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December 27, 2002

Via Federal Express

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



Re: Docket No. AB-279 (Sub No. 3) - 206953
Canadian National Railway Company – Adverse Discontinuance –
Lines of Bangor and Aroostook Railroad Company and Van Buren
Bridge Company in Aroostook County, Maine

Docket No. AB-124 (Sub No. 2) 206954
Waterloo Railway Company – Adverse Abandonment – Lines of
Bangor and Aroostook Railroad Company and Van Buren Bridge
Company in Aroostook County, Maine

Dear Secretary Williams:

I am enclosing an original and ten copies of Canadian National and Waterloo Railway Companies' Response in Opposition to the Trustee of Bangor and Aroostook Railroad Companies' Motion to Compel Answers to Interrogatories and Production of Documents.

Kindly file stamp the enclosed duplicate of this letter and return the same to me in the self-addressed stamped envelope that I have provided for this purpose.

Thank you for your assistance in this matter.

Respectfully submitted,

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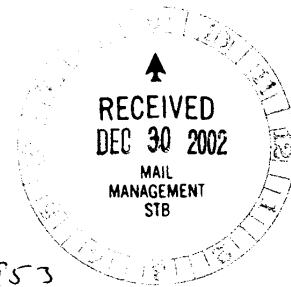
A handwritten signature in cursive script, appearing to read "Myles L. Tobin".

Myles L. Tobin
Attorney for Canadian National
and Waterloo Railway Companies

MLT/kib
Enclosures

cc: Parties on Certificate of Service
Mr. Joseph H. Dettmar

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



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

206953

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

DOCKET NO. AB-124 (Sub-No. 2)

206954

**WATERLOO RAILWAY COMPANY
-- ADVERSE ABANDONMENT --
LINES OF BANGOR AND AROOSTOOK RAILROAD COMPANY AND
VAN BUREN BRIDGE COMPANY
IN AROOSTOOK COUNTY, MAINE**

**OPPOSITION OF
CANADIAN NATIONAL RAILWAY COMPANY AND
WATERLOO RAILWAY COMPANY TO TRUSTEE OF BANGOR
AND AROOSTOOK RAILROAD COMPANY
MOTION TO COMPEL ANSWERS TO INTERROGATORIES
AND PRODUCTION OF DOCUMENTS**

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

Dated: December 27, 2002

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

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

DOCKET NO. AB-124 (Sub-No. 2)

**WATERLOO RAILWAY COMPANY
-- ADVERSE ABANDONMENT --
LINES OF BANGOR AND AROOSTOOK RAILROAD COMPANY AND
VAN BUREN BRIDGE COMPANY
IN AROOSTOOK COUNTY, MAINE**

**OPPOSITION OF
CANADIAN NATIONAL RAILWAY COMPANY AND
WATERLOO RAILWAY COMPANY TO TRUSTEE OF BANGOR
AND AROOSTOOK RAILROAD COMPANY'S
MOTION TO COMPEL ANSWERS TO INTERROGATORIES
AND PRODUCTION OF DOCUMENTS**

Canadian National Railway Company and Waterloo Railway Company (hereinafter collectively "CN"), by its undersigned attorneys, hereby file this response in Opposition to the Motion of the Trustee of Bangor and Aroostook Railroad Company to Compel Answers to Interrogatories and Production of Documents. In support thereof, CN states as follows:

I. BACKGROUND

In this adverse abandonment proceeding, the Trustee of the Bangor and Aroostook Railroad Company ("Trustee" or "BAR") seeks to eliminate the existing access of Fraser Papers, Inc. ("Fraser") to competitive rail service at its plant in Madawaska, Maine. This competitive



access exists by virtue of (1) CN trackage rights over the BAR (and its subsidiary, the Van Buren Bridge Company), extending from St. Leonard, New Brunswick, Canada, to Madawaska, Maine, and (2) a freight easement held by the Waterloo Railway Company over the St. Leonard-Madawaska line. Both the CN trackage rights and the Waterloo easement were acquired in an arms-length transaction with BAR in March of 2001, and allow CN to directly provide rail service to Fraser at Madawaska. Previously, Fraser had access to rail service only from BAR.

