UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:

ANYTHING ELECTRIC CONTRACTORS COMPANY, INC.,

Chapter 7
Case No.: 96-10751

Debtor.

APPEARANCES:

ROBERT S. CATAPANO-FRIEDMAN, P.C.
Attorney for I.B.E.W. Local No. 724 Pension Fund, I.B.E.W. Local No. 236 Annuity and Health Care Funds, and I.B.E.W. Local Union No. 236
744 Broadway
Albany, NY 12207

WALSH & WALSH, LLP.
Attorneys for The Adirondack Trust Company
42 Long Alley
Saratoga Springs, NY 12866-2116

Marion Wait Walsh, Esq.

CHRISTIAN H. DRIBUSCH, ESQ.
Chapter 7 Trustee
Patroon Building
5 Clinton Street
Albany, NY 12207

Hon. Robert E. Littlefield, Jr., United States Bankruptcy Judge

MEMORANDUM-DECISION AND ORDER

Currently before the court is the motion by I.B.E.W. Local No. 724 Pension Fund, I.B.E.W. Local Union No. 236 Annuity and Health Care Funds (successors in interest to I.B.E.W. Local Union No. 724 Annuity and Health Care Funds) (collectively the "Funds"), and I.B.E.W. Local Union No. 236 (successor in interest to I.B.E.W. Local Union No. 724) ("Union") for approval of an administrative expense priority claim under 11 U.S.C. §§ 507(a)(1)

and 503(b)(1)(A)[1] for unpaid contributions to the Funds and the Union attributable to post-petition services provided by Union electricians to the Debtor while it operated as a debtor-in-possession under Chapter 11, liquidated damages, interest, costs, and attorney's fees.

Jurisdiction

The court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157. This is a core proceeding under 28 U.S.C. § 157(b)(2)(B).

Facts

The facts are not in dispute. The Debtor filed a voluntary petition under Chapter 11 of the Bankruptcy Code on February 16, 1996. The Debtor operated as a debtor-in-possession from February 16, 1996 through November 3, 1998, at which time the Debtor's Chapter 11 case was converted to one under Chapter 7.

During the pendency of the Chapter 11, the Debtor used electricians supplied by the Union to conduct and continue its business. The Debtor was a party to a collective bargaining agreement (the "CBA") in effect for the post-petition period June 1, 1997 through February 28, 1999.[2] The CBA required the Debtor to make contributions to the Union and the Funds (collectively "Petitioners") in connection with work performed by the electricians hired from the Union.

The Debtor failed to pay required contributions to the Union and the Funds in connection

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[1]All statutory references herein refer to Title 11 of the United States Code, 11 U.S.C. §§ 101 -1330 (the "Bankruptcy Code"), unless otherwise specified.

[2]The parties stipulated that the CBA was not rejected by the Debtor before the subject post-petition services were performed. On its face, however, the CBA is a post-petition agreement, not a pre-petition agreement subject to rejection pursuant to § 365 and the conditions of § 1113. (*See* Ex. A to Joint Stipulation of Facts and Issues of Law.)

with post-petition services rendered by the Union electricians during the Chapter 11 proceedings for the months of July 1998 through October 1998. The contributions owing to the Union and the Funds under the CBA for this period total $46,677.41. The contributions are broken down as follows:

Health Care Fund	$17,258.16
Pension Fund	$10,399.15
Annuity Fund	$ 5,973.98
Union Dues	$ 3,801.83
Joint Apprenticeship Training Committee	$ 1,188.96
Vacation Fund	$ 4,425.17
Capital Region Labor Management Coordination Committee	$ 264.21
National Labor Management Committee	$ 44.01
Administrative Maintenance Fund	$ 528.43
National Electrical Benefit Fund	$ 2,793.51
	$46,677.41

Section 6.11 of Article VI of the CBA requires the Debtor to pay interest at the rate of 12% per annum to the date of payment on all delinquent contributions to the Pension, Annuity, and Health Care Funds, and reasonable attorney's fees and other expenses of collection. Section 6.18 of the CBA provides for liquidated damages equal to 15% of the contributions owing, 10% per annum interest, attorney's fees, and court costs incurred in the recovery of the delinquent contributions owing to the Administrative Maintenance Fund. Petitioners seek to recover attorney's fees of $14,769.00.

