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Via Messenger

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

RE: STB Docket No. AB-279 (Sub-No. 3), *Canadian National Railway Company—Adverse Discontinuance—Line of Montreal, Maine & Atlantic Railway Ltd., in Aroostook County, Maine*; STB 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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Dear Secretary Williams:

Enclosed please find the original and ten (10) copies of the Comments of the National Industrial Transportation League (“NITL” or “the League”) (Public Version) to be filed in the above-referenced docket, in accordance with the Board’s decisions in this proceeding served on October 24, 2003 and November 26, 2003. Also enclosed is a diskette with a copy of the comments in WordPerfect format.

In addition, enclosed is one additional copy for stamp and return. Kindly date-stamp the additional copy for return to this office by messenger.

If you have any questions, please do not hesitate to contact me. My office telephone number is (202) 331-8800.

Sincerely,

Michael H. Higgins

Nicholas J. DiMichael
Michael H. Higgins

Attorneys for:

The National Industrial Transportation League

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. AB-279 (SUB-NO. 3)

**CANADIAN NATIONAL RAILWAY COMPANY—ADVERSE DISCONTINUANCE—
LINE OF MONTREAL, MAINE & ATLANTIC RAILWAY LTD.
IN AROOSTOOK COUNTY, MAINE.**

STB DOCKET NO. AB-124 (SUB-NO. 2)

**WATERLOO RAILWAY COMPANY—ADVERSE ABANDONMENT—
LINE OF MONTREAL, MAINE & ATLANTIC RAILWAY LTD.
IN AROOSTOOK COUNTY, MAINE**

COMMENTS OF

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

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Attorneys for:

*The National Industrial
Transportation League*

Dated: December 11, 2003

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**CANADIAN NATIONAL RAILWAY COMPANY—ADVERSE DISCONTINUANCE—
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LINE OF MONTREAL, MAINE & ATLANTIC RAILWAY LTD.
IN AROOSTOOK COUNTY, MAINE**

**COMMENTS OF
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE**

Comes now the National Industrial Transportation League (“NITL” or “the League”), by and through its attorneys, and submits its Comments in STB Docket No. AB-279 (Sub-No. 3), *Canadian National Railway Company—Adverse Discontinuance—Line of Montreal, Maine & Atlantic Railway Ltd., in Aroostook County, Maine* and STB Docket No. AB-124 (Sub-No. 2), *Waterloo Railway Company—Adverse Abandonment—Line of Montreal, Maine & Atlantic Railway Ltd., in Aroostook County, Maine*, (“the proceeding”) pursuant to the decisions of the

Surface Transportation Board (“STB” or “Board”) served in this proceeding¹ on October 24, 2003 and November 26, 2003.

I. OPENING STATEMENT.

In two decisions, the Board has referred to this proceeding as “unusual.”² NITL believes that this proceeding is more than unusual. The relief requested by the Trustee for the bankrupt Bangor and Aroostook Railroad Company (the “Trustee”)—essentially voiding two privately negotiated agreements and stripping competitive access from a rail shipper—is extraordinary, unprecedented, and disturbing. The requested relief plainly contradicts several tenets of the Rail Transportation Policy (“RTP”), codified at 49 U.S.C. § 10101, and, if granted, would create chilling precedent for existing and future private sector initiatives that create competitive alternatives for rail shippers. Even ignoring the broader implications of this case, the League believes that the facts presented in the Trustee’s adverse abandonment application fall far short of meeting the relevant public interest standard and fail to justify the Trustee’s request for relief. Thus, NITL strongly urges the Board to reject the Trustee’s application in its entirety.

II. IDENTITY AND INTEREST OF THE LEAGUE.

The League is the oldest and largest nationwide organizations representing parties concerned with the transportation of goods. NITL has over 600 separate company members who conduct industrial and/or commercial enterprises throughout the United States and internationally and use all modes of transportation to move commodities in interstate, intrastate,

¹ In a decision served October 23, 2002, the Board consolidated the Trustee’s adverse abandonment application and its adverse discontinuance application into a single proceeding. Accordingly, in these Comments, NITL refers to this matter as a single “proceeding.” Additionally, NITL refers to the Trustee’s application for both abandonment and discontinuance authorities as a single “application.” For purposes of citation, NITL uses the abbreviation “App.”

² See Decision served November 21, 2003 and Decision served November 25, 2003.

and international commerce. NITL members ship substantial volumes of commodities by railroad. Accordingly, NITL has a substantial interest in the Board's resolution of the issues raised in this proceeding, which implicate both competition and existing and future private sector initiatives in the rail industry.

