

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re:

MONTREAL MAINE & ATLANTIC
RAILWAY, LTD.

Debtor.

Bk. No. 13-10670
Chapter 11

**APPELLANT’S DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD
AND STATEMENT OF ISSUES REGARDING APPEAL 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 ON THE BASIS THAT CERTAIN OF SUCH
CLAIMS ARE DUPLICATIVE OF OTHERS, AND SUCH OTHERS ARE
IMPROPERLY ASSERTED AS ADMINISTRATIVE AND/OR PRIORITY CLAIMS**

Robert J. Keach, the chapter 11 trustee¹ (the “Appellant”) of Montreal Maine & Atlantic Railway, Ltd. (“MMA” or the “Debtor”), pursuant to Rule 8009 of the Federal Rules of Bankruptcy Procedure, hereby (a) designates the items listed below to be included in the record on appeal and (b) submits this statement of the issues to be presented on appeal, in each case with respect to 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 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. 2034] (the “Order”).

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 became 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.

A. Designation of the Record

The Appellant hereby designates the following items, including all documents at the docket entries referred to below, for inclusion in the record of its appeal²:

Date	No.	Title
09/11/13	216	<i>Schedules of Assets and Liabilities and Statement of Financial Affairs</i>
06/13/14	242-1	Proof of Claim
06/13/14	257-1	Proof of Claim
06/13/14	243-1	Proof of Claim
06/13/14	259-1	Proof of Claim
10/19/15	1826	<i>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</i>
10/19/15	1827	<i>Motion to Expedite Hearing Shortened Response Period and Limited Notice with Respect to 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</i>
11/12/15	1855	<i>Response of New Brunswick Southern Railway Company Limited and Maine Northern Railway Company to Trustee’s Objection to Proofs of Claim</i>
11/17/15	1871	Minute Entry dated November 17, 2015
11/19/15	1873	<i>Order Granting Motion to Expedite Hearing Shortened Response Period and Limited Notice with Respect to 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</i>
11/19/15	1877	<i>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 (the “<u>Stipulation</u>”), including the following exhibits described therein³:</i>

² Unless otherwise indicated, all docket references are to Case No. 13-10670 (Bankr. D. Me.).

³ Each of the exhibits listed in the Stipulation are listed below and were admitted at the hearing on November 20, 2015 (the “November 20 Hearing”). See Tr. Hr’g, Nov. 20, 2015, at 89:3-13. To the extent the exhibit was specifically identified at the November 20 Hearing or in a submission to the Court thereafter, such identification is

Date	No.	Title
	Trustee's A	Wheeling payment tracker for Wheeling Line of Credit
	Trustee's B	Statement of payments made on Wheeling line of credit for period from June 15, 2011 to August 6, 2013
	Trustee's C	Borrowing Base Certificate. Figures determined as of June 30, 2009
	Trustee's D	Borrowing Base Certificate. Figures determined as of August 31, 2009
	Trustee's E	Borrowing Base Certificate. Figures determined as of October 31, 2009
	Trustee's F	Borrowing Base Certificate. Figures determined as of April 30, 2010
	Trustee's G	Borrowing Base Certificate. Figures determined as of May 31, 2010
	Trustee's H	Borrowing Base Certificate. Figures determined as of June 30, 2010
	Trustee's I	Borrowing Base Certificate. Figures determined as of ay June 30, 2011
	Trustee's J	Borrowing Base Certificate. Figures determined as of July 31, 2011
	Trustee's K	Borrowing Base Certificate. Figures determined as of January 31, 2012
	Trustee's L	Borrowing Base Certificate. Figures determined as of February 29, 2012
	Trustee's M	Borrowing Base Certificate. Figures determined as of June 30, 2012
	Trustee's N	Borrowing Base Certificate. Figures determined as of June 30, 2013
	Trustee's O	Connection Agreement dated January 29, 2013 between MMA and Eastern Maine Railway Co. and Maine Northern Railway Co.
	Trustee's P	Dispatching Agreement dated June 15, 2011 between MMA and Maine Northern Railway Co.
	Trustee's Q	Blocking Agreement dated January 9, 2003 between New Brunswick Southern Railway Company Ltd., Eastern Maine Railway Company and MMA
	Irving 1	Commercial Agreement dated January 9, 2003 between MMA, Eastern Maine Railway Company and New Brunswick Southern Railway Company Limited
	Trustee's S	Interchange Agreement at Brownville Junction Yard dated January 9, 2003 between MMA and Eastern Maine Railway Company

