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June 11, 2002

BY HAND DELIVERY

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

ENTERED
Office of the Secretary

JUN 12 2002

Part of
Public Record

RE: *Canadian National Railway Company - Trackage Rights Exemption - Bangor and Aroostook Railroad Company and Van Buren Bridge Company,*
STB Finance Docket No. 34014; and **205592**
Waterloo Railway Company - Acquisition Exemption - Bangor and Aroostook Railroad Company and Van Buren Bridge Company
STB Finance Docket No. 34015 > **205591**

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., To Canadian National's May 31, 2002 Supplement. 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.

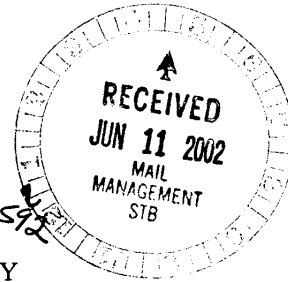
Sincerely,

William A. Mullins

Enclosures

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

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC



STB Finance Docket No. 34014 205592

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

STB Finance Docket No. 34015 205591

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

ENTERED
Office of the Secretary

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REPLY OF BANK AUSTRIA CREDITANSTALT CORPORATE
FINANCE, INC., ET AL., TO CANADIAN NATIONAL'S
JUNE 3, 2002 SUPPLEMENT.

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Dated: June 11, 2002

**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., TO CANADIAN NATIONAL'S
JUNE 3, 2002 SUPPLEMENT.**

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"), hereby files this Reply, addressing the Supplement to Reply filed June 3, 2002, on behalf of Canadian National Railway Company and Waterloo Railway Company (collectively, "CN").

SUMMARY

CN's June 3, 2002 "Supplement to Reply" was in actuality an improper reply to a reply, prohibited by 49 C.F.R. § 1104.13(c) (2001). Rather than creating another unnecessary cycle of pleadings by moving to strike CN's filing, however, Bank Austria submits this brief reply in

order to address CN's improper reply to Bank Austria's comments. CN erroneously asserts that the Surface Transportation Board ("STB" or "Board") must determine whether discontinuance of CN's trackage rights is justified by public need. Actually, the Trustee's petition in this matter is unnecessary inasmuch as the original exemption was permissive, and was never consummated by CN, leaving nothing to revoke. Moreover, in obtaining the exemption, CN never proved that there was a public need for its operation. It would be anomalous to require James E. Howard, Trustee of BAR (the "Trustee") or Bank Austria to prove a negative - that is, to prove that there is no public need for CN's unused trackage rights - when CN itself never proved that there was public need for the operation in the first instance.

CN's vitriol and sarcasm do not change the fact that the public interest, represented by the National Rail Transportation Policy, is best served by termination of CN's unused rights. The public interest is best served by BAR service which can interline shipments to Canadian Pacific Railway, ("CP") to the Guilford System, ("Guilford") or to CN. The public interest is served by a commercially healthy, intact BAR, not one that is hobbled by CN's hold on an important part of BAR's system.

BACKGROUND

On April 24, 2002, the Trustee petitioned the Board to reopen these proceedings and to revoke the notices of exemption which took effect herein on March 14, 2001. CN replied to that petition 16 days later, on May 10, 2002. Bank Austria filed its own reply on the 20th day after the petition was filed, May 14, 2002 (the "May 14 Reply"). Fraser Paper, Inc. ("Fraser Paper") submitted a late-filed reply on May 16, 2002.

CN filed its Supplement to Reply on June 3 ("CN's Supplement"), discussing a related May 15 Bankruptcy Court hearing, but in doing so, it replied to Bank Austria's May 14 Reply.

On June 5, Montreal, Maine & Atlantic Railway LLC ("MMA"), the proposed purchaser of BAR's system, moved to intervene and submitted its comments on the Trustee's petition.

