraser, leaving MMA as the sole carrier with authority to serve that shipper, is required by the present or future PC&N under 49 U.S.C. 10903. The Trustee contends that CN's rights threaten BAR's estate, MMA as BAR's successor, and the shippers and communities MMA now serves in a way that substantially outweighs any potential harm to Fraser and CN from the termination of CN's rights. The Trustee claims that continuation of CN's rights will be harmful because they could (1) threaten the financial viability of MMA, affecting all shippers on MMA's lines, (2) cause MMA to seek to abandon two other rail lines that are not at issue in these proceedings, the "Madawaska-Portage" line, and the "CDAC" line, which runs from Brownsville Junction, ME, to the Canadian border, and (3) adversely affect the fairness of the bankruptcy process by favoring CN over BAR's creditors. The Trustee argues that the harm to Fraser would be minimal because termination of CN's rights would not threaten service to Fraser. In addition, the Trustee claims, truck and rail competition is available that could compensate for termination of its option to be served by CN, and CN has not shared the benefits of its rights with Fraser. The Trustee's position is that CN is not harmed given that it has not even commenced operations under the trackage rights and easement.

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<sup>3</sup> STB Docket No. AB-279 (Sub-No. 3).

<sup>4</sup> STB Docket No. AB-124 (Sub-No. 2). Because CN is the principal provider of service and Waterloo's only role in these proceedings is to hold the operating easement as a subsidiary of CN, further discussion will, for the sake of brevity, refer only to CN and its rights, unless there is a need to refer separately to Waterloo or its easement.

On December 11, 2003, CN, Fraser, and the National Industrial Transportation League (NITL) filed statements in opposition to the Trustee's application. CN has attached verified statements extensively disputing the factual allegations made by the Trustee. For example, CN points out that MMA has entered into an agreement with the State of Maine that restricts MMA's ability to abandon track in return for aid from the state. Fraser discusses its transportation needs and the history of this proceeding. It also argues that the Trustee lacks standing to bring this application because MMA's purchase of the property extinguished the BAR estate's right to file this application and MMA has not joined in it. NITL comments that the involuntary termination of CN's rights would be contrary to the rail transportation policy of 49 U.S.C. 10101 (RTP) and is not required or permitted by the present or future PC&N. On December 29, 2003, the Trustee filed a rebuttal statement that sought to address the issues raised in the opposing protests and comments.

#### PRELIMINARY MATTER

The Board finds that the Trustee has standing to bring this application, notwithstanding MMA's failure formally to join in it. The statutory provisions and regulations governing discontinuances and abandonments permit any entity with a cognizable interest to pursue adverse discontinuance or abandonment authority. Thompson v. Texas Mexican Ry., 328 U.S. 134, 145 (1946) (Tex Mex). See also Chelsea Property Owners – Aban. – The Consol. R. Corp., 8 I.C.C.2d 773, 778 (1992) (Chelsea), aff'd, Consolidated Rail Corp. v. ICC, 29 F.3d 706 (D.C. Cir. 1994) (Conrail); Modern Handcraft, Inc. – Abandonment, 363 I.C.C. 969, 971 (1981) (Modern Handcraft). The Trustee has a cognizable interest in the outcome of this proceeding because the terms of BAR's sale to MMA provide that BAR's estate, the creditors of which are represented by the Trustee, will receive an additional \$5 million from MMA if the Trustee prevails.<sup>5</sup> MMA's nonparticipation does not, by itself, deprive the Trustee of standing to bring his application.

#### DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903(d), the standard governing any application to abandon or discontinue service over a line of railroad, including an adverse abandonment or discontinuance, is whether the present or future PC&N require or permit the proposed abandonment or discontinuance. In implementing this standard, the Board balances the competing benefits and burdens of abandonment or discontinuance on all interested parties, including the railroads, the shippers on the line, the communities involved, and interstate commerce generally. See City of Cherokee v. ICC, 727 F.2d 748 (8th Cir. 1984). Because of the pending bankruptcy proceeding,

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<sup>5</sup> See Application (highly confidential version), V.S. of James E. Howard, Appendix 4, at 12-13. The parties have designated much of the record as confidential. The Board will discuss the information contained in those submissions to the extent necessary to explain its decision.