This is the Petitioners' second motion filed for the relief requested. The Adirondack Trust Company ("ATC") opposed the original motion which was based in part on estimated, unpaid contribution amounts, and it was ultimately withdrawn. ATC again opposes the relief

sought in the current motion.

Arguments

ATC argues that the Petitioners' claim is not entitled to administrative priority under §§ 503(b)(1)(A) and 507(A)(1) merely because its components arise under a collective bargaining agreement. ATC believes that contributions for union dues, various committee funds, an administrative maintenance fund, and the national electrical benefit fund do not fit within a protected category and do not benefit the estate like a wage or a wage related claim. Relying upon *Adventure Resources, Inc. v. Holland*, 137 F.3d 786 (4th Cir. 1998), ATC submits that § 507 is the exclusive list of priorities fixed by Congress and that the courts are not free to fashion their own rules of super-priorities or sub-priorities within any given priority class. Thus, a "bankruptcy claim arising from the breach of a collective bargaining agreement may be afforded priority status 'only insofar as it fits into one of the categories singled out for preferential treatment in 507.' *Id*. at 797." (ATC's brief at 3).

Specifically, ATC objects to the following unpaid contributions to the Funds and Union being given administrative expense priority: Union Dues ($3,801.83); Joint Apprenticeship Training Committee ($1,188.96); Capital Region Labor Management Coordination Committee ($264.21); National Labor Management Committee ($44.01); Administrative Maintenance Fund ($528.43); and National Electrical Benefit Fund ($2,793.51). As a result, ATC asserts that unpaid contributions of $8,621.92[3] sought by the Petitioners are not entitled to administrative expense priority.

[3]The court believes ATC's calculation may contain a mathematical error. When the court adds the portions of Petitioners' claim that ATC argues are not entitled to administrative expense priority, it comes up with a total of $8,620.95.

Petitioners indicate that the Funds are trust funds and multiemployer plans within § 3(37) of the Employee Retirement Income and Security Act of 1974 ("ERISA") (29 U.S.C. § 1002(37)) and employee benefit plans within § 3(3) of ERISA (29 U.S.C. §1002(3)), and the Union is a labor organization as defined in 29 U.S.C.§ 152(5). Petitioners assert that Debtor's failure to make contributions to the Funds pursuant to the CBA and § 515 of ERISA (29 U.S.C. § 1145) gives rise to its liability under § 502(g)(2) of ERISA (29 U.S.C. § 1132(g)(2)).

It is the Petitioners' position that their entire claim for contributions is entitled to administrative priority status. Petitioners contend that ATC's narrow interpretation that only "wage or wage related" claims fit within the priority scheme afforded under § 507(a)(1) is inconsistent with the rules of construction under the Bankruptcy Code and relevant case law. Petitioners argue that the contributions objected to by ATC were equally required under the CBA as were the pension, health care, and vacation contributions.

Furthermore, it is Petitioners' contention that the contributions in question are "wage related," because they are required under a collective bargaining agreement and were to be made by the employer as partial consideration for the employment services performed by the union workers covered by the CBA. Petitioners cite *In re World Sales, Inc*., 183 B.R. 872, 873, 877, and 878 (9th Cir. BAP 1995), *In re Chicago Lutheran Hosp. Ass'n*., 75 B.R. 854, 856 (Bankr. N.D. Ill. 1987), and *In re Schatz Fed. Bearings Co., Inc*., 5 B.R. 549, 552-3 (Bankr S.D.N.Y. 1980), as support for the proposition that all of the contributions owing to Petitioners for July 1998 through October 1998, along with interest, attorney's fees, and liquidated damages provided for under the CBA or ERISA are entitled to first priority as administrative expenses in these proceedings pursuant to 11 U.S.C. § 503(b)(1)(A).

