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November 20, 2003

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BY HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001



Edward J. Fishman **Part of
Public Record**
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209459

**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**

**Finance Docket No. AB-124 (Sub-No. 2) 209460
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 Fraser's Motion For Leave To Disclose Verified Statement of James N. Heller To In-House Personnel At Fraser Papers Inc.**

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

Respectfully submitted,

Edward J. Fishman

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

Enclosures

cc: Parties on Certificate of Service
Maynard Dixon, STB Room 647

DC-606299 v1 0230220-0901

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



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Public Record

**TRUSTEE OF BANGOR AND AROOSTOOK RAILROAD COMPANY'S REPLY IN
OPPOSITION TO FRASER'S MOTION FOR LEAVE TO DISCLOSE VERIFIED
STATEMENT OF JAMES N. HELLER TO IN-HOUSE PERSONNEL AT FRASER
PAPERS INC.**

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

Dated: November 20, 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 FRASER'S MOTION FOR LEAVE TO DISCLOSE VERIFIED
STATEMENT OF JAMES N. HELLER TO IN-HOUSE PERSONNEL AT FRASER
PAPERS INC.**

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 Leave To Disclose Verified Statement of James N. Heller To In-House Personnel At Fraser Papers Inc. (the "Disclosure Request").² It would be extremely harmful to MMA and other rail carriers that interline with MMA to allow Fraser's in-house personnel to review the commercially sensitive information contained in the Heller Verified Statement ("Heller V.S."). Fraser is participating in this proceeding on its own volition and has the resources to retain an outside consultant to review the Heller V.S. Therefore, Fraser's Disclosure Request should be denied.

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 Fraser filed its Disclosure Request under seal and subject to the Protective Order, presumably because it contained a modified copy of the Heller V.S. The Trustee is filing this Reply as a public document because it does not contain or reveal any Highly

Background

The Trustee filed its Application in this proceeding on October 6, 2003. The Application includes a significant amount of material that the Trustee designated as "Highly Confidential" and subject to the Protective Order that was issued by the Board in this proceeding on May 21, 2003. The Protective Order prohibits the disclosure of Highly Confidential material to any employee of Fraser. The Trustee designated the entire Heller V.S. as Highly Confidential and subject to the Protective Order because it contains competitively sensitive and proprietary information provided by or derived from BAR, MMA, CN and Fraser sources.

The Heller V.S. contains or is derived from information designated as Highly Confidential by the Trustee and MMA, including competitively sensitive railroad division information not available to Fraser. In addition, Mr. Heller's expert analysis of the transportation options available to Fraser at the Madawaska Mill is based in part on the market intelligence and professional opinions of MMA marketing, finance and operating personnel.

On November 17, 2003, more than a month after the Application was filed and a full week after Fraser had asked for the Trustee's consent to disclosing the Heller V.S. to Austin Durant and other unnamed Fraser employees, Fraser filed the instant Disclosure Request with the Board.³ Austin Durant is Fraser's Vice President of Materials Management, its highest transportation executive and the person ultimately responsible for negotiating rates and other terms of service with MMA and other rail carriers. In its motion, Fraser claims (inaccurately) that most if not all of the information

Confidential information.

³ The Trustee did not consent to the request for the reasons discussed herein.

in the Heller V.S. (except for certain information that CN has demanded be redacted) is derived from Fraser data or data otherwise available to Fraser. See Disclosure Request at 7. As a result, Fraser asserts that nobody will be harmed or prejudiced from the disclosure of the Heller V.S. (with CN's required redactions) to Fraser in-house personnel. Id. Fraser states that it seeks such disclosure in order to avoid having to hire an outside consultant to review the Heller V.S. Id. at 7-8.

Argument

Fraser has failed to justify its request for removal of the condition in the Protective Order that prohibits the disclosure of the Heller V.S. to Fraser employees. Fraser does not cite to any cases in which the Board has allowed employees of a party to have access to information designated as Highly Confidential by another party.⁴

Fraser is a major customer of and will have an ongoing arms-length business relationship with MMA and other railroads that participate in MMA routings (including CP). Fraser's in-house personnel, including Mr. Durant in particular, are in the best position to take advantage of the competitively sensitive information contained in the Heller V.S to the detriment of MMA and those other railroads. The Board and the ICC have routinely rejected requests to allow employees of a shipper, customer or other entity with a competitive interest to view Highly Confidential material. See, e.g., Burlington Northern Inc. et al. – Control and Merger – Santa Fe Pacific Corp. et al., Finance Docket No. 32549 (ICC served May 3, 1995)(denying a similar modification sought by shippers with which the applicant carriers had "arms-length business

⁴ The Trustee is not aware of any applicable precedent for Fraser's request. Cf. CSX Corp. et al. – Control and Operating Leases/Agreements – Conrail Inc. et al., Finance Docket No. 33388 (STB served Aug. 1, 1997)(authorizing in-house labor union

relationships” because the sought modification “could adversely affect the primary applicants’ future business dealings with those entities”).

