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May 14, 2002

BY HAND DELIVERY

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



RE: *Canadian National Railway Company - Trackage Rights Exemption - Bangor and Aroostook Railroad Company and Van Buren Bridge Company,*
STB Finance Docket No. 34014; and **205396**
Waterloo Railway Company - Acquisition Exemption - Bangor and Aroostook Railroad Company and Van Buren Bridge Company,
STB Finance Docket No. 34015 - **205395**

Dear Secretary Williams:

I am enclosing herewith for filing an unbound original and eleven stapled copies of the Reply Of Bank Austria Creditanstalt Corporate Finance, Inc., Et Al., Supporting Trustee's Petition To Reopen And To Revoke Exemptions. This reply is filed on behalf of Bank Austria Creditanstalt Corporate Finance, Inc., and Bank Austria Creditanstalt SBIC, Inc. As can be seen from the certificate of service, copies of this pleading have been served on all known parties of record by first class mail and by fax to counsel for whom fax numbers were available.

Please acknowledge the receipt and filing hereof by file-stamping the eleventh copy of the filing enclosed for that purpose, returning same to the person delivering the filing for return to me. If there are any questions concerning this filing, please contact me at (202) 274-2953.

Sincerely,



William A. Mullins

Enclosures

cc: All Known Parties of Record
Henry L. Goodman, Esquire

ENTERED
Office of the Secretary

MAY 15 2002

Part of
Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC



STB Finance Docket No. 34014

CANADIAN NATIONAL RAILWAY COMPANY
- TRACKAGE RIGHTS EXEMPTION - BANGOR
AND AROOSTOOK RAILROAD COMPANY AND
VAN BUREN BRIDGE COMPANY

STB Finance Docket No. 34015

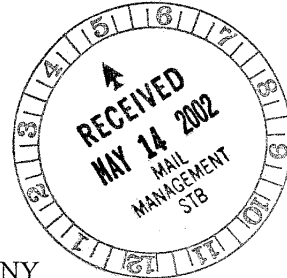
WATERLOO RAILWAY COMPANY -
- ACQUISITION EXEMPTION -
BANGOR AND AROOSTOOK RAILROAD
COMPANY AND VAN BUREN BRIDGE
COMPANY

**REPLY OF BANK AUSTRIA CREDITANSTALT CORPORATE
FINANCE, INC., ET AL., SUPPORTING
TRUSTEE'S PETITION TO REOPEN AND TO REVOKE EXEMPTIONS**

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Due and Dated: May 14, 2002

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CANADIAN NATIONAL RAILWAY COMPANY
- TRACKAGE RIGHTS EXEMPTION - BANGOR
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**REPLY OF BANK AUSTRIA CREDITANSTALT CORPORATE
FINANCE, INC., ET AL., SUPPORTING
TRUSTEE'S PETITION TO REOPEN AND TO REVOKE EXEMPTIONS**

Comes now Bank Austria Creditanstalt Corporate Finance, Inc., and Bank Austria Creditanstalt SBIC, Inc. (collectively, "Bank Austria"), the principal secured creditor of the Bangor and Aroostook Railroad Company ("BAR"), and files this reply to the April 24, 2002, petition of James E. Howard, Trustee of BAR (the "Trustee") requesting that the Surface Transportation Board ("STB" or "Board") reopen these proceedings and revoke the notices of exemption which took effect herein on March 14, 2001. Bank Austria supports the Trustee's requests, and believes that this proceeding - including the promptness with which it is handled - are important to BAR's ability to reorganize successfully to continue providing rail service.

SUMMARY

Bank Austria supports the Trustee's request for relief herein. Bank Austria urges the Board to decide expeditiously that the exemption notices in these proceedings should now be revoked by the Board, based on changed circumstances and principles of the National Rail Transportation Policy ("NRTP"). Since the exemption notices were filed in these proceedings, the permissive rights granted by these exemptions have not been used. That non-use shows that the exemptions granted are not needed by the shipping public. Further, the exemptions threaten an already financially weak carrier. These changed circumstances and the NRTP support the revocation of these exemptions, leading to a stronger BAR when its reorganization is completed.