noted. To the extent any exhibit included in the Stipulation was not specifically identified at the November 20 Hearing, it is identified as "Bates [#]."

Date	No.	Title
Trustee's T		Letter from Ian Simpson, General Manager of Eastern Maine Railway Company, dated August 2, 2013 to MMA regarding overdue payments under the Commercial Agreement
Trustee's U		Letter from Ian Simpson, General Manager of New Brunswick Southern Railway Company Limited, dated August 2, 2013 to MMA regarding overdue payments under the Commercial Agreement
Irving 5		E-mail, dated June 4, 2012 at 11:37 am, from Robert C. Grinrod to Ian Simpson regarding "Revision of Settlement Terms Between NBSR and MMA" with two page attachment titled "Revision of Payment Terms with NBSR Needed."
Bates 1		E-mail, dated July 26, 2012 at 1:03 pm from Donald Gardner to Ryan Ellis regarding "Oil Movement Invoices," and E-mail, dated July 26, 2012 at 2:49 pm from Ryan Ellis to Donald Gardner regarding "Oil Movement Invoices."
Irving 6		E-mail, dated July 26, 2012 at 1:03 pm from Donald Gardner to Ryan Ellis regarding "Oil Movement Invoices," and E-mail, dated July 26, 2012 at 2:50 pm from Ryan Ellis to Joanne Kelter regarding "Oil Movement Invoices."
Irving 7		E-mail, dated July 26, 2012 at 1:03 pm from Donald Gardner to Ryan Ellis regarding "Oil Movement Invoices," and E-mail, dated July 26, 2012 at 3:53 pm from Joanne Kelter to Donald Gardner, regarding "Oil Movement Invoices."
Irving 8		(i) E-mail, dated August 30, 2012 at 7:27 am from Joanne Kelter to Brenda Tarr regarding "Swap," (ii) E-mail from Brenda Tarr, dated August 30, 2012 at 9:53 am regarding "Swap," (iii) E-mail, dated August 30, 2012 at 9:13 am from Joanne Kelter,. (iv) E-mail from Donald Gardner, dated August 30, 2012 at 11:04 am to Joanne Kelter regarding "Swap," (v) E-mail from Ryan Ellis, dated August 30, 2012 at 1:15 pm to Donald Gardner and Joanne Kelter regarding "Swap."
Irving 9		E-mail from Ian Simpson, dated January 3, 2013 at 3:02 pm to Donald Gardner regarding "ISS Crude Payments," and E-mail from Donald Gardner, dated January 3, 2013 at 4:18 pm to Ian Simpson regarding "ISS Crude Payments."
Irving 10		(i) E-mail from Ryan Ellis, dated January 4, 2013 at 1:04 pm to Donald Gardner regarding "November Oil Payments;" (ii) E-mail from Donald Gardner, dated January 4, 2013 at 5:55 pm to Ryan Ellis regarding "November Oil Payments;" (iii) E-mail from Ian Simpson, dated January 7, 2013 at 10:05 am to Donald Gardner and Ryan Ellis regarding "November Oil Payments;" and (iv) E-mail from Donald Gardner, dated January 7, 2013 at 11:25 am to Ian Simpson and Ryan Ellis regarding "November Oil Payments."