Since entering bankruptcy in August of 2001, BAR has sought to terminate Fraser's competitive access to CN rail service, first at the Bankruptcy Court and then in revocation proceedings before the Board. The Bankruptcy Court found that it should not act until the Board had considered the relevant transportation issues at stake. In a decision served June 25, 2002, the Board rejected BAR's revocation efforts, finding that the relief sought by BAR "would deprive Fraser of the benefits of a competitive option. . ." *Canadian National Railway Company-Trackage Rights Exemption-Bangor and Aroostook Railroad Company and Van Buren Bridge Company*, Finance Docket No. 34014 (STB served June 25, 2002) ("*Revocation Decision*") at 8. The Board ruled that the Trustee would have to file a formal Application for Adverse Discontinuance of the Trackage Rights and Adverse Abandonment of the Easement. However, the Board noted that BAR's primary motivation for eliminating Fraser's competitive service options via CN was to obtain a higher sale price for BAR for the benefit of BAR's creditors—something that had little, if anything, to do with the rail transportation policy of 49 U.S.C. §10101. *Revocation Decision* at 7, n. 12.

On November 14, 2002, the Trustee filed and published its Notice of Intent for Discontinuance of Trackage Rights and Abandonment of Freight Easement ("*Notice of Intent*"). The Notice of Intent indicated that, on or about December 23, 2002, the Trustee intended to file a formal Application for the Adverse Discontinuance of the CN Trackage Rights and the Adverse

Abandonment of the Waterloo Freight Easement ("Application"). Simultaneously with the filing of the Notice of Intent, the Trustee also served document requests ("Document Requests") and interrogatories ("Interrogatories") on CN. Over fifteen months have elapsed since the BAR bankruptcy proceeding was initiated, and over seven months have elapsed since BAR initiated revocation efforts before the Board. Yet, on the eve of its purported filing of an Application with the Board, the Trustee evidently believes that it does not have sufficient facts to form the basis for an adverse abandonment case, and consequently has showered CN (and Fraser) with extensive and highly burdensome Document Requests and Interrogatories, clearly formulated to be in the nature of a "fishing expedition", and thereby placing an undue and inappropriate burden on CN.

CN has attempted to be cooperative and has responded to several of the Interrogatories. However, the vast majority of the Interrogatories and the Document Requests will require CN to scour the company in a futile attempt to find answers and documents which the Board has historically ruled are unnecessary and inappropriate subjects for discovery in an abandonment proceeding. Accordingly, CN properly objected to many of these Discovery Requests and Interrogatories. On or about December 9, 2002, the Trustee filed a Motion to Compel.

II. ARGUMENT

A. The Board does not favor the use of discovery in rail abandonment proceedings.

This Board and its predecessor, the ICC, have consistently rejected the use of discovery in abandonment proceedings. The Trustee has presented nothing here to justify the Board's divergence from this long-standing policy. The Motion to Compel should be denied.

The Board's policy on discovery in abandonment cases was most clearly enunciated in *Central R. Co. of Indiana – Abandonment Exemption – In Dearborn, Decatur, Franklin, Ripley, and Shelby Counties, IN*, STB Docket No. AB-459 (Sub-No. 2X) (STB served April 1, 1998),

(“*Central Railroad*”) where the Board stated that “discovery in an abandonment case is typically disfavored. . . due not only to the strict time constraints imposed by Congress, but also because *only rarely can discovery be justified in an abandonment proceeding.*” (emphasis added.) See also *Central R. Co. of Indiana – Abandonment Exemption – in Dearborn, Decatur, Franklin, Ripley and Shelby, Counties in IN*, STB Docket No. AB-459 (Sub-No. 2X) (STB served February 26, 1998), [In an abandonment exemption proceeding, discovery is generally dilatory, typically not productive, and consequently disfavored.]; and *Chicago North Western Transportation Company – Abandonment – Between Palmer and Laurens in Pocahontas County, IA*, ICC Docket No. AB-1 (Sub-No. 212) (ICC Decided May 15, 1991) (“*CNW – Abandonment – Palmer – Laurens*”) [The use of interrogatories requiring voluminous data is contrary to the Commission’s goal that this process be accessible and straightforward as possible. This type of discovery against Protestants, if granted, would needlessly discourage companies from participating in abandonment proceedings.]¹

