

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

IN RE:

MONTREAL, MAINE & ATLANTIC RAILWAY,*

LTD.

Debtor.

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* Chapter 11
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* No. 13-10670
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before the Hon. Louis H. Kornreich
Bangor, Maine
October 1, 2013

APPEARANCES:

Steven Morrell, US Trustee

For Robert Keach, Chapter 11 Trustee Michael Fagone, Esq.

Indian Harbor Insurance Company, et al Jeremy Fischer, Esq.

Wheeling & Lake Erie Railway Company George Marcus, Esq.

XL Insurance Company, Ltd. Craig Goldblatt, Esq.

Travelers Michael Enright, Esq.
Stephen Goldman, Esq.
Josh Randlett, Esq.

Eastern Maine Railway Company, et al Alan Lepene, Esq.

Edward Burkhardt, et al Patrick Maxcy, Esq.

Brotherhood of Locomotive
Engineers and Trainmen Jordan Kaplan, Esq.

USA Department of Justice John Stemplewicz, Esq.
Matthew Troy, Esq.

Estates of Marie Alliance, et al Daniel Cohn, Esq.

Atlantic Specialty Insurance
Company William Welte, Esq.

Unofficial Committee of Victims Luc Despins, Esq.

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Western Petroleum Corporation

Jeffrey Krause, Esq.

CIT Group, Inc.

Victoria Vron, Esq.

1 MR. KEACH: I will Your Honor.

2 THE COURT: Thank you.

3 MR. KEACH: And I believe, Your Honor, that our hope
4 that the lawyers for the FRA are still on the phone, and if so
5 I appreciate their patience.

6 THE COURT: Mr. Stemple -- Stemplewicz, excuse me.
7 (inaudible) your name. And Mr. Troy.

8 MR. TROY: Yes, Your Honor.

9 THE COURT: Welcome aboard, gentleman. Go ahead, Mr.
10 Keach.

11 MR. KEACH: Thank you, Your Honor. Your Honor, when
12 I first spoke to you (inaudible) of my appointment I mentioned
13 that one of the real challenges in this case was finding a way
14 to administer the case notwithstanding the fact that 1171A
15 existed and notwithstanding the fact that even (inaudible)
16 1171A in light of the particular tragedy represented by the
17 (inaudible) derailment and the administrative claims that might
18 arise from environmental cleanup for example, that this case
19 could in fact be (inaudible) terms administratively insolvent.
20 And I think that is rare and, Your Honor expressed similar
21 concerns, I think it was read by some there's a concern that
22 the attorneys' fees would consume the estate and in fact my
23 concern was otherwise, which is that in light of those there
24 are legitimate claims, there was no way actually to provide the
25 professional fees to permit the estate to be administered even

1 at a basic level. And so given that challenge, I began
2 discussions almost immediately thereafter with the Federal
3 Railroad Administration regarding a carve out that would permit
4 the estate to be administered, that would permit the Trustee to
5 retain professionals and to pay them eventually, and so this
6 matter could go forward. One of the -- so the (inaudible)
7 reducible minimums from my standpoint was that we could do so
8 in a way that would have us sharing with the claims that might
9 be asserted by the various victim categories in the case and we
10 have succeeded in doing that. Very simply, Your Honor, and
11 because I think the carve out has been mischaracterized in the
12 opposition there, too. Very simply what has happened is that
13 the Federal Railroad Administrations has agreed that upon the
14 sale of its collateral, which is the US State, and for this
15 purpose the US based Real Estate and Trackage that the proceeds
16 of the FRA's collateral can be used to pay allowed fees of the
17 Trustee and his professionals. It's important to know that at
18 no time do those proceeds become property of the estates,
19 subject to distribution to anyone else. In other words, this
20 is money that would only go to the FRA and only be paid to them
21 and all of which they have complete (inaudible) control and
22 they have been willing to devote it to this purpose. There is,
23 of course, nothing inherent from this motion that suggests that
24 those fees will be allowed. Any party at any time can object
25 to the allowance of fees.

1 THE COURT: (inaudible) expense --

2 MR. KEACH: And expenses. That's right. And any
3 party can object to the onset of expenses. But what it's --

4 THE COURT: So it is a maximum of I really -- and who
5 would the professionals who may be entitled to participate be?

6 MR. KEACH: There would be me, Your Honor, there
7 would be Bernstein Shur, it would be Development Specialist,
8 Inc., and there would be our Canadian Counsel. We will be
9 shortly having to move to retain a tax accountant --

10 THE COURT: Let's be clear for the record, the
11 American Trustee's counsel participating in the Canadian
12 proceeding?

13 MR. KEACH: Correct. Yes, Your Honor. So if the
14 Trustee's professionals as they currently exist and may be
15 higher. For example, we'll be bringing our request soon, a
16 joint request with the monitor to retain an investment banker.
17 That party will be included to the extent of the US's
18 contribution to that claim. It's important to know how we run
19 a business -- this isn't a distribution of \$500 million to the
20 estate. This is an agreement by the FRA.

21 THE COURT: I understand what the word carve out
22 means and I think those professionals here today also
23 understand that. The objections are far more specific than a
24 nebulous refusal brought on the basis of this property of the
25 estate. There is a suggestion that it invokes cash collateral,

1 that's an issue being made by Wheeling. There's a suggestion
2 I'd take made by the wrongful death claimants that there's
3 actually consideration being paid in the form of a waiver or
4 release under 5006 (inaudible). Why don't you address those
5 issues?

6 MR. KEACH: Well, let me just first, this claim by
7 Wheeling that this is cash collateral is just frankly absurd.
8 I mean there's no basis in fact for law under which the
9 severity Wheeling's cash collateral (inaudible) claim to it. I
10 actually don't think they mean cash collateral. What they're
11 saying is if their adequate protection failed, they have a 507B
12 priority and they think I have a duty to provide for that 507B
13 priority -- if I'm providing for myself with somebody else's
14 money. First and foremost, as a 9th circuit (inaudible)
15 commons, Your Honor, there is no such fiduciary duty. There's
16 absolutely no fiduciary duty breach of any kind for the Trustee
17 in a case where it otherwise cannot be administered to provide
18 to the administration of the case. So the factual claim is
19 simply, and the legal claim is simply without merit.

