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December 11, 2003

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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

Re: **Docket No. AB-279 (Sub-No. 3) > 209603**
Canadian National Railway Company -- Adverse
Discontinuance -- Line of Montreal, Maine & Atlantic
Railway Ltd. in Aroostook County, Maine

Docket No. AB-124 (Sub-No. 2) > 209604
Waterloo Railway Company -- Adverse Abandonment -- Line of
Montreal, Maine & Atlantic Railway Ltd. in Aroostook County, Maine

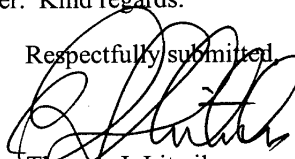
Dear Secretary Williams:

Enclosed for filing in the above-captioned proceedings are an original and ten copies of the public, redacted version of the **Protest and Supporting Evidence of Canadian National Railway Company and Waterloo Railway Company**, dated December 10, 2003. A highly confidential version of the Protest was filed under seal at the Board today.

One extra copy of the redacted Protest and this letter also are enclosed. I would request that you date-stamp those items to show receipt of this filing and return them to me in the provided envelope.

Please feel free to contact me should any questions arise regarding this filing. Thank you for your assistance on this matter. Kind regards.

Respectfully submitted



Thomas J. Litwiler
Attorney for Canadian National
Railway Company

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TJL:tl
Enclosures
cc: Parties on Certificate of Service



PUBLIC - REDACTED

ORIGINAL

209603

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. AB-279 (SUB-NO. 3)

CANADIAN NATIONAL RAILWAY COMPANY
-- ADVERSE DISCONTINUANCE --
LINE OF MONTRÉAL, MAINE & ATLANTIC RAILWAY LTD.
IN AROOSTOOK COUNTY, MAINE

DOCKET NO. AB-124 (SUB-NO. 2)

WATERLOO RAILWAY COMPANY
-- ADVERSE ABANDONMENT --
LINE OF MONTREAL, MAINE & ATLANTIC RAILWAY LTD.
IN AROOSTOOK COUNTY, MAINE

**PROTEST AND SUPPORTING EVIDENCE OF
CANADIAN NATIONAL RAILWAY COMPANY
AND WATERLOO RAILWAY COMPANY**

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

Dated: December 10, 2003

The actual owner of the line, MMA, has not filed or joined the application. Rather, the entity making this filing is a bankruptcy trustee who has no ownership interest in the line and no common carrier responsibility for the line, and whose only real interest is in receiving a five million dollar windfall from MMA if his application is successful. The Trustee's purported justification for the adverse application is that elimination of CN's existing competitive rail access to Fraser would enable MMA to obtain additional revenues from a then-captive Fraser and forestall the abandonment of other, unrelated and allegedly unprofitable rail lines in the MMA system. But granting the Trustee's application would weaken MMA -- not strengthen it -- and would have no effect on the viability or profitability of other MMA lines. And a desire to eliminate existing rail competition is not a basis for granting an adverse abandonment application filed by a host carrier, let alone such an application filed by a third party with no interest in the underlying rail line.

The Board should reject the Trustee's application and the resultant elimination of competitive rail access to Fraser that would follow. Any other result will thoroughly distort the regulatory underpinnings of adverse abandonments, and reverse longstanding Board policy and precedent on the protection and preservation of rail competition.

BACKGROUND

The Board is familiar with the general background and purpose of the Trustee's current application from its decision in a prior proceeding where the Trustee unsuccessfully sought to oust CN from the Madawaska Line. Canadian National Railway Company -- Trackage Rights Exemption -- Bangor and Aroostook Railroad Company and Van Buren Bridge Company, Finance Docket No. 34014, et al. (STB served June 25, 2002) ("Revocation Decision"); see also decision herein served October 24, 2003 at 2 (providing notice of the Trustee's filing of the

adverse abandonment application and referring to the Revocation Decision "[f]or additional background information."). ¹

As explained in the Verified Statement of Clifford L. Carson, Vice President - Commercial Development for CN's Eastern Canada Region, attached hereto at Tab 2 ("Carson V.S."), CN for many years had interchanged traffic with the Bangor & Aroostook Railroad Company ("BAR") at St. Leonard, New Brunswick. St. Leonard is an intermediate terminal on CN's mainline between Montreal, Quebec and Halifax, Nova Scotia. BAR reached St. Leonard and the interchange with the CN via the international rail bridge between Van Buren, Maine and St. Leonard owned by the Van Buren Bridge Company ("VBBC"), a BAR affiliate.² The vast majority of traffic interchanged between BAR and CN at St. Leonard was destined to or from Fraser's large paper mill in Madawaska, approximately 25 miles northwest of Van Buren. Carson V.S. at 2.

By the latter half of 2000, however, BAR and its railroad affiliates were facing serious financial difficulty. In January, 2001, representatives of BAR's parent approached CN and sought to pursue business arrangements that would result in a needed cash infusion for BAR to stave off bankruptcy. Fraser also expressed strong concern to CN about BAR's continued operations and advised CN that a loss of rail service to its Madawaska Mill would likely result in a shutdown of the mill. After further discussions, the BAR parties and CN agreed on an arrangement whereby CN would provide five million dollars (\$5,000,000) in cash, and BAR

¹ Curiously, the Trustee studiously avoids any reference to or discussion of the Revocation Decision in his Application, and makes only passing reference to the fact that there even was a prior agency proceeding. Application at 11 ("After the Board rejected the Trustee's attempt to revoke the trackage rights and easement exemptions . . .").

² Mr. Howard is the bankruptcy trustee for both BAR and VBBC, as well as for several other defunct former rail carriers affiliated with BAR. References herein to BAR include VBBC unless otherwise indicated.

would provide haulage services for CN between the CN/BAR connection at St. Leonard and Fraser's Madawaska Mill.³ To secure the haulage services, BAR also granted CNR limited local trackage rights over the Madawaska Line to serve Fraser and conveyed to Waterloo a non-exclusive freight easement on the Madawaska Line to serve Fraser. Carson V.S. at 2-6.

These transactions were consummated in March, 2001, after CNR obtained STB authority for its acquisition of trackage rights on the Madawaska Line and Waterloo obtained STB authority for its acquisition of the easement on the line. Canadian National Railway Company -- Trackage Rights Exemption -- Bangor and Aroostook Railroad Company and Van Buren Bridge Company, Finance Docket No. 34014 (STB served March 21, 2001); Waterloo Railway Company -- Acquisition Exemption -- Bangor and Aroostook Railroad Company and Van Buren Bridge Company, Finance Docket No. 34015 (STB served March 21, 2001).

As a result of this private negotiated agreement between the railroads, Fraser obtained competitive rail access for its Madawaska Mill. The trackage rights and easement also assured direct CN access to the mill and long-term Fraser access to CN regardless of the fate or disposition of the BAR. Fraser was no longer wholly dependent on BAR for rail service, and Fraser and CN were no longer vulnerable to a potential future strategy by BAR (or its successor, now MMA) to economically close or restrict the St. Leonard gateway. Carson V.S. at 6-7.

At the same time, nothing in the transaction with CN restricted BAR's access to Fraser's Madawaska mill in any way, or hindered BAR (and now MMA) in competing for Fraser's traffic for movement over other BAR routes and gateways to the south and west of Madawaska. Indeed, CN's recovery of its \$5 million investment was always at risk, since CN

³ These haulage services were the subject of a so-called "Junction Settlement Agreement" between BAR and CN.

had no assurance that it would continue to receive a portion of Fraser's Madawaska Mill traffic. Carson V.S. at 8.

Despite these efforts, BAR was placed into involuntary bankruptcy in the U.S. Bankruptcy Court for the District of Maine in December, 2001. In re Bangor & Aroostook Railroad Company, Debtor, No. 01-11565 (Bankr. D. Me.). On March 18, 2002, the BAR bankruptcy Trustee filed a motion with the bankruptcy court to reject the Junction Settlement Agreement, CNR's trackage rights and Waterloo's easement pursuant to 11 U.S.C. § 365(a) and oust CN from the Madawaska Line. In his motion, the Trustee specifically acknowledged that the discontinuance of CNR's trackage rights and abandonment of Waterloo's easement on the Madawaska Line required STB approval under 49 U.S.C. § 10903, and indicated that he intended "promptly" to initiate an adverse abandonment proceeding before the Board seeking such approval. Trustee's Motion to Reject Executory Contracts, No. 01-11565 (Bankr. D. Me.), March 18, 2002, at 12, ¶ 31.⁴ On CN's motion, the bankruptcy court stayed the rejection proceedings pending Board action on the Trustee's anticipated adverse abandonment application.

Instead of filing that application, however, the Trustee on April 25, 2002 filed in Finance Docket Nos. 34014 and 34015 a petition to reopen and revoke the exemptions previously received by CNR and Waterloo, respectively, for their trackage rights and the easement on the Madawaska Line. On June 25, 2002, the STB denied the Trustee's revocation petition. In reaching its decision, the Board specifically determined that:

The exemptions at issue in this case reduced a barrier to entry and increased competition. Moreover, the ultimate objective of BAR and its creditors -- to reduce a CN service option available to Fraser -- would deprive Fraser of the benefits of a competitive

⁴ A copy of this motion was included as Attachment A to the Trustee's Petition to Reopen and Revoke Exemption, dated April 24, 2002, in Finance Docket Nos. 34014 and 34105.

option that was agreed upon over a year ago in arms-length private-sector discussions.

Revocation Decision at 7. The Board also concluded:

In reality, the Trustee and the creditors want us to revoke the exemption so that BAR may command a higher sale price due to the termination of CN's right to operate over the track at issue. That is not adequate justification for revocation under the relevant rail transportation policy criteria.

Revocation Decision at 6. The Trustee was directed, if he wanted to pursue the matter further, to file an adverse abandonment application with accompanying evidence as to why the termination of Fraser's existing competitive access to CN was in the public interest and not merely a means of enriching the BAR bankruptcy estate.

After issuance of the Revocation Decision, the Trustee began slowly to prosecute the adverse abandonment proceeding under 49 U.S.C. § 10903 that the Board had required. More than six weeks later, on August 9, 2002, the Trustee filed a petition in Docket No. AB-279 (Sub-No. 3) for waiver of certain of the Board abandonment regulations. The Trustee sought expedited consideration of his waiver motion, and represented that the "Trustee intends to file its adverse discontinuance application on or about September 16, 2002." Trustee First Waiver Request at 1. After an expedited reply by CN and a proffered surreply by the Trustee, the Board granted the requested waivers in large part in a decision served September 25, 2002 ("First Waiver Decision"). The Board also noted that the Trustee's waiver request had covered only the adverse discontinuance of CNR's trackage rights in Docket No. AB-279 (Sub-No. 3), and that separate waivers and a separate application would be necessary with respect to an adverse abandonment of Waterloo's easement. First Waiver Decision at 6.

On September 30, 2002, the Trustee filed a petition in Docket No. AB-124 (Sub-No. 2) seeking a waiver of regulations with respect to the adverse abandonment of the

Waterloo easement, and also seeking reconsideration of the First Waiver Decision to allow the Trustee to file a single application in Docket Nos. AB-279 (Sub-No. 3) and AB-124 (Sub-No. 2). The Trustee again sought expedited consideration of both requests, explaining that he did not want to serve and publish the notice of intent required by 49 C.F.R. § 1152.20 until he knew he could file a single application. Trustee Reconsideration Request at 6. On October 23, 2002, the Board issued a decision addressing the second waiver request and allowing the Trustee to file a single application encompassing both dockets. That decision cleared the way for the Trustee to proceed immediately with filing his adverse abandonment application.

It was another three weeks, however, before the Trustee served and published the notice of intent required by 49 C.F.R. § 1152.20. Remarkably, on the same day the notice of intent was served -- November 14, 2002 -- the Trustee served massive discovery requests on both CN and Fraser, claiming that the requested information was needed in order to prepare the Trustee's adverse abandonment application. Given that these discovery requests came five months after the Trustee supposedly began preparing the application, three months after the Trustee's initial petition for waiver, and two months after the date on which the Trustee initially said he would file his application,⁵ the Trustee's timing rationale was difficult to understand.⁶ After the Board resolved several resulting discovery disputes between the parties in May, it was nonetheless another five months before the Trustee actually filed his application.

⁵ See Trustee First Waiver Request at 1 ("Trustee intends to file its adverse discontinuance application on or about September 16, 2002.").

⁶ This odd sense of timing is reflected in the Application, which states that "[a]fter the Board rejected the Trustee's attempt to revoke the trackage rights and easement exemptions, the Trustee served discovery on CN and Fraser in order to prepare the instant Application." Application at 11. The Revocation Decision was served on June 25, 2003; the Trustee's discovery was served on November 14, 2003, nearly five months later.

In the meantime, the Trustee had continued negotiations with MMA for the acquisition of BAR's rail assets (and those of BAR's rail carrier affiliates) which had began prior to the bankruptcy. Those negotiations were ultimately successful, and MMA completed its purchase of the BAR assets on January 9, 2003. As Mr. Edward Burkhardt, MMA's Chairman, explains, the sale price paid by MMA reflected the existence of the CN trackage rights, easement and haulage arrangement on the Madawaska Line, and MMA "offered significantly less than it would have paid absent the CN agreements." Burkhardt V.S. at 7 (App. Vol. 2 at 175). The Asset Purchase Agreement between the Trustee and MMA also provided that if the Trustee was able to terminate the CN haulage, trackage rights and easement arrangements and oust CN from the Madawaska Line -- thereby rendering Fraser captive to MMA -- MMA would be required to pay an additional sum of \$5 million to the Trustee as a supplemental purchase price. APA, § 1.8 (App. Vol. 2 at 107-108).

As a result of the sale to MMA, the Trustee no longer has any common carrier responsibility or interest in the former BAR rail lines generally or in the Madawaska Line specifically. Its sole connection to the ongoing MMA rail operations is the monies that could be derived from MMA by extinguishing CN's competitive access to Fraser at Madawaska.

Immediately prior to MMA's acquisition of the BAR assets, MMA entered into two other significant agreements which are not referenced in the Trustee's Application. On December 23, 2002, MMA executed

On that same date, MMA also entered into a

Since its start-up of operations on January 9, 2003, MMA has been hauling Fraser traffic in CN's account along the 25-mile route between the Madawaska Mill and the CN interchange at St. Leonard pursuant to the terms of the Junction Settlement Agreement and an adjusted haulage rate of \$531 per car. Carson V.S. at 8. As discussed in the Verified Statement of Christopher Vellturo, attached hereto at Tab 3 ("Vellturo V.S."), there has been significant competition for Fraser traffic between the CN routing (with MMA haulage) and other MMA routings, as evidenced by the significant traffic movements and volumes that have shifted between MMA and CN routing in 2002 and 2003. Vellturo V.S. at 13, 15-16. Fraser has enjoyed the benefits of head-to-head rail competition, and can choose its routing based on its preferred combination of service and price.

In June, the Trustee returned to the bankruptcy court and, in a direct reversal of his consistently stated position of the prior fourteen months, argued that the STB did not have jurisdiction under 49 U.S.C. § 10903 over the discontinuance of CNR's trackage rights and abandonment of Waterloo's easement on the Madawaska Line, but rather only, at most, an

advisory role secondary to the bankruptcy court's alleged authority under 11 U.S.C. § 1170 to determine whether to oust CN from the Madawaska Line. The United States District Court of Maine recently rejected these arguments, and made it clear that the Trustee's application is before the Board pursuant to the agency's exclusive jurisdiction under 49 U.S.C. §§ 10501 and 10903 and not under 11 U.S.C. § 1170 or any other provision of the Bankruptcy Code. Howard v. Canadian National Railway Company, No. 03-63-P-S (D. Me. October 8, 2003 [recommended decision] and November 18, 2003 [final decision]).⁷

In his adverse abandonment and discontinuance application filed October 6, 2003, the Trustee seeks to oust CN from the Madawaska Line and claims that doing so is necessary to preserve the viability of MMA and prevent the abandonment of other MMA line segments. Despite the fact that it has owned and operated the Madawaska Line for nearly a year, MMA has not joined the Trustee as an applicant. As CN has noted previously, the extremely odd posture of the parties in this proceeding raises significant questions about the credibility of the Trustee's arguments and his suitability to make them on behalf of MMA. CN Motion for Clarification of Procedural Schedule, filed December 8, 2003.

DISCUSSION

The relief sought by the Trustee here is literally unprecedented: the use of the Board's adverse abandonment powers under 49 U.S.C. § 10903 to eliminate a shipper's existing competitive access to service from multiple railroads, solely for the asserted economic benefit of the resulting bottleneck carrier. The fact that such relief is requested not by the involved railroad -- here, MMA -- but rather by a non-carrier third party with a private profit motive of \$5 million, would confound established regulatory policies and public interest principles even further. For

⁷ Copies of these decisions were submitted to the Board in a November 24, 2003 letter filing by the Trustee.

decades, the Board and its predecessor have consistently and diligently sought to assure that transactions approved by the agency would not result in "2-to-1" points where shippers are deprived of existing intramodal rail competition. Now, the Trustee would have the Board affirmatively and intentionally exercise its regulatory authority to create such 2-to-1 points. But the Board is in the business of preserving, protecting and promoting rail competition -- not eliminating it. It should follow that statutory and regulatory mandate here.

In adverse abandonment and discontinuance proceedings,⁸ the Board's primary task is to "provide the public with a degree of protection against the unnecessary discontinuance, cessation, interruption, or obstruction of available rail service." Western Stock Show Assn. -- Aban. Exemption -- In Denver, CO, 1 S.T.B. 113, 131 (1996) (citing Modern Handcraft, Inc. -- Abandonment, 363 I.C.C. 969, 972 (1981)); Salt Lake City Corporation -- Adverse Abandonment -- In Salt Lake City, UT, Docket No. AB-33 (Sub-No. 183) (STB served March 8, 2002) at 6. Here, Fraser has such "available rail service" at Madawaska from the CN rights that the Trustee seeks to adversely discontinue and abandon,⁹ and currently benefits from intramodal rail

⁸ The Trustee's application seeks adverse discontinuance of CNR's trackage rights on the Madawaska Line in Docket No. AB-279 (Sub-No. 3), and adverse abandonment of Waterloo's operating easement on the Madawaska Line in Docket No. AB-124 (Sub-No. 2). For convenience and ease of reference, we occasionally use the term "adverse abandonment" in reference to both requests for relief. CN disagrees with the Trustee's assertion that the Waterloo easement creates no rights independent of CNR's trackage rights, Application, Vol. 1 at 32-33, but that ultimately would be an issue for the bankruptcy court to decide if necessary. CN agrees that the relevant regulatory considerations in this proceeding before the Board apply equally to the CNR trackage rights and the Waterloo easement.

⁹ CN service to Fraser's Madawaska mill is currently provided via haulage by MMA under the Junction Settlement Agreement, but the trackage rights and easement serve to secure those haulage rights and the Trustee has been that he would seek to reject the haulage agreement in the BAR bankruptcy proceeding if (but only if) the trackage rights and easement can be eliminated as well. The Board has similarly recognized the effective competition, service and other transportation attributes of the CN trackage rights and easement even during periods when CN uses MMA haulage to access Fraser. Revocation Decision at 8 (CN position "is not weakened by the fact that CN is not currently exercising its trackage rights but it serving Fraser through the haulage agreement. Contrary

competition between MMA and CN for Fraser's traffic. See Carson V.S. at 16-19; Revocation Decision at 8 (Board approval of the CNR trackage rights and Waterloo easement "reduced a barrier to entry and increased competition. [T]he ultimate objective of BAR and its creditors -- to reduce a CN service option available to Fraser -- would deprive Fraser of the benefits of a competitive option . . ."). As is discussed further in Part II below, eliminating CN's rights on the Madawaska Line would result in significant competitive harm to Fraser, and raise overwhelming policy and precedential issues regarding the Board's treatment of captive shippers, competitive access, and the public interest in rail competition.

The principal justification offered by the Trustee for upending established of regulatory policy and imposing captive status on shippers with existing competitive rail options is that MMA would be forced to abandon two other unrelated segments of its rail system¹⁰ if it is not allowed to extract monopoly rents from Fraser as a bottleneck carrier on the Madawaska Line. The Trustee has submitted with his application a voluminous pleading that seeks to show that MMA's abandonment of those two disconnected line segments would, if considered as a single transaction, save MMA approximately \$800,000 annually in operating losses and opportunity costs under the Board's regulations at 49 C.F.R. § 1152 governing rail line abandonments. Application, Vol. 3, Verified Statement of Robert C. Finley.¹¹ The Trustee had

to what the [BAR] Creditors maintain, Fraser can benefit from the fall-back service availability and competitive option occasioned by the existence of CN's trackage rights, even if CN were never to commence operations under them." (footnote omitted)).

¹⁰ The MMA segments identified by the Trustee are MMA's 59-mile line between Madawaska and Portage, Maine (the "Portage Line") and MMA's 102-mile east-west line between Brownville Junction, Maine and the U.S.-Canada border formerly owned by the Canadian American Railroad Company (the "CDAC Line"). These two line segments are not contiguous: the CDAC Line is located some 130 miles south of the southern end of the Portage Line.

¹¹ The Trustee designated Volume 3 of his Application as highly confidential and filed the entire volume under seal. Volume 3 consists of Mr. Finley's 1½-page verified statement and two

to construct this putative abandonment analysis of another party's rail lines entirely on his own, because, as MMA's Mr. Burkhardt expressly indicates, MMA itself "has not prepared a formal analysis of potential abandonments." Burkhardt V.S. at 9 (Application, Vol. 2 at 177). As discussed in Part III below, taken on its own merits the Trustee's abandonment analysis is riddled with errors and inconsistencies to a degree that renders it virtually meaningless.

The Board need not reach that far, however, since the proffered theory of the Trustee's case is no less fundamentally flawed than many of its various factual allegations. Even accepting the claims that the Trustee makes in his Application as true, the Trustee's case simply collapses under its own weight.

I. THE TRUSTEE'S APPLICATION PROVIDES NO LOGICAL OR RATIONAL THEORY FOR GRANTING THE RELIEF REQUESTED

Seldom has a results-oriented approach to regulatory litigation been more evident than in the Trustee's adverse abandonment application. Since early in 2002, the Trustee's objective has been clear to everyone: eliminate CN's rights on the Madawaska Line so that the Trustee can obtain more money for the BAR estate.¹² The story of this case since then has been the Trustee's

appendices thereto: Mr. Finley's resume, and the 157-page "Railtrac Report" which is the actual analysis of the suggested abandonments. The public, redacted version of the Trustee's application includes only Mr. Finley's 1½-page statement and resume, and omits the Railtrac Report in its entirety. Application at 322-329 (public version). It is, of course, more than a little odd that an entire abandonment case (including such items as across-the-fence land appraisals) would be filed under seal, and less than clear in such circumstances how the Board is supposed to consider the matter on the record in its decision.

¹² E.g., Revocation Decision at 3, 7 ("[T]he Trustee argued [to the bankruptcy court] that these agreements are burdensome to the estate and that their rejection will result in a higher purchase price being paid by the buyer of the estate's assets. . . . In reality, the Trustee and the Creditors want us to revoke the exemptions so that BAR may command a higher sale price due to the termination of CN's right to operate over the track at issue."); May 15, 2002 bankruptcy court hearing, Transcript at 12 (judge's explanation that the Trustee's interests are protected because a "sale [of BAR's rail assets to MMA] can be negotiated with a contingent provision relating to some proportion of the proceeds depending on the outcome of the rejection" of the CN agreements and the ouster of CN from the Madawaska Line.) (attached as Exhibit B to CN Supplement to Reply to Petition to Reopen and Revoke Exemptions, dated May 31, 2002, in Finance Docket Nos. 34014 and 34105).

increasingly futile search for a legal theory that would support that outcome. The Board rejected the Trustee's first attempt at relief in the Revocation Decision in June of 2002, and the bankruptcy and district courts in Maine rejected the Trustee's sudden attempt earlier this year to oust CN from the Madawaska Line with no STB involvement. The Trustee was left to pursue the adverse abandonment application under 49 U.S.C. § 10903 that he supposedly had been preparing all along.

The Trustee settled on a theory for that application more than a year ago, when he decided to argue that a continuance of CN's rights on the Madawaska Line would force the BAR's operator to abandon the supposedly unprofitable Portage Line and CDAC Line in order to offset revenue losses to CN:

The reason for the proposed discontinuance and abandonment is that the trackage rights held by CN and the freight easement held by WRC threaten the viability of the Bangor and Aroostook System as a whole (of which BAR is a part). The [CN rights] give CN the unilateral ability to immediately and substantially reduce BAR's revenue. The continued existence of the [CN rights] may require abandonment of the BAR line between Madawaska and Portage, ME, or a point south of Portage. In addition, the continued existence of the [CN rights] may require abandonment of the CDAC line between Brownville Junction and the U.S./Canada border.

Trustee Notice of Intent for Discontinuance of Trackage Rights and Abandonment of Freight Easement, dated November 14, 2002, at 3.¹³

¹³ This was the first of three notices of intent served, posted, published and filed by the Trustee pursuant to 49 C.F.R. § 1152.20 with respect to the proposed adverse abandonment of CN's rights. Under the original notice of intent, the Trustee's adverse abandonment application was due on December 16, 2002 (although the notice itself incorrectly indicated it would be filed on December 23, 2002). 49 C.F.R. § 1152.20(b). The Trustee filed a second notice of intent on August 13, 2003, and third notice of intent on September 4, 2003, before filing the application itself on October 6, 2003. All three of the notices state identical reasons for the relief sought. August 13th Notice at 3-4; September 4th Notice at 4.

This specific conclusion was arrived at before the BAR rail lines were sold to MMA, before MMA had any experience operating those lines,¹⁴ and before the wide-ranging effects of the Great Northern Paper bankruptcy occurred. Incredibly, this conclusion also was reached a full eight months before the Trustee even retained an outside consultant to analyze and determine whether MMA would actually save any money by abandoning the Portage Line and the CDAC Line. See Order Approving Trustee's Application to Employ John G. Pinto and Railtrac Associates as Consultants in the CN Litigation, In re Bangor & Aroostook Railroad Company, No. 01-11565 (Bankr. D. Me., July 30, 2003) (attached hereto as Exhibit D to Tab 1).¹⁵ This is a case that began with a conclusion by the Trustee and worked backward to the facts. That it took the Trustee sixteen months from the date of the Revocation Decision to put the application together is probably indicative of the problems he confronted in pursuing that approach.

As is usually the case when outcome dictates analysis and not the other way around, there are gaping persuasive and factual holes in the fundamental logic of the case that the Trustee has tried to present. The result that the Trustee seeks simply does not follow from the facts that he has alleged. In a wide variety of areas, the Trustee's case just makes no sense.

¹⁴ MMA believed that

MMA Business Plan, April 2002, at 7 (excerpts attached hereto as Exhibit C of Tab 1).

¹⁵ See also Trustee's Application to Employ John G. Pinto and Railtrac Associates as Consultants in the CN Litigation, July 14, 2003 (attached hereto as Exhibit E to Tab 1), at 3 and internal Exhibit A at ¶ 1 ("[T]he services to be provided by Pinto and RailTrac shall involve an economic analysis and quantification of the adverse consequences that would result from any judicial or administrative decision denying the Trustee's action to discontinuance CN's trackage rights. . . . As part of the [] Services, the Consultants shall perform an economic analysis of the impact of abandoning certain segments of the CDAC and BAR Lines."). Along similar lines, the Trustee's competition witness, Mr. Heller, was not retained until November 20, 2002. See Exhibit F to Tab 1 attached hereto. With no competition witness on board until the end of the 2002 and no abandonment witness retained until the summer of 2003, CN continues to reject the implication (repeated again by the Trustee here) that the Board and other parties are to blame for the Trustee's failure to file his application in December of 2002 as initially promised. See Application at 11 & n.17.

A. Granting the Relief The Trustee Seeks Will Financially Weaken MMA for Much of the Decade

As CN has discussed elsewhere,¹⁶ the Trustee strives mightily in his application to avoid any mention of the potential \$5 million benefit he stands to reap for the BAR estate if he is successful in ousting CN from MMA's Madawaska Line. Despite being the sole interest of the Trustee in this proceeding, that \$5 million gain is mentioned only three times in the 69-page body of the Application: once at the end of a list of six other items, once in passing and once in a footnote. Application at 8, 10 and 34, n.41. A necessary corollary is that the Application also gives little consideration to the crucial flip side of that \$5 million transfer: whether MMA can afford a \$5 million lump sum payment to the Trustee right now, and what effect such payment would have on MMA's efforts to remain viable and competitive in a period of significant financial difficulty. Indeed, that is a subject never discussed anywhere in the four volumes of the Trustee's Application.