Date	No.	Title
	Bates 2	E-mail from Donald Gardner, dated February 5, 2013 at 4:31 pm to Ryan Ellis regarding "Cash Settlement," and E-mail from Ryan Ellis, dated February 7, 2013 at 10:30 am to Donald Gardner regarding "Cash Settlement."
	Bates 3	E-mail from Donald Gardner, dated April 4, 2013 at 3:51 pm to Ryan Ellis regarding "Cash," and E-mail from Ryan Ellis, dated April 4, 2013 to Donald Gardner, dated April 4, 2013 at 3:54 pm regarding "Cash."
	Irving 4	E-mail from Joanne Kelter, dated February 15, 2012 at 3:04 pm regarding "Swap Details," and E-mail from Brenda Tarr, dated February 16, 201 at 8:49 am regarding "Swap Details."
	Irving 3	E-mail from Joanne Kelter, dated October 26, 2011 at 2:24 pm to Brenda Tarr, Jocelyne Baranek and Torrie Potter regarding "Swap Details," and E-mail from Brenda Tarr, dated October 27, 2011 at 9:19 am regarding "Swap Details."
	Irving 2	E-mail from Joanne Kelter, dated August 10, 2011 at 1:03 pm to Brenda Tarr, Jocelyne Baranek and Torrie Potter regarding "Swap Details," and E-mail from Brenda Tarr to Joanne Kelter, Jocelyne Baranek and Torrie Potter, dated August 10, 2011 at 4:01 pm regarding "Swap Details."
11/20/15	1878	<i>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</i>
11/20/15	1886	Minute Entry dated November 20, 2015
12/01/15	1888	Transcript of hearing held before the United States Bankruptcy Court for the District of Maine on November 20, 2015 and, in addition to the exhibits listed above, the following exhibits:
	Irving 11	Summary of payment history as between MN/NB Railroads and MMA (additional exhibit admitted at trial on November 20, 2015)
	Irving 12	Binder of invoices supporting the proof of claim of New Brunswick Southern Railway Company Ltd. (additional exhibit admitted at trial on November 20, 2015)
	Irving 13	Binder of invoices supporting the proof of claim of Maine Northern Railway Company (additional exhibit admitted at trial on November 20, 2015)

Date	No.	Title
12/10/15	1911	<i>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</i>
12/10/15	1913	<i>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</i>
02/05/16	1947	Minute Entry dated February 5, 2016
02/12/16	1955	Transcript of hearing held before the United States Bankruptcy Court for the District of Maine on February 5, 2016
02/24/16	--	Transcript of status conference held before the United States Bankruptcy Court for the District of Maine on February 24, 2016 ⁴
02/16/16	1960	<i>Status Report and Request for Judgment Regarding Trustee's Objection to Proofs of Claim Filed by New Brunswick Southern Railway Company Limited and Maine Northern Railway Company</i>
02/16/16	1966	<i>New Brunswick Southern Railway Company Limited and Maine Northern Railway Company's Status Report and Request for Judgment in Connection with Trustee's Objection to Proofs of Claim Filed by New Brunswick Southern Railway Company Limited and Maine Northern Railway Company</i>
02/17/16	1968	<i>Trustee's Response to New Brunswick Southern Railway Company Limited and Maine Northern Railway Company's Status Report and Request for Judgment in Connection with Trustee's Objection to Proofs of Claim Filed by New Brunswick Southern Railway Company Limited and Maine Northern Railway Company</i>
02/24/16	2028	Minute Entry dated February 24, 2016
02/26/16	2034	<i>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</i>
03/10/16	2046	<i>Notice of Appeal</i>
03/10/16	2047	<i>Motion for Leave to File Appeal Pursuant to 28 U.S.C. § 158(a)(3) and Fed. R. Bankr. P. 8001(b) and 8004</i>
03/10/16	2049	<i>Appeal Transmission form to BAP [for D.E. 2046]</i>
03/10/16	2050	<i>Appeal Transmission form to BAP [for D.E. 2047]</i>

⁴ The Trustee ordered a transcript of the status conference on April 4, 2016.