Notwithstanding the lack of precedent, Fraser asserts that its in-house personnel should be allowed to review the Heller V.S. because it claims that “most if not all” of the Highly Confidential information contained therein is derived from data provided by or otherwise available to Fraser. See Disclosure Request at 8 note 7. Fraser disregards the fact that the Heller V.S. also contains information that is Highly Confidential as to MMA and other rail carriers besides CN.⁵ Contrary to Fraser’s assertion, MMA and other rail carriers that participate in MMA routings will be extremely prejudiced if Fraser in-house personnel are given access to this commercially valuable information.⁶ It is very unlikely that the Board would allow MMA personnel to have access to Fraser’s commercially sensitive data. Fraser fails to offer any reasonable explanation why the reverse – allowing Fraser personnel to have access to MMA’s commercially sensitive data – would be fair.

Fraser’s alternative request to disclose to its employees a version of the Heller V.S. that has been redacted of commercially sensitive MMA and CN data also should be denied. Fraser grossly oversimplifies the Highly Confidential underpinnings of the Heller V.S. It is not simply a question of whether specific data set forth in the Heller V.S. was provided by or derived from a particular source. The Heller V.S. contains an

attorneys to review material designated as highly confidential by applicants because of lack of any commercial relationship between unions and applicants).

⁵ On November 10, the Trustee’s counsel notified Fraser’s counsel that the Trustee could not consent to the disclosure of the Heller V.S. to Austin Durant because the Heller V.S. contains commercially sensitive and proprietary information from BAR and MMA sources.

⁶ The Heller V.S. contains numerous references to information provided by or derived from BAR and MMA data or discussions with MMA personnel.

expert analysis of the competitive transportation options that Fraser enjoys at the Madawaska Mill based on Mr. Heller's discussions with MMA personnel (including market intelligence and professional opinions of MMA marketing, finance and operating personnel) and Mr. Heller's expert interpretation of the leverage that Fraser enjoys over its various transportation options. Mr. Heller's analysis is inextricably linked to the discussions he had with MMA personnel about competitive pressures and leverage in the Fraser transportation market as seen and understood from MMA's standpoint.

The analysis contained in the Heller V.S. itself is Highly Confidential and subject to the Protective Order because it contains an examination of Fraser's transportation options, based in part on the understandings and interpretations of MMA personnel that are commercially sensitive to MMA. If the Board were to authorize the disclosure of this analysis to Austin Durant, Fraser would acquire a roadmap of the competitive pressures that MMA and its interline partners consider and analyze in proposing rates on Fraser traffic and otherwise dealing with Fraser. This would give Fraser considerable leverage over MMA and its interline partners in negotiating future rates and terms of service. The Protective Order established in this proceeding is designed specifically to prevent such commercially harmful disclosure.

The Board should not sanction Fraser's attempt to have its own employees review and analyze the Heller V.S. solely in order to avoid having to retain an outside consultant in this proceeding. Fraser is participating in this proceeding on its own volition and has the resources to retain such an outside consultant. Fraser's aversion to hiring an outside consultant is a thin reed upon which to rely in seeking such an unprecedented and harmful exception to the standard disclosure rules.

Finally, the Board should deny Fraser's request for expedited consideration of this motion. Fraser does not explain why it waited more than a month after receiving the Application to ask for the Trustee's consent to the requested disclosure, or why it waited an additional week after making such inquiry to file the instant motion. It should not have taken more than thirty (30) days for Fraser to determine, as it claims, that it would seek disclosure because it did not want to hire an outside consultant in this case. The timing of this motion strongly suggests to the Trustee that it may have been filed in order to justify a request for an additional extension of time in which to respond to the Application. The Board should not reward Fraser for its failure to retain an outside consultant in a timely manner and its repeated attempts to expand the applicable response deadline in this case.

Conclusion

For the foregoing reasons, Fraser's Disclosure Request should be denied.

Respectfully submitted

By:



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

Dated: November 20, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of November, 2003, a copy of the foregoing
**Reply In Opposition To Fraser's Motion For Leave To Disclose Verified Statement
of James N. Heller To In-House Personnel at Fraser Papers Inc.** was served by
facsimile and first-class mail upon:

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