It should be. Even if elimination of CN's rights allows MMA to increase the revenue it collects for handling Fraser traffic on the Madawaska Line by \$1.4 million/year,¹⁷ it would take three and a half years -- until the middle of 2007 -- just for MMA to earn back the \$5 million it will have to pay the Trustee now for such "relief." If the opportunity costs of the \$5

¹⁶ See CN Motion for Clarification of Procedural Schedule, dated December 5, 2003.

¹⁷

As discussed below, this \$1.4 million/year figure also is more credible than the \$2 million/year in incremental revenue that the Trustee alleges elsewhere in his application -- although the difference between the two numbers has little effect on the analysis here. Of course, any calculation of MMA revenue "losses" in handling traffic to the CN interchange at St. Leonard under the haulage agreement rather than under joint-line rates simply assumes that MMA will not seek to draw such traffic to competitive long-haul MMA routings south of Madawaska. But MMA has competed vigorously -- and often successfully -- to divert Fraser traffic to those routings, which do not entail movements under the haulage agreement or any allocation of revenue with CN. MMA minimizes its revenue "losses" from the CN rights simply by competing more effectively for Fraser's traffic.

million that MMA will disgorge to the Trustee are considered,¹⁸ it will be well into 2008 before MMA receives any benefit from the elimination of CN's rights. In the period between now and then, granting the relief the Trustee seeks actually weakens MMA by depriving it of significant capital resources that otherwise would be available for more pressing purposes.

By the testimony of the Trustee's own witnesses, this is absolutely the wrong time to impose the burden of such a massive cash drain on MMA. In the aftermath of the Great Northern Paper bankruptcy, MMA's Mr. Burkhardt describes MMA as a railroad "living on the edge" that cannot "suffer[] another blow." Burkhardt V.S. at 11 (App. Vol. 2 at 179). Mr. Burkhardt goes on to explain that:

I believe that MMA has the potential to grow into a strong, stable, profitable system. However, it will never have a chance to reach its potential unless it can achieve adequate revenues in the near term.

Burkhardt V.S. at 9 (App. Vol. 2 at 177) (emphasis added). But the relief here sought by the Trustee -- relief that will cost MMA \$5 million -- will do nothing to provide MMA with "adequate revenues in the near term," and indeed will simply exacerbate that problem. If MMA is barely surviving due to a lack of revenue, the last thing the Board or anyone else should want to do is take another \$5 million out of MMA's pocket.¹⁹

MMA, of course, is likely not free to say this. MMA has a binding contractual obligation to pay the Trustee \$5 million if the Trustee is successful in eliminating CN's rights on the Madawaska Line. Trustee/MMA Asset Purchase Agreement, dated July 24, 2002 ("APA"), § 1.8 (Howard V.S., Appendix 4, App. Vol. 2 at 107-108). MMA also is required to cooperate with and

¹⁸ The most recent cost of capital for the railroad industry was 9.8% Railroad Cost of Capital -- 2002, Ex Parte No. 558 (Sub-No. 6) (STB served June 19, 2003).

¹⁹ Conversely, if MMA is not in some proximate risk of failure or dismemberment, the fundamental premise of the Trustee's Application simply vanishes.

support the Trustee in any "proceeding" related to the sale transaction and to "provide such testimony . . . as shall be reasonably necessary in connection" with such a proceeding. APA, § 3.15 (App. Vol. 2 at 120-121). But the untimely financial burden that MMA would face if the Trustee prevails here may explain MMA's absence to date as a participant in this proceeding. It also may illuminate the cautiously parsed nature of the statement provided by MMA's Mr. Burkhardt, which stops far short of any definitive statements supporting the contentions and arguments of the Trustee.²⁰

Whatever MMA's official posture may be, the Trustee's case cannot survive the notion that MMA will be saved by a \$5 million bill today in return for a revenue stream in 2008. The relief sought by the Trustee would -- logically enough -- benefit the Trustee. It would not benefit MMA -- quite the opposite, it would compound MMA's existing problems well into the foreseeable future. Unless the Trustee is willing to waive the \$5 million payment from MMA, there is no way to plug this first oversized hole at the heart of the Trustee's application.

B. The Threatened Abandonments of MMA's Portage Line and CDAC Line Are Unrelated to the Existence or Elimination of CN's Rights on the Madawaska Line

The linchpin of the Trustee's Application is a choice that the Board supposedly must make: either CN is ousted from the Madawaska Line and MMA can thereby increase its revenues on Fraser traffic handled over that line to St. Leonard, or MMA will abandon its money-losing

²⁰ Thus, while Mr. Burkhardt talks vaguely about hypothetical MMA abandonments, he is careful to note that "MMA has not prepared a formal analysis of potential abandonments." Burkhardt V.S. at 9 (App. Vol. 2 at 177). His statement that "if MMA is unable to achieve adequate revenues, then the only sensible approach will be to rationalize the system in an effort to bring revenues and costs in balance," *id.*, seems rather self-evident, and reads more like a textbook excerpt than a forthright assessment of MMA's particular circumstance. The only concrete statements of note by Mr. Burkhardt are that CN's exercise of its trackage rights over the Madawaska Line (in lieu of MMA haulage service) could seriously impact MMA. Burkhardt V.S. at 2, 7, 9, 11-12 (App. Vol. 2 at 170, 175, 177, 179-180). But CN has committed that it will not exercise those trackage rights as long as MMA continues to provide adequate haulage service (as it has to date). See *infra* at 30.

Portage and CDAC Lines further south on the MMA system. According to the Trustee, abandoning the Portage and CDAC Lines would save MMA approximately \$800,000 per year. The significant hole in this argument is that the Trustee never establishes or even alleges any linkage between these two purported "alternatives." Nowhere in the Application does the Trustee claim that the removal of CN from the Madawaska Line will result in a diversion of Fraser traffic onto the Portage or CDAC Lines, or will otherwise have any effect on the viability and economics of the Portage and CDAC line segments. The Trustee believes instead that Fraser traffic on the Madawaska Line will continue to move exactly as it does today, with MMA simply receiving a higher rate for the Madawaska-St. Leonard portion of movements to and from CN.

Under the Trustee's analysis, however, the fate of the Portage and CDAC Lines has nothing to do with developments on the Madawaska Line. If MMA is losing \$800,000 a year on the Portage and CDAC Lines today, it would still be losing \$800,000 a year on those lines after CN's rights on the Madawaska Line were eliminated. Basic regulatory economics says that MMA would not retain such money-losing lines, no matter how profitable MMA's other rail lines might be or how much MMA independently benefits from CN's ouster off of the Madawaska Line. Rail carriers like MMA are not in the business of operating unprofitable lines, and neither good railroad management nor controlling regulatory policy allows the cross-subsidizing of losses on one rail line with profits from another. See, e.g., Chicago and North Western Transportation Company -- Abandonment -- In Marshall, Tama, Grundy and Blackhawk Counties, IA, Docket No. AB-1 (Sub-No. 211) (ICC served January 13, 1989) at 4:

In effect, Hawkeye is arguing that CNW should subsidize its losing operation on this line with its more profitable operations elsewhere on its system. It is inequitable to require shippers elsewhere to pay more than they otherwise would have to so that the shippers on this line could enjoy service at less than the cost of providing it. Such cross-subsidization of rail lines by carriers is contrary to

Congressional policy in the Staggers Rail Act and contrary to our policy.

See also Abandonment of R. Lines -- Use of Opportunity Costs, 571, 577 (1979) ("[H]idden form[s] of cross-subsidization [are] high questionable as a matter of national transportation policy."), aff'd sub nom. Farmland Industries, Inc. v. U.S., 642 F.2d 708 (7th Cir. 1981).

MMA's Mr. Burkhardt vaguely hints that, if MMA can increase its revenues for Fraser traffic on the Madawaska Line, it could use those added resources to improve operations and, in turn, increase traffic volumes on its other rail lines (including the Portage and CDAC segments). Burkhardt V.S. at 7 (App. Vol. 2 at 175). But if investment is all that is needed to save the Portage Line and/or the CDAC Line from abandonment, the relief sought by the Trustee will reduce the capital resources available to MMA over the next several years and, if anything, will hinder -- not help -- MMA's efforts to improve the viability of its other rail lines. See discussion in Section I.A above.

Whether MMA is actually incurring losses on the Portage Line and the CDAC Line is impossible to determine from the evidence the Trustee has submitted. See Section III, infra. But under the facts and theory presented by the Trustee in his Application, the answer to the abandonment question regarding the Portage and CDAC Lines -- whatever it is -- does not turn on the ouster of CN from the Madawaska Line. Abandonment of the Portage Line and/or the CDAC Line is going to happen -- or not happen -- regardless of what the Board does here.

C. Abandonment of MMA's Portage Line or CDAC Line Would

The Trustee's insistence that MMA will have to abandon its Portage and CDAC Lines if the Board does not grant the Application also is fatally undercut by

Thus, if MMA were to abandon the Portage and/or CDAC Lines as the Trustee predicts in his Application and

. The
Trustee's abandonment analyses of the Portage and CDAC Lines do not consider this consequence
of abandonment, and

It is obviously odd that the Trustee would represent to the federal government that
MMA will take certain actions at the same time that

Burkhardt V.S. at 11 (App. Vol. 2 at 179).

**D. The Trustee's Case Ignores MMA's Marketing
Incentive Arrangements with CP**

In a discovery decision served November 14, 2003, the Board ordered MMA to
produce to CN a copy of MMA's marketing incentive agreement with CP. The Trustee had referred
to that agreement in his verified statement included in the Application, but later indicated that he
had never possessed or read the agreement. The marketing incentive provisions are part of

which MMA has

provided to CN under a highly-confidential designation; the relevant provisions of that agreement are attached hereto as Exhibit B to Tab 1.

Under their agreement,

. MMA Business Plan at 18 (Tab 1, Exhibit C hereto).

. Indeed, this appears

to be precisely what MMA has done in competing for and capturing significant Fraser traffic from CN over the last two years. Carson V.S. at 18.

Finally, given the obviously close relationship between MMA and CP, we note that it is less than clear why CP has not elected to participate in this proceeding.

. In public pronouncements regarding the MMA-CP arrangement, MMA's Mr. Burkhardt was quoted as saying:

[The Agreement] is designed to maximize routing of traffic over CPR lines, and to provide reciprocal pricing authority to both [railroads]. CPR will be our main interchange partner, and we look forward to close cooperation in marketing joint MMA/CPR service through the Montreal gateway.

Railway Age, November, 2002 (article attached hereto as Exhibit G to Tab 1). In addition, MMA's CDAC Line was formerly owned by CP, Canadian American Railroad Company -- Acquisition and Operation Exemption -- Certain Lines of Canadian Pacific Limited in Maine, Finance Docket No. 32646 (ICC served December 29, 1994), and MMA provides CP with its only access into the Maritime provinces of Canada.

Yet in the prior discovery dispute regarding the incentive agreement, CP was explicit in seeking to intervene in this proceeding solely for the limited purpose of addressing that discovery matter, and in indicating that it takes no position on the merits of the Trustee's Application. CP Petition for Leave to Intervene, November 6, 2003, at 2. CP's absence on the merits of this case implies that CP does not believe that CN's rights on the Madawaska Line

jeopardize the future viability of the MMA -- or that CP does not care. Either answer undercuts the theory of the Trustee's case for adverse abandonment.

**E. CN's Rights Are Not the Cause of MMA's Problems, and
Elimination of Those Rights Is Not the Solution to MMA's Problems**

Persistent throughout the Trustee's Application is the notion that the difficulties which MMA has encountered since almost immediately after its January, 2003 start-up of operations are a result of CN's rights on the Madawaska Line and the "reduced" revenues that MMA receives under the haulage agreement compared to BAR's pre-2001 revenue divisions. The Trustee begins this argument by repeating once again his oft-stated claim that the March, 2001 transactions between CN and BAR that created CN's rights on the Madawaska Line were a "bad deal." Apart from a more dramatic tone²¹ and a statement from Mr. Yocum -- BAR's President in March, 2001 -- dedicated largely to questioning his own business judgment in entering into the CN agreements, the Trustee's arguments here add little to what he has said before. The Board has previously disposed of these arguments, and its findings eighteen months ago are no less applicable today:

Section 10101(9), although not directly implicated in the class exemption for trackage rights, favors policies that encourage "the honest and efficient management of railroads." The statement of CN officer Clifford L. Carson rebuts any interference that CN acted other than honestly and efficiently in pursuing the exemptions. CN anticipated that BAR was in financial trouble, met with Fraser and BAR management to head off problems, devised an arguably efficient plan to deal with them, and took care, via the trackage rights and easement agreement at issue here, to protect its own interests and those of Fraser in the event that BAR were to fail.

Revocation Decision at 8, n.15.

²¹ E.g., Application at 4 ("BAR's parent made a deal with CN the likes of which would never be seen in normal times and which was a huge mistake.").

Mr. Carson repeats for the record here his discussion on the background and development of the March, 2001 transaction between BAR and CN. Carson V.S. at 2-7. Mr. Yocum may now feel the need to be defensive about his participation in that transaction; CN most assuredly does not.

More fundamentally, and wholly apart from the details of their origin, the continued existence of CN's rights on the Madawaska Line today has little if anything to do with MMA's current financial position and with its ability to survive and prosper into the future. Once again, that conclusion is largely compelled by the facts the Trustee himself has included in his application.

**1. MMA Accounted for the CN Rights In
Bidding to Acquire the BAR Rail Assets**

CN's rights on the Madawaska Line and the haulage rates that MMA receives under the Junction Settlement Agreement did not come as a surprise to MMA. To the contrary, as Mr. Burkhardt makes abundantly clear, MMA was well aware of CN's rights and planned accordingly in structuring its transaction with the Trustee:

I was aware that, prior to its bankruptcy, BAR had entered into a series of agreements with [CN] that gave CN commercial access to the paper mill of Fraser Papers Inc. at Madawaska, Maine.

...

The [BAR] system's light density in general, and BAR's loss of revenues resulting from the CN Agreements in particular, were important considerations in MMA's evaluation of the acquisition. . . . MMA ultimately managed to develop a viable plan for acquisition of the Former BAR System after careful due diligence, operational planning, financial analysis, and negotiations with the Trustee. . . .

...

I also recognized that, absent major traffic growth, CN's implementation of the Trackage Rights Agreements would have been devastating to the plan to operate the entire MMA System. Consequently, in its negotiations with the Trustee, MMA offered significantly less than it would have paid absent the CN Agreements, but it agreed to pay an additional \$5 million if the Trustee succeeded in eliminating the CN Agreements.

Burkhardt V.S. at 1, 6, 7 (App. Vol. 2 at 169, 174, 175) (emphasis added).

Taken together, Mr. Burkhardt's testimony indicates that, at the time MMA acquired the BAR rail lines from the Trustee, he believed that: 1) MMA would be a viable rail carrier with the CN rights on the Madawaska Line in place; and 2) any burden on MMA associated with the continued existence of the CN rights had been negated by the purchase price adjustment for the BAR assets. Of course, the fact that, in an arms-length independent transaction, the Trustee and MMA agreed on an identical value for the CN rights -- \$5 million -- as BAR and CN had agreed on two years earlier simply reconfirms the legitimate nature of the original March, 2001 transaction. More important, however, is the fact that market forces generally and Mr. Burkhardt's substantial business experience and expertise specifically had already determined that CN's rights would not jeopardize MMA's ability to be a viable and prosperous rail carrier. There is no basis to revisit that conclusion here.

**2. MMA's Financial Difficulties Arose From
Events Unrelated to the CN Rights**

As anyone remotely familiar with MMA understands, the major challenge that MMA has faced was the bankruptcy of Great Northern Paper Company ("GNP") and the shut-down of GNP's large paper mills at Millinocket and East Millinocket, Maine. GNP was by far MMA's largest shipper, and according to Mr. Burkhardt the GNP shut-down cost MMA \$800,000 a month in lost revenue. Burkhardt V.S. at 8 (App. Vol. 2 at 176). The annualized revenue impact of that event -- some \$9.6 million dollars -- is nearly seven times the \$1.4 million in additional revenue

.²² Against this

²² . The Trustee at various points in his Application claims that some \$2.0 million in incremental revenue is at stake on the Madawaska Line, but for a variety of reasons the \$1.4 million figure is a more credible amount.

backdrop, the disposition of the present dispute before the Board one way or the other will have little effect on MMA's situation.

This is most dramatically demonstrated by the evidence that Mr. Burkhardt himself provides on MMA's traffic density and annual revenue per route mile. According to Mr. Burkhardt,

In analyzing the viability of any component of the rail network, traffic density is perhaps the most important consideration. In my experience, the most useful measure of traffic density is a railroad's annual revenue per route mile. I used that measure in evaluating MMA's purchase of the Former BAR System, and I continue to use it in evaluating MMA's future prospects.

Burkhardt V.S. at 4 (App. Vol. 2 at 172). The chart below shows the MMA revenue/route mile information provided by Mr. Burkhardt, along with the impact on MMA's revenue/route mile that would result from elimination of CN's rights:

CATEGORY	REVENUE/ROUTE MILE
BAR - 2000	\$53,569
BAR - 2001	\$48,193
BAR - 2002	\$44,282
MMA Plan	\$62,064
MMA Actual - 2003 Annual	\$33,978
MMA Increase - Elimination of CN Rights ²³	\$1,879

The Trustee calculates MMA's haulage revenue at the initial \$500/car, when in reality the haulage rate has now escalated to \$531/car. Carson V.S. at 8. In calculating the revenue that MMA would collect on a post-haulage division, the Trustee usually utilizes BAR's artificially high division and carloading figures from 2000, even though the Trustee himself provides six-year averages for those figures that are significant lower. Application at 22. And the Trustee ignores that, under a divisional arrangement, MMA would incur certain equipment costs that it does not pay under the haulage agreement. Carson V.S. at 9. Using the Trustee's \$2.0 million figure would not significantly change any of the analysis that follows.

²³ \$1,400,000 divided by 745 route miles in the MMA route system. If the Trustee's \$2,000,000 revenue number is used, the resulting increment in MMA system revenue/route mile is \$2,684.

If Mr. Burkhardt is correct that traffic density as measured by revenue/route mile is the most telling and accurate measure of a railroad's viability, then these figures put to rest for good any notion that this case is about the future viability of the MMA. MMA's supposedly "lost" revenue on the Madawaska Line represents just 6.7% of the shortfall that MMA has experienced between the planned and actual operation of the MMA rail system. The "lost" revenue is just 9.6% of the total drop in BAR/MMA system revenues from 2000 to 2003. No matter how the numbers are analyzed, there is simply no way to conclude that MMA's rise or fall will turn on the outcome of the Trustee's application.

The Trustee would be left to argue simply that "every little bit helps" -- that even if elimination of CN's rights on the Madawaska Line would result in only a miniscule benefit to MMA, the Board should do what it can to help MMA through this difficult time. Given the serious competitive harm to Fraser that would result from ousting CN (discussed further below), such a de minimus benefit to MMA would not likely pass the balancing test used by the Board in adverse abandonment proceedings. But, as described above in Section I, this is not a case where "every little bit helps." The price to MMA for a "little bit" of help here would be a \$5 million lump sum payment to the Trustee that would far outweigh any "help" that MMA might receive in return.

3. The Haulage Arrangements Are Not and Will Not Be a Financial Burden on MMA

Although the Trustee never actually says so, the implication throughout the Application -- and indeed through the course of this and the prior related proceeding at the Board -- is that the haulage fee (now \$531) that MMA receives for handling CN's cars the 50 round trip miles between St. Leonard and Madawaska is an unfairly low "bargain" or "discount" rate that itself places some kind of economic burden on MMA. While MMA may make less on that movement than BAR did in the pre-2001 period, the haulage rate which MMA receives today is by any

measure more than compensatory, and indeed higher than haulage rates in other arms-length agreements CN has with other railroads that involve access to an industry. Carson V.S. at 7-8.

It is also higher than

. Carson V.S. at 10-11. Though MMA under the haulage agreement earns less total revenue than BAR did when it was a bottleneck carrier,

. Carson V.S. at 11-

12. The trackage rights rate also compares favorably with trackage rights arrangements CN has with other railroads. Carson V.S. at 8. BAR's excessive rates of the past do not demonstrate that MMA's rates today are inappropriately low.

We note in this regard that, upon a very close reading of his statement, MMA's Mr. Burkhardt never in fact claims that MMA's performance of haulage services under the Junction Settlement Agreement jeopardizes the future existence or viability of MMA. The only definitive statement Mr. Burkhardt ever makes is that CN's exercise of its trackage rights to Madawaska in lieu of MMA haulage service could have serious consequences for MMA. Burkhardt V.S. at 2, 7 and 9 (App. Vol. 2 at 170, 175 and 177). Whether that is true is largely irrelevant, since it is a hypothetical situation that is unlikely to occur unless MMA so chooses. CN has been satisfied with MMA's performance of haulage service to Fraser under the Junction Settlement Agreement. So long as such haulage service continues in the future as it has in the past, CN does not have the need, the desire or the intention to initiate operations under its trackage rights. See Carson V.S. at 12-13. CN so represents to the Board and to MMA as part of this proceeding.

* * * * *

The logical, legal and factual holes outlined above are inherent in the Trustee's case itself. There is little need in discussing them to resort to additional evidence from CN witnesses or other sources, since it is the Trustee's own allegations and arguments that defeat the request for relief. Eighteen months later, the Trustee still has not found a theory that supports the outcome he seeks.

II. ELIMINATING CN'S RIGHTS WOULD OVERTURN LONG-STANDING BOARD POLICIES AND WOULD RESULT IN SIGNIFICANT COMPETITIVE HARM TO FRASER.

CN's haulage rights on the Madawaska Line -- in conjunction with the back-up trackage and easement rights -- provide Fraser with significant competitive benefits and options in the rail transportation of Fraser's traffic. Pursuant to those rights, CN can originate and terminate traffic at Fraser's mill in CN's own name, deal with Fraser directly, and quote its own rates for the entire movement without the need for a concurrence from MMA and without having to contend with a MMA bottleneck carrier division. Carson V.S. at 16; Revocation Decision at 2, n.2. At the same time, nothing in the CN rights in any way restricts MMA's own access to Fraser's mill or inhibits MMA from competing for Fraser's traffic for movement over other MMA routes, such as via Brownville Junction, Maine and the CDAC Line to interchange with CP in Canada, or via Northern Maine Junction, Maine in conjunction with Guilford Rail System. See Carson V.S. at 7. Fraser today has true competitive access to two railroads.

The Board has itself specifically recognized the important competitive benefits to Fraser arising from the CN rights:

The exemptions at issue in this case reduced a barrier to entry and increased competition. Moreover, the ultimate objective of BAR and its creditors -- to reduce a CN service option available to Fraser -- would deprive Fraser of the benefits of a competitive option that was agreed upon over a year ago in arms-length private-sector discussions.

...
Contrary to what the Creditors maintain, Fraser can benefit from the fall-back service availability and competitive option occasioned by the existence of CN's trackage rights, even if CN were never to commence operations under them.

Revocation Decision at 8 (footnotes omitted). As the Board plainly understands, granting the relief sought by the Trustee would eliminate CN as a competitive option at Madawaska, thus rendering Fraser's mill "captive" to MMA. See Decision served October 24, 2003 at 2 (Trustee's request for relief "would leave MMA as the only carrier with authority to serve that shipper [Fraser] over the lines."). It would also turn on their heads the Board's long-standing policies of protecting shippers' existing competitive options and encouraging private-sector solutions to transportation problems.

For years the Board and its predecessor have consistently acted in rail merger cases to protect shipper competitive options at so-called "2-to-1" points, where existing competition would be eliminated as a result of the merger. E.g., Union Pacific/Southern Pacific Merger, 1 S.T.B. 233, 252, 390-393 (1996); Burlington Northern Inc. -- Merger -- Santa Fe Pacific Corp., 10 I.C.C.2d 661, 738-740 (1995); see Union Pacific/Southern Pacific Merger -- General Oversight, Finance Docket No. 32760 (Sub-No. 21), Decision No. 20 (STB served December 19, 2001) at 2-7 (reviewing need and remedies for preserving indirect, as well as direct, competition at 2-to-1 locations. Indeed, the Board's new major merger rules anticipate that carriers will propose conditions to remedy such situations up front in the application. Major Rail Consolidation Procedures, Ex Parte No. 582 (Sub-No. 1) (STB served June 11, 2001) at 16-20.

In stark contrast, the Board here is being asked to affirmatively exercise its jurisdiction to achieve the very result that Board policy prohibits, i.e., to create a captive shipper

by eliminating its existing competitive option. If removing a shipper's existing competitive options through adverse abandonment is permissible because it would financially benefit the carrier that would become the monopoly carrier (as the Trustee has argued), then would refusing to protect shippers at 2-to-1 points in a rail merger proceeding be justified because it would financially benefit the resulting monopoly carrier? The Trustee's argument would place the Board on an unwise and slippery slope away from established policy.

Essentially, what the Trustee seeks here is a ruling by the Board that competition is a burden on interstate commerce. Yet there is simply nothing in the modern era of railroad regulatory policy or precedent that supports Board action on the basis of such a principle. See 49 U.S.C. § 10101(1) ("In regulating the railroad industry, it is the policy of the United States Government to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail"); Union Pacific/Southern Pacific Merger, 1 S.T.B. at 384 ("The competitive process unleashed by the Staggers Rail Act has been one of the most significant public policy successes of this century. One of our most important roles is to ensure that this process continues."). Reasonable parties may disagree (and often do) about how far the Board should go in using its regulatory powers to create competitive access where none currently exists. Few would comprehend an affirmative exercise of the Board's regulatory power to eliminate existing competitive access.

Moreover, granting the relief sought by the Trustee would seriously undermine the Board's long-established policy of encouraging private-sector solutions to transportation problems. Here, in an arms-length transaction initiated at the request of BAR, CN advanced \$5 million in cash to BAR so that BAR could continue operations. Although it did not stave off bankruptcy, BAR did not shut down, and Fraser did not lose rail service. CN paid \$5 million

without a corresponding guarantee of a single car or a single dollar in revenue for CN, and thus assumed significant risk in responding to BAR's request for help. If the Trustee can now undo that transaction and, pocketing the \$5 million, eliminate CN's rights, it would be highly unlikely that any rail carrier in the future would be willing to step up and assume the risk of assisting a troubled connection as CN did. Carson V.S. at 21-22. As a matter of sound transportation policy, the Board should encourage, not discourage, such private-sector initiative.

The Trustee argues that imposing captive shipper status on Fraser will not harm Fraser because CN has not actually sought to compete for Fraser's traffic by lowering CN's rates. This is an odd argument since, unless CN and MMA are agreeing not to compete with each other, the failure of one carrier at a dually-served location to compete for the shipper's traffic is an obviously self-correcting problem -- the other carrier will get all of the business. The evidence here, however, plainly demonstrates that competition between CN and MMA for Fraser's business is very active and has intensified since MMA took over operation of BAR lines. Carson V.S. at 16-19. With competitive access to two railroads, Fraser now routinely solicits competitive bids on its rail traffic. Carson V.S. at 17. This competition has resulted in each railroad gaining traffic from and losing traffic to the other. As Mr. Velturo discusses, the Trustee himself identifies rail freight destinations that have shifted from CN origination out of Madawaska to a BAR/MMA routing in 2002 and 2003. An additional rail freight destinations shifted from MMA routes to CN routes in 2003. Velturo V.S. at 13.

The competitive battle for Fraser's inbound kaolin clay traffic provides a clear example of this dynamic. Prior to the CN Agreements, when BAR solely served Fraser's mill, CN had participated in little of the clay traffic. In early 2001, in response to a solicitation from Fraser, CN offered to enter into a rebate contract with Fraser on the inbound movement of kaolin

clay to Madawaska for the period ending December 3, 2002. Fraser accepted CN's offer and CN was able to capture virtually all of Fraser's inbound clay traffic to the mill for most of 2001 and all of 2002. Winning the clay traffic represented a significant gain for CN representing additional revenue of more than _____ per year. However, in the fall of 2002, as the earlier contract was about to expire, Fraser again solicited a competitive bid from CN for the clay traffic during 2003. _____, CN lost the clay business to MMA. This past fall, in bidding for Fraser's 2004 clay traffic, _____, but still lost the business to MMA and its partner CP. CN's excellent service and transit times were not sufficient _____. Carson V.S. at 18. CN will attempt to win the clay traffic back next fall (for 2005).

