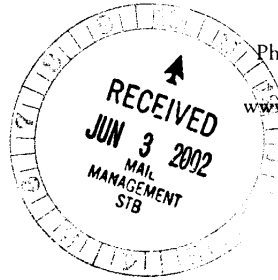


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May 31, 2002



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VIA FEDERAL EXPRESS

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 700
Washington, DC 20006

ENTERED
Office of the Secretary
JUN 03 2002
Part of
Public Record

Re: **Finance Docket No. 34014 ➤ 205518**
Canadian National Railway Company -- Trackage Rights
Exemption -- Bangor and Aroostook Railroad Company
and Van Buren Bridge Company

Finance Docket No. 34015 ➤ 205519
Waterloo Railway Company -- Acquisition Exemption -- Bangor and
Aroostook Railroad Company and Van Buren Bridge Company

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceedings are an original and ten copies of the **Supplement to Reply of Canadian National Railway Company and Waterloo Railway Company to Petition to Reopen and Revoke Exemptions**, dated May 31, 2002.

One extra copy of the Supplement and this letter also are enclosed. Please date-stamp those items to show receipt of this filing and return them to me in the provided envelope.

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

Respectfully submitted,

William C. Sippel
Attorney for Canadian National Railway Company
and Waterloo Railway Company

WCS:tjl

Enclosures

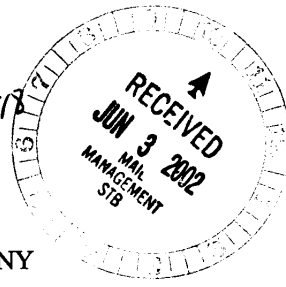
cc: Parties on Certificate of Service

ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34014

205518



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

FINANCE DOCKET NO. 34015

205519

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

**SUPPLEMENT TO REPLY OF CANADIAN NATIONAL
RAILWAY COMPANY AND WATERLOO RAILWAY COMPANY
TO PETITION TO REOPEN AND REVOKE EXEMPTIONS**

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Thomas J. Litwiler
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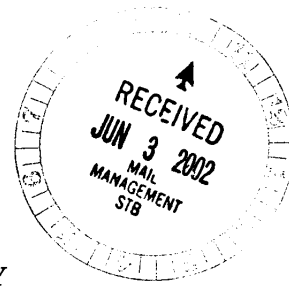
**ATTORNEYS FOR CANADIAN NATIONAL
RAILWAY COMPANY AND WATERLOO
RAILWAY COMPANY**

Dated: May 31, 2002

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34014

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



FINANCE DOCKET NO. 34015

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

**SUPPLEMENT TO REPLY OF CANADIAN NATIONAL
RAILWAY COMPANY AND WATERLOO RAILWAY COMPANY
TO PETITION TO REOPEN AND REVOKE EXEMPTIONS**

Canadian National Railway Company ("CNR") and Waterloo Railway Company ("Waterloo" and, collectively with CNR, where appropriate, "CN") hereby file this supplement to CN's reply to the petition of Bangor and Aroostook Railroad Company, James E. Howard, Trustee ("Trustee" or "BAR") to revoke the exemptions in these proceedings. This Supplement addresses for the Board's information: 1) the recent decision of the bankruptcy court to stay consideration of the Trustee's motion to reject the CNR-BAR trackage rights agreement, pending completion of necessary proceedings before the Board; 2) the recent announcement of an agreement for the sale of BAR and its affiliates as an intact rail system; and 3) the recent "reply" filed herein by BAR's primary secured creditor.

1. Bankruptcy Court Stay of Proceedings

As the Board is aware, BAR has filed a motion with the U.S. Bankruptcy Court for the District of Maine to reject a trackage rights agreement between BAR and CNR that

admits CNR onto a line of BAR and an affiliate between St. Leonard, New Brunswick and Madawaska, Maine (the "Madawaska Line").¹ In response, CN filed a motion at the bankruptcy court to stay proceedings on the Trustee's rejection motion, pending appropriate application to and determination by the Board regarding the adverse discontinuance of CNR's trackage rights on the Madawaska Line.² BAR opposed that request, and -- in lieu of seeking adverse discontinuance against CNR, as it had previously indicated it would -- filed the pending petition to revoke the exemptions obtained fourteen months ago by CNR and Waterloo for their rights on and in the Madawaska Line.

At a May 15, 2002 hearing, the bankruptcy court granted CN's motion to stay proceedings on the Trustee's rejection motion, pending completion of any necessary proceedings before the Board. The docket sheet entry reflecting the Court's order is attached as Exhibit A; a copy of the transcript of the hearing is attached as Exhibit B. As the transcript shows, the Court plainly understood that STB action on the disposition of CNR's trackage rights was needed before the Court should or could proceed on the Trustee's motion to reject the trackage rights agreement. E.g., Transcript at 11 ("And I'm troubled by how this Court could authorize rejection if rejection takes with it the termination of the rights to run on that line of Canadian National which cannot be affected without STB approval. And if that's the case, why we shouldn't just hold our horses here until the STB acts." (citing In re New York, S. & W. R. Co., 160 F.2d 29, 33-34 (3d Cir. 1946), cert. denied, 331 U.S. 884 (1947))). The Court also held that whether

¹ The BAR bankruptcy proceeding is docketed as Case No. 01-11565, In re Bangor and Aroostook Railroad Company (Bankr. D. Me.).

² The Trustee also initially sought to "reject" the easement property interest which Waterloo obtained in the Madawaska Line. As CN previously advised the Board, the Trustee has now dropped that request before the bankruptcy court. CN Reply to Petition to Reopen and Revoke Exemptions, dated May 9, 2002 ("CN Reply"), at 5, n.5 and Tab 2 at 2, n.1.

BAR's pending exemption revocation petition here -- as opposed to an adverse discontinuance application -- would be sufficient to extinguish CNR's trackage rights was an issue for the Board to decide. Transcript at 10, 30.

The Court stayed proceedings until June 26, 2002, indicating that the parties could seek a further stay if the Board had not ruled by that time, or seek earlier resumption of the rejection proceedings if the Board should rule earlier. Both BAR and CN have requested expedited consideration of the pending petition to reopen and revoke, and CN respectfully suggests that a decision on the pending petition by the current June 26, 2002 date set by the Court would be beneficial for all concerned and for the timely disposition of this matter. If -- as CN believes is required -- the Board denies BAR's petition to revoke and directs BAR to file an adverse discontinuance application, further stay of the bankruptcy court proceedings would be in order and could be requested at the June 26th hearing. The Court is plainly aware that an adverse abandonment proceeding may be necessary, Transcript at 10, and has noted that immediate disposition of the motion to reject would not appear necessary to allow orderly disposition of BAR's rail lines:

. . . I also think that perhaps staying it doesn't throw things as far off track as the trustee would have it in that a sale can be negotiated with a contingent provision relating to some proportion of the proceeds depending on the outcome of the rejection, the two parts to the rejection, the STB action and the Court's ultimate determination on that.

Transcript at 12.³

Finally, we note what we believe to be the Trustee's misleading statements to the Court regarding the Board's interest and role in this matter. The Trustee continues to

³ The Court was remarkably prescient in this regard -- as discussed further below, an agreement for the sale of all of BAR's rail lines was announced eight days later.

characterize the exemption process utilized by CNR to obtain its trackage rights in ways wholly inconsistent with the law -- and in ways the Trustee has not repeated to the Board itself. Transcript at 20, 21, 23 ("All that the Surface Transportation Board did is decide to do nothing. . . . [T]he Board did not clothe the trackage rights with any kind of authority at all." "So to summarize those two points, and I think they're critical points, the Board did nothing to create trackage rights, didn't bless them, it didn't do anything. It decided to do nothing, and leave the parties to their legal rights." " . . . [h]e [counsel for CN] is mixing ICC issues precisely to get you into the quandary that you're in and to get you to avoid the clear fact that the Board did nothing"). Even more troubling, however, the Trustee has taken it upon himself to speak for the Board, and to claim that the Board's absence in the bankruptcy proceedings reveals the Board's position on the relevant issues at stake:

There's a party here missing, and it's missing for what I think is a good reason. I don't believe there's counsel in this room for the Surface Transportation Board. If there was an order of the Board under attack or collateral attack, I can assure your Honor that it would be defended by somebody from the general counsel's office.

. . .

