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December 30, 2003

BY HAND DELIVERY

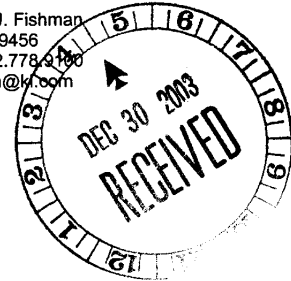
The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 700
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings

DEC 30 2003

Part of
Public Record

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Re: **Finance Docket No. AB-279 (Sub-No. 3)**

**Canadian National Railway Company -- Adverse Discontinuance --
Line of Montreal, Maine & Atlantic Railway Ltd. in Aroostook
County, Maine**

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

Dear Secretary Williams:

Pursuant to 49 C.F.R. § 1152.24(c)(4), I enclose for filing an original and ten copies of the **Public** version of the **Trustee of Bangor and Aroostook Railroad Company's Rebuttal** ("Applicant's Rebuttal"). A copy of the public version of Applicant's Rebuttal is enclosed on computer diskette in Wordperfect format. A **Highly Confidential** version of the Applicant's Rebuttal has been filed under separate cover letter. A copy of the Public version of the Applicant's Rebuttal is being served on all the parties on the Certificate of Service.

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

Respectfully submitted,

Edward J. Fishman
Attorney for Trustee of Bangor and Aroostook
Railroad Company, et al.

Enclosures

cc: Parties on Certificate of Service

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REDACTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

CANADIAN NATIONAL RAILWAY COMPANY
- ADVERSE DISCONTINUANCE -
LINE OF MONTREAL, 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

APPLICANT'S REBUTTAL

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**ATTORNEYS FOR TRUSTEE OF BANGOR
AND AROOSTOOK RAILROAD COMPANY,
ET AL.**

Dated: December 29, 2003

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

CANADIAN NATIONAL RAILWAY COMPANY
--ADVERSE DISCONTINUANCE --
LINE OF MONTREAL, 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

APPLICANT'S REBUTTAL

James E. Howard, Chapter 11 Trustee of the Bangor and Aroostook Railroad Company, Debtor ("Trustee" or "Applicant")¹ hereby files this rebuttal to the protests and comments filed in response to his adverse application ("Application") for discontinuance of certain Canadian National Railway Company ("CN") trackage rights and abandonment of a certain Waterloo Railway Company ("WRC") freight easement. Specifically, this rebuttal addresses the protest filed by CN ("CN Protest") and the opposition comments filed by Fraser Papers Inc. ("Fraser") and the National Industrial Transportation League ("NITL").² The Trustee respectfully requests that the Board grant the Application because the elimination of the CN trackage rights and WRC freight easement is in the public interest.

¹ James E. Howard is acting in his capacity as the Chapter 11 Trustee for Bangor and Aroostook Railroad Company ("BAR"), Van Buren Bridge Company ("VBBC"), Canadian American Railroad Company ("CDAC"), Northern Vermont Railway Company ("NVT") and Newport & Richford Railroad Company ("NRR"). These railroads, along with Quebec Southern Railway, Ltd. ("QSR"), are collectively referred to herein as the "BAR System." James E. Howard is not the Chapter 11 Trustee of QSR, which was subject to bankruptcy proceedings in Canada.

² CN and Fraser are sometimes collectively referred to herein as the "Opponents."

INTRODUCTION

Current And Likely Future Harms From Retention Of The CN Trackage Rights. In

the Application, the Trustee identified several very significant current and likely future harms associated with retention of the CN trackage rights:³

- (1) The present and continuing diversion of revenues from Montreal, Maine & Atlantic Railway Ltd. ("MMA") under a haulage agreement that is underpinned by the threat of CN implementing the trackage rights.
- (2) The threat to the long-term viability of MMA inherent in CN's unilateral power to trigger a multi-million dollar per year revenue shift from MMA to CN by implementation of the CN trackage rights.
- (3) The threat to all shippers using the MMA system, including Fraser, and the communities in which those shippers are located.
- (4) The likelihood MMA would be compelled to abandon the rail line between Madawaska and Portage ("Madawaska-Portage Line") if the CN trackage rights were retained. The Application showed that abandonment of the Madawaska-Portage Line would cause a reduction in routing options for approximately 52 shippers and receivers of approximately carloads of traffic.

and

- (5) The likelihood that MMA would be compelled to abandon the rail line between Brownville Junction and the U.S./Canada border ("CDAC Line") if the CN trackage rights were retained. The Application showed that abandonment of the CDAC Line would result in reduced routing options for approximately 196 shippers and receivers of approximately revenue units (carload and intermodal containers) of traffic.⁴

See Application at Vol. 1-9.⁵

³ Unless otherwise indicated, all references herein to the CN trackage rights include the WRC freight easement and all capitalized terms not defined herein shall have the meaning set forth in the Application.

⁴ The abandonment of the CDAC Line also would eliminate the shortest rail route between Saint John, New Brunswick and Montreal, Quebec. Application at Vol. 1-9.

⁵ For convenience, citations herein to the Application refer to the sequential numbering of the Highly Confidential version.

As to the first and second harms, CN offers a promise to not exercise the trackage rights so long as, in CN's sole discretion, the MMA haulage service remains available and MMA continues to provide the same quality of haulage service. As is explained below, CN's promise is illusory and does not mitigate the significant current and likely future harms to MMA from the continuing diversion of Fraser revenues to CN under the Junction Settlement Agreement.

As to the third harm, the threat to all shippers served by the MMA System, neither CN nor Fraser offers any specific evidence or argument to challenge the evidence that the CN trackage rights could harm all MMA shippers by threatening the long-term viability of the entire MMA system.

As to the fourth and fifth harms, likely abandonment of the Madawaska-Portage and CDAC Lines, CN criticizes the form of the Applicant's evidence rather than its substance, arguing that the Trustee should have framed its evidence on these potential abandonments in precisely the same way that such evidence would have to be presented if the abandonments were before the Board. Fraser argues that the Board may not evaluate the Applicant's evidence regarding the potential abandonments because doing so would constitute an "advisory opinion." To the extent CN or Fraser comment on the substance of the Applicant's evidence on the potential abandonments, they fail to demonstrate or even suggest that the alleged deficiencies would have any material impact on the Trustee's overarching point: If the CN trackage rights remain in place and CN retains its enriched share of the revenue on Fraser traffic under the Junction Settlement Agreement, MMA most likely will not have the financial staying power to retain its unprofitable operations on the Madawaska-Portage Line and the CDAC Line.

Lack Of Material Harm To Fraser. In the Application, the Trustee demonstrated that Fraser, the only shipper served by the CN trackage rights, would not be harmed in any material way by the discontinuance of the CN trackage rights. The Application showed that:

- (1) Continuation of the CN trackage rights was not necessary to protect Fraser from an interruption in rail service, the only concern expressed by Fraser before the grant of the trackage rights;
- (2) Discontinuance of the CN trackage rights would do nothing other than return Fraser to the multiple transportation options it enjoyed prior to the grant of the CN trackage rights;
- (3) Discontinuance of the CN trackage rights would not cause any deterioration of rail service to Fraser;
- (4) Fraser enjoys pervasive truck competition on all outbound paper transportation from the Madawaska Mill, which transportation was equivalent to of Fraser's total rail freight bill in 2000;
- (5) Fraser enjoys robust competition among railroads serving its multiple origins and multiple routings on all inbound commodities delivered to the Madawaska Mill by rail;
- (6)
- (7) Fraser's overall rail transportation costs have per year since execution of the CN Agreements.

See Application at Vol. 1-10 through 1-11 and 1-44.

The Opponents made very little in the way of a response to these points. CN and Fraser acknowledged that interruption in rail service was the only concern expressed by Fraser before the execution of the CN Agreements. CN and Fraser ignored the fact that discontinuance of the trackage rights would return Fraser to the status quo ante, which had worked well for decades. The Opponents also ignored the fact that Fraser never lost service even during the BAR

bankruptcy and provided no evidence to indicate that Fraser would have service interruptions under MMA ownership.

Fraser submitted no evidence responding to Applicant's evidence of Fraser's pervasive truck transportation options and the competitive forces trucks pose, the robust competition Fraser enjoys on multiple railroad routings or any evidence showing any Fraser savings after implementation of the CN Agreements.

CN also submitted no evidence on any of the competition issues. CN limited itself to a canned, wholly theoretical discussion of competitive issues, with no analysis of the facts presented in the Applicant's case.

Opponent's Arguments In Opposition To The Application. With not much to say on the merits of the potential abandonments and only theoretical points to offer on the potential harm to Fraser, CN resorted to distraction. According to CN's Protest:

- (1) MMA should not care about the chance to restore between \$1.4 and \$2 million per year in Fraser revenue by shifting that revenue from CN back to MMA, because the potential revenue gain is only one-seventh of the lost revenue attributable to the temporary shut down of the Millinocket Mills;⁶
- (2) MMA does not really support the Application;

⁶ CN Protest at HC 29-30. For convenience, citations herein to the CN Protest refer to the sequential numbering of the Highly Confidential version.

- and
- (3) The discontinuance of the CN trackage rights is not in the best interests of MMA;
 - (4) If the CN trackage rights are eliminated, MMA will implement a plan to restrict the St. Leonard gateway, thereby cutting off its largest customer (Fraser) from its largest interchange partner (CN), allegedly because MMA favors Canadian Pacific Railway Company ("CP").

As explained below, CN's arguments have no merit. MMA should and does care about restoration of between \$1.4 and \$2 million per year in revenue. MMA clearly does support the Application, in large part because discontinuance of the CN trackage rights is in the best interests of MMA. MMA has neither the power nor the motive to economically close or restrict the St. Leonard gateway. MMA has been open about its own interests motivating its support for the Application. CN is not so open about its motives. Except with respect to the meritless St. Leonard gateway closure argument, CN frames its entire opposition in the cloak of harm to Fraser. See CN Protest at HC 33-38. The Applicant has demonstrated that elimination of the CN trackage rights would not materially harm Fraser, and the Board should also recognize that CN's opposition to the Application is driven entirely by its desire to retain the additional revenue it acquired from BAR/MMA upon implementation of the CN Agreements and by the fact that if MMA fails, CN benefits greatly.

Fraser is reduced to making procedural objections in the apparent absence of any viable substantive argument, and offers an untenable assertion (recently abandoned by CN) that the Trustee did not have standing to file the Application. Fraser, the only shipper served by the CN trackage rights, puts in no specific evidence on any alleged harms from their discontinuance.

Lastly, NITL, a shipper organization, espouses the alleged "benefits" of the trackage rights for Fraser (and CN) without actually demonstrating what those "benefits" are. At the same time, NITL rails against the alleged "concrete harms" Fraser would suffer in the event the

trackage rights were eliminated, again without any proof, and oddly suggests MMA should implement instead of further evaluate the potential line abandonments, which would injure more than 250 shippers using the MMA System (including Fraser).

As explained and proved in the Application, as well as in this Rebuttal submission and supporting Verified Statements, the current and likely future harm to the BAR estate, MMA, and the shippers and communities served by MMA from the retention of the trackage rights by far outweighs the potential harm (if any) to Fraser and CN from the discontinuance of the trackage rights. Accordingly, the Board should find that the public interest supports discontinuance of the CN trackage rights.

PRELIMINARY MATTERS

A. The Impact Of The District Court's Jurisdictional Ruling

The Trustee filed his Application on October 6, 2003, and explained that as of that date the United States District Court for the District of Maine ("District Court") had not yet ruled whether 11 U.S.C. § 1170 or 49 U.S.C. § 10903 would apply to this proceeding. Application at Vol. 1-4. The Trustee noted that if the District Court determined that Section 1170 applied, the Board would be required to submit an advisory report to the District Court and, alternatively, if the District Court determined that Section 1170 did not apply, the Board would decide the case under Section 10903. Either way, the Trustee reasoned, the content of the Application and the substance of the Board's decision would be the same. Application at Vol. 1-4 through 1-5. Thus, the Trustee stated his request for relief in the alternative. Application at Vol. 1-70. On November 18, 2003, the District Court issued an order affirming the Recommended Decision of United States Magistrate Judge David M. Cohen pertaining to the applicability of 49 U.S.C. § 10903 to this proceeding.

On December 8, 2003, the Trustee filed a motion for entry of final judgment pursuant to Fed. R. Civ. P. 54(b) as well as a request pursuant to 28 U.S.C. § 1292(b) that the District Court certify the jurisdictional issue for immediate appeal to the United States Court of Appeals for the First Circuit. Although the District Court may rule on the Trustee's Rule 54(b) motion and Section 1292(b) request for certification before the Board rules on the merits of this Application, it is highly unlikely that if such motion and request were granted, the United States Court of Appeals for the First Circuit would rule on the Trustee's appeal of the jurisdictional issue before a Board decision in the case. Therefore, the Board need not delay its consideration of the Trustee's Application because of these pending court proceedings.

For the foregoing reasons, the Trustee respectfully requests that the Board authorize the discontinuance of the CN trackage rights and abandonment of the WRC easement pursuant to 49 U.S.C. § 10903. The Trustee will keep the Board apprised of any material developments in the pending court proceedings.

B. The Trustee Had Standing To File The Application

CN had, at times, questioned the Trustee's standing to pursue this adverse abandonment and discontinuance. Although CN recently dropped the argument,⁷ Fraser wasted no time in stepping forward to advance it.⁸ The thrust of Fraser's argument is that, given the sale of the BAR System's rail assets to MMA on January 9, 2003, the Trustee no longer has a "proper interest" in the abandonment sufficient to confer standing.⁹

⁷ See CN's Motion for Clarification of Procedural Schedule, filed December 8, 2003, at 3, 9 (indicating that CN is not challenging standing because the Trustee's interest appears sufficient under the Modern Handcraft standard).

⁸ See Fraser's Comments and Reply in Opposition ("Fraser Comment"), filed December 11, 2003, at 5.

⁹ See id. at 11.

The Board and its predecessor have consistently held that any person may institute an adverse abandonment proceeding “[s]ubject to establishing a proper interest in an abandonment proposal” Modern Handcraft, Inc. – Abandonment, 363 I.C.C. 969, 971 (1981) (“Modern Handcraft”). It is undeniable that, among other interests, the Trustee has a financial interest in this abandonment proposal. As CN recognizes, the Trustee’s financial interest alone is sufficient to confer standing under the Modern Handcraft standard.

The Trustee also has a statutory interest in this abandonment proposal as a result of his obligations under the Bankruptcy Code. See 11 U.S.C. § 1165 (directing railroad trustees “to consider the public interest in addition to the interests of the debtor, creditors and equity security holders”); Verified Statement of James E. Howard (“Howard V.S.”) at 2 (Application at Vol. 2-3). Pursuant to that statutory authority, and prior to the sale of the BAR System assets to MMA, the Trustee initiated the effort to seek rejection of the CN Agreements and elimination of the CN trackage rights and WRC easement themselves. The Trustee believes that elimination of the CN trackage rights and WRC easement is in the best interest of the public because, among other reasons, it will contribute to the long-term viability of the MMA System. See Howard V.S. at 7 (Application at Vol. 2-8). The Trustee’s statutory interest in this proceeding is sufficient in and of itself to confer standing under the Modern Handcraft standard.

In an attempt to support its contention that the Trustee lacks standing, Fraser lists nine examples of the different types of applicants the Board has entertained in adverse abandonment proceedings. Ironically, Fraser’s own list confirms that the “proper interest” requirement may be established by interests as disparate as those of government agencies seeking railroad land for non-railroad use, or nearby property owners who wish to exploit railroad land for their own

use.¹⁰ The Trustee's interests are easily on par with those of previous applicants, and the mere fact that the Trustee no longer owns or has a common carrier obligation on the line in question does not affect the Trustee's standing. The fact that the Trustee has sold the BAR System to MMA since initiating this proceeding does not strip him of a sufficient interest to pursue the Application.

