

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE**

In re)	
)	Chapter 11
)	Case No. 13-10670
MONTREAL MAINE & ATLANTIC)	
RAILWAY, LTD.,)	
)	
Debtor.)	

**DEBTOR’S MOTION PURSUANT TO SECTIONS 105(a), 363(b), 363(c), 507(a)(4),
AND 507(a)(5) OF THE BANKRUPTCY CODE AND BANKRUPTCY RULES 6003
AND 6004 FOR ORDER AUTHORIZING (I) THE PAYMENT OF PREPETITION
EMPLOYEE OBLIGATIONS AND (II) THE CONTINUATION OF PREPETITION
EMPLOYEE BENEFITS**

Montreal, Maine & Atlantic Railway Ltd. (“**MMA**” or “**Debtor**”), debtor-in-possession in the above captioned case, through its undersigned proposed counsel, moves this Court for an order pursuant to sections 363(b), 363(c), 507(a)(4), 507(a)(5), and 105(a) of chapter 11 of title 11 of the United States Code (the “**Bankruptcy Code**”), as supplemented by Federal Rules of Bankruptcy procedure 6003 and 6004, authorizing the Debtor to: (i) pay certain pre-petition employee obligations, including pre-petition employee benefits and; (ii) to continue to honor the programs under which such obligations and benefits arise in the ordinary course. In support of the motion, the Debtor states as follows:

I. Jurisdiction and Venue

1. The Court has jurisdiction over this case pursuant to 28 U.S.C. §§ 157 & 1334 and D. Me. Local R. 83.6(a), pursuant to which all cases filed in Maine under the Bankruptcy Code are referred to bankruptcy judges of this district. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding over which the Court has jurisdiction and Constitutional authority to enter a final order.

II. Procedural Background

2. On August 7, 2013, the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the “**Petition Date**”).

3. The Debtor remains in possession and control of its property and continues to operate as a debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

III. Factual Background

4. Reference is made to the affidavit of M. Donald Gardner, Jr. for the factual background of MMA and the events leading to this bankruptcy case. Said facts are incorporated herein as if set forth in full.

IV. Relief Requested

5. By this Motion, pursuant to sections 105(a), 363(b), 363(c), 507(a)(4), and 507(a)(5) of the Bankruptcy Code, the Debtor seeks an order, substantially in the form attached hereto, (i) authorizing, but not directing or obligating, the Debtor to pay, in its sole discretion, all obligations and costs incurred in respect of, or related to, employee obligations, including prepetition Wage Obligations, Payroll Taxes, and General Business Expense Reimbursements, other Employee Benefits, (each as defined below, and collectively, the “**Employee Obligations**”), and to maintain and continue its prepetition employee-related practices, programs, and policies comprising such Employee Obligations, as the same may be modified, amended, or supplemented from time to time in the ordinary course.

A. The Debtor’s Pre-Petition Employee Obligations.

6. In the ordinary course of its business, the Debtor incurs payroll and various other obligations and provides certain benefits to employees in exchange for the employees’ performance of services. As of the July 31, 2013, the Debtor employed 54 individuals, all of

which are salaried (collectively, the “**Employees**”).¹ By virtue of the timing of the filing relative to the current pay period, the Debtor incurred certain Employee Obligations in the period before the Petition Date. These pre-petition Employee Obligations remain outstanding and due and payable. As described in more detail below, the Debtor seeks authority to pay such prepetition amounts.

i. Wage Obligations

7. The Debtor’s monthly payroll, including Withholding Taxes (as defined below), is approximately \$305,725 (the “**Wage Obligations**”), which the Debtor pays on a semi-monthly basis by direct deposits into Employees’ accounts. Therefore, for each semi-monthly pay period, the payroll deposit is approximately \$152,826.50. The Debtor’s next payroll, for the period of August 1st to August 15th, is scheduled for August 15th; therefore, as of the Petition Date, approximately 1/3 of the Wage Obligations for that pay period will be on account of pre-petition earnings (*i.e.*, Employee earnings from August 1st – August 6th). As many of the Debtor’s Employees live week to week, relying on their paychecks to pay their everyday living expenses, the Debtor’s failure to pay the prepetition portion of the Wage Obligations would create financial hardship for, and result in low morale among, the Debtor’s Employees. Accordingly, in connection with the payroll deposit scheduled for August 15, 2013, the Debtor seeks authority to pay the accrued but unpaid prepetition Wage Obligations, which the Debtor estimates is approximately **\$51,000**, in addition to the Wage Obligations arising post-petition provided for by the cash collateral motion.

ii. Payroll Taxes

¹ As of July 31, 2013, MMA Canada employs 34 individuals.

