

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: May 6, 2003

The motion of the Trustee (Trustee) of the Bangor and Aroostook Railroad Company (BAR) to compel Canadian National Railway Company (CN) to respond to discovery requests is granted with respect to Interrogatories 2, 3, 5, 6 and 8 and Document Requests 7, 8 and 10, and denied with respect to BAR's other discovery requests of CN.

BACKGROUND

On November 14, 2002, the Trustee filed a notice of intent to file an application for the adverse discontinuance of the trackage rights acquired by CN in STB Docket No. AB-279 (Sub-No. 3) and a notice of intent to file an application for the adverse abandonment of the operating easement acquired by the Waterloo Railway Company in STB Finance Docket No. AB-124 (Sub-No. 2). The same line is involved in both proceedings. The line (herein, the Madawaska Line or the Line) runs between Madawaska, ME, and the Canadian border, and serves a paper mill owned by Fraser Papers at Madawaska.<sup>1</sup>

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<sup>1</sup> On August 27, 2002, the Montreal, Maine & Atlantic Railway, LLC filed a notice of exemption pursuant to 49 CFR 1150.31, *et seq.*, to acquire and to operate the rail lines and other rail assets of BAR. Notice of the exemption was served and published in the Federal Register on September 19, 2002. In a decision served December 18, 2002, we authorized substitution of

(continued...)

The rights at issue in these proceedings were created as part of a March 2001 agreement between CN and BAR (the March 2001 Transaction), under which CN gave BAR's parent company \$5 million in return for the creation of these rights and the execution of a haulage agreement allowing CN to deal directly with Fraser. Under the haulage agreement, BAR crews and equipment perform the physical transportation under contract with CN, and CN quotes rates to Fraser. CN has not used the trackage rights at issue in these proceedings. Instead, CN has served Fraser under the haulage agreement reached with BAR as part of the March 2001 Transaction.<sup>2</sup> Haulage agreements are not subject to our jurisdiction.

Along with its notice filed on November 14, 2002, the Trustee served CN with 8 interrogatories and 10 requests for the production of documents.

By motion filed on December 9, 2002, the Trustee seeks to compel a response to all of the 10 document requests and a response, or a more adequate response, to all but 2 of the 8 interrogatories (Nos. 2-3 and 5-8).<sup>3</sup>

On December 30, 2002, CN replied in opposition to the Trustee's motion to compel. CN argues that the information sought would be burdensome to produce and irrelevant to the issues. On January 6, 2003, the Trustee filed a motion for leave to file a reply to CN's reply and tendered the separate reply. On January 10, 2003, CN filed a reply in opposition to acceptance of the Trustee's reply to CN's reply.

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

Montreal, Maine & Atlantic Railway, Ltd. (MMA) as the party authorized to acquire the assets of BAR. References in this decision to BAR also refer, as appropriate, to MMA following its acquisition of BAR's assets.

<sup>2</sup> In decisions served in these proceedings on September 25, 2002, and October 23, 2002, the Board discussed the background of these matters and granted the Trustee waivers of, and exemptions from, certain regulatory and statutory requirements in connection with the applications. For additional background information, see Canadian National Railway Company – Trackage Rights Exemption – Bangor and Aroostook Railroad Company and Van Buren Bridge Company, et al., STB Finance Docket No. 34014 et al. (STB served June 25, 2002) (CN – Trackage Rights Exemption – BAR).

<sup>3</sup> By a companion motion, the Trustee also moved to compel Fraser Papers, Inc. to respond to discovery requests. We have addressed those matters in a separate decision, Fraser Discovery, served today in these proceedings.

PRELIMINARY MATTER

We will deny the Trustee's motion to file its reply to CN's reply. Under our regulations at 49 CFR 1104.13(c), the pleading process ends with the reply, and replies to replies are not permitted. When good cause is shown, or when additional information is necessary to develop a more complete record, we may waive the rule. 49 CFR 1100.3. Neither has been shown here. The Trustee argues that we should accept its pleading because CN's reply "blatantly mischaracterizes case law pertaining to the availability of discovery in abandonment cases" and "grossly overstates the alleged burden of complying with the Discovery Requests." This, however, is merely an argument that CN's interpretation of case law and view of its compliance burden is incorrect.

DISCUSSION AND CONCLUSIONS

Under 49 CFR 1114.21(a) and (c), discovery must be "relevant to the subject matter involved in a proceeding." 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 may also be denied if it would be unduly burdensome in relation to the likely value of the information sought. Also at issue is whether the information ought to be obtained through discovery rather than some other means.