CN's three-year rebate contract on outbound paper products -- the largest volume segment of Fraser's rail traffic -- expires at the end of October, 2005. CN expects vigorous competition from MMA on the paper traffic when that contract expires. In the meantime, CN believes that MMA has already succeeded in diverting away from CN some of Fraser's outbound paper traffic. Carson V.S. at 19. This intensified competitive behavior is precisely what economists would expect to see from the competition opened up by the CN Agreements. Velturo V.S. at 8-10, 14-15, 18.

Without question, Fraser has benefited from this competition. Fraser's annualized savings on the transport of the clay alone in 2003 as a result of the competition between CN and MMA is expected to be _____. Velturo V.S. at 15. Elimination of CN's rights would make Fraser's mill captive to MMA and would for the first time make MMA a bottleneck carrier on Fraser's Madawaska traffic. As a bottleneck carrier, MMA would control access to all rail freight options and would be expected to extract its "one

lump" on all movements, regardless of the rail competitive structures that exist down route or up route from the bottleneck. Velturo V.S. at 7, 14-15, 18.

Motor carriers would not provide an effective competitive constraint on MMA's pricing as a bottleneck rail carrier. Although trucks handle a significant percentage of Fraser's total Madawaska traffic, trucks handle their segment of the business due to the short haul involved, tight service requirements or where the receiver is not set up to receive by rail. Carson V.S. at 17. Over the years, CN has lost virtually no Fraser traffic to trucks and has gained virtually no Fraser traffic from trucks. When pricing its transportation services to Fraser, CN takes into account only potential price competition from MMA, not motor carriers. Carson V.S. at 17. . Velturo V.S. at 20.

Ultimately, the effect of eliminating CN's rights would be higher rail freight prices and reduced service levels for traffic originating and terminating at Fraser's Madawaska Mill. Velturo V.S. at 23. As the ICC explained, "[a] carrier with a destination monopoly will likely push the through rate as high as possible and keep the monopoly profits to itself" Union Pacific -- Control -- Missouri Pacific; Western Pacific, 366 I.C.C.459, 538 (1982). That MMA would prefer to be in that position for Fraser's traffic is hardly surprising. Granting the Trustee's Application would accomplish that. But the price for that and resulting harm to the public interest would be the loss of the current active competition between CN and MMA.

III. THE TRUSTEE'S "ABANDONMENT" ANALYSIS OF MMA'S PORTAGE LINE AND CDAC LINE IS FUNDAMENTALLY FLAWED.

As discussed above, the Trustee's argument that, absent a grant of its application, MMA will be forced to abandon its Portage Line and/or its CDAC Line fails on a number of fronts.

. The CDAC

Line is MMA's connection to CP,

. And the viability and profitability of the Portage and CDAC Lines are unrelated to -- and would be unaffected by -- the existence or elimination of CN's rights on the Madawaska Line.

In addition, a hypothetical abandonment of the Portage Line or the CDAC Line would not give rise to the kinds of concerns often present in other abandonment proceedings.²⁴ Both of those line segments have virtually no local or on-line traffic. The shippers of overhead traffic on those lines have at least one and apparently sometimes two alternative overhead routings for their traffic. Abandonment of either the Portage Line or the CDAC Line thus would likely not result in a meaningful loss of access to rail service for existing shippers.

In light of all of these factors, it may not even be necessary to consider the technical merits of the abandonment analysis of the Portage and CDAC Lines which the Trustee presents in the "Railtrac Report" in Volume 3 of his application. But as the verified statements of Richard B. DeMink ("DeMink V.S."), Sandra J. Dearden ("Dearden V.S."), John L. Bradshaw ("Bradshaw V.S."), Arthur L. Spiros ("Spiros V.S.") and Richard S. Shure ("Shure V.S.") attached hereto at Tabs 4, 5, 6, 7 and 8, respectively, detail at some length, the Trustee's analysis is in fact riddled with errors and wholesale misapplications of the Board's abandonment costing regulations. Ultimately, the Trustee's analysis cannot be used as a reliable indicator of anything with respect to the Portage and CDAC Lines.

Given that virtually all of the traffic that moves on the Portage and CDAC Lines is overhead, perhaps the most glaring error in the Railtrac Report is that it

²⁴ Given that (among other things) the Trustee's own evidence shows that MMA currently has an operating profit on the Portage Line, this likely is a truly hypothetical situation.

. This error alone makes it literally impossible to draw any meaningful conclusions about the Portage and CDAC Lines from the Railtrac Report.

Other errors are just as fundamental, if not quite so sweeping in their scope.

The problems continue on the net liquidation value side,

Various other errors are detailed in the witnesses statements as well.

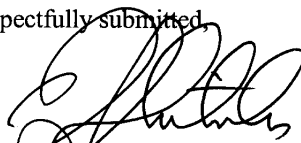
It would be impossible to "re-run" the analysis in the Railtrac Report to address all of these errors, and CN has not tried. The point is simply that the Railtrac Report bears little resemblance to a properly-prepared abandonment application under the Board's regulations at 49 C.F.R. § 1152. Ultimately, the Railtrac Report proves nothing one way or the other with respect to the Portage and CDAC Lines. It should be disregarded for purposes of this proceeding.

CONCLUSION

The Trustee's application presents neither a theory nor facts that support the relief he seeks. Granting the application would deprive Fraser of the existing rail competition at its Madawaska mill, create additional financial burdens on MMA during a difficult period, and upend well-established regulatory policy -- all in order to garner a \$5 million payment for the BAR estate. It will not solve the other problems that MMA faces, and will not change the viability or profitability of MMA's Portage Line and CDAC Line. And where, as here, the applicant is not the rail carrier whose interests supposedly justify the relief sought -- but rather a non-carrier bankruptcy estate with nothing but a monetary stake in the outcome -- the Board should be particularly hesitant to exercise its regulatory powers in the unusual and novel manner requested here. The Trustee's application should be denied.

WHEREFORE, CN respectfully requests that the Trustee's Adverse Application
for Discontinuance of Trackage Rights and Abandonment of Easement be denied.

Respectfully submitted,

By: 

Sean Finn
Cynthia A. Bergmann
Theodore K. Kalick
Canadian National Railway Company
455 North Cityfront Plaza Drive
Chicago, Illinois 60601-5317
(312) 755-7600

William C. Sippel
Myles L. Tobin
Thomas J. Litwiler
Fletcher & Sippel LLC
29 North Wacker Drive
Suite 920
Chicago, Illinois 60606-2875
(312) 252-1500

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

Dated: December 10, 2003

1

TAB 1

EXHIBITS A - C

REDACTED

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8/1/03

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re	)	
	)	
BANGOR & AROOSTOOK RAILROAD COMPANY, ¹	)	Chapter 11
	)	Case No. 01-11565
Debtor.	)	(Jointly Administered)
	)	

**ORDER APPROVING TRUSTEE'S APPLICATION TO
EMPLOY JOHN G. PINTO AND RAILTRAC ASSOCIATES
AS CONSULTANTS IN THE CN LITIGATION**

Upon the Trustee's Application dated July 14, 2003 (the "Application"), to approve the retention of John G. Pinto ("Pinto") and RailTrac Associates ("RailTrac") to provide services as set forth in the Application and the Agreement attached to the Application as Exhibit A (the "Agreement"), the Trustee having served copies of the Application upon the United States Trustee and each person who has entered an appearance and requested notice of such pleadings, the Court having considered the Application and having found good cause to grant the Application, it is hereby ORDERED, DECREED, AND ADJUDGED that:

- A. Service of the Application in the manner described above was sufficient notice to all parties under the circumstances of this case.
- B. The Application be and hereby is APPROVED, effective as of the date the Application was filed -- July 14, 2003.

¹ The following entities are also debtors: Canadian American Railroad Company, Chapter 11 Case No. 02-10858, Logistics Management Systems, Inc., Chapter 11 Case No. 02-10864, Newport and Richford Railroad Company, Chapter 11 Case No. 02-10856, The Northern Vermont Railroad Company Incorporated, Chapter 11 Case No. 02-10857, and Van Buren Bridge Company, Chapter 11 Case No. 02-10865.

C. The Trustee is authorized to employ Pinto and RailTrac (the "Consultants")² to provide services as described, and pursuant to the terms set forth, in the Application and the Agreement. Without limiting the foregoing, neither the Consultants nor any Subcontractor (as defined below) shall be an employee of the Trustee, or of any of the Debtors or any of the estates. The Trustee shall also be authorized to reimburse the Consultants for out-of-pocket costs and expenses incurred on behalf of the Trustee or the Debtors provided that the Trustee approves of the incurring of such expense and agrees to reimburse such expense prior to incurrence of such expense.

D. Because Pinto and RailTrac are not "professional persons" for purposes of 11 U.S.C. §§327 and 330, neither Pinto nor RailTrac shall be required to file fee applications under 11 U.S.C. §330. The Trustee may, without further order of the Court, compensate the Consultants at the usual and customary hourly rates set forth in the Agreement up to \$30,000 for services rendered, and may reimburse the Consultants for all qualified expenses incurred on behalf of the estates. The Trustee is not authorized to pay fees to the Consultants in excess of \$30,000 without first filing and obtaining approval of a fee application meeting the requirements of 11 U.S.C. § 330. The Trustee shall have no obligation to withhold or pay employment taxes, or to provide any services or benefits to the Consultants, other than the Trustee's obligation to pay for services and reimburse for expenses, as set forth in the Agreement and this Order.

E. The Consultants shall be directly responsible to the estates and the Trustee for all services to be provided under the Agreement (including any services rendered by third party independent contractors or subcontractors (collectively, the "Subcontractors")), and shall be solely responsible for tendering payment to any such Subcontractors the Consultants may use,

² The term "Consultants" as used herein shall mean Pinto and RailTrac, individually, and jointly and severally.

and for submitting invoices to the Trustee seeking reimbursement for payments made to such Subcontractors. The Consultants will pay such independent Subcontractors at the hourly rates set forth in the Agreement based only on services actually provided and costs or expenses actually incurred by such Subcontractors. Neither the Trustee nor the estates shall be (i) billed by or directly liable to any Subcontractors used by the Consultants, or (ii) liable to any party other than Pinto or RailTrac for any services rendered or costs incurred by any party, including any Subcontractors used by the Consultants.

F. Notwithstanding the Trustee's agreement herein to pay RailTrac for the bona fide services provided to RailTrac and/or Pinto by any Subcontractors who assist RailTrac and/or Pinto in the delivery of services pursuant to this Agreement, the Trustee shall have no obligation to pay, reimburse or otherwise compensate the Subcontractors directly. RailTrac and Pinto shall defend, indemnify and hold harmless the Trustee, including for all legal fees incurred by the Trustee, in the event of claims asserted by or on behalf of any Subcontractor against the Trustee, whether due to RailTrac's and/or Pinto's failure to pay such Subcontractor or otherwise. RailTrac and Pinto shall indemnify and hold harmless the Trustee from and against all claims, damages, or losses, including all legal fees incurred by the Trustee, arising out of or resulting from work performed by or on behalf of the Trustee relating to this Agreement.

G. RailTrac and Pinto estimate that services valued at between \$15,000 and \$30,000 will be rendered at the hourly rates set forth in the Agreement. Neither the Trustee nor the estates shall be liable for any services rendered in excess of \$30,000, except to the extent the Trustee agrees otherwise in a writing delivered to RailTrac before such services are rendered and the Court approves payment of the fees. To the extent the Trustee agrees to the rendition of additional services as described in this paragraph, compensation and reimbursement shall be

made by the Trustee and the Estates pursuant to the terms of, and at the rates set forth in, the Agreement and this Order, after filing and obtaining approval of a fee application meeting the requirements of 11 U.S.C. § 330.

H. This Order shall be final in 10 days unless a party-in-interest sooner objects.

DATED: July 30, 2003

/s/ James B. Haines, Jr.
Honorable James B. Haines, Jr.
United States Bankruptcy Court

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Relief Requested
Without a Hearing

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re	)	
	)	
BANGOR & AROOSTOOK RAILROAD COMPANY, ¹	)	Chapter 11
	)	Case No. 01-11565
Debtor.	)	(Jointly Administered)
	)	

TRUSTEE'S APPLICATION TO EMPLOY JOHN G. PINTO AND
RAILTRAC ASSOCIATES AS CONSULTANTS IN THE CN LITIGATION

James E. Howard, duly appointed Chapter 11 trustee in the above-referenced matter ("Trustee"), by and through his undersigned counsel, seeks authority to engage and enter into a contract with John G. Pinto ("Pinto") and the firm of RailTrac Associates ("RailTrac") to provide consulting services to the Trustee in connection with proceedings now pending in the United States District Court, District of Maine, and before the Surface Transportation Board ("STB") with respect to rejection, discontinuance and/or abandonment of certain trackage rights granted by the Bangor & Aroostook Railroad Company ("BAR") and Van Buren Bridge Company ("VBB") to the Canadian National Railway Company and/or the Waterloo Railway Company (the "CN Litigation"), all as set forth in the attached Agreement to Provide Consulting and Other Services (the "Agreement", Exhibit A). In support of this Application, the Trustee states as follows:

1. On or about August 15, 2001, an involuntary Chapter 11 bankruptcy case was filed for Bangor & Aroostook Railroad Company ("BAR").

¹ The following entities are also debtors: Canadian American Railroad Company, Chapter 11 Case No. 02-10858, Logistics Management Systems, Inc., Chapter 11 Case No. 02-10864, Newport and Richford Railroad Company, Chapter 11 Case No. 02-10856, The Northern Vermont Railroad Company Incorporated, Chapter 11 Case No. 02-10857, and Van Buren Bridge Company, Chapter 11 Case No. 02-10865. BAR and these affiliated entities may be referred to herein as the "Debtors".

2. On or about December 4, 2001, this Court entered an order for relief against BAR under Chapter 11 of Title 11 of the United States Bankruptcy Code, 11 U.S.C. § 101 et seq.

3. On December 28, 2001, the U.S. Trustee appointed the Trustee as trustee of BAR pursuant to 11 U.S.C. §1163.

4. On May 14, 2002, Canadian American Railroad Company ("CDAC"), Newport & Richford Railroad Company ("N&R"), and Northern Vermont Railroad Company ("NVT") filed voluntary petitions for relief under chapter 11 of the Code, and on May 15, 2002, Van Buren Bridge Company ("VBB") and Logistics Management Systems, Inc. ("LMS") filed voluntary petitions for relief under chapter 11 of the Code, in the United States Bankruptcy Court for the District of Maine. Pursuant to §§1107(a) and 1108 of the Code, LMS, which is not a railroad, is managing its assets and property as debtor-in-possession. Because LMS is a wholly owned subsidiary of BAR, effective control of LMS as debtor-in-possession resides with the Trustee. VBB is also a wholly owned subsidiary of BAR. The bankruptcy Estates of BAR, CDAC, N&R, NVT, VBB, and LMS are referred to collectively herein as the "Estates."

5. CDAC, N&R, NVT and VBB are railroads subject to sections 1161 et seq. of the Code, and initially proceeded as debtors-in-possession pending the appointment of a trustee under section 1163 of the Code. On May 21, 2002, the Court entered an Order authorizing CDAC, N&R, NVT and VBB to conduct business operations in the ordinary course pending appointment of a chapter 11 railroad trustee. On May 31, 2002, the U.S. Trustee appointed James E. Howard as Trustee of CDAC, N&R, NVT and VBB.

6. This Court has jurisdiction over this case pursuant to 28 U.S.C. §§1334(b) and 1409(a), and the standing order of the United States District Court for the District of Maine dated August 1, 1984, pursuant to which all cases filed in Maine under Title 11 are automatically

referred to this Court. This is a core proceeding, and the Court has jurisdiction to enter a final order on this Application pursuant to 28 U.S.C. §157(b)(2)(A) and (O).

7. If the Trustee is successful in the CN Litigation, then Montreal, Maine & Atlantic Railway shall become obligated to pay the Trustee \$5 million.

8. The Trustee wishes to engage the Consultants to perform services described, and on the terms and conditions set forth, in the Agreement between the Trustee on one hand, and Pinto and RailTrac on the other hand. Services to be provided include, without limitation, analysis and possible testimony concerning railroad and transportation matters relevant to the CN Litigation. More specifically, the services to be provided by Pinto and RailTrac shall involve an economic analysis and quantification of the adverse consequences that would result from any judicial or administrative decision denying the Trustee's action to discontinue CN's trackage rights.

9. As compensation for reasonable and necessary services to be provided, Pinto and RailTrac will require payment at hourly rates from \$65 to \$165 per hour, and will require compensation for all out-of-pocket costs and expenses incurred as a direct result of their performance of services; provided, however, that the Consultants shall not be entitled to reimbursement for any costs unless (a) the Trustee has pre-approved the incurring of such expenses and has confirmed in writing to the Consultants that the estates will reimburse them for such expenses, and (b) the Trustee shall have no obligation to reimburse the Consultants for expenses that would not be reimbursable under the Standard Maine Expense Level List, which is set forth in Maine Bankruptcy Rule 2016(a)(5).

10. The Trustee requires the services of the Consultants. The Consultants have agreed that Pinto, who is RailTrac's sole owner, will be the principal individual designated to

perform services required under the Agreement; provided, however, that the Consultants may engage third party independent contractors Mark Amfahr, and Robert Finley (whose Verified Statements are to be submitted with this Application) (collectively, together with any other subcontractor who performs services for Pinto and RailTrac, the "Subcontractors"), but the Consultants shall be solely responsible for tendering payment to any Subcontractors that the Consultants may use; provided, however, that the Trustee agrees to reimburse Pinto and RailTrac for the services performed by Messrs. Amfahr and Finley at the rates of \$125 and \$135 per hour, respectively. Pinto and RailTrac shall not use any Subcontractors in performing the Services other than Messrs. Amfahr and Finley without first obtaining the written consent of the Trustee. Neither the Trustee nor the estates shall be (a) billed by or directly liable to any Subcontractors used by the Consultants, or (b) liable to any party other than the Consultants for any services rendered or costs incurred by any party, including any Subcontractors used by the Consultants. The Consultants have further agreed to defend, indemnify and hold the Trustee harmless, including for all legal fees incurred by the Trustee, in the event of claims asserted by or on behalf of any Subcontractor against the Trustee, whether due to RailTrac's and/or Pinto's failure to pay such Subcontractor or otherwise. RailTrac and Pinto have further agreed to indemnify and hold harmless the Trustee from and against all claims, damages, or losses, including all legal fees incurred by the Trustee, arising out of or resulting from work performed by or on behalf of the Trustee relating to the Agreement.

11. The Trustee believes that the employment of the Consultants is necessary to the proper prosecution of the CN Litigation, and is therefore in the best interests of the estates and their creditors. To the best of the Trustee's knowledge, neither Pinto, nor RailTrac, nor any of the Subcontractors has any connection with the Debtors, or their respective attorneys and

professionals, the United States Trustee or any person employed in the United States Trustee's office, except as otherwise disclosed in the Verified Statements of John G. Pinto and RailTrac Associates, and Mark Amfahr and Robert Finley pursuant to Fed.R.Bankr.P. 2014(a) and D.Me. LBR 2014-1(a) (the "Verified Statements"), which were filed concurrently herewith, and below in this Application.

12. RailTrac and Pinto provided services to Seneca Group, LLC during the months of July and August 2002 in connection with the Trustee's sale of the Debtors' operating railroads. Seneca was employed by order of the Court dated May 31, 2002. One of the current owners of Seneca has performed lobbying services on behalf of Canadian National Railway in matters unrelated to the CN Litigation, but neither Pinto nor RailTrac had any involvement in or connection to such lobbying, and neither Pinto nor RailTrac presently have any ownership interest in Seneca, all as more fully set forth in the Verified Statements. The Trustee does not believe that this relationship causes either Pinto or RailTrac to have a conflict of interest. Based on the statements and representations made in the Verified Statements, the Trustee believes that neither Pinto, nor RailTrac, nor any Subcontractor holds any interest adverse to the Estates or the Debtors, and that Pinto, RailTrac and the Subcontractors are each "disinterested persons" as that term is defined in 11 U.S.C. § 101(14).

13. The Trustee also believes that Pinto, RailTrac, and the Subcontractors are not "professional persons" as the term is used in 11 U.S.C. § 327(a) and F.Bankr.R.Proc. 2014. In holding that maritime engineers were not "professional persons" for purposes of § 327(a), the Court in In the Matter of Seatrain Lines, Inc., 13 B.R. 980, 981 (Bankr. S.D.N.Y. 1981), stated that "the term 'professional person' is limited to persons in those occupations which play a central role in the administration of the debtor proceeding." Accordingly, court approval is

required for the retention of attorneys, accountants, appraisers, auctioneers and person in other professions “intimately involved in the administration of the debtor’s estate.” *Id.* The Second Circuit has stated that the Seatrain definition of “professional persons” has “become a benchmark for the purposes of § 327(a).” United States Trustee v. Bloom (In re Palm Coast, Matanza Shores, L.P.), 101 F.3d 253, 257 (2nd Cir. 1996); In re Johns-Manville Corp., 60 B. R. 612, 620 (Bankr. S.D.N.Y. 1986); see also, In re Park Avenue Partners Ltd. Partnership, 95 B. 605, 616-17 (Bankr. E.D. Wis. 1988) (holding that a property manager was not a “professional person” where the manager did not have the right to set rents or make expenditures in excess of \$2,500, and did not have autonomy to perform significant acts without consulting with the debtor). The Trustee seeks to retain the Consultants for the limited purpose of performing discrete analysis in the CN Litigation. The Consultants will not by any measure play a central role in the administration of the Debtors’ proceedings or become involved in the administration of the estates.

14. Accordingly, the Trustee hereby seeks authority to pay RailTrac and Pinto up to \$30,000 in fees plus reimbursement for reasonable and necessary out-of-pocket costs without filing fee applications and without obtaining any further Order of the Court.

15. The duties and tasks performed by and assigned to Pinto, RailTrac and any Subcontractors used and those matters undertaken by Counsel to the Trustee (Verrill & Dana, LLP), and by Special Counsel to the Trustee (Charles White and Kirkpatrick & Lockhart, LLP) will not be duplicative. Pinto, RailTrac, Counsel and Special Counsel will be coordinating all efforts concerning the CN Litigation to avoid duplication.

16. Pursuant to Rule 2014(a) of the Federal Rules of Bankruptcy Procedure, the Trustee verified that a copy of this Application, proposed order, and accompanying verified

statements were served (electronically or otherwise) on: Robert Checkoway, Esquire, Assistant United States Trustee, and every other party who has entered an appearance in these administratively consolidated cases.

WHEREFORE, the Trustee respectfully requests that the Court enter an order approving this Application and grant the Trustee such other and further relief as is just and appropriate.

Dated: July 14, 2003

Respectfully submitted,

JAMES E. HOWARD, Trustee for the Estates of
BAR and VBB

LOGISTICS MANAGEMENT SYSTEMS, INC.,
Debtor-in-Possession

By Their Attorneys:

/s/ Roger A. Clement, Jr.

Roger A. Clement, Jr., Esq.
Gayle H. Allen, Esq.
Andrew R. Sarapas, Esq.

VERRILL & DANA, LLP
One Portland Square
P.O. Box 596
Portland, ME 04112-0586
207-774-4000 - Phone
207-774-7499 - Fax

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EXHIBIT A

AGREEMENT TO PROVIDE CONSULTING AND OTHER SERVICES

THIS AGREEMENT is made as of July 14, 2003 by and between James E. Howard in his capacity as the chapter 11 Trustee of the Estates of the Bangor & Aroostook Railroad Company ("BAR"), Canadian American Railroad Company, Newport and Richford Railroad Company, The Northern Vermont Railroad Company Incorporated, and Van Buren Bridge Company, all of which are railroad debtors that are being jointly administered in cases pending in the U.S. Bankruptcy Court for the District of Maine, as well as debtor-in-possession Logistics Management Services, Inc. (collectively, the "Trustee" and the "Estates") on the one hand, and RailTrac Associates ("RailTrac"), and John G. Pinto ("Pinto") of Box F, Havertown, Pennsylvania 19083 on the other. RailTrac and Pinto shall be collectively referred to as "Consultants." References to "Consultants" herein shall mean RailTrac and Pinto, both individually and jointly and severally.

WHEREAS, the Trustee periodically will require consulting services as described below;
and

WHEREAS, Consultants are qualified to provide such services; and

WHEREAS, the Trustee and Consultants are interested in entering into an Agreement whereby Consultants will provide various services to the Trustee;

NOW THEREFORE, in consideration of the mutual promises and undertakings of the parties, and intending to be legally bound hereby, it is agreed as follows:

1. Contract for Services. Subject to the terms of this Agreement, Consultants agree to render services (the "Services") to the Trustee at the Trustee's request in the manner and to the extent permitted by this Agreement. Matters for which Consultant's services may be used include analysis and possible testimony to be provided in that certain matter pending before the United States District Court for the District of Maine and the Surface Transportation Board with the Trustee as Plaintiff and Canadian National Railway Company and Waterloo Railway Company as Defendants (the "CN Litigation"), and such further consulting services as the Trustee may request in connection with the CN Litigation. As part of the Services, the Consultants shall perform an economic analysis of the impact of abandoning certain segments of the former CDAC and BAR Lines. Consultants shall perform the Services within time periods that are necessary and appropriate to assist the Trustee in the CN Litigation. Consultants and the Trustee shall agree in advance on the scope of the Services, the time to be spent on the Services, and time frame for performance of the Services. The Consultants shall not perform any services in connection with this Agreement unless the Trustee, either directly or through his attorney, gives prior authorization. Consultants will control their own hours of work, but shall dedicate an adequate amount of time to complete any projects and assignments within the designated time frame.

2. Term. This Agreement shall expire upon completion or termination of the CN Litigation, unless it is sooner terminated upon the occurrence and by virtue of a material breach of this Agreement or other failure to perform by Consultants.

3. **Fees and Reimbursement of Expenses.** RailTrac shall receive a fee for the Services at the rate of \$165 per hour for Pinto, \$65 to \$90 per hour for RailTrac associates, and \$125 to \$135 per hour for Subcontractors (as that term is defined below) retained by Consultants to assist in performing the Services. The Consultants, as provider of the Services, shall provide the Trustee with a billing invoice on a monthly basis. Such invoices shall include, at a minimum, (a) a detailed accounting of the services provided, including the date of service, a description of the service provided, and the identity of the person performing the service in tenth hour increments, and (b) details of all disbursements for which the Consultants seek reimbursement. Expenses associated with the Consultants' services under this Agreement shall be paid by the Consultants, except that the Trustee shall reimburse the Consultants for out-of-pocket expenses incurred as a direct result of performance of the Services, provided that (c) the Trustee has pre-approved the incurring of such expenses and has confirmed with the Consultants in writing that the Estates will reimburse Consultants for such expenses, and (d) the Trustee shall have no obligation to reimburse the Consultants for expenses that would not be reimbursable under the Standard Maine Expense Level List, which is set forth in Maine Bankruptcy Rule 2016(a)(5). The Consultants shall not be entitled to reimbursement for any items of overhead. The Trustee shall promptly pay the Consultants for services rendered pursuant to this Agreement, which shall not exceed a total of \$30,000 except to the extent the Trustee agrees in a writing delivered to the Consultants that services in excess of that amount may be rendered.

The Consultants shall be directly responsible to the estates and the Trustee for all services to be provided under the Agreement. The Consultants may retain the services of third party independent contractors, Mark Amfahr and Robert Finley, (collectively, together with any other subcontractor who performs services for the Consultants, the "Subcontractors"), and shall be solely responsible for tendering payment to such Subcontractors; provided, however that the Trustee agrees to reimburse the Consultants for the Services performed by Messrs. Amfahr and Finley at the rates of \$125 and \$135 per hour, respectively. The Consultants shall not use any other Consultants in performing the Services without first obtaining the written consent of the Trustee. Neither the Trustee nor the estates shall be (a) billed by or directly liable to any Subcontractors used by the Consultants, or (b) liable to any party other than the Consultants for any services rendered or costs incurred by any party, including any Subcontractors used by the Consultants.

4. **Relationship With Subcontractors.** Notwithstanding the Trustee's agreement herein to reimburse RailTrac for the Services provided to RailTrac and/or Pinto by the Subcontractors, the Trustee shall have no obligation to pay, reimburse or otherwise compensate the Subcontractors directly. RailTrac and Pinto shall defend, indemnify and hold harmless the Trustee, including for all legal fees incurred by the Trustee, in the event of claims asserted by or on behalf of any Subcontractor against the Trustee, whether due to RailTrac's and/or Pinto's failure to pay such Subcontractor or otherwise.