III. ARGUMENT.

A. The Relief request by the Trustee is Contrary to the Rail Transportation Policy.

The immediate purpose of the Trustee's application is to re-establish monopoly rail service over the Madawaska paper mill, owned by Fraser Papers, Inc. ("Fraser"), so that the Montreal, Maine, & Atlantic Railway, Ltd. ("MMA"), the successor to the bankrupt Bangor and Aroostook Railroad ("BAR"), may exploit that monopoly position to prop up its struggling rail system. Briefly stated, the Trustee seeks to accomplish this by having the STB void two privately negotiated agreements—one, a trackage rights agreement between the Canadian National Railway Company and BAR, and the other, a freight easement held by the Waterloo Railway Company—which establish competitive access to Fraser's mill.³ (If successful, the Trustee would garner a \$5 million bounty from MMA for BAR creditors.) NITL believes that this plan, which has as its centerpiece the elimination of rail-to-rail competition for a shipper that moves substantial volumes of inbound and outbound commodities by railroad, is fundamentally contrary to the RTP. The extent to which the Trustee's application trenches upon the RTP can be appreciated by applying its individual tenets.

³ In these Comments, NITL refers to the Canadian National Railway Company and the Waterloo Railway Company, collectively, as "CN." The trackage rights and easement granted by BAR are referred to, collectively, as "CN's trackage rights" or "CN's access."

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

Were the Board to grant the relief requested by the Trustee, MMA would obtain monopoly rail service over Fraser's Madawaska plant. Fraser would lose the competitive access that it currently has by virtue of CN's privately negotiated purchase of trackage rights. Intramodal competition would no longer establish rail rates to the facility. This is directly contrary to the first principle of the RTP, which mandates that the Board allow competition and the demand for services to establish reasonable rates for rail transportation "to the maximum extent possible." [emphasis added.]

(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;

The primary justification for the Trustee's petition is that the removal of CN from the market will increase revenues for MMA, helping to preserve the MMA system for other shippers in northern Maine. As discussed in more detail below, at best the merits of this claim are debatable, given the uniform light-density of the MMA system, the apparent unsustainability of certain segments, MMA's precarious financial condition, and the failure of MMA's predecessor. However, it is not debatable that the Trustee seeks additional regulation of the rail transportation system, precisely where the STB has found regulation unnecessary by issuing a class exemption for trackage rights agreements like those challenged here. Regulatory fiat, rather than MMA's effective competition and provision of superior services in the marketplace, would be the conduit for additional revenue. As such, the Trustee's application directly contradicts the second tenet of the RTP.

(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board;

The Trustee's application contends—without any analysis from MMA, itself—that two significant segments of the former BAR system, now operated by MMA, are not currently self-sustaining. App. at 35-38. If so, then efficient rail management dictates that they should be abandoned. The Trustee, however, proposes to evict CN so that MMA can use increased revenues from the viable Madawaska – St. Leonard line to subsidize the segments that are not self-supporting, if not the entire MMA system. This simply does not constitute the efficient use of resources. Thus, the Trustee's application trenches on this element of the RTP.

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

The Trustee's application unabashedly seeks to eliminate competition among rail carriers, by ejecting CN. Thus, it clearly contradicts this element of the RTP. Removing CN would also diminish intermodal competition for those movements where Fraser has both rail and truck options. And, giving MMA the "green light" to increase rates to subsidize struggling segments of its system does not promote the development of a rail transportation system that meets the needs of the public. On the contrary, the public need suggests that MMA should take a hard look at its network and then abandon those segments where there is insufficient demand for rail services. Finally, CN's access to the mill ensures that Fraser will have continued rail service, in the event that MMA's financial difficulties cause service disruptions. Thus, the Trustee's application contravenes this element of the RTP in a number of ways.

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

The Trustee's application indicates that the MMA system faces serious, if not insurmountable, financial difficulties. It is a light density system, which apparently contains at least two significant segments that are not currently self-sustaining. Moreover, for several years prior to MMA's acquisition, and continuing afterward, the former BAR system did not cover operating costs or generate revenue for capital improvements, debt service, or other investments. App. at 17. Attempting to prop up MMA in its current form by granting it a monopoly over Fraser's Madawaska rail traffic—for the purpose of subsidizing other lines—does not promote sound economics in transportation. And, because the Trustee's plan envisions elimination of intramodal and intermodal competition, it doubly trenches on this aspect of the RTP.

(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;

The privately negotiated agreements between BAR and CN brought competitive rail service to Fraser's Madawaska paper mill. This competition ensures that rates on Fraser's rail movements will be reasonable. The relief requested by the Trustee creates an absence of effective competition at the mill, giving MMA the opportunity to extract unreasonable rates.

