

Appeal History:

denied in part March 1, 1990, affirmed in part June 22, 1989 and August 7, 1989, No. [C89-3055](#) (N. D. Iowa Sept. 12, 1990) (Hansen, J.)
aff'd, No. [90-2794](#) (8th Circuit 1991) (Unpublished)

In the United States Bankruptcy Court for the Northern District of Iowa

LARRY K. LEMLEY
Debtor(s).

Bankruptcy No. Y82-03341
Chapter 7

ORDER RE: APPLICATIONS FOR ADMINISTRATIVE EXPENSES AND OBJECTIONS THERETO

On March 10, 1989, the trustee, David M. Nelsen (TRUSTEE), filed his amended final report and accounting. The trustee has applied for trustee's fees pursuant to 11 U.S.C. § 326(a) in the amount of \$2,121.86. He has further applied for reimbursement of expenses in the amount of \$2,630.00.

David M. Nelsen, as attorney for trustee, has applied for legal fees in the amount of \$16,500.00 plus reimbursement of expenses in the amount of \$189.20.

First Interstate Bank f/k/a United Central Bank & Trust Company of Fort Dodge objected to the application for attorney's fees and expenses.

Hearing on the final report including the application for professional fees and trustee's administrative expense was held in Mason City, Iowa on June 13, 1989. The court now issues its ruling which includes findings of fact and conclusions of law as required by Bankr. R. 7052. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case began with the filing of an involuntary chapter 7 petition on December 15, 1982. An order for relief entered under chapter 7 on March 25, 1983. David M. Nelsen was appointed trustee.

On October 13, 1983, trustee made application to the bankruptcy court for the appointment of the law firm of Nelsen & Folkers as attorneys for the trustee. An order was entered appointing Nelsen & Folkers on October 14, 1983. David M. Nelsen is an attorney licensed to practice law in the state of Iowa and at the time of the appointment of Nelsen & Folkers and subsequently has acted as attorney for the trustee.

The trustee's liquidation of assets of this bankruptcy estate has yielded \$124,185.80. On March 10, 1989, the trustee filed his amended final report and accounting. Notice of the final report and accounting, claims report and administrative expense application in the case was given to all creditors and parties in interest by notice of March 27, 1989.

Pursuant to 11 U.S.C. § 326(a), the trustee has requested trustee's fees in the amount of \$2,121.86. The trustee further requests reimbursement, pursuant to 11 U.S.C. § 330(a)(2), of the following "out-of-pocket" expenses:

Secretarial expenses	\$1,317.00
Telephone expenses	632.00
Copies	433.00
Postage	148.00
Bond	<u>100.00</u>
Total Expenses, Reimbursement Request	\$2,630.00

By separate application, noticed to creditors, the law firm of Nelsen & Mackey, as attorneys for trustee, seek professional compensation in the amount of \$16,500.00 plus mileage expense in the amount of \$189.20. The fee application was filed April 29, 1988. The request for compensation begins with a time entry dated April 27, 1983 and concludes with a time entry dated January 7, 1988. The fee application requests compensation at the rate of \$125.00 per hour for 132 hours.

Expenses requested include mileage for four round trips from Mason City to Fort Dodge at 200 miles each plus one miscellaneous trip on July 6, 1984 at 60 miles. Travel expense reimbursement is requested at the rate of 22¢ per mile.

First Interstate Bank objects to the fee application of the attorney for the trustee on several grounds: (1) hourly rate of \$125 is excessive, (2) too much time was spent on certain of the projects or items of work, (3) that the trustee is requesting reimbursement as an attorney for work more appropriately done by the trustee.

Attorney Nelsen has made professional representations to the court that the hours shown on the fee application are those actually expended and that they were expended by him as attorney for the trustee for projects appropriately done by an attorney rather than the trustee. The objecting creditor has introduced no evidence to controvert the representations of the trustee's attorney. The court, therefore, concludes that the fee allowance should not be adjusted on the grounds that some of the work performed were duties of the trustee.

The court, however, does conclude that the fee application should be adjusted for three other reasons.

HOURLY RATE

The burden of proof with regard to a fee application is upon the person requesting compensation. In re Bond's Lucky Foods, Inc., No. 1, 76 B.R. 664, 666 (Bankr. E.D. Ark. 1986). It is the obligation of the bankruptcy court to determine a reasonable hourly rate. In re S.T.N. Enterprises, Inc., 70 B.R. 823, 842 (Bankr. D. Vt. 1987).