ARGUMENT

I. BANK AUSTRIA'S MAY 14 REPLY WAS PROCEDURALLY PROPER; CN'S "SUPPLEMENT" WAS NOT

CN asserts that Bank Austria's May 14 Reply is "odd." CN Supplement to Reply at 6. Perhaps CN considers it odd because it follows the Board's rules, unlike CN's Supplement. Bank Austria filed its May 14 Reply on the 20th day following submission of the Trustee's petition.¹ The filing thus was timely under 49 C.F.R. §1104.13(a) (2001) ("a party may file a reply or motion addressed to any pleading within 20 days after the pleading is filed with the Board").²

Bank Austria was entitled to file its May 14 Reply even though it was not the party against whom the Trustee sought relief. To file a reply, one must simply be a "party," 49 C.F.R. §1104.13 (2001), not the party against whom relief is sought. "Party" means, among other things, a petitioner, a respondent, "or other persons permitted or directed by the Board to participate in a proceeding." 49 C.F.R. §1101.2(d) (2001). *See also* 49 C.F.R. §1121.4(a) (2001) (in an exemption proceeding, "the Board may consider during its deliberation any public comments filed in response to a petition for exemption"). Bank Austria, as the principal secured

¹ There is nothing "odd" in Bank Austria's addressing arguments contained in CN's reply, which was available for review before Bank Austria made its filing. That CN's filing was commented upon is merely a consequence of CN's filing its comments early. Moreover, Bank Austria did not file comments at the Trustee's behest, as CN implies. Rather, Bank Austria filed comments to state its own interest in this matter.

² Fraser Paper and MMA sought leave to intervene because each filed comments more than 20 days after filing of the revocation petition.

creditor of BAR, clearly has an interest in this proceeding, as even CN concedes.³ There is nothing “odd” or procedurally improper about Bank Austria’s May 14 Reply.

There is, however, something procedurally improper about CN’s Supplement; namely, that it is a prohibited reply to a reply. The Board’s regulations prohibit replying to a reply. 49 C.F.R. §1104.13(c) (2001). CN attempts to disguise its prohibited filing as a “supplement.” Had the filing stopped with submission of the transcript of the bankruptcy court hearing, perhaps it could have been considered a supplement. But since the “supplement” spends 3 of its 9 pages answering Bank Austria’s May 14 Reply, CN’s Supplement clearly violates the ‘no reply to a reply’ regulation.

Rather than wasting the Board’s time with a motion to strike CN’s prohibited reply to Bank Austria’s May 14 Reply, to which CN would then again reply, Bank Austria submits this filing to counter CN’s untimely and unwarranted attacks. Bank Austria requests that the Board accept and consider this submission, either by considering it as a reply to CN’s “supplement,” or simply as a filing to close the record, which the ‘no reply to a reply’ rule gives Bank Austria the right to do. To the extent that the Board considers pages 6 through 8 of CN’s Supplement, which attack Bank Austria’s May 14 Reply, the Board should also consider this filing.

³ To the extent 49 C.F.R. §1101.2(d) requires an affirmative request, Bank Austria specifically requests that it be “permitted” by the Board to participate in this proceeding. Given that the Bank’s comments were timely filed, there is no need for the Bank to file a Motion To Intervene.

II. BOARD AUTHORITY IS UNNECESSARY BECAUSE CN NEVER CONSUMMATED ITS PERMISSIVE TRACKAGE RIGHTS EXEMPTION

While BAR and CN sought and received STB authority for the trackage rights agreement they had entered into,⁴ nothing in that exemption approval compelled CN to operate the rights nor compelled BAR to grant CN such access. The authority merely granted regulatory permission for CN to operate trackage rights at any time over BAR's tracks; assuring CN had the contractual right to do so. As the Board has often said, 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). Thus, trackage rights require three things to be fully effective: (1) a contractual right; (2) regulatory authority; and (3) consummation of those trackage rights. Once trackage rights are fully effective and have been consummated, they cannot be cancelled without STB authority. *Thompson v. Texas Mexican Ry. Co.*, 328 U.S. 134 (1946) ("*Tex Mex*").⁵

Here, CN and BAR satisfied two of the three elements to effectuate their *Tex Mex* rights: they had a contract and regulatory authority but the real question is whether or not CN and BAR ever consummated their transaction. It is consummation of the transaction that determines whether the trackage rights notice of exemption became fully effective so as to warrant *Tex Mex* protection. See *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

⁴ *Canadian National Railway Company-Trackage Rights Exemption-Bangor and Aroostook Railroad Company and Van Buren Bridge Company*, F.D. No. 34014 66 Fed. Reg. 15,941 (2001).

