

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MAINE

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

**RESPONSE OF NEW BRUNSWICK SOUTHERN RAILWAY COMPANY LIMITED
AND MAINE NORTHERN RAILWAY COMPANY TO THE RESPONSE AND
RESERVATION OF RIGHTS OF WHEELING AND LAKE ERIE RAILWAY
COMPANY WITH RESPECT TO THE AMENDED OBJECTION OF THE ESTATE
REPRESENTATIVE TO PROOFS OF CLAIM FILED BY NEW BRUNSWICK
SOUTHERN RAILWAY COMPANY LIMITED AND MAINE NORTHERN RAILWAY
COMPANY**

New Brunswick Southern Railway Company Limited (“NBSR”) and Maine Northern Railway Company (“MNR” and together with NBSR, the “**Irving Railroads**”) hereby submit this response (the “**Irving Response**”) to the *Response and Reservation of Rights to the Amended Objection of the Estate Representative to Proofs of Claim Filed by New Brunswick Southern Railway Company Limited and Maine Northern Railway Company* [D.E. 2324] (the “**Response and Reservation**”) of, Wheeling & Lake Erie Railway Company (“**Wheeling**”).

RESPONSE

Wheeling asks that this court to enter an order declaring that “nothing in this proceeding, by way of adjudication or settlement, is binding on Wheeling with respect to (A) the amounts owed by the Irving Railroads or either of them to MMA, and in turn payable to Wheeling by virtue of Wheeling’s security interest; and (B) any right of the Irving Railroads to avoid payment of such amounts to Wheeling by virtue of any claimed right of setoff.” [See Response and Reservation at ¶ 7]. Wheeling argues that it is entitled to such an order because it has not been provided adequate notice and has not been granted the ability to participate in the claim objection

filed by the Estate Representative against the Irving Railroads proofs of claim (the “**Claim Objection**”). In reality, Wheeling has been aware of Claim Objection since its inception, and could have participated in this litigation if it so chose.

Wheeling receives notices of filings in the MMA Bankruptcy Case. Thus, Wheeling received notice of the Claim Objection when the Estate Representative first filed his objection to the Irving Railroads proofs of claim. Additionally, Wheeling has been aware that the Claim Objection may affect the litigation between Wheeling and the Irving Railroads that is pending in the District Court for the District of Maine (the “**District Court Litigation**”) since the District Court Litigation was stayed on January 26, 2016. One of the reasons that the District Court Litigation was stayed, was to allow the Claim Objection to be fully litigated, since resolution of the Claim Objection may impact the District Court Litigation.

Wheeling argues that it has been prejudiced because it was not given the opportunity to participate as a litigant in the Claim Objection. In reality, Wheeling had every right to participate in the Claim Objection. Section 1109(b) of the Bankruptcy Code allows any party in interest to “appear and be heard on any issue in a case.” See *In re Abijoe Realty Corp.*, 943 F.2d 121, 125 (1st Cir. 1991); *In re High Voltage Eng’g Corp.*, 397 B.R. 579, 598 n. 9 (Bankr. D. Mass. 2008) (“Section 1109(b) continues the pattern of permitting interested parties in bankruptcy cases the absolute right to be heard and to insure their fair representation.”) (quoting *In re Amatex Corp.*, 755 F.2d 1034, 1042 (3d Cir. 1985)); *In re Public Serv. Co.*, 88 B.R. 546, 550 (Bankr. D. N.H. 1988) (“the term ‘party in interest’ is to be construed broadly, in order to allow parties affected by a chapter 11 case to appear and be heard.”). Thus, the decision not to participate in the Claim Objection until now was Wheeling’s.

Wheeling also contends that it has not been allowed to participate in discovery. This statement overlooks the fact that the Amended Scheduling Order was served on counsel for Wheeling. Consequently, Wheeling was well aware of the timeline established in the Amended Scheduling Order. It was entitled to object or respond. Additionally, Wheeling was free to serve its own discovery and participate in the depositions. Wheeling chose not to do so. Simply put, Wheeling was not shut out of the process, it simply decided not to participate.