Attorney Nelsen introduced expert testimony as to the reasonable rate. Attorney David Sergeant, an experienced bankruptcy attorney and trustee from Fort Dodge, testified that in reviewing the file he determined that the \$125.00 hourly rate requested by Nelsen was a fair and reasonable rate.

The court questioned Sergeant with regard to the general hourly rate for bankruptcy attorneys in the Fort Dodge area for the years related to this fee application. Sergeant testified that the following were the general rates for creditors' and debtors' attorneys in the Fort Dodge area for the years in question:

<u>Year</u>	<u>Creditors' Attorneys</u>	<u>Debtors' Attorneys</u>
1983	\$80.00	\$80.00
1984	85.00	85.00
1985	85.00	85.00
1986	90.00	90.00
1987	85 to 90.00	65.00
1988	85 to 90.00	65.00

Sergeant further testified that the general rates for attorneys for bankruptcy trustees ranged from \$85.00 per hour to \$120.00 per hour for the period 1983 through 1985 and for 1986 and after, hourly rates ranged from \$90.00 to \$120.00.

Sergeant testified that in his opinion attorneys for trustees should be compensated at a higher rate both because of increased necessity for expertise and because often attorneys for trustees are called upon to represent trustees at no compensation. The court disagrees that the expertise of attorneys for trustees is substantially different from the expertise necessary for bankruptcy counsel for creditors or debtors. Further, the court doubts, and the attorney for the trustee has not shown, that attorneys for trustees are substantially more prone to not being paid than are attorneys for debtors.

The court notes with some concern that Nelsen has advocated the \$125.00 hourly rate based not only on the nature of this case but also based upon his experience and performance. However, in examining the court file in some detail, the court has found at least one clear instance where Nelsen's associate or partner, John Mackey, did the work for which Nelsen seeks compensation at his own normal rate (3/17/87 letter to attorney Wally Miller, attached to 3/25/87 letter to clerk, filed 3/26/87). Hopefully this is an isolated incident; the court will assume so and it shall not affect the court's determination of rates in this case.

The court, having examined the case file, having heard the testimony of Mr. Sergeant and Mr. Nelsen, and relying on its own experience with regard to attorneys' fees, finds and concludes that \$100.00 per hour is a fair and reasonable hourly rate for this case

PRE-APPOINTMENT COMPENSATION

Nelsen was appointed as attorney for trustee on October 14, 1983. From an examination of his fee application, 14.4 hours were expended by Nelsen prior to his appointment as attorney for the trustee.

The Bankruptcy Code contemplates that only a previously appointed attorney for the trustee will be compensated for work performed for the trustee. 11 U.S.C. § 327(a); 11 U.S.C. § 330(a). See Fanelli v. Hensley (In re Triangle Chemicals, Inc.), 697 F.2d 1280 (5th Cir. 1983). Attorney Nelsen seeks

compensation for services rendered prior to court approval of his appointment. There has been no justification for such payment. *In re Independent Sales Corporation*, 73 B.R. 772 (Bankr. S.D. Iowa 1987).

The court finds and concludes that attorney Nelsen may not be compensated for 14.4 hours of services.

TRAVEL TIME

The trustee has represented to the court that the one-way trips from Mason City to Fort Dodge for purposes of representing the trustee took approximately one and one-half to one and three-fourths hours. Four such trips were made. The court, therefore, finds that for each such trip three hours of travel time was used and that four trips were made for a total of twelve hours. There was also one 60-mile trip which the court will determine was travel time in the amount of one hour. Therefore, the court finds that of the hours for which compensation is requested in the fee application, thirteen hours were for time spent in travel. All travel took place after October 14, 1983.

The court does not believe he should be compensated for travel at the full hourly rate. See *In re C & J Oil Co., Inc.*, 81 B.R. 398, 404 (Bankr. W.D. Va. 1987). The court concludes that travel time should be compensated at one-half the allowed rate or \$50.00 per hour.

SUMMARY

Attorney for the trustee has requested compensation for 132 hours. The court has determined that 14.4 hours must be subtracted for pre-appointment services. This leaves 117.6 hours of services for which compensation must be paid. Of these, thirteen hours are for travel. Therefore, 104.6 hours should be compensated at the allowed rate of \$100.00 per hour. Fees allowed for services at the allowed rate are therefore \$10,460.00. In addition, the attorney for the trustee shall be allowed thirteen hours of travel at \$50.00 per hour for a travel allowance of \$650.00. The total fee allowance is, therefore, \$11,110.00 plus \$189.20 in allowed reimbursement for travel expense. The court concludes that the allowed administrative claim of the attorney for the trustee, David M. Nelsen, should be \$11,299.20.