20 THE COURT: Well, I'll reserve until I hear from
21 (inaudible) on that. I understand your position and on the
22 second point -- a consideration point --

23 MR. KEACH: Right. On the second point, we have
24 agreed, the Trustee has agreed that we will not bring further
25 506C claims against the Federal Railroad Administration

1 THE COURT: Whether it's waiting for the record and
2 for people participating what a 506C claim is, and that is that
3 the estate, they seek reimbursement from a secured party to the
4 extent of benefit received by that secured party and I'm
5 paraphrasing, and so secured parties are always at risk and
6 that their collateral may be surcharged and what you're
7 suggesting is, is that there would be no surcharge.

8 MR. KEACH: There will be no further surcharge, Your
9 Honor. And let me explain precisely what we mean by that.
10 First and foremost, as Your Honor knows but I think it is
11 important for the record, under Hartford underwriters the only
12 party with the ability to bring a surcharge is the Trustee. We
13 haven't given away anybody else's rights to bring a surcharge
14 because they don't have such rights. And the Supreme Court has
15 made that abundantly clear. But more importantly, what you
16 have here is essentially a pre-negotiated surcharge in many
17 respects. As Your Honor knows, under going back to cases as
18 old as (inaudible) associates (inaudible) Goodwin's decision of
19 probably 20 or 30 years ago. But there is no ability to
20 surcharge a secured party for the general administration of the
21 bankruptcy estate. But it has to be a specific quantifiable
22 benefit, and in this case we saw no serious risk frankly given
23 the nature of the collateral.

24 THE COURT: I have to be clear on what you're saying.
25 Are you suggesting that we carve out is a de facto surcharge

1 because if you take that position it may be property
2 (inaudible)

3 MR. KEACH: No, Your Honor, what we're saying is that
4 it is not (inaudible) given what they are doing for us to give
5 up the right to surcharge because we don't think the right to
6 surcharge has any value. And in order to get them to do what
7 they needed to do --

8 THE COURT: This all comes down to a Trustee's
9 business judgment.

10 MR. KEACH: Absolutely, Your Honor. And since the
11 trustee is the holder of that right, the Trustee has exercised
12 his business judgment in order, and it's the only way
13 incidentally for this estate to be administered -- the only
14 way. The Trustee has exercised his business judgment to give
15 up the Trustee's right to pursue that claim on behalf of the
16 estate in order to prevent this estate to be administered.
17 Because the alternative outcome here, Your Honor, is that the
18 Trustee can't be paid and the Trustee's professionals can't be
19 paid, and the professionals would literally have to administer
20 this case on a pro bono basis. Your Honor, it's fully aware of
21 the magnitude of the potential clean up claims and 1171A
22 claims, and other claims that may claim an administrative
23 priority. Even if the claims it amounts (inaudible) were \$500
24 million, that amount is likely to be something like 1% of the
25 asserted claims against the estate. So you would be asking the

1 Trustee and his professionals to administer the case for on
2 either a pro bono basis or for a penny on the dollar. You
3 know, I love my work, I'm very dedicated to this case, Your
4 Honor, but I cannot risk millions of dollars and the credit of
5 myself, my firm, and more importantly the other professionals
6 who I'm bringing into this case under those circumstances. And
7 the issue here I think comes down to really only two points.
8 Because as Your Honor has noted, this is the FRA's money. It
9 doesn't have to give it to anybody. If the stipulation is
10 denied, this money goes to the FRA. If the stipulation is
11 granted, it also doesn't go to other people other than the FRA
12 and the Trustee's professionals. Frankly, no creditors are
13 standing to oppose this motion because they are not harmed by
14 its being granted nor are they benefited by its being denied.
15 And we raise that standing issue in our response and the cases
16 also raised that same point. So I don't think Wheeling has
17 standing. I don't think the ad hoc committee, which has yet to
18 file a rule 2019 statement has standing, but more importantly,
19 Your Honor, the cases make it very clear. First it's not a
20 breach of the Trustee's fiduciary duty to do this. In fact,
21 it's in furtherance with that duty. Secondly, I don't think
22 there's any question that the business judgment of the Trustee
23 could do this under these circumstances -- withstand scrutiny
24 and we would ask Your Honor to approve the stipulation.

25 THE COURT: Thank you, Mr. Keach. Does the FRA wish

1 to be heard?

2 MR. STEMPLEWICZ: No, Your Honor. We don't have
3 anything to add at this time. Thank you.

4 THE COURT: Alright. Would you at least endorse that
5 you are gladly willingly participating in the request?

6 MR. STEMPLEWICZ: Yes, Your Honor, that is correct.
7 This is John Stemplewicz speaking for the FRA.

8 THE COURT: Thank you, Mr. Stemplewicz. Opposing
9 parties -- who would like to go first?

10 MR. MARCUS: I would, Your Honor.

11 THE COURT: Mr. Cohn just went first.

12 MR. MARCUS: Your Honor, thank you. George Marcus
13 for Wheeling. Let's just review what we agree with the Trustee
14 on, alright? We agree that it is appropriate to provide a
15 means for payment of creditors who provide services, goods and
16 whatnot for this estate so that it can be administered,
17 (inaudible) reviewed the facts, it's probably insolvent and
18 otherwise those who provide credit to this estate would not get
19 paid. That's a real problem. And that problem is created by
20 the (inaudible) of section 1171 that grants administrative
21 creditor status to the class of victims of personal injury
22 claims. So what we have is what everyone acknowledges to be an
23 insolvent estate. But our contention is this -- no matter how
24 the Trustee comes into the money and whether you consider it to
25 be property to the state or not property to the state, it is

1 still money administered by this Trustee that he is gone from
2 the FRA to ask for and he has received. He has a fiduciary
3 duty to distribute it among similarly situated creditors. The
4 estate professionals --

5 THE COURT: Hold on, let me ask you a question. Does
6 the FRA have a duty to (inaudible) all similarly situated
7 creditors?