Fraser's arguments to the contrary are misplaced, given that the actual parties to the CN Agreements, namely CN and BAR, expressly reserved their respective rights and obligations in the Bankruptcy Court's October 8, 2002 order approving the sale of estate assets to MMA (the "Asset Sale Order").¹¹ The Asset Sale Order expressly reserves "all rights and obligations of the parties to the CN Junction Settlement Agreement, the CN Trackage Rights Agreement, and the Waterloo Easement."¹² CN drafted and requested that language, and the Trustee submitted it to the Bankruptcy Court as part of the Asset Sale Order. CN and the Trustee thus agreed that the determination of whether the Trustee could oust CN from the line would be preserved, with both parties reserving all rights and obligations following the sale.

The parties to the CN Agreements and the Bankruptcy Court understood that the issues related to the termination of the trackage rights and easement would be resolved after the sale of the line encumbered by these rights as if the sale had not occurred. Fraser's suggestion that the sale caused the Trustee to lose rights in this matter conveniently overlooks the Asset Sale Order, which is binding on all parties with notice of the bankruptcy proceeding, including Fraser.

¹⁰ See Fraser Comment at 8-9.

¹¹ A copy of the Asset Sale Order is attached as Appendix 3 to the Howard V.S.

¹² The Trustee previously noted the effect of the Asset Sale Order in the Application. See Application at Vol. 1-8.

ARGUMENT

A. Applicant's Evidence Proves That The MMA System Is At Risk If CN's Trackage Rights Are Retained And Opponents Have Not Identified Any Material Flaws In Applicant's Evidence.

1. CN's Promise To Not Use The Trackage Rights As Long As It Is Satisfied With MMA Haulage Service Is Illusory.

CN says so long as the MMA haulage service remains available to CN and MMA continues to provide the same quality of haulage service, CN has no intention of operating under the Trackage Rights Agreement. See CN Protest at HC 32, 120. This promise is illusory for two key reasons.

First, as the Trustee has explained and Mr. Burkhardt has testified, the Junction Settlement Agreement (under which MMA provides the haulage service) itself threatens the viability of MMA. Thus, CN's promise to not use its trackage rights is of little value to MMA. See Rebuttal Verified Statement of Edward A. Burkhardt ("Burkhardt R.V.S."), attached hereto as Tab 1, at 10.

Second, and more importantly, the Junction Settlement Agreement expires at the end of February 2006. For the period after February 2006, if MMA proposes a haulage fee that CN finds unacceptable, CN will have the right to decline extension of the haulage arrangement and immediately and unilaterally initiate service to the Madawaska Mill pursuant to the Trackage Rights Agreement. If upon renewal of the haulage arrangement, CN proposes a haulage fee unacceptable to MMA, CN could move to use its trackage rights. Similarly, if after expiration of the Junction Settlement Agreement, CN takes the position that MMA's service is no longer "effective," CN could simply decline to renew the haulage arrangement. Neither CN's proposed haulage fee nor its characterization of the quality of MMA's service would be subject to any enforcement rights of MMA. What CN ignores and hopes the Board will ignore is that it has no

obligation to do anything with respect to the haulage arrangement after February 2006.

Burkhardt R.V.S. at 10. If CN does not get what it wants in a renewal of the haulage arrangement, it will simply move to its trackage rights, without breaking its promise to MMA and the Board. In deciding this case, the Trustee respectfully submits that the Board should give no weight to CN's illusory promise not to use the trackage rights.¹³

2. Opponents Fail To Undercut Applicant's Substantial Evidence On Likely Abandonment Of The Madawaska-Portage Line And CDAC Line.

a. Criticisms Of The Rail Trac Report Are Unfounded.

i. CN Did Not Perform Its Own Analysis And Introduces Virtually No Specific Evidence To Challenge Rail Trac Findings.

As part of the Application, the Trustee submitted an entire volume of evidence to support its assertion that MMA would save approximately \$800,000 annually from abandonment of the Madawaska-Portage Line and CDAC Line. This evidence consisted of a detailed financial analysis performed by Rail Trac Associates (the "Rail Trac Report"). Despite having access to much if not all of the underlying data used to prepare the Rail Trac Report and additional BAR and MMA traffic and cost data produced in discovery, CN elected not to perform its own analysis of the economic feasibility of the abandonments. See CN Protest at HC 41 (conceding that CN did not "re-run" the analysis). Instead, CN attempts to brush aside all of the Trustee's abandonment evidence by calling into question certain methodologies used to prepare the Rail

¹³ As previously discussed in the Application, the trackage rights are related to the Junction Settlement Agreement, but the revocation of the Junction Settlement Agreement as an executory contract under bankruptcy law would not extinguish the trackage rights themselves and would likely lead to CN's activation of those trackage rights. See Application at Vol. 1-6 through 1-8.

Trac Report.¹⁴ As explained below, CN's criticisms of the Rail Trac methodology are without merit and therefore the Board should accept the evidence submitted by the Trustee on the anticipated financial benefit to MMA from these abandonments.¹⁵

**ii. CN Criticisms Of
Reveal Its Lack Of Understanding About The Type Of
Evidence That Is Relevant In This Case.**

CN's witnesses claim that the

See Verified Statement of Richard B.

DeMink ("DeMink V.S.") at 1 (CN Protest at HC 178); Verified Statement of Sandra J. Dearden ("Dearden V.S.") at 1 (CN Protest at HC 195).

¹⁴ CN also tries to make much of the fact that MMA itself did not prepare a formal abandonment analysis for the CDAC or Madawaska-Portage Lines, relying upon Mr. Burkhardt's acknowledgement of this fact. CN Protest at HC 15. Obviously, the fact that MMA did not do a separate analysis of the potential abandonments does not represent any critique of the Trustee's analysis. Moreover, in the rest of the paragraph upon which CN relies for this point, Mr. Burkhardt concludes that abandonments on the MMA System are not MMA's best option but "may be the only option if MMA is not relieved of the burdens imposed by the CN Agreements." Burkhardt V.S. at 9-10 (Application at Vol. 2-177 through 2-178). Mr. Burkhardt notes that the CDAC and Madawaska-Portage Lines were the ones "most likely to be abandoned" if MMA is not able to obtain additional operating revenue. Burkhardt V.S. at 7 (Application at Vol. 2-175).

¹⁵ CN also criticizes the Trustee for identifying the potential abandonment of the Madawaska-Portage and CDAC Lines before the Great Northern Paper ("GNP") bankruptcy and before hiring its testifying witnesses. CN Protest at HC 17. The Rail Trac Report does not assume that the former GNP mills at Millinocket and East Millinocket would remain closed permanently; nor does it suggest that reduced production at those mills caused the Madawaska-Portage or CDAC Lines to become abandonment candidates. Thus, CN's point with respect to the GNP bankruptcy is illogical. The Trustee hired its testifying witnesses to provide evidence to support the conclusion that the lines were abandonment candidates, much in the same way that CN hired Dr. Vellturo to support CN's prior conclusion that Fraser would be harmed by the elimination of the CN trackage rights. As is explained below, Dr. Vellturo did not provide any such evidence. However, the point illustrates that CN's criticism of the timing of the Trustee's engagement of its testifying witnesses is hypocrisy.

See Rebuttal Verified Statement of Robert C. Finley ("Finley R.V.S."), attached hereto as Tab 2, at 2.

The Rail Trac Report was not prepared as part of a formal abandonment filing.

Even though it was not prepared as part of a formal abandonment filing, the overall methodology used in preparing the Rail Trac Report is consistent with STB abandonment requirements -

Therefore, even
if one were to accept CN's claims

it would not invalidate or otherwise detract from the ultimate conclusion of the Rail Trac Report:

The Rail Trac Report contains substantial evidence to support this conclusion, and CN has failed to introduce any specific evidence to suggest otherwise.

CN's generalized criticisms of the Rail Trac Report

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Moreover, Mr. DeMink's assertion
based on a flawed interpretation of STB abandonment costing requirements. As

In short, the methodologies used in the Rail Trac Report
provide the most reliable and accurate evidence of revenues that would be lost,
and costs that would be avoided, if MMA abandoned the Madawaska-Portage and CDAC Lines.
Any alleged variances
are not material to the Rail Trac Report's ultimate conclusion –

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that MMA will save money by abandoning the Madawaska-Portage Line and the CDAC Line.

CN has not provided any specific evidence to the contrary.¹⁹

iii. CN Fails To Undercut Applicant's Evidence.

CN fails to mount any serious challenge to the Rail Trac Report. CN witness Arthur Spiros questions certain methodologies used by Rail Trac, but fails to provide any specific evidence to support his claims. See Verified Statement of John G. Pinto ("Pinto V.S."), attached hereto as Tab 4, at 2-7. CN witness Richard Shure does not contest any of the evidence submitted by Rail Trac

See Pinto V.S. at 7-8. Mr. Shure's assertions are not supported by any specific evidence. See Pinto V.S. at 7-10.

iv. Fraser's Advisory Opinion Argument Is Wrong Because, As The Trustee Made Clear In The Application, The Potential Abandonments Are Not Before The Board At This Time.

Fraser argues that the Board should reject the Trustee's abandonment evidence under the advisory opinion doctrine. Fraser Comment at 13. This argument is wrong. The Trustee is not seeking Board authority to abandon the Madawaska-Portage and CDAC Lines. The Trustee does not own those lines and has not asked the Board to rule on whether the abandonment of those lines would be in the public interest at this time. Therefore, Fraser's advisory opinion argument should be rejected out of hand.

¹⁹

b. CN Distorts The Likely Impact Of The MMA/MDOT Agreement.

CN asserts that if MMA were to abandon the CDAC Lines and/or the Madawaska-Portage Line, MMA would “likely face repayment or forfeiture of upwards of \$5 million in infrastructure funding” from the State of Maine, Department of Transportation (“MDOT” or the “State”). CN Protest at HC 23. CN’s explanation of the Rail Funding Agreement relies upon only the most Draconian part of the Agreement. In so doing, CN distorts the likely impact of the Rail Funding Agreement on any MMA abandonments.

MMA and MDOT entered into a Rail Funding Agreement dated as of December 23, 2002, pursuant to which MDOT agreed to provide \$5.4 million to MMA for specified rail infrastructure improvements. MDOT agreed to provide up to \$2.7 million for each of calendar years 2003 and 2004, with a dollar-for-dollar match by MMA. See CN Protest at HC 43-44, Rail Funding Agreement, Sections 1.1 – 1.2. In March of 2003, MDOT and MMA amended the Rail Funding Agreement to waive MMA’s match requirement for 2003. The amendment to the Rail Funding Agreement indicates that the waiver was granted due to the bankruptcy filing of GNP and the resulting inability of MMA to furnish matching funds. Burkhardt R.V.S., Exhibit A.

The Rail Funding Agreement contains two, mutually exclusive remedies for MDOT in the event that MMA abandons any of a prescribed list of rail lines. See CN Protest at HC 48 (which is Exhibit A to the Rail Funding Agreement). In the event of an MMA abandonment, MDOT has the right to require MMA to repay a percentage of funds granted pursuant to the Rail Funding Agreement. The repayment percentage declines on a straight-line basis over ten years. See CN Protest at HC 45, Rail Funding Agreement, Section 2.2(b). CN selectively quotes “the entirety of Section 2.2 of the Rail Funding Agreement,” except for the last sentence, which provides that if the State exercises its remedy under Section 2.2(b) it cannot exercise its

alternative remedy under Section 4. Section 4 is MDOT's alternative remedy for (among other things) MMA abandonments of prescribed rail lines. Under Section 4, upon the occurrence of an Event of Default (as defined therein and including abandonment of prescribed rail lines), MDOT is entitled to recover from MMA an amount equal to the value of the rail assets paid for with funds provided by MDOT. This alternative remedy is defined as the "Value Recovery Remedy." If the State exercises its Value Recovery Remedy, its remedy under Section 2.2(b) is terminated. See CN Protest at HC 46, Rail Funding Agreement, Section 4.

CN's assertion that the Rail Funding Agreement penalties would exceed the annual savings attributable to the abandonment of the Madawaska-Portage Line and the CDAC Line is speculative for two reasons. First, CN does not fully explain MDOT's remedies under the Rail Funding Agreement and thereby distorts those remedies. Second, even under the most Draconian remedy available to MDOT, the penalty under the Rail Funding Agreement does not exceed the benefit of the abandonments.

As Mr. Burkhardt explains, if MMA is forced to seek authority for abandonment of the CDAC Line or the Madawaska-Portage Line, it is his intention to negotiate with MDOT for a repayment of state funds or redeployment of rail assets salvaged from the abandoned lines. Mr. Burkhardt believes the State would be receptive to such an alternative arrangement and his belief is not unfounded. As noted above, the Rail Funding Agreement requires MMA to match each dollar provided by the State. In light of the bankruptcy filing by GNP, MMA approached MDOT and requested that the match requirement be waived for 2003. The State agreed to waive the match. Based upon the State's strong support for MMA and its willingness to waive the

match requirement for 2003 (and possibly for 2004²⁰), Mr. Burkhardt believes the State would be receptive to negotiating an alternative arrangement for repayment of state funds equivalent in value to the assets salvaged from the Madawaska-Portage Line and/or the CDAC Line or redeployment of those assets elsewhere on the MMA system. Burkhardt R.V.S. at 7-8.

Mr. Burkhardt's belief that the State would be receptive to an alternative arrangement for repayment of State funds is not unduly optimistic. David A. Cole, the Commissioner of the Maine Department of Transportation, recently wrote to Mr. Burkhardt on the issue of the State's remedies under the Rail Funding Agreement. See MDOT Letter, attached hereto as Tab 6. In that letter, Commissioner Cole explains that MDOT's primary goal has been to preserve the entire BAR/MMA System in an active status. MDOT believes that a healthy and competitive MMA System is critical to the economic well being of northern Maine. Commissioner Cole explains that the Rail Funding Agreement is one component of MDOT's efforts to support and encourage a viable MMA System. He expresses the view that MMA's success depends "partly upon market forces and the health of the business community that the railroad serves, and partly upon the efficiencies that the entire company brings to operation and maintenance of the system." Id. Mr. Cole says "MDOT is willing to discuss amending the Rail Funding Agreement to more effectively meet the current operating challenges facing MMA." Id.²¹

²⁰ MMA is in the midst of negotiations with MDOT for a possible waiver of the match requirement for 2004. Although that waiver has not been finalized, Mr. Burkhardt is confident that MDOT will waive the requirement, because MDOT understands that the circumstances have changed since the original negotiation of the Rail Funding Agreement. Burkhardt R.V.S. at 8.

²¹ Assuming, for argument's sake, that MDOT insisted upon exercise of its remedy under Section 2.2(b), CN is still wrong in assuming that the penalty would exceed the financial benefit to MMA of the CDAC and Madawaska-Portage Line abandonments. Any penalty paid to the State would be a one-time payment, whereas the savings from the abandonments would be an annual \$800,000 savings.

c. **The MMA/CP Marketing Agreement Has No Material Impact On
The Abandonment Analysis Because**

On December 23, 2002, MMA and CP entered into an agreement

CN also claims that MMA's marketing incentives with CP make it unlikely that MMA would ever abandon the CDAC Line, and that if the CN trackage rights were eliminated, MMA would force Fraser away from MMA-CN joint line routings to MMA-CP joint line routings. CN Protest at HC 25-26. Again, CN has no factual support for these speculations and simply posits them as theoretical possibilities that should nonetheless somehow control over the Trustee's detailed abandonment analysis. In actuality, the heart of CN's argument seems to be that the MMA-CP routing is too competitive for CN's liking. While CN, a Class I railroad, is content to "compete" solely with MMA, a regional railroad against which CN historically has held significant advantages, the possibility that Fraser may be able to choose between MMA-CN routings and MMA-CP routings seems to be something else entirely. MMA cannot force Fraser into directing its rail traffic via certain routings, but if the MMA-CP routings offer better price and service than the MMA-CN routings and Fraser elects to use them, the interests of competition are advanced rather than lessened. Nonetheless, should the CDAC Line traffic remain unprofitable as a consequence of the trackage rights, then MMA clearly would be forced to abandon the CDAC Line.