(7) to reduce regulatory barriers to entry into and exit from the industry;

The relief requested by the Trustee imposes a barrier to entry where there was no barrier before. Recognizing the opportunity to enter a new market, CN reached a privately negotiated agreement with BAR that was exempt, by class, from regulation. Now, the Trustee seeks to use regulation to eject CN from that market, creating essentially a retroactive barrier to entry. The Trustee's goal contravenes this element of the RTP.

(8) to operate transportation facilities and equipment without detriment to the public health and safety;

This element of the RTP would appear to be inapposite.

(9) to encourage honest and efficient management of railroads;

NITL believes that the relief requested by the Trustee does not encourage the efficient management of railroads. The Trustee's application suggests that segments of the MMA system are not self-sustaining. Efficient management by MMA dictates that these portions should be abandoned and that MMA should concentrate on growing portions of its system that are viable. It is contrary to this tenet of the RTP for the Trustee to pursue monopoly market power over Fraser's Madawaska mill so that MMA may use additional revenue generated from Fraser's traffic to support failing segments or inefficient operations. Moreover, in denying the Trustee's petition to revoke, the Board affirmatively found that CN acted "honestly and efficiently in pursuing the exemptions" associated with its privately negotiated access to the Madawaska mill.⁴

(10) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;

This element of the RTP would appear to be inapposite.

(11) to encourage fair wages and safe and suitable working conditions in the railroad industry;

This element of the RTP would appear to be inapposite.

⁴ See STB Finance Docket No. 34014, *Canadian National Railway Co.—Trackage Rights Exemption—Bangor and Aroostook Railroad Company and Van Buren Bridge Co.* (Served June 25, 2002) and STB Finance Docket No. 34015, *Waterloo Railway Co.—Acquisition Exemption—Bangor and Aroostook Railroad Company and Van Buren Bridge Co.*, at n. 15 (Served June 25, 2002).

(12) to prohibit predatory pricing and practices, to avoid undue concentrations of market power, and to prohibit unlawful discrimination;

The Trustee's application directly contradicts this tenet of the RTP because it seeks to give MMA monopoly market power over Madawaska rail traffic. Manifestly, the Trustee's application seeks an undue concentration of market power.

(13) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information;

This element of the RTP is inapposite.

(14) to encourage and promote energy conservation;

This element of the RTP is inapposite.

(15) to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part.

This element of the RTP is inapposite.

Summary of application of the RTP.

NITL submits that the foregoing analysis of the Trustee's application under the individual tenets of the RTP demonstrates that it is unsound as a matter of policy. By seeking to strip competitive access from a shipper, void private sector agreements, invoke superfluous regulation of rail transportation, and sanction inefficient use of resources, the Trustee's application is flatly inconsistent with numerous principles of the RTP. Moreover, a favorable decision for the Trustee would have a chilling effect throughout the industry, casting doubt on similar existing agreements and discouraging future competition enhancing initiatives. Accordingly, NITL strongly urges the Board to reject the Trustee's application on policy grounds.

B. The Trustee's Application lacks merit under the public interest standard applicable to this adverse abandonment proceeding.

NITL believes that aside from contravening numerous principles of the RTP, the Trustee's application fails to satisfy the "present or future public convenience and necessity" standard applicable to adverse abandonment proceedings. See *Fore River Railroad Corp.—Discontinuance of Service Exemption—Norfolk County, MA*, 8 I.C.C.2d 307, 310 (1992). "In implementing the statutory standard, [the Board] consider[s] the relative burdens that continuation of service on the one hand, and cessation of service on the other, would have on the involved carrier, on the owner-lessor of the line, and on the public." STB Docket No. AB-103 (Sub-No. 14), *The Kansas City Southern Railway Co.—Adverse Discontinuance Application—A Line of Arkansas and Missouri Railroad Co.*, 1999 STB Lexis 178, *13 (Served March 26, 1999). In its attempt to satisfy this standard, the Trustee exaggerates the potential public benefits of granting MMA monopoly power over Fraser and understates the harm. When benefits and harms are properly balanced, NITL believes that the Trustee's application falls far short.

1. The Trustee Exaggerates the Benefit of Ejecting CN.

The Trustee alleges that the primary public benefit of giving MMA monopoly market power over Fraser's traffic is promotion of the long term stability of the MMA system for shippers in Northern Maine. App. at 8. The MMA system would purportedly become more stable because of an influx of revenue from captive Fraser traffic. While NITL is sympathetic to the preservation of rail service for Northern Maine shippers, it believes that the Trustee's application does not reasonably demonstrate that enduring stability will be achieved by giving MMA monopoly power over the mill. On the contrary, extensive abandonments—and the ensuing harms the Trustee alleges—will remain a very real possibility, even if MMA gains

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additional revenue from Fraser traffic. In other words, the Trustee advocates highly speculative public benefits to counterbalance the concrete harms that it will inflict upon Fraser and CN.