8. The Debtor is required by law to withhold amounts related to (i) federal, state, and local income taxes, (ii) payroll taxes, and (iii) other similar charges and taxes from the Wage Obligations (collectively, the “**Withholding Taxes**”), and to remit such Withholding Taxes to the appropriate governmental authorities (collectively, the “**Taxing Authorities**”).

9. In addition, the Debtor is required to make payments from its own funds to pay, based on a percentage of gross payroll, additional amounts to the Taxing Authorities (such taxes and other amounts, collectively, the “**Employer Payroll Taxes**” and, together with the Withholding Taxes, the “**Payroll Taxes**”). As of the Petition Date, the Debtor owes the Taxing Authorities approximately \$30,000 for *prepetition* Payroll Taxes.²

iv. Expense Reimbursement

10. The Debtor’s Employees incur various expenses in the course of performing their ordinary duties, such as travel, meal, out-of-pocket advances (among others), which are reimbursed by the Debtor in the ordinary course of business. Because these expenses are incurred as part of their official duties and in furtherance of the Debtor’s businesses, the Employees are generally reimbursed in full (the “**General Business Expense Reimbursements**”) after submission of appropriate documentation to the Debtor. Expenses are reimbursed on a rolling basis, with a lag time between submission and reimbursement. Although it is difficult for the Debtor to determine the precise amount of General Business Expense Reimbursements outstanding at any particular time, as of the Petition Date, the Debtor estimates

² The Debtor pays 19.75% of the gross Wage Obligation on account of the Federal Employers Liability Act (“**FELA**”). Thus, for the August 15, 2013 payroll deposit, approximately \$10,000 of the \$30,000 semi-monthly FELA remittances will be on account prepetition amounts. Additionally, the Debtor withholds approximately \$60,000 on account of Withholding Taxes each pay period. Thus, for the August 15, 2013 payroll deposit, approximately \$20,000 of the \$60,000 in Withholding Taxes will be on account prepetition amounts.

that approximately \$2,000 is outstanding with respect to General Business Expense Reimbursements.

vi. Employee Benefits

11. In the ordinary course of business, the Debtors have established various benefit plans and policies for their Employees that can be divided into the following categories: (i) medical insurance, dental insurance, and life insurance (collectively, the “**Health and Welfare Plans**”); (ii) vacation and holiday policies (the “**PTO Policies**”); (iii) retirement and savings plans (the “**Retirement and Savings Plans**”); and (iv) flexible spending and health savings accounts (respectively, the “**Flexible Spending Accounts**” and “**Health Savings Accounts**” and, collectively, the foregoing programs are referred to herein as the “**Employee Benefits**”).

12. The Debtor engages Aetna, Inc. (“**Aetna**”) for its Health and Welfare Plan. Under the Debtor’s Health and Welfare Plan, the Debtor “self-insures” up to a maximum amount of \$75,000 per employee, per-occurrence. In the ordinary course of the Debtor’s operations, in the event an employee becomes ill for example, Aetna would pay the service provider (*e.g.*, hospital, clinic, etc.) and then invoice the Debtor – up to the \$75,000 per employee threshold – for amounts paid. Historically, the costs associated with the Health and Welfare Plan has been approximately \$120,000 per month but the Debtor anticipates that amount will decline on account of the reduced number of Employees. Nonetheless, because the benefits provided by the Health and Welfare Plans are essential features of the Debtor’s employment package, and failure to provide these benefits would likely harm Employee morale and prompt the premature departure of valued Employees, the Debtor requests authority, but not the obligation or direction to honor these obligations as and when they come due in the ordinary course of business.

vi. Paid Time Off Policies

13. The Debtor maintains a Paid Time Off Policy (the “**PTO Policy**”) for its Employees, which entitles Employees to accrue vacation and “comp” time³ in an amount determined by the Debtor’s PTO Policy. Because the benefits provided by the PTO Policy are essential features of the Debtor’s employment package provided to Employees, and failure to provide these benefits would likely harm Employee morale and prompt the premature departure of valued Employees, the Debtor requests authority, but not the direction or obligation, to honor all such obligations as and when they come due, including payment of same in the ordinary course. As of the July 31, 2013, the Debtor estimates that the amount owed on account of the PTO Policy (including both accrued vacation and accrued “comp” time) is approximately \$103,245.53.