3. CN's Assertion That The Potential Abandonment Of The Madawaska-Portage Or CDAC Lines Is Unrelated To Discontinuance Of The CN Trackage Rights Is Without Merit.

CN asserts that the Trustee never establishes any linkage between MMA's savings from abandonment of the CDAC Line and the Madawaska-Portage Line and elimination of the CN trackage rights. CN asserts that the fate of the CDAC and Madawaska-Portage Lines has nothing to do with elimination of the CN trackage rights. According to CN, "[i]f 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." CN Protest at HC 19. The fallacy in this line of reasoning is that CN takes a very short term view of the viability of the Madawaska-Portage and CDAC Lines. As Mr. Burkhardt explains, if MMA can regain from CN some of the revenue lost on Fraser traffic by eliminating CN's trackage rights, MMA can afford "to take a long term view of the potential of the CDAC and Madawaska-Portage Lines." Burkhardt R.V.S. at 6. As Mr. Burkhardt explains, "with adequate revenue on the Fraser traffic, MMA will have the financial staying power necessary to retain existing business and attract future business by improving operations, increasing service frequency and building its traffic base." *Id.* Clearly, MMA's ability to retain its rail infrastructure – the Madawaska-Portage and CDAC Lines in particular – is directly related to MMA's ability to generate adequate operating revenue on the Fraser traffic. CN's assertion to the contrary is simply wrong because CN takes an artificially short-term view of MMA's future.

CN also asserts that it would be cross-subsidization for the Board to authorize elimination of the CN's trackage rights in an effort to permit MMA to build its traffic base and retain the Madawaska-Portage and CDAC Lines. CN Protest at HC 19-20. Of course, cross-subsidization presupposes that a shipper pays more than it otherwise would so that another shipper retains

service. The case law CN quotes on this point so states. Id. There is no cross-subsidization involved in this instance, because this case is about how CN and MMA split the revenue paid by Fraser on traffic moving to/from the Madawaska Mill on CN and MMA lines. CN steadfastly ignores this critical point.²²

Contrary to CN's assertion, abandonment of the Madawaska-Portage Line and/or the CDAC Line is going to happen or not happen largely depending upon what the Board decides in this case.

4. CN And Fraser Fail In Their Attempt To Marginalize Applicant's Evidence That 250 Shippers Could Be Harmed By The Madawaska-Portage And CDAC Line Abandonments.

In the Application, the Trustee submitted specific evidence to support its assertion that approximately 250 shippers might be harmed from the abandonment of the Madawaska-Portage Line and CDAC Line. Neither CN nor Fraser introduces any specific evidence to the contrary, and therefore the Trustee's evidence on this point must be accepted by the Board. CN points out that there is very little on-line traffic on those lines and therefore implies that very few shippers would be harmed. CN Protest at HC 39. However, CN ignores the fact that the numerous overhead shippers on these lines would lose an existing rail transportation routing option. In particular, many shippers on the CDAC Line would lose an efficient routing to or from CN's primary competitor, CP. Although many of these shippers might have other rail transportation routing options available to them, their individual interest in maintaining a current routing option is as great if not considerably greater than Fraser's interest in CN's unactivated trackage rights.

²² CN argues that if MMA wants to use additional operating revenue gained from CN on Fraser traffic to improve operations on other parts of the MMA System, it should instead take the \$5 million and use that money to make improvements on the MMA System. As is explained in Section C below, CN's suggestion fails to recognize that MMA will raise new equity to pay the Trustee and that MMA could not raise those new funds except for the fact that it will gain between \$1.4 million and \$2 million in additional operating revenue (otherwise paid to CN) in the event the CN trackage rights are eliminated.

The collective interest of these 250 shippers, several of whom would lose access to rail service altogether from the abandonments, easily outweighs Fraser's interest in retaining a backup service option that has not been used.

B. MMA Supports The Application Based Upon Its Belief That Discontinuance Of CN's Trackage Rights Is In The Best Interest Of MMA.

As noted above, CN's protest contains virtually no evidence and relies almost exclusively on fallacious inferences dependent on absent parties, statements not made by Applicant's witnesses, curiously constructed interpretations of Mr. Burkhardt's testimony and rather obvious avoidance of large chunks of James Howard's and Jamie Heller's testimony. There is no better example of this than CN's assertion that MMA does not support the Application.

CN asserts that MMA's payment to the Trustee upon elimination of the CN trackage rights constitutes a financial burden on MMA and suggests that MMA hopes to avoid the payment to the Trustee.²³ Incredibly, CN claims the alleged burden may explain "MMA's absence to date as a participant in this proceeding" and "also may illuminate the cautiously parsed nature of the statement provided by MMA's Mr. Burkhardt." CN Protest at HC 20. The Application included a Verified Statement of Edward A. Burkhardt, the Chairman of the Board of Montreal Maine & Atlantic Corporation and of its wholly-owned subsidiary, MMA. The first paragraph of Mr. Burkhardt's Verified Statement ends with the following sentence: "I am submitting this Verified Statement in support of the Trustee's Application for Adverse Discontinuance and Abandonment." Verified Statement of Edward A. Burkhardt ("Burkhardt V.S.") at 1 (Application at Vol. 2-169). Mr. Burkhardt's Verification clearly indicates that he submitted his Verified Statement in his capacity (among others) as Chairman of Montreal Maine

²³ As is explained in Section C below, the \$5 million payment does not constitute a financial burden on MMA.

& Atlantic Corporation and of MMA. For CN to argue that MMA is absent from this proceeding is absurd. For CN to argue that MMA does not support the Trustee's Application belies any fair reading of Mr. Burkhardt's Verified Statement. Lest there be any doubt about this point, Mr. Burkhardt's Rebuttal Verified Statement reiterates MMA's support for the Application. Burkhardt R.V.S. at 1-2.

C. **The Discontinuance Of CN's Trackage Rights Is In The Best Interest Of MMA.**

CN questions whether MMA can afford the \$5 million payment to the Trustee and questions what effect such a payment would have on MMA's financial viability.

CN Protest at HC 16-18. CN's assertion presupposes that MMA would pay the Trustee out of operating revenues. As Mr. Burkhardt explains, MMA indeed can afford to make the \$5 million payment upon elimination of the CN Agreements and that payment would not diminish MMA's operating revenue. Burkhardt R.V.S. at 2-3.²⁴

CN's assertion that MMA cannot afford to pay for the elimination of the CN trackage rights is based on CN's short-term view of MMA's viability. In his opening Verified Statement, Mr. Burkhardt explained that MMA agreed to pay significantly less for the BAR System assets than it would have paid in the absence of the CN Agreements, but agreed to pay \$5 million if the Trustee succeeded in eliminating the CN Agreements. MMA made that agreement in advance of its purchase, but Mr. Burkhardt testifies that MMA would make the same agreement today.

²⁴ This entire line of argument by CN is unfounded. CN acknowledges Mr. Burkhardt's "substantial business experience and expertise," CN Protest at HC 29, yet questions whether MMA's \$5 million payment to restore balanced bargaining power with its biggest interline partner (CN) on its biggest customer (Fraser) is in MMA's best interest and professes concern over how MMA will pay the amount.

Burkhardt R.V.S. at 2. The owners of MMA's parent have a long-term view of the viability of MMA. Even if it takes MMA three and one-half or more years to earn back the \$5 million payment to the Trustee, there is no better investment MMA could make. During the estimated payback period, the \$5 million payment would generate a simple annual rate of return of approximately 28 percent – well above the industry-wide cost of capital – and the present value of the additional revenue to MMA calculated over 10 years (after subtracting the \$5 million payment to the Trustee) is approximately \$5.8 million. Burkhardt R.V.S. at 3. Perhaps CN would like MMA to take a short-term view of its own viability, but MMA does not.

CN's apparent concern about MMA's ability to pay the \$5 million payment to the Trustee upon elimination of the CN trackage rights is based upon the assumption that the payment would deplete MMA's operating revenue. This is not true. MMA would not pay the Trustee out of operating revenue, but instead would raise the \$5 million payment through new equity capital. Burkhardt R.V.S. at 3. Mr. Burkhardt explains that MMA is able to raise new capital for this payment precisely because elimination of the CN Agreements would be so beneficial to MMA. In contrast, Mr. Burkhardt notes that MMA could not raise an equivalent amount of new capital for other investments in the MMA System, because the other investments would not generate a sufficient return to attract new equity or allow new debt. Burkhardt R.V.S. at 3-4.

Accordingly, CN's apparent concern with MMA's ability to make the \$5 million payment to the Trustee upon elimination of the CN trackage rights is based on an invalid assumption and should be disregarded by the Board. CN praises the Board's informal policy of avoiding interference with privately negotiated agreements.²⁵ When it suits CN's purpose,

²⁵ As explained in Section G, the bankruptcy process specifically contemplates rejection of executory contracts, so the Board should not hesitate to rule on the merits on this Application for fear that it would interfere with the CN Agreements.

however, CN does not hesitate to advocate Board scrutiny of a private agreement, even upon invalid assumptions and reasoning.

D. Applicant's Evidence Proves That Fraser Will Not Be Adversely Affected By Discontinuance Of CN's Trackage Rights And Opponents Have Not Identified Any Material Flaws In Applicant's Evidence.

1. CN And Fraser Acknowledge That The Only Concern Expressed By Fraser Before Execution Of The CN Agreements Was That BAR Might Cease Service To Fraser, But They Do Not Proffer Any Reason Why Trackage Rights Are Necessary Today To Ensure Uninterrupted Rail Service.

CN and Fraser acknowledge that the only concern Fraser expressed before the execution of CN Agreements was that BAR rail service to Fraser might be interrupted by BAR's financial condition. CN Protest at HC 5. The expressed purpose of the Junction Settlement Agreement was to ensure that Fraser would receive uninterrupted rail service at the Madawaska Mill. The only purpose of the Trackage Rights Agreement was to provide CN with access to the Madawaska Mill in the event BAR's service ceased under the Junction Settlement Agreement. CN Protest at HC 6, 13 n.9. CN and Fraser have failed to establish that such a service failure is likely to occur. BAR continued to provide reliable service to Fraser throughout the tumultuous financial period leading up to and during its bankruptcy. MMA has continued to provide reliable service to Fraser since MMA's acquisition of the BAR assets. Although MMA inherited the financial challenges inherent in a light-density rail network, and has weathered additional financial challenges from the GNP shutdown, MMA has never failed to provide service to the Madawaska Mill. CN is satisfied with the service. CN Protest at HC 32; Verified Statement of Clifford L. Carson ("Carson V.S.") at 12-13 (CN Protest at HC 119-120). CN and Fraser express nothing other than a generalized concern about a cessation of MMA service because they have no legitimate basis for fearing an interruption in rail service. The reason for the trackage rights, as expressed by Fraser, the only shipper served by the trackage rights, no longer exists.

Even assuming for argument's sake that an MMA service failure to the Madawaska Mill was a remote possibility, it would not justify the result sought by CN and Fraser. The Board has specific procedures in place for ensuring that alternative rail service is provided to shippers in the event of a service failure. The Board has explicit statutory power under 49 U.S.C. § 11123 to provide immediate directed service in the event of such an emergency. Under the statute, the Board may direct a carrier to operate over the lines of another carrier in the event of certain service failures. Both shippers and railroads may bring petitions for such emergency orders, and the Board resolves such petitions quickly. See, e.g., Joint Petition for Service Order, STB Service Order No. 1518 (Board served October 31, 1997). The Board's regulations provide an extremely rapid procedural schedule for treatment of such petitions, with a reply from the incumbent carrier due within five (5) business days, and the petitioner's rebuttal due three (3) days after that. See 49 C.F.R. § 1146(b); see also 49 C.F.R. § 1147.1.

Thus any alleged security the trackage rights may provide to Fraser is largely redundant with the directed service power contained in the Board's governing statute and regulations. Despite affirmations by both CN and Fraser as to the quality of MMA's service, should a valid service failure ever actually occur, CN or Fraser could seek an expedited order from the Board directing a carrier to service Fraser over MMA's line. Given its physical proximity to the Madawaska Line and its professed support for Fraser's interests in this proceeding, CN would be available (and we presume willing) to provide directed service to the Madawaska Mill in the event of an MMA service failure until a permanent replacement operator could be engaged.

2.

Application at

Vol 1-50, 1-55. As noted above, CN frames its opposition around alleged harms to Fraser. Here, more than anywhere, CN's actions show that the true motive of CN is not to protect Fraser,

3. CN Would Have The Board Decide This Abandonment Case Using Its New Merger Criteria Instead Of The Applicable Public Interest Standard.

The Board must decide this case under the public interest standard of 49 U.S.C. § 10903. See Fore River RR. Corp. – Discontinuance of Service Exemption – Norfolk County, MA, Docket No. AB-359 (ICC served March 30, 1992). CN asserts that granting the relief sought by the Trustee in this Application would overturn long-standing Board competition policy and result in significant competitive harm to Fraser. CN Protest at HC 33-38. The first and most critical point here is that the Board need not ever reach CN's arguments unless elimination of the CN trackage rights constitutes a "2-to-1" foreclosure or raises potential competitive harms to Fraser.²⁶ As explained below, elimination of the CN trackage rights does not result in a "2-to-1" foreclosure with respect to Fraser Paper or raise potential competitive harms to Fraser.²⁷

²⁶ Fraser does not view MMA as a bottleneck carrier. Austin S. Durant, the Vice President-Materials Management of Fraser, has submitted a Verified Statement in this proceeding that indicates as follows:

"Since the granting of the running rights to CN and the competition of two rail carriers at Madawaska, the MMA has benefited with additional rail traffic to and from the Mill. All inbound movements of clay are now routed over MMA as well as the percentage of outbound rail traffic over MMA has grown from less than one percent (1%) to approximately ten percent (10%). This is a significant indication that the competition has benefited both Fraser and the MMA."

Verified Statement of Austin S. Durant ("Durant V.S."), attached to Fraser Comment, at 5 (emphasis added). If MMA were a bottleneck carrier maximizing monopoly profits, it would not benefit from competition with CN. Since Fraser believes MMA has benefited from the competition, Fraser necessarily also believes MMA is not a bottleneck carrier.

²⁷ CN depends entirely upon a theoretical discussion of the "one lump" theory to support its argument. It is important to note that the "one lump" theory is not treated as an absolute by the Board. Western

CN would have the Board apply here the policies it established in its new major merger rules. CN Protest at HC 34. This argument is without merit. The correct analytical framework here is determination of the public interest, under which the Board must balance (i) the potential harms to Fraser and CN from discontinuance of the CN trackage rights against (ii) the potential harms to the BAR estate, MMA and the shippers and communities served by the MMA System from retention of the trackage rights. Application at Vol. 1-8; see Fore River (citing Colorado v. United States, 271 U.S. 153 (1926)).

In contrast, under the new major merger rules, the remedial conditions are specifically crafted to address several factors exacerbated by rail mergers: increased concentration of Class I railroads, the elimination of the railroad industry's excess capacity, and the serious transitional service problems that have accompanied recent major rail consolidations.²⁸ It is against this backdrop of market concerns that the Board formulated its new merger procedures in 2001. Board scrutiny of mergers is heightened in comparison to other regulated transactions due to their effect on industry concentration, their creation or enhancement of market power, their finality, and their potential for regional or national anticompetitive effects. In the new consolidation procedures, the Board incorporated a requirement for an affirmative pro-competitive showing (i.e., plan for enhancing competition) by applicants to rebut the Board's presumption that mergers have anticompetitive effects. Consequently, merger applicants are required to explain whether the potential benefits of merger could be achieved by means short of

Resources, Inc. v. STB, 109 F.3d 782, 787-88 (D.C.Cir. 1997). The Board regards the "one lump" theory as strong enough to create a presumption of bottleneck maximization of monopoly profits, but the presumption is rebuttable. Id. The applicant has submitted more than sufficient evidence to rebut the theoretical presumption espoused by CN's expert, Dr. Velturo. See Heller R.V.S.