The application makes abundantly clear that prior to, and continuing after MMA's purchase, the rail system faced dire obstacles to financial stability. Between 2001 and 2002, traffic on the BAR system decreased by over [REDACTED] carloads. Application ("App.") at 14. By the beginning of 2003, Great Northern Paper, one of the two largest shippers on the line, had ceased operations and closed its Millinocket and East Millinocket mills, causing a staggering loss of [REDACTED]% of system revenues. App. at 15. For many years prior to bankruptcy, the system "did not even cover its system-wide operating costs and had no money for capital improvements, debt service, or other investments, to say nothing of a return on investment." App. at 17. And, in the first six months of its operations, MMA suffered operating losses of approximately \$ [REDACTED]. App. at 28.

Given the foregoing parade of horrors—a summary that does not even begin to capture the full, grim picture—NITL strongly questions the validity of the Trustee's claim that restoration of past revenue levels from Fraser traffic will "greatly enhance[]" MMA's entire system profitability. App. at 27. According to the Trustee, absent the "revenue shift" to CN, MMA's yearly revenue would grow by approximately \$ [REDACTED] million. App. at 5, 22. This additional annual revenue barely covers MMA's initial six month operating loss. Assuming that MMA sustained another \$ [REDACTED] loss in the second half of 2003, it would still have an overall annual operating loss of roughly \$ [REDACTED] million. As such, it would continue to have "no money for

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capital improvements, debt service, or other investments, to say nothing of a return on investment.”⁵

The Application’s admitted very real prospect of continued losses, despite ejection of CN and recovery of additional Fraser revenues, makes even more dubious the Trustee’s position that MMA could achieve stability and avoid abandonment of significant portions of its system—the cornerstone of its attempt to satisfy the public interest standard. At pages 36 and 37 of the application, the Trustee explains that MMA’s continued unprofitability raises the prospect of abandonment of the Madawaska – Portage line and the CDAC line. By purportedly conservative estimates, these abandonments would save \$ [REDACTED] per year. Restoration of “lost” Fraser revenues, of course, will have no effect on the individual profitability of these lines. Associated traffic levels would not rise by virtue of ejecting CN. Fraser will continue to route most of its traffic southwest over the Madawaska line for interchange at St. Leonard, rather than directly south from Madawaska through Portage. The CDAC line, on the other hand, will not increase density unless Great Northern restarts operations at its East Millinocket and Millinocket mills. App. at 16. Accordingly, whether or not the Trustee’s adverse abandonment application is granted, as explained by the Trustee, it remains true that “MMA’s savings from these abandonments would make them very strong abandonment candidates.” App. at 36. Thus, the foundation of the Trustee’s public interest argument collapses. Compulsory diversion of Fraser

⁵ Also, the Trustee does not address the financial impact of MMA’s payment of a \$5 million bounty to the estate of BAR, which would become due were the Trustee to prevail in this proceeding.

revenues will not rescue these segments and avoid the myriad alleged harms to northern Maine shippers, as alleged.⁶

2. The Trustee ignores the harm to Fraser.

The Trustee's application minimizes the harm to Fraser of eviscerating CN's competitive access, just as it exaggerates the purported public benefits. First, the Trustee fails to acknowledge the "fall back" that CN provides, in the event that MMA, or a future operator of the former BAR system, experiences service dislocations. Given recent history, this is not an unlikely prospect. In fact, the Board expressly recognized this benefit to Fraser in its decision denying the Trustee's petition to revoke CN's trackage rights exemption.⁷

Additionally, the Trustee blithely ignores the fact that Fraser will lose the benefit of rail-to-rail competition at the Madawaska mill. Rather than simply recognizing this undeniable fact, the Trustee proffers an analysis of Fraser's routing options: "the discontinuance of the trackage rights would not result in the reduction of any of Fraser's multiple routing options." App. at 45. Of course, in the case of a captive rail shipper, each rail "option" requires participation of the monopoly carrier. The Trustee also suggests that, after removal of CN, Fraser will enjoy intermodal, interline, and bridge competition for outbound movements and origin and bridge competition for inbound movements. App. at 45-49. What the Trustee does not explain is how any of these forms of competition can replace the head-to-head intramodal competition that Fraser now has at its Madawaksa mill.

