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

Re: Docket No. AB-279 (Sub-No. 3), *Canadian National Railway Company – Adverse Discontinuance – Lines of Bangor and Aroostook Railroad Company and Van Buren Bridge Company in Aroostook County, Maine*

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*

Dear Sir:

I am enclosing an original and ten copies of the Comments and Reply in Opposition of Fraser Papers Inc. in the above referenced proceeding. An extra copy is enclosed for date stamp and return to our messenger. In addition, we are enclosing a 3.5" diskette with this document.

Thank you for your attention to this matter.

Sincerely,



Charles A. Spitulnik

Enclosure

cc: All parties on Certificate of Service

enrich creditors, weaken a new carrier by taking \$5 Million that it can scarcely spare and reduce Fraser's transportation alternatives. This approach is hardly consistent with the public interest.

I. INTRODUCTION

The Trustee's attempts before this Board, in the Bankruptcy Court and in the U.S. District Court to extinguish CN's right to serve Fraser's mill in Madawaska, Maine either directly via trackage rights or pursuant to a haulage arrangement, are well documented in the pleadings that the parties have submitted previously in this proceeding, and Fraser will not belabor them here.

Fraser has a direct interest in the outcome of this proceeding. It is the sole shipper served directly by the line that is the subject of the Application. Fraser manufactures specialized printing, publishing and converting papers in three states and two Canadian provinces. Verified Statement of Austin S. Durant ("VS Durant) at para. 4, attached hereto as Exhibit A. The Madawaska, Maine mill produces approximately 1200 tons per day of lightweight fine, specialty grade and coated and uncoated groundwood papers. *Id.* at para. 4. Fraser requires consistent and reliable rail service for both outgoing and incoming goods. Although approximately 50% of the incoming traffic and approximately 30% of the outgoing traffic moves by truck, some of the inbound and the outbound commodities must move by rail either because of the economics, physical constraints or logistics. *Id.* at para. 11.

CN was granted the rights it now has to serve the Madawaska mill as one means of providing assurance to Fraser that it would be able to continue to receive rail service in the event of a failure of the BAR system. *Id.* at para. 8. According to Mr. Durant, Fraser's Vice President – Materials Management, the retention of CN's rights is important for two principal reasons:

- CN's ability to directly serve the mill alleviates Fraser's concerns over any potential loss of rail service to the plant and eliminates the possibility of -- and the inherent delay in -- having to seek emergency authority from the STB for CN to serve the plant should MMA service failure occur. VS Durant at para. 8.
- Continuation of CN's rights also benefits Fraser from the competition that such rights provide. With Fraser having access to two railroads, and access to both CN and non-CN routes, each railroad has a strong incentive to provide Fraser with competitive rates and service. *Id.* at para. 9.

In addition, in view of the "fragility" of MMA's finances, *see* Verified Statement of Edward Burkhardt, Public Version (VS Burkhardt) at 4 (Public Volume at 310), CN's right to serve the Madawaska plant provides protection for Fraser against the possibility that MMA will suffer the same financial fate as BAR.

The arrangement that provided CN access to the Madawaska mill has not proven entirely one-sided for CN. According to Mr. Durant:

Since the granting of running rights to CN and the competition of two rail carriers at Madawaska the MMA has benefited with additional rail traffic to and from the mill. All inbound movements of clay are now routed over MMA as well as the percentage of outbound rail traffic over MMA has grown from less than 1% to approximately 10%.

VS Durant at para. 12. The competition at Madawaska has benefited both Fraser and the MMA.
Id.

Moreover, the importance to Fraser of preservation of reliable rail service and competition for that service stems not just from the impact at Madawaska but on the potential impacts on the plant across the Saint John River in Edmundston, New Brunswick.

The Edmundston mill manufactures woodpulp exclusively for the Madawaska mill. The two mills are thus highly interdependent. Although the Edmundston

mill is located on CN's main line, if the Madawaska mill were to shut down, the Edmundston mill would have to shut down as well. More than 1600 employees and \$8.5 million in Fraser revenue per week would be affected.

Id. at para. 6.

