

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE**

In re:

Maine, Montreal & Atlantic Railroad

Debtor

Chapter 11

Case No. 13-10670

**UNITED STATES TRUSTEE'S OPPOSITION TO TRUSTEE'S MOTION FOR ENTRY
OF AN ORDER DISBANDING THE OFFICIAL COMMITTEE OF VICTIMS**

William K. Harrington, the United States Trustee for Region 1 (the "U.S. Trustee"), respectfully submits this objection to the Trustee's *Motion for an Order Disbanding the Official Committee of Victims*, Docket No. 1441, (the "Motion"). The Court should deny the Motion because there is no good reason to disband the committee. While the authority of the Court to disband this committee is questionable, that is not an issue that needs to be resolved at this juncture. Disbanding the Official Committee of Victims now would be premature, especially when matters critical to the interests of those victims are pending before the Court. The Trustee's Motion to File Settlement Agreements under Seal [Docket Entry# 1397] and the Trustee's Motion seeking approval of the Disclosure Statement [Docket Entry# 1432] are pending and the outcome of both motions will have a significant impact upon the information that is disseminated to the victims. Further, the Trustee's concern for the costs incurred by the committee is better managed in the context of this Court's authority to review and approve professional compensation requests.

FACTUAL BACKGROUND

1. Following the catastrophic train derailment at Lac-Mégantic, Quebec, (“the Derailment”), Montreal Maine & Atlantic Railway, Ltd. (“MMA”) filed a voluntary petition for relief under 11 U.S.C. § 101 *et seq.* on August 7, 2013. MMA’s subsidiary, Montreal Maine & Atlantic Canada Co., filed a petition under Canada’s *Companies’ Creditors Arrangement Act* (the “Canadian Proceeding”) shortly thereafter.

2. On August 21, 2013, the U.S. Trustee appointed Robert J. Keach (the “Trustee”) as the chapter 11 trustee pursuant to 11 U.S.C. § 1163.

3. On August 30, 2013, an informal committee of Quebec claimants (including persons who suffered property damage on account of the derailment and governmental entities) filed a motion for committee formation, seeking the formation of an official Quebec victims committee, including the Province of Quebec and the town of Lac-Mégantic. *Docket Entry # 127.*

4. The Trustee opposed that motion, asserting that no committee was necessary. *Docket Entry # 212.*

5. The U.S. Trustee supported the formation of a committee of eligible persons holding claims arising from the accident. *Docket Entry # 213.*

6. On October 18, 2013, this Court entered an order authorizing the U.S. Trustee to appoint a committee to represent all the victims of the Derailment (“the Order”), *Docket Entry # 391.*

7. On November 27, 2013, following an extensive solicitation of victims, the U.S. Trustee filed an Appointment and Notice of Appointment of Committee of Creditors (“the Appointment”). *Docket Entry # 460.* The U.S. Trustee appointed:

Serge Jacques
Frontenac, QC. Canada G6B-251

Jacinthe LaCombe
Lac Megantic, QC. Canada G6B-226

Megane Turcotte
Lac Megantic, QC. Canada G6B 2N7

8. The U.S. Trustee appointed Pierre Paquet shortly thereafter. The individual members of the committee elected the Town of Lac Megantic and the Province of Quebec as *ex officio* members.

OBJECTION

The Trustee's principal argument in support of the Motion is that the Committee no longer serves a useful purpose. He argues that all victims of the train derailment are represented by "parties and counsel separate from the Committee and its counsel". That argument is ostensibly based upon the entry of an order entered in the Canadian Proceeding declaring all victims of the derailment with claims against the Debtor's Canadian subsidiary to be members of a class represented by counsel in the Canadian case. The Trustee doesn't say why that class and this Committee cannot coexist. Indeed, there is nothing unusual about creditors being represented by individual counsel and committee counsel in a bankruptcy case. Further, the two entities have operated independent of one another for over a year. They operate in different, albeit related cases. Their constituencies may overlap, but their functions are quite different.

The crux of the controversy, of course, is not the duplication of effort of the Canadian class representatives and the committee. The real problem is that the Trustee considers recent committee activity "counter-productive". The Trustee charges that the committee is

investigating the fee structures between the derailment victims and their counsel. The Trustee characterizes those investigations as threatening the Trustee's negotiated settlements. Arguing that the committee has out lived its usefulness, the Trustee reasons that the committee should now defer to the Trustee and the Canadian class representatives.