the Board also will include in its balancing the interests of the BAR estate and its creditors as represented by the Trustee. In making its determination of what is in the public interest, “the Board shall [also] consider whether the abandonment or discontinuance will have a serious, adverse impact on rural and community development.” 49 U.S.C. 10903(d). And the Board takes the goals of the RTP into consideration in making its public interest determinations.<sup>6</sup>

In adverse abandonment or discontinuance cases, where a third party applicant seeks to force abandonment or discontinuance of service over the objection of the carrier providing it, the third party applicant, here the Trustee, has the burden of establishing that abandonment or discontinuance is required or permitted by the PC&N. A decision by the Board concluding that the PC&N does not require or permit continued operations over the track by the carrier in question and authorizing abandonment or discontinuance has the effect of removing the Board’s exclusive and plenary jurisdiction, thereby enabling the applicant to undertake other legal remedies to force the carrier off the line. See Conrail, 29 F.3d at 709; Modern Handcraft, 363 I.C.C. at 972.

As the adverse third-party applicant, the Trustee has the burden of proof. Chelsea, 8 I.C.C. at 778. Here, after considering the arguments and balancing the interests of all concerned, the Board concludes that the Trustee has failed to demonstrate that the adverse discontinuance of CN’s trackage rights authority to operate over this line meets the PC&N test. The function of the Board’s regulatory authority with respect to abandonments or discontinuance of rail service is to provide the public with a degree of protection against the unnecessary discontinuance, cessation, interruption, or obstruction of available rail service. Modern Handcraft, 363 I.C.C. at 972. Here, the Board concludes that the public is best served by denying the adverse abandonment and discontinuance application.

#### Burden on Fraser from Losing Competitive Rail Service

The burden to show that the Board should extinguish competition where it already exists is a difficult one to meet because the Board is guided by its governing statutes and policies, which make competition important. In particular, the RTP emphasizes the role of competition, at 49 U.S.C. 10101(1), (4), and (5). Thus, the Board and its predecessor, the Interstate Commerce Commission (ICC), have always been particularly vigilant to protect existing competition produced by market forces. For example, in the rail merger context, which is where the issue usually arises, the Board and the ICC have consistently sought to assure that agency-approved transactions would not result in the creation of “2-to-1” points where shippers lose existing intramodal rail competition. See, e.g., Union Pacific/Southern Pacific Merger, 1 S.T.B. 233, 252, 390-93 (1996).

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<sup>6</sup> See, e.g., Association of American Railroads v. STB, 306 F.3d 1108, 1111 (D.C. Cir. 2002); Baltimore Gas & Elec. Co. v. United States, 817 F.2d 108, 114-15 (D.C. Cir. 1987).

Because of the strong statutory and Board policies favoring the preservation of rail-to-rail competition and the provision of adequate service for shippers, the Board will not deprive Fraser of the availability of rail service options that it already has absent a very strong showing that such action is in the public interest. In particular, the Trustee has the burden of proving that the benefit of the existing competitive service option available to Fraser from CN is outweighed by other harms. Although the Board understands that the Trustee seeks to maximize the value of the bankrupt estate and is concerned about the health of the MMA, the Board is not persuaded that the Trustee has met that high burden.

The Trustee attempts to meet its burden by showing that the benefit to Fraser of the competitive service option from the CN trackage rights is small due to the availability of alternative truck and rail service and is outweighed by the need to increase the profitability of MMA so that it may continue to provide rail service to shippers on other, less profitable lines. The Trustee provides examples of truck movements and movements involving alternate rail routes (not over the Madawaska line). To show that MMA might have to abandon some of its services unless it becomes more profitable, the Trustee selected two unrelated MMA rail lines (the CDAC line and the Madawaska - Portage line) and attempts to show that MMA is operating them at a loss.