RailTrac and Pinto shall indemnify and hold harmless the Trustee from and against all claims, damages, or losses, including all legal fees incurred by the Trustee, arising out of or resulting from work performed by or on behalf of the Trustee relating to this Agreement.

5. Professional Services. Consultants shall devote their best efforts to the performance of professional services under this Agreement. Consultants shall perform all services under this Agreement in accordance with such standards of professional ethics and practices as may from time to time be applicable during the term of this Agreement. In performing the services required by this Agreement, Consultants shall exercise sound judgment in performing the services requested by the Trustee, the Trustee's attorneys, and any other person whom the Trustee designates to communicate with the Consultants.

6. Independent Contractor Status. Consultants shall be treated for all purposes as independent contractors. In no way limiting the above, Consultants represent and agree that:

(a) Neither Pinto, nor RailTrac, nor any Subcontractor, nor any other person performing duties under this Agreement, are, shall be, or shall be deemed to be an employee of the Trustee or the Estates, and shall not represent themselves as such.

(b) Neither RailTrac nor Pinto, nor any Subcontractor, nor any others who work for RailTrac in providing services pursuant to this Agreement shall be entitled to any rights or benefits, whether present or future, under any retirement or welfare benefit plan of the Trustee or the Estates by virtue of this Agreement or the services provided pursuant to the terms of this Agreement.

(c) Neither RailTrac nor Pinto, nor any Subcontractor, nor any others who work for RailTrac in providing services pursuant to this Agreement shall be entitled to payment by the Trustee or the Estates of social security taxes, workers' compensation premiums, unemployment insurance premiums or compensation, or any other employee benefits, including withholding of federal or state income taxes.

(d) The Trustee shall neither have nor exercise any control over the professional methods used by Consultants in the provision of the services provided hereunder.

(e) Consultants shall be responsible for paying all costs and expenses associated with the operation of their business and the provision of the services hereunder including but not limited to, supplies, tools, and equipment, business and travel expenses, and expenses associated with Consultants' employees, contractors and/or Subcontractors, such as wages, payroll taxes and mandated insurance, except as provided in Paragraph 3, above.

(f) RailTrac holds itself out to the public as providing the types of services subject to this Agreement. RailTrac and Pinto, as an employee and principal of RailTrac, have performed or do perform consulting services for other clients of the nature described herein.

7. Nondisclosure. During the duration of this Agreement and thereafter, Consultants shall not use for themselves or others, and shall not disclose to others, any materials or information which relate to the services performed for the Trustee. Without limiting the

foregoing, Consultants shall keep confidential the identity of, and any information pertaining to, any former employees, customers, vendors, service providers, and account debtors or other parties that have transacted business with the Trustee. All of Consultants' employee(s) and independent contractors and Subcontractors shall be subject to the same requirement. Consultants further agree to enter into and execute all such further confidentiality agreement(s) as the Trustee may reasonably request and/or any court or administrative agency may require.

8. Proprietary Rights. All work performed by Consultants and all materials, products, charts, and lists developed or prepared by Consultants in the performance of services hereunder are the property of the Trustee and all title and interest therein shall vest in the Trustee and shall be deemed to be a work made for hire and made in the course of the services rendered hereunder. Unless otherwise requested by the Trustee, upon the completion of Consultants' services, Consultants shall immediately turn over to the Trustee all such materials developed during the term of this Agreement.

9. Miscellaneous.

(a) This Agreement constitutes the entire agreement of the parties, and no amendments or additions to this Agreement shall be binding unless in writing and signed by both parties. It is expressly understood and agreed that no verbal representation, promise or condition, whether made before or after the signing of this Agreement, shall be binding upon any of the parties.

(b) This Agreement shall be governed in all respects whether as to validity, construction, capacity, performance or otherwise, by the laws of the State of Maine.

(c) This Agreement cancels and supersedes any prior oral or written agreement between the parties pertaining to the subject matter hereof.

(d) The terms and obligations set forth in paragraphs 6, 7, and 8 shall survive the termination of this Agreement.

(e) The obligations of the Trustee under this Agreement are subject to any and all approvals required under Bankruptcy Law.

IN WITNESS WHEREOF, the parties have caused this Agreement to be duly executed in duplicate originals as of the day and year first above written with one original being delivered to each party.

JAMES E. HOWARD, Trustee for the
Estate of BAR, CDAC, NVT, N&R, and
VBB, and as agent for LOGISTICS
MANAGEMENT SYSTEMS, INC.,
DEBTOR-IN-POSSESSION

/s/ John G. Pinto
RailTrac Associates, by
John G. Pinto its Sole Proprietor

/s/ John G. Pinto
John G. Pinto, Individually

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re)
BANGOR & AROOSTOOK RAILROAD COMPANY,¹)
Debtor.)

Chapter 11
Case No. 01-11565
(Jointly Administered)

RECEIVED AND FILED
2002 DEC 16 PM 12:17
U.S. BANKRUPTCY COURT
PORTLAND, MAINE

**ORDER APPROVING TRUSTEE'S APPLICATION TO APPROVE EMPLOYMENT
OF JAMES N. HELLER AND HELLERWORX, INC. AS CONSULTANTS**

Upon the Trustee's Application under 11 U.S.C. § 327(a) to Approve Employment of James N. Heller ("Heller") and Hellerworx (the "Firm") as Consultants (the "Application"), the Trustee having served copies of the Application and the Verified Statement of James N. Heller and Hellerworx, Inc. ("Verified Statement") upon the U.S. Trustee and each person who has entered an appearance and requested notice of such pleadings, the Court having considered the Application and the Verified Statement, and having found good cause to grant the Application, it is hereby ORDERED, DECREED, AND ADJUDGED that:

A. Service of the Application and Verified Statement in the manner described above was sufficient notice to all parties under the circumstances of this case.

B. The Application be and hereby is **APPROVED**, effective as of the date the Application was filed -- November 20, 2002.

C. The Trustee is authorized to employ Heller and the Firm (collectively, the "Consultants") to provide consulting services, and such other services as are necessary in connection with the rejection and abandonment of a trackage rights agreement and easement held by Canadian National Railway in proceedings in this Court and before the Surface Transportation Board, pursuant to the terms and conditions set forth in the Application, and the Agreement and Résumé attached thereto as Exhibits A and B, as follows:

- (1) The Consultants will request payment from BAR for all services rendered and

¹ The following entities are also debtors: Canadian American Railroad Company, Chapter 11 Case No. 02-10858, Logistics Management Systems, Inc., Chapter 11 Case No. 02-10864, Newport and Richford Railroad Company, Chapter 11 Case No. 02-10856, The Northern Vermont Railroad Company Incorporated, Chapter 11 Case No. 02-10857, and Van Buren Bridge Company, Chapter 11 Case No. 02-10865.

costs incurred according to the procedures set forth more fully below. In addition, because the services to be rendered will benefit each of the Debtors, all of the Debtors shall be jointly and severally liable to the Consultants for all services rendered and costs incurred by the Consultants in these jointly administered cases.

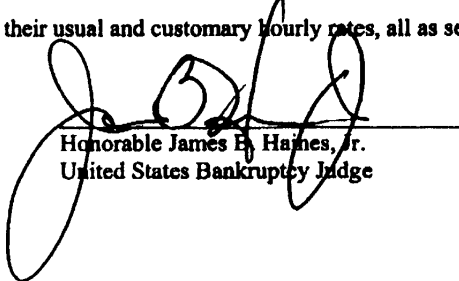
(2) BAR shall be entitled to a pro rata administrative claim against each of the other Debtors' estates for all amounts paid to the Consultants for services and/or costs and expenses. Nothing herein shall constitute a waiver of the rights of any party in interest to contest or challenge the amount of the administrative claim that the Trustee allocates among the Debtors pursuant to the preceding two sentences.

(3) The Consultants may request payment by the Trustee not more often than monthly, and the Trustee may pay from the estate, subject to availability of funds, 100% of all out-of-pocket disbursements and 85% of all charges for services upon presentation of statements meeting the requirements of D.Me. LBR 2016; *provided, however*, that (i) copies of such statements shall be served on the UST, (ii) the Consultants (or the Trustee on behalf thereof) shall make application to the Court not more often than every 120 days (or such other time as the Court on motion may authorize) in the manner required by D. ME. LBR 2016 for allowance and approval of such amounts and payment of any remaining amount due, and (iii) the Trustee shall not pay any requested amount if, at the time payment would otherwise be made, he believes that there is a substantial likelihood that remaining funds would not be sufficient to meet any subsequent requests by any professional.

(4) By agreement of Heller, the Firm, the Trustee and the United States Trustee, paragraph 4 of the Engagement Letter attached as Exhibit A to the Application, purporting to limit liability, shall be and hereby is STRICKEN.

D. Subject to further approval of this Court, the Debtor shall pay the Firm for the services of Heller and other Firm personnel at their usual and customary hourly rates, all as set forth in the Application and Agreement.

DATED: December 13 2002


Honorable James B. Haines, Jr.
United States Bankruptcy Judge

Small-Road Update

Bangor & Aroostook, the final chapter

Sale of the bankrupt Bangor & Aroostook System, one of the oldest names in U.S. freight railroading, to Rail World, Inc., subsidiary MMA, which consists of Montreal, Maine & Atlantic Railway LLC and Montreal, Maine & Atlantic Canada Co., was approved in U.S. Bankruptcy Court in Portland, Me., last month. The Bangor & Aroostook System includes the Bangor & Aroostook Railroad Company, Canadian American Railroad Company, Northern Vermont Railroad Company, Newport and Richford Railroad Company, and Van Buren Bridge Company; Litwin Boyadjian Inc., Trustee to the Proposal of Quebec Southern Railway Company, Ltd.; and Logistics Management Systems, Inc. The sale is expected to be completed by early December, as the U.S. Surface Transportation Board and the Canadian Transportation Agency have both approved the transaction.

"We welcome the opportunity to provide stable, viable rail service to B&A's service territory," said Rail World and MMA President Edward A. Burkhardt. "We have targeted Dec. 1 as closing date, and have a lot of work to do to prepare for startup of our new railway." He said that MMA's priorities were "rail customer and employee issues, and technical matters such as locomotives and cars."

Out: One of the oldest names in U.S. railroading. In: The Montreal, Maine & Atlantic.

In addition to the takeover of the B&A System, MMA has concluded an agreement with Canadian Pacific Railway to acquire CPR lines between the U.S./Canadian border at Richford, Vt., through Brookport to St. Jean, Quebec, and the north-south line from St. Rosalie through Farnham to Stanbridge that were previously leased to Quebec Southern Railway. These lines connect with the B&A at Richford and Brookport and will provide MMA access to Montreal.

CPR and MMA have created an alliance designed to "work together to enhance the operation and viability of the lines MMA is purchasing, provide competitive rail service to shippers, and provide mutual long-term benefits." The alliance "is designed to maximize routing of traffic over CPR lines, and to provide reciprocal pricing authority to both."

"Concluding these negotiations with CPR is a major step toward completing our purchase of the majority of B&A's rail assets," said Burkhardt. "CPR will be our main interchange partner, and we look forward to close cooperation in marketing joint MMA/CPR service through the Montreal gateway."

2

**VERIFIED STATEMENT
OF
CLIFFORD L. CARSON**

My name is Clifford L. Carson. I am Vice President - Commercial Development for the Eastern Canada Region of Canadian National Railway Company ("CNR"). I am responsible for CNR's sales activities and the development of strategies to increase CNR's business in Eastern Canada. I was personally involved in the negotiations between CNR and the Bangor and Aroostook Railroad ("BAR") and its parent Iron Road Railways, Inc. ("Iron Road") that led to the haulage rights and trackage rights for CNR and the freight operating easement for Waterloo Railway, a CNR affiliate ("Waterloo") (collectively "CN") over the BAR line now owned by Montreal, Maine & Atlantic Railway Ltd. ("MMA") between St. Leonard, New Brunswick and Madawaska, Maine ("the Madawaska Line"). It is the CNR's trackage rights and Waterloo's easement that are the subject of the Trustee's adverse discontinuance/abandonment application ("Application") in this proceeding. I previously submitted a verified statement in Finance Docket Nos. 34014 and 34015 as part of CN's Reply dated May 9, 2002 to the petition of the Trustee of the BAR (the "Trustee") to revoke the exemptions for CNR's trackage rights and Waterloo's easement over the Madawaska Line.

My statement in the earlier proceeding included at the outset a detailed review of the events and circumstances leading up to the execution of the haulage agreement, the trackage rights agreement, and the freight operating easement between BAR and CN (collectively the "CN Agreements"). Because an understanding of how and why these rights came into existence is critical to fully comprehending their importance, and because my prior statement was filed in a separate proceeding, with the Board's indulgence I will repeat that part of my prior statement

below before addressing the inaccurate and misleading statements made in the Application regarding these agreements, their terms and the competition they created.

**A. THE MADAWASKA LINE, FRASER AND
THE REQUESTS FOR CN ASSISTANCE**

For many years, until the sale of BAR lines to MMA in 2003, CN interchanged traffic with BAR at St. Leonard, New Brunswick. St. Leonard is an intermediate terminal on CN's main line between Montreal, Quebec and Halifax, Nova Scotia and is located across the St. John's River from Van Buren, Maine which was served by a BAR line at the extreme northern end of BAR's rail system. BAR reached St. Leonard and the interchange with CN via operation over the international rail bridge between Van Buren and St. Leonard owned by the Van Buren Bridge Company ("VBBC"), an affiliate of BAR. See map attached hereto as Attachment A. In January, 2003, essentially all of the rail assets of BAR and VBBC were sold by the Trustee to MMA and MMA took over the operation of these lines.

The vast majority of the traffic interchanged between BAR and CN at St. Leonard (and now handled by MMA over the Madawaska Line under the haulage arrangement with CN) is traffic of Fraser Papers, Inc. ("Fraser"), the operator of a large paper mill located at Madawaska, Maine approximately 25 miles northwest of Van Buren. Fraser's Madawaska mill generates substantial rail traffic including inbound shipments of raw materials such as clay and specialty chemicals and outbound shipments of paper products. Until competition from MMA for Fraser's traffic began to divert traffic away from CN about a year ago, more than 3,800 carloads of Fraser traffic moved over the Madawaska Line via St. Leonard annually.

Throughout the latter half of 2000, it was widely known in the rail industry that the Bangor & Aroostook rail system, of which BAR was a part, was facing serious financial difficulty. Some observers predicted that a bankruptcy or shutdown of operations was imminent.

Fraser advised CN that a loss of rail service to Fraser's Madawaska mill would likely result in a shutdown of the mill and cessation of all inbound and outbound rail traffic. Fraser also advised CN that due to the interdependency of its Madawaska mill and a sister mill at nearby Edmundston, New Brunswick (on the CN), a shutdown of the Madawaska mill would likely result in a shutdown of the Edmundston mill as well. Faced with these possibilities, CN began discussing internally what could be done to assure continued rail service to Fraser and to protect Fraser's access to CN over the long term.

In January 2001, representatives of Iron Road approached CN looking to raise up to \$25 million with which to continue operations. We were told that the Bangor & Aroostook rail system was in dire need of cash and that time was of the essence. The ensuing negotiations between CN and Iron Road/BAR focused on CN providing a substantial cash infusion in exchange for a haulage arrangement and CNR trackage rights over the Madawaska Line to serve Fraser.

On February 6, 2001, Robert Schmidt, President and Chief Executive Officer of Iron Road and BAR, wrote to Keith Heller, Senior Vice President of CN's Eastern Canada Division regarding CN's proposal to BAR:

We are favorably inclined toward this proposal . . . Our understanding of the immediate proposal is that you are offering an arrangement whereby we would grant CN "junction settlement" haulage fees to three specific stations at rates which are less than our current divisions of revenue. A part of this additional revenue (or savings) received by CN will be in essence prepaid to B&A after allowing for CN's cost of capital and perceived risk. CN will provide the cars and be responsible for billing, settlement, loss and damage, and all traditional responsibilities of the tariff carrier, and will pay B&A on a junction settlement basis each month. CN will also receive trackage rights to these destinations and, although their exercise is at CN's discretion, their purpose is to ensure that CN can access this traffic under all circumstances in order to retain

a fair return. This agreement would be for five years and CN will pay B&A US \$5 million when the STB exemption is effective.

A copy of Mr. Schmidt's letter is attached as Attachment B. Mr. Schmidt's letter clearly indicates that BAR understood that CN's proposed "junction settlement" haulage fees would be less than BAR's current divisions of revenue. In the same letter, Mr. Schmidt told Mr. Heller that BAR's legal counsel had advised BAR that CNR's trackage rights could be made effective after seven days by filing a Notice of Exemption with the STB and that BAR "would like to discuss what would be the most mutually advantageous manner to attain requisite regulatory approvals without delaying the initial payment to the B&A."

In light of BAR's precarious financial position and the very real possibilities, among others, that BAR would enter bankruptcy, that BAR could sell the Madawaska Line, or that BAR would otherwise not perform under a haulage arrangement, CN was concerned that trackage rights alone over the Madawaska Line might not adequately protect CN's access to Fraser. Accordingly, CN proposed, and BAR agreed, that as part of the transaction BAR would convey a non-exclusive freight operating easement over the Madawaska Line to CNR's affiliate, the Waterloo, to further secure CN's access to Fraser's mill.

On February 8, 2001, CN, BAR and Iron Road executed a letter agreement setting forth the material terms of their agreement (the "Term Sheet"). A copy of the February 8 Term Sheet is attached hereto as Attachment C. In addition to setting forth the terms of the haulage arrangement, the Term Sheet provided:

Iron Road/BAR to grant immediate trackage rights to CN for movements over BAR lines between St. Leonard and Madawaska, ME, such rights to be used by CN at its discretion. Iron Road/BAR shall also grant CN an easement subject to consent of lienholders on the property underlying the same track, so that CN's right to reach Fraser-Madawaska would also be protected in an asset sale of the company. This easement would contain similar

terms and conditions as the trackage rights agreement, in terms of compensation to Iron Road, liability, etc.

The Term Sheet also specified that:

CN will file a Notice of Exemption with the STB, and will pay to Iron Road a lump sum of \$5 million (U.S. funds) when the STB exemption is obtained.

Approximately one month later, the agreed upon provisions of the Term Sheet were memorialized in three documents: (1) the Junction Settlement Agreement (also known as the "Haulage Agreement") among BAR, its affiliate VBBC and CNR memorializing BAR's agreement to haul CNR cars between St. Leonard and Fraser's mill at Madawaska; (2) the Trackage Rights Agreement among BAR, VBBC and CNR memorializing BAR's and VBBC's agreement to grant trackage rights to CNR over the Madawaska Line for the sole purpose of serving Fraser's mill at Madawaska; and (3) the Easement Deed among BAR, VBBC and CNR's affiliate the Waterloo memorializing BAR's and VBBC's agreement to grant Waterloo a freight operating easement over the Madawaska Line. CNR chose to use an affiliate, the Waterloo, to acquire the easement so that the acquisition would qualify for a class exemption under the STB's regulations, and thereby accommodate Iron Road's request to expedite completion of the transaction and CN's payment of the \$5 million to Iron Road/BAR. I understand that an unredacted copy of each of these documents is attached to Volume 1 of the Trustee's Application (Redacted versions of the CN Agreements are attached to the Public Version of the Application that I reviewed).

Throughout the several months of negotiations among the parties, all four components (the cash payment, the haulage agreement, the trackage rights and the easement) were negotiated together as part of a single integrated transaction by which CN obtained access to Fraser at Madawaska and Iron Road/BAR received a significant cash infusion. The

documentation between the parties confirms that the parties clearly understood this. The Haulage Agreement, for example, provides:

In consideration of services to be provided under this agreement, CNR will pay to Iron Road Railways, Inc. as agent for the Bangor & Aroostook Railway, an amount of five million dollars (\$5,000,000) in U.S. funds. This payment is contingent upon:

- The execution of this junction settlement agreement;
- The execution of the St. Leonard to Madawaska trackage rights agreement (attached);
- The execution of the grant of an easement on the property underlying the St. Leonard to Madawaska trackage, and the consent and subordination of the first lien-holder;
- The approval by the Surface Transportation Board of the Notice of Exemption for both the trackage rights and the easement.

The STB exemptions for CNR's trackage rights and Waterloo's easement became effective on March 14, 2001. The next day, March 15, 2001, BAR, VBBC and CN consummated each of the four components of the transaction. CN wired \$5,000,000 in U.S. funds to Iron Road (as agent for BAR), and all three documents were executed, dated and made effective as of that date. BAR began providing haulage service for CN's account to and from Fraser's mill at Madawaska. The term of the Trackage Rights Agreement began running. Appropriate consents to Waterloo's Easement Deed were obtained by BAR from its overseas lienholders and the easement was subsequently recorded by Waterloo with the Aroostook County, Maine Register of Deeds.

As a result of this transaction, Fraser obtained competitive rail access for its Madawaska mill, not by regulatory prescription, but by an arms-length negotiated private-sector agreement between the railroads involved. The trackage rights and easement assured direct CN access to the mill and long-term Fraser access to CN regardless of the fate or disposition of the BAR. Fraser was no longer wholly dependent on BAR for rail service, and Fraser and CN were

no longer vulnerable to any potential future strategy by BAR (or a successor of BAR) to economically close or restrict the St. Leonard gateway. Moreover, CN's access to Fraser did not come at the expense of BAR access. Nothing in the transaction with CN in any way restricted BAR's access to Fraser's mill at Madawaska or inhibited BAR from competing for Fraser's traffic for movement over other BAR routes (such as with its affiliate the Canadian American Railroad ("CDAC") via Brownville Junction, Maine or with Springfield Terminal via Northern Maine Junction, Maine). BAR provided service under the Haulage Agreement from March, 2001 to early January, 2003, when its lines were sold to MMA. Although I understand the Trustee did not assign the Haulage Agreement or the Trackage Rights Agreement to MMA as part of the sale, MMA agreed with CN to continue the haulage arrangement on the same terms pending the disposition of court and STB proceedings on the rights of the parties to the agreements.

B. THE TERMS OF THE CN AGREEMENTS ARE FAIR TO BAR/MMA

As indicated above, I submitted in the earlier revocation proceeding a verified statement that included the above review of the events and circumstances leading up to execution of the CN Agreements. In its decision in that proceeding denying the Trustee's petition to revoke the exemptions, the Board stated:

"The statement of CN officer Clifford L. Carson rebuts any inference that CN acted other than honestly and efficiently in pursuing the exemptions. CN anticipated that BAR was in financial trouble, met with Fraser and BAR management to head off problems, devised an arguably efficient plan to deal with them, and took care, via the trackage rights and easement agreements at issue here, to protect its own financial interests and those of Fraser in the event that BAR were to fail."

Nowhere in the Application (at least nowhere in the Public Version I reviewed) does the Trustee even refer to, let alone discuss, what the Board said. Instead, the Trustee in the Application asserts that CN's rights should now be eliminated because the CN Agreements were

"a bad deal" for BAR and now MMA. Whether or not this was a "bad deal" for BAR, it was a fair deal.

First, I would point out that in paying \$5 million to BAR in 2001, CN did not under any circumstances obtain exclusive access to Fraser's Madawaska mill. At all times before and after the transaction, BAR continued to have unrestricted access to the mill and all of Fraser's traffic. That is equally true for MMA today. CN's \$5 million did not guarantee it a single car or a single dollar of revenue. To put it another way, BAR got the \$5 million and still had a shot at all of the business. What CN did get -- and what we wanted -- was commercial access to Fraser's mill on market terms (secured by trackage rights and an easement), the ability to assure that rail service to Fraser's mill would continue no matter what happened, and the ability to assure that Fraser would have continued access to CN's routes and service over the long term. Beyond that, we had to compete for Fraser's business. Had CN truly been in a position to "overreach" as the Trustee claims we did, we could have demanded and obtained exclusive access to Fraser's mill or at least to certain Fraser traffic. We didn't.

The haulage rate and the trackage rights rate set forth in the CN Agreements are market-based, similar to rates in other arms-length agreements CN has with other railroads. They are fair, indeed generous, to BAR/MMA. Under the Haulage Agreement, CN currently pays MMA a haulage charge of \$531 (as adjusted) per loaded car for an approximate 25-mile haul to the connection with CN at St. Leonard. Counting the empty return move, that is \$531 for 50 miles of haulage service or more than \$10 per car mile over the entire move.

Although
the terms and conditions of such arrangements vary with the specific circumstances involved,

haulage rates for overhead or bridge haulage arrangements to which CN is a party (where as in the Haulage Agreement, the railroad providing haulage provides the power, fuel and crews) typically range from \$ to \$ per car mile. Special circumstances (such as special power, crew or car arrangements, unique access, or cost savings) can result in higher rates. For example, CN has haulage arrangements with other railroads for CN haulage miles (round trip) to several major industries on CN at a haulage rate of approximately \$ per car mile (including local switching); for CN haulage miles (round trip) to a major port facility at a rate of approximately \$ per car mile (plus a switching charge of \$ per car); for haulage of CN cars miles (round trip) to multiple industries in a metropolitan area at a haulage rate of less than \$ per car mile (including local switching); and for CN haulage miles (round trip) to a power plant on CN for approximately \$ per car mile (using the other railroad's locomotives and fuel but CN crews). In each of the above examples, the voluntary haulage arrangement, like the Haulage Agreement with BAR/MMA, provided the railroad whose cars were being hauled with competitive access to an industry or industries it did not previously serve. As can be seen, the haulage rate paid by CN to BAR/MMA is comparable to, indeed higher than, the haulage rates involved in these other arms-length arrangements.

Moreover, it should be noted that under the Haulage Agreement, CN is responsible for all transportation documentation and billing and for the cost of furnishing cars on outbound shipments and is solely responsible for all loss and damage to the lading (when MMA supplies MMA cars, CN pays the car hire on the cars even while the cars are being handled by MMA over MMA's Madawaska Line). Under a traditional joint line arrangement, BAR would bear its share of these costs, a fact totally ignored by the Trustee.

As for the trackage rights rate, the Trackage Rights Agreement provides for a trackage rights charge of approximately \$106 (as adjusted) per loaded or empty car operated by CNR over the Madawaska Line. Counting the empty return move, that is approximately \$212 per car for the entire 50-mile round trip or more than \$4.00 per car mile.

Trackage rights rates for overhead or bridge rights in the U.S. in agreements to which CN is a party (where as in the Trackage Rights Agreement the trackage rights carrier supplies the power, crews, fuel and cars) average \$ to \$ per car mile. Even allowing for the fact that CNR's trackage rights over the Madawaska Line include access to Fraser, a trackage rights rate of more than \$4.00 per car mile is hardly an "overreach."

Just two months ago, on a potential movement of logs (in CN equipment) from Debert, Nova Scotia on CN to Houlton, Maine on MMA, MMA quoted CN a revenue requirement of \$ US per car for MMA's portion of the haul between St. Leonard and a transload facility on MMA at Houlton, Maine, a distance of approximately 157 miles. A copy of MMA's e-mail setting forth its revenue requirements on this traffic is attached as Attachment D. Under the Haulage Agreement, CN is responsible for all transportation documentation, billing, car hire and loss and damage to the lading. On a traditional joint line basis, of course, MMA bears all of the cost for its portion of the haul including the cost of locomotives, fuel, crews and car hire and assumes all of the liability.

Even more revealing, at the same time, in the same e-mail, on the same traffic, MMA quoted a revenue requirement of \$ US per car for its portion of the haul between St. Leonard and a transload facility on MMA at Northern Maine Junction, Maine. On this movement, MMA is happy to accept \$ for handling each car approximately

. In other words, MMA is willing to haul the traffic

. Again, on this traditional joint line movement, MMA's quote is for full MMA service: MMA bears all the costs and assumes all the risk on its portion of the haul. Under the Haulage Agreement with CN, it doesn't. MMA's own revenue requirements on actual traffic confirm that the haulage rate paid by CN is not unfair to MMA.