The Board’s disfavor of discovery has extended to adverse abandonment proceedings, and encompasses discovery served on the carrier whose rights an applicant seeks to extinguish. For example, in *Salt Lake City Corp. – Adverse Abandonment – In Salt Lake City, UT*, (“*Salt Lake City*”), STB Docket No. AB-33 (Sub-No. 183) (STB served January 11, 2002), the Board granted Union Pacific Railroad Company’s request for a protective order against discovery, holding that “discovery would serve no useful purpose” – that it was neither particularly relevant nor at all necessary. See also *The Kansas City So. Ry. Co. – Adverse Discontinuance Application*

¹ In *Central Railroad*, the Board observed that the party moving to compel discovery (a coalition of shippers on the line) had failed to cite a single precedent where either the Board or the ICC had ever granted a motion to compel discovery in an abandonment proceeding. Here also, the Trustee has not offered a single supporting case justifying the use of discovery in an abandonment proceeding.

– *A line of Arkansas and Missouri R. Co.*, STB Docket No. AB-103 (Sub-No. 14) (STB served January 19, 1999). (“*KCS – Discontinuance – Arkansas and Missouri*”)

The Board has consistently held that the burden of proof in an abandonment case is on the carrier seeking abandonment, and that the applicant is capable of addressing the central issue – whether the public convenience and necessity warrant the abandonment – without the need of any information from opponents. The applicant should have in its possession all of the information that it needs to meet that burden. After the carrier has filed its application, protestants will have the opportunity to offer their own evidence or information to refute the assertions contained in the application. Applicant then may attempt to rebut such evidence in its reply statement. Discovery is not necessary for this purpose. *Illinois Central Railroad Company – Abandonment – in Jackson, Hinds County, MS*, STB Docket No. AB-43 (Sub-No.162) (STB served September 1, 1995) (“*IC – Abandonment – Hinds County*”); see also *Salt Lake City*.

Here, BAR is in possession of all of the information necessary to attempt to meet its burden of proof. It owns the line to Fraser, and continues to operate over that line today. BAR provided service to Fraser under a standard divisions arrangement through the middle of 2001, and continues to provide service to Fraser in conjunction with CN under a haulage arrangement. In short, it has all of the information in its possession necessary to attempt to meet its burden of proof. Discovery is not necessary or appropriate.

B. The Trustee has failed to justify compelling responses to the disputed discovery.

The Board has consistently denied motions to compel discovery in abandonment cases. As the Board stated in *SWKR Operating Company – Abandonment Exemption – In Cochise County, AZ*, STB Docket No. AB-441 (Sub-No. 2X) (STB served February 14, 1997),

Discovery, which can hold up the Board's processes, may be necessary in some cases, even in some cases – such as rate cases – involving statutory decisional deadlines. In abandonment cases, however, it is not typically productive, and hence not typically pursued. Contested discovery may be granted under appropriate circumstances in particular abandonment proceedings, but only when the party seeking discovery shows that the information sought is relevant and might affect the result of the case, and that it ought to be obtained through discovery rather than some other means. Slip op at 2.

See also *Salt Lake City; KCS - Discontinuance - Arkansas and Missouri*. Even in the unusual circumstance where discovery might be appropriate in an abandonment case, the Board has admonished that the “discovery requests [must] be sharply focused and clearly justified.” *Central Railroad*.

Here, the Trustee has failed to demonstrate that the information sought in the Discovery Requests and Interrogatories is necessary to present its case for abandonment.

In its Motion, the Trustee first addresses Document Request Nos. 2, 5 and 6, as follows:

2. Any and all Communications between CN and Fraser relating to the March 2001 Transaction, the proposed abandonment of the Waterloo freight easement and proposed discontinuance of the CN trackage rights on the railroad line between Madawaska and Van Buren, the proposed acquisition of substantially all of the BAR System by the Montreal, Maine and Atlantic Railway, LLC (“MM&A”), the viability of the BAR or the BAR System, and the consequences of financial distress, bankruptcy, dissolution or other events that might affect service provided by BAR to, from or the Madawaska Mill.

5. Any and all Communications between and among any employees, directors, officers, representatives, or other agents of CN (including without limitation any analyses, studies, reports or other documents prepared by such persons) relating to the March 2001 Transaction, the proposed abandonment of the Waterloo freight easement and proposed discontinuance of the CN trackage rights over the railroad line between Madawaska and Van Buren, the proposed acquisition of substantially all of the BAR System by MMA, the viability of the BAR or the BAR System, and the consequences of financial distress, bankruptcy, dissolution or other events that might affect service provided by BAR to, from or at the Madawaska Mill.