The instant proceedings require an assessment of the public interest. Part of that entails a balancing of the interests of the estate of BAR and its creditors against the interests of CN and Fraser. The Trustee maintains that the public convenience and necessity would be better served if we were to remove CN's right to operate over the track because this right is burdensome to BAR's estate and results in the estate receiving a lower price for the sale of its assets. According to the Trustee, the termination of CN's right to operate over the track would not adversely affect Fraser. On the other hand, CN and Fraser maintain that the public interest would be better served if we were to allow Fraser to continue to receive the benefit of the right to provide competitive rail service that CN acquired in the March 2001 Transaction. The relevance of the Trustee's discovery requests turns on whether the information requested would be likely to affect the outcome of these proceedings by helping us to conduct this balancing of interests.<sup>4</sup>

Interrogatories 2, 3, 5, 6, and 8 and Document Requests 1, 3, 4, 7, 8, and 9. Some of these requests focus on CN's existing rates under the haulage agreement. Interrogatories 2, 3, 5, 6 and

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<sup>4</sup> CN cites precedents allegedly holding that discovery in abandonment proceedings is disfavored because (1) discovery against shippers would cause them to refrain from participating in abandonment proceedings and (2) railroads typically can obtain the information they seek by other means. These precedents were decided in the context of traditional abandonment or discontinuance of service proceedings, not adverse abandonments or discontinuances.

8 and document requests 7 and 8 are directed toward showing the rates Fraser pays for CN's service. That information tends to show the extent of the competition resulting from the March 2001 Transaction and also the compensatory benefits which Fraser has realized under that transaction. That may be relevant to the balancing of interests we will need to do to decide this case. We will only require CN to provide this information for the period from March 1, 2001 through the end of calendar year 2002. And we will not require compliance with document requests 1, 3, 4 and 9, which are directed at communications about rates. We are requiring that the rates themselves be provided, and that is sufficient. Confidentiality issues can be handled via protective orders.

Document Requests 2, 5, and 6. The information sought in these requests falls into five topics: (1) the March 2001 Transaction; (2) the acquisition of the BAR System by the MMA; (3) the viability of the BAR System; (4) the consequences of events that might affect the service provided by BAR, such as BAR's bankruptcy; and (5) the effect of the relief sought by BAR in these proceedings. In justifying these three document requests, the Trustee says that CN's communications on these topics "will likely show CN's own assessment of the harm, if any, that the discontinuance of the trackage rights would cause CN."

But the value of the trackage rights to CN is clearly indicated by its decision to pay \$5 million to acquire them as part of the March 2001 transaction. Thus, the Trustee knows the value that CN paid for those rights. The value of the BAR system was most recently addressed by the sale of the Line to the MMA. That sale provided for a higher price – again, \$5 million – to be paid to the Trustee if he could succeed in getting the agreements that make up the March 2001 transaction revoked. As part of this effort, the Trustee is seeking to obtain adverse discontinuance authority from us so as to permit the Bankruptcy Court to void the trackage rights agreement. The difference between the price that MMA is willing to pay for the BAR assets encumbered by the trackage rights and other rights created in the March 2001 transaction, and the price for the assets minus those rights, is the value of those rights as established by a market transaction. The value of those rights has been determined by the MMA, backed by its willingness to pay and endorsed by the Trustee's willingness to sell at that price. The Trustee has not shown that the information about CN's communications regarding the 2001 transaction would be relevant to our assessment of the public interest in this proceeding.

Document Request 10. We will require CN to comply with Document Request 10. This request seeks information on the extent to which the goods that Fraser is currently moving by rail over the route at issue could move by trucks at competitive rates. In particular, the extent to which intermodal competition is available is relevant to whether the public interest would suffer if the trackage rights to CN and to Fraser Papers were eliminated. This in turn is relevant to the question of whether the benefits to the creditors of the BAR arising from the cancellation of the trackage rights – and the benefit of that to the public interest – exceeds the public benefits arising from the continuation of the trackage rights. Confidentiality issues can be handled via protective orders.

Interrogatories 1 and 4. CN has provided the information requested in Interrogatories 1 and 4.

Interrogatory 7. This interrogatory requests information on transit times, the rail cars used for the transportation, and any applicable charges for the use of such cars. CN has partially responded to Interrogatory 7. CN objects that much of the information sought would require a burdensome special study and that the Trustee is in possession of much of the information already.

We will require no further response from CN concerning Interrogatory 7. The Trustee is unlikely to have in its possession transit times for transportation that is exclusively over CN lines. But CN states that it is investigating whether it has information on transit times and will provide that information if it is located and readily accessible. CN states further that burdensome special studies would be necessary to provide the information on transit times if it is not readily available, and we have no reason to question this assertion.<sup>5</sup> If information on transit times is not readily available, we will not require CN to finance a special study to produce it.

We see no relevance to the information requested on car hire or rental charges for the use of equipment not owned by CN. These charges have no bearing on the quality of the service that Fraser would receive from BAR if we were to terminate CN's currently unused trackage rights. If CN's trackage rights were to be terminated, BAR would have to assume responsibility for dealing directly with Fraser. It is reasonable to assume that BAR would use the same equipment that it is using to provide service for CN under the haulage rights agreement. The Trustee has provided no basis for challenging this assumption.

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

It is ordered:

1. The Trustee's motion to file a reply to CN's reply is denied.
2. The Trustee's motion to compel CN responses to discovery is granted with respect to Interrogatories 2, 3, 5, 6 and 8 and Document Requests 7, 8 and 10 as discussed in this decision; and denied with respect to the Trustee's other discovery requests of CN.

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<sup>5</sup> If information on transit times is not readily available, CN would have to pay someone to observe transit times in a statistically reliable manner and to put the data into a useful format.

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

By the Board, Chairman Nober and Commissioner Morgan.

Vernon A. Williams  
Secretary