Another way of demonstrating the fairness of CN's haulage rate is by comparing BAR/MMA's revenue per ton mile and CN's revenue per ton mile on pre-haulage movements versus movements under the Haulage Agreement. Prior to the Haulage Agreement, when BAR was a bottleneck carrier, BAR extracted its "one lump" on all rail moves. BAR revenue per ton mile was very high relative to CN's revenue per ton mile on the same movement. Attached to my statement as Attachment E, is a chart of the top ten traffic lanes (by volume) of outbound paper from Fraser's Madawaska mill showing the BAR/MMA mileage and the CN mileage on each movement, and comparing BAR's revenue per ton mile on the movement in 2001 (pre-haulage) to CN's revenue per ton mile on the same movement and comparing MMA's revenue per ton mile on the movement in 2003 under the Haulage Agreement to CN's revenue per ton

mile on the same movement. As can be seen, BAR's revenue per ton mile in 2000 (when BAR was a bottleneck carrier on the traffic) was substantially greater than CN's, in some cases times greater. Though less than before, under the Haulage Agreement MMA's revenue per ton mile is still larger than CN's (in both cases, MMA supplies the cars). As shown on the chart, MMA's revenue per ton mile in 2003 on these movements still ranges from than CN's revenue per ton mile on the same movement. CN's haulage rate was not unfair to BAR and is not unfair to MMA.

The trackage rights rate is less than the haulage rate. In his testimony, Edward Burkhardt, Chairman of MMA, complains that CN may choose at any time to operate its trackage rights over the Madawaska Line to the mill (using its own locomotives and crews), for which MMA would receive \$4.00 per car mile instead of \$10.00 per car mile for MMA haulage service. The difference between the haulage rate and the trackage rights rate, of course, reflects the fact that in a trackage rights operation, CN bears the cost of furnishing the locomotives, fuel, crew and cars and for switching its own cars at the mill and is solely responsible for all car hire and liability. Four dollars per car mile for CN's trackage rights operation (under which MMA bears none of the above costs and risks) would still provide MMA with more revenue per car mile than

on which MMA bears all of the costs and risks.

In the nearly three years since the CN Agreements were executed, however, CN has not operated its own trains to Fraser's mill. MMA has provided haulage service for CN to the mill for nearly a year and BAR for nearly two years before that. Haulage service under the Haulage Agreement has worked well from CN's perspective and has allowed CN to compete for Fraser's business. The only time CN ever pursued operation of its own trains under the trackage rights

(which the Trustee refused to allow) was in response to the Trustee's initial efforts in early 2002 before the Bankruptcy Court to reject the Haulage Agreement and unilaterally terminate CN's access to the mill. Subsequent developments at the Bankruptcy Court and at the STB made resort to trackage rights operations unnecessary and CN has not sought to operate its own trains in the post-MMA period. Indeed, the additional costs associated with a trackage rights operation and the logistics of conducting operations across the border into the United States (including the possible need to hire American crews) is a disincentive for CN to run its own trains to the mill. Having the trackage rights, of course, acts as a powerful -- and in CN's view successful -- incentive for MMA to maintain the quality of the haulage service provided to CN. Assuming such haulage service remains available to CN and so long as MMA continues to provide the same effective haulage service that it has for the past 11 months, CN has no intention, need or desire to operate its own trains to the mill. CN represents here that so long as comparable and effective haulage service remains available to CN, CN will not seek to exercise its trackage rights or operating easement over the Madawaska Line.

As shown above, under a variety of measurements, the haulage rate and the trackage rights rate are fair to BAR/MMA. Nevertheless, Fred Yocum, the former President and Chief Executive Officer of BAR, and now Vice-Chairman of MMA, characterizes the CN Agreements as "one-sided" and suggests that the CN Agreements were a bad deal for BAR. Even setting aside what the above comparisons reveal, this is a particularly curious view for Mr. Yocum to take since he personally participated in the final stages of the negotiations with CN in 2001 and, as President and CEO of BAR, signed all three of the agreements. I have a hard time believing that Mr. Yocum, as an officer and director of BAR and its parent Iron Road, would knowingly breach his fiduciary duty to his company by entering into a deal with CN that he

knew was a bad deal. I also have a hard time believing that he would have asked for and obtained the consent of his lienholders to enter into the easement with the Waterloo if he truly believed it was a bad deal for his company.

Mr. Yocum also makes the bald assertion that, absent financial distress, no railroad manager would ever give up exclusive access to one of its major shippers. Mr. Yocum knows better. Railroads provide other railroads with commercial access to exclusively-served shippers all the time. Reciprocal switching arrangements among railroads not in financial distress where one railroad elects to provide another railroad with competitive access to an exclusively-served shipper (by accepting a flat switching charge in lieu of a division of the through rate) are, of course, common throughout North America. Where longer distances are involved, railroads will, where their interests warrant, choose to provide another railroad with competitive access to a shipper on its line via a haulage arrangement. For example,

Though less common, railroads, where their interests warrant, will grant direct physical access (in the form of trackage rights or, in Canada, "running rights") to an industry served exclusively by the granting railroad. For example,

That Mr. Yocum, the former President and CEO of BAR would assert that no railroad would ever give up access to one of its major shippers absent financial distress rings particularly hollow. In January, 2001 at the request of the shipper, CN elected to forego a division of the through rate and instead granted "running rights" (i.e., trackage rights) over CN's line at St. Leonard, New Brunswick to another railroad so that the other railroad could directly handle cars of logs from Maine into the Grand River Sawmill of J.D. Irving, Limited at St. Leonard. The Grand River Sawmill is one of the largest sawmills in Atlantic Canada with a production capacity exceeding 200 million board feet annually. Until that time, the mill was served exclusively by CN. Under this arrangement, CN granted the other railroad the right to move, with its own locomotives and crews, cars of logs from the end of the Van Buren rail bridge at St. Leonard over approximately 2 miles of CN's line to the mill and return. For these rights, the other railroad pays

. The railroad that obtained direct access to the mill served exclusively by CN? BAR. So far this year, BAR's successor MMA has handled over cars of logs into the Grand River Sawmill.

Each competitive access arrangement is, of course, necessarily based on its own unique circumstances. My point is that in each instance there were tradeoffs and risks and in each instance, the railroad with exclusive access to the plant balanced its interests, and -- whether

it was to satisfy an important customer, improve the efficiency of operations or achieve a larger objective -- elected to forego a division of the through rate and allowed another railroad to access the plant under a haulage or trackage rights arrangement. Such risks and tradeoffs are the essence of an arm's-length transaction. And, in none of the above examples was the railroad granting the access in financial distress. That Mr. Yocum, who is now employed by MMA, claims in hindsight, the deal he cut with CN in 2001 was not a good deal, does not thereby make it an unfair deal. The transaction with CN involved tradeoffs and risks on both sides. Whether or not it was a "good deal" for BAR, it was a fair deal.

C. COMPETITION BETWEEN MMA AND CN IS ACTIVE AND GROWING

The Trustee is also wrong in his assertion that there is no real competition between MMA and CN on Fraser traffic that would be lost if CN's rights were eliminated. Although I am not able to respond to whatever the Trustee's witness James Heller had to say on the subject because the Trustee designated Mr. Heller's entire statement as "Highly Confidential" (the accompanying Verified Statement of Christopher Vellturo addresses the Heller analysis), I can speak from my own experience as CN's chief marketing officer for this region. Contrary to the Trustee's claim, competition between CN and MMA for Fraser's business is very active and has intensified since MMA took over operation of the BAR.

Execution of the CN Agreements in 2001 gave CN for the first time direct competitive access to Fraser's Madawaska mill. For the first time, CN could originate and terminate traffic at the mill in its own name, deal with Fraser directly and quote its own rate for the entire movement without the need for a concurrence from BAR and without having to contend with a BAR bottleneck carrier division. It also, for the first time, made CN and BAR (now MMA) true competitors for Fraser's traffic. What they began competing for, and what CN

and MMA now compete for, is Fraser's rail traffic. Although trucks handle a significant percentage of Fraser's total Madawaska traffic, trucks handle their segment of the business due to the short haul involved, tight service requirements or where the receiver is not set up to receive by rail. Our experience over the years has been that CN has lost virtually no Fraser traffic to trucks and has gained virtually no Fraser traffic from trucks. Accordingly, in determining how we price our bids on Fraser's traffic, we only take into account potential price competition from MMA, not from motor carriers. CN's real competitor is its rail competitor, MMA.

As a result of having obtained competitive access to two railroads, Fraser now routinely solicits competitive bids on its rail traffic. For example, in early 2001, in response to a solicitation from Fraser, CN offered to enter into a rebate contract with Fraser on the inbound movement of kaolin clay from origins in Georgia to Madawaska for the period ending December 31, 2002. Kaolin clay is the largest volume inbound commodity received at the Madawaska mill. It is used to coat paper to give it a more uniform appearance and a glossy finish. It is usually shipped to Madawaska in slurry form in tank cars, but can also be shipped in dry form in covered hopper cars. Historically, CN participated in little of Fraser's clay traffic. We were, therefore, pleased when Fraser accepted CN's rebate offer, thus securing essentially all of Fraser's clay business for CN through 2002. Although the rebate contract with Fraser became effective approximately six weeks before the Haulage Agreement with BAR took effect, the contract was entered into in contemplation of CN obtaining competitive access to Fraser's mill and once the haulage arrangement was in place, the routes were changed to CN direct to Madawaska.

As that contract was about to expire at the end of 2002, Fraser again solicited a competitive bid from CN for the clay traffic, this time for calendar year 2003. We submitted a proposed rebate contract that we thought would be sufficient to retain the traffic on CN,

. On the last day of December, 2002, Fraser informed us that we had lost the business to an MMA-Canadian Pacific Railway ("CP") routing.

This past fall, Fraser solicited bids on the inbound clay traffic for calendar year 2004. This time we made what we considered a very strong bid, emphasizing CN's scheduled service and reliability and

. On October 30, 2003, Fraser informed us that we had not been selected as the carrier to handle the clay. We subsequently learned that CN's excellent service and transit times were not sufficient

. This is the second year in a row that we have lost the clay business to MMA and its partner CP. That business alone constituted CN's Fraser business in 2002 and represents lost revenue to CN of more than \$ (US) per year. We do not intend to cede this traffic to MMA. We will go after this traffic again next fall, but clearly, MMA has shown its willingness and ability to compete with CN for Fraser's traffic.

Outbound paper constitutes the largest segment of Fraser's rail traffic. CN currently has a three-year rebate contract with Fraser applicable on outbound ground wood paper and printing paper. The current contract provides for a rebate to Fraser of \$

. That is than the rebate in the prior CN contract that expired at the end of October, 2002. We felt that such an increase was necessary to retain the business in the face of increased competitive pressures from BAR/MMA. The first rebate contract with Fraser on outbound paper was entered into in 1999. It was intended to secure CN's participation in the traffic as a non-originating carrier (since we did not have access to the mill in 1999). At the time we entered into that contract,

. We paid this amount to induce Fraser to

. Although it had the effect of putting additional money in Fraser's pocket, this one-time payment dealt with an ancillary issue unrelated to the transportation rate on the paper.

. That contract expires

. We expect vigorous competition from MMA on the paper business when that contract expires. In the meantime, despite CN's contract, we believe that MMA has already succeeded in diverting away from CN some of Fraser's outbound paper traffic.

The result of this competition is that although the mill's production has remained relatively steady, CN is currently handling on an annual basis approximately 700 fewer carloads of Fraser traffic than at the time of my prior statement in May of 2002. Given what we have seen, we have no reason to believe that MMA will not continue to vigorously compete with CN for every carload of Fraser's business that MMA can handle. Without question, Fraser is benefiting from that competition. As the Board recognized in its June, 2002 decision, that competition is not diminished by the fact that CN is not currently exercising its trackage rights, but is serving Fraser solely under the haulage arrangement. As the Board stated:

"Fraser can benefit from the fall-back service availability and competitive option occasioned by the existence of CN's trackage rights, even if CN were never to commence operations under them."

I've no doubt that MMA would prefer to be in the position of a bottleneck carrier on Fraser's traffic without competition from CN. Granting the Trustee's Application would accomplish that. But, the price for that and the harm to the public interest would be the loss of the current active competition between MMA and CN.

**D. MMA'S CURRENT PROBLEMS ARE
NOT RELATED TO THE CN AGREEMENTS**

The testimony of Edward Burkhardt, Chairman of the Board of MMA, in the Application confirms that CN's rights are not the cause of MMA's current problems, and eliminating CN's rights is not the solution to those problems. At the time MMA acquired the assets of the BAR System in January, 2003, the CN's rights to Fraser's Madawaska mill had been in effect for nearly two years. Mr. Burkhardt admits that MMA was aware of the CN Agreements during his negotiations with the Trustee and took them into account in establishing the purchase price MMA was willing to pay: ". . . [I]n its negotiations with the Trustee, MMA offered significantly less than it would have paid absent the CN Agreements, but it agreed to pay an additional \$5 million if the Trustee succeeded in eliminating the CN Agreements." Mr. Burkhardt's testimony leaves no doubt that MMA acquired the BAR assets with full knowledge that the CN rights were in place and the purchase price actually paid by MMA reflected that fact. How can he now plausibly claim that the CN Agreements are "frustrating" MMA's efforts to increase its revenue?

The real causes of MMA's current financial difficulties are candidly described in Mr. Burkhardt's testimony. For example, he acknowledges that "within hours" of the closing on the purchase, Great Northern Paper Company ("GNP"), purported to be the largest single customer on the BAR System, filed for bankruptcy and shortly thereafter announced it would shut down its Millinocket and East Millinocket mills. According to Mr. Burkhardt, GNP's traffic amounted to 25% of the total monthly revenue for MMA. Although the East Millinocket mill has since reopened and rail traffic has begun to return, he states "the continuing sluggish performance of the economy in northern Maine and throughout the United States has also stunted the growth of MMA's traffic base and undermined MMA's push to attract sufficient business

...." CN understands that MMA's east-west line, the former CDAC route, has also experienced a decline in traffic volume, due in part to the rerouting of certain New Brunswick overhead traffic away from that route.

The clear picture that emerges from all of this is that MMA's current problems are not related to the CN's rights. Mr. Burkhardt and his investors knew about the CN rights, knew about the U.S. economy and the economy of northern Maine, and surely knew that GNP was in financial difficulty. Yet, they chose to proceed with the purchase at a price that reflected all of the above. Perhaps in hindsight, it now appears to them that they paid too much. What they now want is for the STB to help them make up for the shortcomings of the deal they struck and soften the impact on MMA's investors by eliminating competition from CN for Fraser's business and using the presumed additional revenue from achieving bottleneck carrier status to subsidize MMA's other operations. I respectfully submit that protecting private investors' expectations is not the Board's role. MMA should be working to address the causes of its current problems, not looking for a subsidy from Fraser and CN.

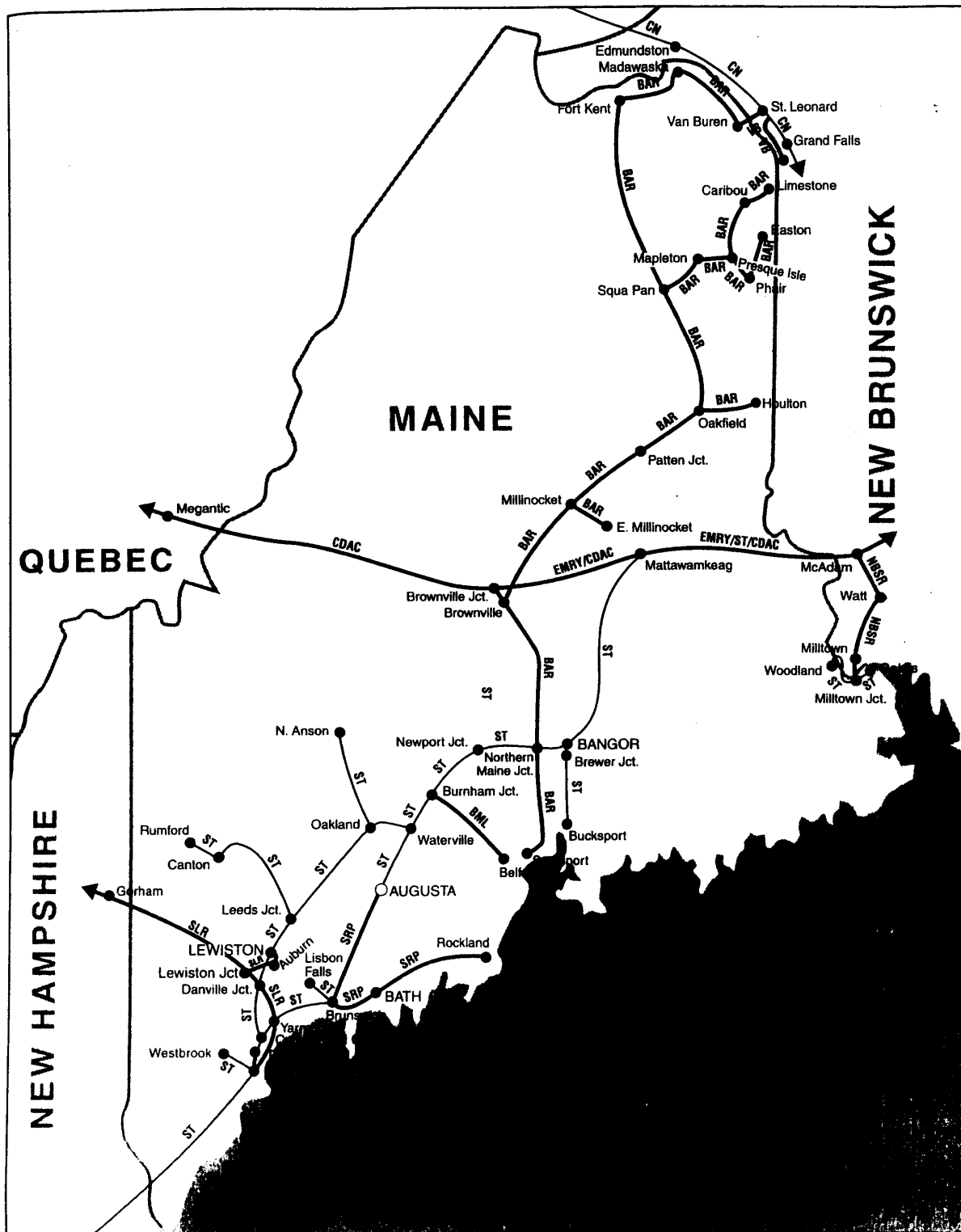
E. THE BOARD SHOULD ENCOURAGE, NOT DISCOURAGE, PRIVATE-SECTOR INITIATIVE

There is a final point I would like to make. In late 2000, BAR approached CN and asked CN for financial assistance. At about the same time, Fraser approached CN and asked CN to do what it could to assure continued rail service to its Madawaska mill. CN responded. In an arm's-length, private-sector transaction, done at the behest of and with the enthusiastic support of BAR, CN paid \$5 million cash to BAR so that BAR could continue operations. Although it did not stave off bankruptcy, BAR did not shut down. Fraser did not lose rail service. CN paid \$5 million without guaranteeing a single car or a single dollar in revenue to CN. If the Trustee assisted by MMA can now undo the transaction and, pocketing the \$5 million, eliminate CN's

rights, I predict it would be highly unlikely that any railroad in the future would be willing to step up and assume the risk of assisting a troubled connection as CN did. As a matter of sound transportation policy, the Board should encourage, not discourage such private-sector initiative.

I urge the Board to deny the Trustee's Application.

CARSON V.S.
ATTACHMENT A



**IRON ROAD
RAILWAYS**
INCORPORATED

February 6, 2001

Mr. Keith Heller
Senior Vice President
Eastern Region
Canadian National
895 de La Gauchetiere Street West
Montreal, Quebec H3B 2M9

Dear Mr. Heller,

Thank you for your letter of February 2, outlining a proposed commercial and operating relationship with three of our operating railroads, The Bangor & Aroostook Railroad, (BAR), The Canadian American Railroad, (CDAC), and the Quebec Southern Railway, (QSR). As you know, these are the three principal operating subsidiaries of our Bangor & Aroostook System (B&A).

We are favorably inclined toward this proposal. As stated in the meeting with Cliff Carson, Francois Hebert, Dale Williams, and Cristina Circelli, we believe that such an alliance will be beneficial for our mutual customers through offering them better transportation alternatives for reduced costs, while allowing both of us to enjoy market share growth and synergies.

Our understanding of the immediate proposal is that you are offering an arrangement whereby we would grant CN "junction settlement" haulage fees to three specific stations at rates which are less than our current divisions of revenue. A part of this additional revenue (or savings) received by CN will be in essence prepaid to B&A after allowing for CN's cost of capital and perceived risk. CN will provide the cars and be responsible for billing, settlement, loss and damage, and all traditional responsibilities of the tariff carrier, and will pay B&A on a junction settlement basis each month. CN will also receive trackage rights to these destinations and, although their exercise is at CN's discretion, their purpose is to ensure that CN can access this traffic under all circumstances in order to retain a fair return. This agreement would be for five years and CN will pay B&A US\$5 million when the STB exemption is effective.

Mr. Keith Heller
February 6, 2001
Page 2

Based on detailed analysis of your proposal, we have identified a limited number of issues which require further development as follow:

Economic Points:

- Analysis of current traffic at Madawaska reveals that considerably more traffic has changed to CN's account than was evident to us during initial discussions. As this derives from very recent significant diversions in your favor, we would like to be sure that it is taken into account in both our analysis and yours.
- We have applied the proposed rates to the above traffic which originates and terminates from these stations. Based on these calculations the annual gross revenue reduction to B&A (cost savings to CN) would be approximately \$2.5 million per year.
- Our analysis has determined that the Internal Rate of Return for CN from this arrangement is much higher than we had anticipated, particularly in view of the trackage rights securing access to the traffic. We believe this is due to the fact that the carload base which we are using is much greater than that which was initially provided to CN, and consequently, our respective rate of return analyses may not be representative of the current traffic. We have attached our analysis, which we would like to discuss further.
- As a possible alternative, we would also like to table the suggestion that we agree on a fair rate of return to CN for the \$5 million paid to B&A. We could then agree on the specific average value received per move and monitor the number of carloads handled through this haulage agreement. When the \$5 million plus the appropriate return was satisfied, the agreement would terminate – whether it takes more than five years or less. Although we believe this would be an equitable way to ensure CN's return, there may be other ways.

Trackage rights:

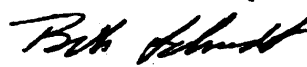
- After conferring with legal counsel, we believe that the trackage rights can be made effective after seven days by filing a Notice of Exemption with the STB. We would like to discuss what would be the most mutually advantageous manner to attain requisite regulatory approvals without delaying the initial payment to the B&A.
- In order to ensure survivability, we have been informed by counsel that it may be necessary that the per car minimum (which would be invoked St. Leonard to Madawaska) be clearly compensatory. We should discuss whether the \$35 per car charge would meet that test.

Mr. Keith Heller
February 6, 2001
Page 3

- The route for the Madawaska trackage rights is acceptable as proposed. With respect to Brookport and Magog we would be prepared to give our consent to the rights requested subject, however, to the continued existence of the Quebec Southern Railway lease and its restrictions. (This lease/purchase is amortizing over the next estimated 36 months or may be settled by lump sum payment at any time).
- Finally, we assume that a trackage rights agreement will have traditional industry standard language which calls for capital expenditure's costs to be divided on a wheelage basis, and which addresses liability, loss and damage, and labor issues which may arise.

Again, I would like to reiterate that we are appreciative of your proposal. We are favorably inclined with the concept and would be prepared to consider expanding its scope. This letter has attempted to clarify certain points and we look forward to discussing this with you at your earliest convenience.

Sincerely,



Robert T. Schmidt
President & CEO



Canadian National

K. L. Haller
Senior Vice President
Eastern Canada Division

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1 Administration Road
Concord, Ontario, Canada
L4K 1B9
Telephone: (905) 668-3340
Facsimile: (905) 761-4829

CARSON V.S. ATTACHMENT C

Canadian National

Premier vice-président
Division de l'Est du Canada

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Concord (Ontario) Canada
L4K 1B9
Téléphone : (905) 668-3340
Télécopieur : (905) 761-4829

TRANSMISSION BY FAX

February 8, 2001

Mr. Robert T. Schmidt
President and CEO
Iron Road Railways Inc.
44 Canal Center Plaza, Suite 303
Alexandria, VA 22314

Dear Mr. Schmidt,

This letter is in response to yours of February 6, regarding CN's February 2 proposal to provide financial assistance to Iron Road Railways in exchange of rate consideration and trackage rights.

Your February 6 letter states that you have analysed CN's proposal, in light of recent traffic diversions in CN's favour, and have concluded that the revenue impact of CN's offer is greater than you had originally assumed. You have also advised that certain contractual restrictions contained in the Quebec Southern Railway lease would prevent Iron Road from immediately granting CN trackage rights over these lines.

In light of these new developments, CN is prepared to amend its offer of February 2 as follows:

- For traffic that is routed via CN from and to Madawaska, ME, CN is prepared to offer Iron Road / BAR a "junction settlement" rate of \$500 (U.S. funds) per loaded car for movements between Madawaska, ME and St. Leonard, NB. CN will assume responsibility for car ownership and per diem, and for the establishment of rates, routes and divisions. *This agreement would have a term of 5 years, renewable by mutual consent at the end of this term.*
- CN is prepared to pay to Iron Road a trackage rights fee of 35 cents per car mile, but not less than \$50 (U.S. funds) per round trip (loaded and empty) for local trackage rights between Madawaska, ME and St. Leonard, NB, to serve Fraser Paper. This new minimum is compensatory. CN also accepts your proposal that this trackage rights agreement should be consistent with industry practice in such matters as (e.g.) liability, labour protection, loss and damage, and the pro-rata sharing of the cost of future capital investment.
- CN is prepared to drop its request for enhanced junction settlement rates and associated trackage rights for movements to Brookport and Magog.
- All other terms of my February 2 proposal remain unchanged, ie:
 - Junction settlement rates to be in effect for 5 years; rates to be escalated annually by a percentage equal to the annual percent change in the Rail Cost Adjustment Factor (RCAF-U);

Mr. Robert T. Schmidt
Page 2
February 8, 2001

- Iron Road / BAR to grant immediate trackage rights to CN for movements over BAR lines between St. Leonard and Madawaska, ME, such rights to be used by CN at its discretion. Iron Road/BAR shall also grant CN an easement on the property underlying the same track, so that CN's right to reach Fraser-Madawaska would also be protected in an asset sale of the company. This easement would contain similar terms and conditions as the trackage rights agreement, in terms of compensation to Iron Road, liability, etc.
- CN will file a Notice of Exemption with the STB, and will pay to Iron Road a lump sum of \$5 million (U.S. funds) when the STB exemption is obtained. The trackage rights agreement would be perpetual, and thus would survive beyond the five-year term of the junction settlement rate agreement, ^{subject to consent of IRRA holders} subject to adjustment of its economic terms prior to or upon expiration of the junction settlement rate agreement.

We believe that this is a fair and reasonable offer. While we are prepared to provide any clarification or greater detail that you may require, you should be aware that CN is not prepared to grant any further concessions to Iron Road in this matter. The preceding offer is subject to CN and Iron Road reaching a full agreement. If you concur to these terms, we would be prepared to draft such an agreement in short order.

I look forward to receiving your earliest response.

Yours sincerely,

Keith Heller

I concur,



Mr. Robert T. Schmidt
President and CEO,
Iron Road Railways Inc.



Mr. Robert T. Schmidt
President and CEO,
Bangor & Aroostook Railway



Mr. Robert T. Schmidt
President and CEO,
Quebec Southern Railway

**CARSON V.S
ATTACHMENT D**

Houry Stepanian
2003/11/05 13:59

To: Cliff Carson/CARSON/CNR/CA
cc:
Subject: RE: Houlton, ME

----- Forwarded by Houry Stepanian/STEPANIA/CNR/CA on 11/05/03 01:59 PM -----



"Jim Speed"
<jaspeed@mmarail.com>
m>

To: <Houry.Stepanian@cn.ca>, <jaspeed@mmarail.com>
cc: "Bob Thomas" <rdthomas@mmarail.com>
Subject: RE: Houlton, ME

09/10/03 04:04 PM
Please respond to
jaspeed

REDACTED

**CARSON V.S
ATTACHMENT E**

REDACTED

VERIFICATION

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

Executed on December 5th, 2003.