8 MR. MARCUS: The FRA has no duty at all.

9 THE COURT: But you're saying that if the FRA is
10 going to part with its money it has to do it (inaudible).

11 MR. MARCUS: It doesn't have to do anything.

12 THE COURT: If -- I said if it's going to part with
13 its money.

14 MR. MARCUS: Well, in a way what I'm saying is that
15 it is incumbent upon the Trustee, it is his duty to, if he is
16 able to obtain this money to distribute it to creditors
17 similarly situated. Now the Wheeling is not only party who may
18 be providing credit for this estate for the administration of
19 the state.

20 THE COURT: How does the Trustee obtain front and can
21 make a distribution to everybody if it doesn't get paid?

22 MR. MARCUS: Well, he goes to Wheeling with the exact
23 same pitch he was successful with before. But there are other
24 creditors who are in the class who should be protected by that
25 same money.

1 THE COURT: And you represent the Wheeling --

2 MR. MARCUS: I represent the Wheeling --

3 THE COURT: Okay.

4 MR. MARCUS: One of them. In respect to the super
5 priority claim.

6 THE COURT: And how is a super priority claim
7 adversely affected by the (inaudible)?

8 MR. MARCUS: I don't believe it's adversely affected,
9 Your Honor. My point is different -- that it's a fiduciary.
10 If a fiduciary who owes duties to all creditors acquires
11 assets, he has the duty to distribute them fairly among the
12 various creditors who are similarly situated. I mean, it's not
13 just the Wheeling, Your Honor. It is other creditors --

14 THE COURT: You're stating that a universal
15 proposition that's in a very, very troubling (inaudible), do
16 you mean that the executive or probate's estate who would --
17 receives compensation from a third party has to contribute
18 those moneys to the estate for distribution?

19 MR. MARCUS: It depends on the circumstances. Money
20 comes into a stage under various guidances and circumstances.

21 THE COURT: Okay, we settled on that one. What else?

22 MR. MARCUS: In this case -- in this case, clearly
23 the (inaudible) has a fiduciary and the first record --

24 THE COURT: We have a fiduciary duty, yes --

25 MR. MARCUS: Right.

1 THE COURT: And that means that any money that
2 (inaudible) for his own compensation has to be equitably
3 distributed to other people?

4 MR. MARCUS: No, not -- no, because I think when you
5 pose the question that way, you're saying does he have to take
6 his pay and give it to somebody else? No. We're talking about
7 a fund of money. A fund of money that --

8 THE COURT: But we are talking about his pay. I'll
9 tell you why. Because the arrangement as I understand it from
10 the papers and from Mr. Keach's disclosure is that this Court
11 will allow his fees and FRA has agreed to pay such fees and
12 expenses as are allowed to the extent of \$500 million, so the
13 Trustee is never getting the fund of money. He's only getting
14 allowed savings from the third party.

15 MR. MARCUS: Well, that isn't what his motion says.

16 THE COURT: But that's what Mr. Keach said.

17 MR. KEACH: That's exactly what the motion says and
18 that's exactly what the (inaudible). This is not a \$500
19 million (inaudible). Listen, if we don't -- actually
20 (inaudible)

21 THE COURT: Now if I only award him \$200, FRA will
22 only give him \$200, correct Mr. Keach?

23 MR. KEACH: Correct.

24 MR. MARCUS: Well, here's what the motions says.

25 THE COURT: Well, I'm just telling you he just said

1 correct, so I don't need to know what the motion says.

2 MR. MARCUS: Well, then maybe we're varying in
3 motion. But the point is -- the point is --

4 THE COURT: Hold on, hold on. It makes no
5 difference. Let's assume that your version of what he said
6 plagerously is correct. What he just said supersedes that.
7 We're done.

8 MR. MARCUS: Okay. Alright.

9 THE COURT: Now move on to the next point.

10 MR. MARCUS: The first circuit of (inaudible)
11 recognizes a distinction based upon who the recipient of the
12 funds is. Alright? In fact, that case involves directly the
13 question that's whether or not the recipient was a Trustee, had
14 fiduciary duties. In that case it didn't. And the first
15 circuit noted the distinction. Other courts have also made
16 note of a distinction, including Judge Haines for the BAP who
17 said that even a Trustee or a state professional who gets a
18 (inaudible) may have the duty to readjust and disgorge based
19 upon treatment of other state professionals. Now, I know
20 there's an effort to distinguish the robotics case from this
21 case, but it's (inaudible) distinction without a difference.
22 In both cases, the secured creditors gave up money that they
23 could have gotten and was up with a less than satisfying claim
24 to give money to an estate professional for the purpose of
25 making a distribution and for the purpose of funding the state

1 professionals. Even in that situation, Judge Haines speaking
2 for the BAP recognized that there may well be a duty of the
3 Trustee to share that with other creditors in similar
4 situations.

5 THE COURT: Did he say there is or there may well
6 be?

7 MR. MARCUS: He said there may be because he did not
8 rule on the issue. It's an open question.

9 THE COURT: Thank you.

10 MR. MARCUS: You're welcome.

11 THE COURT: You'd like to close that rule?

12 MR. MARCUS: I think it should be -- I think it
13 should be closed.

14 THE COURT: And why should it be closed? I'm not
15 being facetious. It's just on the basis of fundamental
16 fairness? Is that what --

17 MR. MARCUS: Well, that's a big part of it because
18 there are other creditors besides the Trustee and Trustee
19 professionals who are extending credit to this estate to allow
20 it to operate, to be maintained, and to be preserved for the
21 benefit of everybody else. The Trustee is not the only entity
22 providing such credit. For example, the people who are working
23 for the railroad have a self-insured that the debtors self-
24 insured health insurance policy. They're extending credit when
25 they go see the doctor. Now what happens if they don't get

1 paid? Is the Trustee in the position to say we'll take the
2 money to pay our fees, but those employees, they're not gonna
3 get paid on their health insurance claims. We don't know what
4 these outcomes are gonna be.