This is not a line of railroad, this is an executory contract and the silence of the missing counsel from the Surface Transportation Board speaks volumes to that.

Transcript at 19-20, 24. Once the Board issues its decision on BAR's pending petition to revoke, CN would request that the Board take whatever additional action the agency finds necessary to represent its own interest and speak in its own voice before the bankruptcy court.

2. Agreement for Sale of BAR System

On May 23, 2002, Montreal, Maine & Atlantic Railway LLC ("MM&A"), an affiliate of Rail World, Inc., announced that it had signed an asset purchase agreement providing

for MM&A's acquisition of the rail lines of BAR and its various affiliates.⁴ The MM&A press release announcing the agreement is attached as Exhibit C. That press release quotes the Trustee on his views regarding the contemplated sale:

He said 'I am particularly pleased that the sale agreement contemplates an intact sale of the Bangor & Aroostook rail system in Maine and Quebec while maximizing return to the creditors. We are well aware that any alternative could involve a balkanization of the network, with potential line abandonments and loss of rail service to small communities.'

Press Release, Exhibit C at 1.

The definitive sale arrangement with MM&A simply confirms what was already largely apparent: that the ouster of CN from the Madawaska Line which the Trustee seeks is not required to secure the viability of BAR's rail system or the continuation of rail service under new ownership. Even with CN's trackage rights and other interests in the Madawaska Line in place, the Trustee has reached an agreement for the sale of BAR's entire rail network, with no line abandonments or loss of service contemplated. Whatever this matter is about, it is not about the public interest in preserving the rail service currently provided by BAR -- a goal plainly unrelated to the elimination of CN's rights, as recent events establish.

The Trustee, of course, has never claimed otherwise. Instead, he has generally alleged that the trackage rights and other CN interests are "burdensome to the estate," and has specifically stated that the Trustee could receive \$5 million more from a purchaser (presumably MM&A) if the CN rights were eliminated. BAR Petition, Attachment A at 4, ¶ 14; CN Reply, Tab 2 at 1, 12. Whether the asset purchase agreement signed with MM&A provides such a "bonus" to the Trustee if CN is removed as a competitive presence on the Madawaska Line is

⁴ Most of these affiliates voluntarily entered bankruptcy several weeks ago, presumably in contemplation of the just-announced sale.

unknown. But even if it does, the rationale and justification for the Trustee's actions against CN is solely the private interest of BAR's creditors in maximizing their debt collection against the BAR estate. Those actions have nothing to do with the public interest in preserving the rail service today provided by BAR.

What the Trustee's actions do plainly implicate, of course, is the public interest in preserving the competitive rail service today available from CN on the Madawaska Line. If the Trustee seeks to pursue ouster of CN for the benefit of BAR's creditors, the Trustee should be required to show in an adverse discontinuance proceeding that those financial interests somehow negate the public interest in the trackage rights held by CN. In the meantime, requiring such a proceeding obviously will not affect the preservation of viable rail service on BAR's lines -- lines which MM&A has already agreed to acquire and operate in their entirety.

3. Bank Austria "Reply" Filing

Against this backdrop, the recent "reply" filed by Bank Austria Creditanstalt Corporate Finance, Inc. and Bank Austria Creditanstalt SBIC, Inc. ("Bank Austria"), BAR's primary secured creditor, is particularly vacant. Procedurally, the Bank Austria filing is odd in any number of ways: It is denominated as a "reply" to the Trustee's petition to reopen and revoke, even though the Trustee's petition sought no relief against Bank Austria and was not even served on Bank Austria. It is unaccompanied by any petition seeking leave for Bank Austria to intervene in this proceeding. It was filed on the very last day for "replies" to the Trustee's petition -- despite the Trustee's urgent request for expedited consideration, and after the early filing of the CN Reply in accordance with that request. It largely parrots the Trustee's petition, but also tries to respond to the arguments in the CN Reply -- apparently as a surrogate

for the Trustee, who did not feel he could file such a reply to a reply.⁵ It contains allegations regarding the "need" for CN rail service and the absence of harm to Fraser Paper but is unverified -- and thus reflects nothing more than counsel's uninformed musings on such matters.

It is the substance of the Bank Austria filing, however, that most vividly belies the credibility and reveals the self-interest of Bank Austria in this matter. Bank Austria repeatedly says on behalf of the Trustee what the Trustee himself has steadfastly declined to say at all: that revocation of the CNR and Waterloo exemptions and ouster of CN from the Madawaska Line is needed to assure preservation of rail service on the BAR system. See Bank Austria Reply at 3, 4, 6, 10.

Unfortunately for Bank Austria, the BAR Trustee has never made any argument -- before the Bankruptcy Court or the Board -- that CN's rights on the Madawaska Line threaten the viability of the BAR or, more to the point, jeopardize the continuation of rail service on BAR's lines. The agreement to sell the BAR rail system intact to MM&A disposes of any such argument as a matter of fact. Bank Austria's purported concern for BAR's shippers is just so much fear-mongering -- and unverified fear-mongering at that. Its attempt to put words in the Trustee's mouth is entitled to no credibility.

What the Trustee has said, of course, is that elimination of CN as a competitive presence on the Madawaska Line might bring an additional \$5 million from a purchaser of the BAR rail system. And curiously enough, the primary beneficiary of that \$5 million would likely be BAR's "principal secured creditor" . . . Bank Austria. We would suggest that it is such potential financial gain which motivates this non-carrier lending institution -- not some corporate

⁵ The Trustee represented to the Bankruptcy Court on May 15, 2002 (the morning after Bank Austria's filing, which was not mentioned in court) that BAR's revocation petition had "been fully briefed" at the STB. The Court accepted this representation. Transcript at 26, 30.

concern for rail shippers in Maine. Bank Austria is, of course, free to pursue its private financial interests in any manner it chooses. But its posturing here under the guide of "public interest" is vacuous at best.

The other new arguments offered by Bank Austria are equally unavailing. Bank Austria claims that BAR's grant of rights to CN in March, 2002 was hasty, unwise and under duress -- even though Bank Austria formally consented to those arrangements when made, presumably because they were in the best interests of BAR at that time. Compare Bank Austria Reply at 5, 7, 10 with CN Reply at 5 and BAR Petition, Attachment A, Exhibit C. Bank Austria claims that Fraser Paper cannot be harmed by the discontinuance of CN's trackage rights because it can rely on the haulage arrangement between BAR and CN -- even though the Trustee has sought to reject the haulage agreement and all parties agree the haulage agreement can be terminated without STB approval. Bank Austria Reply at 4, 10. Bank Austria claims repeatedly, without factual verification of any kind, that there is no public "need" for the rail service available from CN through trackage rights -- even though that is precisely the issue that would and must be considered by the Board, on a full record, in the adverse discontinuance proceeding that is required in these circumstances. Bank Austria Reply at 4, 7-8, 10; Western Stock Show Assn. -- Aban. Exemption -- In Denver, CO, 1 S.T.B. 113, 131 (1996) (Board's role in adverse trackage rights discontinuance case is to "provide the public with a degree of protection against the unnecessary discontinuance, cessation, interruption, or obstruction of available rail service.").

CONCLUSION

Each of the foregoing -- the Court's stay decision, the MM&A sale announcement, and the Bank Austria filing -- confirms what is not at stake here: the preservation and continuation of viable rail service on the existing BAR rail system. They also

confirm what is at stake here: the preservation of CN as an existing competitive alternative on the Madawaska Line, and a potential financial gain for certain creditors of BAR. In considering these latter items, the Board should not be distracted by unfounded fears regarding the former. An existing sale arrangement for the rail system of BAR and its affiliates is in place. Resolution of the pending matter before the Board one way or the other is not necessary for continuation of BAR's rail service by a new operator to proceed. The pending matter should be considered on its own merits and in accordance with clearly controlling case law.

WHEREFORE, CNR and Waterloo respectfully request that the Board accept this supplement and deny BAR's petition to reopen and revoke exemptions, without prejudice to BAR filing an appropriate adverse discontinuance application pursuant to 49 U.S.C. § 10903.