Clifford L. Carson

3

**VERIFIED STATEMENT
OF
CHRISTOPHER A. VELLTURO, PH.D.**

I. Qualifications

I am the founder and president of Quantitative Economic Solutions, LLC, a microeconomic consulting firm located in Cambridge, Massachusetts. I received a Bachelor of Science degree (*cum laude*) in applied mathematics and economics from Brown University in Providence, Rhode Island, and a Doctor of Philosophy (Ph.D.) degree in economics from the Massachusetts Institute of Technology (MIT) in Cambridge. While at MIT, I specialized in industrial organization and econometrics. During my tenure at MIT, I was awarded Bradley Fellowships in public economics (which is the study of how public policy decisions affect private sector incentives), and I have completed extensive training in that field. My Ph.D. thesis on the structural changes in the U.S. rail industry fostered by the passage of the Staggers Act, and their economic significance, was prepared under the guidance of Professor Ann Friedlaender, a leading expert in rail regulatory reform. My thesis and its progeny have been featured significantly in previous assessments of the competitive effects associated with rail industry consolidation.¹ I am called upon frequently to referee scholarly articles pertaining to the U.S. rail industry that are submitted to a number of the leading applied microeconomics journals.

¹"Cost Effects of Mergers and Deregulation in the U.S. Rail Industry" (with Berndt, *et. al.*) in *Productivity Issues in Services at the Micro Level*, ed. Zvi Griliches and Jacques Mairesse, Kluwer Academic Publishers, 1993; "Cost Effects of Mergers and Deregulation in the U.S. Rail Industry" (with Berndt, *et. al.*), *Journal of Productivity Analysis*, 4, 127-144, 1993; "Rail Costs and Capital Adjustments in a Quasi-Regulated Environment" (with Friedlaender, *et. al.*), *Journal of Transport Economics and Policy*, 131-152, May 1993; "Deregulation, Mergers and Cost Savings in Class I U.S. Railroads, 1974-1986" (with Berndt, *et. al.*), *Journal of Economics and Management Strategy*, Vol. 1, No. 2, 1992.

I have studied structural, regulatory, and competitive issues relating to the rail industry for 20 years. I have published several papers in academic journals relating to regulatory and competitive determinants of rail efficiency and viability. This body of research focused significantly (though not exclusively) on rail consolidation and rail regulatory reform. I continue to conduct research on transportation issues generally, and rail issues in particular. I assessed structural and competitive issues relating to the assimilation of Conrail into CSX and Norfolk Southern, and the acquisitions by Canadian National Railway Company ("CN") of the Illinois Central Railroad Company and its affiliates and subsequently, Wisconsin Central Ltd. and its affiliates, all before the Surface Transportation Board ("STB"). I presented testimony before the Board during the ANPR phase of the Board's rulemaking on Major Rail Consolidation Procedures.

I have extensive antitrust expertise and experience with respect, in particular, to the competitive ramifications of mergers and acquisitions. In the past seven years, I have conducted competitive analyses for over 120 proposed transactions. This work has spanned a broad array of industries, including (in addition to the aforementioned work in the rail industry): automobile manufacturing, grains and agricultural products, sugar, salt, fertilizers, chemicals, forestry products, machine tools, municipal waste, retail distribution, rail bed service equipment, petroleum and petroleum products, plastics, medical products and services, software, electronic funds transfer networks, lime, cement, computer and electronics manufacturing, and many others. In addition to the Board, I have presented my work before the United States Department of Justice (Antitrust Division), the Federal Trade Commission, the European Commission, the

Canadian Competition Bureau, the Federal Reserve, and various state Attorneys General.

My curriculum vitae is provided as Attachment 1.

II. Assignment and Conclusions

I have been asked by CN to address the competitive ramifications of the Adverse Application filed by the Trustee of the bankrupt Bangor & Aroostook Railroad Company ("Trustee") for abandonment/discontinuance of trackage and easement rights granted to CN (and its subsidiary The Waterloo Railway Company) on a rail line currently owned by the Montreal, Maine & Atlantic Railway, Ltd. ("MMA") between St. Leonard NB and Madawaska ME (the "Madawaska Line" to serve a paper mill ("Madawaska Mill") owned and operated by Fraser Papers Inc. ("Fraser Papers"). It is my understanding that, in the event such discontinuance is granted, it is anticipated that previously granted haulage rights on the Madawaska Line provided to CN by the Bangor and Aroostook Company ("BAR") will not be continued or extended. Thus, I assess the competitive ramifications of the discontinuance of any independent access by CN to the Madawaska Mill.

If CN's trackage rights on the Madawaska line are discontinued, there will be a significant reduction in rivalry for rail transportation into and out of the Madawaska Mill. While there are two independent rail options into and out of the Madawaska mill under the existing trackage agreement, the proposed discontinuance will provide MMA with complete control over rail access to the Madawaska mill, in that all rail traffic outbound from the mill must originate on the MMA, and all inbound traffic must terminate with the MMA. In the parlance of STB competitive assessment, the proposed discontinuance will result in a "2-to-1" structural change in effective rail service at Madawaska, and Fraser

Paper will once again find itself a captive shipper.

As a general matter, the STB has long recognized that such “2-to-1” structural changes in rail freight competitive options are in need of remedial action, unless sufficient competition from other transport modes provides sufficient competitive constraints on the railroads’ pricing and service offerings. Such remedial actions frequently take the form of the granting of trackage rights to offer independent access to the captive shipper for a second railroad. The proposed discontinuance eliminates just such trackage rights, and returns the Madawaska mill to a captive (and presumptively, competitively harmed) shipper.

A detailed analysis of traffic patterns and competitive conduct surrounding transportation into and out of the Madawaska mill demonstrates that current competition among MMA and CN is intense, and that Fraser Paper has benefited from this enhanced competition in the form of lower prices and increased service quality. This analysis also clearly demonstrates that intermodal competition (motor carriers) has not offered meaningful competitive constraints on rail freight service prices and service levels for shipments into and out of Madawaska, and is unlikely to offer a competitive constraint remotely comparable to that currently provided by the rivalry between MMA and CN in the future. Thus, the proposed discontinuance will likely result in significantly higher transportation costs for Fraser Paper.

III. Overview of Competitive Assessment of Captive Shippers

A. Current Analytic Framework

In their determination of the potential for competitive harm to a given shipper, economists/analysts seek to determine whether a particular shipper is effectively

“captive” to a single rail freight line (denoted, for expositional ease, as Railroad A). More specifically, analysts seek to determine: does a given shipper have access to *any existing* rail transportation alternatives where access to the rail transportation services of Railroad A are not necessary to complete the transport?² If no such alternatives are available, then the shipper faces an existing rail transport bottleneck in the form of Railroad A. The shipper is effectively captive if there are no feasible rail entry possibilities or intermodal (largely motor or water carrier) transport alternatives that offer *effective* competition to rail freight service.³ Effective competitive alternatives mean, in this context, that the alternatives provide a binding constraint on the pricing and service levels provided by the rail bottleneck service. In other words, the freight railroad must charge competitive prices for its service else it will lose volume traffic to competing modes or to rail entry of sufficient volume to render any supra-competitive price unprofitable.⁴

B. Rail Freight Bottlenecks and Captive Shippers

The existence of the bottleneck railroad has far reaching implications for the effective rates a captive shipper will pay for transportation services, even if the bottleneck exists for a relatively minimal length of the overall rail route over which the shipper

² For a more generalized discussion of the nature and characteristics of captive shippers, see “Testimony of Roger Nober” before the Senate Committee on Commerce Science and Transportation Subcommittee on Surface Transportation and Merchant Marine Hearing on Railroad Shipper Issues and S. 919, October 23, 2003 (henceforward “Nober Testimony”).

³ See Nober Testimony, p. 2 and p.5.

⁴ This concept of identifying competitive alternatives for the purpose of assessing potential anti-competitive harm through the assessment of pricing constraints lies at the heart of the federal antitrust enforcement agencies model for identifying and assessing anti-competitive conduct and related consumer harm. See, e.g. US. DOJ and FTC Horizontal Merger Guidelines, Sections I and II.

seeks transportation service. As the STB has repeatedly and consistently determined, the competitive implications of an existing rail bottleneck can and should be considered, regardless of the rail competitive structures that exist down-route or up-route from the bottleneck, and should be considered in terms of the competitive implications that such a bottleneck has on the total transportation costs paid by the captive shipper. This is because the bottleneck railroad controls access to all rail freight alternatives for the shipper, and can be in a position of significant market power and market dominance to obtain the entire monopoly profit associated with a rail freight move.

1. The “One Lump” Approach to Rail Bottleneck Issues

In STB parlance, this concept is referred to as the “one lump” assessment of anti-competitive issues in rail freight transportation. Recognition that a bottleneck carrier’s incentive to extract all available economic rents associated with the overall traffic movement in which it participates, regardless of its ownership position in any of the other routes used to complete the move, represents the long standing basis upon which the ICC and STB have evaluated competitive concerns in rail freight markets. Shortly after the passage of the Staggers Act, the ICC stated: “A carrier with a destination monopoly will likely push through a rate as high as possible and keep the monopoly profits to itself”.⁵ The ICC reiterated its position on the relevance of one lump analyses in the overall competitive assessment of rail moves in its BN/SF decision in 1995 and 1998: “Our experience has been that where a single rail carrier controls a destination segment, and no transportation alternatives are available, the shipper will be captive and the single rail

⁵ UP/MP, 366 I.C.C. at 538.

carrier will be able to capture the preponderance of the economic profits.”⁶

A simple economic model speaks to the nature of rail bottlenecks and the nature of potential competitive harm under the one lump analysis. I provide a schematic of this model in Attachment 2. In this scenario, the terminating/originating rail spur at the captive shipper is owned/controlled by Railroad A. All other railroads must access this spur to provide rail service to the shipper. I assume that the cost of rail freight transport into (or out from) the bottleneck point (point N) is priced at \$10/ton. The shipper’s best non-rail alternative in this scenario is to ship its products via motor carrier to either the same sites as served by the railroads (or any alternative site) at a transport cost of \$30/ton.

Under the one lump approach, the competitive structure and competitive interactions of the non-bottleneck railroads is irrelevant in determining the likely total effective rail rate that the shipper will pay. The bottleneck railroad, Railroad A, as a profit-maximizing agent, will recognize that it controls access to all transportation alternatives for the shipper, except the \$30/ton motor carrier option, and will charge a per ton rate so that the total overall cost of the rail option is just under \$30 (for clarity \$29 is used as the amount in Attachment 2). In this way, the bottleneck carrier is in a position to capture all of the “economic rents” associated with the enhanced competitive position that rail has over motor carriers.

It is the pernicious effect on rail rate setting identified above that has led the STB to presumptively require rail mergers that reduce the number of serving roads at a given

⁶ *Burlington Northern Inc. – Control and Merger – Santa Fe Corp.* 10 I.C.C. 2d 661, 751 (1995). See also *CSX Corp – Control and Operating Leases/Agreement – Conrail Inc.* STB Finance Docket No. 33388, Decision No. 89, slip op. at 70).

shipper from “2-to-1” to provide remedial relief. In virtually all such relief, the STB requires the granting of trackage rights over the bottleneck route to an independently owned and operated railroad. Typically, such trackage rights are granted where the recipient railroad agrees to pay some pre-determined, cost-based charge (typically per car) to the bottleneck railroad to ensure that the recipient road can offer effective competition while the bottleneck road is not required to provide access without recouping any associated costs.

2. A Schematic Interpretation of Bottleneck Issues and the Role Trackage Rights Have in the Resolution of Anti-Competitive Rate Setting

In Attachment 3, I modify the model in Attachment 2 and introduce the concept of trackage rights and how rail freight competition can be restored as a result. Prior to the granting of trackage rights on the bottleneck route, Railroad A would charge just under \$20/ton for its portion of the move, thereby ensuring that traffic will not divert to motor carriers (priced at \$30/ton), yet making sure that Railroad A captures the entirety of the monopoly profits available to it. In this context, motor carriers represent the effective pricing constraint on Railroad A, for the fear of lost volume to motor carriers at \$30/ton keeps Railroad A from charging an even higher price.

Now I introduce the concept of trackage rights along the bottleneck route, where Railroad B is permitted to run freight over the route in question and pay \$8/ton in fees to Railroad A. Accounting for a competitive rate of return of the capital and assets Railroad B (including the recuperation of any up-front fees that may have been expended to obtain the trackage rights), a new equilibrium price will be reached, as Railroads A and B compete for business over the previously bottlenecked rail line. In this instance, the

equilibrium price the shipper will pay for rail transportation services drops, from just under \$30/ton, to approximately \$20/ton, with the maintained hypothesis (for illustrative purposes only) that \$2/ton represents an equilibrium return on capital outlays for Railroad B. The equilibrium price for the bottleneck portion of rail service thus rests at approximately \$10. Whereas before Railroad A faced no credible threat that the shipper could turn to another railroad for service into or out of its plant, the creation of an independent railroad option in Railroad B forces Railroad A to face the specter of losing shipment volume and its corresponding gross profit margins. Thus, Railroad A will respond to the competitive threat by lowering its prices to compete with Railroad B. Critically, the shipper benefits greatly from the change in competitive structure, from Attachment 2 to Attachment 3, the shipper saves approximately \$9 per ton on its rail-shipped volumes.

The fact that Railroad A now faces rivalry for transportation along the bottleneck route stimulates competition, and the resulting lower transportation costs benefit the shipper (either through direct savings or through more aggressive pricing and enhanced sales volumes for its delivered products).⁷ Note in this outcome, the motor carrier option no longer represents a binding competitive constraint on the pricing of rail freight traffic, as the motor carrier price of \$30 is no longer in the same range as the competitive rail freight price of \$20.

⁷ For ease of exposition, I assume throughout this analysis that price is the only dimension along which competition takes place. In reality, rail competition involves not only price, but level of service – including delivery time, access to specialized cars/equipment, and other factors. Often, various rail transportation options are compared on a price-quality basis, where different price-quality bundles are offered by different competitors. While such price-quality bundles are somewhat differentiated from one another, they still afford significant competitive constraints on one another. In this sense, the “prices” identified in Attachments 2 and 3 (and thereafter) should be considered as “quality-adjusted” prices.

As a final note, it is important to recognize that the benefits the shipper enjoys as a result of competition among so-called bridge carriers in Attachments 2 and 3 differs dramatically. Under Attachment 2, Railroad A is the effective termination point of all rail traffic, and as the controlling agent into the shipper, it gets to collect and keep all of the economic rents associated with rail transportation. Under the granting of trackage rights in Attachment 3, the control of which rail options to use returns to the shipper, and the shipper benefits from the resulting lower prices and/or improved service.

C. Assessing the Competitive Influence of Intermodal Competition and *de novo* Rail Entry

As the STB has long recognized, the necessity/ability of trackage rights to restore/foster competition and lower effective rail prices is dependent on the extent to which other transport modes or new rail entry already provide an effective competitive discipline on existing railroads. Again, Attachment 3 provides a useful framework for considering this issue. If the price at which a motor carrier could provide an effective transportation alternative to the candidate captive shipper were not \$30, but \$20, then the granting of trackage rights would not be required to sustain/establish effective competition (I provide a schematic of this set of conditions in Attachment 4). In this example, motor carriers would represent an effective constraint on rail freight rates, (in the STB's parlance, motor carriers would provide "effective competition") and the competition afforded by the granting of trackage rights would be redundant.

Similarly, if a rival railroad (Railroad C) were able to credibly threaten to build a new rail spur into the candidate shipper and charge rates near \$8/ton for its segment of rail movements, the granting of trackage rights would again result in a competitive

redundancy, and would not be necessary to maintain effective rail competition. I provide the schematic for this scenario in Attachment 5.

IV. Competitive Evaluation of The Proposed Discontinuance at Madawaska

Beginning in April 2001, CN obtained rights from BAR to haul traffic over the Madawaska line ("Haulage Agreement"). Concurrently, CN obtained trackage rights on the same line ("Trackage Agreement"). In consideration for the haulage/trackage rights, CN paid \$5,000,000 to BAR. Prior to the Haulage Agreement, BAR earned approximately \$1,000 per carload on traffic BAR handled in conjunction with CN. Under the Haulage Agreement, CN obtained access to the Madawaska line in exchange for payments to BAR of approximately \$531 per carload for hauled traffic.⁸ For traffic moved under the Trackage Agreement BAR (now MMA) would receive approximately \$200 per carload.

As demonstrated below (and repeatedly demonstrated by the Trustee's own analyses)⁹, competition between BAR/MMA and CN since the implementation of the haulage/trackage agreements has been intense. Available data indicate that significant rail traffic has changed hands back and forth between CN and BAR/MMA, and that Fraser Paper has been able to use each road as a credible threat against the other to obtain more attractive rates on its outbound paper and inbound supplies. Consistent with the STB's long standing assessment of the competitive implications of trackage/haulage rights vis-a-vis captive shippers, the creation of such rights on the Madawaska line has

⁸ See Verified Statement of Clifford Carson ("Carson VS").

⁹ See Verified Statement of James Heller ("Heller VS")

resulted in an intensification of the level of competition for outbound and inbound freight to the Fraser Paper Mill.

Under the proposed discontinuance, the rivalry between CN and BAR/MMA fostered through the haulage/trackage agreements will be eliminated, and the effective rates Fraser Paper pays for its rail services will reflect this loss in rivalry.¹⁰ Other modes of transportation (motor carriers or de novo rail entry) do not offer effective constraints and will not ensure that Fraser Paper will enjoy the same level of rail freight pricing it has had under the currently competitive scenario. Thus, Fraser Paper will be adversely affected through higher rail freight rates/reduced service quality if the proposed discontinuance is granted.

1. Existing Competitive Dynamic on the Madawaska Line

There is direct evidence that the establishment of CN haulage/trackage rights had a fundamental impact on the nature of competition for outbound and inbound freight traffic at the Fraser Paper mill.

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(Heller VS, Page 8)¹².

¹⁰ Throughout this section I refer to changes in "rail rates" -- such changes in rail rates may occur in the form of changed prices for a consistent level of service, changed service levels for a consistent price, or any combination thereof.

¹¹ Heller VS, footnote 12.

¹² See also Heller VS, footnote 12.

. As noted extensively in the previous section, this is precisely the kind of rivalry that haulage/trackage rights are intended to create/restore – the availability of more than one independent route to rail access where there had previously been only one such route.

a. Competitive Gains/Losses in Traffic Volume Resulting From Increased Rivalry Between CN and MMA/BAR

Not surprisingly, the competitive interaction generated by this increased rivalry has led to significant shifts in traffic volumes between rail freight options that alternatively use the BAR/MMA and the CN access rights to access the Fraser Paper mill.

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¹⁴ Based on my conversations with CN business and marketing personnel, these results are not surprising. CN perceived that it faced sharply higher competition from BAR/MMA as BAR/MMA sought to regain volumes on the Madawaska Line.

¹³ Heller VS at pp.21-23

¹⁴ Heller VS, footnote 46.

In his Verified Statement, Mr. Heller attributes most of the price reductions enjoyed by Fraser Paper to intensified competition by bridge carriers – carriers that handle Fraser Paper traffic for a portion of the route toward the final destination – and that the benefits of such competition are unrelated to the haulage/trackage rights granted to CN. While bridge competition may have intensified and may have resulted in lower prices charged by such bridge carriers, the conclusion that the benefits of such lower prices to Fraser Paper is not dependent on the establishment of CN's rights on the Madawaska Line is incorrect as a matter of economics. First, some of the most intense competition for Fraser traffic is between full-line haulage by CN, and interlined hauls by the Canadian Pacific/MMA. The haulage/trackage rights creates direct and independent competition between these rail options; no independence existed prior to CN's acquisition of its rights to the Fraser Mill.

Second, with CN's competitive access to the Fraser Mill, the lower prices associated with more intense downstream bridge competition (between, for example, CSX and NS for deliveries and origins in the Southeastern U.S.) now inures to Fraser Paper, where previously, such competition only would result in greater economic rents to the benefit of the MMA/BAR. Prior to CN's access, Fraser Paper would delegate all of its rail transport pricing and routing decisions to the BAR, since the BAR controlled access to all such options. With the establishment of haulage/trackage rights by CN, Fraser Paper has two such options. Just as depicted in Attachments 2 and 3 *infra*, any reduction in bridge pricing that would benefit Railroad A (here, MMA) -- and not the shipper -- under Attachment 2, instead directly benefits the shipper under Attachment 3. Attachment 3 is the competitive dynamic that currently exists under CN's

haulage/trackage rights; if these rights are discontinued, the competitive dynamic will revert to Attachment 2, where the MMA keeps the benefits associated with bridge competition. As a result, Fraser Paper's rail rates will rise.

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. This is not surprising, given that the re-establishment of the effective bottleneck will, in turn, re-establish the MMA as the single railroad that controls all access to the Madawaska mill and will thus enable MMA to earn the economic rents currently unavailable to MMA as a result of increased competition with CN.^{16,17}

The increase in rivalry for rail freight moves was not limited to competition for outbound freight. Fraser Paper also benefited

¹⁵ See MMA HC 000195, 000371.

¹⁶ See also MMA HC 000325-26

¹⁷ It is important to note that, despite the Trustee's repeated assertion that motor carriers offer effective competition, there is not one instance in his filing that identified a loss of specific rail traffic volume to motor carriers or a gain of rail traffic volume from motor carriers. Consistently, my independent analysis has turned up no such instances. I will discuss the implications of this finding in the inter-modal competition section, *infra*.

¹⁹ Indeed, this intensified competitive behavior is precisely what economists would expect to see if the haulage/trackage agreement had generated a new competitive dynamic and more extensive rail freight competition.

b. Price Reductions on Outbound Paper at CN are the Direct Result of Aggressive Competition from MMA/BAR

¹⁸ Heller VS, p. 31 (emphasis added).

¹⁹ For a more complete discussion on the nature of competition between CN and MMA for the Madawaska clay business, see Carson VS.

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In his Verified Statement, Mr. Heller

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²⁰ Heller reports that

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²² For additional details on the CN-Fraser rebate arrangement, see Carson VS.

. Competition for such marginal volume is the basic building block of price formation in economics, and to see CN “sharpening its pencil” vis-à-vis other rail options through a reduction in such marginal rates is a clear indication of more robust competition, and corresponding financial benefits to the shipper.

2. Logistical Implication of the Discontinuance at Madawaska

In the parlance of the captive shipper models I presented in Section II, *supra*, the discontinuance of the CN haulage/trackage rights on the Madawaska line would result in a shift in the competitive dynamic into and out of the Fraser Paper mill from the scenario presented in Attachment 3 back to the scenario presented in Attachment 2. In other words, the discontinuance would create (technically, re-create) a captive shipper at Madawaska. All rail freight options into the Fraser Paper mill would have to terminate with the MMA, and all freight options originating at the Fraser Paper mill would be on the MMA. CN would no longer have the ability to price rail service into and out of Madawaska independently of MMA.

3. Competitive Implications of Proposed Discontinuance

The loss of CN’s independence into Madawaska resulting from the proposed discontinuance would create an effective “2-to-1” change in the competitive structure for Fraser Paper. As noted extensively above, the STB has recognized that such changes in

competitive structure are presumptively anti-competitive and in need of remedial action, unless other transportation options afford effective rate competition. As I have demonstrated above, the implementation of the haulage/trackage rights resulted in an intensification in rail freight competition. This would strongly indicate that the removal of such rights would weaken the intensity of rail freight rivalry.

The only remaining questions, therefore, are whether supplemental competition from other transport modes, or *de novo* rail entry would place an effective discipline on MMA pricing under the discontinuance of the haulage/trackage rights. It is my understanding that the completion of a *de novo* rail spur into the Fraser Paper mill has never been contemplated and is a highly unlikely event²³, so I do not consider it a realistic alternative here. I focus instead on the potential constraining impact of motor transport.

First, it is important to note that, for such motor carrier transports to offer any effective competitive constraint on the MMA, post-discontinuance, the entire move using motor carriers must be completed without any required access to the MMA rail spur into Madawaska. Any motor carrier moves in conjunction with an initial rail move, including any TOFC moves or intermediate shipments via rail into warehouses for subsequent moves by motor carrier, are wholly irrelevant in that such movements rely on an originating rail haul from the mill to the point where motor carrier transport begins (be

²³ Even a cursory review of a North American rail freight route map demonstrates that, due to its geographic isolation, Madawaska is a highly improbable locale for a rail spur extension for virtually all North America railroads. Only CN merits any consideration, and I understand from CN personnel that a *de novo* rail spur from the Fraser mill to the CN connection at St. Leonard, New Brunswick, is not feasible from a financial perspective.

that a rail TOFC/COFC yard, or a warehouse). Again, under the proposed discontinuance, all such initial rail moves would be under the control of the MMA.

Second, as noted earlier, there is no historical evidence that motor carriers and rail freight operators have competed with each other for paper volumes out of Madawaska, or for input volume into Madawaska.

If there were an active competitive dynamic between motor carriers and rail freight for Madawaska outbound paper traffic, I would expect to see movement in these shares as one set of rivals won business from the other, and the other sought to gain it back. Indeed, one of the central avenues of evidence that the U.S. antitrust enforcement officials recognize in qualifying two products or services as substitutes is the existence of customer switching between them.²⁴ Here, there is no evidence of switching behavior between rail and truck. Indeed, in my communications with CN marketing and sales officials, they could not recall a single instance where motor carrier options had any impact on their pricing decisions regarding outbound Madawaska paper.

Finally, in this regard, it is very telling that

All these factors clearly indicate that motor carrier transport does not represent an effective constraint on rail freight rates out of Madawaska. As motor carriers do not represent a good alternative to MMA's control of rail freight access into Madawaska, I

²⁴ See, Velturo, Christopher A: "Creating An Effective Diversion: Evaluating Mergers With Differentiated Products," *Antitrust*, Spring 1997.

would expect rail freight rates into and out of Madawaska to rise considerably as a result of the proposed discontinuance.²⁵

As a final defense for the proposed discontinuation, the Trustee claims that

²⁵ The Trustee has claimed that,

²⁶ Heller VS, p. 45.

V. Conclusions

Based on my review of the available evidence in this proceeding (both independently and as presented by MMA in its submissions), my experience in antitrust economics generally and with respect to the rail industry in particular, and my discussions with relevant business personnel at CN, I conclude that the proposed discontinuance will result in a significant reduction in competition for rail transport services into and out of the Fraser Paper mill. The discontinuance will result in a change in the competitive structure from “2-to-1” independent participants. The STB has found such changes in structure to be presumptively problematic. The evidence in this case indicates that the Madawaska line is not an exception. Significant competitive rivalry that has developed under the haulage/trackage rights would be eliminated. Other transport modes (notably motor carriers) and *de novo* entry will not serve as effective constraints on the MMA going forward at Madawaska. The result will be higher rail freight prices and reduced service levels for traffic originating at and terminating in Madawaska.



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ATTACHMENT 1

CHRISTOPHER A. VELLTURO
President

In the course of his career, Dr. Vellturo has performed extensive economic analyses and provided expert testimony in the context of mergers and acquisitions, antitrust litigation, intellectual property litigation and numerous other matters spanning a broad array of industries. He is recognized by legal industry journals as one of the top fifty antitrust economists worldwide and has appeared repeatedly before the U.S. Department of Justice, the Federal Trade Commission, various states' Attorneys General offices, the Federal Reserve Bank Board of Governors, and numerous other regulatory agencies on merger-related issues. Dr. Vellturo has also made appearances at hearings before the European Commission and testified at the Canadian Competition Bureau, the U.S. District Court and the American Arbitration Association. To date, he has performed economic analyses in over one hundred mergers and acquisitions and relating to litigation matters, an excess of fifty antitrust and one hundred intellectual property actions.

Prior to forming Quantitative Economic Solutions, LLC (QES), Dr. Vellturo was a Principal at Analysis Group/Economics (AG/E) and a Senior Vice President and member of the Board of Directors at National Economic Research Associates (NERA). He was also a founding director of Cambridge Economics, Inc., a microeconomic consulting firm recently acquired by Lexecon, Inc.

Dr. Vellturo has published on a variety of topics, including merger and acquisition-related efficiencies, price discrimination, differentiated product analysis and market definition. His research has appeared in leading academic journals, including *Antitrust*, the *Antitrust Law Journal*, and the *Journal of Economics and Management Strategy*. Dr. Vellturo is a recipient of the Bradley Fellowship in Public Economics and has served as a referee for *American Economic Review* and *Rand Journal of Economics*.

A Ph.D. graduate in Economics from the Massachusetts Institute of Technology, Dr. Vellturo also holds a Sc.B. in Applied Mathematics and Economics from Brown University, where he graduated *magna cum laude* and *Phi Beta Kappa*.