5 THE COURT: No, we don't and once the Trustee is paid
6 there may be a right of (inaudible).

7 MR. MARCUS: Well, if there's a (inaudible) right of
8 disgorgement, then that goes part way to addressing the issues
9 that I'm raising.

10 THE COURT: I don't know that there is or there
11 isn't, but one thing that I've made abundantly clear is that
12 we're not gonna have a run up of administrative expenses in
13 this case.

14 MR. MARCUS: And I appreciate that, and I'm not
15 suggesting that anybody would run them up. Alright? That's
16 not my point. My point is that there are other creditors
17 besides the Trustee and professionals who are extending credit
18 to this estate and therefore it is incumbent upon the Trustee
19 to seek payment not just for himself but other creditors who
20 are extending their credit. It could be employees, it could be
21 the Wheeling, it could be a vendor. Now we (inaudible)
22 insolvent, so when we are at the end of a chase, or near the
23 end of a chase, is it at the appropriate outcome that the
24 Trustee and his professionals are paying full and the
25 employees, Wheeling, vendors are not. That is the fundamental

1 issue.

2 THE COURT: I don't know and I'm not asking, but let
3 me suggest something to you. Let's assume that the Trustee
4 went to the FRA with a grand proposal as you have outlined and
5 they thought about it and they said you know we don't like the
6 Wheeling, we don't like the employees, we don't like anybody --
7 but we do like you, Mr. Keach, so we're gonna give you the
8 carve out or there'll be no carve out at all. Did he fulfill
9 his fiduciary duty?

10 MR. MARCUS: He may well have. If that was the
11 position of the FRA, then I'd say well, you know, the fiduciary
12 has a duty at least to try, and he tried. Now we don't know
13 that.

14 THE COURT: We don't know that.

15 MR. MARCUS: And we don't know what position the FRA
16 would say -- would take if we said, now look -- this carve out
17 to fund administration is a really good idea. And I think it
18 is. But you know, there are other people who are extending
19 credit to fund this estate and keep it alive and keep it going
20 for the benefit of everybody else. They should be included
21 within this scope. We don't know what the FRA would say when
22 addressed with that question. And that is the proper question
23 for the Trustee to have asked initially. We don't know that he
24 did.

25 THE COURT: Okay. Do you have anything else?

1 MR. MARCUS: I'll consult my notes, Your Honor.
2 (inaudible) Well, I think the last point really -- I may have
3 made it already, but in case I haven't, is this -- what sets
4 this case apart from the other authorities cited by the Trustee
5 is that this is universally acknowledged to be an insolvent
6 estate. And what that means by definition, if you accept that
7 statement that this estate is insolvent, what that means by
8 definition is that creditors who provide services and goods and
9 credit to operate the bankruptcy estate, to keep it alive, to
10 enhance, maintain and preserve it, I'm not going to get paid.
11 That's what that means. And so you have to ask yourself the
12 question, doesn't the Trustee at least at a minimum have a duty
13 to go to the FRA and say, you know that \$500 million it really
14 needs to be expanded to the class of creditors for extending
15 credit to the estate. Not just (inaudible).

16 THE COURT: This is different from the cases that
17 (inaudible) upon because this case has a unique situation where
18 the claimants themselves, a large body of claimants in this
19 case, have administrative claims.

20 MR. MARCUS: That's right.

21 THE COURT: And in order for the Trustee to do what
22 he needs to do to make a distribution, he has to find a way of
23 not entering the hall of mirrors. Do you want him to enter the
24 hall of mirrors?

25 MR. MARCUS: No, because I say that is an appropriate

1 distortion to make. In other words, the Trustee can comply
2 with his fiduciary duties by saying look, those administrative
3 creditors who are there by (inaudible) whose (inaudible) are
4 sunk, and I can't do anything about it, that's a separate
5 classification that is reasonable.

6 THE COURT: You are presuming that post firing
7 administrative claimants in the ordinary sense are going to go
8 unpaid and I'm unwilling to make that assumption right now and
9 I will tell you that there could be consequences later on if
10 that turns out to be the case.

11 MR. MARCUS: Well, let me suggest this, Your Honor.
12 Number 1 is, if you assume that the estate is administratively
13 insolvent --

14 THE COURT: I don't -- I think you'd want me to take
15 that as a matter of not fact, but a matter of wrong.

16 MR. MARCUS: I think the Trustee has conceited it.

17 THE COURT: The Trustee -- what the Trustee has said
18 is, is that I have to pay for goods and services every day, I'm
19 paying for goods and services every day, I'm not running
20 anything up, at least that's what I understand him to say, but
21 I also wanted to find a way to get the Trustee's professionals
22 paid. Now if the Trustee showed up here and said, Your Honor
23 I'm not paying for fuel, I'm not paying for electricity, and
24 I'm not paying the help and I'm not paying whatever else I'm
25 obligated to pay, and by the way I just made a deal so that I

1 can get paid, I'd have a big problem with that. Now you want
2 me to assume that.

3 MR. MARCUS: You know --

4 THE COURT: and I don't think that that's the record.

5 MR. MARCUS: Well, you know what? There's no record
6 today. So if those irrelevant facts then it's the burden of
7 the Trustee to say that the (inaudible) administrative
8 creditors will be unpaid. Now keep in mind that payroll is two
9 weeks (inaudible). There's a payroll being incurred today and
10 there's no cash collateral authority for the day -- for payday.
11 The next payday is after the expiration of the cash collateral
12 authority. Now maybe things will turn out well. Maybe they
13 won't. But there are creditors extending credit every single
14 day.

