UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

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

MOTION FOR LEAVE TO FILE APPEAL PURSUANT TO 28 U.S.C. § 158(a)(3) AND FED. R. BANKR. P. 8001(b) AND 8004

Robert J. Keach, the chapter 11 trustee[1] (the "Appellant") of Montreal Maine & Atlantic Railway, Ltd. (the "Debtor") hereby moves, pursuant to 28 U.S.C. § 158(a)(3) and Fed. R. Bankr. P. 8001(b) and 8004, for an order granting the Appellant leave to appeal from an interlocutory order of the United States Bankruptcy Court for the District of Maine (the "Bankruptcy Court"), granting in part, and denying in part, the Appellant's objections to certain proofs of claim filed by New Brunswick Southern Railway Company Limited ("NBSR") and Maine Northern Railway Company Limited ("MNR" and, collectively with NBSR, the "Appellees").[2] Leave to appeal should be granted because the Order involves a controlling issue of law for which there exists a substantial ground for difference of opinion and because the appeal materially advances the ultimate termination of litigation on multiple issues between

[1] In accordance with the Trustee's Chapter 11 Plan of Liquidation, dated July 15, 2015 (As Amended on October 8, 2015) [D.E. 1822] (the "Plan"), upon the Effective Date of the Plan (which occurred on December 22, 2015, *see* D.E. 1927), Robert J. Keach is no longer the chapter 11 trustee of the Debtor's estate, but is the Estate Representative of the Post-Effective Date Estate (as defined in the Plan). *See* Plan § 6.1(a). For the sake of continuity, Mr. Keach will continue to be referred to as the chapter 11 trustee.

[2] Attached hereto as **Exhibit A**, is a true and correct copy of the Order Sustaining in Part and Overruling in Part Trustee's Objection to Proofs of Claim Filed by New Brunswick Southern Railway Company Limited and Maine Northern Railway Company Limited on the Basis that Certain of Such Claims are Duplicative of Others, and Such Others are Improperly Asserted as Administrative and/or Priority Claims, dated February 26, 2016 [D.E. 2034] (the "Order").

Appellant and the Appellees. In further support of this Motion, the Appellant states the following:

I. Jurisdiction, Venue and Basis for Relief

1. The United States District Court for the District of Maine (the "District Court") has jurisdiction to entertain this motion seeking leave to appeal an interlocutory order pursuant to 28 U.S.C. § 158(a)(3). Pursuant to 28 U.S.C. § 158(b)(1), (6) and Rule 83.6(c) of the District Court's local rules (the "Local Rules"), the District Court has authority to refer and has referred this matter to the United States Bankruptcy Appellate Panel for the First Circuit (the "BAP").

2. The relief sought in this motion is predicated upon 28 U.S.C. § 158(a)(3) and Fed. R. Bankr. P. 8004.

II. Statement of Facts

A. Events Leading to the Commencement of the Bankruptcy Case and Appointment of Appellant as Trustee

3. From January 2003 until May 2014, the Debtor operated an integrated international shortline freight railroad system (the "System") with its wholly owned Canadian subsidiary, Montréal Maine & Atlantic Canada Co. ("MMA Canada"). The System originally included 510 route miles of track in Maine, Vermont, and Québec, comprising a substantial component of the transportation systems of Northern Maine, Northern New England, Québec and New Brunswick.

4. On July 6, 2013, an unmanned eastbound Debtor train with 72 carloads of crude oil, a buffer car, and 5 locomotive units derailed in Lac-Mégantic, Québec (the "Derailment"). The Derailment set off several massive explosions, destroyed part of downtown Lac-Mégantic, and is presumed to have killed 47 people. A large quantity of oil was released into the environment, necessitating an extensive cleanup effort. As a result of the Derailment and the

related injuries, deaths and property damage, lawsuits were filed against the Debtor in both the United States and Canada.

5. After the Derailment, Canadian train activity was temporarily halted between Maine and Québec on the MMA Canada line, resulting in the Debtor losing much of its freight business. Consequently, the Debtor's aggregate gross revenues decreased drastically to approximately $1 million per month.

6. On August 7, 2013, the Debtor filed a voluntary petition for relief commencing in the Bankruptcy Court a case (the "Bankruptcy Case") under chapter 11 of the United States Bankruptcy Code (the "Bankruptcy Code"). Simultaneously, MMA Canada filed for protection under Canada's Companies' Creditors Arrangement Act (Court File No. 450-11-000167-134). On August 21, 2013, the Office of the United States Trustee (the "UST") appointed the Appellant to serve as trustee in the Debtor's Bankruptcy Case pursuant to 11 U.S.C. § 1163 [D.E. 64].

B. The Debtor's Schedules and the Proofs of Claim

7. On September 11, 2013, the Debtor filed its schedules of assets and liabilities and statement of financial affairs [D.E. 216] (the "Schedules"). The Schedules list (a) MNR as having a non-contingent, liquidated and undisputed general unsecured claim in the amount of $144,276.00 (the "Scheduled MNR Claim") and (b) NBSR as having a contingent, unliquidated and disputed claim owed by MMA Canada in the amount of $2,351,245.00. *See* Schedule F (Creditors Holding Unsecured Nonpriority Claims), pp. 134, 150 of 244.

8. On June 13, 2014, MNR filed Proofs of Claim Nos. 242-1 (the "MNR Duplicate Claim") and 257-1 ("Claim 257") and NBSR filed Proofs of Claim Nos. 243-1 (the "NBSR Duplicate Claim" and, collectively with the MNR Duplicate Claim, the "Duplicated Claims")

and 259-1 ("Claim 259" and, collectively with Claim 257, the "Asserted 1171(b) Claims"). The MNR Duplicate Claim was identical to Claim 257 and the NBSR Duplicate Claim was identical to Claim 259.

9. Claim 257 asserts claims in the aggregate amount of $335,101.19 arising from "freight services provided to the Debtor in connection with interline rail shipments." *See* Claim No. 257. The proof of claim asserts a priority claim under section 1171(b) of the Bankruptcy Code in the amount of approximately $167,228.89 as follows:

> Of the total claims asserted in this Proof of Claim, approximately $167,228.89 are secured by equitable liens against all property of the Debtor under the Six Month Rule applicable in federal court receiverships, and are entitled to priority pursuant to 11 U.S.C. § 1171(b). *See in re Boston and Maine Corporation*, 634 F.2d 1359 (1st Cir. 1980), *cert. denied*, 450 U.S. 982 (1981); *Southern Railway v. Flournoy*, 301 F.2d 847 (4th Cir. 1962); *Miltenberger v. Logansport*, 106 U.S. 286 (1882); *Kneeland v. Bass Foundry*, 140 U.S. 592 (1891); *Finance Co. v. Charleston*, 62 F. 205 (4th Cir. 1894). The claims qualify for treatment under the Sixth Month Rule, and are entitled to priority under section 1171(b) of the Bankruptcy Code, because they (i) relate to current operating expenses incurred by the Debtor that were indispensable to the ongoing operation of the Debtor's railroad, (ii) were incurred within six months prior to the commencement of the Debtor's reorganization case, and (iii) were for goods or services that were provided in expectation that they would be paid out of current operating revenue and not in reliance on the Debtor's general credit.

Claim 257, Attachment A.