EDUCATION

- 1989 Ph.D. in Economics, Massachusetts Institute of Technology
 Primary Fields: Econometrics, Industrial Organization
 Secondary Fields: Public Finance, Game Theory, Law and Economics
- 1983 Sc.B. in Applied Mathematics and Economics (*magna cum laude*), Brown University

PROFESSIONAL EXPERIENCE

- 2002-Present **Quantitative Economic Solutions, LLC**
 President/Manager – Direct research on microeconomic issues in litigation and non-litigation matters. Areas of particular focus include: antitrust, regulation, and damages assessment in intellectual property and contract matters.
- 2000-2002 **Analysis Group/Economics**
 Principal - Direct research and provide expert testimony on a variety of microeconomic issues with particular emphasis on antitrust, intellectual property, and mergers and acquisitions. Expert reports and testimony presented in U.S. District Court. Presented antitrust economic analyses to Federal Trade Commission, U.S. Department of Justice, Federal Reserve Bank Board of Governors and the European Commission.
- 1996-2000 **National Economic Research Associates, Inc.**
 Senior Vice President (1999-00)
 Vice President (1996-99)
- 1991-1996 **Cambridge Economics, Inc.**
 Director - Directed research and provided expert testimony on a variety of microeconomic issues with particular emphasis on antitrust, intellectual property, and mergers and acquisitions. Prior expert testimony provided in U.S. District Court and before the American Arbitration Association. Presented antitrust economic analyses to U.S. Department of Justice, Federal Trade Commission (Antitrust Division), state Attorneys General offices, and the Federal Reserve Bank Board of Governors.
- 1989-1991 **National Economic Research Associates, Inc.**
 Senior Consultant - Directed and performed research relating to issues of antitrust, intellectual property, mergers and regulation.
- 1987 **Department of Economics, M.I.T.**
 Teaching Assistant - Undergraduate econometrics.
- 1985-1989 **Dean Ann F. Friedlaender, M.I.T.**
 Research Associate - Participated in research relating to transportation pricing and capital allocation responses to regulatory changes.

1983-1985 **National Economic Research Associates, Inc.**
Research Associate - Conducted research on a wide variety of issues including antitrust, railroad rate setting, optimal landfill pricing, and PCB and asbestos abatement strategies.

AWARDS AND PROFESSIONAL ACTIVITIES

1987-1989 Recipient, Bradley Fellowship in Public Economics
1986 M.I.T. Departmental Fellowship
1983 Phi Beta Kappa, Brown University
1983 Sigma Xi, Brown University
Present Journal Referee for *American Economic Review* and *Rand Journal of Economics*
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TESTIFYING HISTORY (PAST FOUR YEARS)

- *Milliken & Company v. Mohawk Industries, Inc., et al. / Shaw Industries Group, Inc., et al. / Interface, Inc., et al.*
U.S. District Court, District of South Carolina, Spartanburg Division, Civil Action Nos. 7-02-3631-20/7-02-3632-20/7-02-3633-2.
- *Torah Soft, Ltd. v. Michael Drosnin*
U.S. District Court, Southern District of New York, 2000 Civ.: 0676 (JCF).
- *Dresses for Less, Inc., DFL Management Inc., The DFL Apparel Group, an unincorporated association, Allison-Che' Fashions, Inc., Bucci Studio Ltd., Garden City Dresses for Less, Inc., Donald Weiner and Barbara Weiner, individually and derivatively as shareholder of Stella N. Bishop Fashion Corp., and I.S.B. Fashions Corp. v. CIT Group/Commercial Services, Inc. and The Uptown Credit Group, Inc.*
U.S. District Court for the Southern District of New York, C.A. No. 01 CIV. 2669 (WHP).
- *Verizon California Inc., a California Corporation, v. Ronald A. Katz Technology Licensing, L.P., a California limited partnership*
U.S. District Court, Central District of California, Case No. 01 CV-09871 RGK (RCx).
- *First Citizens Bank and Trust Company of South Carolina, as Conservator for Alex Compton, a minor and Alex Reid Compton and Lisa Compton, in their individual capacity, as the natural parents of Alex Compton, a minor v. CSX Transportation Inc.*
U.S. District Court, District of South Carolina, Anderson Division, Civil Action File No. 8-01-4613-20.
- *DePuy AcroMed, Inc. and Biedermann Motech GMBH, Plaintiffs, v. Medtronic Sofamor Danek, Inc., f/k/a Sofamor Danek Group, Inc. and Medtronic Sofamor Danek, U.S.A. Inc.*
U.S. District Court, District of Massachusetts, Civil Action No. 01-CV-10165 (EFH).

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- *The Toro Company v. White Consolidated Industries, Inc. and WCI Outdoor Products, Inc*
U.S. District Court, District of Minnesota, Civil Action No. 4-95-656.
- *In Re: Vitamins Antitrust Litigation*
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South Carolina Court for Common Pleas, Anderson County, C/A No: 01-PC-04-504 and C/A No: 01-CP-04-505
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- *Arthur D. Little Enterprises, Inc. and The Gillette Company*
American Arbitration Association, Northeast Case Management Center, Arbitration No. 11 133 00735 00
- *Roll Off Service v. Waste Management of Arkansas, Inc. d/b/a Waste Management of Northwest Arkansas*
U.S. District Court, Western District of Arkansas, Fayetteville Division, Civil No. 01-5059
- *VLT, Inc. and Vicor Corporation v. Lucent Technologies Inc. and Tyco Electronics Power Systems, Inc.*
U.S. District Court, District of Massachusetts, C.A. No. 00-11049 PBS
- *Texas Instruments, Incorporated v. Tessera, Inc.*
U.S. District Court, Northern District of California (Oakland Div), No. C-00-02114 CW
- *The Commissioner of Competition v. Canadian Waste Services Holdings Inc, Canadian Waste Services Inc. and Waste Management, Inc.*
Competition Tribunal of Canada (CT-2000/002)
- *Massachusetts Businessman's Association Inc., v. Blue Cross and Blue Shield of Massachusetts, Inc.*
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- *Union Carbide Chemicals & Plastics Technology Corp. and Union Carbide Corp. v. Shell Oil Company, Shell Chemical Company and CRI Catalyst Company*
U.S. District Court, District of Delaware, C.A. No. 99-274 (SLR)
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U.S. District Court, Southern District of New York, C.A. 98 CIV 8012
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Superior Court of the State of California, for the County of Los Angeles, (No. BC 191 681)
- *General Electric Capital Corporation v. DirecTV, Inc., Hughes Electronics Corporation and General Motors Corporation*
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U.S. District Court, Eastern District of Virginia, C.A. No. 98-1821-A
- *Forty-Niners Truck Plaza, Inc. v. Unocal Corporation*
Superior Court in and for the County of Sacramento, California, Case No. 531830
- *Dade Behring Marburg GmbH, Syva Company v. Biosite Diagnostics, Inc.*
U.S. District Court, Southern District of New York, C.A. No. 97-501 MMS
- *CBS Broadcasting Inc., et al., v. PrimeTime 24 Joint Venture*
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U.S. District Court, District of Delaware, C.A. No. 89-533 (JJF)

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- Expert Report in connection with *Massachusetts Eye and Ear Infirmary v. Novartis Ophthalmics, Inc. and QLT, Inc., QLT, Inc. v. Massachusetts Eye and Ear Infirmary, Evangelos S. Gragoudas, M.D. and Joan W. Miller, M.D., The General Hospital Corporation v. Massachusetts Eye and Ear Infirmary, Evangelos S. Gragoudas, M.D. and Joan W. Miller, M.D.*, September 2003, U.S. District Court, District of Massachusetts, Civil Action No. 01-10747-EFH.
- Verified Statement before the Surface Transportation Board in connection with *Kansas City Southern – Control - The Kansas City Southern Railway Company, Gateway Eastern Railway Company, And The Texas Mexican Railway Company*, August 2003, Railroad Control Application, Finance Docket No. 34342.
- Expert Report and Revised Expert Report in connection with *Milliken & Company v. Mohawk Industries, Inc., et al. / Shaw Industries Group, Inc., et al. / Interface, Inc., et al.*, July 2003 and October 2003, U.S. District Court, District of South Carolina, Spartanburg Division, Civil Action Nos. 7-02-3631-20/7-02-3632-20/7-02-3633-2.
- Expert Report in connection with *Torah Soft, Ltd. v. Michael Drosnin*, April 2003, U.S. District Court, Southern District of New York, 2000 Civ.: 0676 (JCF).
- Expert Report and Supplemental Expert Report in connection with *Verizon California Inc., a California Corporation, v. Ronald A. Katz Technology Licensing, L.P., a California limited partnership*, March 2003, U.S. District Court, Central District of California, Case No. 01 CV-09871 RGK (RCx).

- Expert Report in connection with *First Citizens Bank and Trust Company of South Carolina, as Conservator for Alex Compton, a minor and Alex Reid Compton and Lisa Compton, in their individual capacity, as the natural parents of Alex Compton, a minor v. CSX Transportation Inc.*, December 2002, U.S. District Court, District of South Carolina, Anderson Division, Civil Action File No. 8-01-4613-20.
- Expert Report in connection with *DePuy AcroMed, Inc. and Biedermann Motech GMBH, Plaintiffs, v. Medtronic Sofamor Danek, Inc., f/k/a Sofamor Danek Group, Inc. and Medtronic Sofamor Danek, U.S.A. Inc.*, December 2002, U.S. District Court, District of Massachusetts, Civil Action No. 01-CV-10165 (EFH).
- Expert Report in connection with *Merck & Co., Inc. v. Teva Pharmaceuticals USA, Inc.*, November 2002, U.S. District Court, District of Delaware, Civil Action No. 01-0048 –JJF.
- Expert Report in connection with *The Toro Company v. White Consolidated Industries, Inc. and WCI Outdoor Products, Inc.*, November 2002, U.S. District Court, District of Minnesota, Civil Action No. 4-95-656.
- Expert Report in connection with *Dresses for Less, Inc., DFL Management Inc., The DFL Apparel Group, an unincorporated association, Allison-Che' Fashions, Inc., Bicci Studio Ltd., Garden City Dresses for Less, Inc., Donald Weiner and Barbara Weiner, individually and derivatively as shareholder of Stella N. Bishop Fashion Corp., and I.S.B. Fashions Corp. v. CIT Group/Commercial Services, Inc. and The Uptown Credit Group, Inc.*, November 2002, U.S. District Court for the Southern District of New York, C.A. No. 01 CIV. 2669 (WHP).
- Expert Report and Rebuttal Expert Report (with Laura G. Boothman) in connection with *The Eurotrain Consortium vs. Taiwan High Speed Rail Corporation*, July 2002 and April 2003, International Chamber of Commerce, International Court of Arbitration, Case No. 11 375/BWD/SPB.
- Expert Report in connection with *In Re: Vitamins Antitrust Litigation*, June 2002, U.S. District Court for the District of Columbia, Misc. No. 99-197 (TFH) MDL No. 1285.
- Expert Report in connection with *Syndia Corporation v. The Gillette Company and The Lemelson Medical, Educational & Research Foundation, L.P., Involuntary Plaintiff*, February 2002, U.S. District Court for the Northern District of Illinois, Eastern Division, Case No. 01 C 2485.
- Expert Report in connection with *Arthur D. Little Enterprises, Inc. and The Gillette Company*, December 2001, American Arbitration Association, Northeast Case Management Center, Arbitration No. 11 133 00735 00.
- Expert Report in connection with *Roll Off Service v. Waste Management of Arkansas, Inc. d/b/a Waste Management of Northwest Arkansas*, December 2001, U.S. District Court, Western District of Arkansas, Fayetteville Division, Civil No. 01-5059.
- Affidavit and Expert Report in connection with *The Commissioner of Competition v. Canadian Waste Services Holdings Inc, Canadian Waste Services Inc. and Waste Management, Inc.* (CT-2000/002) before the Competition Tribunal of Canada, May 2001.

- Expert Report and Supplemental Expert Report in connection with *Texas Instruments, Incorporated v. Tessera, Inc.*, May 2001, U.S. District Court, Northern District of California (Oakland Div), No. C-00-02114 CW.
- Verified Statement before the Surface Transportation Board in connection with *Canadian National Railway Co. et al Control Application regarding Wisconsin Central Transportation Corp. et al*, Railroad Control Application, Finance Docket No. 34000, April, 2001.
- Expert Report In Connection With *Union Carbide Chemicals & Plastics Technology Corp. and Union Carbide Corp. v. Shell Oil Company, Shell Chemical Company and CRI Catalyst Company*, October 2000, U.S. District Court, District of Delaware, C.A. No. 99-274 (SLR).
- Expert Report in connection with *Carl Zeiss Jena GmbH, Carl Zeiss Inc., v. Bio-Rad Laboratories, Inc., Cornell Research Foundation Inc., and Bio-Rad Laboratories, Inc., Cornell Research Foundation Inc., v. Carl Zeiss Jena GmbH, Carl Zeiss Inc.*, May 2000 — U.S. District Court, Southern District of New York, (98 CIV. 8012 RCC (DFE)).
- Verified Statement before the Surface Transportation Board in connection with *Canadian National Railway Company, Grand Trunk Western Railroad Incorporated, Illinois Central Railroad Company, Burlington Northern Santa Fe Corporation, and The Burlington Northern and Santa Fe Railway Company-- Railroad Control Application*, Finance Docket No. 33842, March 2000.
- Expert Report in connection with *L'Oreal S.A. and Cosmair, Inc., v. Revlon Consumer Products Corp., Charles Revson, Inc., and Almay, Inc.*, February 2000 — U.S. District Court, District of Delaware, (Civil Action No. 98-424 SLR).
- Expert Report and Amended and Supplemental Expert Report in connection with *Omniglow Corporation v. Unique Industries, Inc.*, November 1999 and May 2001 — U.S. District Court, District of Massachusetts, (C.A.No. 99-30052-MAP).
- Expert Report in connection with *Joseph E. Seagram & Sons, Inc., The Seagram Company Ltd. and JDC S.A. de C.V. v. St Maarten Spirits, Ltd., and St. Maarten Spirits Limited*, August 1999 — Superior Court of the State of California, for the County of Los Angeles, (No. BC 191 681).
- Expert Report in connection with *General Electric Capital Corporation v. DirecTV, Inc., Hughes Electronics Corporation and General Motors Corporation*, August 1999 — U.S. District Court, District of Connecticut, (3:97 CV 01901 (PCD)).
- Expert Report in connection with *America Online, Inc. v. AT&T Corporation*, March 1999 — U.S. District Court, Eastern District of Virginia, C.A. (98-1821-A).
- Expert Report in connection with *Bristol Technology, Inc. v. Microsoft Corporation*, February 1999 — U.S. District Court, District of Connecticut, C.A. (No. 398-CV-1657 (JCH)).
- Expert Report in connection with *Ashraf M. Dahod v. Bay Networks, Inc. and LanCity Corporation, Inc.*, September 1998 — U.S. District Court, District of Massachusetts, C.A. (No. 96-11907 REK).

- Expert Report in connection with *Dade Behring Marburg GmbH, Syva Company v. Biosite Diagnostics, Inc.*, August 1998 — U.S. District Court, Southern District of New York, C.A. No. 97-501 MMS
- Expert Report in connection with *Harris Corporation, et. al v. Atmel Corporation*, June 1998 — U.S. District Court, Eastern District of Virginia, C.A. (No. 98-98-A).
- Expert Report in connection with *Critikon, Inc. v. Becton Dickinson Vascular Access, Inc.*, June 1998 — U.S. District Court, District of Delaware, C.A. (No. 93-108 (JJF)).
- Expert Report in connection with *CBS Broadcasting Inc., et al., v. PrimeTime 24 Joint Venture*, May 1998 — U.S. District Court, Southern District of Florida, C.A. No. 96-3650-CIV-Nesbitt.
- Expert Report in connection with *Becton Dickinson and Company v. Syntron BioResearch, Inc.*, May 1998 — U.S. District Court, Southern District of California, C.A. No. 97-CV-1634K.
- Expert Report in connection with *Luigino's, Inc. v. Pezrow Company, Inc. and Pezrow Company of New Jersey, Inc.*, October 1997 — U.S. District Court, District of Minnesota Fifth Division, C.A. No. 5-96-244.
- Supplemental Expert Report in connection with *Neles-Jamesbury, Inc. v. Fisher Controls International, Inc. and Fisher Service Company*, October 1997 — U.S. District Court, District of Massachusetts, C.A. No. 94-40200).
- Expert Report in connection with *Neles-Jamesbury, Inc. v. Fisher Controls International, Inc. and Fisher Service Company*, August 1997 — U.S. District Court, District of Massachusetts, C.A. No. 94-40200.
- Expert Report in connection with *The Toro Company v. White Consolidated Industries, Inc. et al.*, May 1997 — U.S. District Court, District of Minnesota, C.A. No. 4-95-656.
- Supplemental Expert Report in connection with *Century Wrecker Corporation v. Chevron, Inc.*, May 1997 — U.S. District Court, Western District of Pennsylvania, C.A. No. 89-1452.
- Supplemental Rebuttal Expert Report in connection with *Polo Ralph Lauren, L.P. v. The Magnin Company, Inc.*, May 1997 — American Arbitration Association Commercial Arbitration Tribunal, C.A. No. 74-181-1094-96.
- Rebuttal Expert Report in connection with *Polo Ralph Lauren, L.P. v. The Magnin Company, Inc.*, May 1997 — American Arbitration Association Commercial Arbitration Tribunal, C.A. No. 74-181-1094-96.
- Expert Report in connection with *Wang Laboratories, Inc. v. FileNet Corporation*, April 1997 — U.S. District Court, District of Massachusetts, C.A. No. 94-12141 RLC.
- Affidavit in Support of Ag-Chem Equipment Co. Inc. and Soil Teq, Inc.'s Motion For Summary Judgment, August 1996 — U.S. District Court, District of Minnesota, C.A. No. 4-93-1228.

- Expert Report and Supplemental Expert Report in connection with *Roll Systems, Inc. v. Wallace Computer Services Inc.*, July 1996 and December 1996 — U.S. District Court, District of Massachusetts, C.A. No. 94-10372-MEL.
- Expert Report in connection with *Dynamic Manufacturing Inc. et al. v. Chevron Inc.*, April 1996 — U.S. District Court, Eastern District of Virginia, C.A. No. 2:95CV947.
- Expert Report in connection with *Century Wrecker Corp. v. Chevron Inc.*, March 1996 — U.S. District Court, Western District of Pennsylvania, C.A. No. 89-1452.
- Expert Report in connection with *Medtronic v. Pacesetter and St. Jude Medical Inc.*, February 1996 — American Arbitration Association.
- Expert Report in connection with *Cedar Ridge Trailer Sales et al. v. National Community Bank of New Jersey et al.*, December 1995 — Superior Court of New Jersey, C.A. No. BER-L-09277-92.
- Expert Report in connection with *Federal Trade Commission v. New Balance Athletic Shoe, Inc.*, 1995 — Boston, Massachusetts, File No. D9268.
- Expert Report in connection with *Minnesota Mining and Manufacturing Co. v. Avery Dennison Corp.*, 1995 — U.S. District Court, District of Minnesota, C.A. No. 4-93-1070.
- Expert Report in connection with *Minnesota Mining and Manufacturing Co. v. Norton v. Bay State Abrasives Co.*, 1994 — U.S. District Court, District of Delaware, C.A. No. 89-533 (JJF).

PUBLICATIONS AND PRESENTATIONS

“What Drives Consolidation?” Presented at the 28th Semiannual Members Meeting MIT/CRE, Cambridge, MA, May 14, 1998.

“Proving Unilateral Effects and Efficiencies in Merger Cases: A Demonstration.” Presented at the 46th Annual ABA Antitrust Meeting, Washington, DC, April 1, 1998.

“Creating An Effective Diversion: Evaluating Mergers With Differentiated Products,” *Antitrust*, Spring 1997.

“Economic Battles in the Antitrust Wars: Network Industries and Their Relevance to Antitrust in the Computer Industry.” Presented at the Washington State Bar Association’s Thirteenth Annual Antitrust, Consumer Protection and Unfair Business Practices Conference, November 8, 1996.

“Differentiated Products: New Tools for New Methods.” Presented at NERA’s Seventeenth Annual Antitrust & Trade Regulation Seminar, Santa Fe, NM, July 5, 1996.

“Market Definition Under Price Discrimination” (with J. A. Hausman and G. K. Leonard), *Antitrust Law Journal*, Vol. 64, No. 2 (Winter 1996).

"Learning-by-Doing in the Context of Antitrust Analysis" (with J. Hausman), April 1995.

"An Economic Analysis of ATM Surcharging," prepared for Southeast Switch Inc., October 5, 1995.

"Cost Effects of Mergers and Deregulation in the U.S. Rail Industry" (with Berndt et al.), *Productivity Issues in Services at the Micro Level*, ed. Zvi Griliches and Jacques Mairesse, Kluwer Academic Publishers, 1993.

"Cost Effects of Mergers and Deregulation in the U.S. Rail Industry" (with Berndt et al.), *Journal of Productivity Analysis*, 4, 127-144, 1993.

"Rail Costs and Capital Adjustments in a Quasi-Regulated Environment" (with Friedlaender et al.), *Journal of Transport Economics and Policy*, 131-152, May 1993.

"Deregulation, Mergers and Cost Savings in Class I U.S. Railroads, 1974-1986" (with Berndt et al.), *Journal of Economics and Management Strategy*, Vol. 1, No. 2, 1992.

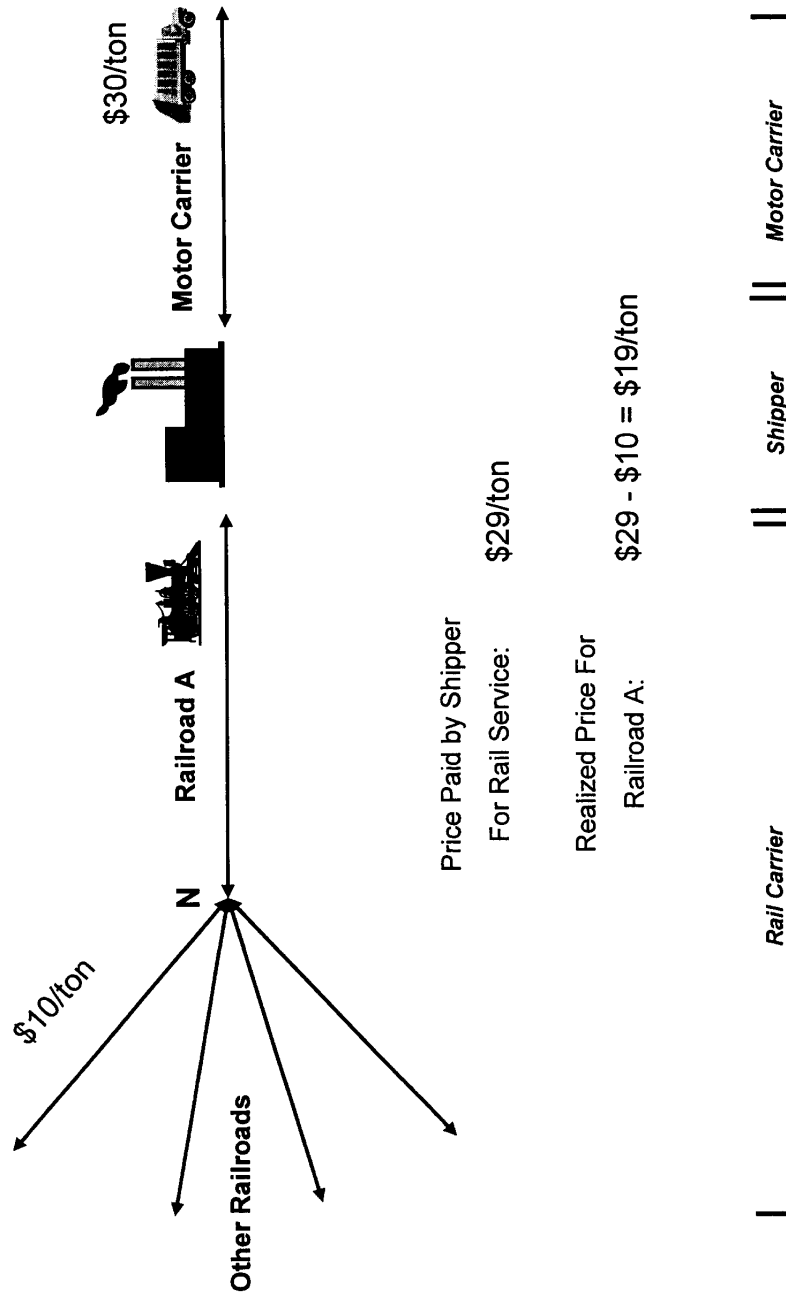
"Observations on Pre-Trial Bargaining Models," MIT Mimeo, September 1989.

"The Deregulation of the U.S. Rail Industry: Efficiency and Equity in Attaining Rail Viability," Ph.D. Dissertation, Department of Economics, MIT, 1989.

"Achieving Cost Efficiency Through Merger: Evidence from the U.S. Rail Industry," Presented at the American Economic Association Symposium on Mergers and Acquisitions, New York, December 29, 1988.

