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SERVICE DATE - NOVEMBER 14, 2003

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: November 13, 2003

The Surface Transportation Board is granting, in part, the motion of the Canadian National Railway Company (CN) to compel the submission of documents from the Montreal, Maine & Atlantic Railway, LLC (MMA) and the Trustee of the bankruptcy estate of the Bangor and Aroostook Railroad Company (the Trustee).

BACKGROUND

By motion filed on October 29, 2003, CN asks the Board to compel MMA and the Trustee to submit certain documents, in particular: the documents sought in Document Request Nos. 7, 8, and 10 to MMA; and a particular document sought in Document Request No. 9 to the Trustee. CN also requests that MMA and the Trustee be ordered to provide the information by November 14, 2003.

On November 5, 2003, the Trustee filed a reply in opposition to CN's motion to compel submission of the subject document requested in Document Request No. 9 to the Trustee. On November 6, 2003, the Canadian Pacific Railway Company (Canadian Pacific) filed a petition to intervene for the limited purpose of contesting CN's motion to compel. Canadian Pacific tendered a response objecting to CN's Document Request No. 10 to MMA and Document Request No. 9 to the Trustee. Also on November 6, 2003, MMA filed a reply in opposition to CN's motion to compel. CN filed a reply on November 12, 2003, to Canadian Pacific's petition,

stating that it does not object to the limited intervention sought by Canadian Pacific but contests that carrier's position that it should not be compelled to respond to the discovery sought by CN. Also on November 12, 2003, Canadian Pacific requested that the CN reply filed on that date be rejected as a reply to a reply prohibited by 49 CFR 1104.13(c). According to Canadian Pacific, while CN's reply is styled as a reply to Canadian Pacific's intervention request, it is primarily a reply to Canadian Pacific's response to CN's motion to compel.

#### PRELIMINARY MATTERS

Canadian Pacific's petition for limited intervention will be granted. Canadian Pacific has an interest in the outcome of the motion to compel because it involves documents raising confidentiality issues for that carrier. The participation of Canadian Pacific in determining that matter will not broaden the scope of these proceedings. CN's reply of November 12, 2003, will be rejected as a prohibited reply to a reply.

#### DISCUSSION AND CONCLUSIONS

Under 49 CFR 1114.21(a) and (c), discovery must be "relevant to the subject matter involved in a proceeding" or be "reasonably calculated to lead to the discovery" of relevant evidence. The requirement of relevance means that the information might be able to affect the outcome of a proceeding. Under 49 CFR 1114.21(c), discovery also may be denied if it would be unduly burdensome in relation to the likely value of the information sought.<sup>1</sup>

Based on these standards, the Board rules on CN's four document requests as follows.

#### Document Request No. 7 to MMA

7. Any and all Communications between MM&A and BAR relating to: (1) the March 2001 Transaction, (2) the proposed abandonment of the Waterloo freight easement and proposed discontinuance of the CN trackage rights on the railroad line between Madawaska and Van Buren, (3) the proposed acquisition of substantially all of the MM&A System by MM&A, (4) the viability of MM&A or the MM&A System, (5) the effect of the Waterloo freight easement and/or the CN trackage rights on MM&A's financial viability or the service provided by

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<sup>1</sup> See the Board's two decisions disposing of the Trustee's separate motions to compel discovery against CN and Fraser Papers, Inc., simultaneously served in Waterloo Railway Company – Adverse Abandonment – Lines of Bangor and Aroostook Railroad Company and Van Buren Bridge Company in Aroostook County, ME, STB Docket No. AB-124 (Sub-No. 2), et al. (STB served May 6, 2003) (Prior Discovery Decisions).

MM&A, and (6) the preparation, development and content of the Notice of Intent and the Adverse Abandonment Application referenced therein.

Document Request No. 8 to MMA

8. Any and all Communications between the Trustee and MM&A relating to: (1) the March 2001 Transaction, (2) the proposed abandonment of the Waterloo freight easement and proposed discontinuance of the CN trackage rights on the railroad line between Madawaska and Van Buren, (3) the proposed acquisition of substantially all of the MM&A System by MM&A, (4) the viability of MM&A or the MM&A System, (5) the effect of the Waterloo freight easement and/or the CN trackage rights on MM&A's financial viability or the service provided by MM&A, and (6) the preparation, development and content of the Notice of Intent and the Adverse Abandonment Application referenced therein.

CN's motion to compel responses to Document Request Nos. 7 and 8 to MMA will be denied in part. Document Request Nos. 7 and 8 each contain six sub-requests. Concerning the documents requested in sub-request Nos. (1) - (3), the likely value of the information in assessing the public interest would be small in relation to the burden involved in its production. Since the vast majority of information involving the March 2001 Transaction and MMA's acquisition of the BAR System not already available does not appear to be relevant to the issues in these proceedings, the request for "any and all communications" relating to these transactions, as sought in sub-request Nos. (1) and (3), would force the parties to search extensively for much information that has little or no relevance to these proceedings. Thus, those broad requests are simply too burdensome. Similarly, the request for documents sought in sub-request No. (2) is overly broad and should have been focused on specific issues involved in these proceedings. In Prior Discovery Decisions, supra note 1, the Board denied the Trustee's motion to compel the production of the same type of documents sought in sub-request Nos. (1) - (3) here. The request for documents in sub-request No. (6), "any and all communications" related to the preparation, development, and content of the notice and the application, will be denied because it is unduly broad and burdensome and would not result in the production of relevant documents not already available to CN or ordered to be made available by this decision. For these reasons, CN's motion to compel submission of the documents sought in sub-requests (1) - (3) and (6) of Document Request Nos. 7 and 8 to MMA will be denied.