⁶ Reading between the lines, even the Trustee appears to recognize the future of the Madawaska – Portage and the CDAC lines remains in doubt. Seven pages into the application, at note 13, the Trustee notes, "MMA could make a very compelling case" for the abandonment of those lines.

⁷ See STB Finance Docket No. 34014, *Canadian National Railway Co.—Trackage Rights Exemption—Bangor and Aroostook Railroad Company and Van Buren Bridge Co.* (Served June 25, 2002) and STB Finance Docket No. 34015, *Waterloo Railway Co.—Acquisition Exemption—Bangor and Aroostook Railroad Company and Van Buren Bridge Co.* (Served June 25, 2002).

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Rather than answer the foregoing inquiry, however, the Trustee makes the astounding claim that “the discontinuance of the CN trackage rights will do nothing other than return Fraser to the place it was in prior to the Trackage Rights Agreement.” App. at 44. The Trustee’s “status quo” argument, of course, completely ignores the benefit that Fraser has received as a result of CN’s trackage rights. Taking this benefit away, as the Trustee seeks, is a concrete harm to Fraser, not a return to the status quo; it does not leave Fraser in the same position because Fraser undeniably stands to lose all the benefits of rail-to-rail competition. Such injury to shippers other than Fraser is not lost on the Trustee. Elsewhere, the Trustee cites loss of intramodal competition as a detriment that would befall other shippers if MMA reduced its system: “Other shippers would go from two to one rail routing option, thereby giving the remaining railroads significant leverage to increase rates.” App. at 66 [emphasis added]. It is astonishing that the Trustee does not count this same loss of competition at the Madawaska mill as a serious harm to Fraser. Accordingly, NITL urges the Board to cast a jaundiced eye on the Trustee’s allocation of benefits and harms.

3. The Trustee makes no claim that CN’s haulage rates unfairly compensate MMA for its services.

NITL finds it very significant that the Trustee does not claim that the haulage fees that CN pays MMA for handling Fraser traffic are less than compensatory or even reasonable for the service that MMA provides. Instead, the Trustee argues that under the current arrangement with CN, which BAR negotiated, MMA simply does not realize the same monopoly return that BAR previously achieved under a joint rate. MMA allegedly earns approximately one half of what it could earn, per car, if the former rate applied. App. at 5. NITL believes that MMA’s profitable operations on the Madawaska line place the merits of the Trustee’s claim in a vastly different light, than if CN’s haulage fees somehow forced MMA to operate at a loss. In fact, as the

Trustee's application candidly admits, MMA was fully aware of the level of the haulage fee when it considered purchasing the BAR system and decided to go forward regardless, knowing full well that it was embarking upon an extremely risky venture:

At the time MMA acquired the former BAR System, MMA believed it could have operated the entire system, even allowing for the lost Fraser revenues to the Junction Settlement Agreement. However, there was little room for error. MMA would have been in a precarious position and would have had to consider certain abandonments unless it could successfully grow other traffic. It would have been continually vulnerable to economic downturns or the loss of significant business.

App. at 33. Given MMA's informed decision and absent uncompensatory rates, NITL believes that the Trustee's claim of unfairness rings hollow.

4. The Trustee improperly discounts the harm to CN.

Finally, NITL contends that the Trustee's application improperly considers the harm that CN will suffer, if the Board grants the requested relief. The Trustee's entire treatment of this issue amounts to the assertion that CN is a profitable Class I railroad that can absorb the loss. App. at 67. This hardly does justice to the loss of \$ [REDACTED] of revenue, annually, which CN gained as the result of entering a new market through a freely-negotiated agreement.

IV. CONCLUSION.

NITL strongly urges the Board to deny the relief requested by the Trustee. Viewed in a larger context, the relief sought contravenes numerous tenets of the Rail Transportation Policy and, if granted, would create chilling precedent for competition-enhancing private-sector agreements. With regard to the public convenience and necessity standard applicable to this adverse abandonment proceeding, NITL contends that the Trustee significantly exaggerates the potential public benefits of granting MMA monopoly power over Fraser and understates (or

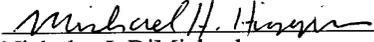
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ignores) the concrete harms. When benefits and harms are properly balanced, NITL believes that the Trustee's application falls far short of the mark.

Respectfully submitted,

The National Industrial Transportation League

By its Attorneys,


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December 11, 2003

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CERTIFICATE OF SERVICE

I hereby certify that I have served on this 11th day of December, 2003, a copy of the foregoing Comments of the National Industrial Transportation League by hand delivery or first-class mail on the parties listed below:

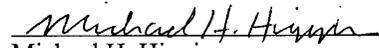
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