TRUSTEE'S APPLICATION FOR COMPENSATION AND EXPENSE REIMBURSEMENT

The Code provision for allowance of trustee compensation is governed by 11 U.S.C. § § 326 and 330. The percentage allowances set out in 11 U.S.C. § 326 constituted a cap on compensation, not a mandate. *In re Roco Corp.*, 64 B.R. 499, 502 (D. R.I. 1986).

The court, having examined the case file, finds that the trustee's request for compensation in the amount of \$2,121.86 should be granted.

The trustee has also requested expense reimbursement pursuant to 11 U.S.C. § 330(a)(2) in the amount of \$2,630.00. Of this, \$1,317.00 is a requested reimbursement for secretarial expenses. From an examination of the court file, the court can find no itemization of the secretarial time expended by date, amount of time per date and project. The trustee, however, has represented to the court that all of this time was spent separately from secretarial expenses devoted to work for the attorney for the trustee.

Generally, secretarial services performed for a trustee's or debtor's attorney is not separately compensated and is generally treated as part of the overhead expense of the attorney. See In re Bond's Lucky Foods, Inc., No. 1, 76 B.R. 664, 668 (Bankr. E.D. Ark. 1986). This is not to say, however, that where a trustee finds it necessary to hire a secretary to perform work for the estate, this may not be a compensable expense. However, such requests for secretarial expense reimbursement by a trustee should be closely scrutinized where the same secretary or secretaries are also

utilized by the attorney for the trustee who is also the trustee. This court believes it is incumbent upon any trustee who is also attorney for the trustee to justify the payment of such secretarial expense, including the itemization of the secretary's time spent on particular dates and particular projects. There should be no question that the secretarial reimbursement requested is not for work done by the legal secretary for the attorney for the trustee.

Reimbursement for expenses must be actual and necessary. 11 U.S.C. § 330(a)(2). The trustee's documentation of his expenses must be "adequate and sufficiently detailed to enable the Court to render an independent decision." First Hawaiian Bank v. Anderson (In re Central Pacific Boiler & Piping, Ltd.), 88 B.R. 277, 278 (Bankr. Ha. 1988); see also In re Perez Hernandez, 73 B.R. 329, 331 (Bankr. P.R. 1987).

The court concludes that the documentation of the secretarial expense is insufficient to permit an allowance to the trustee for that expense. The court concludes that the trustee's application for secretarial expense reimbursement should be denied.

IT IS THEREFORE ORDERED that David M. Nelsen as attorney for the trustee should be allowed \$11,110.00 for professional fees for his representation of the case trustee and should be allowed \$189.20 for reimbursed expenses for total professional compensation allowed of \$11,299.20.

IT IS FURTHER ORDERED that the trustee's application for trustee's fees is granted in the amount of \$2,121.86. Trustee's application for expense reimbursement is allowed in the amount of

\$1,313.00 and disallowed in the amount of \$1,317.00.

An order of distribution, consistent with the court's previous orders on allowances of claims and administrative expenses, shall separately be entered.

SO ORDERED ON THIS 22ND DAY OF JUNE, 1989.

William L. Edmonds
Chief Bankruptcy Judge

cc: David M. Nelsen,

Trustee/Atty. for Trustee
Neven Mulholland,
Atty. for First Interstate Bank
M. Gene Blackburn and
Michael P. Mallaney,
Attys. for Debtor
U.S. Trustee

In the United States District Court
For the Northern District of Iowa
Central Division

IN RE:
Appeal No. C89-3055

ORDER

Bankruptcy No. [Y-82-03341](#)
LARRY K. LEMLEY,
Debtor.

This matter is before the court on appellant David M. Nelsen's appeal, filed September 20, 1990, from a decision of the bankruptcy court,⁽¹⁾ entered June 22, 1989, disallowing certain attorney's fees and trustee's expenses claimed by Mr. Nelsen, attorney for the trustee and the trustee, and the bankruptcy court's denial, filed August 7, 1989, of the appellant's motion to reconsider. No resistance to appellant's appeal has been filed. Appellant has requested oral argument in his brief filed March 1, 1990. This request will be denied.