However, the request for the information sought in sub-request Nos. (4) and (5) of Document Request Nos. 7 and 8 to MMA will be granted. These requests seek documents bearing on specific issues raised by the Trustee in the application in these proceedings – the viability of MMA and how its shippers will be affected by continuation of CN's trackage rights. In the application here, the Trustee extensively argues that MMA's financial position is precarious and that CN's trackage rights will have a major effect on the viability of MMA and its shippers. The Trustee and MMA, unlike CN in Prior Discovery Decisions, are likely to have this

information. Because these document requests are more narrowly focused on major issues raised by the Trustee and MMA themselves, the Board will require their submission.

Document Request No. 10 to MMA

10. All operating agreements, trackage rights agreements, joint facility agreements, voluntary coordination agreements, most favored nations agreements, marketing agreements, or haulage agreements entered into by CP [Canadian Pacific] and MM&A or effective between MM&A and CP.

MMA has indicated that it would be willing to provide the information in Document Request No. 10 but for the objection of Canadian Pacific. But, in its reply as set forth below, MMA does not agree that the sought agreements are discoverable.

CN's motion to compel production of this information will be granted. Canadian Pacific's confidentiality objection will be met because the documents would be subject to the protective order served on May 21, 2003.

Canadian Pacific and MMA also object on the grounds that the request is too broad and the information is not likely to affect the outcome of these proceedings. However, the request appears to be sufficiently focused because it refers to a limited number of specific, readily identifiable documents and agreements. Moreover, the information sought could bear upon, or lead to admissible evidence bearing upon, the extent to which MMA/Canadian Pacific routings could substitute for CN movements over the Madawaska line if CN's trackage rights were terminated by the Board, which is an issue in these proceedings.

Document Request No. 9 to the Trustee

9. All documents utilized in support of, preparation of, or relating to the Trustee's Application for Adverse Abandonment of CN's trackage rights and/or the Waterloo freight easement.

CN maintains that, although the Trustee supplied most of the requested workpapers, it has not supplied one of them. In particular, according to CN, the Trustee has failed to submit a copy of a document to which he refers on page 18 of his own verified statement filed in support of his application, namely, a "coordinated marketing and operating agreement" executed between MMA and Canadian Pacific.

CN's motion to compel the production of this document will be granted, subject to the protective order served on May 21, 2003. The Trustee effectively waived any of his own objections to the provision of the document when he referred to it in his verified statement.

The Board is not persuaded by the Trustee's response that he cannot produce this document because he does not have it and did not review a copy of it in preparing his application. The Trustee offers no answer to the obvious question, "How can a party cite a document that it neither possesses nor has reviewed?" If the document exists, it must be in the possession of either Canadian Pacific, the Trustee, or both parties. Rather than attempt to determine the current location of this document and any copies, the Board will order that "the Trustee and/or Canadian Pacific" produce this document. If the Trustee is correct that only Canadian Pacific has the document and that carrier elects not to provide it notwithstanding the protective order, CN may seek to strike reference to the document in the testimony of the Trustee.

#### Request for Expedited Compliance

CN's request for an expedited response by November 14, 2003, appears reasonable, but to allow MMA and the Trustee and/or Canadian Pacific sufficient time to produce the documents, those entities will be given until November 21, 2003, to produce them. Because CN needs the information before its protest is due, the current due date of November 20, 2003, for protests will be extended to November 28, 2003.<sup>2</sup>

#### It is ordered:

1. Canadian Pacific's petition to intervene is granted, its tendered reply is accepted, and CN's reply of November 12, 2003, to that petition is rejected.
2. CN's motion to compel is (a) granted as to Document Request Nos. 7 and 8 to MMA, sub-parts (4) and (5), Document Request No. 10 to MMA, and Document Request No. 9 to the Trustee, and (b) denied as to Document Requests Nos. 7 and 8 to MMA, sub-parts (1) - (3) and (6). The Trustee and/or Canadian Pacific will comply with Document Request No. 9 to the Trustee.
3. MMA and the Trustee and/or Canadian Pacific are directed to comply with this decision by November 21, 2003, and the due date for protests or comments is extended to November 28, 2003.

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<sup>2</sup> On November 12, 2003, CN and Fraser Papers, Inc., requested an extension of the due date for protests or comments until December 11, 2003. That request will be addressed in a separate decision.

4. This decision is effective on its date of service.

By the Board, Chairman Nober.

Vernon A. Williams  
Secretary