

RELIEF REQUESTED WITHOUT A HEARING

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE**

In re:

MONTREAL MAINE & ATLANTIC
RAILWAY, LTD.

Debtor.

Bk. No. 13-10670
Chapter 11

**APPLICATION FOR ORDER, PURSUANT TO SECTIONS 327 AND 328
OF THE BANKRUPTCY CODE, AUTHORIZING THE EMPLOYMENT
OF COVINGTON & BURLING LLP, AS SPECIAL REGULATORY
COUNSEL FOR THE TRUSTEE NUNC PRO TUNC TO AUGUST 21, 2013**

Robert J. Keach (the “Trustee”), the chapter 11 trustee in the above-captioned case, hereby requests that this Court enter an order approving the Trustee’s employment of Covington & Burling LLP (“Covington”) as special regulatory counsel for the Trustee.

JURISDICTION, VENUE AND STATUTORY BASIS

1. This Court has jurisdiction to entertain this application pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicates and applicable rules relating to the relief sought herein are §§ 327(e) and 328(a) of the United States Bankruptcy Code, Rule 2014(a) of the Federal Rules of Bankruptcy Procedure (hereinafter “Fed. R. Bankr. P.”) and Rules 2014-1, 2014-2, and 2014-3 of this Court’s local rules (the “Local Rules”).

BACKGROUND

2. On August 7, 2013 (the “Petition Date”), Montreal Maine & Atlantic Railway, Ltd., the above-captioned debtor (the “Debtor”), filed a voluntary petition for relief under chapter 11 of 11 U.S.C. § 101 et seq. (the “Bankruptcy Code”). On August 21, 2013, the United States Trustee

(the “U.S. Trustee”) appointed the Trustee to serve in the Debtor’s Chapter 11 case (the “Case”) pursuant to 11 U.S.C. § 1163.

3. The Debtor is a Delaware corporation that, since January 2003, has operated in an integrated, international shortline freight railroad system (the “System”) with its wholly-owned Canadian subsidiary, Montreal Maine & Atlantic Co. (“MMA Canada”). The Debtor and MMA Canada have fully-integrated business operations and accounting, with the Debtor collecting most of the generated revenue and transferring to MMA Canada the funds required to pay its expenses.¹ On or about August 7, 2013, MMA Canada filed for protection from creditors in a concurrent proceeding under Canada’s Companies’ Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended (the “Canadian Case”).

4. The System has 510 route miles of track in Maine, Vermont and Quebec and operates from its head office in Hermon, Maine. The System is a substantial component of the transportation system of Northern Maine, Northern New England, Quebec, and New Brunswick. Prior to the Petition Date, the Debtor employed approximately 179 people and operated about 15 trains daily.

5. As set forth on the record by the Debtor’s counsel during the August 8, 2013 hearing, and as discussed in the *Affidavit of M. Donald Gardner, Jr. in Support of First Day Pleadings* [Docket No. 11] (the “Gardner Affidavit”), the Debtor’s bankruptcy case was precipitated by a derailment, on July 6, 2013, of an unmanned eastbound Debtor train with 72 carloads of crude oil and 5 locomotive units, in Lac-Mégantic, Quebec (the “Derailment”). The Derailment set off several massive explosions, destroyed part of downtown Lac-Mégantic, and is presumed to have killed 47 people. Prior to the Petition Date, and as a result of the Derailment

¹ The historical facts relating to the Debtor are alleged upon the Trustee’s current information and belief. The Trustee was recently appointed and has not yet completed his investigation of the Debtor, its assets and business, or any other circumstances, including those leading to the commencement of the Case. The Trustee reserves his right to allege different facts if and when he becomes aware of new or different information.

and the related injuries, deaths, and property damage, lawsuits were filed against the Debtor both in the United States and Canada. The Trustee expects that the estate will face significant prepetition personal injury, wrongful death, and environmental claims.

6. Post-Derailment, the Debtor's aggregate monthly gross revenues dropped to approximately \$1 million. As a result of the Derailment, the Debtor has lost much of its freight business, and faces litigation claims and extraordinary environmental clean-up liability. These issues precipitated the filing.