²⁸ See Major Rail Consolidation Procedures, STB Ex Parte No. 582 (Sub-No.1) (STB served June 11, 2001) at 14.

merger (e.g., joint venture, alliance) because of such potential anticompetitive effects.²⁹ The Board's new major merger rules simply do not apply to the Board's evaluation of this adverse abandonment case or to evaluation of the potential harms to Fraser in particular.

On a related point, CN argues that the relief sought by the Trustee in the Application is inconsistent with the rail transportation policy ("RTP"). CN Protest at HC 33. However, the only element of the RTP cited by CN is the first one, codified at 49 U.S.C. § 10101(1), which makes it 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;" (emphasis added). Of course, if the Board grants the relief requested by the Trustee, it will have determined based on evidence in the record that any potential reduction in competition is outweighed by overriding public interest concerns and other elements of the RTP, including the policy to "ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;" and the RTP element "to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes." 49 U.S.C. § 10101(4) and (5). Moreover, to the extent the Board finds that the retention of the CN trackage rights threatens the viability of MMA and that MMA's failure would enhance CN's market power with respect to Fraser or other shippers in Maine, see Application at Vol. 1-68, the Board would be fostering the twelfth element of the RTP, which includes avoiding "undue concentrations of market power." 49 U.S.C. § 10101(12). On balance, the elements of the RTP strongly favor granting the relief requested by the Trustee.

²⁹ See id. at 23.

4. **CN and Fraser Do Not Deny That Fraser's Overall Rail Transportation Costs Since The Time CN Gained Commercial Access To The Madawaska Mill.**

a. **CN And Fraser Do Not Challenge Applicant's Evidence**

CN and Fraser never challenge a key finding made by the Trustee – Fraser has saved per year in overall rail transportation costs since the time CN gained commercial access to the Madawaska Mill. See Rebuttal Verified Statement of James N. Heller (“Heller R.V.S.”), attached hereto as Tab 5, at 1-3, 12. Neither CN nor Fraser has challenged these neither has challenged the methodology used to calculate these savings; neither has independently calculated any savings to Fraser; and neither has identified any possible savings in addition those the Trustee has identified. In fact, Fraser never identifies or attempts to quantify the savings, if any, it feels it has received or might receive as a result of the CN Agreements.

On outbound paper moved over non-CN routings, Fraser annualized savings amount to a of Fraser's 2000 total rail freight costs. Heller R.V.S. at 2-3.

Heller R.V.S. at 2.

annualized savings on clay are of its total rail freight costs, while savings on silica

Heller R.V.S. at 4, 14.

In an attempt to inflate and obscure the real impact CN commercial access has had (or has not had) on Fraser, CN witness Dr. Vellturo relies on numbers that are irrelevant to the merits of this case. He highlights

Verified Statement of Christopher A. Vellturo (“Vellturo V.S.”) at 16 (CN Protest at

HC 154). He also highlights

Velturo V.S. at 15, 22 (CN Protest at HC 153, 160). These revenue figures merely show wealth transferring between railroads (including CN and MMA), a measure that has nothing to do with the impact the trackage rights have had on Fraser or on competition for Fraser traffic. Heller R.V.S. at 2.

**b. Applicant's Expert Witness Mr. Heller Demonstrated That Fraser's
Was Attributable In Part To Competitive Behavior
Unrelated To The Trackage Rights Agreement And The Junction
Settlement Agreement And CN/Fraser Have Submitted No Evidence
To The Contrary.**

Fraser's overall transportation costs have gone down per annum since
execution of the CN Agreements and it is far from clear that

is attributable to the CN Agreements. Heller R.V.S. at 1-4, 12-14. Much of these
is attributable to market forces other than the CN Agreements, including bridge
competition, truck competition, product competition and geographic competition. Heller R.V.S.
at 1. These forms of competition pre-date the implementation of the Haulage Agreement and
would continue unabated even if the CN Agreements were terminated. Verified Statement of
James Heller ("Heller V.S.") at 46 (Application at Vol. 4-47); Heller R.V.S. at 1-2.

On outbound paper traffic, active bridge competition and the special marketing efforts of
accounted for much of Heller R.V.S. at 3.
Moreover, truck competition for outbound paper is pervasive (discussed below), putting
downward pressure on MMA and other railroad rates. Heller R.V.S. at 9-12; Application at Vol.
1-49.

Likewise, the in Fraser transportation costs for inbound commodities
can be attributed to market forces other than the CN Agreements. Heller R.V.S. at 12. There are

multiple origins and multiple routings for Fraser's clay traffic, and the origin carriers and bridge carriers offer rate concessions to Fraser to win its traffic. Heller R.V.S. at 13. The competition for clay traffic historically has been fierce because it is high-value traffic. Heller V.S. at 31 (Application at Vol. 4-32); Application at Vol. 1-60. This competition will continue, regardless of the termination of the trackage rights. Additionally, imported clays from Brazil are increasingly used in place of kaolin clay, and the use of such imported clays creates additional geographic competition that benefits Fraser, but is independent of the CN Agreements. Product competition from the less expensive calcium carbonate, which can move by truck, further benefits Fraser. Heller R.V.S. at 13-14. Dr. Velturo dismisses both product and geographic competition³⁰ in spite of the fact that the Board considers these forms of competition potentially sufficient constraints in preventing competitive harm even in 2-to-1 situations.³¹

CN argues that the CN Agreements have led to intensified bridge competition. Velturo V.S. at 11-12 (CN Protest at HC 149-150). But as the actual competitive market conditions have shown, bridge competition pre-dates and exists independent of the CN Agreements. Heller R.V.S. at 1, 3, 13. To the extent bridge competition has intensified as a result of the CN Agreements, it has not intensified much. This is shown by the _____ to Fraser since implementation of the CN Agreements. Heller R.V.S. at 1-2, 6-7. Neither CN nor Fraser have proffered any evidence or conducted any analysis to show that Fraser has not benefited, or could not benefit, from these forms of competition that are unrelated to the CN Agreements.

³⁰ Dr. Velturo summarily rejects the Trustee's evidence on geographic competition and product competition, but engages in an extensive discussion of de novo entry despite the fact that the Trustee never raised this argument in its Application.

³¹ Major Rail Consolidation Procedures, STB Ex Parte No. 582 (Sub-No.1) (STB served June 11, 2001) at 85.

5. Opponents Deny, But Offer No Evidence To Contradict, That Fraser Enjoys Pervasive Truck Competition On All Outbound Paper Transportation, Which Comprises Of Fraser's Annual Rail Freight Bill.

Fraser enjoys pervasive truck competition for its outbound traffic,

Heller V.S. at 7

(Application at Vol. 4-8). In fact, Fraser spends nearly on truck transportation of outbound paper. Heller V.S. at 6 (Application at Vol. 4-7). Overall, approximately 35% of Fraser outbound paper is moved by truck. Vellturo V.S. at 21 (CN Protest at HC 159); Durant V.S., attached to Fraser Comment, at 4.

Heller R.V.S. at 9.

Dr. Vellturo attempts to argue that the price difference between truck and rail precludes competition between these two modes of transportation. Vellturo V.S. at 21 (CN Protest at HC 159). In the same statement, Dr. Vellturo asks us to recognize that there are "price-quality bundles" that are "somewhat differentiated from one another, [but] still afford significant competitive constraints on one another," Vellturo V.S. at 9, n.7 (CN Protest at HC 147), thus destroying his own argument that trucks are not competitive. This price gap represents the value of better service, for example, or faster delivery time. *Id.* It is well-settled that the mere existence of a price difference does not preclude a finding that services are in the same relevant market.³²

Further proof of pervasive truck competition is in CN's own documents. They are replete with evidence of Dr. Vellturo dismisses. Although Mr. Carson asserts

³² United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 401 (1956) (holding that cellophane is in the same relevant market as other flexible packaging materials despite costing two or three times more).

Carson V.S. at 17 (CN Protest at HC 124), e-mails (see Heller R.V.S., Exhibit A thereto) between Tina St. Jarre (of Fraser) and Bill Foliot (of CN) prove otherwise. In one such e-mail exchange, Mr. Foliot writes:

In response Ms. St. Jarre (of Fraser) writes:

* * *

In a separate discussion regarding rates to Mr. Foliot (of CN) quotes a rail rate and states:

Ms. St. Jarre (of Fraser) responds:

In response, Mr. Foliot (of CN) writes:

-
- ³³ Heller R.V.S. Exhibit A, HC 000901.
³⁴ Heller R.V.S. Exhibit A, HC 000901.
³⁵ Heller R.V.S. Exhibit A, HC 000878.
³⁶ Heller R.V.S. Exhibit A, HC 000880.

* * *

In two other e-mail exchanges, Ms. St. Jarre (of Fraser) asks Mr. Foliot (of CN) for rail quotes on t

and

Had Dr. Vellturo read CN's documents, he would have seen that

Dr. Vellturo's hasty dismissal of truck competition is no small oversight. It means that his theoretical conclusion fails to account for the fact that of Fraser traffic can be won away by truck.

6. Opponents Offer No Evidence To Counter Applicant's Evidence That Fraser Enjoys Robust Competition Among Railroads Serving Its Multiple Origins and Multiple Routings On All Inbound Commodities Delivered To The Madawaska Mill By Rail.

a. CN Espouses The "One Lump" Theory Instead Of Addressing The Trustee's Evidence Of The Actual Competitive Environment.

³⁷ Heller R.V.S. Exhibit A, HC 000880.

³⁸ Heller R.V.S. Exhibit A, HC 000888.

³⁹ Heller R.V.S. Exhibit A, HC 000895.

CN declined to address the Trustee's evidence on the actual competitive environment in this case. Instead, Dr. Velturo draws conclusions predicated on a series of hypothetical examples and the one lump theory. Dr. Velturo's theoretical approach to this case is in direct contradiction to his previous statement filed with the Board. In that statement, Dr. Velturo calls for a "case-by-case" analysis, a "fact-specific" approach when evaluating competitive effects. *Heller R.V.S.* at 6. In that same Major Rail Consolidation Procedures proceeding, CN also argues for a close examination of the facts. CN saw it necessary to move away from per se rules, toward a rule of reason analysis in line with courts and antitrust enforcers, in which specific facts are examined in detail in order to avoid improperly displacing market decisions with legal constraints.⁴⁰ CN went on to say that it would be particularly inappropriate for the Board, which has been explicitly directed by Congress to minimize federal regulatory controls under a deregulatory statute, to adopt a per se rule, especially in light of the Board's "expertise and institutional capacity to examine industry facts that courts lack."⁴¹

Had CN or its witness actually applied the one lump theory to the facts of this case, they would have seen that the theory does not hold here. *Heller R.V.S.* at 1.

b. CN's Witness Velturo Failed To Account For The Critical Fact That The Putative "Bottleneck" Carrier Cannot Absorb Rebate Price Concessions Of Other Carriers If It Does Not Know About The Rebates.

The fatal flaw in Dr. Velturo's theoretical conclusion is that it is dependent upon MMA (the "bottleneck" carrier in his example) knowing what Fraser is willing to pay and what it does pay. *Heller R.V.S.* at 6-8. But MMA does not know this. Without this information, MMA

⁴⁰ Major Rail Consolidation Procedures, STB Ex Parte No. 582 (Sub-No.1) (STB served June 11, 2001) at 93.

⁴¹ Id.

cannot capture the benefits of the price concessions (usually offered as rebates) that the other railroads give to Fraser in order to compete for its traffic. Heller R.V.S. at 7-8. For example, inbound clay traffic moves under tariff rates,

Heller R.V.S. at 13.

Unlike the omniscient Railroad A in Dr. Velturo's hypothetical example, MMA cannot adjust its portion of the rate in order to capture the value of these rebates if does not know what they are. Thus, the value of the rebates flows directly to Fraser. Prior to execution of the CN Agreements, BAR was not able to take full advantage of its putative bottleneck position because of this lack of information, and because of the presence of truck competition. Even after termination of the CN Agreements, these factors will persist and remain as safeguards against MMA absorbing monopoly rents for itself.⁴²

7. CN's Reliance On The Revocation Decision Is Misplaced.

CN's repetitive reliance on the Board's decision in Canadian National Railway Company – Trackage Rights Exemption – Bangor and Aroostook Railroad Company and Van Buren Bridge Company, Finance Docket No. 34014 (STB served June 25, 2002) (the "Revocation Decision") with respect to the alleged or potential harm to Fraser is misplaced. CN Protest at HC 7-8, 14-15, 33-34. In the Revocation Decision, the Board's analysis turned on whether the petitioner met "its burden of proof by articulating reasonable, specific concerns addressing the revocation criteria" under 49 U.S.C. § 10502(d) and 49 C.F.R. § 1115.4. See Revocation Decision at 7-8. The Board applied a different test on much less evidence than what is now in

⁴² Cf. Burlington N. Inc. and Burlington N. RR. Co. – Control and Merger – Santa Fe Pac. Corp. and the Atchison, Topeka and Santa Fe Ry. Co., 1995 WL 528184 (ICC served August 23, 1995) at 62 (when certain factors are present that limit a carrier's ability to take full advantage of a bottleneck such as imperfect information and competitive constraints in the form of truck competition, those factors will remain in place as effective safeguards after the merger).

the record in this adverse abandonment proceeding. The Board now has extensive evidence showing that the elimination of the CN trackage rights will not materially harm Fraser.

Moreover, the Board will decide this case under the public interest standard of 49 U.S.C. § 10903. See Fore River RR. Corp. – Discontinuance of Service Exemption – Norfolk County, MA, Docket No. AB-359 (ICC served March 30, 1992).

E. CN Belittles MMA's Effort To Regain Adequate Revenue On Fraser Traffic.

Much in the same way that CN does not care and does not think the Board should care about the 250 other shippers that might be harmed by the potential MMA abandonments, CN thinks MMA should not care about a chance to restore \$1.4 million to \$2 million per year in revenue by shifting that revenue from CN to MMA, because that amount of revenue is only one-seventh of the lost revenue attributable to the shutdown of the Millinocket Mills as a result of the GNP bankruptcy. CN Protest at HC 29-30. CN espouses the view that the operating revenue impact of GNP's closure is much greater and that elimination of the trackage rights would have "little effect on MMA's situation." CN Protest at HC 29-30. CN asserts that the Trustee can only argue that "every little bit helps" and claims that "elimination the CN's rights on the Madawaska Line would result in only a miniscule benefit to MMA." CN Protest at HC 31 (emphasis added). MMA relies on a collection of relatively small shippers for a significant portion of its revenues. To be successful, MMA must operate a sizable network of lines to retain existing business and attract future business. Burkhardt V.S. at 4 (Application at Vol. 2-172); Burkhardt R.V.S. at 4. The GNP shutdown had a significant adverse impact on MMA. MMA took dramatic steps to respond to the shutdown and survive. Burkhardt V.S. at 7-8, 11 (Application at Vol. 2-175 through 2-176, and 2-179). The Millinocket Mills are coming back online. Burkhardt R.V.S. at 5. However, regardless of the outcome with respect to the

Millinocket Mills, Mr. Burkhardt disagrees with CN that \$1.4 to \$2 million per year in additional operating revenue is a "little bit." Burkhardt R.V.S. at 5. Revenue of \$1.4 to \$2 million per year may be a "little bit" for CN, but for a struggling regional railroad like MMA, these numbers represent significant operating revenue improvements. Moreover, when it comes to operating revenues on a regional railroad, every little bit does help. MMA's long-term success depends upon generating increased business from small shippers. Burkhardt R.V.S. at 4. Thus, regardless of what happens at the Millinocket Mills, MMA's future does depend in part on the Board's decision in this proceeding.

F. Instead Of Analyzing Applicant's Evidence, CN Reintroduces Its Now Familiar "Gateway Closure" Argument But Again Fails To Provide Any Proof.