On October 17, 1989, appellant and Neven Mulholland, attorney for First Interstate Bank, filed a notice of settlement of appeal. On November 17, 1989, this court entered an order remanding this matter to the bankruptcy court for a hearing and action on the proposed settlement of the appeal. On January 3, 1990, the bankruptcy court entered an order declining to approve the proposed settlement. On March 1, 1990, appellant filed a brief in support of his position. On March 27, 1990, the clerk of the bankruptcy court submitted a second certificate on appeal. This matter is now ready for decision.

"The bankruptcy court's findings of fact are not to be overturned unless clearly erroneous; however, its conclusions of law are subject to de novo review." In re Martin, 761 F.2d 472, 474 (8th Cir. 1985). See also Matter of Newman, 875 F.2d 668, 670 (8th Cir. 1989) (citing Martin); Bankruptcy Rule 8013 (findings of fact may not be set aside unless clearly erroneous).

On March 10, 1989, David M. Nelsen, as trustee, filed an application for trustee's fees in the amount of \$2,121.86 and expenses in the amount of \$2,630, and, as attorney for the trustee, filed an application for attorney's fees in the amount of \$16,500 plus expenses in the amount of \$189.20. In its order of June 22, 1989, the bankruptcy court disallowed \$1,317 of the claimed trustee's expenses and \$5,390 of the claimed attorney's fee. The disallowed \$1,317 was for claimed secretarial expenses. The court denied these claimed expenses on the ground that the documentation of this expense was insufficient to permit reimbursement. Order, filed June 22, 1989, at 8-9. The bankruptcy court disallowed the \$5,390 in attorney's fees for three reasons. First, the court found that the claimed hourly rate of \$125 was excessive. Id. at 46. The court found that a rate of \$100 per hour was fair and reasonable. Id. at 6. Second, the court found that 14.4 hours of claimed service were incurred before Mr. Nelsen's appointment as attorney for the trustee and thus were not compensable. Id. at 6. Third, the court found that 13 of the claimed hours were spent in travel, which should-be compensated at \$50 per hour. Id. at 7.

The court has read appellant's brief and examined the supporting documents submitted. Finding no error in the opinion of the bankruptcy court, this court determines that it could add little to this case by a separate opinion coming to the same legally warranted conclusions.

ORDER:

Accordingly, It Is Ordered:

1. Appellant's request for oral argument, filed March 1, 1990, is denied.
2. The decisions of the bankruptcy court, entered June 22, 1989, and August 7, 1989, are hereby affirmed.

Done and Ordered this 12th day of September, 1990.

David R. Hansen

Judge

UNITED STATES DISTRICT

COURT

United States Court Of Appeals

For the Eighth Circuit

No. 90-2794

In Re: Larry K. Lemley,
Debtor.

David M. Nelsen, Trustee and
United
Attorney,
the

of Iowa.
Appellent,

[UNPUBLISHED]
vs.

First Interstate Bank,
No. [Y-82-03341](#)
Appellee.
[C89-3055](#)

Appeal from the

States Court for

Northern District

Bankruptcy

Appeal No.

Submitted: March 4, 1991
Filed: March 13, 1992

Before ARNOLD, WOLLMAN, and BEAM, Circuit Judges.

PER CURIAM.

David M. Nelsen appeals the Judgment of the district court⁽²⁾ affirming the bankruptcy court's⁽³⁾ decision to award less than Nelsen requested in fees and expenses for his services as bankruptcy trustee and attorney to the trustee in this Chapter 7 proceeding.

We have carefully reviewed the record, and conclude, as did the district court, that the bankruptcy court did not abuse its discretion in making its award. See In re Urban Am. Der. Co., 564 F.2d 808, 809 (8th Cir. 1977) (per curiam) (standard of review). The bankruptcy court did not apply an improper legal standard or base its award on clearly erroneous factual findings. See, In re McCombs, 751 F.2d 286, 288 (8th Cir. 1984) (per curiam); In re Endeco, Inc., 675 F.2d 166, 168 (8th Cir. 1982).

Accordingly, the judgment is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

1. The Honorable William L. Edmonds, United States Bankruptcy Judge.
2. The Honorable David R. Hansen, United States District Judge for the Northern District of Iowa.
3. The Honorable William L. Edmonds, United States Bankruptcy Judge for the Northern District of Iowa.

[To the top](#)