The 2-to-1 arguments and the principles of the *Tex Mex* case,¹ on which Canadian National Railway Company ("CN") and its affiliate Waterloo Railway Company ("WRC") rely, do not apply in this circumstance. Fraser Paper is not a 2-to-1 shipper because it currently is shipping CN direct, and even if the Board grants the Trustee's petition, Fraser Paper would still have that option because the Board cannot approve or disapprove the haulage rights used to serve Fraser Paper. Because CN never activated the trackage rights, Fraser never depended on CN service via those rights. Accordingly, no *Tex Mex* rights have attached to CN's trackage rights and thus the Trustee does not have to file an adverse abandonment application.

Bank Austria also urges the Board not to be drawn into broader issues posed by Canadian National Railway Company ("CN") and its affiliate Waterloo Railway Company ("WRC"), such as whether their agreements with BAR have been "consummated." Ruling on that question would infringe on the Bankruptcy Court's jurisdiction to determine whether those contracts remain "executory" under 11 U.S.C. Section 365(a). Instead, the Board must focus on whether

¹ *Thompson v. Texas Mexican Ry. Co.*, 328 U.S. 134 (1946) ("*Tex Mex*").

CN and WRC used the rights offered them through the notices of exemption, and whether, in light of that disuse, rail policy requires that those rights continue to be available under present circumstances, or whether they should be revoked. Bank Austria submits that the rights can be revoked without harming the public interest.

BACKGROUND

In January and February of 2001, BAR's parent, Iron Road Railways Incorporated ("Iron Road") was urgently seeking additional financial resources to support continued operation of BAR and its other subsidiaries. CN offered to pay Iron Road \$5 million in exchange for haulage rights over 22.72 miles of BAR track and the bridge of BAR's subsidiary Van Buren Bridge Company ("VBB"). These haulage rights gave CN rate-setting control and direct access to Fraser Paper's paper mill at Madawaska, ME. To secure this access, CN also obtained contingent trackage rights - rights it did not intend to use so long as the haulage arrangement worked satisfactorily - and a non-exclusive freight easement for its subsidiary WRC. Through these arrangements, CN effectively added a nearly 23-mile extension to its lines, serving a shipper of nearly 4000 carloads per year, at a cost to CN of only \$5 million. Even that expenditure would be paid back to CN over time through the reduced fees BAR would receive under the haulage arrangement, as opposed to the amounts BAR received under the previous joint rates arrangement.

CN and WRC filed notices of exemption with the Board on March 7, 2001. Those notices became effective on March 14, 2001.

Even CN does not dispute that it has never operated a train under its contingent trackage rights to Madawaska, ME. Instead, BAR has provided haulage service for CN since March 2001. In exchange for a \$5 million payment from CN to Iron Road in March 2001, BAR

surrendered its division of joint rates on movements interchanged to CN for a lower per car haulage rate fee.

In March 2002, the Trustee determined that CN's trackage rights to Madawaska, along with the CN-BAR haulage agreement and WRC's easement, significantly compromised BAR's ability to reorganize, to restore its financial soundness, and to reassure shippers of its continued availability. Accordingly, the Trustee on March 18, 2002, petitioned the Bankruptcy Court to reject the Iron Road/BAR/VBB agreements with CN and WRC. Not until six weeks later, after the Trustee filed his petition in these matters with the Board, did CN even broach the subject with BAR of CN operating a train of its own to Madawaska. No such operation has yet been conducted.

ARGUMENT

Need for Expedited Decision. Though opposed to each other on the merits of the Trustee's Petition, CN, WRC, and the Trustee all agree that the Board should handle this matter as quickly as possible. In seeking an expedited ruling, the Trustee highlighted Congress' intent to reform handling of rail bankruptcies by avoiding seriatim review of issues. *See* Trustee's Petition to Reopen and Revoke Exemptions filed April 24, 2002 ("Petition"), at 7-8. CN, meanwhile, agrees with the Trustee's request to resolve matters quickly. *See* Reply of Canadian National Railway Company and Waterloo Railway Company to Petition to Reopen and Revoke Exemptions ("CN Reply"), dated May 9, 2002, at 18-19.