Instead of explaining why it did not share one penny of its additional revenue on Fraser traffic with Fraser, CN reintroduces its now familiar argument that elimination of the CN trackage rights will motivate MMA to "restrict" the St. Leonard gateway.⁴³ CN Protest at HC 6; Carson V.S. at 6-7 (CN Protest at HC 113-14). CN has been making this claim ever since the revocation proceeding in May of 2002, without any substantiation.⁴⁴ Now, having had more than 19 months to get ready, and having had more than 2 months to scrutinize the Trustee's Application, CN submits absolutely no evidence to support its "gateway closure" assertion. Moreover, despite Mr. Carson's desire to remember gateway closure risk as a problem, see Carson V.S. at 6-7 (CN Protest at HC 113-14), service interruption was the only concern Fraser expressed before the implementation of the CN Agreements. See supra at 24. After all this time, all CN can muster is a speculative claim that MMA's marketing incentive arrangement with CP

⁴³ Aside from this unsupported assertion, CN does not make any specific claim that it would be harmed by the grant of the Application.

⁴⁴ See, e.g., Reply of Canadian National Railway Company and Waterloo Railway Company to Petition to Reopen and Revoke Exemptions, filed May 10, 2002 in Finance Docket No. 34014, at 10.

somehow signals an MMA plan to “restrict otherwise competitive MMA-CN joint line routings for Fraser in favor of MMA-CP joint line routings.” CN Protest at HC 26. CN bases its claim on three points:

- The MMA/CP incentive arrangement
- Mr. Burkhardt told *Railway Age Magazine* that he hoped CP and MMA would have close cooperation in joint-line marketing;
- CP has not taken a position on the merits of the Trustee’s Application and therefore either does not believe CN’s trackage rights jeopardize MMA or does not care.

CN Protest at HC 24-27. CN offers no evidence to support these points, none of which have any merit.

CN has reviewed MMA’s Business Plan and filed it with its Protest. See CN Protest, Exhibit C at HC 80.

In his opening Verified Statement, Mr. Burkhardt explained that MMA had every incentive to help Fraser remain competitive. If Fraser cannot compete with other paper manufacturers served by other railroads, MMA loses a significant amount of revenue. Burkhardt V.S. at 10 (Application at Vol. 2-178); Burkhardt R.V.S. at 9.

In response to CN’s first charge, Mr. Burkhardt says “MMA will indeed use its marketing incentive arrangement with CP to offer Fraser attractive transportation rates and routings over CP.” Burkhardt R.V.S. at 9. This will benefit Fraser. MMA also will work with CN to offer attractive rates and routings to Fraser. To do otherwise would harm MMA. Id. CN would like

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the Board to see this case as about “restricting” the St. Leonard gateway, but CN has given the Board no evidence to suggest that MMA could even benefit from doing so, much less any evidence that MMA has the power to do so. This case is about putting MMA in a position to negotiate with CN, rather than live with CN’s permanent power to dictate MMA’s share of revenue on Fraser traffic moving over the St. Leonard gateway.

As Mr. Burkhardt

notes, CP and CN have had a “strong rivalry” over the years, but MMA is a pawn of neither. Burkhardt R.V.S. at 10. Nothing in the *Railway Age* article so heavily relied upon by CN supports CN’s assertion that MMA would or could restrict the St. Leonard gateway.

CN would have a great advantage over CP in Northern New England if MMA were to fail. MMA’s success will depend on its ability to offer attractive routings on CP and CN (and Guilford) for Fraser, as well as the hundreds of other, smaller shippers served by MMA. Therefore, MMA has no economic incentive to close the St. Leonard gateway.

Although CP has not taken a position on the merits of the Trustee’s Application, CP’s absence implies nothing about the Trustee’s Application and CN’s speculation about the “meaning” of CP’s silence is totally irrelevant. With no evidence, CN apparently is left to argue that the Board should make its decision in this case based in part on an inference drawn from the absence of a railroad’s participation in the case. See CN Protest at HC 26-27.

G. Equitable Treatment Of Creditors Is In The Public Interest, And An Appropriate Factor In The Board's Consideration Of The Application.

1. CN/Fraser Attempt To Portray Recovery Of \$5 Million As An Inappropriate Purpose Of The Application Ignores Interests Of Creditors Under The Bankruptcy Law.

CN and Fraser both assert that the Trustee's sole remaining role is to collect funds (or, as CN puts it, a "windfall") to satisfy obligations to creditors of the BAR estate. See CN Protest at HC 4, 18; Fraser Comment at 4, 8. CN actually claims the Trustee has attempted to "avoid any mention" of the potential \$5 million payment from MMA despite the fact that the Trustee included the payment in a tabulated list of the anticipated benefits of the discontinuance of the CN trackage rights in the introductory section of the Application. See CN Protest at HC 18; Application at Vol. 1-12. The Trustee has never concealed the fact that the \$5 million payment will be of benefit to both the estate and the public interest.

Despite both CN and Fraser's fixation on the \$5 million payment, the Trustee's bankruptcy duties encompass much more than simply collecting funds to satisfy the obligations to creditors. A trustee in bankruptcy is a fiduciary representing not only creditors, but also the entirety of the bankruptcy estate.⁴⁵ All bankruptcy trustees have a duty to the public to marshal assets of the estate, to the potential benefit of many entities in addition to unsecured creditors, according to the priorities set forth in 11 U.S.C. § 507.⁴⁶

⁴⁵ Petitioning Creditors of Melon Produce, Inc. v. Braunstein, 112 F.3d 1232, 1240 (1st Cir. 1997).

⁴⁶ See 7 Collier On Bankruptcy ¶ 1106.02[3] (15th ed. rev.2001); In re CoServ, L.L.C., 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002) (trustee "is a fiduciary holding the bankruptcy estate and operating the business for the benefit of its creditors and (if the value justifies) equity owners"); In re DN Associates, 144 B.R. 195, 199 (Bankr. D. Me. 1992), aff'd 3 F.3d 512, 516 (1st Cir. 1993) ("Without question, the Chapter 11 debtor and its management occupy a fiduciary role vis-a-vis the estate and its constituents.").

Here, the Trustee--like all Chapter 11 Trustees--is charged with the duty to investigate the acts, conduct, assets, liabilities and financial condition of the debtor, file disclosure statements, and in appropriate cases file, secure and obtain confirmation of and implement a reorganization plan. 11 U.S.C. § 1106. This is in addition to the special duties imposed upon railroad trustees under Subchapter IV of the Bankruptcy Code. In fulfilling these duties, the trustee is answerable to the public at large as a court officer charged with fiduciary responsibilities.⁴⁷ Both railroad and non-railroad trustees are empowered and in fact required to use all means available under the Bankruptcy Code to avoid burdensome obligations, and to recover property of the bankruptcy estate using the recovery, avoidance and rejection tools granted to all trustees of all bankruptcy estates under, inter alia, Bankruptcy Code section 365, 542, 543, 544, 547, 548, and 549.

The duties of a railroad trustee under the Bankruptcy Code are even broader than the responsibility of trustees in non-railroad cases. Such duties extend not only to treating creditors fairly and equally, but also to furthering the public interest in continuing, to the maximum extent possible, rail service provided by the debtor. In this respect, the duties of a railroad trustee under the Bankruptcy Code are virtually identical to the Board's responsibility to consider the public interest in evaluating an abandonment application.

The public interest was served by the sale of substantially the entire BAR system to MMA. To the maximum extent possible, rail service was preserved, and, by placing the system in the hands of MMA, a proven operator, the prospects of ensuring that rail service would be provided for the long-term were enhanced. The job, however, is not finished. The Trustee's Application further serves the public interest, as defined by the Bankruptcy Code, in minimizing the possibility that a reorganized railroad such as MMA will not prosper or, even worse, will be

⁴⁷ In re Marvel Entertainment Group, Inc., 140 F.3d 463, 479 (3d Cir. 1998).

forced to return to the protection of a bankruptcy proceeding. Terminating the trackage rights will serve to protect and foster the ability of MMA to continue to provide service throughout the entire system for the long-term.

CN and Fraser in effect invite the Board to ignore the Trustee's duties to the public and to ignore the impact that the pending Application will have upon the BAR estate. The Board must reject any such invitation to consider the Application in a vacuum, as if no bankruptcy had occurred.⁴⁸ The public interest issues that must be considered by the Board are entirely consistent with the public interest issues arising under the Bankruptcy Code.

Moreover, CN's assertion that the Board should follow its informal policy of not interfering with privately negotiated, arms-length agreements ignores the importance of the bankruptcy policies underlying this case. The Bankruptcy Code ensures that all creditors of a similar class receive similar treatment of their claims, and the provisions empowering the Trustee to reject executory contracts and to avoid certain transfers and agreements are designed to facilitate the distribution of assets pro rata among all creditors of the same class holding allowed claims. The Trackage Rights Agreement was entered into on the eve of bankruptcy and is avoidable and subject to rejection under the provisions of the Bankruptcy Code, not unlike the contract of any other, non-railroad creditor.

Bankruptcy laws are designed to free debtors from the burden of bad deals made on the eve of bankruptcy. Mr. Carson's Verified Statement ignores this reality, and contains many misstatements that need to be corrected. At the time of the initial discussions between Iron Road

⁴⁸ See, e.g., NextWave Personal Communications, Inc. v. Federal Communications Commission, 254 F.3d 130 (D.C. Cir. 2001), aff'd 537 U.S. 293, 301 (Jan. 27, 2003) (applying "the fundamental principle that federal agencies must obey all federal laws, not just those they administer," the Court charged the FCC with the obligation of applying "the usual rules governing the treatment of such obligations in bankruptcy.").

and CN, Fred Yocum was a director of Iron Road and its subsidiary railroads, including BAR and VBB. On or about February 21, 2001, Mr. Yocum was elected President of the railroads, but contrary to Mr. Carson's Verified Statement, was never an officer of Iron Road and did not personally participate in the negotiations with CN. Compare Carson VS at 13 (CN Protest at HC 120). Mr. Yocum merely signed the previously negotiated agreements.

Under bankruptcy law, the Trustee is not bound by bad deals made by officers or directors prior to the filing date. Indeed, the Trustee has an obligation to set aside arrangements that are detrimental to the company and its creditors. Thus, there is therefore no merit to CN's argument that the Board's decision would have a chilling effect on a rail carrier's willingness to assume risk when assisting a struggling rail carrier. CN Protest at HC 36. This argument serves only to illustrate the purposes of the Bankruptcy Code in equalizing the distribution of assets among all injured creditors to the extent they have allowable claims as defined under the Bankruptcy Code. Every time a party loans money or otherwise commits itself to a struggling company, it is at risk that the struggling company will be forced into bankruptcy--as BAR was here--and that the lender/helping company will not recover its investment. CN admits the risks that it took, and the Bankruptcy Code (which was adopted pursuant to the Bankruptcy Clause of the U.S. Constitution) mandates that such risks be shared by all creditors.

Moreover, CN frames its concern as one of transportation policy. CN argues that if the Trustee can undo the Trackage Rights Agreement, secure \$5 million in additional funds for creditors of the BAR estate and eliminate CN's trackage 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." CN Protest at HC 36. The Trustee strongly disagrees that the Board's decision in this case would have any influence on a rail carrier in the future assuming

the risk of assisting a struggling connection. CN knew when it entered into the CN Agreements that the Board had authority to receive, evaluate and decide adverse abandonment applications. If the Board grants the relief sought by the Trustee in the Application, it will be but one more adverse abandonment decision, this time in the context of a rail carrier gaining trackage rights on the line of another rail carrier later put in bankruptcy by its creditors. In short, any railroad granted trackage rights on the lines of another railroad already is aware of the fact that the grantee railroad can file an adverse abandonment application. See, e.g., Thompson v. Texas Mexican Railway Co., 328 U.S. 134, 145 (1946). There is no new risk here.

The matter at hand cannot be viewed in isolation from the Trustee's bankruptcy reorganization duties, which include rejection of burdensome executory contracts, administration of the estate, reorganization of the railroad and the estate, and payment to all entities entitled to distribution under the applicable provisions of the Bankruptcy Code. Maximizing the recovery of assets is fundamental to the reorganization process under the Bankruptcy Code. The Trustee's right to avoid the burdensome obligations imposed on the BAR estate by the CN Agreements in order to maximize the benefit to the estate and their creditors is a legitimate and necessary act that is not only protected, but mandated, by the Bankruptcy Code.⁴⁹

Terminating CN's rights under the CN Agreements is in the best interest of the BAR estate because (1) it will result in an additional \$5 million cash payment to the estate from MMA; (2) it will increase the amount that the BAR estate will receive on account of "Earn Out"; (3) it will release BAR from obligations under the CN Agreements that it cannot possibly perform; and (4) it will greatly improve the Trustee's ability to confirm a plan.

⁴⁹ Federal Communications Commission v. NextWave Personal Communications, 537 U.S. 293, 301, 123 S.Ct. 832, 839 (Jan. 27, 2003).

CN's blithe dismissal of the concerns of the BAR bankruptcy estate and its creditors suggests a fundamental misunderstanding of the Bankruptcy Code and its mandate concerning parity among creditors. The Board must factor into its public interest analysis the positive impact that abandonment and discontinuance will have on the BAR estate and the public's confidence in the bankruptcy system.

2. Distribution Of \$5 Million To Creditors Is Not The Trustee's Only Goal.

CN's repetitive, erroneous assertion that the Trustee's only interest in this proceeding is in receiving \$5 million from MMA deliberately ignores 18 pages of the Trustee's testimony in this case. See Howard V.S. at 2-5, 11-23 (Application at Vol. 2-3 through 2-6 and 2-12 through 2-24). It also ignores substantial other portions of the Application, including the entirety of discussion of shipper harm from the potential Madawaska-Portage and CDAC Line abandonments; loss of efficient rail routings; diversions of rail traffic to truck; hazardous material diversions from rail to truck; and community impact. See Application at Vol. 1-40 through 1-43, and 1-67 through 1-69).

CN's reliance on the Revocation Decision with respect to Trustee's motives also is misplaced. CN Protest at HC 8. In that proceeding, the Board applied a different test on much less extensive evidence than is currently in the record here. The Board's analysis in rejecting the revocation petition turned on whether the petitioner met "its burden of proof by articulating reasonable, specific concerns addressing the revocation criteria" under 49 U.S.C. 10502(d) and 49 C.F.R. 1115.4. See Revocation Decision at 7. Based on the evidence then before it in that separate proceeding, the Board said the Trustee's objective was to "command a higher sale price" and ruled that the Trustee had not met the revocation criteria. Id. The Board now has extensive evidence of the multiple goals of the Trustee and will decide this case under the public

interest standard of 49 U.S.C. § 10903. See Fore River RR. Corp. – Discontinuance of Service Exemption – Norfolk County, MA, Docket No. AB-359 (ICC served March 30, 1992).

H. Contrary To NITL's Assertions, The Rail Transportation Policy Favors Granting The Application.

1. The NITL Filing Reveals Its Lack Of Understanding About The Competitive Transportation Alternatives At The Madawaska Mill And Epitomizes The Misconceptions That CN And Fraser Have Been Espousing To The Board.

The Comments filed by the National Industrial Transportation League ("NITL") demonstrate the lack of knowledge and understanding NITL has about both the standards relevant to this case and about Fraser's various competitive transportation options at the Madawaska Mill.

NITL's laundry list of the RTP elements it asserts are implicated by this proceeding is both erroneous and besides the point. The RTP would be advanced by a decision benefiting both MMA and the shippers along its lines, and the Trustee is not seeking to revoke trackage rights class exemptions or other irrelevant claims inherent to NITL's arguments. The Application proves that the relief sought is in the public interest, and does so under the statutory and regulatory framework set up by the Board for deciding adverse abandonments, a framework NITL nowhere addresses. NITL's general policy arguments are not controlling, and are mistaken.