Petitioners rely on § 502(g)(2)(C)(ii) and § 502(g)(2)(D) of ERISA in support of their claim for liquidated damages of up to 20% of the amount of the contributions owing to their ERISA covered multiemployer plans and reasonable attorney's fees and costs of collection, respectively. In addition, they assert the CBA provides for liquidated damages of 15% of the delinquent amount owing to the Administrative Maintenance Fund. The Petitioners cite *In re San Rafael Baking Co.*, 219 B.R. 860 (9th Cir. BAP 1998), and *In re World Sales, Inc.,* 183 B.R. 872, as support for their position that their liquidated damages and attorney's fees and costs are entitled to administrative priority status.

Petitioners seek interest equal to 12% per annum for the delinquent amount owing to the Funds pursuant to§ 502(g)(2)(B) of ERISA and the terms of the CBA. 29 U.S.C. § 1132(g)(2). Petitioners also seek interest of 10% per annum on the amount owing to the Administrative Fund pursuant to the CBA. ATC asserts that Petitioners are entitled to post-petition, pre-conversion interest on the delinquent contributions which are granted first priority status and cites *In re Olympia Holding Corp*., 250 B.R. 136 (Bankr. M.D.Fla. 2000), in support of its position. In their brief, the Petitioners agree to limit their request that interest on the contributions be accorded administrative expense priority to interest accruing post-petition and pre-conversion. (Petitioners' brief at 8, 15).

Although it cites no case law in support of its position, ATC asserts that liquidated damages and legal fees incurred to collect contributions due under the CBA should not be entitled to administrative priority under §§ 503(b)(1)(A)and 507(A)(1) simply because they are provided for in the CBA. ATC contends such claims should be afforded administrative priority only if they fall under a specific priority category delineated by Congress.

Discussion

Priorities for payment of claims are enumerated in § 507. First priority is given to administrative expenses allowed under § 503(b) and any fees and charges assessed against the estate under chapter 123 of Title 28. 11 U.S.C. § 507(a)(1). The presumption in bankruptcy cases is that a debtor's limited resources will be divided equally among creditors. *Trustees of the Amalgamated Ins. Fund v. McFarlin's, Inc.*(*In re McFarlin's, Inc.*), 789 F.2d 98, 100 (2d Cir. 1986). For this reason, statutory priorities are narrowly construed. *Id*.

Section 503(b) identifies the types of claims allowable as administrative expenses in a bankruptcy case, including "the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case." 11 U.S.C. § 503(b)(1)(A). This section has been further qualified by case law to include only those expenses that (1) arise out of a post-petition transaction between a creditor and the bankrupt's trustee or the debtor-in-possession, and (2) relate to consideration supplied and beneficial to the debtor-in-possession and the operation of its business. *In re McFarlin's, Inc.*, 789 F.2d at 101. First priority administration claims basically include all other claims a trustee or debtor-in-possession incur so long as such claims are beneficial or necessary to the administration of the estate. *In re Chicago Lutheran Hospital Ass'n*., 75 B.R. at 856 (citing *Matter of Jartran*, 732 F.2d 584 (7th Cir. 1984)). The priority afforded under § 503(b)(1)(A) is based on the premise that the operation of a business by a debtor-in-possession benefits pre-petition creditors; therefore, any claims that result from that operation are entitled to payment prior to payment to "creditors for whose benefit the continued operation of the business was allowed." *Cramer v. Mammoth Mart, Inc. (In re Mammoth Mart, Inc.)*, 536 F.2d 950, 954 (1st Cir. 1976). Thus, §

503(b)(1)(A) provides an incentive for creditors and others to continue or commence doing business with an insolvent entity, because these parties will be paid ahead of other creditors. *Id*.

The contributions at issue constitute contractual liabilities under the CBA. While the CBA establishes the Petitioners' right to payment, the Bankruptcy Code, in turn, determines to what extent that entitlement is to be treated as an administrative expense.