10. Claim 259 asserts claims in the aggregate amount of $2,164,471.30 arising from "[f]reight services provided to the Debtor in connection with interline rail shipments." *See* Claim No. 259. The proof of claim asserts a priority claim under section 1171(b) of the Bankruptcy Code in an amount not less than $1,971,834.67, as follows:

> Not less than $1,971,834.67 of the claims asserted in this Proof of Claim are secured by equitable liens against all property of the Debtor under the Six Month Rule applicable in federal court receiverships, and are entitled to priority pursuant to 11 U.S.C. § 1171(b). *See in re Boston and Maine Corporation*, 634 F.2d 1359 (1st Cir. 1980), *cert. denied*, 450 U.S. 982 (1981); *Southern Railway v. Flournoy*, 301 F.2d 847 (4th Cir. 1962); *Miltenberger v. Logansport*, 106 U.S. 286 (1882); *Kneeland v. Bass Foundry*, 140 U.S. 592 (1891); *Finance Co. v. Charleston*, 62 F.

> 205 (4th Cir. 1894). The claims qualify for treatment under the Sixth Month Rule, and are entitled to priority under section 1171(b) of the Bankruptcy Code, because they (i) relate to current operating expenses incurred by the Debtor that were indispensable to the ongoing operation of the Debtor's railroad, (ii) were incurred within six months prior to the commencement of the Debtor's reorganization case, and (iii) were for goods or services that were provided in expectation that they would be paid out of current operating revenue and not in reliance on the Debtor's general credit.

Claim 257, Attachment A.

C. The Preference Litigation

11. On August 6, 2015, the Appellant commenced an adversary proceeding against NBSR which is currently pending before the Bankruptcy Court under case caption, Keach v. New Brunswick Southern Railway Company Limited, Adv. Proc. No. 15-01016 (the "NBSR Preference Litigation"). The Appellant's complaint under sections 547 and 550 of the Bankruptcy Code seeks the avoidance and recovery of approximately $1,006,623.10 in preferential transfers received by NBSR during the 90-day period prior to the Petition Date (the "NBSR Preference Claim").

12. On the same date, the Appellant likewise commenced litigation against MNR seeking to avoid and recover preferential transfers received by MNR in the approximate amount of $185,957.70 (the "MNR Preference Claim" and, collectively with the NBSR Preference Claim, the "Preference Claims"). The adversary case against MNR is currently pending before the Bankruptcy Court under case caption, Keach v. Maine Northern Railway Company, Adv. Proc. No. 15-01017 (the MNR Preference Litigation" and, collectively with the NBSR Preference Litigation, the "Preference Litigation").

13. On September 29, 2015, the Appellees answered the complaints filed against them by the Appellant and on October 16, 2015, the Bankruptcy Court entered pretrial scheduling orders in both the NBSR Preference Litigation and the MNR Preference Litigation.

The pretrial scheduling orders in both cases were subsequently amended to extend the fact and expert discovery deadlines to May 15, 2016 and April 14, 2016, respectively.

D. The Claim Objection Proceedings Before the Bankruptcy Court

14. On October 19, 2015, the Appellant filed the Trustee's Objection to Proofs of Claim Filed by New Brunswick Southern Railway Company Limited and Maine Northern Railway Company Limited on the Basis that Certain of Such Claims are Duplicative of Others, and Such Others are Improperly Asserted as Administrative and/or Priority Claims [D.E. 1826] (the "Claim Objection"). The Claim Objection sought an order disallowing the Duplicate Claims in their entirety and allowing the Asserted 1171(b) Claims (subject to a reservation of rights with respect to the amount of such claims) only as general unsecured claims against the Debtor. Claim Objection, ¶ 20.

15. Specifically, with respect to the Asserted 1171(b) Claims, the Appellant argued that, as a matter of law in this circuit, pre-petition interline freight claims such as the claims asserted by the Appellees do not qualify as "six-month claims." Claim Objection, ¶ 24 (*citing* In re Boston & Maine Corp., 600 F.2d 307, 308, 310 (1st Cir. 1979) ("Boston & Maine I")).

16. As an independent basis for disqualifying the Asserted 1171(b) Claims as "six-month claims," the Appellant further argued that, in furnishing services to the Debtor, the Appellees relied—not on the Debtor's operating revenues at the time the service was provided—but upon the Debtor's general credit and specific security and payment arrangements dictated by the Appellees. Id. at ¶ 29 (*citing* In re Boston & Maine Corp., 634 F.2d 1359, 1379-80, 1382 (1st Cir. 1980) ("Boston & Maine II")). By way of support, the Appellant pointed to the Appellees' decision to opt out of the Interline Settlement System (the "ISS")—a credit risk mitigation system which, in effect, is a central clearing house for all participating railroads to net accounts

receivable and payable with respect to other participating railroads' shares of the freight revenue invoiced to a customer by the originating railroad—in favor of an agreement with the Debtor pursuant to which the Debtor's and the Appellees' share of freight revenue was invoiced jointly either by the Debtor or an originating railroad participating in the ISS. Id. at ¶¶ 7-8.

17. As further evidence of the Appellees' reliance on the Debtor's general credit, the Appellant pointed to the Debtor's financing arrangement with Wheeling & Lake Erie Railway Company ("Wheeling") pursuant to which the Debtor granted a security interest to Wheeling in accounts receivable and certain inventory. Id. at ¶ 9. The Appellant contends that the Appellees' knowledge of Wheeling's first priority security interest in receivables establishes that the Appellees were relying solely upon the Debtor's credit as opposed to its daily or weekly cash flow. Id. at ¶ 10.

18. On November 12, 2015, the Appellees filed the Response of New Brunswick Southern Railway Company Limited and Maine Northern Railway Company to Trustee's Objection to Proofs of Claim [D.E. 1855] ("Appellee's Response"). Appellees argued that Boston & Maine I did not address the issue of whether interline freight claims qualify as "six-month claims." Appellee's Response, pp. 3-8. On the other hand, they argued, Boston & Maine II explicitly held that *per diem* claims, such as those asserted by interlining railroads, constitute "six-month claims" entitled to priority. Id.

19. Next, the Appellees argued that neither their decision to opt out of the ISS nor the existence of Wheeling's first priority security interest in receivables is indicative of the Appellees' reliance upon the Debtor's general credit in providing services to the Debtor. Id. at pp. 8-13. Instead, the Appellees pointed to a "payment swap" process allegedly instituted by the

Debtor and the Appellees through their course of dealing as evidence that the Appellees relied exclusively upon the Debtor's operating revenues in providing freight services to the Debtor. Id.

20. On November 19, 2015, the Appellant and the Appellees filed the Stipulation with Regard to Trustee's Objection to Proofs of Claim Filed by New Brunswick Southern Railway Company Limited and Maine Northern Railway Company Limited [D.E. 1877] (the "Stipulations"). The Stipulations included, *inter alia*, agreement among the Appellant and the Appellees that: (a) the Duplicate Claims would be withdrawn; (b) at all times relevant, Wheeling held a valid security interest in the Debtor's accounts receivable and certain inventory; (c) the Debtor was a participant in the ISS but the Appellees were not participating railroads in the ISS; (d) by agreement, the Debtor acted as the billing railroad when either MNR or NBSR originated traffic and interchanged with the Debtor, as well as when the Debtor originated traffic and interchanged with either of the Appellees; (e) the Debtor collected from the ISS freight revenue attributable to freight services provided by the Appellees in connection with shipments originated by other carriers that were interchanged by such carriers with the Debtor, and by the Debtor with the Appellees. Stipulation, ¶¶ 1-4.

21. Further, the Debtors and the Appellees agreed:

> 6. **Issues to be Determined.** The Parties agree, in accordance with Fed. R. Bankr. P. 7042(b), made applicable to this matter by Fed. R. Bankr. P. 9014(c), that the hearing on November 20, 2015 will address solely whether the claims asserted by the MN/NB Railways in Proofs of Claim 257 and 259 qualify as "six-month" claims entitled to priority under Section 1171(b) of the Bankruptcy Code. The amount of such claims shall be determined at a subsequent hearing, if required.