For example, NITL's repeated claims that MMA would obtain "monopoly" rail service and charge unreasonable rates have absolutely no basis in fact. See NITL Comments at 6, 8. NITL (as well as both CN and Fraser) has not offered any evidence that the BAR ever subjected Fraser to "unreasonable" rates during the many decades prior to the creation of the CN trackage rights, or that Fraser complained about the BAR having "monopoly power" during that long

period. It is fanciful speculation to claim such would occur now. NITL apparently is unaware of the fact that Fraser enjoys pervasive truck competition on outbound transportation and various forms of competition (including bridge competition, product and geographic competition, and product substitution) on inbound transportation. See Heller R.V.S. at 2, 3, 9, 13-14.⁵⁰

Similarly, NITL asserts that the Trustee's plan envisions "elimination of intramodal and intermodal competition." NITL Comment at 8. NITL is wrong. The Trustee seeks to eliminate trackage rights that have not even been activated, returning Fraser's routing options to MMA-CN or MMA-CP routings without eliminating either intermodal or intramodal competition. Indeed, Fraser would merely return to the status quo that had suited it for much of the previous century, as well as continue to enjoy its competitive and much-utilized trucking options. See Durant V.S. at 4 (acknowledging that 50% of inbound and 30% of outbound Fraser traffic moves by truck).

In the end, NITL is unable to offer any data or other factual support for its hand-wringing over the alleged "concrete harms" to Fraser if the trackage rights are revoked, as well as the alleged benefits Fraser claims to have received from the inactivated trackage rights. NITL's speculation and conjecture about the impact of the Application on the RTP simply do not suffice to overcome the Application's detailed analysis under the abandonment statutes and regulations.

2. NITL's Contradictory Arguments On The Merits Fail To Support Its Position.

NITL, a shipper organization, is conflicted from the start by its elevation of Fraser's interests over the rest of the shippers on the MMA system. NITL does not purport to be speaking on behalf of any shippers (other than Fraser) on the MMA System, despite claiming

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that it is “sympathetic to the preservation of rail service for Northern Maine shippers.” See NITL Comments at 11. At the same time, NITL asserts that “MMA should take a hard look at its network and then abandon those segments where there is insufficient demand for rail services,” blatantly elevating the interests of a single shipper over the other 250 shippers on the MMA System. See id. at 7. That NITL would purport to support shippers, primarily Fraser, on the one hand, and advocate carving up the MMA system on the other, is simply bizarre and completely contradictory with its own mission statement.

Moreover, NITL claims the approximately \$2.1 million revenue shift in favor of MMA absent the trackage rights would not enhance the MMA System’s profitability and by extension the viability of the rail network in Northern Maine. See id. at 12-13. While a large Class I railroad such as CN may not consider such a revenue shift to be significant, MMA does. NITL’s remarks blindly support Fraser and CN, while nonetheless recognizing the extreme situation facing MMA and the possibility that abandonments could occur on the system that, or, according to NITL, should occur. See id. at 7.

In addition, NITL fails even to consider the possibility that, ironically, if its arguments in favor of Fraser came to fruition, Fraser would likely lose access to MMA as a viable routing option due to MMA’s disintegration. Yet when NITL performs its balancing of the unknown and largely speculative harms and benefits to Fraser against the very real and fully detailed harms and benefits to MMA, it nonetheless believes that “the Trustee’s application falls far short of the mark.” That outcome throws into sharp relief the inherently contradictory nature of NITL’s argument.

CONCLUSION

For the foregoing reasons, the Trustee respectfully requests that the Board authorize the discontinuance of the CN trackage rights and abandonment of the WRC easement pursuant to 49 U.S.C. § 10903.

Respectfully submitted,

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**ATTORNEYS FOR TRUSTEE OF BANGOR &
AROOSTOOK RAILROAD COMPANY, ET
AL.**

Dated: December 29, 2003

LIST OF VERIFIED STATEMENTS

Tab 1 - Edward A. Burkhardt Rebuttal Verified Statement

Tab 2 - Robert C. Finley Rebuttal Verified Statement

Tab 3 - Mark Amfahr Verified Statement

Tab 4 - John G. Pinto Verified Statement

Tab 5 - James N. Heller Rebuttal Verified Statement

Tab 6 - MDOT Letter to Edward Burkhardt

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REBUTTAL VERIFIED STATEMENT**OF****EDWARD A. BURKHARDT**

My name is Edward A. Burkhardt. I am the Chairman of the Board of Montreal, Maine & Atlantic Corporation and its wholly-owned subsidiary, Montreal, Maine & Atlantic Railway Ltd. ("MMA"). The purpose of this Rebuttal Verified Statement is to address certain comments made in opposition to the Application for Adverse Discontinuance and Abandonment ("Application") filed by James E. Howard, Trustee of the Bangor & Aroostook Railroad Company ("Trustee").

MMA's Support of Application

In my opening Verified Statement, I plainly stated MMA's support for the Trustee's Application.¹ I explained in detail why the CN Agreements severely undermine the MMA System's viability. Although some of my statements referred to the Trackage Rights Agreement in particular, numerous statements clearly apply as well to the Junction Settlement Agreement. CN has not yet elected to implement service under its Trackage Rights Agreement. Thus, the references in my opening Verified Statement to the present effect of the CN Agreements on MMA operating revenue could only pertain to the Junction Settlement Agreement.² Thus, I do not know how CN or any other party could read my opening Verified

¹ "I am submitting this Verified Statement in support of Trustee's Application for Adverse Discontinuance and Abandonment." Verified Statement of Edward A. Burkhardt, Application Vol. 2 ("Burkhardt V.S.") at 1.

² Although my opening Verified Statement is replete with such references, I point out pages 2-3 where I discussed the operating revenue impact of the Junction Settlement Agreement; page 7, where I explain that elimination of the CN Agreements would allow MMA to negotiate with CN for a larger share of the revenue that MMA currently receives on Fraser

Statement and conclude that MMA does not support the Application or that MMA's concerns are limited to implementation of the Trackage Rights Agreement.³

MMA's Conditional \$5 Million Payment to the Trustee

CN asks whether MMA can afford a \$5 million payment to the Trustee and questions what effect such a payment would have on MMA's effort to remain viable. CN points out that it might take MMA three and a half or more years to earn additional revenue from Canadian National on Fraser traffic to cover the \$5 million payment. Protest and Supporting Evidence of Canadian National Railway Company and Waterloo Railway Company ("CN Protest") at 16-18. MMA indeed can afford to make the \$5 million payment upon elimination of the CN Agreements, and contrary to CN's assertion, the payment would not diminish MMA's operating revenue. There is, in fact, no better investment MMA could make in the System.

In my opening Verified Statement, I explained that MMA agreed to pay significantly less for the BAR System assets than it would have paid in the absence of the CN Agreements, but agreed to pay \$5 million more if the Trustee succeeded in eliminating the CN Agreements. MMA made that agreement in advance of purchase, but MMA would make the very same agreement today. The owners of Montreal, Maine & Atlantic Corporation, MMA's parent, myself included, have a long term view of the viability of MMA. We are not in it for the short term. Even if it takes MMA three and a half or more years to earn back the \$5 million

traffic routed to CN; and page 12, where I note that "elimination of the CN Agreements, including CN's ability to exercise the Trackage Rights Agreement, will allow MMA to recover lost revenues and achieve a level of stability that will ultimately benefit shippers throughout the State of Maine." (emphasis added.)

³ Moreover, my opening Verified Statement and this Rebuttal Verified Statement go well beyond what MMA is required to do under Section 3.15 of the MMA/BAR Asset Purchase Agreement. That rather general and standard contract language does not motivate my testimony.

payment to the Trustee,⁴ there is no better investment MMA could make. The \$5 million payment to the Trustee would generate a simple annual rate of return of approximately 28%, which is well above the industry-wide cost of capital.⁵ Obviously, after earning back the \$5 million payment, MMA will continue to earn a greater share of the revenue on Fraser traffic moving to/from CN. In fact, the present value over 10 years of the additional revenue, after subtracting the payment to the Trustee, is approximately \$5.8 million.⁶

In my opening Verified Statement, I stated my belief that MMA has the potential to grow into a strong, stable and profitable system, but also pointed out MMA's need to generate adequate operating revenue in the near term. Burkhardt V.S. at 9. This is the basis for CN's professed concern about MMA's ability to pay \$5 million to the Trustee upon elimination of the CN trackage rights. CN's professed concern is unfounded. CN assumes MMA will fund the \$5 million payment out of operating revenue. This is not MMA's intention. MMA would raise the \$5 million through new equity capital, which has already been agreed to by the founding shareholders, much in the same way it raised equity financing for the initial purchase price, working capital requirements and reserves. The \$5 million payment carries no cost against MMA's net income. MMA is able to raise new capital for this payment precisely because

⁴ Upon elimination of the CN trackage rights, MMA would negotiate with CN for a larger share of the total transportation charges paid by Fraser. Because MMA has a direct incentive to ensure that Fraser remains competitive with other paper manufacturers not served by MMA, MMA's potential gain in operating revenue on Fraser traffic will be determined in the negotiation with CN. See Burkhardt V.S. at 7. MMA, in those negotiations, might secure a division which allows it to earn back the \$5 million payment sooner than projected by CN or later than projected by CN.

⁵ Twenty eight percent (28%) is derived by dividing \$1.4 million by \$5 million, yielding a simple annual rate of return.

⁶ The value of a stream of earnings of \$1.4 million per year paid at the end of each of ten years discounted at 5% is \$10.8 million; deducting a cash payout of \$5 million at inception, the balance is \$5.8 million.

elimination of the CN Agreements would be so beneficial to MMA.⁷ The STB should not be concerned that the \$5 million payment would have any adverse effect on MMA's operations, because it will not be drawn from operating revenue.

Rebuilding MMA's Traffic Base

In my opening Verified Statement, I explained that MMA relies on a collection of relatively small shippers for a significant portion of its revenues and that to be successful the railroad must operate a sizeable network of lines to retain existing business and attract future business. Burkhardt V.S. at 4. I outlined why MMA's success depended upon growing its traffic base and that growing its traffic base was dependent upon improving operations. Burkhardt V.S. at 5-7. I explained the adverse impact of the Great Northern Paper Company ("GNP") shut down, the steps MMA took in response to that shut down and that Brascan's purchase of the Millinocket Mills and resumption of operations there helped MMA stave off disaster. Burkhardt V.S. at 7-8, 11.

CN espouses the view that the operating revenue impact of GNP's closure is so much greater than the impact of the CN Agreements and that the elimination of the CN Agreements would have "little effect on MMA's situation." CN Protest at 27-28. CN observes that elimination of the CN Agreements would only generate additional operating revenue of between \$1.4 million and \$2 million per year for MMA, "a mere \$1,879 to \$2,684 per route mile on the MMA System." CN Protest at 28. CN asserts that we can only argue that "every little bit helps" and claims that "elimination of CN's rights on the Madawaska Line would result in only a miniscule benefit to MMA." CN Protest at 29. (emphasis added.) First, I must say that I

⁷ In contrast, MMA could not raise an equivalent amount of new capital for capital improvements to its light density lines, for example. Any MMA investment in existing infrastructure will need to be funded, at least in the short term, out of operating revenue or state grants.

disagree that \$1.4 to \$2 million per year in additional operating revenue, or \$1,879 to \$2,684 per route mile, is a “little bit.” It may be a “little bit” from the perspective of Canadian National, but for a struggling regional railroad like MMA, these are significant operating revenue improvements.

Moreover, the Millinocket Mills are coming back on line. The two machines at the East Millinocket Mill began producing paper in June. While much of the paper that has been produced has been newsprint, for which the rail market share is relatively low, the resumption of shipments from East Millinocket was sufficient for MMA to restore the emergency pay cuts that we implemented in January. It has also been the principal reason for our operation being profitable for every month beginning in August. We look forward to the resumption of super calendar paper production, which has a relatively high rail market share, in the Millinocket Mill during 2004.

Finally, as I made clear in my opening Verified Statement, every “little bit” does help and MMA’s long term success depends upon generating increased business from small shippers. Thus, in a very real sense, MMA’s future does depend in part on the Board’s decision in this case.

The Possible CDAC and Madawaska-Portage Abandonments

Canadian National claims that the potential for abandonment of the former Canadian American Railroad Company rail line between Brownville Junction and the U.S./Canada Border (the “CDAC Line”) and the Madawaska-Portage Line is unrelated to the elimination of the CN trackage rights. In essence, CN asserts that if the CDAC and Madawaska-Portage Lines are money losers today they would be money losers even after elimination of CN’s trackage rights. If true, CN says, MMA would not retain the Madawaska-Portage and CDAC

Lines, with or without elimination of CN's trackage rights to serve Fraser. CN Protest at 19.

Here once again, CN's assertion is based on a short term view of MMA, and displays an amazing ignorance of railway network economics. In the short term, MMA is losing money on the Madawaska-Portage and CDAC Lines. If MMA can regain from CN⁸ some of the revenue lost on Fraser traffic through the elimination of CN's trackage rights, it can afford to take a long term view of the potential of the CDAC and Madawaska-Portage Lines. In other words, with adequate revenue on the Fraser traffic, MMA will have the financial staying power necessary to retain existing business and attract future business by improving operations, increasing service frequency and building its traffic base. See Burkhardt V.S. at 3, 6-7. Thus, MMA's ability to retain the Madawaska-Portage and the CDAC Lines, and indeed, its existing rail network, is directly related to MMA's adequate revenue on Fraser and other traffic. Canadian National's assertion that abandonment of the CDAC and Madawaska-Portage Lines is unrelated to discontinuance of the CN trackage rights is wrong.

The Maine DOT Rail Funding Agreement

Canadian National asserts that if MMA were to abandon the CDAC Line or the Madawaska-Portage Line, MMA would "likely face repayment or forfeiture of upwards of \$5 million in infrastructure funding." CN Protest at 21. Canadian National's explanation of the Rail Funding Agreement quotes and summarizes only a part of the Agreement. In so doing, CN distorts the likely impact of the Rail Funding Agreement on any MMA abandonments.

The Rail Funding Agreement contains two, mutually exclusive, remedies for the State of Maine in the event that MMA abandons any of the lines listed on Exhibit A to the Agreement. CN has identified and discussed the more Draconian of the State's two options. CN

⁸ MMA's desire to earn greater revenue on Fraser traffic is not an effort to gain greater revenue from Fraser. See Burkhardt V.S. at 10-11.

Protest at 21. In the event of an MMA abandonment of a listed line segment, the State's alternative remedy is to recover from MMA an amount equal to the value of railroad improvements funded by the State. Rail Funding Agreement, Section 4.

If MMA is forced to seek authority for abandonment of the CDAC Line or the Madawaska-Portage Line, my intention would be to negotiate with the State with respect to a fair and appropriate repayment or a redeployment of the rail assets acquired with State money. I believe the State would be receptive to such an alternative arrangement. The Rail Funding Agreement requires MMA to match each State dollar provided. Rail Funding Agreement, Section 1.2. In light of the bankruptcy filing by GNP, MMA approached the State and requested that the match requirement be waived for the 2003 construction season. The State agreed and we amended the Rail Funding Agreement.⁹ MMA is in the midst of negotiations with the State of Maine with respect to the possible waiver of the match requirement for 2004. Although that waiver has not been finalized, I am confident that it will be, because the State of Maine understands that circumstances have changed since negotiation of the Rail Funding Agreement.

For the same reason, I believe the State would be receptive to negotiating a fair and balanced arrangement in the event MMA were compelled to abandon either the CDAC or the Madawaska-Portage Lines. For example, if MMA were to abandon the CDAC Line, I might propose that the State authorize MMA to redeploy rail assets paid for with State money (or assets of equivalent value) on other parts of the MMA System. Alternatively, I might propose that MMA reimburse the State for the value of assets removed from the CDAC Line. Given the change in circumstances, I consider it highly unlikely that the State would insist upon its most

⁹ A copy of the First Amendment to the Rail Funding Agreement is attached as Exhibit A.

Draconian remedy. In an event, any repayment to the State would be funded through sale of track materials and real estate on the abandoned lines.