6. Any and all Communications between CN and any person or entity other than Fraser relating to the March 2001 Transaction, the proposed abandonment of the Waterloo freight easement and proposed discontinuance of the CN trackage rights over the railroad line

between Madawaska and Van Buren, the proposed acquisition of substantially all of the BAR System by MM&A, the viability of the BAR or the BAR System, and the consequences of financial distress, bankruptcy, dissolution or other events that might affect service provided by BAR to, from or at the Madawaska Mill.

These three Discovery Requests are objectionable for a host of reasons. On their face, they are overbroad, unduly burdensome, and thoroughly irrelevant. They seek every communication, oral, written or electronic, between every employee of CN and Fraser, between every employee of CN and another employee of CN, and between every employee of CN and any other third party, pertaining to the March, 2001 transaction, the proposed abandonment of the Freight Easement and Trackage Rights, the proposed acquisition of the BAR system by Montreal Maine and Atlantic Railway ("MM&A"), the viability of the BAR or the BAR system, and the consequences of financial distress, bankruptcy, dissolution or "other events" that might affect service by BAR to Fraser.²

BAR's claim in its Motion to Compel that these Document Requests are "narrowly tailored" (Motion to Compel at 8) defies credibility. These three Discovery Requests alone would involve hundreds of employee hours, and would force CN to scour thousands of records looking for any and all documents remotely relating to the BAR, MM&A, the Junction Settlement Agreement, and any related matters.

Moreover, nothing of what BAR seeks here is particularly relevant to this transaction or is necessary for the filing of its Application. BAR says that the information sought will "likely" show CN's "own assessment of the harm that the discontinuance would cause CN." Motion to

² The definition of "communication" in the BAR Document Requests is "any oral, written or electronic statement of any kind conveyed by one person to another person through any means, any statement made by one person in the presence of one or more other persons, and/or any document delivered by or for one person to another person through any means. This includes, but is not limited to, voice messages, voice mail, dictation or any form of oral or unwritten statement."

Compel at 8. BAR also claims that these documents also will “likely” show CN’s future plans for service to and from the Madawaska Mill. Motion to Compel at 8. To the contrary, these Requests are plainly and simply a fishing expedition to elicit every possible document relating to the BAR and MM&A, none of which have any relevance to this adverse abandonment proceeding. There is no specific request for documents relating to CN’s assessment of the harm caused by this transaction. And if there had been such a request, as this Board has repeatedly held, the Board’s responsibility is to protect competition, not competitors. CN’s assessment of the harm to itself is not at issue. Rather, BAR will have to face the burden of establishing why loss of competitive service to Fraser, effectively turning a shipper with access to two railroads into a captive shipper, is in the public interest.

Nor is there any hint in these Document Requests of an inquiry relating to CN’s service plans for service to and from Madawaska. Had BAR actually asked that question, CN certainly would have been willing to advise that it has operationally prepared to utilize the trackage rights over the BAR line, and the only impediment is that BAR has refused to allow CN access to utilization of those trackage rights. But, this is not the question that BAR asked. The plain language of the Document Requests belies this assertion. BAR’s requests are not relevant or appropriate.

The vast bulk of the remaining objectionable discovery served on CN – including Interrogatories 2, 3, 5, 6 and 8 and Document Requests 1, 3, 4, 7, 8 and 9 – focus on CN’s existing rates and pricing for service to Fraser’s mill at Madawaska, and the profitability of that traffic to CN. They have nothing whatsoever to do with the trackage rights or freight easement. These Interrogatories and Document Requests are as follows:

2. Describe the Effective Rates applicable to the transportation to the Madawaska Mill of each type of Inbound Material by CN (as origin, destination and/or intermediate carrier) during each of calendar years 1999 and 2000, and during the period from January 1, 2001 through the Changeover Date. If the Effective Rates changed during any applicable period, describe the changes and when they occurred. Your response should include without limitation the following information for each time period:

- (i) the Effective Rates applicable to the transportation of each type of Inbound Material by origin(s), mode(s) if not exclusively by rail, carrier(s), routing(s) and volume transported (in tons, carloads or other relevant measure);
- (ii) the components of such Effective Rates, including without limitation the standard rate or charge applicable to each shipment of Inbound Material, the nature and amount or percentage of any volume or other credits, discounts, rebates or reclaims, and any other adjustments that affected such Effective Rates; and
- (iii) the nature and amount or percentage of any division of such Effective Rates among or between different carriers if more than one carrier was involved in the transportation to the Madawaska Mill of such Inbound Material.