Stipulation, ¶ 6.

22. The next day, the Appellant filed the Trustee's Reply in Support of Objection to Proofs of Claim Filed by New Brunswick Southern Railway Company Limited and Maine Northern Railway Company Limited on the Basis that Certain of Such Claims are Duplicative of

Others, and Such Others are Improperly Asserted as Administrative and/or Priority Claims [D.E. 1878] (the "Appellant's Response").

23. The Appellant rebutted the Appellees' argument that the Appellees relied on the Debtor's operating revenues by pointing both to Wheeling's security interest and to the course of dealing between the parties. Specifically, the Appellant argued that the Appellees cannot reasonably argue they relied solely upon the Debtor's encumbered cash flow when the Appellees had no assurance that those funds would be used to satisfy their claims. Appellant's Response, ¶ 6. Second, the Appellant asserted that the Appellees' business arrangement with the Debtor necessitated a reliance on the Debtor' general credit because: (a) the Appellees lacked dominion over the Debtor's cash, and the receivables ultimately to be remitted to the Appellees were comingled with the rest of the Debtor's receivables; and (b) the Debtor could have, and often did, use the cash to pay other operating expenses in advance of paying the Appellees. Appellant's Response, ¶ 7.

24. In addition, the Appellant argued that the Asserted 1171(b) Claims are in the nature of interchange charges—not freight services or goods—and therefore are not meaningfully distinct from the "interline" claims the First Circuit determined in Boston & Maine I are *per se* not entitled to section 1171(b) priority status. Appellant's Response, ¶¶ 10-11. Finally, the Appellant argued that the Asserted 1171(b) Claims were not necessary to the Debtor's operation and therefore also fail the "necessity" test under section 1171(b). Id. at ¶ 12.

25. The Bankruptcy Court held an evidentiary hearing on November 20, 2015 during which testamentary evidence was submitted. Following the hearing the hearing the Bankruptcy Court directed the parties to submit simultaneous post-trial briefs on or before December 10, 2015.

26. On December 10, 2014, the Appellant filed the Trustee's Post-Trial Brief in Support of Objection to Proofs of Claim Filed by New Brunswick Southern Railway Company Limited and Maine Northern Railway Company Limited on the Basis that Certain of Such Claims are Duplicative of Others, and Such Others are Improperly Asserted as Administrative and/or Priority Claims [D.E. 1911] (the "Appellant's Brief"). The Appellant reiterated his argument that interchange charges are *per se* general unsecured claims in this jurisdiction and asserted that the Appellees still had not established that the charges forming the basis for the Asserted 1171(b) Claims were necessary operating expenses of the Debtor. Appellant's Brief, ¶¶ 3-10. Finally, the Appellant argued that the Appellees did not rely on the Debtor's cash flow, but instead on a special security arrangement orchestrated among the Appellees and their affiliate and parent company. Id. at ¶¶ 11-17.

27. In the Post-Hearing Brief of New Brunswick Southern Railway Company Limited and Maine Northern Railway Company in Support of the Allowance of their Proofs of Claim filed on December 10, 2015 [D.E. 1913] (the "Appellees' Brief"), the Appellees argued that the charges giving rise to the Asserted 1171(b) Claims are priority claims as a matter of First Circuit law under Boston & Maine II. Appellees' Brief, pp. 4-5. The Appellees further challenged the Appellant's argument that the charges were for services necessary to the Debtor's operations. Id. at pp. 7-9. Finally, the Appellees reiterated their earlier arguments that the Asserted 1171(b) Claims arise out of services provided in reliance upon the Debtor's operating cash. Id. at pp. 12-15.

28. On February 5, 2016, the Bankruptcy Court issued oral findings of fact and conclusions of law in support of its determination that the Asserted 1171(b) Claims are entitled

to priority under section 1171(b) of the Bankruptcy Code.[3] Specifically, the Bankruptcy Court determined that Boston & Maine II reversed Boston & Maine I and, therefore, that charges of the type forming the basis for the Asserted 1171(b) Claims are not *per se* general unsecured claims. 2/5/16 Hrg. Tr., 15:18-16:3. Next, the Bankruptcy Court found that the Asserted 1171(b) Claims represented charges for services which were necessary to the Debtor's operations and, therefore, that the necessity prong of the 1171(b) test had been satisfied. Id. at 17:14-17. Finally, the Bankruptcy Court held that the Appellees established their reliance on the Debtor's operating revenues in satisfaction of the reliance prong of the test. Id. at 20:8-21:7.

29. On February 26, 2016, the Bankruptcy Court entered the Order which states, in relevant part,

> The Asserted 1171(b) Claims, to the extent allowed, are afforded priority status under § 1171(b). The amount of the Asserted 1171(b) Claims is not determined by this Order, and thus those Asserted 1171(b) Claims are not allowed in any amount at this time. The Appellant's rights to object to the amount of the Asserted 1171(b) Claims are fully reserved.

Order, ¶ 3.

III. Issues of Law Presented by Appeal and Relief Sought

30. Pursuant to Fed. R. Bankr. P. 8004(b), the Appellant hereby designates the following questions presented by this appeal:

a. Whether the Bankruptcy Court's holding that interline charges of the type forming the basis for the Asserted 1171(b) Claims are not *per se* general unsecured claims is in error, as a matter of law, and, in addition, in conflict with established precedent in this jurisdiction?

b. Whether the Bankruptcy Court clearly erred in finding that the Appellees sufficiently established that the charges forming the basis for the Asserted 1171(b) Claims constituted charges for services indispensable to the Debtor's operations in satisfaction of the necessity prong of the 1171(b) test?

[3] Pursuant to Fed. R. Bankr. P. 8004(b)(1)(E), a transcript of the February 5, 2016 oral opinion is attached hereto as **Exhibit B** (the "2/5/16 Hrg. Tr.").

c. Whether the Bankruptcy Court clearly erred in finding that the Appellees sufficiently established their reliance upon the Debtor's operating revenues to satisfy the reliance prong of the 1171(b) test given the uncontroverted testimony, *inter alia*, (1) that the Appellees instead relied on collateral and security arrangements put into place by the Appellees; (2) that the Appellees instead relied upon the Debtor's collecting of the Appellees' funds via the ISS system rather than any payment from the Debtor; and (3) that the Appellees consented to modifications in the payment arrangements which required the Appellees to extend credit for up to 120 days per transaction ?

31. By this appeal, the Appellant seeks a reversal of the Order as a matter of law and as based upon clearly erroneous findings of fact and the entry of an order remanding this Bankruptcy Case to the Bankruptcy Court with instructions to sustain the Appellant's objection to allowance of the Asserted 1171(b) Claims as priority claims.

IV. Argument in Support of Leave to Appeal

A. Standards for Granting Leave to Appeal Under 28 U.S.C. § 158(a)(3)

32. The District Court's jurisdiction to hear appeals is delineated by 28 U.S.C. § 158 which provides, in pertinent part, that the "district courts . . . shall have jurisdiction to hear appeals . . . with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title." 28 U.S.C. § 158(a)(3). Pursuant to 28 U.S.C. § 158(b)(1), (6) and Local Rule 83.6(b), the District Court has referred appeals in this jurisdiction to the BAP.