Although the Trustee relies on the fact that Fraser has shipped about 35% of its outbound and about 50% of its inbound product by truck, the record shows that Fraser is to a significant degree heavily dependent on rail to meet its transportation needs. According to CN witness Carson, the traffic that moves by truck does so because it involves short hauls, tight service requirements, or receivers that are not equipped for rail service.<sup>7</sup> Further, Fraser witness Durant testifies<sup>8</sup> that rail service is essential for Fraser, and his testimony is supported elsewhere in the record. From 1991 - 2002, the percentage of outbound traffic moving by rail (about 65%) has remained relatively constant, varying by only a couple of percentage points.<sup>9</sup> The lack of variation in the rail share is further evidence that Fraser must use rail service for some of its products and that truck is not a viable alternative. Indeed, Trustee witness Yocum confirms that “Fraser requires consistent and reliable rail service.”<sup>10</sup> Similarly, the difference in the price Fraser

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<sup>7</sup> Protest (public version), V.S. of Clifford L. Carson, at 17.

<sup>8</sup> Comments and Reply in Opposition of Fraser Papers, Inc., filed Dec. 11, 2003, V.S. of Austin S. Durant, at 2-3.

<sup>9</sup> Application (highly confidential version), V.S. of James N. Heller, at 9 (Table 2).

<sup>10</sup> Application (public version), V.S. of Frederic W. Yocum, Jr., at 7.

charges depending on whether its product is transported by rail or by truck means that truck may not be an economically viable alternative to reach some of its customers. The Trustee fails to show that the traffic that does not share these characteristics can also feasibly move by truck.

Next, the Trustee argues that Fraser has not actually benefitted from CN's ability to serve Fraser directly over the Madawaska line. The Trustee views this as persuasive evidence that the benefit of CN's presence has been, and will continue to be, illusory.

The Trustee's attempt to dispute the actual benefit to Fraser of CN's presence is not credible for three reasons. First, as Fraser points out, evidence of competition between the two carriers is shown by the fact that MMA now handles all inbound movements of clay, and MMA's percentage of outbound rail traffic has grown from less than 1% to approximately 10%. This change indicates that CN's competitive presence confers a substantial ongoing benefit to Fraser because Fraser is exercising its choice in a way that presumably benefits it. Fraser could not do so if CN were out of the picture because it would not have the leverage to direct its business to the rail option that afforded it the better rates or service.

Second, the Trustee's analysis of rate changes after CN began to provide service does not necessarily reflect the extent of competition. It has been only a little over 1 year since MMA acquired the BAR system. Fraser's October 2002 transportation contract with CN was signed when a bankrupt BAR was the only source of CN's competition, and that contract will last until 2005. When that contract was signed, CN was essentially competing only with itself. Competition on transportation rates between CN and MMA should get stronger as contracts expire and MMA further stabilizes. Moreover, before the March 2001 Transaction, Fraser solicited rate quotes only from BAR but now solicits quotes from both CN and MMA.<sup>11</sup>

Third, the Trustee's attempt to dispute the benefit to Fraser of CN's presence ignores service benefits. In its business plan, MMA states that BAR was providing generally inadequate service that was a source of "significant problems for paper freight."<sup>12</sup> CN's trackage rights protect Fraser from a recurrence of these problems and offer the opportunity for Fraser to benefit from improved service from CN in addition to rate competition. Indeed, Fraser has already begun to enjoy one type of service benefit – because of the March 2001 Transaction, Fraser now has three possible service options over the Madawaska line (service under the haulage agreement, possible future through service by CN using its trackage rights, or possible joint line service by MMA and CN), rather than the one option (joint line service) that it had before the March 2001 Transaction.

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<sup>11</sup> Application (highly confidential version), V.S. of James N. Heller, at 8 & n.12.

<sup>12</sup> See Protest of CN (highly confidential version), Exh. C, at 14.

The Trustee also relies on anecdotal examples of product and geographic competition and unsubstantiated claims that Fraser and its Brascan Corporation affiliate ship enough on MMA to have market power over MMA in the absence of CN. With nothing more, it is difficult for the Board to justify removing a rail competitor on these grounds alone.

#### Harm to Other Parties Involving CN's Service Rights

The Trustee argues at length that the estate should be relieved of its obligations under the March 2001 Transaction because that transaction weakened BAR. The Trustee's argument is two-fold. First, the Trustee argues that MMA's survival depends on the termination of CN's rights to serve Fraser. Second, the Trustee contends that MMA will have to abandon the Madawaska-Portage and CDAC lines unless the Board terminates CN's trackage rights. Overlaid on both these arguments is the Trustee's argument that the March 2001 Transaction was unfair to BAR and now MMA.