3. Describe the Effective Rates applicable to the transportation to the Madawaska Mill of each type of Inbound Material by CN (as origin, destination and/or intermediate carrier) during the period from the Changeover Date through December 31, 2001 and during the period from January 1, 2002 to the present. If the Effective Rates changed during any applicable period, describe the changes and when they occurred. Your response should include without limitation the following information for this period:

- (i) the Effective Rates applicable to the transportation of each type of Inbound Material by origin(s), mode(s) if not exclusively by rail, carrier(s), routing(s) and volume transported (in tons, carloads or other relevant measure);
- (ii) the different components of such Effective Rates, including without limitation the standard rate or charge applicable to each shipment of Inbound Material, the nature and amount or percentage of any volume or other credits, discounts, rebates or reclaims, and any other adjustments that affected such Effective Rates; and
- (iii) the nature and amount or percentage of any division of such Effective Rates among or between different carriers if more than one carrier was involved in the transportation to the Madawaska Mill of such Inbound Material.

5. Describe the Effective Rates applicable to the transportation from the Madawaska Mill of each type of Outbound Product by CN (as origin, destination and/or intermediate carrier) during each of calendar years 1999 and 2000, and during the period from January 1, 2001 through the Changeover Date. If the Effective Rates changed during any applicable period, describe the changes and when they occurred. Your response should include without limitation the following information for each time period:

- (i) the Effective Rates applicable to the transportation of each type of Outbound Product by destination(s), mode(s) if not exclusively by rail, carrier(s), routing(s) and volume transported (in tons, carloads or other relevant measure);
- (ii) the different components of such Effective Rates, including without limitation the standard rate or charge applicable to each shipment of Outbound Product, the nature and amount or percentage of any volume or other credits, discounts, rebates or reclaims, and any other adjustments that affected such Effective Rates; and
- (iii) the nature and amount or percentage of any division of such Effective Rates among or between different carriers if more than one carrier was involved in the transportation to the Madawaska Mill of such Outbound Product.

6. Describe the Effective Rates applicable to the transportation from the Madawaska Mill of each type of Outbound Product by CN (as origin, destination and/or intermediate carrier) during the period from the Changeover Date through December 31, 2001 and during the period from January 1, 2002 to the present. If the Effective Rates changed during any applicable period, describe the changes and when they occurred. Your response should include without limitation the following information for each time period:

- (i) the Effective Rates applicable to the transportation of each type of Outbound Product by destination(s), mode(s) if not exclusively by rail, carrier(s), routing(s) and volume transported (in tons, carloads or other relevant measure);
- (iv) the different components of such Effective Rates, including without limitation the standard rate or charge applicable to each shipment of Outbound Product, the nature and amount or percentage of any volume or other credits, discounts, rebates or reclaims, and any other adjustments that affected such Effective Rates; and
- (v) the nature and amount or percentage of any division of such Effective Rates among or between different carriers if more than one carrier was involved in the transportation to the Madawaska Mill of such Outbound Product.

8. Describe whether and to what extent CN has passed along, shared, credited or otherwise distributed to Fraser any of the transportation cost reduction attributable to the change, as of and subsequent to the Changeover Date, from CN-BAR joint rates to the rates provided in the Junction Settlement Agreement for that portion of transportation to or from the Madawaska Mill that occurs over the railroad line between Madawaska and Van Buren.

1. Any and all Communications between CN and Fraser relating to the Effective Rates applicable to transportation that originates from or terminates at the Madawaska Mill, including without limitation any such transportation provided by or on behalf of CN (as origin, destination and/or intermediate carrier) with respect to rail traffic destined to or originating from the Madawaska Mill but excluding waybills and bills of lading.