33. To appeal from an interlocutory order, an appellant must file a notice of appeal and a motion seeking leave to appeal within fourteen days of the date of entry of the order being appealed. Fed. R. Bankr. P. 8002(a), 8004(a). The Order, which was entered on January 26, 2016, explicitly stated:

> Notwithstanding the minute entry at DE 1947, this Order constitutes the ruling and judgment on the matters read into the record on February 5, 2016. The time period within which the parties must appeal this Order in accordance with the Bankruptcy Rules thus runs from the date hereof.

Order, ¶ 4. Accordingly, the deadline for filing a notice of appeal and motion seeking leave to appeal an interlocutory order is March 11, 2016.[4]

34. Section 158(a)(3) does not articulate a standard or test for determining whether an appellate court should exercise its discretion to hear an appeal of an interlocutory order. However, courts in this jurisdiction regularly look to 28 U.S.C. § 1292(b) which governs the certification of interlocutory orders to circuit courts of appeal. Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.), 218 B.R. 643, 652 (1st Cir. B.A.P. 1998). *See also*, Watson v. Boyajian (In re Watson), 309 B.R. 652, 659 (1st Cir. B.A.P. 2004); Murphy v. Internal Revenue Service, 2014 WL 840255 *1 (D. Me. March 4, 2014); JBI v. The Directors and Officers of JBI (In re Jackson Brook Institute), 280 B.R. 1, 4 (D. Me 2002).

35. Under 28 U.S.C. § 1292(b), courts appropriately exercise their discretion to hear an appeal where "(1) the 'order involves a controlling question of law' (2) 'as to which there is substantial ground for difference of opinion' and (3) whether 'an immediate appeal from the order may materially advance the ultimate termination of the litigation.'" Bank of New England, 218 B.R. at 652.

> Courts have stated that interlocutory certification under section 1292(b), and the leave to appeal under section 158(a)(3), should be used 'sparingly and only in exceptional circumstances.' However, courts have also reasoned that discretion under section 158(a)(3) is greater than that afforded under section 1292(b), and that the bankruptcy context requires a more flexible view of finality. Hence, courts have advocated a more pragmatic and liberal approach in determining the appealability of bankruptcy court orders.

Murphy, 2014 WL 840255 at *1 (*quoting* BancBoston Real Estate Capital Corp. v. JBI Assoc. Ltd. P'ship, 227 B.R. 569, 581-82 (D. Me. 2014).

[4] Contemporaneously with the filing of this Motion, the Appellant filed a Notice of Appeal in accordance with Fed. R. Bankr. P. 8004(a).

B. The Order Involves a Controlling Question of Law

36. An order satisfies the first prong of the test when the outcome of the case is dependent upon a question of law; no alternate theory exists upon which a party could succeed. Watson, 309 B.R. at 660 (*citing* Bank of New England, 218 B.R. at 652). *See also*, Jackson Brook Institute, 280 B.R. at 5.

37. The Appellees claim priority under section 1171(b) of the Bankruptcy Code and that is the only basis for priority on which the Appellees have relied. If the Appellees cannot establish a priority claim under section 1171(b), there is no other statute under which they can successfully claim priority status.

38. The Claim Objection challenged the priority interest asserted by the Appellees. All other issues, including the extent to which the Asserted 1171(b) Claims should be allowed, have been reserved until a later date. The Stipulation explicitly limited the November 20, 2015 proceedings to the issue of whether the Asserted 1171(b) Claims do, in fact, qualify for priority status under section 1171(b) and the Order to be appealed explicitly recognizes that "the only issue addressed at the Hearing was whether the Asserted 1171(b) Claims claims [sic] qualify as 'six-month' claims entitled to priority under 11 U.S.C. § 1171(b) of the Code." Order, ¶ C.

39. While the Order does not resolve the extent to which the Asserted 1171(b) Claims should be allowed, it does decide the question as to whether those claims should be afforded priority. The legal findings in the Order are premised upon an examination of section 1171(b) of the Bankruptcy Code and case law construing that statute.

40. Since the Order presents a question of law as to the applicability of section 1171(b) to the Asserted 1171(b) Claims and that statute—as construed by applicable case law—

is the only basis on which the Appellees can claim priority status, the first prong of the 28 U.S.C. § 1292(b) test is satisfied.

C. Substantial Grounds for Difference of Opinion Exist

41. "Substantial grounds for difference of opinion exist where the proposed interlocutory appeal presents one or more difficult and pivotal questions of law not settled by controlling authority." Watson, 309 B.R. at 660 (*citing* Bank of New England, 218 B.R. at 652).

42. Throughout the proceedings before the Bankruptcy Court, the Appellant consistently maintained that controlling authority in this jurisdiction explicitly mandates against priority treatment of the Asserted 1171(b) Claims. At the same time, the Appellees consistently argued that controlling authority in this jurisdiction clearly weighs in favor of priority treatment. The Bankruptcy Court recognized this tension when discussing the task of applying the three-prong test to determine whether a claim constitutes a "six-month" claim:

> I note at the outset that this is not necessarily an easy concept to apply, which might have explained why at the end of oral argument, after hearing the exact same evidence and hearing the same testimony, both Mr. Lepene and you, Mr. Keach, argued the answer was clear. And I had to do then—what I had to do was different. And I struggled with that. And I think Courts have struggled with that.
>
> I found at least one commentator in Five Bankruptcy Services LED, Section 46:67 say something I thought was observant. Quote, 'It is difficult, [if] not impossible, to identify from prior decisions any unified principle or group of principles to be applied when claimant requests priority for prepetition claim in railroad reorganization pursuant to 1171(b). Each case has been decided based on its unique facts and Courts' analysis of equities asserted by the competing parties.'

2/5/16 Hrg. Tr., 14:20-15:11.

43. While the Appellant continues to assert that the Asserted 1171(b) Claims are *per se* general, unsecured claims under persuasive, if not controlling authority in this jurisdiction, the Bankruptcy Court's comments, commentary on this statute, case law construing the statute

and, most significantly, the findings and conclusions contained in the Order, are all evidence that substantial grounds for differing opinions exist with respect to this issue.

D. The Appeal of this Order Materially Advances the Ultimate Termination of the Claims Adjudication Process

44. "An interlocutory appeal materially advances the ultimate termination of the litigation where resolution of the issue on appeal 'greatly assists' in resolving the underlying matter, and does not unnecessarily delay resolution of the underlying matter." Watson, 309 B.R. at 660 (*citing* Bank of New England, 218 B.R. at 652). "This element overlaps the 'controlling question of law' factor, in that both are directed toward assuring that the interlocutory review will advance the resolution of this underlying action." Fleet Data Processing Corp., 218 B.R. at 654.

45. In the bankruptcy context, claims are rarely resolved in a vacuum. In this case, the Appellees are seeking payment on the Asserted 1171(b) Claim at the same time they are defending against preference claims in the Preference Litigation currently pending before the Bankruptcy Court. If the Asserted 1171(b) Claim is a general unsecured claim, the claim may be disallowed as a result of the pending Preference Litigation under section 502(d) of the Bankruptcy Code. If those claims have the 1171(b) priority, some authority exists to the effect that—and the Bankruptcy Court in this case has ruled—section 502(d) cannot be used to disallow the Asserted 1171(b) Claim. Thus, the issue of basic claim allowance cannot move forward until the issue on appeal is resolved. The parties have an opportunity to negotiate all of these claims in an expedient manner which would limit costs and expenses for all parties. However, the most critical step in resolving those issues, is obtaining a final determination as to the priority, if any, of the Asserted 1171(b) Claims.

46. A final determination as to priority would also allow the parties to evaluate the *value* of the Asserted 1171(b) Claims in relation to other claims. (As section 1171(b) claims, the claims may be paid in full; as unsecured claims, the claims have a much lower current value). Once that value is determined, the Appellant and the Appellees can negotiate the offsetting pre-petition and preference claims. Accordingly, an immediate appeal of the Order would facilitate a resolution to both the claims adjudication process with respect to the Asserted 1171(b) Claims and the Preference Litigation.