15 THE COURT: And I assure you, Mr. Marcus, all of that
16 will be taken into account when it comes to allowance of fees
17 and any disgorgement. Anything else?

18 MR. MARCUS: No.

19 THE COURT: Alright. If the Court is gonna reserve
20 its power to disgorge -- the Court's power is always reserved
21 in that regard.

22 MR. MARCUS: Well, I'd like it to be express. If
23 there's an express reservation of disgorgement on account of
24 unpaid administrative expenses, that would address the fairness
25 issue that I'm talking about. Because we don't know -- there

1 is no record today that can give the Court any assurance that
2 administrative creditors are gonna get paid. In fact, the only
3 record today is that they won't because of the admission of
4 insolvency. So if they -- so I would advocate if the Court is
5 not inclined to modify the stipulation in the way we've asked.
6 I would request an express reservation of the Court's power
7 (inaudible) in proper motion to order disgorgement in the event
8 that administrative creditors such as the super priority
9 creditor is not paid and satisfied. Now further, one last
10 argument I want to make and that is this court's orders on cash
11 collateral had provided by consent with the Trustee that
12 Wheeling super priority claim gets paid first and I think
13 there's a judicial (inaudible) factor at work here by virtue of
14 those orders. Now if the Court wants to reserve because they
15 may not be super priority claim, I don't know, but at a minimum
16 the Court should reserve the right --

17 THE COURT: Why is there a super priority claim to
18 FRA's money?

19 MR. MARCUS: It may not be anything to FRA's money.
20 But the point is -- but the point is I'm not tagging
21 (inaudible) order a super priority claim over (inaudible)? No,
22 it's got nothing to do with their money. I'm talking about the
23 duty of the Trustee, I'm talking about the fact that the
24 Trustee has arranged for his credit to be paid, but not other
25 credit that he's incurring. So in other words, the Trustee is

1 operating and saying to creditors, you give me credit.
2 Wheeling, you give me credit. Let me use your cash collateral.
3 I'll make sure that you have a claim. But when it comes time
4 to getting paid, he's taking care of himself. Not the others.

5 THE COURT: Now if that's (inaudible) consented to
6 using cash collateral--

7 MR. MARCUS: Under the condition that it had a super
8 priority claim. Now if that is an (inaudible) scenario for the
9 Court --

10 THE COURT: But hold on, because you're traipsing me
11 around in circles. We've agreed to cash collateral and the
12 super priority claim and you've conceived that FRA's money is
13 FRA's money. So how does this benefit you in any way?

14 MR. MARCUS: Because if the Trustee gets paid and
15 other administrative creditors such as Wheeling do not --

16 THE COURT: I've been there already --

17 MR. MARCUS: Okay, well, and I'm trying to go back to
18 that point to say this -- that if the Court is inclined to
19 approve the stipulations --

20 THE COURT: And I've heard that already.

21 MR. MARCUS: Then it should order that is subject to
22 disgorgement --

23 THE COURT: I've heard that already, too. Anything
24 new?

25 MR. MARCUS: Nothing new.

1 THE COURT: Okay, thank you very much Mr. Marcus. I
2 appreciate your input and your insight. Mr. Cohn?

3 MR. COHN: Good afternoon. And Your Honor, for the
4 record Daniel Cohn representing the unofficial committee of
5 wrongful death claimants and also the 42 estates that are
6 identified in our papers. We have three objections. The first
7 of them, Your Honor, has to do with the amount and it's the
8 question as much as it is an objection, but we need the --
9 we're still (inaudible) withdraw the objection, so we
10 (inaudible) answers to the question. And the question is why
11 does this estate need \$500 million for professional fees?

12 THE COURT: It doesn't. That's already been asked
13 and answered. What I understand is that FRA has said to the
14 extent that this estate needs \$5 million and to the extent that
15 the Court allows it for professionals, they'll carve out their
16 collateral to pay it. But I asked Mr. Keach a question before,
17 I said if I only award professionals \$200, how much would FRA
18 pay and he said \$200, don't you have your answer?

19 MR. COHN: No, I don't, Your Honor.

20 THE COURT: And why don't you have your answer?

21 MR. COHN: Because the question is there's a big
22 difference between somebody standing up and saying, Your Honor,
23 my budget for professional fees is \$100,000 and saying my
24 budget for professional fees is \$5 million. And I think it's a
25 fair question to be asked by any party (inaudible).

1 THE COURT: I don't think that that's -- I didn't
2 understand it to be that way, and I'll tell you what my
3 understanding is. I will repeat myself again, that at the end
4 of the day, hopefully that will be sooner than later, the
5 Trustee and other estate professionals will each submit
6 requests for payments and (inaudible) compensation and
7 reimbursement. This Court will allow or disallow or partially
8 allow those applications (inaudible) FRA to the extent it has
9 collateral sufficient to pay will carve out on its collateral
10 funds to pay. Now, if your question is that this (inaudible)
11 case, we should have a preview of coming attractions as to what
12 the Trustee intends to do, why he would even ask for a limit of
13 \$5 million in the first place and get to the bottom of why he's
14 wasting all of this money that's not going to go to your
15 wrongful death estates. That's really what you're trying to
16 tell me. But I'm telling you that that's rather premature in
17 my view. What the Trustee has done is to set an out of sight
18 light and you and every other party of interest in this case is
19 going to keep a very sharp eye on Mr. Keach and company to make
20 sure that they don't squander assets because I've told
21 everybody that from the first day. Anyone whose heard my
22 message knows the consequences. So what's your problem?

23 MR. COHN: Well, the problem is that we do I think
24 have the right to know and what it relates to --

25 THE COURT: Have the right to know what?

1 MR. COHN: A right to know what he has in mind doing
2 with the \$5 million?

3 THE COURT: There is no \$5 million. There is no \$5
4 million. Mr. Keach, is there \$5 million?

5 MR. KEACH: There is no \$5 million-fund, Your Honor.
6 The \$5 million is a limit on the (inaudible). We have the
7 limited and (inaudible) professional fees that this Court
8 awards.