⁵ The *Tex Mex* doctrine was intended to ensure that shippers who were receiving trackage rights service would not lose that service without a public interest finding, even if there was no longer a contract governing the trackage rights operations.

and 31465, 1995 ICC LEXIS 69 at *3 (ICC served April 7, 1995)(“*Arkansas Central*”). Whether CN’s rights have been consummated is a factual question of whether the operations actually have been conducted. *Id.* See also *Lackawanna County Railroad Authority-Acquisition Exemption-F&L Realty, Inc., et al.*, STB Docket Nos. 33905 and 33906, 2001 STB LEXIS 814 (“Because L&S provided rail transportation . . . discontinuance authority must be obtained.”); and *Consolidated Rail Corp.-Trackage Rights Exemption-Boston and Maine Corp., et al.*, Finance Docket No. 31561, 1996 STB LEXIS 329 (served June 18, 1996) (“cessation of service” does not eliminate the need to revoke a trackage rights exemption). Here, the facts are clear: CN has never conducted any trackage rights operations and thus never consummated the transaction for which the notice of exemption was sought. As a result, Fraser Paper has never received trackage rights service and without such actual service, no party, including Fraser and CN, is entitled to rely on the protections afforded in *Tex Mex*.

As Bank Austria pointed out in its May 14 Reply and as also set forth by MMA, CN’s failure to consummate the trackage rights means that revocation of CN’s exemption is an unnecessary step and that the bankruptcy court can reject the trackage rights contract without the additional need for Board authorization. See page 9 of Bank Austria’s May 14 Reply, citing *Arkansas Central*. That case is particularly on point. In *Arkansas Central*, the ICC held that it was unnecessary to grant discontinuance of trackage rights that were never operated. Herzog Stone Products, a shipper, had incorporated a rail carrier to operate a former spur serving Herzog’s facilities, and obtained an exemption for the company’s operation of the line. The Kansas City Southern Railway Company (“KCS”) shortly thereafter obtained an exemption to also operate the line under trackage rights with the new carrier. However, Herzog changed its mind before activating the new railroad, and returned to the ICC seeking revocation of the

operation exemption. While KCS had continued to serve the facility, it had never initiated trackage rights operations, but rather continued to operate the track as an exempt spur. The Commission held that because KCS never conducted trackage rights operation, revocation of KCS' exemption was not necessary.

Likewise here, granting the revocation petition is not necessary, nor is it necessary for BAR to file an adverse discontinuance application. Given that there has been no trackage rights service to Fraser, neither it nor CN, can reasonably assert that the Board needs to make a public interest finding on whether to discontinue rights that were never operated in the first place. According, the issue is not whether the Board should require the filing of an adverse discontinuance application versus whether the Board can simply revoke the exemption to achieve the same result. Positing the question that way misses the point. Instead, neither such action is required because the exemption was permissive in the first instance, was never consummated. The notice of exemption is simply void because it was never effectively implemented; thus the terms of the contract govern. If that contract is no longer valid because it has either expired on its terms or been rejected by the bankruptcy court, then CN no longer has any rights and no Board action is required to effectuate those rights. It is simply unnecessary for the Board to revoke the trackage rights exemption noticed in this matter or for the Board to require the filing of an adverse discontinuance application.

III. EVEN IF BOARD AUTHORITY IS REQUIRED TO DISCONTINUE CN'S RIGHTS, THE TRUSTEE'S PETITION SHOULD BE GRANTED

A. The Trustee Should Not Have To Meet The Public Interest Test

CN argues that the Trustee must file an adverse discontinuance proceeding and prove that there is no public need for CN to operate under a trackage rights exemption before CN's trackage rights can be extinguished. The Board should reject CN's contention because in the context of a

petition to revoke an exemption, the Trustee should not be required to meet the public interest standard that would be applicable to an adverse discontinuance application.