There is no dispute that the CBA was entered into between the parties post-petition. Although there was no formal order of the court approving the CBA, § 363(c)(1) provides statutory authority for a debtor-in-possession to enter into transactions in the ordinary course of business without notice or a hearing.[4] This allows "a trustee (or debtor-in-possession) the flexibility to engage in ordinary transactions without unnecessary oversight, while protecting creditors by giving them an opportunity to be heard when transactions are not ordinary." *In re Leslie Fay Cos., Inc.*, 168 B.R. 294, 301 (Bankr. S.D.N.Y. 1994)(citing *Roth American*, 975 F.2d at 952). A debtor-in-possession's transactions in the ordinary course of business create expenses of administration. *In re Crystal Apparel, Inc.*, 220 B.R. 816, 830 (Bankr. S.D.N.Y. 1998). Thus, the issue presented is whether the CBA was executed in the ordinary course of business.

Courts have developed two tests commonly used to determine whether a transaction is in the ordinary course of business: (1) the "horizontal test" or "industry-wide test," and (2) the "vertical test" or "creditor's expectation test." *See In Re Lavigne,* 114 F.3d 379, 384 (2d Cir.

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[4]11 U.S.C. § 363(c)(1) provides:

> If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business without notice or a hearing.

1997)(citing *In re Roth American, Inc.*, 975 F.2d 949, 952-52). If either test is not satisfied, the disputed transaction is not in the ordinary course of business*, see In re Leslie Fay Cos., Inc*., 168 B.R. at 304; thus, application of these tests requires the court to engage in a two-step inquiry. The inquiry under the "horizontal test" is whether, from an industry-wide perspective, the transaction is of a kind commonly undertaken by companies in that industry. *In re Roth American, Inc*., 975 F.2d 949, 953 (3d Cir. 1992). The "vertical test" focuses on the creditor's reasonable expectation of what transactions the particular debtor-in-possession is likely to enter into in the ordinary course of its business. *Id.* This inquiry requires the court to "examine the debtor's transaction from the vantage point of a hypothetical creditor and inquire whether the transaction subjects a creditor to economic risks of a nature different from those accepted when it decided to extend credit." *In re Johns-Mansville Corp.*, 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986). Several courts have determined that post-petition collective bargaining agreements were in the ordinary course of business, and therefore could be entered into by a trustee or debtor-in-possession without court approval. *The Hillard Dev. Corp.*, 2004 W.L. 1347049 (Bankr. S.D.Fla. 2004); *see Leslie Fay Companies, Inc.*, 168 B.R. at 303(citing *In re Illlinois-California Express, Inc.*, 72 B.R. 987 (D. Colo. 1987); *In re DeLuca Distributing Co.*, 38 B.R. 588 (Bankr. N.D. Ohio 1984)); *see also In re IML Freight, Inc.*, 37 B.R. 556, 559 (Bankr.Utah 1984); *In re Roth American, Inc*., 975 F.2d 949.

In applying the "horizontal test" in this case, the court must compare the Debtor's business to similar businesses. In so doing, the court finds that the "horizontal test" is met. It would not be unusual for electrical contractors to employ union electricians to provide labor and to enter into collective bargaining agreements in order to secure the benefits of a unionized work

force. The court also finds that the "vertical test" is satisfied. By entering into the CBA, the Debtor was able to maintain a labor force and avoid disrupting its business. Such a transaction was not beyond the realm of transactions a hypothetical creditor could reasonably expect to be undertaken under the circumstances. No issue has been raised that the CBA required the Debtor to do anything extraordinary.

As stated by the court in *In re DeLuca Distributing Co.*:

> Given our national labor policy of encouraging collective bargaining agreements and avoiding labor strife..., the court finds that the reasonable expectation of creditors is that the debtor will enter into collective bargaining agreements. ... Such an agreement is often in the best interest of creditors since it helps to avoid the disruption of the debtor's business.