9 THE COURT: So if I only award you \$200, how much
10 will you get?

11 MR. KEACH: \$200.

12 THE COURT: Thank you, Mr. Keach. Mr. Cohn?

13 MR. COHN: Your Honor, it still -- it strikes us as -
14 - it strikes us as improper and inappropriate amount and the
15 reason why it does affect us, Your Honor, and why we can't
16 simply say, well, you know --

17 THE COURT: Now we're getting to something. How does
18 it affect you?

19 MR. COHN: The way that it affects us, Your Honor, is
20 that there was a negotiation with the FRA. The Trustee had any
21 number of things he could have asked and what he asked for was
22 \$5 million for the Trustee and professionals.

23 THE COURT: I suspected he asked for more.

24 MR. COHN: I think probably so, too. And there were
25 other things that he could have asked for. For example, and

1 there are other ways the negotiation could have turned out.
2 For example, okay, a \$1 million for the Trustee and his
3 professionals and \$2 million for other people who have other
4 claims that have administrative priority. At that point, you
5 would have had something to consider about whether we should
6 have (inaudible) or not. Or, for that matter, the way it could
7 have turned out is that he could have involved us even in the
8 negotiations or consulted with us as part of the negotiations
9 and in ascertaining from our perspective what (inaudible)
10 principle is and would we -- what would we -- what would it be
11 such a waive our rights under section 1171A for the purposes of
12 this (inaudible). None of that occurred. So what we have
13 instead is a result of a negotiation we didn't punch a stake
14 in, we know nothing about, and the result is to --

15 THE COURT: I'm hearing -- I hear you, but by what
16 right would you have reason to know the substance of those
17 negotiations and here's the significance of my question -- is
18 that if you can establish that, then we may have to have an
19 evidentiary hearing. But the fact --

20 MR. COHN: (inaudible)

21 THE COURT: Yes, I know you did, but by what right?

22 MR. COHN: Well, that leads actually to the second
23 concern, which is the statutory scheme and it says that we have
24 a right to participate pro rata in any distribution to
25 administrative claimants of assets of the estate.

1 THE COURT: Now I don't know that it says that, but
2 it really doesn't say that, it says that you have the standing
3 of an administrative claimant, and quite frankly I know that
4 the we means the 42 estates and I previously expressed on many
5 occasions my compassion for the losses that have been suffered.
6 (inaudible) be established (inaudible) has been liquidated, no
7 claims have been filed that I'm aware of. And I take it at
8 face value that you're here today because you have clients that
9 will eventually be determined to have some right of
10 participation. But in order to (inaudible) in the extended
11 (inaudible) participation we're gonna need an act of
12 (inaudible) of the state professionals in order to do what is
13 necessary to get done.

14 MR. COHN: Your Honor, I want to acknowledge the
15 practical argument that in order for a bankruptcy estate to
16 function well, they need professionals. And the statutory
17 scheme that the congress created in railroad reorganizations --
18 at least in railroad reorganizations where there is a large
19 body of pre-petition wrongful death and bodily injury claims is
20 problematic from the practical perspective of getting that
21 estate administered. Now, we have other places in the
22 statutory scheme where congress has basically told the parties,
23 go negotiate because the consequences of not negotiating are
24 too horrible. You see that in section 1129, we see that for
25 that matter in 363F, there are also (inaudible) places in the

1 code where congress basically gave the people what amounted to
2 veto power. The only problem was if you exercised the veto
3 power, you're shooting yourself in the foot. So what congress
4 is saying to -- and congress has done it again right here --
5 1171A, in the context of this case, presents us with a
6 situation in which the parties have to reach an agreement. And
7 so what needs to happen here is that there needs to be a
8 discussion of what that agreement will be. And so, I mean
9 (inaudible), Your Honor --

10 THE COURT: You have no statutory authority for that.
11 This is all by analogy.

12 MR. COHN: Yes, Your Honor, but I'll tell you what I
13 do have --

14 THE COURT: There's no per say requirement, is there?

15 MR. COHN: No per say requirement for what?

16 THE COURT: For negotiation review about his fee --

17 MR. COHN: Well, there's a per say requirement for
18 you to turn down this motion because the motion is improper
19 under sections basically 506C and 1171 --

20 THE COURT: Okay, alright. Tell me the impropriety
21 under 506C?

22 MR. COHN: Okay, the Trustee, which he has to, of
23 course, but he (inaudible) impedes knowledge that this is a
24 pre-negotiated section 506C surcharge. Those were his words.
25 What's being done here is a settlement, which all (inaudible)

1 petition financing arrangements, well most of them are, which
2 is the estate, the -- people agree on what the amount of the
3 (inaudible) to make available, and then there won't be any
4 more. And they provide that assurance in the form of a waiver
5 of the estate's rights under section 506C. That is in the
6 state (inaudible). In the case it were all (inaudible) conduct
7 the 4th circuit.

8 THE COURT: You don't have to lecture me on what a
9 surcharge is. You are (inaudible) that this carve out is a
10 surcharge and is consideration for waiver of further
11 surcharges?