47. In addition, under the confirmed plan in this Bankruptcy Case, funds are being reserved for the Asserted 1171(b) Claims. *See* Order Confirming Trustee's Revised First Amended Plan of Liquidation Dated July 15, 2015 and Authorizing and Directing Certain Actions in Connection Therewith [D.E. 1801], § F, ¶ 85. If it is determined on appeal that such claims do not have a section 1171(b) priority, such funds will be released to pay additional distributions to the victims of the Derailment. Accordingly, resolution of the appeal will advance the Bankruptcy Case by determining the final amount of the payment to the victims.

V. Conclusion

48. The Appellant should be granted leave to appeal the Order pursuant to 28 U.S.C. § 158(a)(3) and Fed. R. Bankr. P. 8004 because the Order resolves controlling and significant issues of law which impact not only the adjudication of the Asserted 1171(b) Claims but also the Preference Litigation, and the distributions to victims under the confirmed plan.

Dated: March 10, 2016

ROBERT J. KEACH, CHAPTER 11 TRUSTEE OF MONTREAL MAINE & ATLANTIC RAILWAY, LTD.

By his attorneys:

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EXHIBIT
A

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

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

ORDER SUSTAINING IN PART AND OVERRULING IN PART TRUSTEE'S OBJECTION TO PROOFS OF CLAIM FILED BY NEW BRUNSWICK SOUTHERN RAILWAY COMPANY LIMITED AND MAINE NORTHERN RAILWAY COMPANY LIMITED ON THE BASIS THAT CERTAIN OF SUCH CLAIMS ARE DUPLICATIVE OF OTHERS, AND SUCH OTHERS ARE IMPROPERLY ASSERTED AS ADMINISTRATIVE AND/OR PRIORITY CLAIMS

This matter came before the Court on the *Trustee's Objection to Proofs of Claim Filed by New Brunswick Southern Railway Company Limited and Maine Northern Railway Company Limited on the Basis that Certain of Such Claims Are Duplicative of Others, and Such Others Are Improperly Asserted as Secured and/or Priority Claims* (the "Objection") (Docket Entry "DE" 1826) filed by Robert J. Keach, the chapter 11 trustee (the "Trustee") of Montreal Maine & Atlantic Railway, Ltd. (the "Debtor" or "MMA"), in relation to (a) Proofs of Claim No. No. 242-1 (the "MN Duplicate Claim") and 257-1 ("Claim 257") filed by Maine Northern Railway Company Limited ("MN Railway") and (b) Proofs of Claim No. 243-1 ("NB Duplicate Claim," and together with the MN Duplicate Claim, the "Duplicate Claims") and 259-1 ("Claim 259," and together with Claim 257, the "Asserted 1171(b) Claims") filed by New Brunswick Southern Railway Company Limited ("NB Railway", and together with MN Railway, the "Claimant Railways"). After such notice and opportunity for hearing as was required by the United States Bankruptcy Code (the "Code"), the Federal Rules of Bankruptcy Procedure, and the Local

Bankruptcy Rules for the District of Maine, and after due consideration of, among other things, the Objection, the Response of the Claimant Railways to the Objection (DE 1855), the Trustee's Reply (DE 1878), the Stipulations of the parties (the "Stipulations") (DE 1877), the admissions and other filings of the parties, and the testimony and documentary evidence presented at the November 20, 2015 evidentiary hearing held in this matter (the "Hearing"); and for the reasons set forth on the record by the Court on February 5, 2016[1], the Court made certain findings of fact and conclusions of law in accordance with Fed. R. Bankr. P. 7002. Several of those factual findings and conclusions of law are as follows[2]:

A. Pursuant to 28 U.S.C. §§ 157(a) and 1334(b), and Rule 83.6 of the Local Rules of the United States District Court for the District of Maine, this Court has jurisdiction over the Objection, including but not limited to, the Asserted 1171(b) Claims and the Duplicate Claims.

B. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), and the Court has constitutional authority to enter judgment in this matter.

C. Pursuant to the Stipulations, the only issue addressed at the Hearing was whether the Asserted 1171(b) Claims claims qualify as "six-month" claims entitled to priority under 11 U.S.C. §1171(b) of the Code. If so, the amount of such claims would be determined at a subsequent hearing, if required.

D. Based upon the unique facts of this matter and the Court's analysis of the equities asserted by MMA, on the one hand, and the Claimant Railways, on the other, the Claimant Railways met their burden of establishing that the Asserted 1171(b) Claims qualify as claims that are entitled to priority under §1171(b) of the Code because:

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[1] A transcript of the hearing is set forth at DE 1955.

[2] This Order does not enumerate all of the factual findings and conclusions of law set forth at the Hearing and no special significance is intended by that fact.

(1) the Asserted 1171(b) Claims represent current operating expenses that were necessarily incurred by MMA in connection with its on-going operations;

(2) the Asserted 1171(b) Claims were incurred within six months prior to the commencement of this case; and

(3) the services that are the subject of the Asserted 1171(b) Claims were provided to MMA with the expectation that they would be paid for out of the current operating revenues of MMA, and not in reliance on its general creditworthiness.

For these reasons, as well as those set forth on the record at the Hearing, it is hereby **ORDERED**, **ADJUDGED**, and **DECREED** that:

1. The Objection is sustained in part and overruled in part, as set forth herein.

2. The Duplicate Claims shall be disallowed in their entireties and expunged from the Debtor's claims register.

3. The Asserted 1171(b) Claims, to the extent allowed, are afforded priority status under § 1171(b). The amount of the Asserted 1171(b) Claims is not determined by this Order, and thus those Asserted 1171(b) Claims are not allowed in any amount at this time. The Trustee's rights to object to the amount of the Asserted 1171(b) Claims are fully reserved.

4. Notwithstanding the minute entry at DE 1947, this Order constitutes the Court's ruling and judgment on the matters read into the record on February 5, 2016. The time period within which parties must appeal this Order in accordance with the Bankruptcy Rules thus runs from the date hereof.

Dated: February 26, 2016

/s/Peter G. Cary

Peter G. Cary
Chief Judge, United States Bankruptcy Court
District of Maine

EXHIBIT B

UNITED STATES BANKRUPTCY COURT

DISTRICT OF MAINE

Case No. 13-10670-pgc

- x

In the Matter of:

MONTREAL MAINE & ATLANTIC RAILWAY LTD.,

Debtor.

- x

U.S. Bankruptcy Court

District of Maine

537 Congress Street

2nd Floor

Portland, Maine 04101

February 5, 2016

9:00 AM

B E F O R E:

HON PETER G. GARY

U.S. BANKRUPTCY JUDGE

Hearing on Judge's Oral Opinion

Transcribed by: Nicole Yawn

A P P E A R A N C E S :

OFFICE OF THE U.S. TRUSTEE

Attorney for the U.S. Trustee

537 Congress Street

Room 303

Portland, ME 04101

BY: ROBERT J. KEACH, ESQ.

BERNSTEIN, SHUR, SAWYER & NELSON

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100 Middle Street

Portland, ME 04104-5029

BY: LINDSAY K. ZAHRADKA, ESQ.

THOMPSON HINE LLP

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3900 Key Center

127 Public Square

Cleveland, OH 44114-1291

BY: ALAN R. LEPENE, ESQ. (TELEPHONIC)

P R O C E E D I N G S

THE CLERK: -- the honorable Peter Gary presiding.