The Trustee postures himself as the guardian of the public interest, a role that might have been appropriate when his work included managing an ongoing operating railroad as part of the estate, but is no longer appropriate now that his sole remaining role is to collect funds to satisfy the obligations to creditors. The Trustee presents extensive evidence about future abandonments -- an extended discussion of hypothetical conjecture about events and applications that may or may not ever come to pass depending on actual developments and actual revenue and cost experience that MMA (not the Trustee) will encounter as operations proceed. The Trustee ignores the importance of the promotion of competition as part of the rail transportation policy, asking this Board to take an action that eliminates competition to the detriment of Fraser and for the sole identifiable benefit of the estate (and its creditors) that will receive an additional \$5 Million if this application succeeds. The harm to Fraser from the loss of competitive rail alternatives, or from the loss of rail service altogether if CN's rights are extinguished and MMA fails to thrive, would be substantial. The Trustee's application omits any analysis of this from the assessment of the alleged public interest. Instead, that Application makes much of issues that have no relevance to this proceeding, and fails to demonstrate that the public convenience and necessity justify the grant of this adverse abandonment, and the Application should be denied.

II. ARGUMENT

A. THE TRUSTEE'S INTEREST HERE DOES NOT CONFER STANDING TO BRING THIS APPLICATION.

The Trustee's timing is off. What is his interest here and what role does he now play? While posturing himself as the guardian of the public interest, the Trustee ignores the change in his role and in his attendant responsibilities that occurred as soon as the sale of all of the assets of the BAR to the MMA was approved and consummated. As a result, the burden of acting in the public interest has shifted away from the Trustee to MMA. Absent any particular mantle of duty to protect the interests of the public, there is no precedent that suggests that it is proper for a person or an entity to bring an adverse abandonment proceeding as a means of securing the benefit of a bargain. The impropriety of this approach is underscored where achieving the benefit of that bargain will harm the shipping public by reducing competition and harm an admittedly financially precarious operating railroad by depriving it of \$5 Million in cash. Perhaps that railroad, the MMA, is a proper applicant here¹, but the Trustee is not.

The Trustee attempts to justify his assertion that he has a duty to protect the public interest by relying on an excerpt from the bankruptcy code. His justification is misplaced. The Trustee relies on an excerpt from 11 U.S.C. §1165, as well as its statutory predecessor, former Section 77 of the Bankruptcy Code, which "directs railroad trustees 'to consider the public interest in addition to the interests of the debtor, creditors and equity security holders.' 11 U.S.C. §1165." Verified Statement of James E. Howard

¹ CN has raised a similar issue in its Motion for Clarification of Procedural Schedule filed in this proceeding on December 5, 2003. CN states: "One would expect that the party on whose behalf an entire adverse abandonment application is predicated would be the applicant. But MMA is not, despite the fact that it plainly is the real rail transportation party-in-interest under the Trustee's theory of the case." *Id.* at 2. After reviewing the Trustee's real justification for proceeding with the attempt to terminate CN's rights, CN states further: "Apparently unconvinced that his own case would be persuasive, the Trustee has elected to file someone else's case instead." *Id.* at 7.

(Public Version) at 2 (Public Volume at 141). While accurately quoting the excerpt from the statute, the Trustee omits the context within which that obligation is placed. In its entirety, that section states:

In applying sections 1166, 1167, 1169, 1170, 1171, 1172 1173 and 1174 of this title, the court and the trustee shall consider the public interest in addition to the interests of the debtor, creditors, and equity security holders.

11 U.S.C. §1165. All of the sections listed refer to the special duties that fall upon a trustee in a railroad reorganization as opposed to any other type of Chapter 11 proceeding and have no bearing on this case. Section 1166 places the trustee and debtor railroad in the same status as any other rail carrier – i.e., subject to the provisions of subtitle IV of title 49 that are applicable to railroads. At first blush this would seem to support the Trustee’s assertions here, but that blush fades upon reference to the facts - - there is no debtor railroad involved any more and the Trustee is not operating a railroad. The railroad has been sold in its entirety to MMA. *See* STB F. D. No. 34110, *Montreal, Maine & Atlantic Ry., LLC - - Acquisition and Operation Exemption - - Bangor & Aroostook R. Co., et al.* (Service Dates September 29, 2002 and December 28, 2002).