12 MR. COHN: In addition to my saying it, Your Honor,
13 Mr. Keach said it. So --

14 THE COURT: What did you say, Mr. Keach?

15 MR. KEACH: (inaudible)

16 THE COURT: You'll get an opportunity. Yes.

17 MR. COHN: So where we are is, what was settled was,
18 the estate's rights under section 506C. If this had been done
19 simply as a surcharge under 506C, then what would have happened
20 is the money would come into the estate and the (inaudible)

21 THE COURT: Let me short circuit this --

22 MR. COHN: Sure. Okay.

23 THE COURT: -- because if as you say that's what this
24 is, that's what this is then your claimants would have a right,
25 Mr. Marcus would have a right as a (inaudible) super priority,

1 and everybody but me would have a right of participation in
2 that money. But if you're not correct, then there's still a
3 question --

4 MR. COHN: Yes, Your Honor. (inaudible) and the
5 motion should be denied.

6 THE COURT: Well, thank you very much. (inaudible)

7 MR. COHN: I guess it strikes me that when you --
8 it's like any situation where you (inaudible) which by the way
9 is also not so much a release but an acknowledgement of their
10 claim by the Trustee -- but when you give the estate's rights
11 away that is --

12 THE COURT: Then there is consideration and you must
13 ask Mr. Keach about that and he will respond further about
14 that. That is certainly a legitimate point. At some point it
15 may estate money, but it may not be and I'll have to decide
16 that question, won't I?

17 MR. COHN: Okay, so I have nothing further to say on
18 that issue, Your Honor.

19 THE COURT: Alright, what's #3?

20 MR. COHN: My third point, Your Honor, is that under
21 the -- the way that the stipulation is structured, there is
22 basically a 30-day notice that the FRA can give at any time.
23 It is structured as a 15-day notice within a 15-day (inaudible)
24 takes effect, so I'm just gonna simplify and call it a 30-day
25 notice. And the FRA can give that notice any time in its

1 absolute discretion. And what that notice does is that it
2 determinates (inaudible). Now, if the FRA were to give that
3 notice at a time when there were still expenses that could be
4 charged against the FRA under section 506C, the estate has
5 heard because what happens is those expenses continue to pile
6 up. The 506C rights have been waived and the estate is left
7 worse off. Mr. Keach assures me that that was not -- well, I
8 should let Mr. Keach speak for himself, but it does strike me
9 that whatever the spirit of corporation was among Mr. Keach and
10 the FRA that this is the type of thing that is important enough
11 that it ought to be pinned down again to be being part of a
12 defined legal agreement, namely either, that the notice will
13 not be sent with an effective date prior to the end of the
14 incurrence of cell-related costs or if the notice is sent that
15 506C will apply to any --

16 THE COURT: Excuse me, there should be a snap back if
17 there's a termination.

18 MR. COHN: Yes, sir. I agree.

19 THE COURT: Does anyone else wish to be heard in
20 opposition? Mr. Keach?

21 MR. KEACH: Your Honor, I'll be very brief because
22 it's been a long day for everybody, including the Court, but
23 first and foremost, let me make it very clear -- I did not say
24 it, and Your Honor asked me a question and permitted me to
25 clarify and that I made very clear this is not a 506C charge.

1 (inaudible) surcharge substitution is not a 506C surcharge. It
2 is a carve out. It is in the (inaudible) a pure carve out in
3 the sense that when it is paid the FRA reduces its claim and
4 its lien. None of these proceeds ever -- as in ever become
5 property of the estate. What happens here is there is a sale.
6 If there was a sale for an (inaudible) FRA would give us \$28
7 million. It takes so much of that \$28 million as represent to
8 allow fees and expenses of the Trustee and its professionals
9 and it pays them to the professionals. Not to the estate -- to
10 the professionals. The estate never touches it. Therefore, the
11 507B claim never attaches to it. No other administrative
12 claims ever attach to it -- it just doesn't happen. And as all
13 of the cases have said, under those circumstances, the estate
14 has no claim to the funds. There is no duty to disgorge to the
15 estate. Carve outs incidentally are generally immune from
16 disgorgement and that's why we structured it this way. Because
17 you need to structure it in a way that allows administration.
18 But more of the point, and I'll let FRA speak for itself, but
19 FRA was not interested in giving up its money to fund operating
20 losses of the estate. It was not interested in giving up its
21 money to fund 1171A claims, it was only interested in giving up
22 its money in order to allow the case to be administered during
23 its very important regulatory role.

24 THE COURT: It's not just a lender, it's your
25 regulator and this is closely related to what the railroad

1 reorganization (inaudible) proper (inaudible) in maintaining
2 the line pending outcome and disposition of chapter 11.

3 MR. KEACH: Absolutely, Your Honor, and let me just
4 speak to (inaudible) point because I don't want the public
5 record to be muddled toward members of the public who are here.
6 Current administrative expenses are being paid. Under my
7 watch, they will be paid. Mr. Marcus has an (inaudible) argue
8 for Wheeling on this point, much less the employees, but the
9 employees are being paid and they will be paid. Vendors are
10 being paid and they will be paid under my watch. That's not an
11 issue here. That's a complete red herring. What we have here
12 is the only way this estate can be administered. We needed to
13 get the estate administered. We went to the FRA. This is
14 essentially a gift from the FRA. We're not inclined to look it
15 away. Nobody's harmed by this because frankly this is not a
16 situation where there's a \$5 million pool and if we don't take
17 it, it goes to somebody else. If the motion is denied today,
18 the FRA gets the money. The money is gone. Nobody gets it, we
19 don't get it, nobody gets it. But if it's granted, then the
20 estate can be administered and nobody's lost anything they ever
21 had because they never had it and they never had a right to it.
22 And that's that basis upon which we did this. Just for the
23 last piece of public record, Your Honor, we didn't come up with
24 the \$5 million number out of (inaudible) air. The Aroostook
25 railroad case with which Your Honor is very familiar, although

1 it was adjudicated by Judge Haines -- we look at Trustees,
2 professionals and aggregate fees to the end of that case. Those
3 fees in the aggregate exceeded \$9 million. We think we can be
4 more efficient. We think this case is different. But I will
5 also add that case did not have anything resembling the
6 complexity arising out of the (inaudible) accident. So we
7 didn't pluck the number out of the air, we picked a number we
8 thought would get us through enough of the case so that we'd
9 have a view to where the assets were and what the claims were.
10 I have no doubt Your Honor it may not be sufficient, but it was
11 sufficient to get us where we needed to go and that's why we
12 asked for the number.