The Canadian Pacific Marketing Incentive

Canadian National expresses a concern that MMA's marketing incentive arrangement with Canadian Pacific Railway Company ("CP") somehow signals an MMA plan to "restrict otherwise competitive MMA-CN joint-line routings for Fraser in favor of MMA-CP joint-line routings." CN Protest at 24. CN's concern is founded on three points. First, CN claims that the MMA/CP marketing incentive arrangement encourages MMA to compete vigorously with CN so that MMA can obtain incentive payments from CP. Second, CN relies on a *Railway Age* article in which I expressed the goals of the marketing incentive arrangement and expressed the hope that CP and MMA will have close cooperation in joint-line marketing. Third, CN argues that the fact CP has not taken a position on the merits of the Trustee's Application suggests that CP does not believe CN's trackage rights jeopardize MMA or that CP does not care about MMA's viability. None of the points has merit.

CN has MMA's Business Plan and has filed it with the STB. See CN Protest, Exhibit A. MMA's Business Plan makes plain the fact that MMA relies heavily on the success of Fraser's Madawaska Mill. CN Protest, Exhibit A at 75, 80. In my opening Verified Statement, I explained that MMA has every incentive to help Fraser remain competitive. Burkhardt V.S. at 10-11. MMA would lose a lot of revenue if Fraser is not able to compete with other paper manufacturers served by other railroads. MMA will indeed use its marketing incentive arrangement with CP to offer Fraser attractive transportation rates and routings over CP. This will occur whether or not CN retains its trackage rights to serve Fraser. By the same token, MMA will work with CN to offer attractive rates and routings over CN. To do otherwise

would harm MMA. This case is not about “restricting” the St. Leonard gateway. Rather it is about putting MMA in a position to negotiate with CN, rather than live with CN’s power to dictate MMA’s share of revenue on Fraser traffic moving over the St. Leonard gateway.

The MMA Business Plan also makes plain the fact that a large portion of MMA’s traffic moves by CP routings. CN Protest, Exhibit A at 78. Nothing in MMA’s Business Plan or in the CP marketing incentive arrangement, both of which cover the entire MMA System, suggests in any way that MMA would favor CP routings of Fraser traffic over CN or any other routings. CP and CN have had a strong rivalry over the years, but to suggest that MMA would disadvantage itself or any of its shippers as a pawn of either CP or CN is simply ridiculous. If CN’s trackage rights were eliminated, MMA would be in a position to work with CN on reallocation of revenues earned from Fraser with the same spirit of mutual benefit that motivated MMA’s marketing incentive arrangement with CP. Nothing in the referenced *Railway Age* article suggests anything to the contrary.

In my view, CP’s absence from this case implies nothing and CN’s argument from the absence of information is a figment of a lawyer’s imagination.

CN’s Promise to Not Use the Trackage Rights

CN says so long as the MMA haulage service remains available to CN and MMA continues to provide the same quality of haulage service, CN has no intention to operate under the Trackage Rights Agreement. Verified Statement of Clifford L. Carson (“Carson V.S.”) at 13. This promise is of little consequence. The Junction Settlement Agreement expires at the end of February 2006.¹⁰ As I have previously explained, the Junction Settlement Agreement threatens

¹⁰ In fact, the Junction Settlement Agreement was not assigned to MMA and CN has only agreed to abide by its terms pending disposition of this proceeding and court proceedings.

PUBLIC VERSION

the viability of MMA, so even in the short term CN's promise is of little value to MMA. More importantly, MMA does not take a short term view of its future. For the period after February 2006, if MMA proposes a haulage fee unacceptable to CN (whether MMA's proposed fee is higher, the same or lower than the just expired haulage fee), CN would have the right to implement its trackage rights and it would not have broken its promise to MMA and to the Board to not do so, because from CN's perspective, the haulage service would no longer "remain available" to CN. See Carson V.S. at 13. In like fashion, if upon a renewal CN proposed a haulage fee (lower, the same, or higher than the just expired fee) and MMA declined to accept CN's proposal, CN could implement its trackage rights without breaking its promise. If CN (unilaterally) were of the view that MMA's service was not "effective," CN could simply decline to renew the Junction Settlement Agreement and implement its trackage rights, without violating its promise. See Carson V.S. at 13. The overarching point is that CN will have no obligations to MMA under the haulage arrangement after February 2006, and no obligation or commitment to not implement the trackage rights.

Carson V.S. at 7. Thus, the concerns I express herein with respect to the period after February 2006 could arise even sooner.

**BURKHARDT REBUTTAL V.S.
EXHIBIT A**

[REDACTED]

VERIFICATION

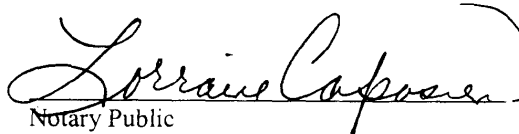
STATE OF CHICAGO)
)
COUNTY OF COOK) ss:

Edward A. Burkhardt, being duly sworn, deposes and says that he is the Chairman of the Board of Montreal, Maine & Atlantic Corporation and its wholly owned subsidiary, Montreal, Maine & Atlantic Railway Ltd. ("MMA") and President and CEO of Rail World, Inc., the founding shareholder of MMA and that he has read the foregoing statement, knows the contents thereof, and that the same is true and correct to the best of his knowledge, information and belief.



Edward A. Burkhardt

Subscribed and sworn to before by Edward A. Burkhardt this 22nd day of December, 2003.



Notary Public

My Commission Expires:



2

REBUTTAL VERIFIED STATEMENT

OF

ROBERT C. FINLEY¹

I. INTRODUCTION

My name is Robert C. Finley. I am a Principal with Harford & Associates, Inc. I have nearly thirty (30) years of experience in railroad marketing, costing and financial analysis. I was retained by Rail Trac Associates to assist in the preparation of a report (the "Railtrac Report") that determined it would be in the financial interest of the Montreal, Maine & Atlantic Railway Ltd. ("MMA") to abandon the following lines of railroad: (1) the portion of its main line between Madawaska and Portage, Maine (the "Madawaska-Portage Line"); and (2) the portion of the former Canadian American Railroad Company line between Brownville Junction, Maine and the US/Canadian border (the "CDAC Line").

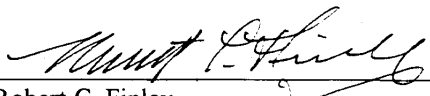
[Redacted]

¹ A resume describing my qualifications and relevant experience is included in the Rail Trac Report. See Application, Vol. 3-162.

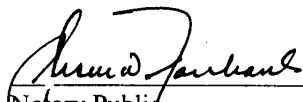
VERIFICATION

STATE OF CONNECTICUT)
) SS Old Lyme
COUNTY OF NEW LONDON)

Robert C. Finley, being duly sworn, deposes and says that he is a Principal with Harford & Associates, Inc., and that he has read the foregoing statement, knows the contents thereof, and that the same is true and correct to the best of his knowledge, information and belief.


Robert C. Finley

Subscribed and sworn to before by Robert C. Finley this 22nd day of December, 2003.


Notary Public
SUSAN W. FAIRBANKS

My Commission Expires: 7/22/06

3

VERIFIED STATEMENT

OF

MARK AMFAHR¹

I. INTRODUCTION

My name is Mark Amfahr. I was retained by Rail Trac Associates ("Rail Trac") to assist in the preparation of the revenue and carload data set forth in the Rail Trac Report. I have over 20 years of experience in railroad sales, marketing and strategic planning. My experience includes sales and marketing management positions with the Iowa Interstate Railroad and the Chicago and North Western Transportation Company, where my responsibilities included revenue and carload forecasting and strategic marketing initiatives. Since 1993, I have represented U.S. and international railroads as an independent consultant in connection with a variety of special projects, including cost and revenue studies and market forecasts.

[Redacted]

¹ A resume describing my qualifications and relevant experience is included in the Rail Trac Report. See Application, Vol. 3-165.

VERIFICATION

STATE OF MINNESOTA)

) SS

COUNTY OF WASHINGTON)

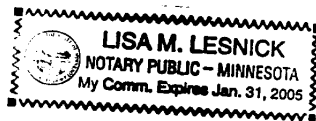
Mark Amfah, being duly sworn, deposes and says that he an independent consultant retained by Rail Trac Associates, and that he has read the foregoing statement, knows the contents thereof, and that the same is true and correct to the best of his knowledge, information and belief.

Mark Amfah
Mark Amfah

Subscribed and sworn to before by Mark Amfah this 22nd day of December, 2003.

Lisa M. Lesnick
Notary Public

My Commission Expires:



4

VERIFIED STATEMENT

OF

JOHN G. PINTO¹

I. INTRODUCTION

My name is John G. Pinto and I am the President of Rail Trac Associates ("Rail Trac"). I have been engaged in real estate and appraisal practice both in the private and public sector since 1961. Since 1976, I have been active in the appraisal, title research, acquisition and sale of railroad properties throughout the U.S. and internationally. Appraisal clients have included railroads, transit and commuter agencies, financial institutions, public agencies and other purchasers of rail properties. I have qualified as an expert witness in several federal and state courts and I have given numerous lectures on rail property issues. I also have served as a consultant to the Federal Railroad Administration and the Surface Transportation Board (and its predecessor, the Interstate Commerce Commission).

[Redacted]

¹ A resume describing my qualifications and relevant experience is included in the Rail Trac Report. See Application, Vol. 3-159.

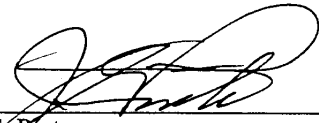
VERIFICATION

DISTRICT OF COLUMBIA)

) SS

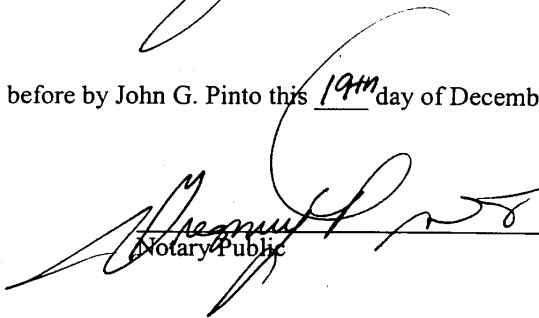
COUNTY OF _____)

John G. Pinto, being duly sworn, deposes and says that he is the President of Rail Trac Associates, and that he has read the foregoing statement, knows the contents thereof, and that the same is true and correct to the best of his knowledge, information and belief.



John G. Pinto

Subscribed and sworn to before by John G. Pinto this 19th day of December, 2003.



Notary Public

My Commission Expires:

GREGORY PROCTOR
Notary Public, District of Columbia
My Commission Expires September 30, 2008

5

REBUTTAL VERIFIED STATEMENT

OF

JAMES HELLER

I. Introduction

The purpose of this statement is to rebut Dr. Vellturo's theoretical conclusions predicated on the one lump theory in a bottleneck carrier situation. Dr. Vellturo makes no attempt to apply his theories to the facts of this case. Had he applied the one lump theory to the facts before us, the results would have shown that the bottleneck theory does not hold here. MMA cannot capture monopoly rents under the one lump theory because: (1) other carriers compete for Fraser traffic through rate concessions that MMA does not know about; (2) truck competition is significant; and (3) Fraser enjoys market power over MMA.

A. Summary Of My Opening Verified Statement

Dr. Vellturo offers no evidence to counter the findings of my opening verified statement. Dr. Vellturo does not dispute the fact that total Fraser savings are _____ and account for _____ of Fraser's 2000 total rail freight bill. I _____ concluded that _____ savings is attributable to market forces independent of the CN Trackage Rights, including bridge competition, truck competition, product competition and geographic competition,¹ and Dr. Vellturo does not show

¹ Heller V.S. at 46-49.

otherwise.

On outbound paper, the elimination of the Haulage Agreement and Trackage Rights (collectively the "Contracts") would not have an adverse effect on Fraser because of the various forms of competition that would continue unabated. Fraser and its paper consignees have access to and make extensive use of truck, rail and intermodal transportation.³

31, 2003 than it did the previous year due to CN's increased rates.⁴ Dr. Vellturo does not refute these facts. There is no basis to think that CN would act differently under the Trackage Rights Agreement.⁵

Fraser's

annualized savings on outbound traffic that moved over non-CN routings amount to a

2

Verified Statement of Christopher A. Vellturo ("Vellturo V.S.") at 15,16, 22. All this shows is a wealth transfer between CN and MMA, which is not relevant to the effects the Haulage Agreement and Trackage Rights have on Fraser.

³ Heller V.S. at 10, 13, 21-25, 46.

⁴

⁵ Heller V.S. at 13-21, 46.

of Fraser's 2000 total freight rail costs and Dr. Velturo does not challenge this. As I explained in my opening verified statement, these savings mainly are attributable to bridge competition and

Truck competition has been a consistent presence and competitive constraint to rail rates in the Fraser outbound transportation market since at least 1991. The vast majority of outbound paper destinations receive truck service. Dr. Velturo ignores this. In every state where Fraser's consignees use rail transportation, truck transportation is also used. Dr. Velturo ignores this. There are no states where Fraser's consignees use only rail transportation.⁷ Dr. Velturo ignores this as well.

As with outbound paper, Dr. Velturo offers no independent analysis or evidence to refute my findings regarding inbound traffic. I showed that Fraser's annualized savings on clay is of Fraser's 2000 total rail freight bill, which Dr. Velturo acknowledges, Velturo V.S. at 15, and that such savings are mainly attributable to geographic competition, bridge competition and product substitution. Fraser receives clay from multiple origins and has multiple clay routings, which means competition on the origin and on the bridge. Imported clay increasingly is being used, which gives Fraser another source of origin competition. Also, calcium carbonate increasingly is being used as a substitute for clay. All of these factors constrain rate increases for clay transportation.⁸

⁶ Heller V.S. at 21-25.

⁷ Heller V.S. at 7-13.

⁸ Heller V.S. at 26-35.

Savings on silica are of Fraser's 2000 total freight rail costs and this savings is attributable to origin competition and bridge competition.⁹ MMA locally within the MMA system,

Corn starch, titanium dioxide and talc all are sold to Fraser on a delivered price basis, meaning the supplier of the commodity pays for the shipment of the commodity. Thus, any savings from reduced transportation costs flow to the supplier, not Fraser.¹¹ Dr. Velturo does not challenge any of the findings summarized in this paragraph.

Fraser has considerable leverage over MMA. Fraser's parent, Brascan, has acquired the Great Northern Paper ("GNP") mills in Millinocket and East Millinocket,¹² and Fraser is the largest customer on the MMA system. Given Fraser's size and significance to MMA, MMA has no choice but to satisfy Fraser.

B. Summary of Dr. Velturo's Statement

Dr. Velturo's statement focuses on the one lump theory. He introduces a series of hypothetical examples of a bottleneck carrier and captive shipper. Velturo V.S. at 4-5, 7-11. Using the one lump theory, Dr. Velturo purports to predict the effect of discontinuance on Fraser.

Dr. Velturo attempts to show that

⁹ Heller V.S. at 35-40.

¹⁰ Heller V.S. at 40-41.

¹¹ Heller V.S. at 41-43.

¹² Heller V.S. at 45.

Vellturo V.S. at 17.

Next, Dr. Vellturo summarily concludes without analysis that truck and rail do not compete with each other for Fraser traffic. He argues that the consistency of the rail/truck share split for outbound paper since 1991 means there is no competition between the two modes of transportation. If there were competition, Dr. Vellturo states he would expect to see movement in these shares as one mode won traffic from the other. Vellturo V.S. at 21. Dr. Vellturo goes on to say that

Vellturo V.S. at

21. As I showed previously and will discuss here again, truck competition is a significant constraint on rail rates in the Fraser outbound transportation market.

Lastly, Dr. Vellturo summarily rejects the existence of Fraser's market power over MMA.

Vellturo V.S. at 22. Dr. Vellturo's theory ignores concrete examples of Fraser's ability to exercise such market power over MMA and its predecessors.