Survival of MMA. In essence, the Trustee is alleging that MMA's survival depends on the termination of CN's rights to serve Fraser. Trustee witness Burkhardt points to MMA's operating loss of nearly \$2 million in the first 6 months of 2003. However, the record demonstrates that MMA's start-up problems were due to other causes and that those causes are subsiding.

In particular, MMA's start-up problems were due more to closure of mills owned by Great Northern on other segments of MMA's system than to the haulage agreement or CN's unused trackage rights. The traffic of Great Northern accounted for 25% of BAR's monthly revenue.<sup>13</sup> In comparison, even under the more favorable division of revenue available to BAR before the March 2001 Transaction, the Fraser traffic accounted for only 14% of BAR's revenue in 2000,<sup>14</sup> and MMA would not lose all of the revenue from this traffic if CN began using its trackage rights.<sup>15</sup> Moreover, the former Great Northern mills, purchased in April 2003 by a

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<sup>13</sup> Application, V.S. of Edward A. Burkhardt (public version), at 8.

<sup>14</sup> Id. at 3.

<sup>15</sup> See id. at 3. Witness Burkhardt maintains that revenue attributable to Fraser was \$3,626,000 in year 2000 for about 3400 cars of Fraser traffic. According to witness Burkhardt, BAR's revenue for the same traffic under the haulage agreement would have been \$1,700,000 and would have declined to \$680,000 if CN had hauled this traffic itself using its trackage rights. However, the \$680,000 is an understatement because CN would bear the cost of running the trains using its trackage rights.

subsidiary of Brascan, are beginning to resume production. Indeed, Trustee witness Burkhardt notes this as cause for optimism.<sup>16</sup>

Additionally, two other recent developments seem to be improving MMA's situation. The State of Maine has entered into an agreement with MMA to provide \$5.4 million in infrastructure improvement funding to MMA for the years 2003 and 2004, waiving the requirement for matching funds for 2003.<sup>17</sup> And MMA has entered into a broad-based agreement with the Canadian Pacific Railway Company (CP) providing, among other things, for CP to pay MMA marketing incentives for traffic interchanged between MMA and CP over a 10-year period.

Line Abandonments. The Trustee's argument that Fraser must lose competitive rail service so that MMA will not have to abandon the Madawaska-Portage and CDAC lines also is unpersuasive. The Trustee submits a cost-revenue analysis that attempts to show that these lines are unprofitable for MMA and thus candidates for abandonment if MMA cannot be made profitable enough otherwise to support them. CN responds that the Trustee's analysis is faulty and is not in accord with Board standards for evaluating the costs and revenues attributable to lines proposed for abandonment.

MMA's infrastructure improvement funding agreement with the State of Maine (discussed above) obligates MMA to refrain from abandonment of any of its lines for 10 years, allows the State to impose a substantial penalty on MMA for breach of the agreement, and imposes a lien on MMA's property to secure its obligations to the State. The Trustee responds that he considers it "highly unlikely that the State would insist on its most draconian remedy," if

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<sup>16</sup> Applicant's Rebuttal, V.S. of Edward A. Burkhardt (public version), at 5:

Moreover, the Millinocket Mills are coming back on line. The two machines at the East Millinocket will begin producing paper in June. While much of the paper that has been produced has been newsprint, for which the rail market share is relatively low, the resumption of shipments from East Millinocket was sufficient for MMA to restore the emergency pay cuts that we implemented in January. It has also been the principal reason for our operation being profitable for every month beginning in August. We look forward to the resumption of super calendar paper production, which has a relatively high rail market share, in the Millinocket Mill during 2004.

<sup>17</sup> The Rail Funding Agreement is attached to CN's Protest (highly confidential version), Tab 1, Exh. A. An amendment to the agreement appears in Applicant's Rebuttal (highly confidential version), V.S. of Edward A. Burkhardt, Exh. A.

MMA were to seek to abandon a line.<sup>18</sup> This is mere speculation and as such is entitled to little weight. It is clear that the State itself is providing a prop against MMA's failure and that the subject lines are not in imminent peril of being abandoned. Thus, the Trustee's theory regarding potential harm to these two lines from CN's continued rights to serve Fraser fails.