Finally, Wheeling's request for an order stating that certain decisions of this Court will not be binding on Wheeling in the District Court Litigation is misplaced. The parties agree that the District Court will determine whether the Irving Railroads' setoff rights are superior to Wheeling's security interest. However, whether this Court's decision regarding the amounts owed by the Irving Railroads to MMA and the amounts owed by MMA to the Irving Railroads will be binding upon Wheeling will be determined by the application of principles of collateral estoppel. That issue is not before this Court. Irving Railroads position on this matter was made clear to Wheeling several weeks ago in an e-mail dated March 6, 2017. A true and accurate copy of the March 6, 2017 e-mail is attached hereto as Exhibit 1.

For the foregoing reasons, the Irving Railroads respectfully request that (i) this Court deny Wheeling's request for an order determining that nothing in this proceeding, by way of adjudication or settlement, is binding on Wheeling, and (ii) grant the Irving Railroads such other and further relief as the Court deems just and proper.

Respectfully submitted,

Dated: March 29, 2017

/s/ Keith J. Cunningham

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*Attorneys for New Brunswick Southern
Railway Company Limited and Maine
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EXHIBIT 1

From: Lepene, Alan
Sent: Monday, March 06, 2017 11:21 AM
To: Andrew Helman
Cc: Henderson, James; 'ewycoff@pierceatwood.com'
Subject: RE: Wheeling/NBSR/MNR

There will be no preclusive effect as far as the setoff issue is concerned because the bankruptcy court will not be addressing that issue. Insofar as the issue of the amounts owing from MMA to the Irving Railroads and from the Irving Railroads to MMA, which the bankruptcy court will be determining, whatever outcome is dictated by the principles of collateral estoppel will apply. The Irving Railroads are not waiving any rights in that regard.

Alan

216-566-5520

216-440-4172 (cell)

From: Andrew Helman [<mailto:ach@marcuslegg.com>]
Sent: Monday, March 06, 2017 10:43 AM
To: Lepene, Alan
Cc: Henderson, James; 'ewycoff@pierceatwood.com'
Subject: RE: Wheeling/NBSR/MNR

Hi Alan,

We favor a stay too. As far as what Bob is seeking, we're indifferent so long as it is clear that there's no preclusive effect as to Wheeling.

Thanks,

Andrew

From: Lepene, Alan [<mailto:Alan.Lepene@thompsonhine.com>]
Sent: Monday, March 06, 2017 10:16 AM
To: Andrew Helman <ach@marcuslegg.com>
Cc: Henderson, James <James.Henderson@thompsonhine.com>; 'ewycoff@pierceatwood.com' <ewycoff@pierceatwood.com>
Subject: RE: Wheeling/NBSR/MNR

Hi Andrew,

Do you have any issues with Bob's amended objection? I continue to be in favor of having the bankruptcy court determine the amounts owed by MMA to the Irving Railroads and the amounts owed by the Irving Railroads to MMA. The bankruptcy court will not address whether Irvings' rights of setoff are superior or inferior to Wheeling's security interest. With that, I'd be in favor of continuing the stay of the District Court litigation.

Alan

From: Andrew Helman [<mailto:ach@marcuslegg.com>]
Sent: Monday, March 06, 2017 9:09 AM
To: Lepene, Alan
Subject: Wheeling/NBSR/MNR

Alan, Are you in favor of continuing the stay in the USDC litigation?

Thanks,

Andrew



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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MAINE**

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

CERTIFICATE OF SERVICE

I, Michelle S. Pottle, an employee of Pierce Atwood LLP, being over the age of 18, hereby certify that on the date set forth below I caused copies of the Response of New Brunswick Southern Railway Company Limited and Maine Northern Railway Company to the Response and Reservation of Rights of Wheeling and Lake Erie Railway Company with Respect to the Amended Objection of the Estate Representative to Proofs of Claim filed by New Brunswick Southern Railway Company Limited and Maine Northern Railway Company to be served upon the parties indicated on the service list attached hereto in the manner described on said service list.

Dated: Portland, Maine
March 29, 2017

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