C. Detailed Analysis of the Facts Rebuts Any Hypothetical Conclusion Predicted by Unapplied Theory

Dr. Vellturo's verified statement relies exclusively on theoretical concerns, but does little (or nothing) in the way of applying these theories to the facts before us. Instead of conducting independent analysis and proffering evidence based on that

analysis, Dr. Velturo makes broad-based conclusions using hypothetical examples. At certain points, Dr. Velturo refers to a "detailed analysis of traffic patterns and competitive conduct," but no such analysis was conducted by him on the facts of this case.¹³

The effectiveness and applicability of Dr. Velturo's verified statement is belied further by his well-documented view, which I share, that a "case-by-case" and "fact-specific" approach is necessary when evaluating competitive effects.¹⁴ In this case, Dr. Velturo retreats from the analytical approach he recommended very recently to the Surface Transportation Board. My analysis of the facts rebuts the hypothetical conclusions predicted by Dr. Velturo's unapplied theory.

II. Outbound Paper Traffic

Dr. Velturo acknowledges that truck transportation accounts for approximately of Fraser outbound paper shipments, Velturo V.S. at 21, yet he attempts to characterize MMA as a bottleneck carrier. Fraser must have no other transportation alternatives on its outbound shipments for this to be so. The significant share of Fraser outbound traffic that moves by truck destroys the theory that MMA is a bottleneck.

Dr. Velturo's example in his Attachment 3 predicts that after Railroad B gets trackage rights over Railroad A, rail competition causes more competitive prices.

Velturo V.S. at 8-9. The analysis from my opening verified statement shows that although some competition has occurred since implementation of the Haulage

Agreement, savings to Fraser

and Dr. Velturo does not refute this

¹³ There are no analyses or calculations whatsoever in Dr. Velturo's workpapers.

¹⁴ Statement of Christopher A. Velturo, Ph.D., at 86, 87 (May 16, 2000), filed in *Major Rail Consolidation Procedures*, STB Ex Parte No. 582 (Sub-No.1) (STB served June 11, 2001).

result. The question then is why have
concluded it is because numerous factors in the market, including how Fraser requests
bids for its traffic and truck competition, already had constrained MMA's ability to make
monopoly profits prior to the implementation of the Haulage Agreement.

A. Dr. Vellturo Fails To Account For Rebates

The one lump theory relies on the assumption that the monopolist or bottleneck carrier will practice a "price squeeze" on the other carriers, paying them only for their incremental cost and capturing all monopoly rents for itself. Vellturo V.S. at 5-6. Actual application of the one lump theory in this case shows that the facts precluded BAR/MMA from capturing monopoly profits prior to the Haulage Agreement, and would preclude MMA from capturing monopoly profits in the future after termination of the Trackage Rights.

In order to "price squeeze" the other carriers, MMA would have to know the actual effective rate Fraser is paying and the maximum rate Fraser would pay and dictate the division of revenues with other carriers participating in the movements. This means MMA would need information regarding pricing of the entire movement in order to extract or even identify monopoly rents.

We are dealing with an actual competitive environment that differs vastly from that set forth in Dr. Vellturo's theoretical example. Unlike MMA, Railroad A in Dr. Vellturo's example has complete information about its competition and therefore can charge monopoly prices, capture all of the economic rent and still win the business. If the other carriers in the route adjust their rates, Railroad A would then adjust its rate to capture the surplus and the shipper would still be paying monopoly prices. In reality

MMA does not know the rates, rebates or terms struck between the other carriers and Fraser,¹⁵ a crucial fact ignored by Dr. Velturo in his hypothetical. MMA cannot capture the benefits of the price concessions offered by other carriers in response to bridge competition, for instance, if it does not know about them. The significance of this is amplified here because

Warehousing provides Fraser with opportunities to create additional competition for at least part of a rail route. Fraser's use of warehousing makes it even more difficult for MMA to determine how to set monopoly rates. Furthermore, Fraser's outbound shipments go to numerous destinations and involve different products. Fraser's pricing is complex and Fraser is the only one with all of the pricing information.

The fact that MMA has imperfect knowledge of the various price concessions other carriers are offering Fraser completely undercuts the applicability of the one lump theory to this case. Dr. Velturo ignores this critical fact when discussing his oversimplified one lump theory hypothetical.

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B. Dr. Velturo Wrongly Rejects Truck Competition

Another reason why the one lump theory breaks down when applied here is the presence of truck competition. A bottleneck rail carrier cannot engage in a price squeeze if it faces significant competitive pressure from other carriers. MMA faces significant competition from trucks. Despite Dr. Velturo's theoretical protestations, truck rates are a constraining force on freight rail rates from Fraser's Madawaska Mill.

Between 1991 and 2002, truck transportation was a consistent presence for Fraser outbound paper. Dr. Velturo concludes that this consistency of rail/truck market shares means the two modes of transportation do not compete. Had Dr. Velturo reviewed the data produced by Fraser in this case, he would have seen that

The consistency of
rail/truck share splits does not mean

Contrary to the static portrait of the Fraser transportation market Dr. Velturo paints, actual analysis of the documents and data decisively show a shifting and dynamic transportation market rife with competition among carriers, including truckers.

1. CN and Fraser Transportation Purchasing Correspondence Proves Truck Competition Is A Significant Competitive Constraint On Rail Rates

The competitive conditions of the Fraser transportation market speak for themselves.

Vellturo V.S. at 20. If Dr. Vellturo had made even a cursory review of CN's own transportation purchase correspondence he would be compelled to reach a different conclusion. In an e-mail exchange (attached hereto as **Exhibit A**) between Tina St. Jarre (of Fraser) and Bill Foliot (of CN) regarding rates, Mr. Foliot writes:

In response Ms. St. Jarre (of Fraser) writes:

* * *

In a separate discussion regarding rates to Mr. Foliot
(of CN) quotes a rail rate and states:

Ms. St. Jarre (of Fraser) responds:

¹⁷ See Exhibit A, HC 000901.

¹⁸ See Exhibit A, HC 000901.

¹⁹ See Exhibit A, HC 000880.

In response, Mr. Foliot (of CN) writes:

* * *

In two other e-mail exchanges, Ms. St. Jarre (of Fraser) asks Mr. Foliot (of CN) for

and

**2. The Price Differential Does Not Preclude Head-to-Head
Competition Between Truck and Rail**

It is untenable to say that rail and truck do not compete vigorously because of the price difference for the two services. Buyers of transportation services make selections based on price and service.²⁴ Dr. Vellturo says as much in his own statement: quality

²⁰ See Exhibit A, HC 000880.

²¹ See Exhibit A, HC 000880.

²² See Exhibit A, HC 000888.

²³ See Exhibit A, HC 000895.

²⁴

See Exhibit A, HC 000901.

differences (e.g., level of service) affect price, and although "such price-quality bundles are somewhat differentiated from one another, they still afford significant competitive constraints on one another."²⁵ In other words, the level of "quality-adjusted prices" really determines who wins the business. The quality adjustment involves an implicit quantification of service factors such as "delivery time, access to specialized cars/equipment,"²⁶ availability of unloading platform space, ability to use the equipment for temporary storage, loss and damage to goods, reliability, and numerous other factors that may be unique to a shipper at a specific point in time. MMA would have to quantify all of these shipper and customer preferences in order to capture monopoly rents.²⁷

III. Fraser Inbound Commodities

As with outbound traffic, the one lump theory espoused by Dr. Velturo breaks down when applied to inbound traffic as well. Dr. Velturo does not refute my finding that Fraser's savings on its inbound traffic are (approximately of its 2000 total rail freight bill).²⁸ According to Mr. Durant, Fraser moves approximately 50% of its incoming traffic via truck.²⁹ As was the case with outbound paper, the presence of truck as an alternative transportation option for most of Fraser's inbound traffic precludes a finding of MMA as a bottleneck.

²⁵ Velturo V.S. at 9, n.7.

²⁶ Velturo V.S. at 9, n.7.

²⁷ Because the truck rate is a price-quality bundle, MMA has no idea how Fraser and its consignees value the "quality" aspect of the bundle.

²⁸ Heller V.S. at 48-49.

²⁹ See Verified Statement of Austin S. Durant at 4.

A. Clay

Dr. Velturo does not dispute that Fraser enjoys robust competition due to its multiple origins and multiple routings for clay.³⁰ He also ignores the fact that such competition for clay traffic pre-dates the implementation of the Haulage Agreement. Competition for the clay business is fierce because clay is high-value traffic. Origin carriers and bridge carriers all offer rate concessions to Fraser, just like with outbound traffic. These concessions, in the form of rebates and volume requirements, are unknown to MMA. MMA cannot capture the benefits of the price concessions offered by other carriers in response to such competition if it does not know about them. As with outbound paper, the effect of these concessions is significant because

There are other competitive forces constraining clay traffic rates that would persist even if the CN Trackage Rights were terminated. The increasing use of imported Brazilian clays creates geographic competition, the benefits of which flow directly to Fraser. Dr. Velturo too readily dismisses the effects of such competition without analysis. Velturo V.S. at 22, n.25. In addition to imported clays, calcium carbonate is increasingly being used as a substitute for clay. Calcium carbonate can be manufactured at on-site facilities at the paper mill or can be transported in slurry form

³⁰ Heller V.S. at 26-27.

via truck or rail.³¹ Dr. Vellturo completely misses the fact that use of calcium carbonate would allow Fraser to bypass MMA.

B. Silica

Fraser enjoys two separate origins and multiple routings for each origin on its silica traffic. Bridge competition was the primary cause of the savings on silica traffic of Fraser's 2000 total rail freight bill). Fraser created further competition by changing its silica origin, thereby creating origin competition between origin carriers.³² Dr. Vellturo challenges none of this.

Once again, application of the one lump theory to the silica business breaks down. It is the delivered price of the commodity that determines its competitive position. Thus when Fraser shifted the silica origin

therefore, MMA would not know how to price its services to capture the monopoly profit.

C. Delivered Price Commodities

Several inbound commodities are sold to Fraser on a delivered price basis, which means that neither MMA nor Fraser knows the total transportation rate. Corn starch, for example, is shipped to Chicago, and then re-billed, so only the producer knows the total transport costs and what arrangements exist with the originating carrier regarding rebates. Once again, BAR did not and MMA will not have access to sufficient information to identify or capture monopoly profits on this traffic.

³¹ Heller V.S. at 34-35.

³² Heller V.S. at 39-40.

IV. Fraser Has Much Leverage Over MMA

Dr. Velturo dismisses the market power Fraser enjoys over MMA. As explained in my opening verified statement, Fraser has much competitive leverage because of intense geographic competition, product competition, product substitution, bridge competition, and truck competition. Dr. Velturo ignores specific examples where Fraser, in the past, has used its market power to divert traffic away from BAR completely.³³

Neither CN nor Fraser can deny that Fraser is MMA's largest and most significant customer. The addition of the Great Northern Paper mills in Millinocket and East Millinocket, Maine into the Brascan family fortifies Fraser's importance to MMA. Fraser is actually operating these mills.³⁴ MMA will rely on Fraser for of its revenues, based on its future projected level of business for the Great Northern Paper mills.³⁵ Neither Dr. Velturo nor Mr. Durant denies Fraser's ability to shift (or threaten to shift) its traffic to other modes of transportation, which will force MMA to make concessions on its clay rates, for instance. Termination of the CN Trackage Rights would do nothing to affect Fraser's considerable leverage over MMA.

V. Conclusion

In short, the one lump theory when applied to the facts before us does not explain how Fraser rail transportation rates actually have been set; it predicts savings to Fraser that should have occurred after implementation of the Haulage Agreement but

³³ Heller V.S. at 43-44.

³⁴ See Application Vol. 1-69.

³⁵ See Application Vol. 1-14-15.

have not occurred; and it mischaracterizes the relative market power of MMA and Fraser.

**HELLER R.V.S.
EXHIBIT A**

REDACTED

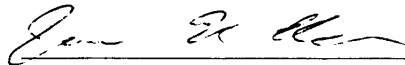
VERIFICATION

STATE OF Maryland)

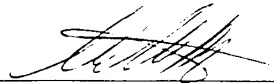
) SS

COUNTY OF Montgomery)

James N. Heller, being duly sworn, deposes and says that he is the President of Hellerworx, Inc. and that he has read the foregoing statement, knows the contents thereof, and that the same is true and correct to the best of his knowledge, information and belief.


James N. Heller

Subscribed and sworn to before by James N. Heller this 23rd day of December 2003.


Notary Public

My Commission Expires:

MILENA DJURDJEVIC
NOTARY PUBLIC STATE OF MARYLAND
My Commission Expires February 8, 2006

6



STATE OF MAINE
DEPARTMENT OF TRANSPORTATION
16 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0016

JOHN ELIAS BALDACCI
GOVERNOR

DAVID A. COLE
COMMISSIONER

December 24, 2003

Mr. Edward A. Burkhardt
President & CEO
Rail World, Inc.
8600 West Bryn Mawr Avenue
Suite 500N
Chicago, Illinois 60631-3579

Re: Rail Funding Agreement, dated December 23, 2002

Dear Mr. Burkhardt:

Under the Rail Funding Agreement between Montreal, Maine & Atlantic Railway, Ltd. ("MMA") and the State of Maine, acting by and through its Department of Transportation ("MDOT"), MDOT has certain rights to require MMA to make repayment of State funds granted to MMA. Under Section 2.2(b) of the Rail Funding Agreement, upon abandonment of the lines listed on Exhibit A to the Rail Funding Agreement, the State may "require MMA to repay a percentage of funds granted pursuant to this Agreement equal to the number to years prior to ten that abandonment is sought divided by ten." Alternatively, the State has the right to exercise default remedies set forth in Section 4 of the Rail Funding Agreement. As relevant here, Section 4 provides that "the State shall be entitled to recover from MMA an amount equal to the value of the Rail Assets at the time of the Event of Default." The term "Rail Assets" is defined in Section 3.1(a) of the Agreement to include rail and other track material paid for with State funds.

From the beginning of the Bangor and Aroostook Railroad (BAR) bankruptcy through the first year of system operation by MMA, the primary goal of MDOT has been to preserve the entire system in an active status. MDOT believes that a healthy and competitive MMA system is critical to the economic well-being of the parts of Northern Maine served by the Railroad. The Rail Funding Agreement, backed by the citizens of Maine through passage of a transportation bond referendum, is one component of MDOT's efforts to support and encourage a viable MMA system.



RECYCLING SYMBOL

BAR REBUTTAL
PUBLIC
93

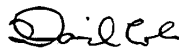
THE MAINE DEPARTMENT OF TRANSPORTATION IS AN AFFIRMATIVE ACTION - EQUAL OPPORTUNITY EMPLOYER

Mr. Edward Burkhardt
Page 2
December 24, 2003

MMA's success depends partly upon market forces and the health of the business community that the Railroad serves, and partly upon the efficiencies that the entire company brings to operation and maintenance of the system. We commend both labor and management for the efforts they have expended during the first year of operations, especially given the cash flow problems caused by the bankruptcy of MMA's major customer. Should the need arise MDOT is willing to discuss amending the Rail Funding Agreement to more effectively meet the current operating challenges facing MMA. Our willingness to do so rests on our commitment to achieving the highest public good with the resources provided to us by the citizens of Maine.

Please feel free to contact Robert Elder and Allan Bartlett in our Office of Freight Transportation should you think amendment to the Rail Funding Agreement is required.

Sincerely,



David A. Cole
Commissioner

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of December 2003, a copy of this **Public** version of the **Applicant's Rebuttal** was served by Federal Express upon:

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Office of the Governor
1 State House Station
Augusta, Maine 04333-0001

Maine Public Utilities Commission
242 State Street
18 State House Station
Augusta, Maine 04333-0018

Maine Department of Transportation
16 Statehouse Station
Augusta, Maine 04333

The Honorable George Z. Singal
United States District Court of Maine
156 Federal Street
Portland, Maine 04101

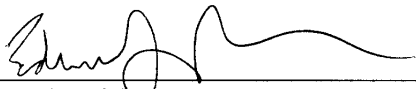
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