Section 1167 relates to the status of collective bargaining agreements under the Railway Labor Act, 45 U.S.C. §151 *et seq.*, a statute that applies only to railroads and airlines. Section 1169 relates to a trustee’s election not to operate over a line on which the debtor railroad is a lessee. Section 1170 relates to rail line abandonments. The Trustee attempted to treat this proceeding as one brought under §1170, but the U.S. District Court for the District of Maine has recently concluded that §1170 does not apply to the Trustee’s efforts here. *Howard v. Canadian National R. Co.*, Civil No. 03-63-P-S, *Order Affirming the Recommended Decision of the Magistrate Judge* (Nov. 18, 2003) and *Recommended Decision on Defendant’s Motion to*

Dismiss at 19 (October 8, 2003)(recommending that the Court “Dismiss Count III of the Complaint, which seeks relief pursuant to section 1170, for failure to state a claim on which relief can be granted.”)²

Section 1171 relates to priority of claims. Section 1172, which describes the plan of reorganization, clearly contemplates application only in the context of an estate that continues to own and operate a railroad. Sections 1173 and 1174 relate to confirmation of the plan and liquidation, respectively. All of them require the Trustee to consider the public interest when making decisions or seeking relief in the context of ongoing rail operations. None of them pertains here because the Trustee is no longer engaged in that business. Instead, he is engaged in the business of collecting funds for satisfaction of the interests of creditors. That is, he is now in the same position as any other trustee in a Chapter 11 case, whose duties are outlined in 11 U.S.C. §1106. He has no statutory standing to either look out for or to represent the interests of others beyond the scope of the creditors of the estate, such as MMA who is the putative beneficiary of the relief requested here and all of the other shippers located on the MMA system.

Once the Trustee is stripped of his role of guardian of the public interest, his standing to bring this Application must be examined under 49 U.S.C. §10903. Although the regulations of 49 C.F.R. Part 1152 apply to adverse abandonment proceedings, *see* STB Docket No. AB-33 (Sub-No. 183), *Salt Lake City Corp. – Adverse Abandonment of Line of the Union P. R. Co. – In Salt Lake City, UT* (Service Date October 5, 2001) at pp. 3-4, those rules provide no guidance as to who might have standing as an adverse applicant. In *Modern*

² The Trustee filed copies of these decisions with this Board as attachments to its November 24, 2003 letter in this proceeding.

Handcraft, Inc. - - Abandonment in Jackson County, MO, the ICC stated the following:

The situation presented here - - where a rail line abandonment is sought by noncarrier applicants and opposed by a rail carrier - - while uncommon, is not unique. See *Baltimore and Annapolis R. Co.*, 348 I.C.C. 678, 704 (1976). Subject to establishing a proper interest in an abandonment proposal, any person may institute a proceeding for the issuance of a certificate of public convenience and necessity authorizing abandonment of a rail line. *Thompson v. Texas-Mexican Ry. Co.*, 328 U.S.C 134 (1946).

Modern Handcraft, Inc. - - Abandonment in Jackson County, Mo., 363 I.C.C. 969, 971 (1981) (emphasis supplied). That decision, however, provides no guidance as to who might have a “proper interest”.

A review of applicants in adverse abandonment cases does not reveal any case where someone acting in the capacity of a debt-collector has brought and successfully prosecuted such a case.

- In *Modern Handcraft*, the applicants were an adjacent property owner with a reversionary interest in the property and the local transportation authority, which had plans to use the right-of-way for mass transit purposes. *Id.*
- In STB Docket No. AB-33 (Sub-No. 183), *Salt Lake City Corp. – Adverse Abandonment of Line of the Union P. R. Co. – In Salt Lake City, UT* (Service Date March 8, 2002), the applicant was a city claiming the right under a franchise agreement with the railroad to effect termination of the railroad’s right to conduct operations on a line that had been out of service for a period of time specified in that franchise agreement. The application was unsuccessful but not because of the identity or standing of the applicant.
- In *East St. Louis Junction Railroad Company--Adverse Abandonment--In St. Clair County, IL*, STB Docket No. Ab-838 and *Union Pacific Railroad Company--Adverse*

Discontinuance--In St. Clair County, IL, STB Docket No. AB-33 (Sub-No. 199) (Service Date: September 22, 2003), the applicant was the Illinois Department of Transportation, which argued that the subject right-of-way was required for the construction of a relocated Illinois Route 3, and the construction of a connection from Interstate Highway 64 to a proposed New Mississippi River Bridge and relocated Interstate Highway 70.

- In *New York City Economic Development Corporation--Adverse Abandonment—New York Cross Harbor Railroad In Brooklyn, NY*, STB Docket No. AB-596 (Service Date: May 12, 2003), applicant was the New York City Economic Development Corporation, on behalf of the City of New York, which owned the land involved in the rail operations affected by the application. The City sought authority for abandonment of a portion of the facilities used by the carrier in order to allow the City to accomplish other purposes found by the Board to be consistent with the public interest.
- In *CSX Corporation, et al. --Adverse Abandonment Application--Canadian National Railway Company et al.*, STB Docket No. AB-31 (Sub-No. 38) (Service Date: February 1, 2002), the applicant sought to terminate CN and its subsidiary Grand Trunk Western Railroad's use of a line of railroad that was situated on land owned by New York Central Lines, L.L.C. (NYC) but managed by CSX, which also controls NYC.
- In *Napa Valley Wine Train, Inc.--Adverse Abandonment--In Napa Valley, CA.*, STB Docket No. AB-582 (Service Date: July 12, 2001), the Napa Valley Flood Control and Water Conservation District filed an adverse application seeking abandonment by

the Napa Valley Wine Train, Inc. (“NVWT”) of segments of Napa Valley Wine Train, Inc.'s line based on plans to construct a federally-approved flood control project on the Napa River that would require relocating the three segments of NVWT's rail line.

- In *Grand Trunk Western Railroad Incorporated--Adverse Discontinuance of Trackage Rights Application--A Line of Norfolk And Western Railway Company in Cincinnati, Hamilton County, OH*, STB Docket No. AB-31 (Sub-No. 30) (Service Date: February 12, 1998), Norfolk and Western Railway Company filed an adverse discontinuance application when the tenant railroad, Grand Trunk Western Railroad Incorporated, declined to seek authority or exemption to discontinue operations and the City of Cincinnati desired to have the railroad interests in the property terminated expeditiously so that the property could be used for public purposes.
- In *The Western Stock Show Association--Abandonment Exemption--In Denver, CO*, STB Docket No. AB-452 (Sub-No. 1X) (Service Date: July 3, 1996), the Western Stock Show Association (“WSSA”) asked the ICC to find that the public convenience and necessity require or permit the discontinuance of service by the Burton Northern Railroad Company, the Union Pacific Railroad Company, and the Denver Terminal Railroad Company (“DTRC”), doing business as Denver Rock Island Railroad, over two lines of railroad adjacent to WSSA's facilities in the Denver Stockyards, in Denver, CO. In support of the adverse discontinuance, WSSA argued that: (1) shippers would not be harmed by a loss of DTRC's service; (2) DTRC is unwilling or unable to obtain insurance coverage adequate to protect WSSA and the public; (3) the carrier is in default of its contractual obligation to make certain periodic payments;

(4) the carrier is unwilling or unable to pay any rental for the use of WSSA's property, and (5) DTRC's operation over the involved lines is not economically viable.

- In *Chelsea Property Owners - - Abandonment - - Portion of the Consolidated Rail Corporation's West 30th Street Secondary Track in New York, NY*, 8 I.C.C. 2d 773 (1992), *aff'd sub nom, Consolidated Rail Corp. v. ICC*, 29 F.3d 706 (D.C. Cir. 1994), a group of property owners whose property was either adjacent to an elevated rail line or through whose buildings the line passed, sought adverse abandonment of the operating rights of the rail carrier that had ceased operation on the line in order to accomplish the reversion of their property interests and/or removal of the line.

While this is not an exhaustive listing of adverse abandonment proceedings, the Trustee's interests here do not rise to the level of the interests of prior applicants. Stripping away the professed concern for protecting the shipping public, what interests are left for the Trustee to be asserting here? There is a brief statement by MMA's Chairman Edward Burkhardt (13 pages out of the 4 volume Highly Confidential Version of the Application, and 13 pages out of the 320 pages of the Public Version) that confirms that the real party in interest here is MMA. However, the Trustee does not have authority or standing to protect MMA and MMA is not an applicant.

Having recognized that the Trustee has no interest but the desire to collect an additional \$5 Million from MMA, it is clear that the Trustee does not have a "proper interest" that confers standing to bring an adverse abandonment application. His is hardly the same level of interest as those reflected in the cases described above – local government agencies that have legitimate interests in use of rail right-of-way for other public purposes (*e.g., Napa Valley Wine Train; East St. Louis Junction R. Co.*), or adjacent or servient property owners whose property is

burdened by the presence of a rail line that is either already inactive or is no longer needed to serve the shipping public (*e.g., Western Stock Show Association; Chelsea Property Owners*).

The implications of validating the Trustee's interest in this context as proper would be enormous. It would open the door for any creditor of any railroad that faces competition for the traffic of a major shipper to bring an adverse abandonment or discontinuance application to remove the competitor and bolster the performance of that creditor's debtor. Even in the context of "uncommon" cases, opening a floodgate of cases the sole purpose of which is to achieve a result that is directly contrary to the goal of fostering competition for rail service cannot be appropriate. Because the Trustees does not have proper standing to bring this application, the Application should be dismissed.

B. THE TRUSTEE RELIES ON EVIDENCE OF HYPOTHETICAL ADDITIONAL ABANDONMENTS THAT ARE NOT BEFORE THE BOARD IN THIS CASE.

Whether or not he is the proper person to be making arguments about the interest of members of the public other than the creditors of the BAR estate, the case presented in the Application is founded upon the implications of threatened future abandonments of MMA operations over line segments other than the line that is directly involved in this proceeding and the impact of those possible abandonments on the Maine shipping public. No amount of detail about hypothetical fact patterns that could bring the MMA to file these applications can change one fundamental fact: those abandonments have not been filed and are not before the Board at this time. As a result, the Board does not have applications to which interested parties can respond, and with respect to which notice and comment (including opposition from shippers and state and local governments) have been provided.

The Application here is no more than a request for an advisory opinion. The Trustee presents (1) a threat by the President of MMA that MMA may have to abandon service on two lines if it does not recapture revenue that is now paid to CN under the terms of the agreements that are the subject of this proceeding; (2) an extensive detailed analysis of the justification for those abandonments; and (3) an explanation of the harm to the shipping public that will follow from the loss of routing alternatives when those abandonments occur. In order for the Board to give any credence to the putative threat of loss of service and to the parade of horrors the Trustee posits will follow, this Board must first accept the invitation, in effect, to state now how it will rule on those abandonment applications. What abandonment applications?

The Board does not “give advisory opinions on hypothetical situations.” ICC Docket Ex Parte No. 55 (Sub-No. 62), *Applications for Certificates of Registration for Certain Foreign Carriers (49 CFR Part 1171)*, 133 M.C. 511, 517 (1985). This Board may issue declaratory orders in appropriate circumstances to resolve disputes about the interests of parties seeking such rulings, *see* 5 U.S.C. §554(e)³. However, this case includes no request for such a ruling to remove uncertainty and there is no such dispute. To the contrary, the Trustee posits these abandonments as though they will occur.

The Trustee’s affirmative use of the threat of abandonments is a unique attempt to satisfy the applicable regulations. While the Trustee has supplied a great deal of information and presented it in a form that MMA would use if it were ever to file such applications, there has been no compliance with the Board’s notice and comment procedures about those threatened cases. Moreover, the assumption that these are a legitimate threat glosses over the reality,

³ 5 U.S.C. §554(e) states the following: “The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.”

acknowledged by the Trustee, that public opposition to any such proposed abandonments would be substantial. The documents attached to the Trustee's Verified Statement confirm that a previous attempt to abandon the line that is now the CDAC portion of the MMA encountered intense opposition. *See* App. 2 to VS Howard at 25 fn.7 (Public Volume 193). The Canadian Pacific, owner of the line at that time, subsequently withdrew the application when it sold the line in question to Canadian American Railroad Company. STB Docket No. AB-213 (Sub-No. 4), *Canadian Pacific Limited--Abandonment--Line Between Skinner and Vanceboro, ME*, 1996 WL 61250 (I.C.C.) (Service Date February 14, 1996). There is no basis on this record to conclude that an abandonment application now would generate any less opposition.

Nor is there any basis in the record to justify the Board's placing any reliance on evidence of hypothetical abandonments that may or may not occur. Not having been provided with a crystal ball, this Board cannot see into the future to know exactly how these scenarios will play out. Without that, the Board's reliance on the Trustee's wholly conjectural analysis of the threatened abandonment of two line segments would constitute an inappropriate advisory opinion. The Board should not consider the Trustee's evidence and argument on this point.

C. THE RELIEF THE TRUSTEE REQUESTS IS DIRECTLY CONTRARY TO THE PUBLIC INTEREST IN PRESERVING COMPETITION.

Assuming for the sake of argument that there remains a valid application, what is left? The concepts and evidence that remain demonstrate that the Application proposes the removal of competition, a result that is directly contrary to the policy that guides this Board's determination of the public's interest.

The statute that guides the Board's review of this matter states the following:

A rail carrier providing transportation subject to the jurisdiction of the Board under this part may--

(1) abandon any part of its railroad lines; or

(2) discontinue the operation of all rail transportation over any part of its railroad lines;

only if the Board finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance. In making the finding, the Board shall consider whether the abandonment or discontinuance will have a serious, adverse impact on rural and community development.

49 U.S.C. §10903(d). In applying this statute, the Board is guided by the Congressional statement of the National Transportation Policy, which promotes competition between rail carriers, and between railroads and other modes. 49 U.S.C. §10101 (1), (4), (5).

Fraser is the shipper most directly affected by the relief sought in this Application. To Fraser, there is no doubt that this Application is directly contrary to this Board's statutory mandate and should be denied. According to Fraser's Vice President – Materials Management,

Revocation of CN's rights would have a substantial adverse effect on Fraser, essentially removing a critical measure of transportation security for our Madawaska mill and an important competitive option for Fraser.

VS Durant at para. 3. Fraser needs the CN rights to continue because it relies heavily on rail for movement of goods both inbound and outbound, and truck movement is not a solution for much of its traffic. *Id.* at para.11. Keeping CN present as a competitor to MMA has dual advantages. It preserves competition, giving both CN and MMA the incentive to price the traffic moving to and from Fraser at levels that permit Fraser to continue to compete in the highly competitive paper and paper products markets.

Equally important, preservation of the CN option provides Fraser with an essential link to the rail network if MMA suffers the same financial woes and fate as BAR. MMA cannot blame CN's rights solely for its financial position. Its Chairman, Edward Burkhardt, has stated in this proceeding that MMA began its life on "fragile" financial footing.

VS Burkhardt at 4 (Public Volume at 310). MMA acquired these assets with no guarantee that 100% of the rail traffic from Madawaska would move over MMA in MMA's account, as opposed to via haulage for CN or via CN's exercise of trackage rights. MMA made that bet, not Fraser and Fraser should not be penalized for a wager made by MMA.

Moreover, neither the Trustee's experts nor MMA's President explains how the payment by MMA to the BAR estate of \$5 Million will promote the financial strength of the already fragile MMA. This is a paradox that the Application does not address. The Application goes to great lengths to explain how the reduction in revenue from CN's moving traffic under the haulage agreement as compared to the revenue that would be available if the traffic were moving in MMA's account undercuts MMA's viability. Absent from those discussions of MMA's financial picture, however, is any explanation of how MMA will finance the repayment to the Trustee for the benefit of BAR's creditors. If that repayment will come out of the enhanced revenue, then where is the benefit to MMA? It will remain weak for at least as long as it takes to repay the Trustee.

MMA also assumed the continued volumes from the former Great Northern Paper mills at Millinocket. That assumption proved wrong almost immediately due to the loss of volume that followed the initial shutdown and continuing substantial reduction of those operations. Fraser should not be forced to suffer the loss of competitive alternatives to compensate MMA for making erroneous assumptions or for staking a portion of its revenue projections on a change in the operating scenario that existed at the time it took over BAR's system. Indeed, Fraser notes that MMA has continued to gain traffic as it competes with CN, providing benefit to both Fraser and MMA. Mr. Durant states the following:

Since the granting of running rights to CN and the competition of two rail carriers at Madawaska the MMA has benefited with additional rail traffic to and from the

mill. All inbound movements of clay are now routed over MMA as well as the percentage of outbound rail traffic over MMA has grown from less than 1% to approximately 10%. This is a significant indication that the competition has benefited both Fraser and the MMA

VS Durant at para. 12.

Fraser submits that denial of this application is dictated by this Board's mandate of promoting competition and ensuring the availability of sound and reliable transportation alternatives to the shipping public. Looking at the root of the Trustee's motivation in this proceeding, the inquiry before this Board comes down to the following question: Is the public interest better served by ensuring that an additional \$5 Million is available to satisfy the creditors of BAR, or by ensuring that competitive service offerings remain available to shippers who are not at present captive to any single carrier? To a bankruptcy court, the recovery of that \$5 Million might take precedence. But to this Board, it cannot. The District Court has recently confirmed that this is a case that is governed by 49 U.S.C. §10903, not by 11 U.S.C. §1170 or any other provision of the Bankruptcy Code. Clearing away the smoke screen created by the Trustee's misguided analysis of the public interest, and by the irrelevant and inappropriate reliance on the hypothetical abandonment scenario, there is only one conclusion possible: the relief sought in this Application must be denied in its entirety.

WHEREFORE, and in view of all of the foregoing, Fraser respectfully requests
the Board to deny the Application.

Respectfully submitted,



Charles A. Spitulnik

Alex Menendez

McLEOD, WATKINSON & MILLER

One Massachusetts Avenue, N.W.

Suite 800

Washington, D.C. 20001

(202) 842-2345

Dated: December 11, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of December 2003, a copy of the foregoing COMMENTS AND REPLY IN OPPOSITION OF FRASER PAPERS INC. was served by hand delivery (for the persons in Washington, D.C.) or Federal Express (for those persons outside of Washington, D.C.) upon:

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Charles A. Spitulnik

A

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. AB-279 (Sub-No. 3)

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

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**

**VERIFIED STATEMENT OF
AUSTIN S. DURANT**

Austin S. Durant, under penalty of perjury, says:

1. I am Vice President – Materials Management of Fraser Papers, Inc., dba as Nexfor Fraser Papers (“Fraser”), a subsidiary of Nexfor, Inc. I am responsible for corporate purchasing, information systems and transportation for all of Fraser’s facilities. I have been employed by Fraser for 16 years, and have been responsible for purchasing transportation services for Fraser for that entire time.

2. The bankruptcy trustee for the Bangor and Aroostook Railroad ("BAR") has filed a petition with the STB which could affect the ability of the Canadian National Railway ("CN") to serve Fraser's paper mill at Madawaska, Maine.
3. Fraser strongly opposes the Trustee's petition. Revocation of CN's rights would have a substantial adverse effect on Fraser, essentially removing a critical measure of transportation security for our Madawaska mill and an important competitive option for Fraser.
4. Fraser is a large producer of specialized paper products in North America with pulp and/or paper manufacturing facilities in three states and two Canadian provinces. One of Fraser's largest facilities is a paper mill at Madawaska, Maine in the far northeast corner of Maine. The Madawaska mill produces approximately 1200 tons per day of lightweight fine, specialty grade and coated and uncoated groundwood papers. The mill is located on the line that is the subject of this proceeding - - in fact, it is the center of the controversy between and among the Trustee of the estate of the bankrupt and now defunct Bangor and Aroostook Railroad Company ("BAR"), the Montreal, Maine and Atlantic Railway ("MMA") that acquired the assets and now carries out the operations of the former BAR, and the Canadian National Railway Company ("CN"), and various of their respective subsidiaries and corporate affiliates.
5. Our Madawaska mill is one of Fraser's largest facilities. Consistent and reliable rail service to the Madawaska mill is extremely important to Fraser. The mill is highly dependent on rail service for both the inbound supplies, such as clay from Georgia and specialty chemicals from the Midwest, and for

outbound transportation of paper products through the United States. The mill has limited ability to store raw materials and outbound product on-site. The mill receives supplies and ships product by truck, but logistics, physical constraints and economics, prevent Fraser from sole reliance on truck transportation. Without consistent and reliable rail service, the mill could not operate for more than a few days.