Bank Austria joins both sides in seeking a quick resolution of this matter by the Board. Avoiding prolongation of efforts to reorganize railroads in bankruptcy was a major goal of revised rail regulation in the late 1970's and early 1980's. Extended indecision is inimical to the interests of the railroad seeking to reorganize; as lingering uncertainty drives away shippers and

dims prospects for a successful reorganization. Accordingly, the Board should rule on the Trustee's Petition as quickly as possible.

The Board Should Reopen These Proceedings. The Board should exercise its authority under 49 U.S.C. §722(c) and 49 C.F.R. §1115.3 to reopen this proceeding because relevant circumstances have changed substantially since these exemptions were issued. When BAR granted trackage rights to CN and an easement to WRC, it was seeking to work out financial difficulties and to continue meeting its obligations to creditors and the shipping public without seeking bankruptcy protection. Since that time, however, certain creditors forced BAR into bankruptcy. Though BAR fought against the involuntary bankruptcy, being subject to direction of the bankruptcy court has forced BAR to explore options that it would not otherwise have done. One of those options is the ability provided by bankruptcy law to reject executory contracts. *See* 11 U.S.C. §365(a).

In reviewing the choices it must make in reorganizing to continue serving the public, BAR was forced to assess many past decisions. The haulage and trackage rights agreements with CN and the easement granted to WRC were, at the time they were granted, a matter of expedience and practical necessity to stave off creditors and avoid bankruptcy. However, using the financial breathing room afforded by Chapter 11 reorganization, the Trustee has determined that these hastily arranged agreements with CN and WRC are inimical to BAR's long term interests.

Bank Austria agrees with the Trustee's conclusions in this regard. Moreover, based on over a year's operation under the haulage rights, it is now clear that Fraser Paper does not need CN to serve it via trackage rights and that CN does not intend to exercise the trackage rights, except possibly as a litigation tactic. To be implemented, trackage rights require three things: (1)

a contractual right; (2) regulatory authority; and (3) consummation of the trackage rights. In fact, parties must have a written trackage rights agreement to qualify for regulatory authority. 49 C.F.R 1180.2 (d)(7). Accordingly, BAR's unwillingness and inability to allow CN's operation and CN's intentions not to exercise the trackage rights (except possibly as a litigation tactic) are crucial changes in the circumstances present when the exemptions were granted in these proceedings last year. Furthermore, the now-apparent lack of need for trackage rights operations is a crucial change as well. The Board should reopen these proceedings in light of these significantly-changed, crucial circumstances.

The Notices Should Be Revoked. Under 49 U.S.C. §722 and 49 C.F.R. §1115.3, the Board can change any of its actions upon finding substantially changed circumstances. As stated above, circumstances that caused the March 2001 arrangements have been altered significantly and no longer exist. Thus, under Section 722, the Board should change its prior action in these dockets by revoking the exemptions CN and WRC obtained herein.

If the Board goes beyond Section 722(c) to consider the exemption revocation criteria of 49 U.S.C. Section 10502(d), Bank Austria submits that revocation remains justified. The Board has previously revoked exemptions which, on reflection and a fuller explication of pertinent facts, the Board found to require more thorough examination through a petition for exemption or an actual application under the Board's statutes. *See, e.g., Riverview Trenton Railroad Company-Acquisition and Operation Exemption-Crown Enterprises, Inc.*, STB Finance Docket Nos. 33980 and 34040, 2002 STB LEXIS 108 (served Feb. 15, 2002). Therein, the Board stated,

“We can revoke an exemption, once granted, in whole or in part when necessary to carry out the national rail policy.” *Id.* at 14.²

Circumstances arising since March 2001 have shown that the rail transportation policy is not served by the exemptions in issue. Since March 2001, CN has served Fraser Paper via haulage rights. CN’s contingent trackage rights have not been used. Trackage rights are permissive in nature only and never have to be consummated. *St. Louis Southwestern Railway Company--Trackage Rights Over Norfolk and Western Railway Company--Kansas City to St. Louis*, 363 I.C.C. 899 (1981). Once a carrier fails to use them, they may simply disappear. See generally *Arkansas Central Railway Co., Inc.--Operation Exemption--Line of Herzog Stone Products, Inc.*; *Kansas City Southern Railway Co.--Acquisition and Operation Of Trackage Rights Exemption--Arkansas Central Railway Co., Inc.*, Finance Dockets Nos. 31405 and 31465, 1995 ICC LEXIS 69 (ICC served April 7, 1995)(“*Arkansas Central*”) (ICC found that trackage rights can be extinguished without the need to seek revocation if the trackage rights have never been used).