Be seated.

THE COURT: Good morning.

UNIDENTIFIED SPEAKER: Good morning.

UNIDENTIFIED SPEAKER: Good morning.

THE COURT: We're here on the Montreal Maine & Atlantic Railway Ltd case, Chapter 11, case number 13-10670. And we have Ms. Zahradka and Mr. Keach here for -- or on behalf of the trustee.

Good morning.

MS. ZAHRADKA: Good morning, Your Honor.

MR. KEACH: Good morning.

THE COURT: And do we have Mr. Lepene on the phone for New Brunswick Southern and Maine Northern or Northern Maine?

MR. LEPENE: Yes, Your Honor. Good morning.

THE COURT: Good morning.

So I'm going to read an oral decision this morning. I'm also going to read parts of the stipulation. I'm doing this to try to put in one place the complete decision. In that case, if there's further review, at least a reviewing Court can initially look to just one place. So it's for that convenience.

So this is my oral decision concerning the

objections of Chapter 11 Trustee Robert J. Keach, Trustee to the proofs of claim filed by Maine Northern Railway Company, Maine Northern, and the New Brunswick Southern Railway Company, LTD, New Brunswick. I may refer to these railways collectively as claimant railways. I note at the hearing and in some of the various pleadings, sometimes they're referred to as the Irving Railroad.

The claimant railways assert that certain of their claims against the debtor, Montreal Maine & Atlantic Railway, Ltd., Debtor for MMA, are priority claims under 11 U.S.C. Section 1171(b). When I refer to section numbers on their own, I'm referring to the bankruptcy format from 1978 code. This decision contains my findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedures 7002.

In reaching this decision, I've considered, among other things, the trustee's written objections, document -- or docket entry 1826; the joint response of the claimant railways, 1855; the trustee's reply, 1878; the stipulations of the parties, 1877; the admissions and other filings of the parties in this case; and the evidence presented at the November 20th, 2015 testimonial hearing, which evidence included the admitted exhibits and the testimony of Carl Hansen (ph), general manager of Corporate Credit Financial for all the Irving companies, including the claimant

railways, and Ian Simpson, general manager of the claimant railways.

Actually, I'd like to take one minute and thank the parties and their counsel for the materials you provided to me. They're excellent. They were very helpful. Notwithstanding they disagreed with each other, but they were very helpful.

And I also want to thank the attorneys and the witnesses for the excellent presentation at the hearing. I've only been a judge for a year -- two years and a month, but I found that one of the most professional, thorough, civil, and efficient hearings I've had the pleasure to preside over.

Background -- one thing you did to make my job easier is that you provided certain stipulations, which helped to focus the hearing, focus my analysis. Those stipulations are set forth, as I said, in 1877 for trying to unify the record in one place. I'm going to repeat some of them here. To the extent there's any discrepancy between what I say here and those listed at 1877, 1877 controls. Here they are.

Maine Northern's proof of claim, 242-1, and New Brunswick's proof of claim, 243-1, the duplicate claims, are withdrawn and expunged in their entirety from MMA's claims register. Maine Northern's proof of claim, 257-1, and New

Brunswick's proof of claim, 259-1, are not withdrawn and are referred to today as the 1171(b) claims. For purposes of resolving the objection to the 1171(b) claims, the Wheeling and Lake Erie Railway Companies at all times held valid security interests in the debtor's accounts receivable and certain inventory and proceeds to secure obligations due under a line of credit and a (ph) security agreement dated in June of 2009.

MMA was a participating railroad in the Interline Settlement System, the ISS. Claimant railways weren't. The ISS provides a certain central clearinghouse for participating railroads involved in the interchange of freight traffic among multiple rail carriers to settle accounts receivable and accounts payable arising from the interchange of such traffic.

Railroads participating in the ISS that originate traffic are known as billing railroads, and they invoice the customer for all freight charges from the point of origin to the point of destination, even if the shipment is interchanged with other railroads along the route. Customers are responsible for paying the billing railroad the entire invoice, and the billing railroad is responsible for paying the other railroads involved in the shipment their share of the proceeds representing the freight charges earned by them.

Railroads that participate in the ISS calculate on a monthly basis the accounts receivable and accounts payable arising from the interchange of traffic that are due and owing each participant. The payment of the net amount due and owing is made on the second business day of each month. By agreement with the claimant railways, MMA acted as the billing railroad. When either claimant railway originated traffic, it interchanged with MMA as well as when MMA originated traffic, it interchanged with either of the claimant railroads.

MMA also collected from the ISS freight revenue attributable to freight services provided by the claimant railways in connection with shipments originated by other carriers that were interchanged by such carriers with MMA and by MMA with the claimant railways. For the purposes of the claims, parties stipulated that, other than $1,952 claimed by New Brunswick for repair of cars owned or leased by the debtor other than 5,146 claimed by Maine Northern for repair of cars owned or leased by the debtor, inspection services provided by Maine Northern, the claims of the claimant railways, if any, result from the fact that MMA collected funds, either directly from customers or via the ISS, and did not pay amounts to the claimant railways.

The Irving Companies, as defined as Irving Pulp & Paper, Ltd, Irving Paper, Ltd, and J.D. Irving, Ltd are

affiliates of both of the claimant railways and customers of MMA. During the six-month period preceding the filing, claimant railways and the Irving Paper Companies, on the one hand, MMA, on the other, would settle their respective accounts receivable and accounts payable by arranging concurrent exchange of wire transfers and checks.

The issue before me is whether the claims asserted by the claimant railways in the 1171(b) claims qualify as 6-month claims titled to priority under 1171(b). The amount of such claims shall be determined at a subsequent hearing, if required. So in addition to these stipulations, I found the following -- I find that the following facts were established at the hearing or otherwise. And by otherwise, I mean they may have been determined by the prior filings or prior representations. And those facts are as follows.

The MMA claimants railway business relationship began approximately in 2003. As the debtor indicated in its first amended disclosure statement, from January 2003 until May 2014, the debtor and the wholly owned Canadian subsidiary, MMA Canada, operated on an integrated international short line freight railroad system. This system originally included 510 route miles of track in Maine, Vermont, Quebec and were operated from the debtor's principle office in Hermon, Maine.

The system was a substantial component of the

transportation systems in Northern Maine, Northern New England, Quebec, and New Brunswick. And it provided the shortest rail transportation route between Maine and Montreal and was a critical rail artery between St. John and New Brunswick and Montreal.

In 2003, at the time when MMA and the claimant railways began doing business, Mr. Hansen had concerns that MMA would not be able to pay Irving. MMA and the claimant railways established a weekly payment swap system. In Mr. Hansen's words, quote, "Basically, Irving Paper and Irving Pulp & Paper's funds would flow into my department once a week. We'd get hold of MMA, and we'd agree that simultaneously I'd send them their wire transfer and they would the same second send the wire transfer back to me for monies owed to New Brunswick Southern," end quote.

In terms of the amount of cash that was being sent from Irving to MMA compared to the amount of cash that MMA was sending to Irving, Irving's was by far larger initially. These transfers were done virtually simultaneously. Mr. Hansen's stated reason for establishing this -- agreeing to this system was that he was determined that the claimant railways were not going to rely on MMA's credit to make sure they got paid.

Mr. Simpson testified that the decision not to participate in the ISS was not influenced by the credit

worthiness of MMA. The claimant railways could have withheld transferring money to MMA by wire if MMA did not pay the amounts due to Irving.

Until June or July of 2012 this arrangement worked. Then things changed. As the debtor described in the first amended disclosure statement, in the two years leading up to the commencement of this case, the debtor -- the Chapter 11 case -- the debtor benefited from a dramatic increased use of trains to move oil from the Central and Western regions of the U.S. to refineries in the East.