6. The impact would not be limited to the Madawaska mill. Fraser operates a sister mill at Edmundston, New Brunswick across the Saint John River from the Madawaska mill. The Edmundston mill manufactures woodpulp exclusively for the Madawaska mill. The two mills are thus highly interdependent. Although the Edmundston mill is located on CN's main line, if the Madawaska mill were to shut down, the Edmundston mill would have to shut down as well. More than 1600 employees and \$8.5 million in Fraser revenue per week would be affected.
7. When it became apparent to Fraser in late 1999 that BAR was having serious financial difficulties, we became extremely concerned. We did what we could to support and assist BAR, such as immediate payment of their invoices to assist cash flow. We also contacted CN, the nearest other railroad, to determine what could be done to assure continued rail service to the mill. In early 2001, CN advised us that CN had reached an agreement with Iron Road, the parent of BAR, that would allow direct CN routing on traffic to and from the Madawaska mill. I subsequently learned that in exchange for a substantial cash payment from CN, BAR had agreed to haul CN cars, and CN had

acquired trackage rights and an easement over BAR's line, to our Madawaska mill. It is those rights that I understand the Trustee now seeks to have revoked.

8. Continuation of CN's rights to the Madawaska mill is extremely important to Fraser. CN's ability to directly serve the mill alleviates Fraser's concerns over any potential loss of rail service to the plant and eliminates the possibility of -- and the inherent delay in -- having to seek emergency authority from the STB for CN to serve the plant should a MMA service failure occur. CN's rights also serve to protect Fraser's access over the long term to CN's long-haul routes and service.
9. Continuation of CN's rights also benefits Fraser from the competition that such rights provide. With Fraser having access to two railroads, and access to both CN and non-CN routes, each railroad has a strong incentive to provide us with competitive rates and service on our traffic. Much like a shipper with a build-out option, even without direct service from CN to the mill, the availability of that service alone provides Fraser with competitive leverage.
10. Revoking CN's rights, as the Trustee has requested, would send Fraser back to where we were in 2000, wholly dependent on one railroad and vulnerable to potential service deficiencies or even complete loss of service.
11. Truck transportation is not an adequate substitute for rail service if CN is ousted and MMA then fails. While we do move approximately 50% of our incoming traffic and approximately 30% of our outgoing traffic by truck,

some of the inbound and the outbound commodities must move by rail either because of the economics, physical constraints or logistics.

12. Since the granting of running rights to CN and the competition of two rail carriers at Madawaska the MMA has benefited with additional rail traffic to and from the mill. All inbound movements of clay are now routed over MMA as well as the percentage of outbound rail traffic over MMA has grown from less than 1% to approximately 10%. This is a significant indication that the competition has benefited both Fraser and the MMA.
13. Fraser strongly opposes the Trustee's petition. Revocation of CN's rights would have a substantial adverse effect on Fraser, essentially removing a critical measure of transportation security for our Madawaska mill and an important competitive option for Fraser.
14. Fraser understands that in their support of the application the MMA has argued that denial of the application will cause hardship and potentially force their abandonment of other lines servicing other shippers in the state of Maine. Without a case by case assessment and scrutiny associated with the revenues and costs of the potential abandonment(s) mentioned by the MMA there is little substance to these comments and should be excluded from these proceedings.
15. What we want is what we have – access to two railroads and the security and competitive benefits that that provides.
16. The Surface Transportation Board is dedicated to helping shippers secure improved competitive options on transportation by way of providing

competitive transportation environments. I respectfully request the STB to oppose the application of termination of adverse abandonment as filed by the trustee.

VERIFICATION

I, Austin S. Durant, verify under penalty of perjury under the laws of the United States that the foregoing statement is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on December 8, 2003.

A handwritten signature in black ink, appearing to read "A. Durant", is written over a horizontal line.

Austin S. Durant