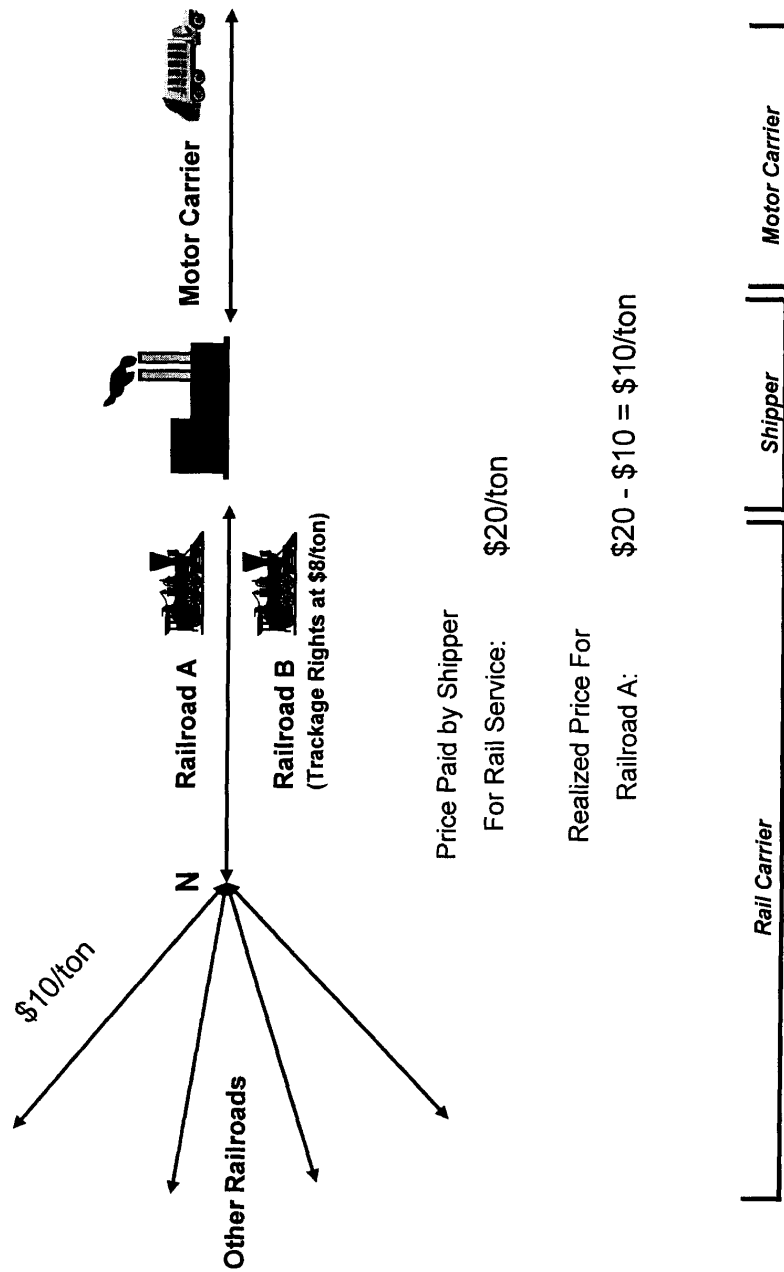
Attachment 2

Illustration of "One Lump" Economics and Rail Freight Pricing



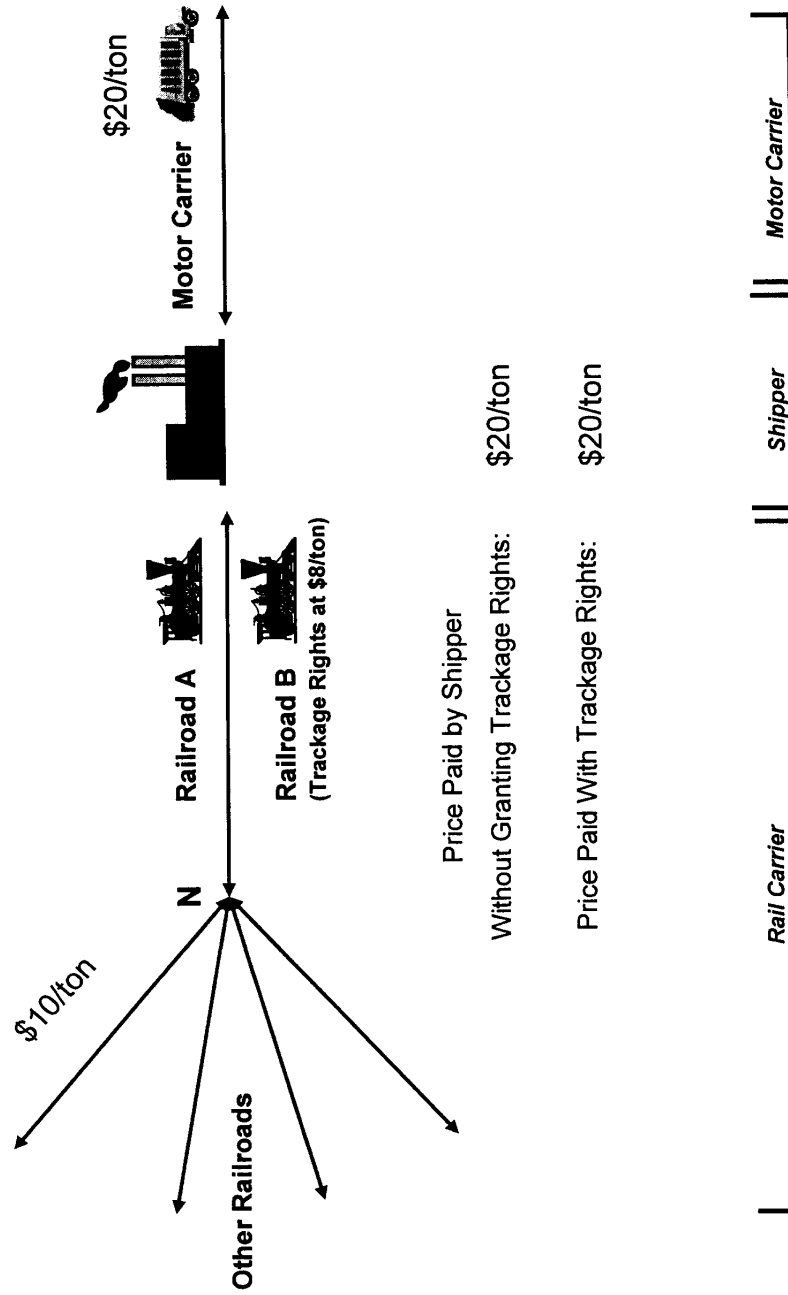
Attachment 3

Illustration of "One Lump" Economics and Rail Freight Pricing



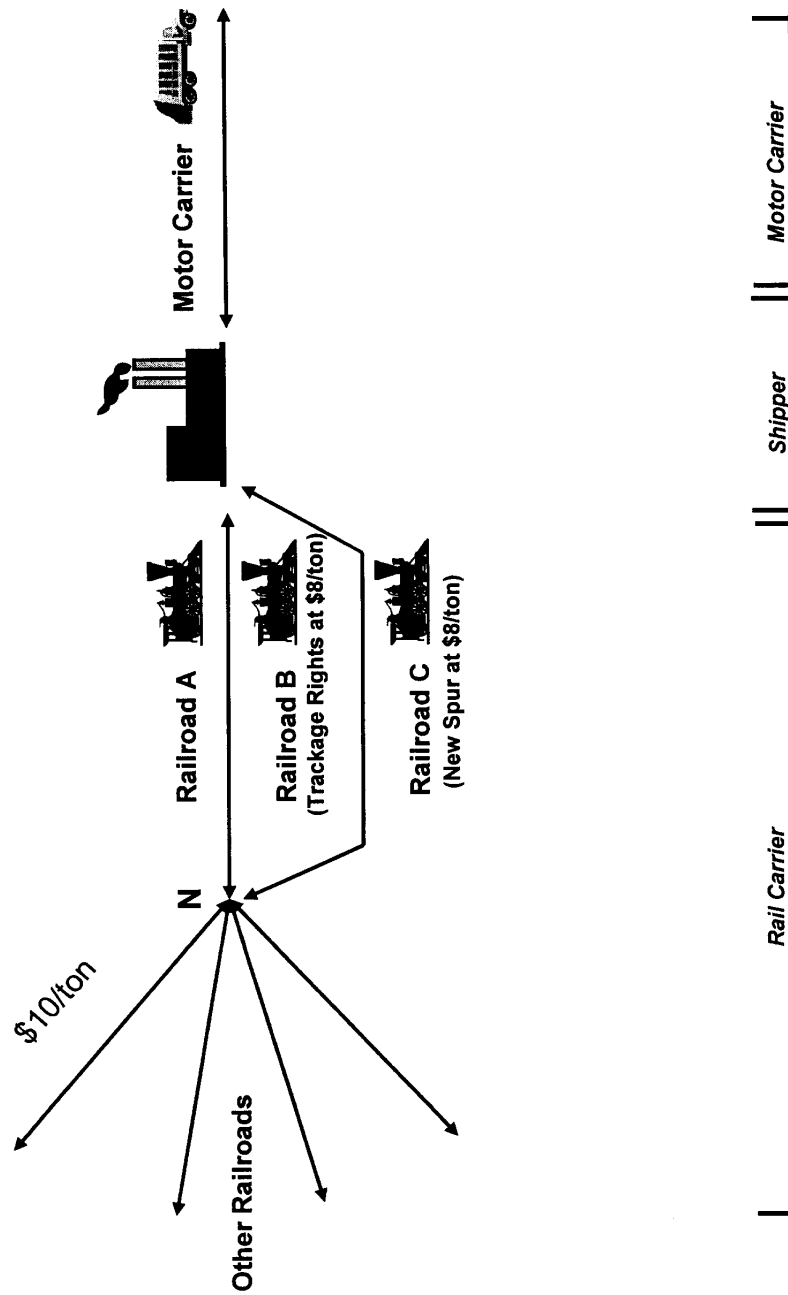
Attachment 4

Illustration of "One Lump" Economics and Rail Freight Pricing



Attachment 5

Illustration of "One Lump" Economics and Rail Freight Pricing



VERIFICATION

[illegible]

Christopher Vellturo, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true and correct to the best of his knowledge and belief.


Christopher Velturo

Subscribed and sworn to before
me on this 5th day of December, 2003.

Monica K. Stuckland
Notary Public

My Commission expires: Sept. 4, 2009

4

PUBLIC

TAB 4

**VERIFIED STATEMENT
OF
RICHARD B. DEMINK**

My name is Richard B. DeMink. I am associated with Highroad Consulting, Ltd. as a transportation cost consultant. I have more than thirty years experience in railroad cost and financial analysis, regulatory costing, and development and preparation of railroad forecasts and budgets in the course of various management positions with the National Rail Passenger Corporation (Amtrak), the Chicago and North Western Transportation Company, and the Western Railroad Association. I have appeared as a witness in numerous proceedings before regulatory agencies, including the Surface Transportation Board's predecessor, the Interstate Commerce Commission.

I have been retained by the Canadian National Railway Company ("CN") to evaluate the Verified Statement of Mr. Robert C. Finley, and the accompanying Rail Trac Associates report (the "Rail Trac Report"), attached to the Adverse Application for Abandonment/Discontinuance of Trackage Rights and Easement filed by the Trustee of the Bangor & Aroostook Railroad Company ("BAR").

[REDACTED]

ATTACHMENT 1

Richard B. DeMink Senior Consultant

Richard DeMink has more than thirty-one years' experience in cost and financial analysis, including activity based costing, rail costing and regulatory costing, and the development and preparation of capital budgets and budget forecasts.

He held several key management positions at Chicago & North Western in the Cost and Finance Department during the course of his 31-year tenure within the railroad industry, where he conducted numerous studies to measure productivity and profitability.

As Manager – Cost and Economic Analysis, he was responsible for the analyses of profitability and return on investment related to North Western's investment in rail facilities and equipment. During his tenure at North Western, Mr. DeMink was also responsible for evaluating requests for capital, and he performed financial analyses for construction or acquisition of equipment and new facilities.

Mr. DeMink helped to design and implement the railroad's management cost system, which was used for measuring the profitability of all traffic handled on the system. He also conceived and developed a cost model for costing of unit train operations. The cost system became a basis for North Western's Contribution Based Management System, which encompassed analysis and reporting of profitability for all business segments, including profitability by commodity, corridor, customer and specific market segments. The Contribution Based Management System was implemented by senior management system-wide, with a primary focus on optimizing revenues and utilization of assets for the railroad.

Rich earned a reputation in the industry as an expert in rail costing and economic analysis. In 1996, he joined Amtrak's Intercity Finance Department, where he was responsible for the preparation of capital budgets, budget forecasts and monitoring performance against budget. This included preparation of required documentation related to the annual Capital Plan for Amtrak's Intercity Business Unit, and monitoring spending patterns in search of underutilized capital. As Manager – Budgets, he prepared a \$60 million annual budget for operating costs over the rail lines of more than twenty Amtrak railroad partners, and a \$200 million budget for common costs not allocated to specific business units.

Mr. DeMink served as an expert cost witness in a number of proceedings before regulatory agencies, in which he performed the financial analyses and presented written testimony. A few examples include:

- He prepared the financial presentation and submitted testimony, on behalf of Chicago & North Western, for a rate case involving unit train shipments of iron ore from Northern Michigan to Escanaba.



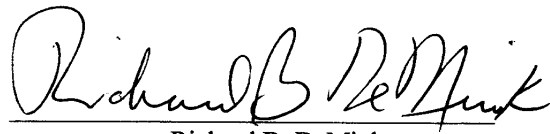
- He also prepared the financial presentation and submitted testimony for a rate case involving shipments of lumber from West Coast origins to destinations in the Midwest and the eastern United States.
- He performed financial analyses and presented testimony in numerous ExParte intrastate freight rate increase hearings before State Commissions in Arizona, Colorado, Illinois, Iowa, Minnesota, North Dakota and South Dakota.

Mr. DeMink earned a BS, Mathematics at the University of Illinois, Champaign-Urbana, Illinois.

VERIFICATION

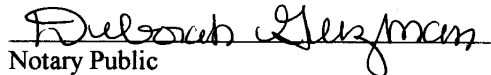
STATE OF ILLINOIS)
) ss
COUNTY OF COOK)

Richard B. DeMink, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true and correct to the best of his knowledge and belief.

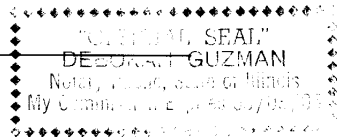


Richard B. DeMink

Subscribed and sworn to before
me on this 5th day of December, 2003.


Notary Public

My Commission expires:



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ATTACHMENT 1

Sandra J. Dearden

Sandra J. Dearden is President of **HIGHROAD Consulting, Ltd.**. Prior to forming the firm in 1996, Sandra was General Manager – Sales & Marketing for a strategic business unit at Chicago & North Western Transportation Company; she brings more than 25 years of experience in strategic planning, contribution based management, business development, regulatory and litigation support to the firm's engagements.

During her tenure at North Western, business unit revenues increased in the double digits each year, and by 69% during the last five years in an otherwise declining market. Annual profits increased by \$15 million during the same time period due to business growth and productivity changes, including improved covered hopper utilization which was the result of a new customer service program, and allocation of equipment based on contribution per car day.

While Sandra was responsible for pricing and marketing of transportation services she also chaired the North Western's Hazardous Commodity Committee, which was responsible for development of policies for handling of hazardous commodities, for seven years. As Chair, she conducted research and authored the company's Degree of Hazard Rating Manual, which successfully limited the company's liability. Also in that role, she researched and drafted a policy for handling of hazardous waste, which was adopted by senior management, and she represented North Western on a nationwide committee of railroads to plan for transportation of high level nuclear waste.

Ms. Dearden was instrumental in the development of the unit train distribution system for Canadian potash to U.S. markets. She conceived and implemented North Western's truck competitive fertilizer marketing program, which received recognition when North Western was awarded a *Golden Freight Car Award* for distinguished marketing by Modern Railroads Magazine.

As a consultant, Ms. Dearden has earned a reputation for her work for railroads and shipper clients to identify and measure competitive impact. Under her direction, the firm developed **VIEWPOINT™**, an analytical process to benchmark freight transportation costs.

Sandra has participated in numerous proceedings before the Interstate Commerce Commission and its successor agency, the Surface Transportation Board. During her tenure at North Western, she served as an expert marketing witness on more than twelve line abandonment cases. North Western received favorable rulings in all of those proceedings. Additional examples of litigation experience include:

- **Finance Docket 42051, Wisconsin Power and Light Company, Complainant, v. Union Pacific Railroad, Defendant.** A team of **HIGHROAD** consultants prepared and submitted rebuttal testimony regarding G&A staffing of the stand-alone railroad for the shipper, Wisconsin Power & Light, in a stand-alone rate case against the Union Pacific Railroad. Ms. Dearden developed the staffing plan for the Marketing Department and she served as Project Manager, directing development of the staffing plan for the other departments. In their decision, the STB found that the defendant railroad had market dominance and that the challenged rates were too high. Maximum reasonable rates were prescribed and reparations were ordered.



- **Finance Docket 33388, CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company – Control and Operating Leases/Agreements – Conrail, Inc. and Consolidated Rail Corporation.** Ms. Dearden presented testimony on behalf of a client supporting neutral control of Indiana Harbor Belt.
- **Finance Docket 42060, North America Freight Car Association – Protest and Petition for Investigation, Reply to Motion to Dismiss of the Burlington Northern and Santa Fe Railway Company.** Ms. Dearden representing a client participated in the proceeding, opposing storage charges on empty cars announced by Burlington Northern Santa Fe, on the basis that the charges violate the terms of an agreement negotiated in 1983 under Exparte 328.
- **Finance Docket 32760, Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company – Control and Merger – Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp. and the Denver and Rio Grande Western Railroad Company, Comments of the Kansas City Southern Railway.** Sandra Dearden prepared the competitive impact study for Kansas City Southern to support its position, opposing the merger of Union Pacific Railroad's and Southern Pacific Transportation Company. Although the Surface Transportation Board approved the merger, KCS received a favorable opinion from the U. S. Department of Justice, due to the competitive impact.
- **Finance Docket No. AB-6 (Sub-No. 382X), Burlington Northern and Santa Fe Railway Company Abandonment within the city limits of Chicago in Cook County, Illinois. HIGHROAD's** Ms. Dearden and other consultants assisted the client in opposing the abandonment, and noted errors in the BNSF financial filing. The abandonment was denied.

Representing Chicago & North Western -

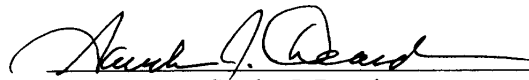
- **Finance Docket 28640, Chicago, Milwaukee, St. Paul and Pacific Railroad Company – Reorganization – Acquisition by Grand Trunk Corporation.** Ms. Dearden presented written and oral testimony as an expert marketing witness, on the anti-trust portion of North Western's application to acquire the Chicago, Milwaukee, St. Paul & Pacific Railroad. North Western received a favorable ruling on this part of the case.
- **Finance Docket 29518, Soo Line Railroad Company – Purchase (Portion) – Chicago, Rock Island and Pacific Railroad Company, Debtor (William M. Gibbons, Trustee) – Lines in Minnesota, Iowa and Missouri.** This case involved Chicago & North Western's proposed acquisition of the former Rock Island Spine Line from Minneapolis to Kansas City. Ms. Dearden presented expert marketing testimony that outlined the benefits of the proposed acquisition relative to the competitive impact on the farm retailers in Iowa. The acquisition was approved.

Ms. Dearden has directed numerous cross-functional projects and has the experience needed to consult on a number of subjects and projects. She serves on the Intermodal Advisory Board, Chicago Area Transportation Study (CATS). As CATS' representative she recently authored the freight component of the RTP 2030 Initiative to develop a Regional Transportation Plan for northeastern Illinois. She is an Officer on the Board of Directors of the Traffic Club of Chicago; she is a member of the Rail Committee, for the National Industrial Traffic League; and she serves on the Board of Directors as Chair of Legislative Matters for the Midwest Association of Rail Shippers. She also served a two-year as the National Representative for Public Policy for the National Association of Women Business Owners.

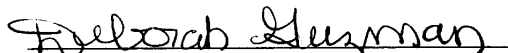
VERIFICATION

STATE OF ILLINOIS)
) ss
COUNTY OF COOK)

Sandra J. Dearden, being duly sworn, deposes and says that she has read the foregoing statement, knows the contents thereof, and that the same are true and correct to the best of her knowledge and belief.


Sandra J. Dearden

Subscribed and sworn to before
me on this 5th day of December, 2003.


Notary Public

My Commission expires: _____



6

PUBLIC

TAB 6

**VERIFIED STATEMENT
OF
JOHN L. BRADSHAW**

My name is John L. Bradshaw, and I am associated with the Highroad Consulting firm as an Executive Consultant. I have held numerous senior management positions in the Operations Departments of three railroads. I started my railroad career at the Chicago and North Western Transportation Company where I was General Manager of Commuter Operations and, later, Assistant Vice President and Division Manager. I left the Chicago and North Western to become part of the senior management team at Wisconsin Central Railroad and its affiliate, Tranz Rail, in New Zealand. As Vice President and General Manager of Wisconsin Central from its inception, I directed and implemented the Railroad's initial service design and operating plan. My qualifications are included in Attachment 1 hereto.

I have been asked to comment on several of the cost items utilized in the Verified Statement of Mr. Robert Finley, in which he purported to calculate the revenues and avoidable costs associated with abandonment of two branch lines owned and operated by the Montreal, Maine & Atlantic Railway Company ("MM&A"), specifically the Madawaska-Portage line and the Brownville Junction-Boundary line.

[REDACTED]

ATTACHMENT 1

John L. Bradshaw

HIGHROAD Consulting, Ltd.
Executive Consultant

John Bradshaw is a professional consultant with extensive senior management experience, managing rail operations in the United States and internationally.

Prior to initiating a consulting career, John was part of the senior management team at Wisconsin Central Transportation Corporation. He was Vice President and General Manager of the railroad from startup. In that role he directed and implemented the railroad's initial service design and operating plan. Under his leadership, Wisconsin Central achieved the lowest operating ratio in the industry and he integrated leading edge technology, the first in the industry, by utilizing remote control technology. John was also involved in the creation of the new commuter rail service on the North Central line to Antioch, Illinois.

Mr. Bradshaw was subsequently assigned as Group General Manager – Operations of Wisconsin Central's New Zealand Operation, Tranz Rail, where he managed all transportation operations, yard operations, engineering, mechanical and administration activities on the national system. Within the first three years, he reduced the operating ratio from 90% to 78%. Accomplishments include reorganization and restructuring of the system-wide operations group, including major shops, resulting in 750 headcount reduction and 10% decrease in man-hours. Also, he improved car cycle times by 35% with a 30% increase in tons handled.

Because of his accomplishments, John was promoted to Vice President Corporate Development, where he directed corporate due diligence for domestic and international expansions in North America, Great Britain, Australia, Jordan, South Africa, Estonia, and Poland. He led operations due diligence for V-Line, Westrail, National Rail, and Freight Corporation in Australia. His responsibilities included evaluation of operations and market analyses, knowledge of system and regulatory requirements, and he championed transportation privatization proposals and executed implementation. Under his direction Tasrail reduced its operating ratio from 131% to 79%, and he secured flexible work rules enabling capture of a 10-year unit grain train contract. Finally, he represented Wisconsin Central on the Canadian National Merger Team, and assisted in preparation of the application to the Surface Transportation Board.

Mr. Bradshaw started his transportation career at the Chicago and North Western Transportation Company where he held various positions, including General Manager of Commuter Operations. His last position with the railroad was Assistant Vice President and Division Manager at St. Paul, MN. Where he directed the daily operations of all transportation operations, yard operations, engineering, mechanical and administration forces. In that position he improved service reliability on shipments of fertilizer, grain and coal in Wisconsin and Minnesota by 50%. Also, he implemented division consolidation plans, including a significant line sale to the Dakota, Minnesota & Eastern, and a sale of the Minnesota Transfer Railway, which generated significant savings to the Class I owners.



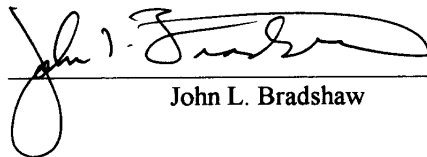
As a consultant, John performed a study of locomotive requirements for the Indiana Harbor Belt Railroad. The project involved review of current operations and development of a plan to rationalize the locomotive fleet and fleet requirements. Also, he was Project Manager on a project for The Village of Oak Park, Illinois. He was successful at developing and implementing a plan to achieve the project objectives to address environmental issues relative to the parking of trains, including engine noise and air quality.

ATTACHMENT 2
MM&A Locomotives

VERIFICATION

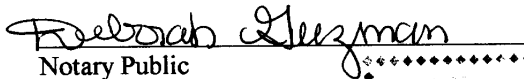
STATE OF ILLINOIS)
) ss
COUNTY OF COOK)

John L. Bradshaw, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true and correct to the best of his knowledge and belief.



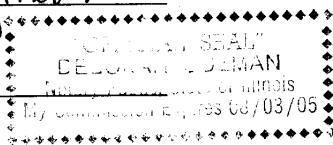
John L. Bradshaw

Subscribed and sworn to before
me on this 5th day of December, 2003.



Notary Public

My Commission expires: _____



7

**VERIFIED STATEMENT
OF
ARTHUR L. SPIROS**

My name is Arthur L. Spiros. I am a principal with Rail Property Management, a full-service real estate management firm specializing in the appraisal and sale of railroad properties. I have over 32 years of experience in railroad real estate, specializing in the areas of title evaluation, sales, real estate closings, appraisals, and taxation. On average, I complete approximately 75 railroad real estate transactions each year, and throughout the course of my career, I have bought or sold in excess of 15,000 miles of railroad right of way. My qualifications are included as Attachment 1.

I have been retained by Canadian National Railway Company ("CN") to evaluate the real estate portion of the Net Liquidation Value calculated by Mr. John Pinto in connection with possible abandonment of the Madawaska-Portage line and the Brownville Junction-Boundary line, owned and operated by the Montreal, Maine & Atlantic Railway Company ("MM&A"). As discussed in greater detail below, Mr. Pinto's appraisal is insufficient and fatally flawed.

[REDACTED]

ATTACHMENT 1

RAIL PROPERTY MANAGEMENT

57 Ogden Avenue
Clarendon Hills, Illinois 60514

Arthur L. Spiros

Mr. Spiros has over 32 years of experience in railroad real estate, specializing in the areas of title evaluation, sales, real estate closings, appraisals, and taxation. He has organized and managed real estate inventory records, land titles, and legal documentation relating to railroad's land holdings and titles for Class I, Regional, and Short Line Railroads. In connection therewith, he also has handled railroad land valuation and appraisals for state tax assessments, and has completed the appraisals of several regional and short line carriers. From 1971 through 1987, Mr. Spiros had been employed with the Illinois Central Railroad Company in its real estate department, beginning his career as a draftsman, and working his way up through the ranks as Manager, Title & Closing. In 1987, Mr. Spiros founded and became a principal with Rail Property Management, a full service real estate management firm specializing in railroad properties.

Mr. Spiros received a Bachelor of Science degree in Architectural Design from the University of Illinois at Chicago. In addition, he has completed graduate level studies in the fields of property management and real estate appraisal. Mr. Spiros is currently holds an Illinois real estate license, and is a member of the American Railway Development Association and the National Association of Real Estate Appraisers.

VERIFICATION

STATE OF ILLINOIS)
) ss
COUNTY OF COOK)

Arthur Spiros, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true and correct to the best of his knowledge and belief.



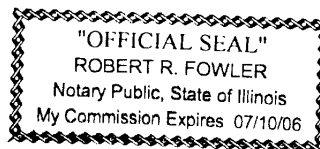
Arthur Spiros

Subscribed and sworn to before
me on this 8th day of December, 2003.



Notary Public

My Commission expires: 7/10/06



8

**VERIFIED STATEMENT
OF
RICHARD S. SHURE**

My name is Richard S. Shure. I am a principal and founder of Phaedrus, Inc. an Evanston, Illinois-based company providing contracting and consulting services to the railroad products industry. Previously, I was Vice President of Rail Products at Azcon Corporation, a major salvage processor with processing plants in Chicago, Pittsburgh, St. Louis and Duluth, where I was responsible for bidding on and implementing abandoned rail line removal projects, including assessment of the market values of metallics and ties, transportation costs, and all supportive restoration and clean-up activities in connection with those bids and removal projects. I was employed by Azcon for 17 years. In my capacity as Vice President, I was responsible for dismantling and salvaging over 3,000 miles of rail line within the continental United States and Canada. A more detailed statement of my qualifications is attached hereto as Attachment 1.

I have been retained by the Canadian National Railway Company ("CN") to evaluate that portion of the Net Liquidation Value pertaining to rail materials submitted by Mr. John Pinto in connection with potential abandonment of the Montreal, Maine & Atlantic Railway Company's ("MM&A") rail lines between Madawaska-Portage and Brownville Junction-Boundary.

[REDACTED]

ATTACHMENT 1

Richard S. Shure

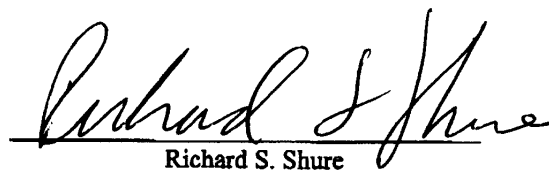
Mr. Shure has seventeen years in the railroad salvage industry with Azcon Corporation, dismantling approximately three hundred miles of railroad trackage annually. His first four years at Azcon were spent inspecting all abandonments for dismantling within the continental United States and Canada. His responsibilities included the hiring and monitoring of contractors to restore road crossings, dismantle bridges, and dispose of railroad ties. His remaining years at Azcon were as Vice President of Rail Products responsible for bidding and dismantling of abandoned rail lines; researching current market values of metallics and ties, transportation costs, and all supportive restoration and cleanup activities. His division was the largest supplier of rerolling rail in the United States and an active participant in the scrap and relay markets.

Mr. Shure as a PhD in Public Policy, a Bachelor of Science degree in Industrial Engineering, and has been a Registered Professional Engineer since 1971.

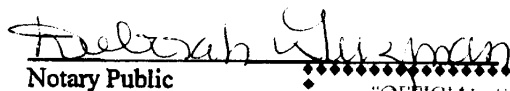
VERIFICATION

STATE OF ILLINOIS)
) ss
COUNTY OF COOK)

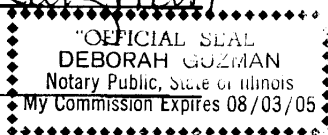
Richard S. Shure, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true and correct to the best of his knowledge and belief.


Richard S. Shure

Subscribed and sworn to before
me on this 8th day of December, 2003.


Notary Public

My Commission expires:



CERTIFICATE OF SERVICE

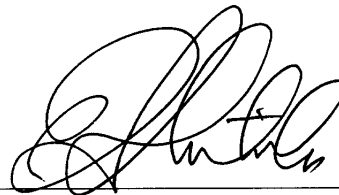
I hereby certify that on this 11th day of December, 2003, a copy of the foregoing
**Protest and Supporting Evidence of Canadian National Railway Company and Waterloo
Railway Company**, in its public, redacted version, was served by overnight delivery upon:

Charles H. White, Jr.
Attorney at Law
1200 Britannia Lane
Annapolis, MD 21403

Kevin M. Sheys
Kirkpatrick & Lockhart LLP
1800 Massachusetts Avenue, N.W.
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Michael L. Rosenthal
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1201 Pennsylvania Avenue, N.W.
Washington, DC 20004-2401

A handwritten signature in black ink, appearing to read 'T. Litwiler', is written over a horizontal line.

Thomas J. Litwiler