Respectfully submitted,

By: 

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Cynthia A. Bergmann

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**ATTORNEYS FOR CANADIAN NATIONAL
RAILWAY COMPANY AND WATERLOO
RAILWAY COMPANY**

Dated: May 31, 2002

EXHIBIT A

NTCAPR

U.S. Bankruptcy Court
District of Maine (Bangor)
Bankruptcy Petition #: 01-11565-jbh

Assigned to: Chief Judge James B. Haines Jr.
Chapter 11
Involuntary
Asset

Date Filed: 08/15/2001

Logistics Management Systems, Inc
Tax id: 01-0445232
Consolidated Debtor

Roger A. Clement, Jr., Esq.
Verrill & Dana
One Portland Square
represented by P.O. Box 586, DTS
Portland, ME 04112
(207) 774-4000

Newport and Richford Railroad Company
Tax id: 03-0215814
Consolidated Debtor

Roger A. Clement, Jr., Esq.
represented by (See above for address)

Northern Vermont Railroad Company Incorporated
Consolidated Debtor

Roger A. Clement, Jr., Esq.
represented by (See above for address)

Van Buren Bridge Company
Tax id: 01-60009896
Consolidated Debtor

Roger A. Clement, Jr., Esq.
represented by (See above for address)

Canadian American Railroad Company
Tax id: 01-0494383
Consolidated Debtor

Roger A. Clement, Jr., Esq.
represented by (See above for address)

Bangor & Aroostook Railroad Company
RR 2, Box 45
Bangor, ME 04401
Debtor

Jacob A. Manheimer, Esq.
Pierce, Atwood, Scribner,
Allen, Smith & Lancaster
One Monument Square
Portland, ME 04101
(207) 791-1100
represented by
Keith J. Cunningham, Esq.
Pierce Atwood
One Monument Sq.
Portland, ME 04101-1110
(207) 791-1100

Union Tank Car Company
Petitioning Creditor

Deborah L. Thorne, Esq.
FagelHaber LLC
55 East Monroe Street
40th Floor
Chicago, IL 60603
(312) 346-7500
represented by
Thomas M. Brown, Esq.
Eaton Peabody Bradford & Veague
P. O. Box 1210
Bangor, ME 04402-1210
(207) 947-0111

Ebenezer Railcar Services, Inc.
Petitioning Creditor

George W. Kurr, Jr., Esq.
Gross, Minsky & Mogul
P.O. Box 917
Bangor, ME 04402-0917
(207) 942-4644
represented by

Helm Financial Corporation
Petitioning Creditor

Curtis E. Kimball, Esq.
 Rudman & Winchell
 84 Harlow Street
 represented by P. O. Box 1401
 Bangor, ME 04401
 (207) 947-4501

James E. Howard
Trustee

Kirkpatrick & Lockhart, LLP
Charles H. White
 represented by **Kevin M. Sheys**
Roger A. Clement, Jr., Esq.
 (See above for address)

Docket Date	#	Docket Text
05/15/2002	<u>312</u>	Application to Employ Jacob A. Manheimer and the law firm of Pierce Atwood as Special Counsel to James E. Howard, Trustee Filed by James E. Howard. (msh,) Additional attachment(s) added on 5/15/2002 (msh,). (Entered: 05/15/2002)
05/15/2002		Hearing Continued re: motion to assume re reject leases (related document(s)149); Progress, Allfirst and Trustee all agree that deadline within which Trustee may reject leases is extended to 7/8/02. Hearing scheduled for 6/26/2002 at 11:00 AM at Bankruptcy Courtroom, Portland. (msh,) (Entered: 05/15/2002)
05/15/2002	<u>313</u>	Consented To Order Further Extending the Trustee's Time to Assume or Reject Non-Residential Real Estate Leases; Continued preliminary hearing will be held on June 26, 2002 at 11:00 a.m. at Bankruptcy Court, Portland, Maine. (msh,) Modified on 5/15/2002 (msh,). (Entered: 05/15/2002)
05/15/2002 X		Motion to stay granted until further hearings on 6/26/02; Hearing Continued re: (related document(s)281); parties may request earlier hearing should the Surface Transportation Board rule earlier than expected; discovery may continue on issues raised by Trustee's motion to reject trackage agreement; oral motion by Roger Clement to admit Charles White, Esq. pro hac vice also orally granted. Hearing scheduled for 6/26/2002 at 11:00 AM at Bankruptcy Courtroom, Portland. (msh,) (Entered: 05/15/2002)
05/15/2002		Hearing Continued re trustee's motion to reject or assume executory contracts (service and trackage agreements) as motion stayed until further hearings scheduled for 6/26/02 re: (related document(s)226). Hearing scheduled for 6/26/2002 at 11:00 AM at Bankruptcy Courtroom, Portland. (msh,) (Entered: 05/15/2002)

PACER Service Center			
Transaction Receipt			
05/28/2002 15:20:37			
PACER Login:	of0031	Client Code:	TJL
Description:	Docket Report	Case Number:	01-11565-jbh
Billable Pages:	2	Cost:	0.14

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

IN RE: BANGOR AND AROOSTOOK) Case No. 01-11565 (11)
RAILROAD COMPANY,) Portland, Maine
Debtor.) May 15, 2002

TRANSCRIPT OF HEARING ON MOTION TO
STAY PROCEEDINGS ON TRUSTEE'S MOTION TO REJECT
EXECUTORY CONTRACTS

BEFORE
THE HONORABLE JAMES B. HAINES

APPEARANCES:

For the Trustee	:	Mr. James Howard Roger Clement, Esq. Charles White, Esq.
For Maine/Montreal Railroad and Atlantic Railway	:	Robert Keach, Esq. Michael Baxter, Esq. (via telephone)
For Canadian National Railway: and Waterloo Railway	:	William Sippel, Esq. Reagan Hornney, Esq. Cynthia Bergman, Esq.
For Canadian National Railway: and Illinois Central Railroad	:	Frances Gecker, Esq.
For the U.S. Trustee	:	Robert Checkoway
Court Recorder	:	Marsha Heath

Typewrights

P.O. Box 2229, South Portland, Maine 04116-2229
(207) 767-5722

INDEX OF WITNESSES

WITNESS:	DIRECT	CROSS	REDIRECT	RECROSS
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No witnesses presented.

INDEX OF EXHIBITS

EXHIBIT	MARKED	ADMITTED
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No exhibits presented.

1 HEARING COMMENCED (MAY 15, 2002, 1:00 P.M.)

2 BAILIFF: Bankruptcy Court of the United States is
3 in session, Judge Jim Haines presiding. Please be seated
4 and come to order.

5 THE COURT: All right. Good afternoon. We're
6 here in Bangor & Aroostook. We've got a couple of matters
7 on. We'll get appearances of counsel first, and then we'll
8 take it from there. The two matters that are on today are a
9 Motion to Stay Proceedings on the Trustee's Motion to
10 Reject, and argument on the Trustee's Motion to Reject
11 Executory Contracts. We understood at the close of
12 proceedings last time that insofar as determination on the
13 motion to reject is concerned, the trustee is urging at this
14 stage that it be determined as a matter of law that these
15 are executory contracts subject to rejection under the Code
16 based on the documents, the four corners of the documents.
17 So let me start by getting appearances of everyone in the
18 courtroom. I know we have one counsel on the phone as well,
19 but we'll start in the courtroom, starting with trustee's
20 counsel.

21 ROGER CLEMENT, ESQ.: Good morning [sic], your
22 Honor. Roger Clement for the Trustee, Jim Howard.

23 CHARLES WHITE, ESQ.: Good afternoon, your Honor.
24 My name is Charles White. I'm a member of the Bar of the
25 District of Columbia, and I have the privilege of

1 representing the trustee in this case.

2 MR. JAMES HOWARD: Your Honor, James Howard, the
3 trustee of Bangor & Aroostook.

4 THE COURT: Thank you.

5 ROBERT KEACH, ESQ.: Your Honor, Robert Keach for
6 Montreal/Maine Atlantic.

7 THE COURT: Okay. And Mr. Baxter is on the phone?

8 MICHAEL BAXTER, ESQ.: Yes, Michael Baxter, your
9 Honor, for Montreal/Maine and Atlantic Railway.

10 THE COURT: Thank you.

11 ROBERT CHECKOWAY, ESQ.: Robert Checkoway, your
12 Honor, for the U.S. Trustee.

13 THE COURT: Thank you.

14 WILLIAM SIPPEL, ESQ.: Good afternoon, your Honor,
15 William Sippel for the Canadian National Railway and the
16 Waterloo Railway.

