

In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

NETWORK COMMUNICATIONS INC.
Debtor(s).

Bankruptcy No. X90-02242S
Chapter 11

ORDER RE: APPLICATION FOR COMPENSATION FILED BY COUNSEL FOR THE DEBTOR

The matter before the court is the application for professional compensation filed by Jeffrey L. Poulson, the attorney for the debtor. Notice of the application was given to all parties. The only objection was filed by the Committee for Unsecured Creditors (COMMITTEE). Hearing on the application was held February 16, 1993, in Sioux City. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A).

Findings

Network Communications, Inc. (NETWORK), a telemarketing company located in Sioux City, filed its chapter 11 petition on December 24, 1990. Its main customer was U. S. Sprint Communications Limited Partnership (SPRINT) for which it sold long distance telephone service. Although it attempted to stay in business, it was unable to do so, and on or about January 23, 1991, NETWORK ceased operations. It was obvious to management at that time that NETWORK would not be able to reorganize as a going concern. However, NETWORK management decided to file a liquidation plan. A motion to dismiss or convert filed by the Committee was resisted by the debtor; the motion was denied.

Poulson requests fees and expenses totalling \$31,055.82. Poulson represented the debtor beginning December 4, 1990. It appears from the itemization of time and expenses (ITEMIZATION) that early on, his work was devoted to settlement with one or more creditors, rather than bankruptcy. It also appears that bankruptcy was an option worked on by the attorney as early as December 14, 1990. Poulson was paid a retainer of \$10,000.00 by the debtor. There is no evidence of when it was paid. It was more than sufficient to pay debtor's pre-filing legal fees and expenses.

During the case, Poulson initiated four adversary proceedings on behalf of the debtor. All were settled. The following amounts were paid to the estate:

\$20,000.00 by defendant Bell Atlantic;

\$ 3,543.50 by defendant First National Bank;

\$15,000.00 by defendant Standard Office Equipment; and

\$95,000.00 by SPRINT.

Creditor Gary Penisten claimed a security interest in the monies paid by SPRINT. The debtor's liquidation plan was confirmed on March 3, 1993. Pursuant to the plan and Penisten's claim, Penisten received payment of \$74,575.00 in principal, \$10,291.00 in interest and \$541.75 in attorney's fees. The total payment was \$85,407.75. There is no dispute that Penisten's security agreement gave him the right to add attorney's fees to the secured portion of his claim.

With only minor exceptions, Poulson performed all the legal services for the debtor. He seeks compensation at the rate of \$90.00 per hour. This rate is reasonable. Attorney time on the case totaled 258.30 hours. Exhibit C of the fee application attempted to break out litigation time, but it did not show each adversary proceeding separately. From an examination of Exhibit C, the court finds that the attorney spent 110 hours of his total time on the SPRINT litigation. The firm's law clerk spent 69 hours doing research on the case; of that, 27.2 hours were spent on SPRINT.

The attorney's expenses total \$5,138.82. The itemization does not make it possible to attribute an exact amount of this figure that was incurred in the SPRINT litigation. The attorney spent approximately 42 per cent of his time on the SPRINT case. The court doubts that this high a percentage of expenses was spent on the SPRINT case. One reason for this doubt is that the filing fee in the case is part of these expenses as are filing fees (at \$120.00 each) for three adversary proceedings besides SPRINT. Thus, in filing fees alone, SPRINT accounts for only 13 per cent of total filing fees. The court estimates that one-fourth of the expenses in the case were spent on the SPRINT case. One fourth of \$5,138.82 equals \$1,284.70. This estimate will be rounded off to \$1,200.00. The total cost of the SPRINT litigation is estimated to be \$12,188.00. The out-of-pocket expenses not associated with SPRINT are estimated to be \$3,938.82 (\$5,138.82 minus \$1,200.00). The attorney time not associated with SPRINT is estimated to be 148.30 (258.30 minus 110).

There will be no distribution in the case to general unsecured creditors. Priority unsecured creditors will receive a dividend. These creditors include the former employees of the debtor.