CN argues that it would be improper for the Board to simply revoke the trackage rights exemption and, instead, the Trustee must file for adverse discontinuance authority, citing *Tex Mex*. However, CN’s argument presumes that *Tex Mex* rights have ‘kicked in’ already, but CN is wrong. CN’s failure to use its trackage rights entirely distinguishes this proceeding from *Tex Mex*. In *Tex Mex*, the trackage rights in question had been in active operation for nearly forty

² CN’s suggestion that the Board would have to conduct a full adverse abandonment proceeding, CN Reply at 7-9, appears principally to be an attempt to protract these proceedings. CN’s suggestion is particularly inappropriate where, as here, not a single train has been operated under the trackage rights and CN appears to have no actual interest in operating under the trackage rights except as a means to forestall consideration of the Petition.

years. Service thereunder had become a necessary public service, and the Court concluded that such service could not simply be discontinued without consideration of the public interest.

Here, there is no comparable public interest to consider because CN has not used the rights. No shipper has become dependent on availability of CN's service via trackage rights. As a result, because no trackage rights operations have actually begun, the protections afforded a tenant railroad, and the public interest considerations under *Tex Mex* have not kicked in. Indeed, Fraser Paper obviously is satisfied with the haulage rights operation. If the Board grants the Trustee's Petition, that action will not affect the haulage arrangement for Fraser. Accordingly, *Tex Mex* is inapplicable here.

Revocation of the exemptions granted in these proceedings will foster other segments of the NRTP, namely: promoting fair and expeditious regulatory decisions (*see* 49 U.S.C. § 10101(2 and 15)), ensuring continuation of a sound rail transportation system (*see* 49 U.S.C. § 10101(4)) by facilitating BAR's reorganization to continue to serve shippers; fostering sound economic conditions in transportation (*see* 49 U.S.C. § 10101(5)) by enabling BAR to reorganize free of the burdens of the dormant rights held by CN and WRC; encouraging honest and efficient management of railroads (*see* 49 U.S.C. § 10101(9)) by allowing the Trustee to exercise rights under 11 U.S.C. § 365(a) to cancel agreements that are inimical to the long term health of BAR; and prohibiting predatory practices (*see* 49 U.S.C. § 10101(12)) by preventing CN from taking undue advantage of Iron Road's need for cash in March 2001.

CONCLUSION

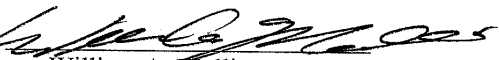
The Trustee has determined that the agreements for which exemptions were granted in these proceedings are inimical to the long term financial health and service capabilities of BAR. Accordingly, he has requested the Bankruptcy Court to reject those agreements, and has

requested the Board in these proceedings to revoke the exemptions of those agreements from more complete regulatory review. These requests will have no immediate impact on service to Fraser Paper, which continues to receive haulage service under an agreement that did not require Board approval. Accordingly, in light of the changed circumstances in these matters and the provisions of the NRTP, the Board should reopen these proceedings and revoke the exemptions obtained by CN and WRC herein.

Respectfully submitted,

BANK AUSTRIA CREDITANSTALT
CORPORATE FINANCE, INC., AND BANK
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By



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CERTIFICATE OF SERVICE

I, David C. Reeves, hereby certify that I have on this 14th day of May, 2002, served copies of the foregoing Reply Of Bank Austria Creditanstalt Corporate Finance, Inc., et al., Supporting Trustee's Petition To Reopen And Revoke Exemptions upon the following persons by first class mail, postage prepaid, and by facsimile to the facsimile numbers noted below:

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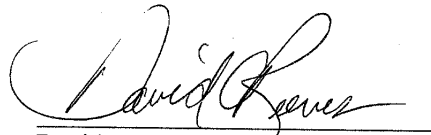
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