17 THE COURT: Thank you.

18 CYNTHIA BERGMAN, ESQ.: Good afternoon, your
19 Honor, Cynthia Bergman, in-house counsel, Canadian National.

20 THE COURT: Thank you.

21 FRANCES GECKER, ESQ.: Good morning, your Honor,
22 Frances Gecker on behalf of Canadian National/Illinois
23 Central Railroad.

24 THE COURT: Thank you.

25 REAGAN HORNNY, ESQ.: Reagan Hornny on behalf

1 of Canadian National.

2 THE COURT: All right. Thank you. Well, I
3 thought we'd start this afternoon, I wanted to go over a few
4 things based on my understanding of where things sit with
5 proceedings in this Court and elsewhere, and then open the
6 door for the argument that we expected to have today, which
7 we will have. The trustee seeks to reject at this stage the
8 junction agreement and the trackage agreement with Canadian
9 National and involving Waterloo. The trustee has also, as
10 I understand it, initiated some proceedings before the
11 Surface Transportation Board and--but in the submissions
12 from Waterloo and Canadian National I understand there's
13 dispute either before the Board or at least between the
14 parties as to what the correct procedural mechanism to
15 effect the steps that need to be taken at the Surface
16 Transportation Board need be. The trustee is, depending
17 on who you ask, is--either needs to get revocation of the
18 exemption under which the agreements were approved or went
19 into effect back a year ago when they were entered into or,
20 alternatively, needs to effect through the Surface
21 Transportation Board what's called an adverse abandonment of
22 lines that are rail lines as the term of art goes, of the
23 other parties to the contract. Now, my understanding too is
24 that Waterloo and Canadian National argue that these aren't
25 executory contracts for a couple of reasons including that

1 because there is an interest in property that was granted
2 as part of them, and that they are leases or that they are
3 financing agreements, all of those arguments have been made.
4 Also they take issue with whether this could be appropriate
5 exercise of the trustee's business judgment because in any
6 event they say under Section 365 you can't overcome the
7 interest that was granted as part of the ancillary agreement
8 which now the trustee is not seeking to reject under that
9 circumstance, but they say, gee, business judgment can't be
10 exercised reasonably in these circumstances because whatever
11 you do with the junction agreement and the trackage
12 agreement, the ancillary agreement created a lease that's
13 going to run with the land. Now, I've just got a couple of
14 points that concern me that relate to the parties'
15 underlying positions and what's before me that might help
16 you in making your arguments on both counts, both with
17 regard to stay and with regard to whether or not these can
18 be rejected or not. So I might as well tell you what a
19 couple of my concerns are so you can tailor your remarks to
20 them and perhaps we can move things along a little better.
21 If it weren't for the fact that this is a railroad, we
22 probably wouldn't be there, we'd be in some other more
23 profitable line of business, but if it weren't for the fact
24 that this is a railroad, the two agreements that are before
25 me look to me like classically are ripe for rejection under

1 Section 365. They on the--first of all, on the junction
2 agreement and the trackage agreement, are--contain
3 integration clauses which say no matter what their genesis
4 was, they say look at this as a distinct contract and don't
5 interpret it in the light of anything else that predated it.
6 I don't think there's any factual contest that under the
7 four corners of the agreement or the history since their
8 execution there have been and continue to be rights and
9 obligations on both sides that they are not totally
10 executing. I know there's some argument about whether
11 they're a financing agreement, but if you operate the
12 integration clauses, they don't look to be. There's a
13 junction agreement and a trackage agreement. The--
14 certainly there was \$5 million paid up front to get the
15 benefit of the rates and rights that are reflected in the
16 agreements, but in a classic executory contract context that
17 would figure into the damages that the parties whose
18 contracts were rejected would be entitled to demonstrate and
19 approve as a consequence of rejection. The fact that--and
20 even if they were a financing arrangement, the debtor's not
21 seeking to assume a financing arrangement and make someone
22 continue to give them financing in bankruptcy which is not
23 something they're entitled to do under 365, they would--
24 they're just not going to perform, and that again, that goes
25 to the damages and the extent of the claim. These are--this

1 is how I read the agreements, okay. Now, there were a
2 couple sort of summary statements in the submissions by
3 Canadian National that, well, these would be leases and then
4 subject to the rights of the lessee in a rejected lease to
5 retain its rights under the lease. They don't look like
6 leases to me. The cases and authorities that I consulted
7 with the benefit of what was pointed to me by the parties
8 here describe trackage agreements and leases as distinct
9 kinds of relationships. This is not the classic kind of
10 railroad lease that's addressed in--I think it's 1167 --
11 I could be wrong on the citation. But the section of the--
12 oh, it's not, it's 1169, excuse me. That--where the debtor
13 is the lessee and has under some kind of lease agreement
14 exclusive rights to a rail that's owned by another railroad
15 company and seeks to reject it because it's not profitable
16 to operate that line so seeks to reject it and then proceeds
17 under 1169. This is one where there isn't--I mean, there
18 are shared rights and responsibilities including the rights
19 to occupy and use the line under the trackage agreement, and
20 it just doesn't look like the kind of--the same kind of
21 lease that's addressed in Section 364 with regard to
22 preservation of rights. I'm willing to hear about that, but
23 it doesn't look like it. Then when you look at the
24 easement, which is pointed to by Canadian National as being
25 a big difference here, and indeed in one of the cases which

1 seemed to be most pertinent, the New York case, Fed. 2nd 29,
2 New York-Susquehanna and Western Railroad Company case, they
3 said that if there was an easement accompanying the trackage
4 agreement, there would be some significance to that in
5 granting an interest underlying the agreement in the real
6 estate and that this might--that arrangement might therefore
7 run with the real estate. I looked again at the so-called
8 easement or ancillary agreement, because unlike the two
9 integrated documents, it expressly references the trackage
10 agreement. But it isn't a case where the debtor granted
11 anybody an unqualified easement and then contracted for
12 restricted use. It granted an easement to the extent of
13 available use under the agreement. So that if the agreement
14 disappears, there's no utility to the easement. The
15 easement's gone. Now, that may or may not make sense, but
16 that's the way the parties drafted it, and so it says, you
17 know, it's like you can park your red Chevrolet in this
18 space as long as you own a red Chevrolet, and I'm going to
19 give you a deed to the real estate that says you've got that
20 right, but once you lose the red Chevrolet, you don't have
21 an easement to park anything there any more because it's the
22 red Chevrolet, and that's really the way this easement
23 appears to operate by its plain meaning. Okay. With all
24 that said, at this juncture, and again, I'm not here to
25 pronounce but here to sort of invite comment that will

1 inform me better, it looks to me as though from an
2 economic bankruptcy point of view, this is a classic
3 situation in which the debtor is party to an agreement
4 or agreements that impose burdensome obligations on it
5 and don't give it a good return, and from a bankruptcy
6 economics point of view, should be and would be entitled
7 under 365 to reject these contracts. Now, that addresses
8 the economics, but what troubles me more is the situation
9 on the ground and the public interest and the role of the
10 STB, okay, because again from the New York Susquehanna case,
11 it seems to me, I mean, granted that it's an ICC case and
12 it's an old case, but it says if this is indeed a rejection
13 of trackage rights and is--has an impact on the line of
14 Canadian National such as adverse abandonment, which they
15 contend. First of all, it seems to me the Surface
16 Transportation Board is the one that says this is a
17 situation in which revocation of the exemption is what's
18 going to do the trick, or adverse abandonment is what you've
19 got to go through. I mean, that seems to me to be
20 peculiarly their call. And if they say that, okay, maybe
21 you've got the right to get rid of the burdensome economic
22 obligations as a matter of bankruptcy law, but still the
23 public interest demands that there not be an ouster or
24 adverse abandonment from this line of Canadian National,
25 then how can we break apart--when you assume or reject a