Discussion

Poulson is entitled to reasonable compensation for actual, necessary services provided to the debtor-in-possession and to reimbursement of actual necessary expenses. 11 U.S.C. § 330(a). The Unsecured Creditors Committee objects to the amount of the application arguing that once the debtor's management realized that reorganization as a going concern was not possible, the case should have been voluntarily converted to chapter 7 with the resultant appointment of a trustee. The Committee contends that a chapter 7 trustee would have liquidated the assets of the debtor much more cheaply than the debtor-in-possession which used the extensive services of Poulson to attain the same object through sales, settlements and plan distribution.

The court's concern is that counsel for a debtor-in-possession should not be compensated as a professional for performing the non-legal duties of the debtor-in-possession. But that is true also in a liquidation case--the trustee's attorney in chapter 7 should not be compensated for performing the non-legal duties of the trustee. The court is generally watchful that attorneys are not compensated as professionals for performing trustee duties.

The court finds no such abuse in this case. The continuance of this case in chapter 11 was worthwhile because of the special efforts of the debtor-in-possession in selling assets and settling controversies. The court cannot find from the evidence that a trustee would have done better or substantially better.

In examining the itemization, the court sees no pattern of abuse by Poulson in doing work more appropriately done by a chapter 7 trustee. However, there are two difficulties in this area--the application is sometimes vague as to the purpose of phone calls, letters and conferences. Also, the itemization lumps various tasks together, making it difficult for the court and parties to determine if the amount of time spent on a task was excessive or unreasonable. Where fee itemizations are vague or contained "lumped" entries, the court has on occasion imposed a five per cent reduction in time allowed rather than deny compensation. Such a reduction is warranted here. The reduction will be applied to the attorney's time spent on matters other than the SPRINT litigation.

Also, the court must state its concern regarding the cost of the SPRINT litigation. The litigation was estimated by the court to cost \$12,188.00. This figure is composed of attorney's fees of \$9,900.00 (110 hours at \$90.00 per hour); law clerk expenses of \$1,088.00 (27.2 hours at \$40.00 per hour); and an estimated \$1,200.00 in expenses.

The debtor settled its proceeding against SPRINT for \$95,000.00. Of this, \$85,407.75 went to the creditor claiming a security interest in the claim. Payment of the secured claim left only \$9,592.25 for the estate. No other creditor claimed an interest in this amount. To permit the debtor to pay \$12,188.00 in attorney's fees to recover approximately \$9,600.00 would be to reduce the unencumbered assets of the estate to the detriment of priority and other unsecured creditors, and to Penisten's benefit. Had the claim against SPRINT been abandoned, Penisten might have succeeded in bringing the suit himself. He might have been paid in full, but if so, he would have obtained nothing else from the estate. If not paid in full, any deficiency would have availed him a general unsecured claim. Such creditors in this case are receiving nothing. For the estate to pay part of his attorney's fees would unfairly put him in a better position vis a' vis the other unsecured creditors. The settlement value of the claim against SPRINT was not great enough to pay Penisten in full **and** pay all attorney's fees associated with the collection. Had the claim been abandoned, legal fees would have been Penisten's costs, not the estate's. The court will not permit those attorney's fees not covered by the settlement to be paid with other assets of the estate. Therefore, the allowance of the SPRINT litigation will be limited to \$9,592.25.

In addition, the court will allow Poulson 140.9 hours (148.30 - 5%) at \$90.00 per hour for other work in the case. The law clerk expense will be allowed in the amount of \$1,672.00 (41.8 hours at \$40.00 per hour). Of the total expenses of \$5,138.82, the sum of \$1,200.00 was attributable to the SPRINT case, and therefore a partial allowance has been made for those costs. The balance of \$3,938.82 will be allowed. The total allowance of fees and expenses is \$27,884.07. A retainer of \$10,000.00 having been paid and previously applied, the debtor shall forthwith pay the balance of \$17,884.07.

ORDER

IT IS ORDERED that Jeffrey L. Poulson is allowed as an administrative expense, professional fees and reimbursement of expenses in the amount of \$27,884.07. A \$10,000.00 retainer having been previously paid, the debtor shall forthwith pay Poulson the sum of \$17,884.07. Judgment shall enter accordingly.

SO ORDERED ON THIS 13th DAY OF JULY, 1993.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on I mailed a copy of this order and a judgment by U. S. mail to: Jeffrey L. Poulson, Clay Arendes, W. J. Giles, 2002 List, and U. S. Trustee.