United States and Canadian oil drillers were producing oil faster than the new pipelines could be built. Trains were needed to transport crude oil to refineries. Prior to the derailment, the debtor had been hauling 500,000 barrels of oil monthly through Quebec and Maine. Due to this business, the debtor enjoyed a significant increase in gross revenue. For a short time, positive net operating income, although needed (ph), capital expenditures remained deferred and underfunded.

This resulted in an increase in oil shipments carried by the MMA and interchanged with the claimant railways for delivery to St. John. Beginning in 2012, the amounts owed by MMA for interline freight services provided by the claimant railways began to exceed the amounts owed by Irving to MMA. As Mr. Hansen put it at trial, "Well, the

shipment of oil would have been coming out of the Dakotas by C.T. They would hit MMA's line."

"They would interchange with MMA. Then the oil would come. The train would come down through until it hit New Brunswick Southern's line. New Brunswick Southern would transport it then into St. John, New Brunswick. And the cost, our share, Irving's share -- it would bring it from where we would interfaced with St. John, became excessive, quite high."

Turning to the burden of proof, I don't think that's any -- of any dispute. Section 502(a) provides that, quote, "A claim or interest, proof of which is filed under Section 501 of this title, is deemed allowed unless a party and interest objects," end quote. If an objection is filed in court after notice and hearing, quote, "shall allow such claim, except to the extent the claim is unenforceable against the debtor, property of the debtor," end quote. That's 502(b)(1).

The burden is on the objecting party to put forth evidence sufficient to negate the prima facie validity of the claim. If the objecting party produces such evidence, the burden shifts back to the claimant to prove the validity of its claim by a preponderance of the evidence. Given the travel of this case, I conclude the burden is on the claimant railways to establish that their claims are

priority claims under Section 1171(b).

Trustee argues that these claims fail for several reasons. Generally, the reasons are, one, interline charges are per se unsecured claims as a matter of law; two, claimant railways have failed to establish that the interline charges were necessary operating expenses of MMA; three, the claimant railways failed to establish that they provided services or goods to MMA with the expectation that they'd be paid for current operating revenues, not in reliance on MMA's general credit worthiness.

As a sort of subset of this argument, the trustee asserted that the claimant railways established a, quote, "special security arrangement," end quote, with MMA, which excepts them from the protections of the six-months rule. I'll address those three arguments in that order.

One, interline charges cannot be 1171(b) claims as a matter of law. Obviously, I've got to first look at 1171(b), which provides, quote, "any unsecured claim against the debtor that would have been entitled to priority, if a receiver in equity of the property of the debtor had been appointed by federal court on the date of the order for relief on its title shall be entitled to the same priority in the case of its chapter (ph)," end quote.

This section codified a long-established equitable doctrine called the six-months rule applied in railroad

receivership cases that permitted receivers to pay certain necessary expenses incurred in the period immediately preceding the receivership. See in re: Boston and Maine Corp., 634 F.2d 1359, 1366 through 79.

As is clear -- or maybe not so clear -- from the language of this rule, it does not set forth terms or conditions which give rise to a priority. There's no test to do. That job is left to the courts.

In the Boston and Maine II case, the one that I cited a minute ago, 634 F.2d 1359, is a good place to start. That Court wrote that, "A claim will be entitled to priority under 1171(b) when it, one, represents a current operating expense necessarily incurred; two, was incurred within six months before the reorganization petition was filed; and three, the goods or services were delivered in the expectation that they would be paid for out of current operating revenues of the railroad and not in reliance on the railroad's general credit." I note at the outset -- that's the end of the three-part test.

I note at the outset that this is not necessarily an easy concept to apply, which might have explained why at the end of oral argument, after hearing the exact same evidence and hearing the same testimony, both Mr. Lepene and you, Mr. Keach, argued that the answer was clear. And I had to do then -- what I had to do was different. And I

struggled with that. And I think Courts have struggled with that.

I found at least one commentator in Five Bankruptcy Services LED, Section 46:67 say something I thought was observant. Quote, "It is difficult, it not impossible, to identify from prior decisions any unified principle or group of principles to be applied when claimant requests priority for prepetition claim in railroad reorganization pursuant to 1171(b). Each case has been decided based on its unique facts and Courts' analysis of equities asserted by the competing parties."

So the trustee argues that -- let me just make sure I have something here. Turning to the first argument of the trustee. Trustee argues that the freight services provided to MMA in connection with the interline rail shipments cannot, as a matter of law, constitute 1171(b) claims. I disagree.

I read Boston and Maine II to have reversed the decision of District Court, which denied priority treatment of the claims of interlining railroads which sought six-month priority status for their per diem claims. Other Courts have done that also. Finance Company vs. Charleston, 62 F. 205.

So my conclusion was that, as a matter of law, the mere fact that the claims are for interline freight services

does not exclude them from possible priority consideration. So if the claimant railways can -- I find they pass that first challenge by the trustee. And if the claimant railways can satisfy the judicially established three elements required for the 1171(b) claims, then they're entitled to priority treatment. So let's turn to that.

Looking first at the necessity of the charges, the testimony of Mr. Hansen and Mr. Simpson as well as the debtor's statements in its first amended disclosure statement lead me to conclude that the claimant railways meet this element. The testimony by Mr. Simpson established that the inability of MMA to interchange traffic with the claimant railways on the, quote, "critical rail artery," quote, between St. John and Montreal would have had a significant adverse effect on MMA's operations, including, among other things, the possible loss of business with Irving as well as a reduction in revenue.

Ian Simpson testified at trial regarding the freight services provided to MMA. He confirmed the importance of MMA -- importance to MMA of the critical rail artery between Montreal and St. John. He characterized it as the most direct, economical, and practical route for the shipment of oil to the refineries in St. John.

At trial, he further testified that the impact on MMA's operation if they had been unable to interchange

traffic with the Irving Railroad, would have been significant in negative ways. He also testified that the only way that MMA could get traffic into St. John would be through the claimant railways' lines for final delivery. In cross-examination by the trustee, he did admit it would not be impossible for MMA to technically interchange with another carrier to indirectly deliver product. But he said it would not be practical or economical.

Simpson had firsthand knowledge of MMA's efforts to solicit Irving Paper Company's (indiscernible) business. Although the testimony of Mr. Hansen on some of these issues was blunted by the trustee on cross-examination, I conclude that the persuasive testimony of Mr. Simpson on these facts was not controverted. Based upon this and the other evidence adduced at the hearing, I conclude that the claimant railways satisfied their burden on the necessity issue. I don't ascribe to the narrow view of what a necessity is. I find that it is sufficient claims are for a current expense, goods and services and bringing ordinary operation of the rail.

The second element, the six-month element -- there's no meaningful challenge as to that. So I conclude that the claimant railways meet their burden.

Now turning to, I think, what's the heart of it is the third element, that the goods or services were delivered

in the expectation that they be paid for out of current operating revenues of the railway and not in reliance on the railroad's general credit. I admit that element is not easily applied and is susceptible to the arguments that parties made in the closing arguments. As a matter of common sense, these alternatives are not mutually exclusive.

A party dealing with a railroad might well rely on both the current operating revenues of the railroad as well as its general credit. A credit manager of any entity dealing with a railroad could plausibly testify that it relied on the current operating revenues of the railroad rather than its general credit, or perhaps more closer to the truth, that it relied more on the railroad's current operating revenues than its general credit. Thus, arguably, anybody dealing with a railroad within six months of bankruptcy could potentially be entitled to a priority claim.