vii. Retirement Plans

14. The Debtor maintains a retirement plan pursuant to section 401 of the Internal Revenue Code (the “**401(k) Plan**”). Through automatic payroll deductions, Employees can contribute to the 401(k) Plan and the Debtor “matches” 401(k) Plan contributions made by Employees, up to a total of 1.5%. As of the Petition Date, the accrued and unpaid aggregate *prepetition* 401(k) Plan obligations, including amounts deducted from Employee payroll and “matched” by the Debtor, total approximately \$5,000 in the aggregate.

15. Because the benefits provided by the 401(k) Plans are essential features of the Debtor’s employment package, and failure to provide these benefits would likely harm Employee morale and prompt the premature departure of valued Employees, the Debtor requests authority to honor these obligations, including certain *prepetition* expenses related thereto, as and when they come due in the ordinary course of business.

³ Accrued “Comp” compensates an Employee for working on a otherwise normal day off.

viii. Savings Plans

16. The Debtor also provides flexible spending and health savings accounts. A flexible spending account is a tax-advantaged financial account that allows an Employee to set aside a portion of his or her earnings to pay for qualified expenses, such as medical care or dependent day care (the “**Flexible Spending Account**”). Each Employee can choose to contribute pre-tax dollars up to the limits set by the Internal Revenue Service to the Flexible Spending Account. The contributions associated with the Flexible Spending Account are *entirely* funded by the Employees who choose to enroll and, as such, the Debtor simply seeks authority to transfer amounts withheld from Employees’ paychecks to their Flexible Spending Accounts.

17. The Debtor also maintains a health savings account program, which is a tax-advantaged financial account that allows an Employee to set aside a portion of his or her earnings to pay for qualified medical expenses if participating in the high deductible health care medical plan (the “**Health Savings Accounts**”). Employees can choose to contribute pre-tax dollars up to the limits set by the Internal Revenue Service to the Health Savings Account. The contributions associated with the Health Savings Accounts are *entirely* funded by the Employees who choose to enroll and, as such, the Debtor simply seeks authority to transfer amounts withheld from Employees’ paychecks to their Health Savings Accounts.

18. Because the benefits provided pursuant to the Flexible Spending and Health Savings Accounts are essential features of the Debtor’s employment package provided to Employees, and failure to provide these benefits would likely harm Employee morale and prompt the premature departure of valued Employees, the Debtor requests authority to honor obligations in respect thereto as and when they come due in the ordinary course of business.

V. Authority for Relief Requested

19. Pursuant to section 507(a)(4)(A) of the Bankruptcy Code, claims for “wages, salaries, or commissions, including vacation, severance, and sick leave pay” earned within 180 days before the Petition Date are afforded priority unsecured status. Similarly, section 507(a)(5) of the Bankruptcy Code provides that Employees’ claims for contributions to an employee benefit plan also are afforded priority unsecured status. To the extent there are prepetition amounts outstanding as of the Petition Date for Employee Obligations, the Debtor believes all the related claims are priority claims. As priority claims, the Employee Obligations must be paid in full before any general unsecured obligations of the Debtor may be satisfied. Accordingly, the relief requested will affect only the *timing* of the payment of these priority obligations and will not prejudice the rights of general unsecured creditors or other parties in interest.

20. Out of an abundance of caution, however, for amounts exceeding the priority limit, the Debtor requests authority, but not a direction or obligation, to pay such prepetition amounts due to the Employees because such payments are essential to the Debtor’s operations and the benefits achieved by such payments far exceed the negative effects resulting from failure to make such payments. Section 363(b)(1) of the Bankruptcy Code provides, in pertinent part, that a debtor may, in the exercise of its sound business judgment and after notice and a hearing, use property of the estate outside of the ordinary course of business. *See* 11 U.S.C. § 363(b). In addition, it is well established that a bankruptcy court has power to authorize payment of prepetition claims where the payment of such claims is necessary to facilitate reorganization.