The Trustee has asserted in the context of both the Motion to Seal and in the Disclosure Statement that too close an examination of the details of his settlements will threaten his ability to consummate them. The U.S Trustee and others have raised concerns regarding the secrecy surrounding the settlements. The Trustee is a fiduciary with respect to thousands of victims with interests in hundreds of millions of dollars. He is seeking extraordinary relief in a public proceeding which, by law, subjects the Trustee to the highest standards of disclosure and transparency. He has ample tools at his disposal to shut down any overreaching by the committee. Thus, he should be prepared to accommodate all reasonable requests from any creditor constituency seeking additional information which might bear upon their consideration of the plan.

When Judge Kornreich authorized the U.S. Trustee to appoint a victims' committee to assure adequate representation of victims of the derailment in this case, he found that the victims "are not of a single type". What was apparent then is obvious now. The Trustee's plan classifies the victims of the derailment into five separate classes, with separate and distinct claims. Indeed, the administration of these classes will be administered by different entities. Class 12 will be administered by a Wrongful Death Trustee. The other classes of derailment victims will be administered by the Canadian Monitor. The victims are manifestly different not only in the types of injuries they have sustained. Their differences include their relative language proficiency and

their understanding of the American legal system. By authorizing the appointment of this committee, Judge Kornreich sought to preserve the right of all victims, particularly those unrepresented in the U.S., to participate meaningfully in this proceeding, an exercise made unusually difficult by virtue of their differences.

The work of this committee may be nearing a conclusion; but it is not, necessarily, finished. The Trustee's Plan was filed March 31, 2015. Yet, it remains a work in progress. The Plan was last amended on July 7, 2015. *Docket Entry#* 1496. The Disclosure Statement was also amended on July 7. See, *Docket Entry #* 1497. Incidentally, these amendments discuss the fee structures between the derailment victims and their counsel in far greater detail than was provided several months ago. The Notice to all Derailment Claimants was amended July 8, See, *Docket Entry #* 1500.

More information concerning the Plan may be forthcoming between now and confirmation. There may be claimholders other than those in Class 12 who may use the Committee as a medium through which to analyze the Trustee's amended pleadings. The potential for prejudice to creditors yet to be identified by the Trustee is too great to warrant a premature disbandment of the committee. As all victims of the derailment are poised to consider a plan that would discharge their various claims against MM&A and enjoin them from seeking further relief from those who have contributed to the Trustee's settlement fund, they should have every reasonable means available to deliberate on the Plan, including the work of the official committee.

The U.S. Trustee shares the Trustee's concerns about cost containment, particularly in large, complex cases such as this—a concern reflected in the U.S. Trustee Guidelines for

Reviewing Applications for Compensation. Thus, the U.S. Trustee strongly encourages all estate-paid professionals to be efficient and accountable for costs and to comply with the U.S. Trustee Guidelines. The Trustee's concerns about costs of investigations are reserved. They apply equally to the Trustee and the Committee and are better handled in other contexts, such as the applications for compensation. The Committee's professionals, like all retained professionals, have the obligation to comply with section 330. Should any professional perform tasks that are neither reasonable nor necessary, the parties may and should object to the professionals' fees when presented for court approval.

STATUTORY FRAMEWORK

A. 11 U.S.C. § 1102

Section 1102(a) of the Code governs the formation, appointment, and modification of official committees. It provides under what circumstances the court and the U.S. Trustee may act and under what standard. Congress gave the U.S. Trustee and bankruptcy courts important, but divergent, authority with respect to committees in chapter 11. As to the U.S. Trustee's role, the U.S. Trustee appoints all official committees and, as appropriate, monitors membership and occasionally modifies their composition. 11 U.S.C. § 1102(a)(1) and (2).

Section 1102 also confers important, but different, authority on bankruptcy courts with respect to official committees. A bankruptcy court may, if requested:

- Order the U.S. Trustee to appoint additional committees if necessary to assure adequate representation, 11 U.S.C. § 1102(a)(2);

- Order the U.S. Trustee to change committee membership if necessary to ensure adequate representation, 11U.S.C. 1102(a)(4);
- Order the U.S. Trustee to increase membership to include a creditor that is a small business concern, 11 U.S.C. § 1102(a)(4); and
- Order that a committee not be appointed in a small business case, 11 U.S.C. § 1102(a)(3).

Beyond that, section 1102 is silent on the court's role in committee appointments, composition, modification, or disbandment. 7 COLLIER ON BANKRUPTCY ¶ 1102.07[1] (16th ed. 2012) (no specific authorization for court to order the disbandment of a committee appointed by the U.S. Trustee).