Date	No.	Title
03/14/16	2053	<i>Notice of Docketing Record on Appeal to BAP</i>
03/30/16	2088	<i>BAP Order Granting Motion for Leave to Appeal re: BAP No. 16-015</i>

In addition, the Trustee designates all docket entries in the Debtor’s chapter 11 case, No. 13-10670 (Bankr. D. Me.), and all docket entries and pleadings filed in the adversary proceedings stylized Keach v. New Brunswick Southern Railway Co. Ltd., Adv. Pro. No. 15-01016 (Bankr. D. Me.), and Keach v. Maine Northern Railway Co., Adv. Pro. No. 15-01017 (Bankr. D. Me.).

B. Statement of Issues on Appeal

The Appellant hereby designates the following questions presented by this appeal:

- a. Whether the Bankruptcy Court’s holding that charges of the type comprising the Asserted 1171(b) Claims are not *per se* general unsecured claims is in error, as a matter of law, given the clear legislative history and the case law that has developed under the Bankruptcy Code?
- b. Whether the Bankruptcy Court erred, as a matter of law, in not considering whether the basis for the Asserted 1171(b) Claims is indeed a “good or service” as is required for priority status under Bankruptcy Code section 1171(b), where the claims of the Irving Railroads⁵ arose out of MMA’s role as a collection agent for the Irving Railroads, and not because of the provision of any section 1171(b) services to MMA?
- c. Whether the Bankruptcy Court clearly erred, and applied an improper legal standard, in holding that “it is sufficient [that] claims [were] for a current expense” that increased the “profitability” of MMA to satisfy the “necessary operating expense” requirement for priority status under Bankruptcy Code section 1171(b) when, as a matter of law, the Irving Railroads were required to establish (and failed to establish) that the services, if any, that they provided were essential to the survival of MMA as a going concern in order to qualify their claims as section 1171(b) claims?
- d. Whether the Bankruptcy Court clearly erred, and applied an improper legal standard, when it held that the Irving Railroads’ claims were not disqualified from section 1171(b) priority, notwithstanding the Irving Railroads’ admitted use of special security arrangements (including triangular set off and other collateralization), because such admitted special security arrangements were

⁵ The “Irving Railroads” shall mean, collectively, New Brunswick Southern Railway Company Limited and Maine Northern Railway Company.

not the equivalent of a perfected security interest under the Uniform Commercial Code, when, as a matter of law, disqualifying “special security arrangements” can be as simple as cash-on-delivery or cash-in-advance arrangements or similar structures, and no perfected security interest is required?

- e. Whether the Bankruptcy Court clearly erred, and applied an improper legal standard, when it failed to find that the Irving Railroads’ claims were disqualified from section 1171(b) priority as a result of the use of “special security arrangements” when the Irving Railroads’ own witness testified that the Irving Railroads were extending credit to MMA only on a “secured basis”?
- f. Whether the Bankruptcy Court clearly erred in finding that the Irving Railroads sufficiently established their reliance upon the Debtor’s current operating revenues to satisfy the reliance prong of the 1171(b) test given the uncontroverted testimony, *inter alia*, that (i) the Irving Railroads instead relied on collateral and security arrangements they had put in place; (ii) the Irving Railroads instead relied upon the Debtor’s role in collecting the Irving Railroads’ funds via the ISS rather than any payment from the Debtor; and (iii) the Irving Railroads consented to modifications in the payment arrangements with the Debtor which required the Irving Railroads to extend credit for up to 120 days per transaction solely because the Irving Railroads were relying on ISS and not on the Debtor?

Dated: April 11, 2016

**ROBERT J. KEACH,
ESTATE REPRESENTATIVE OF POST-
EFFECTIVE DATE ESTATE OF MONTREAL
MAINE & ATLANTIC RAILWAY, LTD.**

By his attorneys:

/s/ Sam Anderson

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