1 contract, you do the whole thing? And I'm troubled by how
2 this Court could authorize rejection if rejection takes
3 with it the termination of the rights to run on that line
4 of Canadian National which cannot be affected without STB
5 approval. And if that's the case, why we shouldn't just
6 hold our horses here until the STB acts. And I point to
7 160 Fed. 2nd 33-34, in which the Second Circuit discussed
8 that in the New York Susquehanna case, and it says, "But the
9 rejection of trackage rights, even under a plan of
10 reorganization, must also rest with the commission, and if
11 the trustee" -- and I know there's been some change there,
12 but -- "and if the trustee or the insurance group are to
13 gain relief, they must procure it not by way of
14 disaffirmance of contracts to be conditioned on a decision
15 of the highest court before which the matter may come, but
16 from the commission by the exercise by that body of the
17 power conferred on it by Congress." So my question is even
18 if -- and this goes to the stay, and I'll be quiet in just a
19 minute -- even if as a matter of bankruptcy law, on the four
20 corners of the documents that are before me, I conclude that
21 there's every ability to reject burdensome contracts, and
22 these qualify as contracts subject to rejection under the
23 Bankruptcy Code, why must I not still await something from
24 the STB that says who has the rights to run on that length
25 of track besides the debtor, if anyone, as a matter of

1 the public interest. Because again, I don't see where I
2 get to making that determination and pronouncement as a
3 matter of rail policy, rail regulation public interest,
4 and it seems to me that that's a necessary prerequisite
5 to rejection of the entirety of the contract as opposed
6 to just the economic covenants of the contract, and it
7 troubles me. So with that said, probably having confused
8 the issues as much as clarify them, I'm going to invite
9 argument on the stay provision because--and I also think
10 that perhaps staying it doesn't throw things as far off
11 track as the trustee would have it in that a sale can be
12 negotiated with a contingent provision relating to some
13 proportion of the proceeds depending on the outcome of the
14 rejection, the two parts to the rejection, the STB action
15 and the Court's ultimate determination on that. But with
16 that said, I'd like to hear argument on the stay motion,
17 which is Canadian National's, so we'll start with
18 Mr. Sippel, I guess.

19 MR. SIPPEL: Thank you, your Honor. We have
20 before your Honor today a motion to stay proceedings on the
21 trustee's motion to reject the junction settlement agreement
22 and the trackage rights agreement between the debtor and CN-
23 Waterloo, pending a decision by the Surface Transportation
24 Board on whether those trackage rights and easement rights
25 over a line of the debtor should be terminated. The trustee

1 has, as your Honor knows, acknowledged the jurisdiction of
2 the STB here. There is no dispute on that. The trustee has
3 already made a filing with the STB. The issue before you
4 today is really whether the Court can and should proceed on
5 the trustee's motion to reject before the STB rules. We
6 believe that the Court should stay proceedings temporarily
7 not only because the law requires it, but also because
8 allowing the STB to go first is the only way that would
9 permit the Court to make a rational, informed decision on
10 the trustee's motion to reject. The trustee here is not
11 seeking merely a rejection of the contracts as contracts
12 with CN operations continuing under some other set of terms.
13 The trustee is seeking the termination of the CN's rights to
14 operate over the Bangor's line, and that is to preclude
15 those operations altogether. That is what triggers the
16 STB's jurisdiction and the requirement that the Board should
17 be allowed to go first. The seminal case on this
18 requirement, your Honor, is the United States Supreme Court
19 decision of Thompson v. Texas-Mexican Railway, known as the
20 "Tex-Mex case," in which the Supreme Court held that where
21 the relief sought to effectuate or implicate a railroad
22 abandonment or discontinuance, the courts should, in the
23 words of the Court, "Stay their hands until the agency
24 acts." The Court stated, and I quote, "However the case may
25 be viewed, the court below should have stayed its hand and

1 remitted the parties to the commission for a determination
2 of the administrative phases of the questions involved,
3 until that determination is had, it cannot be known with
4 certainty what issues for judicial decision will emerge.
5 Until that time, judicial action is premature." The
6 Third Circuit in the Susquehanna case which your Honor
7 was just discussing citing the Supreme Court's Tex-Mex
8 decision, reversed the Bankruptcy Court's decision to
9 proceed with a hearing on whether trackage rights held by
10 the New York Central over a line of the debtor should be
11 rejected before the agency had a chance to act. The Court
12 there stated, and I quote, "A finding by the commission that
13 abandonment of specified trackage is or is not adverse to
14 the public interest is a prerequisite to action by the
15 District Court." In a literally unbroken line of cases
16 following the Tex-Mex decision, cases cited in our brief,
17 courts have stayed their hands to allow the agency to act
18 first. In many of these cases, your Honor, the courts have
19 dismissed the judicial proceedings. We have not asked for
20 that here. We have asked only for a more limited action of
21 a temporary stay. The reallocation of bankruptcy
22 responsibility between the courts and the ICC/STB did not
23 change the basis for these decisions. That change has no
24 relevance to the pending issues here. Bankruptcy Code
25 governs only abandonments governed by the Bankruptcy Code,

1 i.e., abandonments of the debtor's lines handled under
2 Section 1170. The Interstate Commerce Act governs the
3 abandonment of CN's rights here, and that law has not
4 changed, and these cases are still the law on that issue.
5 The trustee has cited no case law or legislative history
6 to the contrary. Given the relief which the trustee seeks,
7 the STB must be allowed to go first. Not only is a stay
8 required here, there are cogent reasons why the Court
9 should stay proceedings and allow the board to go first.
10 The trustee's business judgment justifications are
11 predicated entirely on the trustee winning before the STB.
12 Nowhere in the trustee's arguments does he address the
13 problems this Court would face if the Court proceeds and
14 the trustee does not win before the STB. Let me phrase it
15 this way: If the Board declines to remove CN's rights and
16 in the meantime the junction settlement agreement, sometimes
17 referred to as the haulage agreement, has been rejected, the
18 trackage rights remain and apply, and the haulage agreement
19 terms are gone. Yet the trustee has not even alleged let
20 alone shown that the terms of the trackage rights agreement
21 are more beneficial to the estate than the haulage agreement
22 terms. The haulage agreement terms may well have been
23 better for the estate. How could it have been sound
24 business judgment for the trustee to have rejected the
25 haulage terms in those circumstances? Now, what if the

1 Board declines to remove the CN's rights in the meantime and
2 the haulage agreement and the trackage rights agreement have
3 been rejected? Under the Supreme Court's Tex-Mex decision
4 which I just cited, your Honor, the STB has exclusive
5 jurisdiction to set the new terms for the trackage rights
6 operation if the parties cannot agree on those terms. The
7 old trackage rights terms and the haulage agreement would
8 have been rejected without any determination that the new
9 trackage rights term set by the STB are more beneficial to
10 the estate than the haulage agreement terms or the old
11 trackage rights terms. Now, how could it have been sound
12 business judgment for the trustee to have rejected the
13 haulage terms and the old trackage rights terms before he
14 even knew what the new trackage rights terms as set by the
15 STB would be? As the Supreme Court pointed out in the Tex-
16 Mex decision, the agency has inherent authority to impose
17 conditions on any issuance of authority to abandon CN's
18 rights. Until the Board acts, the trustee won't know what,
19 if any, conditions the Board may require or may impose. How
20 can the trustee exercise sound business judgment if he
21 doesn't know what conditions the Board may impose? We need
22 to wait until we hear from the STB. These are the kinds of
23 problems that the Court will face if rejection is considered
24 ahead of STB action, and this is exactly why courts have
25 consistently stayed or dismissed judicial proceedings and

1 allowed the agency to go first. A logical, orderly way to
2 proceed, indeed the way the law in our view requires it,
3 your Honor, is that the stay proceedings--is to stay
4 proceedings on the trustee's motion to reject temporarily
5 until the STB has acted. The implication of the trustee's
6 argument is that if the Court proceeds to reject the haulage
7 agreement and the trackage rights agreement before the STB
8 acts, the estate will benefit because the parties will
9 somehow be able to return to the old pre-haulage agreement
10 joint line divisional basis that was in effect prior to
11 the haulage agreement. But this is something that there is
12 no indication and there is no assurance that the parties
13 could return to the old divisional basis. Fundamentally it
14 is because the old basis was predicated on an agreement
15 between the railroads on how to divide or split the revenue
16 on the through movement between them. The parties may not
17 be able to reach an agreement on a new divisional basis, and
18 if the parties cannot agree, once again, the STB has
19 jurisdiction to establish the divisional split. In the
20 meantime, as common carriers, both the Bangor & Aroostook
21 and CN have a common carrier obligation to continue to
22 provide the service if the shipper wants the traffic routed
23 that way. Thus the traffic would move without there being
24 any agreed arrangements in place on how to divide the
25 revenue, and before rolling the parties into this situation