3. Any and all Communications between and among any employees, directors, officers, representatives, or other agents of CN (including without limitation any analyses, studies, reports or other documents prepared by such persons) relating to the Effective Rates applicable to transportation that originates from or terminates at the Madawaska Mill, including

without limitation any such transportation provided by or on behalf of CN (as origin, destination and/or intermediate carrier) with respect to rail traffic destined to or originating from the Madawaska Mill but excluding waybills and bills of lading.

4. Any and all Communications between CN and any person or entity other than Fraser relating to the Effective Rates applicable to transportation that originates from or terminates at the Madawaska Mill, including without limitation any such transportation provided by or on behalf of CN (as origin, destination and/or intermediate carrier) with respect to rail traffic destined to or originating from the Madawaska Mill but excluding waybills and bills of lading.

7. Any agreements, contracts, leases or other documents (including additions and modifications thereto) entered into by CN and Fraser or effective between CN and Fraser relating to transportation that originates from or terminates at the Madawaska Mill (including without limitation the Effective Rates applicable to such transportation) but excluding waybills and bills of lading.

8. Describe whether and to what extent CN has passed along, shared, credited or otherwise distributed to Fraser any of the transportation cost reduction attributable to the change, as of and subsequent to the Changeover Date, from CN-BAR joint rates to the rates provided in the Junction Settlement Agreement for that portion of transportation to or from the Madawaska Mill that occurs over the railroad line between Madawaska and Van Buren.

9. Any and all Communications between and among any employees, directors, officers, representatives or other agents of CN (including without limitation any analyses, studies, reports or other documents prepared by such persons) relating to the profitability, margins or other measures of revenue net costs and expenses attributable to transportation of rail traffic to or from the Madawaska Mill by CN (as origin, destination and/or intermediate carrier) during the period from the Changeover Date through the present.

Once again, BAR claims that these eleven Interrogatories and Document Production Requests, most with several subparts, which collectively would necessitate a search for every rate on every carload of traffic moved to and from Fraser over a four-year period, including, but not limited to, a search for every document and oral communication on each such rate and each such carload is somehow "narrowly tailored." Motion to Compel at 9. CN respectfully disagrees.

To describe these Interrogatories and Document Requests as overly broad and unduly burdensome hardly begins to tell the tale. What BAR is asking for is the devotion of hundreds of employee hours to a special study analyzing each carload and each rate over a four-year period. BAR is also asking that CN devote hundreds of employee hours to scouring the company for

every last bit of communication, including but not limited to voice mail and other oral communications, relating to each rate and each carload. This type of incredibly burdensome discovery is neither appropriate nor allowed in abandonment proceedings.

BAR argues that information regarding these rates will somehow bear on what, if any, adverse affect the trackage rights discontinuance will have on Fraser (Motion to Compel at 9). CN frankly fails to see the connection or relevance. CN and Fraser have entered into arms-length arrangements for rail transportation to and from the Madawaska mill at agreed upon rates. BAR apparently intends to ask this Board to substitute its judgment for that of Fraser as to what constitutes adequate compensation for transportation services. However, as discussed above, the public interest analysis here will focus on the loss of Fraser's competitive options, effectively making the Madawaska mill a two-to-one point, leaving Fraser captive to BAR's rate-making decisions. CN's negotiated rates with Fraser are simply not relevant to this analysis.

To the extent that BAR intends to argue lack of shipper harm, it is free to do so, but the Board has consistently held that discovery is not necessary on this issue. Where carriers have attempted to probe the extent of shipper harm through the discovery process, this Board has uniformly held that such discovery is unnecessary and inappropriate. (*IC – Abandonment – Hinds County; CNW – Abandonment – Palmer – Laurens*).

Ironically, in its Petitions for Waiver previously filed in this proceeding, BAR sought a waiver of the requirement in Section 1152.22(d) to submit data regarding its own revenues and costs associated with the line. This waiver request was granted. Now, BAR seeks to argue that, while its revenues and costs associated with the line are not relevant, nevertheless, CN's revenues and costs are somehow relevant and must be supplied in discovery in order to establish the profitability of the traffic to CN. Motion to Compel at 10-11.