First and most obviously, if there were a public need for CN to operate under trackage rights, why hasn't CN done so? It is undisputed that CN has not exercised its option to conduct trackage rights operations. Indeed, it is likely that the exemption should not have been issued in the first instance because CN had no intent to operate the trackage rights. CN apparently indicated that it had no specific intention to operate under the exemption. CN's non-use of the permissive rights itself shows that there is no public need for the trackage rights operation.⁶

Second, in requesting that the Trustee disprove public need, CN is asking that the Trustee disprove something that CN never proved to exist in the first place. It is inherently difficult to prove a negative. *Bartnicki v. Vopper*, 532 U.S. 514, 552 (2000). In other circumstances, the Board has rejected requirements that parties prove a negative. See *Market Dominance Determination-Product and Geographic Competition*, 3. S.T.B. 937, 941 (1998); *National Starch and Chemical Corp v. Atchison, Topeka & Santa Fe Railway*, Docket No. 40365, 1992 ICC LEXIS 104 at *7 (served May 27, 1992). It should do so here as well.

Finally, rejection of CN's suggestion that the Trustee disprove public need is particularly appropriate because CN has never proved public need for the trackage rights in the first instance. CN's unused trackage rights arose from an exemption proceeding, where CN avoided having to establish that the trackage rights met a public need or served the public interest. Now, however, CN insists that an adverse discontinuance application is required to prove that public need does not exist. The inherent inequity of insisting on an application to revoke a notice of exemption is obvious, and should be rejected by the Board.

⁶ Indeed, it is questionable whether CN is attempting to serve any "public" need or interest inasmuch as the trackage rights allow it to serve only one shipper, not the shipping public.

B. Even If The Public Interest Test Is Applied, The Public Interest Clearly Requires That The Exemption Be Revoked

CN's argument that all parties in this proceeding seek only to protect their monetary interests while CN seeks to foster the public good is nonsensical. Indeed, in attempting to remain the sole service provider to Fraser Paper, it is CN that seeks to sacrifice the public good for its own financial interests. Fraser Paper is a major shipper. Handling its traffic can generate significant revenue for the handling carrier. That is why CN wants so desperately to control Fraser's traffic under its haulage and trackage rights agreements.

Bank of Austria and the Trustee likewise have economic interests to protect. The difference between their interests and CN's are that the Bank's and the Trustee's interests are aligned with the public interest. MMA's filing also clarifies Bank Austria's financial interests and how those interests relate directly to the public interest. MMA and the Trustee have agreed that if the assets that MMA has agreed to purchase are unencumbered by CN's trackage rights, MMA will pay more for the purchase of BAR's assets. MMA June 5 Reply at 3, n.3. As the principal secured creditor of BAR's estate, Bank Austria has a financial interest in how much the Trustee is paid for BAR's assets.

However, the public, and even Fraser Paper, also have an interest in MMA receiving BAR's assets unencumbered by CN's unused trackage rights. As stated in MMA's filing, if CN retains rights on BAR's line, MMA will lose even more revenue than the amount by which the purchase price for BAR's assets will be reduced. "MMA will pay a lower price if CN's trackage rights remain in place, but will lose even more in potential revenues, and thus the rights will create a drag on its ability to maintain essential shipper services and grow its operations." MMA June 5 Reply at 3, n.3. In other words, the amount which MMA will pay for BAR's system is directly related to the soundness of the system that MMA is purchasing. The public, including

Fraser Paper, will be better served by a more sound MMA than by allowing CN to cherry pick the major shipper on a remote section of BAR's system.

Likewise, Fraser's competitive options would actually be enhanced, not reduced, if CN is no longer allowed to directly serve Fraser's facility. If MMA purchases the former BAR, its geographic reach will be no wider in scope than BAR's and certainly nowhere near the geographic scope of CN. As a regional railroad, BAR (and MMA if it steps into BAR's shoes) could not and did not serve Fraser's origins and destinations. Thus, prior to CN's direct service to Fraser, BAR was required to interchange Fraser's traffic with its connecting carriers; Guilford, CN, and CP, for ultimate delivery of Fraser's traffic. Once CN was allowed to directly serve Fraser via the haulage/trackage rights arrangement, Fraser actually lost its ability to have its traffic interchanged to CP or to the Guilford system.⁷

So let's call a spade a spade, CN wants Fraser to remain captive to it and CN's argument that Fraser would see a reduction in competition if CN is removed is merely a red herring. Indeed, it is a matter of simple railroad economics to realize that if Fraser's facility remains a CN-served point, CN would have no incentive to short haul itself in order to interchange with CP or Guilford; whereas MMA would have no choice but to interchange with them, giving Fraser more routing options. Freeing Fraser from CN's grip thus actually enhances competition, provides additional routing options, and best serves the National Rail Transportation Policy.