1 by rejecting the contracts prematurely, the Court should
2 allow the STB to act first and then proceed. A final point,
3 your Honor. Allowing the Board to act need not unduly delay
4 these proceedings. The trustee's petition to revoke asks
5 the Board for expedited consideration, and CN has joined in
6 that request. As of May 10, the matter was fully briefed
7 before the Board. Under the Board's rules, where there is
8 good cause the Board will expedite its decision. If the
9 trustee is ultimately required to file an adverse
10 abandonment application as CN has argued, the Board's
11 regulations contain time limits in which the Board will act.
12 The trustee can also ask the Board to expedite its decision
13 there. Moreover, unlike an abandonment application which
14 contemplates salvage of the track, which has environmental
15 implications, the abandonment or discontinuance of operating
16 rights where the owner of the line will continue operations,
17 i.e., it doesn't involve any salvage of the track, requires
18 no environmental review by the Board, thus being able to
19 expedite the proceeding and the decision. Allowing the
20 Board to act before further court proceedings will not
21 unduly -- excuse me -- delay these proceedings. Now,
22 staying the proceedings does not mean that discovery
23 could not go forward. Allowing discovery would not create
24 the problems for the Court that premature rejection of the
25 contracts would. And, your Honor, we'd have no objection to

1 allowing for the discovery to go forward so long as the
2 other proceedings were stayed before your Honor. And for
3 all of these reasons, your Honor, we think the CN's motion
4 to stay this proceeding should be granted.

5 THE COURT: Thank you. Mr. White? Mr. Clement?

6 MR. CLEMENT: Your Honor, as a housekeeping
7 matter, I don't think we've done this previously, although
8 Mr. White has appeared telephonically at prior hearings, I
9 would like to orally move his admission to practice pro hac
10 vice for this case in this Court. Mr. White is a member in
11 good standing of the Bars of Washington, D.C., and the
12 Commonwealth of Massachusetts.

13 THE COURT: So ordered.

14 MR. CLEMENT: Thank you.

15 MR. WHITE: Thank you, your Honor.

16 THE COURT: Thank you.

17 MR. WHITE: This is quite remarkable. We're
18 arguing ICC stuff in a Bankruptcy Court, and I don't think
19 we should be going into great depth into ICC matters in this
20 proceeding. But I do want to address at least three issues
21 that are I think critically important, one of which my
22 friend, Mr. Sippel, did not mention to your Honor, and that
23 is the nature of what is pending before the Surface
24 Transportation Board. There's a party here missing, and
25 it's missing for what I think is a good reason. I don't

1 believe there's counsel in this room for the Surface
2 Transportation Board. If there was an order of the Board
3 under attack or collateral attack, I can assure your Honor
4 that it would be defended by somebody from the general
5 counsel's office. I had the privilege to sit in that office
6 for a number of years, and whenever an order of the agency
7 was under review in a court, whether it's a Bankruptcy Court
8 or an Appellate Court, general counsel would be here
9 defending it. The reason I'm bringing this up is to point
10 out just exactly the nature of the so-called trackage rights
11 rights is. The Surface Transportation board did not -- and
12 I challenge counsel to show you where they did -- they did
13 not authorize or create or issue any order whatsoever
14 authorizing trackage rights. All that the Surface
15 Transportation Board did was to decide not to invoke its
16 process. I'd like to say that again because I'm slow
17 thinking. All that the Surface Transportation Board did is
18 decide to do nothing. It left the parties to their
19 respective legal rights, to their legal remedies, and to
20 their legal relief. And that's precisely what's in front of
21 your Honor. The Court--the commission, the board--the Board
22 did not clothe the trackage rights with any kind of
23 authority at all. It left the parties to their own devices.
24 It left the contracts as pure contracts and it left the
25 issue because of that precisely to the courts to address and

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1 solve. There is no positive action by the Board here
2 whatsoever. Point number two, which is equally important
3 and nullifies Tex-Mex, there is absolutely no attempt when
4 they could have by Canadian National to activate the
5 trackage rights. They did absolutely nothing for a year
6 while they could have. Only in aid of this litigation
7 today, right now, they attempt to come on the line, but to
8 do so they'd have to upset the automatic stay and they'd
9 have to disrupt the operations of the bankrupt when it is
10 just trying to hold things together. So rightly the
11 management of the railroad declined to let them come on the
12 line simply to strengthen their position in litigation. So
13 to summarize those two points, and I think they're critical
14 points, the Board did nothing to create trackage rights,
15 didn't bless them, it didn't do anything. It decided to do
16 nothing, and leave the parties to their legal rights. And
17 these legal rights are here precisely before you. Canadian
18 National decided to do nothing and, in fact, in their papers
19 before the Surface Board said they will not exercise their
20 trackage rights. They are not to exercise them. They're
21 going to leave them to the--leave the operations to the
22 Bangor & Aroostook. So there were no--there is--there are
23 no trackage rights operations to support the rationale of
24 the Tex-Mex line of cases, and that leads me to the third
25 and the most fun kind of issue that your Honor is faced

1 with. Congress in 1978 changed the whole relationships of
2 the courts to the ICC in railroad reorganizations. I'm very
3 proud to say that there are two people in the courtroom who
4 have practiced under the old regime, and one is the trustee.
5 The trustee and I are older than most here. We started this
6 kind of practice under the old Section 77 scheme in which
7 the courts and the Interstate Commerce Commission were so
8 intertwined that it was virtually impossible to get a fast
9 reorganization of a railroad. Issues would be bounced back
10 and forth, it would be Alfonse and Gaston with false starts
11 all over the place, and it would only multiply the expense
12 and the time to reorganize railroads. During my watch at
13 the ICC in 1978, Congress changed all of that. It
14 specifically wanted to streamline railroad reorganizations
15 and make them precisely as you began this very helpful
16 recitation of your view of the case more like ordinary
17 bankruptcy. That was the whole purpose of the section--of
18 the revision of the bankruptcy act into the Bankruptcy Code
19 and the elimination of the old Chapter 77. I'll call your
20 Honor's attention to that Wheeling case that is in one of
21 our pleadings. There Congress said enough of this
22 intertwined, confusing joint jurisdiction. We want the
23 Board and we want the courts to proceed ahead expeditiously
24 on parallel tracks. No more ping-pong back and forth. Get
25 on with the business. Legal issues belong to the courts,

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1 regulatory issues belong in the forum, the regulatory forum,
2 and that's where they are. Counsel is very, very astute and
3 very smart and a very highly respected member of the ICC
4 bar, but he is mixing ICC issues precisely to get you into
5 the quandary that you're in and to get you to avoid the
6 clear fact that the Board did nothing and the Canadian
7 National did nothing, and the parties are left at the
8 respective rights and remedies, and they're legal, and
9 they're fully ripe for you to adjudicate precisely because
10 the Board will tell you if they were here that they have no
11 jurisdiction over contracts. There's a line of cases that
12 are equally as long as counsel will quote to you on Tex-Mex
13 saying that the Surface Transportation Board will never
14 adjudicate a contract, they're not a court, they don't have
15 your skills. They don't pretend to be judges. They won't
16 do--they won't touch your issues. So Congress purposely
17 separated the tracks and purposely said expedite, move
18 forward. So we respectfully submit, your Honor, that the
19 matter is fully ripe before the Board right now. The briefs
20 are in, the little pleadings on in -- they're not quite
21 briefs -- and the matter is ripe for the Board to
22 adjudicate. But so is the matter ripe for you to
23 adjudicate on legal issues. The parties, by choosing to
24 go for an exemption rather than invoking some other process,
25 left themselves -- left themselves -- in the position to go

1 to court to protect their legal rights, number one. Number
2 two, there is no trackage rights operation on behalf of
3 Canadian National. There's nothing to protect. There's no
4 line of railroad. There's just a series of executory
5 contracts which the trustee -- which were negotiated, by the
6 way, under something like financial duress. I am sure that
7 the trustee if he is put on the stand, or I'm sure anybody
8 if they were put on the stand and were asked "Would you do
9 this deal in a normal time, would you sell access to a big
10 shipper for this amount of money in normal circumstances?"
11 No, they acted under economic duress on the threshold of
12 bankruptcy, and the--all the trustee has done is exercise
13 good business judgment to say that this is an impediment
14 to reorganization, this is a continuing cloud on the title
15 to the estate, and this is a legal issues. There are no
16 operations, there are no rights that have been created.
17 This is not a line of railroad, this is an executory
18 contract and the silence of the missing counsel from the
19 Surface Transportation Board speaks volumes to that. We
20 respectfully submit, your Honor, that this is fully in your
21 very capable hands to adjudicate. You needn't defer to a
22 parallel agency that I suspect is not going to defer to you.
23 They have it in front of them and they'll probably move
24 smartly forward. So I think that Congress intended both
25 for you and for the Board to address the issue and allow

1 the trustee to go on with the reorganization of the
2 railroad.