21. This principle was first articulated by the Supreme Court in *Miltenberger v. Logansport Co.*, 106 U.S. 286, 311 (1882) (“Many circumstances may exist which may make it necessary and indispensable to the business . . . and the preservation of the property, for the

receiver to pay preexisting debts of certain classes, out of the earnings of the receivership, or even the corpus of the property, under the order of the court, with a priority of lien.”), and has been commonly referred to as the “necessity of payment” doctrine. *See, e.g., In re Motor Coach Indus. Int’l Inc.*, No. 09-078, 2009 WL 330993, at *2 n.5 (D. Del. Feb. 10, 2009) (“The ‘doctrine of necessity’ or ‘necessity of payment’ doctrine is a general rubric for the proposition that a court can authorize the payment of prepetition claims if such payment is essential to the continued operation of the debtor.”).

VI. Cause Exists to Grant the Requested Relief

22. In this case, delay in payment or failure to satisfy Employee Obligations, including the PTO Policy, would irreparably impair morale, dedication, confidence, and cooperation of the Employees, and would adversely impact the Debtor’s relationship with them at a time when their support is critical to the Debtor’s chapter 11 case and ongoing business operations and sale efforts. At this critical juncture, the Debtor simply cannot risk damage to its business from a rapid decline in Employee morale. Absent the relief requested herein, the Employees may suffer undue hardship and, in many instances, serious financial difficulties, as Employees rely on their wages and benefits to meet their personal financial obligations. In addition, it would be inequitable to require the Debtor’s Employees to bear the cost of any business expenses they incurred prepetition with the belief such expenses would be promptly reimbursed.

23. To the extent the Debtor collects Payroll Taxes, such funds may be held in trust by the Debtor for the benefit of the Taxing Authorities and may not constitute property of the Debtor’s estate. *See, e.g., 26 U.S.C. § 7501; 11 U.S.C. § 541; see also Begier v. Internal Revenue Serv.*, 496 U.S. 53 (1990). Because the Payroll Taxes are not property of the Debtor’s estate,

these funds are not available for the satisfaction of creditors' claims. If Payroll Taxes, however, are somehow deemed to be property of the Debtor's estates under section 541 of the Bankruptcy Code, the Payroll Taxes are afforded priority status under section 507(a)(8) of the Bankruptcy Code. *See* 11 U.S.C. § 507(a)(8). As priority claims, the Payroll Taxes must be paid in full before any general unsecured obligations of the Debtor may be satisfied. Accordingly, the relief requested will only affect the *timing* of the payment of Payroll Taxes and will not prejudice the rights of general unsecured creditors or other parties in interest.

VII. Reservation of Rights

24. Nothing contained herein is intended or should be construed as an admission as to the validity of any claim against the Debtor, a waiver of the Debtor's rights to dispute any claim, or an approval or assumption of any agreement, contract, or lease under section 365 of the Bankruptcy Code.

VIII. Relief under Bankruptcy Rules 6003 & 6004 is Warranted

25. Bankruptcy Rule 6003 provides that to the extent relief is necessary to avoid immediate and irreparable harm, a bankruptcy court may approve a motion to "pay all or part of a claim that arose before the filing of the petition" prior to 21 days after the Petition Date. Fed. R. Bankr. P. 6003. The Debtor submits the facts described herein demonstrate that the relief requested in this Motion is necessary to avoid immediate and irreparable harm to the Debtor's business operations and the value of the Debtor's estate, and that Bankruptcy Rule 6003 has been satisfied to permit such payments, if any are necessary.

26. Further, the Debtor seeks a waiver, for the purposes of this Motion, a waiver of the 14-day waiting period otherwise required to effectuate an order authorizing the use, sale, or lease of property under Bankruptcy Rule 6004(h).

IX. Notice

27. The Debtor, through counsel, will cause this Motion, as well as the proposed Order, to be served by first class U.S. mail, postage prepaid and, as applicable, by electronic mail on (i) United States Trustee; (ii) the 20 largest unsecured creditors in this case; (iii) the Federal Rail Administration; (iv) Wheeling & Lake Erie Railway Company; (v) the United States Secretary of Transportation; (vi) the Surface Transportation Board; and (vii) all parties requesting notice in this case. The Debtor respectfully requests that the Court find such notice to constitute fair, adequate, and sufficient notice of all matters set forth in this Motion.

WHEREFORE, the Debtor respectfully requests entry of an Order granting the relief requested herein and such other and further relief as is just and proper.

Dated: August 7, 2013

Respectfully submitted,

MONTREAL MAINE & ATLANTIC
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