If MMA were to apply for abandonment of these two other lines, standard Board procedures and methodology would be applied, under which the abandonment of each line is considered on its own merits. The Board would focus on the individual revenues, costs, and shipper needs pertaining to each line and the carrier owning the line. Longstanding agency policy precludes the consideration of cross subsidies in abandonment proceedings, which is what the Trustee would have the Board look at here. See Chicago and North Western Transportation Company – Abandonment Between Marshalltown (Powerville) and Cedar Falls Junction and Between Kicks and Dike – In Marshall, Tama, Grundy and Blackhawk Counties, IA, No. AB-1 (Sub-No. 211) (ICC served Jan. 13, 1989).

Fairness. Recurrent themes of the Trustee's application are that MMA should be released from the trackage rights obligation because the entire March 2001 Transaction, of which the trackage rights agreement was a part, was unfair to a smaller, weakened BAR and remains inequitable and harmful to MMA. Neither of these claims are supported by the record.

It appears that CN and BAR entered into the March 2001 Transaction at arm's length and knowing the costs and benefits associated with it, including the trackage rights payments, the payments to be received under the haulage agreement, the payments forgone under the prior division of joint rate revenue with CN, the payment from CN, and BAR's own cost of service. Although BAR was experiencing economic problems at the time, the Trustee has not shown that the subject transaction was other than one ultimately made at arm's length. Additionally, the Trustee has failed to show any improprieties involving the March 2001 Transaction.

Further, the Trustee and MMA do not contend that the price paid by CN for the trackage rights was unfair. The \$5 million that CN paid BAR to enter into the trackage rights and haulage agreements equals the \$5 million that MMA agreed in the purchase agreement to pay the estate if the Trustee succeeds in vacating the trackage rights and the haulage agreement.<sup>19</sup> In the bankruptcy proceeding, MMA and the Trustee assigned the same \$5 million value to the trackage rights and haulage agreement, which is persuasive evidence that the compensation paid by CN for its rights was not an unfair or inadequate amount.

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<sup>18</sup> Applicant's Rebuttal (public version), V.S. of Edward A. Burkhardt, at 7-8.

<sup>19</sup> See section 1.8 of the Asset Purchase Agreement, which is reproduced in Application (public version), V.S. of James E. Howard, Appendix 4.

Moreover, the terms of the March 2001 Transaction appear fair when compared to other similar deals. CN witness Carson has compared the terms of the March 2001 haulage agreement with the terms of haulage agreements between CN and other railroads.<sup>20</sup> CN's payment/car-mile to MMA is higher than the payment/car mile under other CN haulage agreements.<sup>21</sup> CN witness Carson also has prepared a table showing that the revenue/ton-mile received by BAR/MMA under the haulage agreement exceeds that received by CN for its portion of each joint movement on the table, although the BAR/MMA revenue/ton-mile for each movement is less than it was when BAR was the sole rail carrier serving Fraser.<sup>22</sup> Further, CN witness Carson testifies that the trackage rights rental fee for the entire 50-mile round trip is higher than the average fee paid by tenant carriers that use CN tracks under trackage rights agreements.<sup>23</sup> The Trustee does not dispute this assertion.

Finally, there is no allegation of any fraud or misrepresentation, the type of claim that might cause the Board to subject its economics to greater scrutiny.

#### Rural and Community Development

Under 49 U.S.C. 10903(d), the Board must consider whether the discontinuance of CN's trackage rights would have a serious, adverse effect on rural and community development. While neither party focuses specifically on rural and community development as a separate issue, the Board notes that preservation of needed rail service will benefit rural and community

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<sup>20</sup> Protest (highly confidential version), filed on December 11, 2003, V. S. of Clifford L. Carson, at 8-9. This decision does not state the numerical details of the comparison because they are provided under seal in the highly confidential version of CN witness Carson's statement. Stating them is not necessary to explain the Board's findings.

<sup>21</sup> Witness Carson's figures are consistent with railroad cost patterns. Railroad unit costs usually increase less than proportionally with distance, as fixed costs are spread over increasing volume and distance. The payment/car-mile figures presented by CN show that payment/car-mile tends to decrease with the total (round trip) number of car-miles. CN's payment/car-mile to MMA for its relatively short movement is at the upper payment range.