13 THE COURT: You've been accused of breaching an
14 obligation to the state by negotiating on your own behalf and
15 not on behalf of other solely situated parties. What do you
16 have to say?

17 MR. KEACH: Number one, Your Honor, as the case is
18 made very clear, it is not a breach of fiduciary duties as from
19 the administration of the case, even to the exclusion of other
20 administrative parties as a matter of law, but more
21 importantly, and the FRA can speak for itself, but the FRA may
22 -- and I'm gonna reveal all of the settlement, negotiations
23 with the FRA because frankly unlike some of my (inaudible) I
24 don't believe in exposing settlement discussions. But the FRA
25 made it very clear very early that it had no interest in

1 funding 1171A claims or operating losses of the estate that was
2 off the table. That just wasn't available to me and we got the
3 best option we could get to get the estate administered.

4 THE COURT: Thank you.

5 MR. KEACH: Thank you, Your Honor.

6 THE COURT: Is there anyone else who wishes to be
7 heard?

8 MR. STEMPLEWICZ: Your Honor, John Stemplewicz for
9 the FRA --

10 THE COURT: Go ahead, Mr. Stemplewicz.

11 MR. STEMPLEWICZ: Thank you. Just a few quick
12 points. One is that (inaudible) stipulation says what it says.
13 If earmarks these funds for the Trustee's professionals. The
14 FRA does not and would not consent to any other purpose,
15 including the (inaudible) of other creditors and finally the
16 FRA does not and would not consent without the 506C waiver. We
17 agree with Your Honor's comments regarding the FRA (inaudible)
18 in this case and we agree with the decision taken by the
19 Trustee. Thank you very much.

20 THE COURT: Thank you, Mr. Stemplewicz. Mr. Marcus?
21 Any final remarks?

22 MR. MARCUS: The only remark is that before this
23 final approved stipulation is entered that (inaudible)
24 reservation advice to review and look at it at a later time
25 (inaudible) administrator (inaudible) extending (inaudible).

1 And as Judge Haines observed, that is a question that should be
2 reserved (inaudible) court should make a rule (inaudible) turn
3 out in fact an insolvent as represented.

4 THE COURT: Thank you. Mr. Cohn, do you have any
5 final comments?

6 MR. COHN: Nothing.

7 THE COURT: Mr. Keach, you arose?

8 MR. KEACH: Yeah, I just wanna --

9 THE COURT: (inaudible) approach the (inaudible)

10 MR. KEACH: Certainly, Your Honor. I was amiss, Your
11 Honor, and I'll be very brief in not addressing robotics, which
12 is Judge Haines' (inaudible) decision, as Mr. Marcus indicated
13 the entire discussion in that case about this is (inaudible)
14 that it wasn't part of the ruling, but to be very, very clear
15 about what that case was. That case did not involve
16 (inaudible). What Judge Haines indicated he was concerned
17 about in that case was the fact that under that arrangement if
18 the secured creditor was paid in full the fees actually got
19 funded out of the equity and the assets and there was no
20 reduction in the secured party's claim or lien. So robotics
21 doesn't even involve a carve out and there's absolutely no
22 suggestion in the case that a real carve out such as here would
23 have to be shared in any way, shape or form. I would add, Your
24 Honor, that Your Honor always has the ability to review fees.
25 Any party in the case has the right to try to surcharge the

1 Trustee if the Trustee has done something or acted improperly
2 or if they think (inaudible).

3 THE COURT: Let me ask you a follow up question. I'm
4 not suggesting anything by this, but if a party in interest
5 were the court (inaudible) or to request disgorgement of X
6 dollars and I were to rule on disgorgement of X dollars, where
7 would the X go?

8 MR. KEACH: The X would go back to the FRA, Your
9 Honor. This money never becomes property of the estate. And
10 let me point out (inaudible) very clear from the cases that we
11 cited, Your Honor. And I'll point out there are a couple of
12 things. First, true carve outs are not subject to disgorgement
13 for that very reason. They don't diminish the estate and the
14 carve out doesn't give money back to the estate. That doesn't
15 prevent anybody who wants to from bringing a surcharge case or
16 objecting the fees. Those issues are wide open for everybody.
17 But there shouldn't be any specific reservation of rights on
18 this issue, any greater (inaudible) specific reservation of
19 rights (inaudible) liability to go after his claim because he
20 doesn't really have (inaudible) claim. All of those rights are
21 reserved and singling this out --

22 THE COURT: Including the right, this Court were
23 disgorgement of fees paid and distribution to other similarly
24 situated parties.

25 MR. KEACH: I'm extremely aware of Your Honor's

1 powers and we reserve our right in the face of (inaudible).

2 That's true.

3 THE COURT: Okay, then. Do we have anything else on
4 for today? Alright I'm going to take this under advisement.
5 I'll get back to you just as soon as I'm able and I appreciate
6 everyone's participation. Court is adjourned.

7 THE COURT OFFICIAL: All rise.

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10 End of Audio

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C E R T I F I C A T E

I hereby certify that this is a true and accurate transcript of the proceedings which took place on October 1, 2013 which have been electronically recorded in this matter.

Amy K. McCord
Transcriber

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MAINE

_____)	
In re)	
)	CHAPTER 11
MONTREAL MAINE & ATLANTIC)	CASE NO. 13-10670-LHK
RAILWAY, LTD.)	
)	
Debtor)	
_____)	

CERTIFICATE OF SERVICE

I, Taruna Garg, hereby certify that I caused a copy of the *Supplement to Wrongful Death Claimants' Motion for Reconsideration of Order Granting Trustee's Motion for Approval of Stipulation with Federal Railroad Administration filed on November 1, 2013 (Transcript of Hearing held on October 1, 2013 on Trustee's Motion for Approval of Stipulation with Federal Railroad Administration)* to be served via the Court's CM/ECF system on November 7, 2013 and by U.S. First Class Mail, as indicated, upon the parties listed on the attached Service List.

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