RELIEF REQUESTED

7. Subject to the approval of this Court, the Trustee seeks to employ Covington to serve as his special regulatory counsel in connection with the Case and the Canadian Case, with the retention being effective as of August 21, 2013.

BASIS FOR RELIEF

8. Under section 327(e) of the Bankruptcy Code, a trustee is authorized to employ, one or more attorneys to represent the trustee on specified matters as long as those attorneys do not hold or represent an interest adverse to the debtor or the estate with respect to the matter on which they are to be employed. 11 U.S.C. § 327(e). Under section 328(a) of the Bankruptcy Code, an attorney retained under section 327(e) may, with the Court's approval, be employed on any reasonable terms and conditions, including on retainer or on an hourly basis. 11 U.S.C. § 328(a).

9. Upon the Trustee's appointment, the Trustee selected Covington to serve as his special regulatory counsel. Covington is recognized for its expertise in matters before the Surface Transportation Board (the "STB"), Federal Railway Administration (the "FRA"), and the Department of Transportation (the "DOT"). This firm's specialized knowledge and experience with respect to federal railroad related regulatory filings, combined with its familiarity with

chapter 11 proceedings, will be crucial to the Trustee's administration of the Debtor's estate. Accordingly, Covington (a) has the necessary background to deal effectively with the potential legal issues and problems that may arise in the context of the Case and the Canadian Case, and (b) is well-qualified to represent the Trustee in the Case and the Canadian Case in an efficient and timely manner.

10. In accordance with Local Rule 2014-3, the professional services that Covington will render to the Trustee may include some or all of the following:

- (a) Providing consulting and legal services necessary to obtain authorizations from the Surface Transportation Board ("STB"), the Federal Railroad Administration ("FRA"), and/or the United States Department of Transportation ("DOT") required in connection with the Case or the Canadian Case;
- (b) Assisting the Trustee in any investigations, proceedings, litigation, negotiations, and transactions before the STB, FRA, and/or DOT;
- (c) Preparing and filing any and all necessary or desirable STB, FRA, and/or DOT pleadings;
- (d) Appearing at any and all necessary or desirable administrative proceedings that may be brought before the STB, FRA, and/or DOT;
- (e) Providing regulatory legal services and advice to the Trustee in connection with the Canadian Case; and
- (f) Providing regulatory legal services and advice to the Trustee in connection with the Case.

11. To the best of the Trustee's knowledge, and pursuant to Fed. R. Bankr. P. 2014(a), the partners and employees of Covington do not have any connection with or any interest adverse to the Trustee, the Debtor, the Debtor's creditors, any other party in interest, their respective attorneys and accountants, the United States Trustee, or any person employed in the Office of the United States Trustee, except to the extent certain connections are set forth herein or in the Declaration of Michael St. Patrick Baxter in Support of the Application for Order, Pursuant to

Sections 327 and 328 of the Bankruptcy Code, Authorizing the Employment of Covington & Burling LLP, as Special Regulatory Counsel for the Trustee *Nunc Pro Tunc* to August 21, 2013 (the “Baxter Declaration”) filed contemporaneously herewith. Moreover, the Trustee believes that Covington does not represent or hold any interest adverse to the Debtor or its estate with respect to the regulatory matters on which this professional is being employed.² Accordingly, Covington qualifies as special counsel under section 327(e).

12. A bankruptcy court has the discretion to grant a post facto application provided extraordinary circumstances justify the untimeliness of the application. In re Jarvis, 53 F.3d 416, 421 (1st Cir. 1985). Such factors include “whether the applicant was under time pressure to begin service without approval.” Jarvis, 53 F.3d at 420-21 (*quoting In re F/S Airlease II, Inc.*, 844 F.2d 99, 105-06 (3d. Cir. 1988)). The size and complexity of this Case and the Canadian Case necessitate the immediate attention of the Trustee and his professionals to a vast number of time-sensitive procedural, legal, and operational concerns. Given the nature of the services Covington is providing, and the relatively short delay of one week in filing the Application, the Trustee does not believe that this application is untimely. However, out of an abundance of caution, the Trustee seeks approval of his retention of Covington retroactive to August 21 and the Trustee believes that, if it applies, Jarvis supports the relief requested.

