

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

ADIRONDACK RAILWAY CORP.

CASE NO. 81-00456

Debtor

Chapter 11

APPEARANCES:

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STEPHEN D. GERLING, U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Court has before it two applications by professionals seeking interim compensation for services rendered to the Debtor estate.

The first is the Fourth Interim Application For Fees And Disbursements By Attorneys For Trustee filed on October 26, 1990 by Hancock & Estabrook, Esqs. ("Hancock Application"). The second is the First Interim Application For Fees And Disbursements By Special Counsel To The

Trustee filed on October 26, 1990 by Briggs, Dwyer and Smith, P.C. ("Briggs Application").

A hearing on both Applications was held before the Court on November 13, 1990 at Utica, New York. At the hearing, Hancock appeared in support of both Applications, while the United States Trustee ("UST") appeared and alleged that it had not been served with either Application and sought to reserve its rights until it had been served.

The Court also received, prior to the hearing, correspondence from William Kuntz, III ("Kuntz") objecting to the proposed fees, and enclosing a copy of a Civil Appeals Scheduling Order issued by the Clerk of the United States Court of Appeals for the Second Circuit on October 15, 1990, scheduling oral argument of an appeal from an Order of the District Court (90-CV-50 NYND) which affirmed an Order of this Court providing for liquidation of the case pursuant to 11 U.S.C. §1174. The Scheduling Order indicates that the appeal "shall be heard as early as the week of January 28, 1991". It does not appear that either Hancock or Briggs received a copy of Kuntz' objection prior to the November 13, 1990 hearing.

On November 30, 1990, the UST, after reviewing the Hancock and Briggs Applications, filed Statements in which it raised no objection to "an award of final compensation".

The Hancock Application seeks an interim fee of \$103,945.00 and disbursements of \$8,501.25 for services rendered generally between November 1, 1985 and September 30, 1990, while the Briggs Application seeks an interim fee of \$2,115.00 and disbursements of \$498.25 for services rendered as special counsel between July 7, 1988 and September 27, 1990.

At the November 13, 1990 hearing on both Applications, the Court expressed its concern regarding the status of a personal injury action being pursued against the Debtor in state court by one Salvatore Praga for injuries suffered post-petition in a fall from a railroad overpass bridge, allegedly under the control of the Debtor, and located in the Village of Saranac Lake, New

York ("Praga Claim"). On December 3, 1990, Briggs filed an Affidavit with the Court in response to its inquiries at the hearing.

Attached to the Hancock Application, as Exhibit D, is a "Liquidation Analysis" which appears, subject to certain contingencies, to forecast \$189,050 as the "Balance available to Unsecured creditors", after the payment of all secured debt, administrative expenses and priority claims estimated at \$327,000. One of the contingencies referred to, however, is the Praga claim.

Arguably, if the Praga claim results in a recovery in excess of \$189,050, there will be no distribution to unsecured creditors, since the Court is unaware of any insurance maintained by the Debtor from which any liability adjudged to be due Praga could be satisfied. See Code §§503(b)(1)(A), 726(a) and In re Dennis Ponte, Inc., 61 B.R. 296, 298 (9th Cir. BAP 1986).

The Court must also be mindful of the requirement that administrative claims, to include Praga, are to be paid on a parity and that interim compensation is a phenomena that is generally common to reorganizations as opposed to liquidations. See IML Freight, Inc., 52 B.R. 124, 135 (Bankr. D.Utah 1985); Code §726(b) and 2 King, COLLIER ON BANKRUPTCY (15th Ed. 1989) ¶331.01.

Likewise, the Court cannot ignore the pending appeal of Kuntz which, if successful, would presumably return the case to a "reorganization" posture.

A review of the Briggs Affidavit indicates that in its "Professional Opinion and Evaluation" the Praga claim is worth \$40,000 at best, but there is a likelihood of a "no cause" for the Trustee. (See Affidavit of Matthew H. Dwyer, Esq. sworn to Nov. 30, 1990 para. 24, pg. 6). While the Court recognizes Briggs' expertise in this area, it is also aware that the Trustee is the sole remaining defendant in the state court action, that the Briggs Affidavit relies on a bill of particulars furnished to a former co-defendant, and that the statutory recreational use defense is not presently

included in Trustee's answer as an affirmative defense.

Upon consideration of all of the factors presented by the Hancock Application as well as the Briggs Application, the Court concludes that while it does believe that the fees and disbursements sought therein are warranted, payment of those fees presently, given the uncertainties of the Praga litigation, the liquidation nature of the case and the limitation on available estate funds, would be imprudent. The Court is reluctant to allow interim payment which may be subject to later disgorgement. See In re IML Freight, Inc., *supra*, 52 B.R. at 139.

Thus, insofar as the Applications seek interim compensation presently payable from assets of the estate, they are denied, without prejudice to being reconsidered upon a liquidation of the Praga claim.

IT IS SO ORDERED.

Dated at Utica, New York

this day of January, 1991

STEPHEN D. GERLING
U.S. Bankruptcy Judge