

In the United States Bankruptcy Court

for the Northern District of Iowa

NATIONAL CATTLE CONGRESS INC.

Debtors.

Bankruptcy No. 93-61986KW

Chapter 11

ORDER RE APPLICATION FOR FINAL ORDER APPROVING ATTORNEYS' FEES AND EXPENSES FOR COUNSEL FOR UNSECURED CREDITORS' COMMITTEE

On March 5, 1996, the above-captioned matter came on for hearing on Application for Final Order Approving Attorneys' Fees and Expenses for Counsel for Unsecured Creditors' Committee. Debtor appeared by Attorney John Titler. Attorney Tom Fiegen appeared on behalf of Childers & Fiegen ("Counsel"). Also present was Assistant U.S. Trustee Janet Reasoner. After presentation of evidence and arguments of counsel, the Court took the matter under advisement. The time for filing briefs has now passed and the matter is ready for resolution. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

STATEMENT OF THE CASE

In this application, Counsel seeks fees for legal services performed as counsel for the Official Committee of Unsecured Creditors for the period between July 16, 1995 and January 31, 1996. Fees for that period total \$24,076.75 and expenses total \$5,528.64 for a total current request of \$29,605.39.

The Court considered this matter in a similar hearing held on September 7, 1995 on the Second Interim Application of Childers & Fiegen, P.C., Counsel for Official Committee of Unsecured Creditors, for Approval of Compensation of Attorneys' Fees and Expenses. At that time, Counsel sought fees for the period between August 16, 1995 and July 15, 1995. Fees for that period total \$31,338 and expenses total \$6,121.14 for a total request of \$37,459.14. The parties ultimately agreed to a partial payout on that fee application with Debtor reserving its right to pose objections at this time.

The Court also previously approved interim payment of fees and expenses based on 75% of balances shown on monthly statements subject to Court review and final allowance. The Court approved Counsel's first application for interim compensation for the period ending on August 15, 1994, subject to Debtor's reservation of its right to object to the fees, in the amount of \$38,108.60.

At this time, the Court will review all of Counsel's interim fee applications and all of the objections filed regarding those applications. The Court notes that the total cumulative fees requested is \$91,499.25 and cumulative requested expenses total \$17,908.16. To date Counsel has received total payments of \$75,134.44.

At the hearing, Counsel offered the following evidence: (1) a professional statement by Mr. Fiegen and (2) testimony by Gerald Maifeld, President of K&W Electric and a member of the Unsecured Creditors' Committee. Mr. Fiegen commented that the goal of the Committee was to obtain a payout for unsecured creditors which was as close as possible to 100%. He stated that the Committee's forcefulness kept the case alive and moving forward. Mr. Fiegen further stated that the Unsecured Creditors' Committee has interests which are not necessarily consistent with those of Debtor and that the Committee should not be penalized for attempting to protect the interests of unsecured creditors. He concluded that reliance solely on result-oriented hindsight does not allow the Court to fairly judge the work done by the Committee.

Mr. Maifeld was one of the most active members of the Unsecured Creditor's Committee. He testified about his role in the Committee activities. Mr. Maifeld testified that the Unsecured Creditors' Committee was contacted by various gaming companies and that the Committee did not necessarily seek them out. He stated that the Committee's concern was getting unsecured creditors paid. In addition, Mr. Maifeld made numerous statements concerning the Unsecured Creditors' Committee's concerns about the conduct of Debtor's management. As in prior hearings and testimony, many of these concerns were based upon rumor and conjecture in the community about management and were not supported by substantive facts.

Debtor objects to the application and reasserts objections to Counsel's previous fee applications. It states that the fees and expenses are, in general, excessive and not warranted under the circumstances. Specifically, Debtor asserts that the following charges are excessive: 1) Attorney Fiegen's hourly rate increase from \$100 to \$120 without explanation, 2) the rates of \$1.00 per page for fax transmissions regardless if the transmission is long distance or local and \$.30 per page for receipt of faxes. Debtor argues that a charge of \$.50 per page for transmitting faxes is more appropriate and that no charge should be made for receiving faxes.

Debtor asserts that some actions taken by Counsel interfered with and complicated Debtor's efforts to reorganize. On this issue, Debtor specifies that the following actions by the Committee and Counsel were unwarranted: 1) negotiations in 1994 with gaming companies, such as Lady Luck and Concorde Gaming, for the purpose of formulating a plan of reorganization; 2) pursuing allegations of Debtor wrongdoing in issuing bonds and granting mortgage liens; 3) attempting to obtain appointment of a Chapter 11 Trustee.

The U.S. Trustee asserts that Counsel must show that the services provided were reasonably related to the functions of the Committee described in § 1103(c). In an objection filed February 25, 1996, in which the Debtor joins, the U.S. Trustee objects that Counsel should show that the services relating to the following areas were reasonably related to Committee functions and did not unduly interfere with Debtors efforts to reorganize: (1) efforts to replace the board of directors; (2) negotiations with competing gaming corporations; (3) moving for appointment of a Chapter 11 Trustee; (4) drafting and filing a disclosure statement, plan and claims report; and (5) providing technical advice and expertise to Jamco, Inc.

At the hearing held September 7, 1996, August J. Masciotra testified on behalf of Debtor. He stated that the Committee and Counsel made statements to the media meant to harass and embarrass Debtor and its directors. He stated that Attorney Fiegen called Masciotra a lightning rod for critics and imparted the idea that passage of the referendum would only benefit the "fat cats" of the community.

Committee member Jerry Maifeld also testified at the September hearing on behalf of the Committee. He testified that all of Counsel's activity was authorized by the Committee. Debtor originally argued that some actions taken by Counsel were not authorized by the Committee. It appears to have now withdrawn this objection. At any rate, testimony by Mr. Maifeld undermines this objection and the Court concludes that Counsel has sufficiently established that all legal services rendered by Counsel were authorized by the Committee.

Subsequent to the September 7, 1995 hearing, Debtor provided copies of Counsel's pending fee statements with yellow highlighting showing the specific entries to which its objections are directed. A review of the highlighted entries indicates that Debtor's objections duplicate some of the U.S. Trustee's objections. For convenience, the Court has combined Debtor's and the U.S. Trustee's objections. These parties collectively object to Counsel's involvement in the following general areas: 1) objecting to incurring secured debt in April 1994; 2) communicating with Lady Luck and Concorde Gaming representatives regarding a management agreement, formulating a plan of reorganization in July 1994, including disclosure statement and report on claims, based on negotiations with Concorde Gaming, and attempting to replace the board of directors; 3) drafting and filing Motion for Appointment of Chapter 11 Trustee; 4) opposing revocation of Debtor's racing license; 5) investigating whether bonds and mortgages given by Debtor were correctly authorized by corporate resolution; 6) providing technical advice and expertise to Jamco, Inc.

Also subsequent to the September 7, 1995 hearing, Counsel sent the undersigned a seven-page letter which states that it is intended to serve as a brief in support of the fee application. This letter was never formally filed in the case.

CONCLUSIONS OF LAW

The Official Unsecured Creditors Committee was appointed pursuant to 11 U.S.C. § 1102(a). Counsel was appointed attorney for the Committee with court approval pursuant to § 1103(a). Under § 330(a)(1), the Court may award "reasonable compensation for actual, necessary services" rendered by professional persons employed under § 1103.

The fee applicant bears the burden to prove necessity and reasonableness of fees under § 330(a)(1). In re Tak Communications, Inc., 154 B.R. 514, 517 (Bankr. W.D. Wis. 1993). Legal services rendered on behalf of a committee are necessary if they are rendered in furtherance of the committee's duties under § 1103(c). In re Gulf USA Corp., 171 B.R. 379, 382 (Bankr. D. Idaho 1994); In re Heck's Properties, Inc., 151 B.R. 739, 745 (S.D.W. Va. 1992). Section 1103(c) states:

- c. A committee appointed under section 1102 of this title may --
 1. consult with the trustee or debtor in possession concerning the administration of the case;
 2. investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;
 3. participate in the formulation of a plan, advise those represented by such committee of such committee's determination as to any plan formulated, and collect and file with the court acceptances or rejections of a plan;
 4. request the appointment of a trustee or examiner under section 1104 of this title; and
 5. perform such other services as are in the interest of those represented.

Thus, the three basic functions of a committee are 1) to monitor the debtor's operations, 2) to investigate potential insider causes of action, and 3) to negotiate on the plan of reorganization. In re Cumberland Farms, Inc., 154 B.R. 9, 12 (Bankr. D. Mass. 1993). These functions are intimately tied to promoting the economic interests of the committee members. In re Pettibone Corp., 74 B.R. 293, 309 (Bankr. N.D. Ill. 1987).

In performing these functions, a committee is entitled to seek administration of the bankruptcy estate in a manner different from that favored by the trustee or debtor-in-possession. In re Lifschultz Fast Freight, Inc., 140 B.R. 482, 488 (Bankr. N.D. Ill. 1992). A committee acts within its statutory authority to seek appointment of a Chapter 11 Trustee as specifically provided in § 1103(c)(4). Heck's Properties, 151 B.R. at 757. Participation in formulation of a plan of reorganization and advising creditors of its determination regarding any plan formulated are perhaps a committee's most important functions. In re Wire Cloth Prods., Inc., 130 B.R. 798, 812 (Bankr. N.D. Ill. 1991).

Although committee functions are fairly broad and important, committees do not act in the capacity of "Grand Overseer" over every Chapter 11 case. In re Strayer Seed Farms, Inc., No. 95-62081KW, slip op. at 3 (Bankr. N.D. Iowa Jan. 9, 1996); Pettibone, 74 B.R. at 309. Counsel must limit the issues deemed necessary to investigate and not become overly involved in the case. Cumberland Farms, 154 B.R. at 12. A committee's attorney must use reasonable billing judgment and consider if the costs of services would be disproportionately large in relation to the size of the estate or likelihood of success. Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc., 924 F.2d 955, 959 (9th Cir. 1991). The value of the services must be viewed with the benefit of hindsight and must be reasonable in light of the outcome. In re Wang Labs., Inc., 149 B.R. 1, 4 (Bankr. D. Mass. 1992).

Allowance of fees for a committee's attorney lies within the sound discretion of the bankruptcy court. Puget Sound, 924 F.2d at 957. Such discretion is exercised with an eye toward balancing the two policies underlying § 330: economizing in the interest of the estate while encouraging qualified lawyers to take bankruptcy cases. Tak Communications, 154 B.R. at 516.

A . General Categories of Legal Services

The Court has reviewed Counsel's fee applications in light of the foregoing with special focus on each of the delineated categories of Counsel's services to which Debtor and/or the U.S. Trustee object.

1. Secured debt motion in April 1994

The Unsecured Creditors' Committee was acting within its authority in objecting to Debtor incurring secured debt. This occurred early in the case and, at that time, the Committee would have legitimate reasons for questioning the accumulation of additional debt. The Court has computed that Counsel billed approximately \$1,170 for services related to this matter. The Court will approve that entire amount.

2. Communicating with Lady Luck and Concorde Gaming, formulating a plan of reorganization, attempting to replace Debtor's Board.

The record is uncontested that the Unsecured Creditors' Committee was contacted by these gaming companies and not vice versa. Because of this and because of the state of Debtor's reorganization efforts at that time, it was not unreasonable for the Committee to explore alternatives. However, it appears that these contacts and the nature of the relationship went much further than was appropriate under the circumstances. Eventually it hindered Debtor's reorganization efforts, contrary to the interests of unsecured creditors.

The Committee's communications with the gaming companies are intertwined with its formulation of a plan of reorganization including disclosure statement and report of claims based on the negotiations with Concorde Gaming. The plan called for replacement of Debtor's Board of Directors and sale of Debtor to Concorde. On its face, the plan was more than likely unconfirmable as it had serious flaws in terms of implementation. Additionally, the Committee filed the plan at a time when the exclusivity period had not expired. The plan was stricken because it was filed within Debtor's period of exclusivity. Ultimately, the Committee decided not to resubmit it.

The Court concludes that a portion of the Committee's contact with Lady Luck and Concorde is compensable. However, approximately half of the time spent on these communications, including formulation of a plan and attempted replacement of the board of directors, should be stricken as unreasonable. The Court has computed that Counsel billed approximately \$11,000 for services related to this matter. The Court approves half of that amount, or \$5,500. The remaining \$5,500 is disallowed.

3. Motion for Appointment of Chapter 11 Trustee

Counsel for the Committee began drafting a Motion for Appointment of a Chapter 11 Trustee in June of 1994 and finally presented it to the Court in March of 1995. This appears to be largely an effort by the Unsecured Creditors' Committee to put pressure on Debtor's management. Letters generated by Counsel, which are part of the record, contain a fair amount of innuendo indicating that the purpose of filing this Motion to Appoint Trustee was to put pressure on Debtor's management. Although § 1103(c)(4) expressly authorizes the Committee to request appointment of a trustee, the Court concludes that in the present circumstances these efforts by the Committee were motivated by purposes other than those approved by § 1103(c)(4). See Heck's Properties, 151 B.R. at 757.

The Motion for Appointment of a Chapter 11 Trustee was not thoroughly investigated from a factual standpoint. The motion from a legal standpoint was not well considered. The evidence, when finally presented, established substantial innuendo and rumor about management throughout the community, with no real basis in fact. This is reflected in the Court's ruling denying the Motion for the Appointment of a Trustee.

All of Counsel's time spent on this motion is stricken as not being of benefit to the Committee or the estate. The Court has computed that Counsel billed approximately \$8,500 for services related to this motion. This entire amount is disallowed. The Court also rejects Counsel's expenses in April 1995 relating to this motion for witness and service fees in the total amount of \$494.21.

4. Opposing revocation of Debtor's racing license

The Racing and Gaming Commission's authority to revoke Debtor's license was highly contested. The Committee's brief was cogent and relevant to the issues. Its efforts promoted the interests of unsecured creditors and were of benefit to the estate. Counsel is entitled to be compensated for all of the time spent opposing the revocation of Debtor's racing license. The Court has computed that Counsel billed approximately \$3,320 for services related to this matter and will approve

that entire amount.

5. Investigating whether bonds and mortgages given by Debtor were correctly authorized by corporate resolution

It is fair that the Committee did some investigation to determine whether Debtor's management was authorized by corporate resolution in the acquisition of bonds and mortgages. However, it should have been apparent, after evidence was gathered and presented, that there was adequate corporate authorization for these actions. The Committee became overly involved in this issue. The Court concludes that a portion of the time spent on this matter should be stricken. The Court has computed that Counsel billed approximately \$4,100 for services related to this matter. The Court approves \$3,000 of that amount and disallows \$1,100.

6. Providing technical advice and expertise to Jamco, Inc.

Counsel had numerous contacts with Jamco, Inc., its attorneys and its principals. Some of these contacts are arguably legitimate as negotiations regarding Jamco's plan. However, as the U.S. Trustee points out, some of Counsel's activities constitute nothing more than time spent providing technical advice and expertise to Jamco concerning bankruptcy matters. This type of activity is not necessary to promote Committee objectives and is not compensable. The Court has computed that Counsel billed approximately \$4,500 for services related to this matter. Of that amount, the Court approves \$2,500 and disallows \$2,000.

B. Specific Objections

As noted above, Debtor has specifically objected that the following charges are excessive: 1) Attorney Fiegen's hourly rate increase from \$100 to \$120 without explanation and 2) the rate of \$1.00 per page for fax transmissions regardless if the transmission is long distance or local and \$.30 per page for receipt of faxes.

1. Increase in Hourly Rate

Debtor specifically objects to the increase in the hourly rate charged by Attorney Tom Fiegen from \$100 to \$120 per hour. Generally, in reviewing fee applications, the Court calculates the lodestar amount by considering the hours expended by the attorneys and estimating the reasonable time required to perform the compensable services. In re Snook, No. 92-62249LW, slip op. at 3 (Bankr. N.D. Iowa Jan. 11, 1994). The Court then multiplies the number of hours reasonably expended by a reasonable hourly rate. In re Apex Oil Co., 960 F.2d 728, 731 (8th Cir. 1992).

Debtor's objection appears to be directed at the reasonableness of Attorney Fiegen's new hourly rate of \$120. In In re Hunt's Health Care, Inc., 161 B.R. 971, 982 (Bankr. N.D. Ind. 1993), a creditor objected to trustee's counsel increasing hourly rates during the pendency of a case. The court overruled the objection as there was no evidence that the rates charged, either before or after the increase, were not reasonable or that it was not appropriate for counsel to increase its hourly rates. Id. In another case, a bankruptcy court's denial of increased fees was found to be clearly erroneous. Heck's Properties, 151 B.R. at 754. The district court stated that the case had progressed over two and one-half years and the billing rates for two associates would be expected to increase during that period. Id. Another court, however, has stated that the assumption that the passage of time alone warrants an automatic increase in counsel's hourly rate is unacceptable in a bankruptcy context. In re First Software, Corp., 79 B.R. 108, 119 (Bankr. D. Mass. 1987).

The Court concludes, in the exercise of its discretion and applying its personal knowledge of legal fees in this district, that Counsel's increase of Attorney Fiegen's hourly rate is not unreasonable or inappropriate. This case is fairly complex and longstanding. The rate of \$120 per hour for an attorney of Mr. Fiegen's experience rendering services such as those required in this case is acceptable.

2. Fax charges

Debtor objects to Counsel charging \$1.00 per page for fax transmissions and \$.30 per page for fax receipts. Courts have acknowledged in recent years that communication by facsimile transmissions has become "a way of life." In re Nephi Rubber Prods. Corp., 146 B.R. 782, 783 (Bankr. N.D. Ind. 1992). They differ, however, in deciding how to compensate for the expense of faxes.

In Nephi Rubber, the court allowed reimbursement for outgoing facsimile transmissions at the amount of the telephone call charge or, if such amount is not readily determinable, \$1.00 per page for domestic and \$2.00 per page for international transmissions. Id. at 784. The court did not allow reimbursement of incoming facsimile transmissions reasoning that the cost of receiving the transmissions is de minimis. Id. Another court decided to allow reimbursement for outgoing fax expenses at the actual cost of the telephone call, or, if telephone logs are not maintained, at \$.15 per page. In re Almacs, Inc., 178 B.R. 598, 605 (Bankr. D.R.I. 1995). Incoming faxes were reimbursed at a flat rate of \$.20 per page. Id. In In re CF & I Fabricators, Inc., 131 B.R. 474, 494 (Bankr. D. Utah 1991), the court concluded that charges for faxes would be reimbursed only at the actual cost, i.e. the cost of the telephone call for outgoing faxes and the actual cost of paper, toner or ink for incoming faxes.

The Court concludes that fax transmissions and receipts should be billed according to their actual cost. This Court has previously stated, in reviewing a fee application submitted by Childers & Fiegen, that there is no reason for charging more to receive a fax than to photocopy a document. In re Reil, No. 92-00860W, slip op. at 3 (Bankr. N.D. Iowa June 27, 1994). Therefore, a flat rate of \$.25 for fax receipts will be allowed as reflecting the actual costs of paper and toner or ink.

The actual cost of an outgoing fax is the cost of the telephone call. If the cost of the telephone call for outgoing faxes is not readily discernable, a flat rate of \$.25 per page would be acceptable as reasonably related to the amount of postage that would be required if the communication was made by mail rather than by fax.

The Court notes that starting approximately July 21, 1995, Counsel began charging \$.25 per page for faxes both received and transmitted. Counsel is requested to recompute the expenses charged for faxes prior to that date to conform with Reil and this decision. Furthermore, Counsel shall delete the charges of \$.25 per page for outgoing faxes if it has also charged for the actual cost of the telephone call.

C. Conclusion

In summary, the Court disallows the following amounts in response to objections to general categories of services charged: \$5,500 for negotiating with Lady Luck and Concorde Gaming, drafting a plan of reorganization, and attempting to replace Debtor's Board; \$8,500 for pursuing Motion to Appoint Chapter 11 Trustee; \$1,100 for investigating corporate authority for mortgages and bonds, and \$2,000 for providing advice to Jamco, Inc. These disallowed amounts total \$17,100. The Court also rejects Counsel's expense related to the Motion to appoint trustee of \$494.21. Fax charges are disallowed to the extent they are inconsistent with this ruling.

The Court has considerable discretion in making determinations concerning reasonableness and necessity of fees under § 330(a). In this ruling, the Court has taken into consideration the general tenor of correspondence and comments made by the Committee throughout this case. On occasion, the Committee appeared to be motivated more by a sense of vindictiveness than by actual legal support for the various positions assumed. It is the feeling of this Court that this colored the Committee's perception of how they were going to proceed and emotions sometimes replaced legal support. In light of this, the Court concludes that Counsel's fees and expenses are reasonable and necessary to the extent they are approved herein.

WHEREFORE, the various Applications of Childers & Fiegen, P.C., Counsel for Official Committee of Unsecured Creditors, for Approval of Compensation of Attorneys' Fees and Expenses are APPROVED in part and DENIED in part.

FURTHER, fees for legal services as set out in the Applications are DENIED in the amount of \$17,100.

FURTHER, all other fees requested for legal services are APPROVED.

FURTHER, expenses of \$494.21 are DENIED.

FURTHER, Counsel shall recompute charges for fax transmissions and receipts in accordance with this decision.

FURTHER, the remainder of the expenses requested are APPROVED.

SO ORDERED this 26th day of March, 1996.

Paul J. Kilburg
U.S. Bankruptcy Judge