<sup>22</sup> Protest (highly confidential version), V. S. of Clifford L. Carson, Attachment E. On February 10, 2004, CN filed a more legible replacement for Attachment E.

<sup>23</sup> Protest (highly confidential version), V. S. of Clifford L. Carson, at 10. This decision does not provide these figures because they are submitted under seal in the highly confidential version of CN witness Carson's statement, and stating them is not necessary to explain the Board's findings.

development and interstate commerce in general. The facts here demonstrate that approval of the Trustee's application could have an adverse effect on rural and community development in this area.

CN and Fraser focus specifically on the transportation needs of Fraser's Madawaska mill. The record demonstrates that the mill is one of Fraser's largest and that the mill and an operationally independent nearby mill in Edmundston, Canada, have over 1600 employees.<sup>24</sup> Thus, it appears that the well-being and the economic development of the communities and rural area near the mill might be adversely affected if the Board were to approve the Trustee's application. As previously discussed, while the Trustee maintains that shippers and communities along the unrelated Madawaska-Portage and CDAC lines will lose service if CN's trackage rights are not discontinued, the likelihood of a service loss for this reason is small due to MMA's agreement with the State of Maine. Rather, the only credible evidence of record shows that rural and community interests, as well as the interests of the affected shipper and interstate commerce generally, will benefit overall from the continued competitive service option provided by CN.

#### Impact of the Bankruptcy on this Proceeding

According to the Trustee, the Board's analysis of the public convenience and necessity should give substantial weight to the positive impact that termination of CN's right would have on the estate of the BAR and the public's confidence in the bankruptcy system. The Trustee argues that the Board, in undertaking its public interest analysis, should not allow CN's interests to enjoy more protection than those of the creditors of BAR's estate. The Trustee maintains that it has shown that Fraser's interest in competitive service is less important to the public interest than the need to enhance the assets of the estate and the ability of MMA to provide adequate service.

In deciding cases such as this one, the Board weighs the public interests reflected in the bankruptcy laws. However, the Trustee has not sustained his burden of showing that the interests of the estate and MMA outweigh the public interest in retaining CN's opportunity to provide competitive service. Moreover, it appears to the Board that the outcome would likely be similar if the March 2001 Transaction were the type that could be reviewed under bankruptcy law. Bankruptcy law permits transactions to be undone if the transaction is between the debtor and a creditor and was entered into within 90 days prior to the bankruptcy. Even assuming that CN could be considered a creditor under the March 2001 Transaction, the parties entered into that transaction more than 90 days prior to the filing of the involuntary bankruptcy petition. And although a transaction entered into outside that 90-day period can be undone on a showing that it was a fraudulent conveyance or was unduly burdensome on the estate, the Board is aware of no allegation here that the Transaction was fraudulent and the outcome here appears to be consistent

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<sup>24</sup> Comments of Fraser Papers, Inc., V.S. of Austin Durant, at 3.

with the goals of the bankruptcy laws because the reorganization has succeeded and the assets of the bankrupt estate were sold to a willing buyer that is now operating them. Were the Trustee's petition to be granted, the creditors would get more money and the buyer could operate more profitably. But these benefits do not appear critical to the success of the reorganization.

Under these circumstances, giving due consideration to the interests of the bankrupt estate and MMA, the Board is not persuaded that those interests justify stripping CN of its right to provide competitive rail service to Fraser or depriving Fraser of its right to receive that service.

#### Summary

The Trustee has the burden of showing that the PC&N require or permit the abandonment and discontinuance of service by CN and its affiliate, Waterloo, of their rights to serve the Fraser facility on the Madawaska line. What the Trustee is asking the Board to do is to permit the termination of a privately negotiated, pro-competitive transaction that appears to provide substantial benefits to all parties other than the creditors of the estate and MMA, which knowingly acquired the BAR system subject to CN's rights. Having reviewed the extensive record presented by the parties, the Board finds that the Trustee has not provided a sufficient basis for taking such an extraordinary action, and its petition will be will be denied.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

#### It is ordered:

1. The application in these proceedings is denied.
2. This decision is effective on its date of service.

By the Board, Chairman Nober.

Vernon A. Williams  
Secretary