3 THE COURT: Could I just ask a couple of
4 questions?

5 MR. WHITE: Of course, your Honor.

6 THE COURT: That's all great, as long as the STB
7 agrees with you, right?

8 MR. WHITE: Mhmm.

9 THE COURT: But if they say no, this is a line or
10 this does require adverse abandonment or there's something
11 more there than just a contract and it invokes our
12 jurisdiction to deal with it, and I've already jumped,
13 that's--first of all, that's my question, don't we have a
14 can of worms that we wouldn't have if we just waited? And
15 my second question, and I'm not going to gang up with more
16 than two questions, is if it's so patently clear that the
17 STB did nothing more than nothing and therefore these are
18 mere contracts not embodied with any of the necessity for
19 its public interest analysis or administrative duties, won't
20 it be the case that you will have your answer that they
21 agree with your point of view very quickly, probably more
22 quickly than it would take this Court to unsnarl things if
23 they didn't agree with you?

24 MR. WHITE: To be candid, your Honor, yes. I'll
25 address the first question. For--well, your questions are

1 astute and exactly right on point. Yes, they probably will
2 act quickly because of the nature of the proceeding that's
3 in front of them. It's been fully briefed, it's been kept
4 very simple. And indeed if they say, "Trustee, you lose, we
5 have somehow created trackage rights by our action or non-
6 action," then, yes, we face a--we face an administrative
7 proceeding which you can help the process by directing the
8 agency to act smartly and expeditiously. You can have that
9 relationship with them to speed it. I'm not so clear,
10 however, if you say that the contract has been properly
11 rejected, but there is some kind of a residual right that
12 came into being because the shipper somehow is relying on
13 these trackage rights and will find another way for it.
14 That may not preclude the agency from going forward and
15 having a case even if you--even if you reject the contract.
16 The agency has great jurisdiction over its own dockets. It
17 can fashion some kind of a proceeding in the absence of an
18 underlying contract. They have--they've got very broad
19 jurisdiction that way, your Honor.

20 THE COURT: I appreciate that. Thank you.

21 MR. WHITE: Thank you, your Honor.

22 THE COURT: Let me ask whether there's--I mean, I
23 don't want to end up with ping-pong here either, because I
24 think I've got the gist of each side's positions.
25 Mr. Sippel, is there anything that you are absolutely

1 compelled to add in reply?

2 MR. SIPPEL: Yes, your Honor, if I could.

3 THE COURT: Okay.

4 MR. SIPPEL: I'd like to address the issue raised
5 by Mr. White that the STB has done absolutely nothing here.
6 What that overlooks, your Honor, is that--is the whole
7 fundamental nature of the STB's exemption process. What
8 these exemptions are called are class exemptions which a
9 carrier can invoke as a shortcut to essentially avoiding
10 full regulatory review of the transaction that otherwise is
11 subject to the Board's jurisdiction. In creating the class
12 exemption, there are decisions that the ICC or now the STB
13 has made wherein the public interest findings are made.
14 What they basically said, we will adopt a class action
15 because these kinds of things are in the public interest and
16 we don't need to go through an individual regulated
17 proceeding every time one of these comes up. That's just a
18 burden on the parties. And so having made the public
19 interest findings in adopting the class exemption, putting
20 that in the regs, then a carrier can come in on trackage
21 rights and invoke that class exemption and use the shortcut,
22 save time and save money. It's part of the effort to
23 deregulate and simplify the regulatory process that the
24 railroads have to go through. So the public interest
25 findings are there, your Honor. They were made at the time

1 the class exemption was adopted.

2 THE COURT: Yeah, and removing the exemption or
3 revoking it is a whole different kettle of fish.

4 MR. SIPPEL: What the effect of revocation is is
5 to essentially say you can't do this under an exemption, you
6 have to proceed on an individual regulated basis. Again,
7 your Honor, I've already addressed this and I won't go back
8 through this. The 1978 Bankruptcy Code, those changes apply
9 to abandonments governed by the Bankruptcy Code. Under 1170
10 those are abandonments of the debtor. This is not an
11 abandonment of the debtor, this is an abandonment of CN's
12 rights. Thank you, your Honor.

13 THE COURT: Thank you. Is there anybody else that
14 wishes to be heard?

15 MR. CLEMENT: Your Honor, I have just a couple of
16 very quick points from a bankruptcy hat, obviously, not an
17 STB or an ICC hat. Two points in response to the Court's
18 concern, and these are my words, not yours, but that we
19 somehow would sort of scramble the eggs here, and then if
20 the STB did something that the trustee didn't like, it would
21 be difficult to unscramble those eggs. I'd point out that
22 the motion seeks merely for authority of the trustee to
23 reject the contracts and does not seek to actually have them
24 declared rejected today, so it would give the trustee the
25 ability to watch the STB proceedings and see what the result

1 there is and decide based on those proceedings whether it is
2 prudent to reject or not. Second, I'd point out that a
3 rejection of the contract merely constitutes a breach. It
4 does not as--by operation of law, terminate the contracts.
5 It merely would relieve the trustee of the burdens of
6 performance at this point. And, third, even if you accept
7 everything that CN has said here, the only issue that
8 they've left on the table that they really argue should be
9 stayed would be the issue of the trustee's business judgment
10 to reject, leaving therefore I think free to go forward in
11 any event the issue of whether these are executory
12 contracts. Thank you.

13 THE COURT: Well, I've considered this and I
14 appreciate the arguments of counsel on both sides because
15 this is a new area for the Court, but events of recent days
16 promise that it may not be new for long. The motion to
17 stay seeks a stay of proceedings on the motion for authority
18 to reject the trackage and junction or haulage agreement
19 pending action by the STB. I understand that what the
20 trustee is seeking is authority to reject, as opposed to
21 absolutely rejection, and I don't doubt that it might be
22 possible or it might be appropriate to grant that authority
23 to reject conditioned on a determination by the STB. But
24 the conditions that the STB may place, if it chooses to go
25 forward with the regulatory proceeding, may be sufficient as

1 to change the dynamics for the exercise of the trustee's
2 business judgment in a sufficiently significant way that
3 the authority to reject contingent would be either a blank
4 check or it would be meaningless until we know what the STB
5 is going to do. And given the fact that this Court can be
6 available on very short notice to convene appropriate
7 proceedings when necessary, I think it better, rather than
8 conditioning authority to reject, to stay for a limited
9 period of time proceedings on the motion for authority to
10 reject pending an STB determination because it appears to me
11 that there is potential for considerable mischief if the
12 contracts are rejected before the STB acts for the reasons
13 stated by Mr. Sippel. I also don't think it will unduly
14 delay. If Mr. White is correct, and I have no reason to
15 think he's not correct, about the alacrity with which the
16 STB will proceed given the minimal character of CN-
17 Waterloo's complaints about what's sought to be done here
18 and the lack of regulatory blessing for the arrangement in
19 the first instance, and if as represented and as I accept
20 the representation the matter is fully briefed before the
21 STB, then the chances are highly likely that there will be a
22 decision which clears the way for rejection in short order
23 within the next thirty to forty-five days, and we can move
24 things ahead quickly while avoiding the potential for
25 ensnarling this Court with a problem created by acting too

1 soon. I'm not--I'm not timid of acting, as I've--I've given
2 you my view of the character of the contracts and the
3 potential for rejection rather straightforwardly at the
4 beginning of the hour. Nothing's been said today, although
5 we didn't get to the second part of the argument today, but
6 there's nothing on review and re-review of the agreements
7 and the submissions of the parties that dissuades me from
8 the views I expressed then. But the parties will have an
9 opportunity to try to dissuade me once the STB acts and we
10 go forward on these matters. The--I agree that such
11 discovery as is appropriate may go forward pending STB
12 action, but I'm going to stay in-court proceedings on the
13 motion to--for authority to reject for about six weeks
14 until eleven o'clock on June 26th here at which time I will
15 hear arguments to further extend the stay or to go ahead in
16 the light of STB inaction or to go ahead in light of STB
17 action, so we'll continue both of the matters that were on
18 today to June 26th at eleven o'clock and go forward. If
19 the STB acts extremely quickly, the continuance that I'm
20 ordering today is without prejudice to the parties if there
21 is felt necessity to seek an earlier hearing on the motion
22 to reject should the STB rule quickly and it be ripe for
23 further consideration of the motion to reject sooner than
24 June 26th. Like I say, I would not--I would not be hesitant
25 to act waiting for the STB but for the fact that this--the