The delineated roles for the courts and the U.S. Trustees in committee matters under section 1102 are no accident. The 1986 amendments, which established the U.S. Trustee Program on a permanent, nationwide basis, reflected Congress's desire to separate the judicial and administrative functions and to screen courts from administrative functions that could raise conflict of interest issues. *See In re Victory Markets, Inc.*, 196 B.R. 1, 3-4 (Bankr. N.D.N.Y. 1995). In another committee challenge context, one court noted some "uneven history" in the law regarding the differing roles and then correctly summarized the historical development of the role of bankruptcy courts and U.S. Trustees regarding committee membership to separate administrative and adjudicative functions. *See, In re ShoreBank Corp.*, 467 B.R. 156, 160 (Bankr. N.D. Ill. 2012). It is against this legislative backdrop that Trustee's Motion must be considered.

The decision to appoint an additional committee can be made either by the U.S. Trustee under section 1102(a)(1) or by the bankruptcy court under 1102(a)(2). Here, the committee was appointed as an "additional committee" under section 1102(a)(2). *See, Docket Entry # 391.*

Under section 1102(a)(2), the court decides whether the additional committee is necessary for adequate representation. *See In re New Life Fellowship*, 202 B.R. 994, 995 (Bankr. W.D. Okla. 1996).

No specific section of the Bankruptcy Code expressly addresses how to disband an official committee. *See ShoreBank*, 467 B.R. at 162-163; *see also In re Mercury Fin. Co.*, 240 B.R. 270, 278 (N.D. Ill. 1999) (noting that the repeal of former section 1102(c) created “considerable confusion regarding a court’s authority to alter (reconstitute) a committee’s composition or size” and that “[t]he answer to this question has been far from unanimous”). Congress subsequently clarified the court’s ability to alter committee composition when it enacted section 1102(a)(4). *See ShoreBank*, 467 B.R. at 160. Judicial authority to ensure “adequate representation” appears to be fully addressed under section 1102(a)(4).

As noted in *In re Caesars Entertainment Operating Co, Inc.*, 526 B. R. 265 (Bankr. N.D. Ill. 2015), section 105(a) does not confer power upon the Court to disband committees. “That section gives bankruptcy courts power only to implement existing Code provisions... It is neither an independent source of rights, nor a source of substantive authority... Because it is neither, section 105(a) does not allow bankruptcy courts to contradict the Code... such as by exercising powers the Code does not confer”. 526 B.R. at 269 [citations omitted].

B. 11 U.S.C. § 330.

The cost of professional services and duplication of efforts among professionals entitled to compensation from the estate are legitimate concerns better addressed in other contexts, such as setting appropriate restrictions on investigations and in the review of professional fees under section 330.

Should the Trustee, or any other parties, contend that tasks performed by the Committee and its professionals were not reasonable and necessary when rendered, those parties will have an opportunity to raise the matter at hearings on interim and final fee applications under sections 330 and 331. The U.S. Trustee does not agree that the Official Committee of Victims should be constrained in its work by the Trustee's vision of what its work should entail or whether its services are still useful. The U.S. Trustee does share the Trustee's concerns about cost containment more generally by all professionals in this case—a concern reflected in the U.S. Trustee Guidelines for Reviewing Applications for Compensation. Thus, the U.S. Trustee strongly encourages all estate-paid professionals to be efficient and accountable for costs and to comply with the U.S. Trustee Guidelines, for example, by using client-approved budgets, by hiring efficiency co-counsel for commoditized work, and by avoiding duplicative or overlapping work.

For all of these reasons, the Court should deny the Trustee's Motion.

WHEREFORE, the U.S. Trustee respectfully requests that the Court deny the Motion and grant such other and further relief as is just and proper.

Dated at Portland, Maine this 14th day of July, 2015.

Respectfully submitted,

WILLIAM K. HARRINGTON
UNITED STATES TRUSTEE

By: /s/ Stephen G. Morrell
Stephen G. Morrell, Esq.
United States Department of Justice
Office of United States Trustee

537 Congress Street
Portland, ME 04101
Phone: (207) 780-3564

CERTIFICATE OF SERVICE

I, Stephen G. Morrell, being over the age of eighteen and an employee of the United States Department of Justice, U.S. Trustee Program, hereby certify that on July 14, 2015, I electronically filed the forgoing OBJECTION OF THE UNITED STATES TRUSTEE TO TRUSTEE'S MOTION FOR ENTRY OF AN ORDER DISBANDING THE OFFICIAL COMMITTEE OF VICTIMS which was served upon each of the parties set forth on this Service List via U.S. mail, postage prepaid, on July 14, 2015. All other parties listed on the Notice of Electronic Filing have been served electronically.

Dated at Portland, Maine this 14th day of July, 2015.

/s/ Stephen G. Morrell

Service List: