

**In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division**

FILED

Date 4 O'clock & 30 min PM
6-7-93

MARY C. BECTON, CLERK *CR*
United States Bankruptcy Court
Savannah, Georgia

In the matter of:)
)
KEY AIRLINES, INC.)
)
)
Debtor)

Chapter 11 Case
Number 93-40226

ORDER ON PROFESSIONAL FEES

The firm of Brennan and Wasden, counsel for the Debtor, has moved this court, pursuant to 11 U.S.C. Section 330, for approval of professional fees and expenses for the period January 10, 1993, through March 12, 1993. Counsel requests \$71,026.50 in attorney and paralegal fees for 643.5 hours of work, plus \$3,314.37 in expenses advanced. Certain objections were filed by the United States Trustee based primarily upon assertions that Debtor's counsel had performed duplicative efforts and lumped its time entries in such a fashion as to make evaluation of the reasonableness of the fees impossible. A full evidentiary hearing was held on April 14, 1993, at 12:00 o'clock p.m.

Under Section 330 of the Bankruptcy Code, the Debtor's attorney may

be compensated as follows:

(a) After notice to any parties in interest and to the United States trustee and a hearing, and subject to sections 326, 328, and 329 of this title, the court may award to a trustee, to an examiner, to a professional person employed under section 327 or 1103 of this title, or to the debtor's attorney--

- (1) reasonable compensation for actual, necessary services rendered by such trustee, examiner, professional person, or attorney, as the case may be, and by any paraprofessional persons employed by such trustee, professional person, or attorney, as the case may be, based on the nature, the extent, and the value of such services, the time spent on such services, and the cost of comparable services other than in a case under this title; and
- (2) reimbursement for actual, necessary expenses.

11 U.S.C. §330. The court should award "reasonable compensation" for actual and necessary services rendered. Port Royal Land & Timber Co. v. Berkowitz, et al., 924 F.2d 208 (11th Cir. 1991); Grant v. George Schumann Tire & Battery Co., 908 F.2d 874 (11th Cir. 1990); In re Manoa, 853 F.2d 687 (9th Cir. 1988). The legislative history of Section 330 indicates that Congress intended fees to be awarded based on the value of the services, considering the cost of comparable non-bankruptcy services. *See generally*, Matter of Concrete Products, Inc., Chapter 11 Case No. 88-20540, slip op. at 18-19 (Bankr. S.D.Ga. Feb. 7, 1992) ("The Code adopts the position that

compensation should not be below a level allowed for comparable services other than in a case under the Code") (quoting Collier on Bankruptcy, ¶330.05 at 330-61).

According to the bankruptcy court in In re Gianulias, 11 B.R. 867 (E.D.Cal. 1989):

In enacting Section 330(a), Congress sought to ensure that bankruptcy attorneys would not be paid less than their colleagues practicing in other areas of the law. Congress expressed its concern that if the field did not provide adequate compensation, bankruptcy specialists, who enable the system to operate smoothly, efficiently and expeditiously would be driven elsewhere. H.Rep.No. 95-595, 95th Cong., 1st Sess. 329-30 (1977), reprinted in U.S.Code Cong. & Admin. News, 5963, 6286.

Id. at 871. The predecessor to Section 330, section 241, was based on "economy of administration and conservation of estate." Manoa, 853 F.2d at 689. Under the former code section, trustees and attorneys were considered public officers not entitled to compensation comparable to private employment. Id. However, Section 330 provides that attorneys should be paid at rates comparable to private employment for actual, reasonable, and necessary services rendered to a bankruptcy estate. See Matter of Concrete Products, Inc., *supra*, slip op. at 18-19.

The first analysis under Section 330 is to determine the "lodestar" fee.

Grant, 908 F.2d at 878-79. The court should multiply "the attorney's reasonable hourly rate by the number of hours reasonably expended." Id. at 879. Norman v. Housing Authority of City of Montgomery, 836 F.2d 1292, 1299 (11th Cir. 1988) (citing Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed. 2d 40 (1983)). The rates and hours should be reasonable in light of the twelve factors set forth in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974). See also Kerr v. Screen Extras Guild, 526 F.2d 67 (9th Cir. 1975) cert. denied 425 U.S. 951, 96 S.Ct. 1726, 48 L.Ed.2d 195 (1976).

After the lodestar is determined, the court may consider fee enhancement based on "risk of non-recovery, excellent or exceptional results, or delay in receipt of payment." Grant, 908 F.2d at 880. See generally, Manoa, 853 F.2d at 690-92; Matter of UNR Industries, Inc., 986 F.2d 207, 210-211 (7th Cir. 1993); In re Price, 143 B.R. 190, 197-199 (Bankr. N.D.Ill. 1992); In re Montgomery Drilling Co., 121 B.R. 32, 39 (Bankr. E.D.Cal. 1990). The converse is also applicable; fees may be reduced for less than average work, considering the twelve Kerr-Johnson factors. Montgomery Drilling, 121 B.R. at 39.

The court recognizes that the lodestar amount is presumptively accurate, and a party wishing to increase or decrease the lodestar must make a strong showing that the lodestar amount should be modified. Id. In re Kucek Development

Corp., 113 B.R. 652, 657 (E.D.Cal. 1990). *See generally* In re Old South Transp. Co., Inc., 134 B.R. 660 (Bankr. M.D.Ala. 1991); In re Gold Seal Products Co. Inc., 128 B.R. 822 (Bankr. N.D.Ala. 1991); In re Energy Co-op, Inc., 95 B.R. 961, 966 (Bankr. N.D.Ill. 1988).

In support of the application Debtor offered the testimony of Mr. J. Reid Williamson, an attorney at law. Mr. Williamson testified that he had personally been involved in a number of Chapter 11 cases, and that he was familiar with the market for bankruptcy attorneys and the quality of representation available in the Southern District of Georgia. Mr. Williamson further testified that he performed an exhaustive review of the back-up documentation to Debtor's counsel's bill, a complete review of the file maintained by Debtor's counsel for the time period in which fees are sought, and an extensive interview of Debtor's counsel. Mr. Williamson's uncontroverted testimony was that the hours expended and the hourly fees sought were reasonable, the hours and services were necessary and that they provided substantial benefit to the estate. He found no unnecessary charges for duplication of services. Moreover, he testified that the fee application as originally submitted and later supplemented were in keeping within the general practice of bankruptcy attorneys in this district and provided a sufficient basis upon which an evaluation of reasonableness could be made.

The reasonable hourly rate is the prevailing market rate among bankruptcy attorneys in the Southern District of Georgia for similar services performed by attorneys of reasonably comparable skills, experience and reputation. See Norman at 1299 (citations omitted). Williamson, an experienced practitioner, testified that he was familiar with the rates typically charged in Chapter 11 cases. He testified that such attorneys typically charged \$125.00 for partners, \$100.00 for associates, and \$45.00 for paralegals. This testimony indicated that it is customary in this district for bankruptcy attorneys to charge their paralegal time at an hourly rate, and not to absorb it as part of the attorney's hourly rate. Therefore, pursuant to Missouri v. Jenkins, 491 U.S. 274, 286-289, 109 S.Ct. 2463, 105 L.Ed 2d 229, (1989), the court will allow Debtor's attorneys to separately bill for the services of their paralegal. See also, Matter of Continental Illinois Securities Litigation, 962 F.2d 566, 568-69 (7th Cir. 1992).

Mr. Williamson has previously testified in other cases as to the reasonableness of attorneys' services. Pursuant to Federal Rule of Evidence 702, I conclude that he qualifies as an expert, and his opinion testimony as to the reasonable hourly rate, and necessity of the hours expended, will be considered by the court in determining the value of the attorneys' services. Based on his testimony I conclude that the lodestar hourly rate in this case is \$125.00 per hour for partners, \$100.00 for associates and \$45.00 for paralegals.

The next step in determining the amount of a fee award is to determine the number of hours reasonably expended by the attorneys for the benefit of the estate. See Norman, 836 F.2d at 1301 (citing Hensley v. Eckerhart, 461 U.S. at 434). Under Hensley, excessive, redundant, and unnecessary hours should be excluded. Exclusions for excessive or unnecessary work are left to the discretion of the trial court, but the court is aided in this determination by the evidence of "prevailing views among practitioners in the area on such subjects . . . As the . . . [C]ourt must be reasonably precise in excluding hours thought to be unreasonable or unnecessary, so should be the objections and proof from fee opponents." Norman at 1301.

The application and testimony of Wiley A. Wasden, III, a partner in Debtor's counsel's firm, establish that the hours for which compensation was sought were actually devoted to Debtor's case. This testimony was uncontradicted and establishes *prima facie* entitlement to the fee requested. The United States Trustee, pursuant to statutory authority, filed comments in response to the application and argued that the amount sought should not be awarded on a number of grounds.

Duplication of Services

Clearly there were numerous days during the application period when

more than one attorney in applicant's firm performed services for Debtor. Duplication of services arising from the assignment of excess personnel is not compensable. In this case, however, Debtor's counsel was operating from the inception of the case and for several weeks thereafter under immense stress and on very short deadlines. Upon consideration of the testimony, review of the application and taking judicial notice of the numerous hearings that occurred during the period in question, I find that there was no unnecessary duplication. In all instances, attorneys were either working simultaneously on separate projects or if working together, such was necessary due to the novelty of the issues or the short timeframe counsel had to prepare Debtor's case.

As the court in Frontier Airlines recognized:

The fee applications which have been submitted reflect the fact that in order to provide the needed services on what, at times, were highly expedited matters, it was clearly necessary for multiple attorneys to be involved. This is not to say that all of those attorneys were performing the same function, but their functions were, in large part, interrelated and could not be carried out without some degree of coordination and communication among them. To this end, intraoffice conferences among counsel are not only expected but are necessary, and there is no reason why compensation should not be provided for such services. Similarly, in preparing matters for trial, it may well occur that more than one attorney has been involved in preparing different aspects of the case and their appearance at court may be necessary even though they may not rise to be heard.

In re Frontier Airlines, Inc., 74 B.R. 973, 977-978 (Bankr. D.Colo. 1987).

Lumping Time Entries

Relying on the case of In re Beverly Mfg. Corp., 1841 F.2d 365 (11th Cir. 1988), the United States Trustee objects to compensation being awarded when numerous services involving several hours of work are "lumped" together. Testimony revealed that some attorneys working on the case made entries on their time records simultaneously with the performance of the task while others may have recorded all the work performed at the end of the day or within a few days thereafter. Testimony further revealed, however, that on days when substantial time was devoted to the case the attorneys did not separately record time entries on individual telephone calls, conferences, research projects, or drafting documents. The following excerpt from the application is illustrative:

01/21/93

WBW 9.70 hours

Telecons with M. Graves regarding UCC Amendments; Telecon with Clerk of Court regarding UCC Amendments; Research Stock Options and Management Contracts; Assist WAW in drafting stock option and management contract; telecons with Bill Parkinson; prepare fax to T.Howe

WAW 10.90 hours

Numerous telecons to work on Fling deal; Review and Supervise Preparation of Option Agreement

and Management Control Document; Numerous fax and telecons to Parkinson; Receipt and review of fax from M.Graves regarding opinion letters

I have previously held and now reaffirm that "lumping" time in this manner does not result *per se* in disallowance of the fee sought. In Beverly, *supra*, the Eleventh Circuit held only that it was not an abuse of discretion for the Bankruptcy Court to disallow such time from an award but this falls far short of a fixed rule that fee requests documented in such a manner can never be allowed. What must exist, however, is that there be some evidence from which the court can make a determination of reasonableness. Johnson, 488 F.2d at 717, 720. Without such evidence the court cannot articulate the reasons for its conclusion as required in order that there can be meaningful appellate review. Matter of First Colonial Corp., 544 F.2d 1291, 1298 (5th Cir. 1977). Johnson, 488 F.2d at 717, 729. See also Norman, 836 F.2d at 1304. In the above entries a total of 20.6 hours was billed by two attorneys on one day. It is impossible to tell how much time was spent on the telephone, the length of research, the novelty of any of the questions, or the time spent in drafting documents.

On other occasions "lumping" poses less difficulty in assessing the reasonableness of the fee sought - for example, when multiple tasks are performed but over a comparatively short period of time:

02/03/93
WAW 2.90 hours

Numerous telecons with Howe, Bill
Stalions, Bill Parkinson, Jr., and
Opler; Fax documents to Andrews,
Cullums and Opler

or where larger periods of time are consumed by single task or in court preparation
and appearances:

01/20/93
WAW 11.10 hours

Meeting with clients to prepare for
negotiations; Travel to Washington
for meeting and return

02/12/93
WAW 12.90 hours

Prepare, meet with client and
telecon with insurance man; Travel
to Waycross and attend 6-hour
hearing; Aid the court in final
preparation of order and return
travel

These excerpts illustrate why there can be no simple or magic formula
to determine when lumping is objectionable. It must be decided on a case-by-case
basis with the essential test being "Does the format of the bill, including lumping of
time entries, preclude meaningful review of the reasonableness of the bill?" I have
reviewed the application and find the entries on the following dates to be inadequate
to meet the test:

DATE	WAW Hours	WBW Hours	JBW Hours
01/21		9.7	
01/21	10.9		
01/26		7.6	
02/02	12.4		
02/03		7.3	
02/04	10.9	5.4	
02/05	8.9		
02/06	10.9	8.6	
02/09			9.1
02/10		7.4	10.5
02/11	10.1		7.2
02/12			10.3
02/18			5.6
02/22			6.1
03/01	8.0		
03/09	6.1		
03/10	6.8		8.2
Totals	85.00	46.00	57.00
Amount	<u>x \$125.00</u> \$10,625.00	<u>x \$100.00</u> \$4,600.00	<u>x \$100.00</u> \$5,700.00

This finding should not be interpreted as suggesting that the work was not performed as outlined. The record is uncontradicted that the work was performed. Rather, because of the multitude of tasks listed, the intermingling of time devoted to research or document drafting with meetings or telephone conferences of unknown duration, or general lack of specificity I am unable to assess the necessity of particular tasks or

reasonableness of the time spent. In such circumstances the time billed may be disallowed, Beverly, *supra*, or reduced. Matter of Isaiah James Davis, Chapter 11 Case No. 87-50208, Adv. No. 88-5006, slip op. at 48-49 (Bankr. S.D.Ga. September 8, 1989) (following Hensley v. Eckerhart). I have held that a reduction is appropriate where records were not kept contemporaneously or otherwise were insufficient to support an application in full. Concrete Products, *supra*, slip op. at 66. *See generally* Norman, 836 F.2d at 1303. In this case I find such a reduction rather than disallowance to be in order. Percentage reductions have been approved as a practical means of trimming fee applications in some cases. *See* Gates v. Deukmejian, 987 F.2d 1393, 1399 (9th Cir. 1992), and cases cited therein. While percentage reductions have been termed a "meat axe approach" in some factual settings, clearly "laser precision" is impossible in this case. To disallow these hours entirely would be unwarranted in view of the fact that considerable effort was clearly expended. However, some reduction is demanded: first, in order to insure that future applications in this and other cases be better documented so that an assessment of reasonableness can be made, and second, to bring the fees allowed for these hours of effort to a reasonable level in light of the services actually described. I therefore order a 33% reduction in the fees otherwise allowable for these services which amounts to a \$6,975.00 reduction. I agree with the court in Frontier Airlines that "slavish and burdensome" record-keeping should not be the goal. Nevertheless more specificity is required as to the dates and items set forth above to be allowed in full.

I also find the following entries to be insufficiently documented to warrant compensation at a rate applicable to attorneys.

<u>Date</u>	<u>Attorney</u>	<u>Hours</u>
02/19	JBW	6.8
03/03	JBW	5.2
03/04	JBW	6.9
03/08	JBW	7.6
03/09	JBW	9.8
	TOTAL	36.30

I will allow compensation for these hours at the rate applicable for paralegals inasmuch as they appear, through necessity, to have been handled by counsel because of Debtor's small staff and the time pressure the parties operated under. This results in an additional reduction of 36.30 x \$55.00 or \$1,996.59.

Benefit to the Estate

The United States Trustee questions whether sufficient benefit to the estate has been shown to support an award.¹ The concept of benefit is included

¹ Under the Bankruptcy Act of 1898, Section 241 authorized attorney compensation as follows:

The judge may allow . . . reasonable compensation for services rendered and reimbursed for proper costs and expenses incurred in a proceeding under this chapter . . .

Awards under §241 were based on economy of administration and conservation of the bankruptcy estate. Manoa, 853 F.2d at 689. In re Beverly Crest Convalescent Hosp., Inc., 548 F.2d 817, 820-21 (9th Cir. 1976), as amended 1977; In re York Int'l Bldg., Inc., 527 F.2d 1061, 1072 (9th Cir. 1975). Trustees as well as bankruptcy attorneys were considered public officers and not entitled to compensation comparable to private employment. Manoa, 853 at 689. York, 527 F.2d at 1069. Under these old principles, if a lawyer's work did

among the factors for fee allowance set forth in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974).

- 1) The time and labor required;
- 2) The novelty and difficulty of the legal questions;
- 3) The skill required to perform the legal service properly;
- 4) The preclusion of other employment by the attorney due to acceptance of the case;
- 5) The customary fee for similar work in the community;
- 6) Whether the fee is fixed or contingent;
- 7) Time limitation imposed by the client or the circumstances;
- 8) The amount involved and the results obtained;
- 9) The experience, reputation, and ability of the attorney;
- 10) The undesirability of the case;
- 11) The nature and length of the professional relationship with the client; and
- 12) Awards in similar cases.

Id. at 717-19. Factor "8," however, includes both the amount involved and the result

not subsequently benefit the estate, the lawyer was not paid in order to conserve the assets of the estate. *See generally* Port Royal, 924 F.2d at 208. Under §330, the court must look at whether the services were actually rendered, reasonable, and necessary and must not immediately disallow compensation upon a showing of lack of benefit. Id.

obtained and it is only one of the twelve factors utilized to establish a reasonable fee, not the dispositive factor.

In this case, the results obtained have been beneficial. Through counsel's efforts, pre-petition attempts to cancel Debtor's lease of four aircraft were thwarted. Counsel was also responsible for reversing pre and post-petition efforts to cancel Debtor's flight insurance. Because of counsel's efforts Debtor was afforded the opportunity to use cash collateral and to enjoy the full benefits of the "breathing spell" envisioned by Chapter 11 to permit reorganization to succeed. During the time covered by the application Debtor continued flight operations and generated over \$800,000.00 in gross receipts. Had Debtor's counsel not vigorously and effectively prosecuted the many actions brought before this court, this Debtor would have shut down with no opportunity to seek additional capital or to market its assets, principally its FAA and DOT certificates, in an effort to pay creditors.

Whether those efforts are ultimately successful is not the only test. Instead, as suggested in Port Royal Land and Timber Co. v. Berkowitz, 924 F.2d 208 (11th Cir. 1991), even unsuccessful litigation may be compensated if the effort was actually made, was reasonable and was necessary to the faithful representation of the

bankruptcy estate.² The language of Section 330 does not authorize the court to award attorney's fees only to a prevailing party. Rather, the statute authorizes the court to award "reasonable compensation for actual, necessary services rendered . . . " 11 U.S.C.A. §330(a)(1). Port Royal, 924 F.2d 209. Therefore, even if the benefits outlined above are transitory in nature, I will not penalize counsel for necessary services which were of potentially great value to Debtor at the time rendered. If market conditions had been better and if counsel had been successful in attempts to sell Debtor or attract new capital, the entire bankruptcy proceeding might have been avoided. However, that is not the case. Counsel should be compensated for necessary services although "everyone loses something" in the final analysis. Manoa, 853 F.2d at 691. Counsel has not delayed the administration of this case or provided the Debtor with substandard representation which would warrant a decrease in fees.

The United States Trustee's final objection appears to be that the fee request is simply "too much," in part because of time devoted to research. Although the attorneys' fee application contains a number of references to research, there is no evidence to support a finding that this work was inflated or unnecessary. This case has involved a number of issues which do not typically occur in a Chapter 11 proceeding. Debtor's attorneys have had to employ 11 U.S.C. Section 1110 and 11 U.S.C. Section

² Legislation pending in Congress would establish a similar analysis - whether the fees were "necessary in the administration of or beneficial toward the completion of the case." This language, like the Port Royal order reversing the denial of fees where there had been no traditional monetary benefit supports my conclusion that fees for Chapter 11 debtors' counsel are not contingent solely upon successful confirmation of a plan.

108(b), have sought authority to pay pre-petition debts to avoid a seizure of aircraft and a number of other unusual issues. Further,

No matter how experienced a lawyer is, he has to conduct (or have conducted for him) research to deal with changes in the law, to address new issues, and to refresh his recollection. No one carries the whole of Federal [Bankruptcy Law] -- not only the many detailed statutes and regulations but the thousands of decided cases - around in his head, and a lawyer who tries to respond to a motion or brief without conducting fresh research is courting sanctions or a malpractice suit.

Matter of Continental Illinois Securities Litigation, 962 F.2d 566, 570 (7th Cir. 1992).

I am not authorized to "destroy substantial entitlements to attorneys' fees on the basis of inarticulable and unsubstantiated dissatisfaction with the lawyers' efforts to economize on their time and expenses." Id. See also Norman at 1302 ("There is nothing inherently unreasonable about a client having multiple attorneys, and they may all be compensated if they are not unreasonably doing the same work and are being compensated for the distinct contribution of each lawyer.") (citing Johnson v. University College of University of Alabama in Birmingham, 706 F.2d 1205, 1208 (11th Cir. 1983), *cert. denied*, 464 U.S. 994 (1983)).

Debtor's counsel has broken down the services provided into several primary areas. The first involves a proposed sale of Debtor to Fling Vacations. The

second involves a proposed sale to Skybus, Inc. As previously noted these efforts were made in an effort to maintain Debtor's viability without the necessity of filing a Chapter 11, a goal which is to be encouraged, and are compensable. The third relates to Debtor's aircraft and an adversary involving the purported termination of the leases. The fourth covers a number of insurance matters, including an attempted post-petition termination by the aircraft insurers and the carriers for all other insurers. The fifth concerned Debtor's use of cash collateral. The sixth involved actions taken in response to a threatened seizure of Debtor's aircraft. All of these matters were essential to preserving Debtor as a viable airline, presented novel questions of law, were performed under great time pressure and achieved positive results for Debtor.

The eighth area presented in counsel's application involved general administration of the bankruptcy proceedings, including preparation of schedules, etc., and are actual, necessary expenses of a Chapter 11 debtor. As to each of these areas, Mr. Williamson testified that the hours expended were entirely within the limits of what could be accepted as normal for highly qualified bankruptcy attorneys practicing in this District. Given the nature of the matters involved, I conclude that these efforts were actual, necessary services, except as otherwise noted herein.

I therefore find that the hourly rates charged by the applicant are reasonable and the number of hours for which compensation is sought should be

allowed except as otherwise noted. No issue was raised as to the reimbursement of expenses advanced by Debtor's counsel other than fax charges which counsel billed at a rate of \$1.50 for the first page and \$1.00 for each additional page. The United States Trustee urged that fax charges be compensable at a rate of \$.50 per page plus the cost of any associated long distance toll charges. I sustain that objection and direct counsel to prepare an amended statement of fax expenses in accordance with this ruling, together with an order allowing the expenses as then allowable. The balance of expenses advanced of \$3,314.37, less \$778.00 fax charges are allowed. IT IS HEREBY ORDERED that Debtor's counsel is awarded the sum of \$62,054.41 in attorney's fees, and \$2,536.37 in expenses, with fax expenses to be allowed by separate order.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 7th day of June, 1993.