Evidence on the profitability of Fraser traffic to CN is plainly and simply not relevant. Rather, the preservation (or lack thereof) of rail competition for Fraser and Fraser's ability to choose between alternate carriers, is at the heart of the public interest analysis in this matter. As the Board stated in granting BAR's petitions for waiver of revenue and cost information, "BAR is certainly not arguing that CN should be forced to discontinue these rights on the ground that their exercise will be unprofitable to CN." *Canadian National Railway Company – Adverse Discontinuance – Lines of Bangor and Aroostook Railroad Company and Van Buren Bridge Company in Aroostook County, ME*, (STB served September 25, 2002).

To the extent that BAR is arguing that this rate and profitability information somehow "could have a direct bearing on the impact, if any, the trackage rights have on Fraser's transportation service options", it is free to make this argument in its Application, but discovery as to transportation service options has been repeatedly rejected by this Board (*IC – Abandonment – Hinds County*; *CNW – Abandonment – Palmer – Laurens*.) The Board has consistently held that the applicant does not need to seek discovery on issues related to transportation service options in order to argue in its Application, and on rebuttal, that alternatives are available if the line is abandoned, or service discontinued. (*CNW – Abandonment – Palmer – Laurens*; See also *Missouri Pacific Railroad Company – Abandonment – Between Opelousas and Church Point in St. Landry Parish and Acacia Parish, LA*, ICC Docket No. AB-3 (Sub-No. 81), served March 28, 1989.

Finally, in Document Request Nos. 7 and 10, BAR argues that it is seeking information pertaining to Fraser's ability or inability to utilize alternate modes of transportation to and from the Madawaska mill. Motion to Compel at 10. Those Discovery Requests are as follows:

7. Any agreements, contracts, leases or other documents (including additions and modifications thereto) entered into by CN and Fraser or effective between CN and Fraser relating to transportation that originates from or terminates at the Madawaska Mill (including without limitation the Effective Rates applicable to such transportation) but excluding waybills and bills of lading.

10. Any and all Communications between and among any employees, directors, officers, representatives or other agents of CN (including without limitation any analyses, studies, reports or other documents prepared by such persons) relating to: (i) the ability or inability of Fraser, CN or any other rail transportation service provider to divert any aspect of transportation to or from the Madawaska Mill from non-rail to rail transportation; and (ii) the ability or inability of Fraser, or any non-rail transportation service provider, to divert any aspect of transportation to or from the Madawaska Mill from rail to non-rail transportation.

Beyond the fact that these Discovery Requests are similarly overbroad (not limited in time or scope), and will also require undue employee hours to scour the extent of any and all "communications" written, oral or electronic, relating to Fraser's potential for use of alternate modes of transportation, the fact is that, once again, this Board has specifically and repeatedly held that such information is not an appropriate basis for discovery. As this Board held in *IC – Abandonment – Hinds County*,

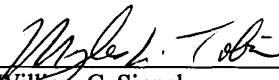
[The Applicant railroad] bears the burden of proving that the present or future public convenience and necessity require or permit the abandonment. The Application should have in its possession all of the information it needs to meet that burden. . . To the extent that transportation alternatives available to shippers are placed in issue by the Applicant, shippers will have the opportunity to offer their own evidence or information and to refute IC's assertions. Rather than requiring shippers to make available specific requested information, it can be left to shippers to present whatever information they believe that they need to support their assertions. Applicant then may refute or rebut such assertions and information in its reply statement.

Here, BAR serves Fraser and the territory served by this line. It is familiar with the transportation alternatives in the area. Seeking that discovery from CN is not appropriate and has been held by this Board to be unnecessary.

CONCLUSION

For all of the foregoing reasons, CN respectfully submits that the discovery sought by BAR in this proceeding is incredibly overbroad, unduly burdensome, generally irrelevant and wholly unwarranted. After fifteen months, it is time for the Trustee to submit its Abandonment Application, if it truly intends to do so. As in other abandonment proceedings, discovery here is not well founded and should not be allowed. CN requests that the Trustee's Motion to Compel be denied in all respects.

Respectfully submitted,

By: 

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

Dated: December 27, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of December, 2002, a copy of the foregoing **Opposition of Canadian National Railway Company and Waterloo Railway Company to Trustee of Bangor and Aroostook Railroad Company's Motion to Compel Answers to Interrogatories and Production of Documents**, was served by telefax and first class mail postage prepaid, to:

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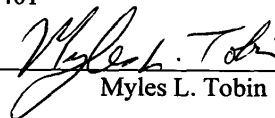
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