Had the claimant railroads been dealing with MMA in the manner in which it did prior to the oil shipments, 2012, this case would have been easier for me. And the trustee's argument would have been more powerful for me. When the oil started shipping, however, that arrangement changed.

MMA could not -- as was testified at the hearing, MMA could not afford to keep current on payments owed to the

claimant railways under the new reality of the new -- post-2012. And it proposed an alternative, which the claimant railways accepted. Under this new system, the interline freight charges incurred in connection with oil shipments would be carved out of the swap arrangement and instead, those charges would be paid to the claimant railways on MMA's receipt of payment from the ISS of the amounts owed to MMA for such shipments.

Carl Hansen testified about the claimant railways' reasons for doing so. Quote, "Once I was briefed a bit on what this ISS was, I felt comfortable enough that monies would be coming into MMA without any hiccups, so to speak, and that shortly thereafter, within a matter of days, I would be paid the monies owed by MMA for the transportation of oil on our lines." Mr. Hansen emphasized at trial that this new arrangement was not, in his view, based upon the claimant railways' reliance on MMA's general credit worthiness.

"Q: Mr. Hansen, in providing freight services in connection with the interchange of traffic, the MMA, did Irving Railroads rely on MMA's general credit worthiness?"

Mr. Hansen's answer -- Absolutely not.

Q: What did the Irving Railroads rely upon?

Answer by Mr. Hansen -- "We relied upon them being paid out of the ISS system, which I felt was secure and that

meant I would be paid shortly thereafter." End of Mr. Hansen's quotes here.

Mr. Simpson supported this testimony. Quote, "We expected prompt payment. Because when ISS -- when they received their money from the ISS, they were receiving their share and our share. And that's what we were looking for. When they got paid, we were to be paid."

Based on testimony like this as well as other evidence presented at the hearing, I conclude that the claimant railways met their burden as to the third element of the 1171(b) claims. Testimony shows that, in order to keep the interchange of services going between the parties, claimant railways agreed to wait for the ISS system to process payment and then to pay -- the ISS to pay them to MMA before MMA would pay the claimant railways. I do not conclude that this was reliance on MMA's credit, nor do I conclude that this was some sort of special security arrangement which excepts the claimant railways from the protection of the six-months rule. I didn't find anything in that deal or that arrangement that had incorporated common conditions of the commercial credit, security interests, and the like.

I do not find that the existence of the Wheeling line of credit changes my conclusion. Mr. Hansen was not aware that MMA had a line of credit with Wheeling, he so

testified. Mr. Simpson admitted he was aware of it, quote, "anecdotally," end quote, but had no knowledge of how it, quote, "worked," end quote, and was not familiar with it. Nobody, according to the testimony, ever advised Mr. Hansen or Mr. Simpson that MMA's ability to pay claimant railroads was dependent on MMA being able to draw on the Wheeling line of credit.

So based upon the unique facts and my analysis of the equities asserted by MMA, on one hand, and he claimant railroads, on the other, I conclude that the claimant railways have met their burden. The claims shall be allowed as 1171(b) claims.

Now, the stipulations indicate that the amount of the claims will be determined at a subsequent hearing, if required. I throw in as a suggestion -- and I've said a lot here. I'm sure the parties want to digest it. And they can figure out what kind of further process is required.

So my proposal, subject to both of your input, is that you submit a brief status report in 14 days and the status report indicate whether a further hearing's required. If so, at that time, also submit a proposed joint pretrial order. And you can contact the clerk's office to arrange for the hearing time. But that's just my stab at a proposal. And I'm open to ideas.

And maybe I begin with you, Mr. Keach?

MR. KEACH: Your Honor, I think my suggestion is that Mr. Lepene and I talk with respect to the issues relating to the amount. It may very well be that we can stipulate as to the amount relatively quickly and actually allow Your Honor to enter a sort of unified final judgment based on that stipulation. And then the parties can decide what they want to do with that input. But --

THE COURT: Okay. And one of the reasons that I wanted to put all of this in this fashion is I thought that somebody might be not happy with what I'm doing. So I wanted to try to streamline it as best I could.

So fine. Why don't we do that? What do you think? Fourteen days?

MR. KEACH: Easily within 14 days. I suspect sooner. I'm not sure about Mr. Lepene's schedule, but I suspect it's really not going to be that difficult.

THE COURT: Okay.

Mr. Lepene, your thoughts on this?

MR. LEPENE: I would agree with Mr. Keach and what you have proposed, Your Honor. And I will plan to call Mr. Keach. And I'm sure we can accomplish that within 14 days.

THE COURT: Okay. Thank you.

Mr. Keach, anything else this morning?

MR. KEACH: Nothing further, Your Honor. Thank

you.

THE COURT: Thank you.

Mr. Lepene, anything from you?

MR. LEPENE: Nothing further, Your Honor. Thank you.

THE COURT: Okay. Thank you.

The Court will be adjourned.

THE DEPUTY: All rise.

(Whereupon, these proceedings were concluded at 9:29 AM)

I N D E X

RULING

C E R T I F I C A T I O N

I, Nicole Yawn certify that the foregoing transcript is a true and accurate record of the proceedings.

_____

Nicole Yawn

February 10, 2016

Veritext Legal Solutions
330 Old Country Road
Suite 300
Mineola, NY 11501

UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT

BAP NO. ME 16-_____

Bankruptcy Case No. 13-10670

MONTREAL MAINE & ATLANTIC RAILWAY, LTD.,
Debtor.

ROBERT J. KEACH, solely in his capacity as the chapter 11 trustee for MONTREAL, MAINE & ATLANTIC RAILWAY, LTD.,
Appellant,

v.

NEW BRUNSWICK SOUTHERN RAILWAY COMPANY LIMITED and MAINE NORTHERN RAILWAY COMPANY LIMITED,
Appellees.

_____, U.S. Bankruptcy Appellate Panel Judge.

ORDER ON MOTION FOR LEAVE TO FILE APPEAL PURSUANT TO 28 U.S.C. § 158(a)(3) AND FED. R. BANKR. P. 8001(b) AND 8004

Upon consideration of the Motion for Leave to File Appeal Pursuant to 28 U.S.C. § 158(a)(3) and Fed. R. Bankr. P. 8001(b) and 8004 (the "Motion") filed by Robert J. Keach, the chapter 11 trustee[1] (the "Appellant") of Montreal Maine & Atlantic Railway, Ltd. (the "Debtor"), and the Panel having determined in its discretion that leave to appeal the Order Sustaining in Part and Overruling in Part Trustee's Objection to Proofs of Claim Filed by New Brunswick

[1] In accordance with the Trustee's Chapter 11 Plan of Liquidation, dated July 15, 2015 (As Amended on October 8, 2015) [D.E. 1822] (the "Plan"), upon the Effective Date of the Plan (which occurred on December 22, 2015, *see* D.E. 1927), Robert J. Keach is no longer the chapter 11 trustee of the Debtor's estate, but is the Estate Representative of the Post-Effective Date Estate (as defined in the Plan). *See* Plan § 6.1(a). For the sake of continuity, Mr. Keach will continue to be referred to as the chapter 11 trustee.

Southern Railway Company Limited and Maine Northern Railway Company Limited on the Basis that Certain of Such Claims are Duplicative of Others, and Such Others are Improperly Asserted as Administrative and/or Priority Claims, dated February 26, 2016, and the oral findings read into the record by the United States Bankruptcy Court for the District of Maine on February 5, 2016, is appropriate under 28 U.S.C. § 158(a)(3), the Motion is hereby **GRANTED**.

FOR THE PANEL:

Dated: By: _____