1 arrangement holds the potential that in addition to
2 relieving the debtor of the executory burdens of the
3 contract, there could be results on the ground that are
4 subject to STB jurisdiction that should be addressed by them
5 ahead of time, and as I say, I think it's sort of fruitless
6 to grant conditional authority to reject at this stage
7 because we can convene on very short notice to get to the
8 meat of the matter following an STB ruling, and I am here at
9 the convenience of the parties to do that. So the motion to
10 stay is granted and continues--it is stayed until June 26th.
11 There will be continued hearings on the motion to stay as
12 well as continued hearings on the motion for authority to
13 reject June 26th at eleven o'clock here. If any of the
14 parties think that we're going to require more than a
15 half an hour at that time or feel a need based on change
16 of circumstances to bring the matters before the Court
17 sooner or in a special setting, you should contact the
18 Clerk's office and we'll be sure to set it up for them
19 forthwith. Now, let me just say one other thing, because
20 some of the parties here may be parties with interest in
21 the three voluntary Chapter 11 railroad cases that were
22 filed in Bangor, as I understand it, yesterday. At the
23 eleven o'clock hour counsel for the trustee was in Court
24 with regard to the motion to extend the time to assume or
25 reject certain leases, and the U.S. Trustee through

1 Mr. Checkoway was here as well, and I believe Mr. Keach
2 was here also. They indicated, the trustee and the U.S.
3 Trustee indicated the preference, a strong preference that
4 those three railroad cases which are cases in which the
5 debtors are related to Bangor & Aroostook be jointly
6 administered to effect the most efficiency in the court
7 process, and I also know that Judge Kornreich had had a
8 conflict which precluded him from sitting on this case,
9 which if as was represented at the eleven o'clock hour there
10 are many of the same parties and creditors involved, may
11 endure in any event. So I have conferred with Bangor
12 Clerk's office, and I expect that should a motion for joint
13 administration be filed, it will be acted on quickly. If
14 there is a need for interim operating authority pending --
15 there is -- pending appointment of a trustee for the same
16 reasons as we entertained and entered orders authorizing
17 that in this case, the Court will be available to do that.
18 If there is need for other first aid types of orders, we
19 can be available tomorrow and Friday to do that in Portland.
20 So I just wanted the parties to know that we're aware of
21 the situation, that we know there may be needs near term,
22 that we've discussed the propriety of joint administration
23 short of consolidation as a first step, and that we can go
24 forward to handle the needs of the parties here in Portland
25 and do it on an administratively consolidated basis in any

1 event to make things run efficiently for them. Is there
2 anything else we can do in this case today?

3 MR. CLEMENT: Your Honor, I'd just--so the Court
4 knows what's coming down the pike as well, there are two
5 other affiliates that we expect will be filing this
6 afternoon. Those are subsidiaries of the Bangor & Aroostook
7 Railroad as opposed to sister companies. One is called the
8 Van Buren Bridge Company and the other one is called
9 Logistics Management, Inc. Those we expect will be part of
10 the package and would be subject to the motion for joint
11 administration as well. Just--I don't think it changes
12 anything you just said, but I just wanted you to--

13 THE COURT: Van Buren Bridge is one of the parties
14 to--

15 MR. CLEMENT: That's correct.

16 THE COURT: --the haulage, the agreements that are
17 before me now, right?

18 MR. CLEMENT: That's correct.

19 THE COURT: Okay. Very good. Thank you for that.
20 Heads up. We'll be in recess.

21 BAILIFF: All rise.

22
23 HEARING CONCLUDED (MAY 15, 2002)

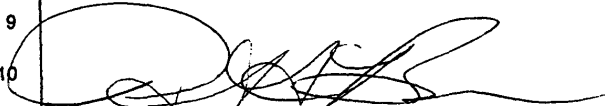
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1 STATE OF MAINE)

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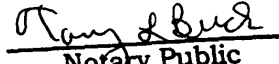
3 CUMBERLAND)

4
5 I, Patricia A. Burrows, transcriber, do
6 certify that the foregoing is a correct transcript
7 from the electronic sound recording of the proceedings
8 in the above-entitled matter.

9
10 
11 Patricia A. Burrows, Transcriber

Date: May 20, 2002

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13
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15
16
17 A TRUE COPY dated this 20th
18 day of May, 2002
19 at South Portland, Maine.

20 
21 Notary Public

22
23
24
25
TAMMY BUCK
Notary Public
My Commission Expires
May 4, 2008

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For Immediate Release
Dated: Thursday, May 23, 2002

**Montreal, Maine & Atlantic Railway Signs Asset Purchase Agreement
With James E. Howard, Trustee, Bangor & Aroostook Railroad Company**

Rail World, Inc. announced today that its affiliate, Montreal, Maine & Atlantic Railway LLC, ("MM&A") had signed an asset purchase agreement with James E. Howard, Trustee of the Bangor & Aroostook Railroad Company ("B&A"). The agreement provides for MM&A to purchase approximately 745 miles of rail line in Maine, Quebec and New Brunswick from B&A and its affiliates. Mr. Howard intends to file the agreement with the bankruptcy court as soon as the affiliate parties have signed, and to request the court's approval to complete the sale.

B&A is currently operating under Chapter 11 of the US bankruptcy statutes, and its Canadian affiliate, Quebec Southern Railway, is under court-supervised administrative proceedings. The other B&A affiliates involved in the sale are Canadian American Railroad, Northern Vermont Railroad, Newport & Richford Railroad and Van Buren Bridge Company, all of which have filed under Chapter 11 and are awaiting the appointment of a Trustee as is required under railroad provisions of the federal bankruptcy laws. Also involved is Logistics Management System, a warehousing and logistics subsidiary of B&A, which is operating under debtor-in-possession provisions of the bankruptcy laws.

Rail World is a Chicago-based rail management and investment company. Its President, Edward A. Burkhardt, is former Chairman, President and CEO of Wisconsin Central Transportation Corporation, and led the investor group that acquired Wisconsin Central in 1987, generally regarded as the most successful of the regional railroads created after the Staggers Act deregulation legislation took effect in the early 1980s. He led privatizations of railways in New Zealand, Great Britain, and Australia while with Wisconsin Central, and, after the establishment of Rail World in 1999, led an investor group that privatized the Estonian railways. Mr. Burkhardt currently serves as Chairman of the Supervisory Board of Estonian Railways.

Mr. Howard indicated that it would take several months for the bankruptcy court to review the sale agreement and to consider comments of the creditors and other parties of interest. The court will consider any "higher and better" proposals for purchase of the railway assets during this time. He said "I am particularly pleased that the sale agreement contemplates an intact sale of the Bangor & Aroostook rail system in Maine and Quebec while maximizing return to the creditors. We are well aware that any alternative could involve a balkanization of the network, with potential line abandonments and loss of rail service to small communities."

Mr. Burkhardt said, "We are very pleased to reach this milestone in the acquisition of the B&A. We believe this can be a highly successful railway, and are anxious to close the purchase as soon as possible. We are particularly impressed with the quality of the employees and the customer base." He indicated that MM&A's plans had been well received in the financial markets, and that negotiations over placement of the financing were well advanced.

Investing with Rail World are Larry R. Parsons, President of the Wheeling & Lake Erie Railroad ("W&LE"), a regional railroad located in Ohio, West Virginia and Pennsylvania, Jerry R. Davis, retired President of Union Pacific Railroad, and Frank Turner, retiring President of the American Short Line and Regional Railroad Association and a veteran rail manager.

For information – contact:

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Larry R. Parsons, Chairman & CEO of Wheeling & Lake Erie Railroad Co. (330 767 3401, ext. 1293).

#

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of May, 2002, a copy of the foregoing
**Supplement to Reply of Canadian National Railway Company and Waterloo Railway
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