13. Any pre-retention fees and costs relating to the Case will be paid subject to the applicable sections of the Bankruptcy Code, the Fed. R. Bankr. P. and this Court’s Local Rules.

14. The Trustee understands that Covington intends to apply to the Court for compensation for professional services rendered and reimbursement of expenses incurred in connection with the Case in accordance with the applicable provisions of the Bankruptcy Code,

² The Trustee serves as the fee examiner in chapter 11 cases pending before the Bankruptcy Court for the Southern District of New York. Covington is an estate professional in those cases. The Trustee does not believe that this precludes the retention of Covington in this case, which is wholly unrelated to the New York cases.

the Fed. R. Bankr. P., the Local Rules, the United States Trustee Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed under 11 U.S.C. § 330, and any applicable orders of the Court.

15. In accordance with Local Rule 2014-3, the Trustee, subject to approval by this Court, proposes to pay Covington its customary hourly rates for representation of parties in reorganization cases in effect as set forth in the Baxter Declaration. These hourly rates are subject to change from time to time in accordance with Covington's established billing practices and procedures. The Trustee submits that such rates are reasonable and should be approved by the Court, subject to a determination of amounts to be paid to Covington upon application for allowance of compensation. The Trustee, subject to Court approval, and if approved by the Court, also proposes to reimburse Covington for its actual and necessary expenses incurred in representing the Trustee. Covington professionals will maintain detailed records of time spent and any actual and necessary expenses incurred in connection with the rendering of their services by category and nature of the services rendered. Covington also reserves the right to seek fee enhancements or bonuses to the extent permitted under applicable law.

16. Covington's hourly rates are set at a level designed to fairly compensate it for the work of its attorneys and paralegals, and to cover fixed and routine overhead expenses. Hourly rates vary with the experience and seniority of the individuals assigned and may be adjusted by Covington from time to time. It is Covington's policy in all areas of practice to charge its clients for all other expenses incurred in connection with a client's case. The expenses charged to clients include, among other things, witness fees, travel expenses, filing and recording fees, postage, express mail and messenger charges, computerized legal research charges and other computer services. Covington will charge the Trustee for these expenses in a manner and at rates consistent with charges made generally to its other clients, consistent with its standard practices and

consistent with applicable local and administrative rules. Covington believes that it is more equitable to charge these expenses to individual clients who incur them, rather than increasing the hourly rates and spreading the expenses among all clients.

17. Local Rule 2014-3 requires that a good faith estimate of a range of fees be set forth in retention applications, unless the range of fees is impossible to forecast. Based on regulatory, mass tort and environmental matters at issue in this Case and the Canadian Case, a fee range is impossible to forecast at this early stage.

NOTICE

18. Notice of this Application was served on the following parties on the date and in the manner set forth in the certificate of service: (1) the United States Trustee; (2) the Debtor's counsel; (3) the non-insider holders of the twenty (20) largest unsecured claims against the Debtor or, if applicable, the lawyers representing such holders; (4) applicable federal and state taxing authorities; (5) the holders of secured claims against the Debtor, or if applicable, the lawyers representing such holders; and (6) others who have, as of the date of the Application, entered an appearance and requested service of papers in the Case.

CONCLUSION

19. The services of Covington are necessary to enable the Trustee to execute faithfully his duties under the Bankruptcy Code. Based upon Covington's extensive experience and expertise, Covington is both well-qualified and uniquely able to represent the Trustee under the Bankruptcy Code in an efficient, cost-effective, and timely manner.

Dated: August 27, 2013

/s/ Robert J. Keach
Robert J. Keach
CHAPTER 11 TRUSTEE OF MAINE
MONTREAL & ATLANTIC RAILWAY,
LTD.