⁷ While not entirely clear on the existing record, it appears that Fraser Paper was willing to accept CN service and thus lose its competitive interchange options for two reasons: (1) CN, as a financially sound railroad, provided service certainty; and (2) the cost to Fraser remained unchanged as long as the contract remained in place. The only change was how CN and BAR divided the same revenue pie. *See e.g.* Fraser Paper's witness Durant statement that "[r]evocation of CN's rights would . . . essentially remov[e] a critical measure of transportation security for our Madawaska mill. . . [w]hen it became apparent that BAR was having serious financial difficulties, we became extremely concerned . . . and CN's ability to directly serve the mill alleviates Fraser's concerns over any potential loss of rail service." Durant verified statement, pages 2 and 3.

Among other goals, revocation will allow competition among CN, CP and Guilford to establish reasonable rates and promote adequate service to meet Fraser Paper's needs⁸ (*see* 49 U.S.C. §10101(1)); it will promote a safe and efficient rail transportation system by allowing MMA to earn adequate revenues (*see* 49 U.S.C. § 10101(3)); and it will foster sound economic conditions in transportation (*see* 49 U.S.C. § 10101(5)).

If the Board considers whether it must revoke CN's trackage rights exemption, the Board must decide whether the public interest is better served by strengthening MMA or by further filling the coffers of CN; whether the public interest is better served by calming Fraser Paper's nervousness or by setting MMA on the most sound financial footing possible to serve the entire BAR system. The answer clearly must be, in light of BAR's apparent ability to serve Fraser Paper satisfactorily in the past, that a sound MMA that is able to serve Fraser Paper *and others* best serves the *public* interest. Keeping CN as the sole provider of service to Fraser serves only one interest: CN's. Accordingly, if the Board does apply a public interest test to the Trustee's request to revoke the exemption, the public interest is best served by granting the Trustee's motion and revoking CN's authorization to operate over BAR's tracks.

CONCLUSION

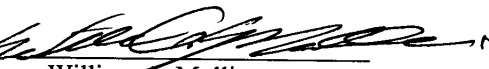
Bank Austria's May 14 Reply was procedurally appropriate. The same cannot be said of CN's Supplement, at least insofar as it is an improper reply to Bank Austria's May 14 Reply. If the Board considers pages 6 - 8 of CN's Supplement, it likewise should accept and consider this supplement to Bank Austria's May 14 Reply.

⁸ Fraser Paper's witness Durant stated, "Without consistent and reliable rail service, the [Madawaska] mill could not operate for long." Durant verified statement, page 2. Because CN only recently gained access via haulage, and itself has never directly served the Madawaska mill, BAR's service clearly has been "consistent and reliable rail service" necessary to keep the Madawaska mill in operation.

Because CN never consummated its trackage rights to serve Fraser Paper, the Board need not revoke CN's trackage rights exemption. However, if the Board determines that it must revoke those rights, ample grounds for doing so exist. The Trustee need not establish lack of public need for those rights via an adverse discontinuance proceeding inasmuch as CN never showed public need for the rights. Rather, the Trustee need only show that the public interest justifies revocation of the exemption. The public's interest in the soundness of MMA's operation of BAR's properties and in enhancing Fraser's competitive options, outweighs CN's private financial interest. Accordingly, the exemption should be revoked.

Respectfully submitted,

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

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CERTIFICATE OF SERVICE

I, David C. Reeves, hereby certify that I have on June 11, 2002, served copies of the foregoing Supplement to 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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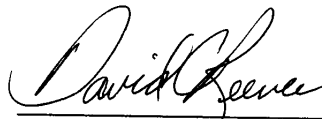
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