38 B.R. at 594.

Based upon the foregoing, the Court concludes that the Debtor's entry into the CBA was in the ordinary course of the Debtor's business. As a result, prior court approval was not needed, and the Petitioners' claim is entitled to administrative status. It cannot be disputed that the electricians' post-petition employment under the CBA benefitted the estate. A disruption in the operation of the Debtor's business was avoided, and the Debtor was able to continue operating as a debtor-in-possession for the benefit of creditors. The post-petition benefits accrued by the employees were actual and necessary expenses of preserving the estate and required under the terms of the CBA. The fact that the Debtor's business ultimately failed should not affect the Petitioners' administrative claim. To not allow the Petitioners' administrative claim would nullify the benefits the electricians bargained for through the Union, despite the fact that the parties had agreed to the terms of the CBA and the electricians performed under the CBA. It is reasonable to assume that the Union electricians who continued to work for the Debtor post-

petition did so with the reasonable expectation that if the Debtor's reorganization was not successful, their compensation under the CBA would be entitled to administrative priority status. In addition, as the Debtor enjoyed the benefits of the CBA, it is only equitable that it also must accept its burdens.

We must look to the consideration due the Petitioners for the benefit provided. The CBA spells out the compensation the electricians were entitled to for the labor they supplied. The court agrees with the Petitioners that the contributions owed for union dues, the joint apprenticeship training committee, the capital region labor management coordination committee, the national labor management committee, the administrative maintenance fund, and the national electrical benefit fund were equally required under the terms of the CBA as were the pension, health care, and vacation contributions.

Likewise, Petitioners' claim for liquidated damages, interest, and attorney's fees which accrued under the CBA based on the Debtor's default should also be recovered as an administrative claim. The CBA imposed certain obligations on the Debtor if contributions were not made timely. The attorney's fees sought are provided for in the CBA. The purpose of the attorney's fees clause in the CBA was to indemnify the Petitioners against legal expenses incurred by reason of the Debtor's default. This, however, does not entitle the Petitioner to a blank check for attorney's fees. It is incumbent upon the court to examine the reasonableness of the fees requested as the expenditure will, to the extent allowed, reduce the Debtor's estate.

Petitioner' seek attorney fees of $14,769.00. To evaluate the reasonableness of attorney's fees, this court is guided by the "lodestar" approach which requires the court to determine the reasonable hourly rate for services rendered and multiply that by the reasonable number of hours

required to complete the tasks at hand. In this case, the court finds the hourly rate of $135 charged by the Petitioners' counsel to be reasonable. In reviewing the number of attorney hours spent in connection with the Petitioners' motion, however, the court is struck by several factors.

First, it is unclear as to whether the time records were kept contemporaneously, or generated for the purpose of this motion. Second, the overall number of hours, namely 109.4, seems somewhat excessive given counsel's experience in representing unions and the fact that the motion did not involve novel or complex legal issues. Third, a majority of the time entries include multiple work components making it impossible to ascertain the time devoted to a specific task in order to fairly evaluate the work done. For example, on May 10, 2001, 3 hours were devoted to "[r]eview A. Shaw [m]otion papers and M. Walsh response to motion and phone discussions with M. Walsh, Atty. Daffner and client regarding same." (Catapano-Friedman Aff. ¶ 3.) On May 23, 2001, 2.5 hours were devoted to "[l]egal review regarding issues raised by Attorney Walsh regarding motion for administrative priority and phone conferences with M. Walsh, C. Dribusch and Attorney Daffner on same." (*Id.*)

Finally, a number of the entries contain tasks the court would consider clerical and/or ministerial and part of office overhead. For example, the May 22, 2001 entry includes time for picking up documents, approximately 15 entries include time for sending out a document, the April 5, 2002 and April 22, 2003 entries include time for filing documents, the April 5, 2002, August 5, 2002, and April 22, 2003 entries include time for serving documents, and the September 17, 2003[5] and February 18, 2003 entries include time for faxing. (*Id.*) This problem is

[5]The September 17, 2003 time entry is inserted between the September 13, 2002 and October 3, 2002 entries. Thus, chronologically, it would appear the services labeled September 17, 2003 were actually performed on September 17, 2002.

compounded by the fact that each of these clerical/ministerial tasks was lumped together with other tasks, thereby making it impossible for the court to conclude what amount of time was spent on the clerical/ministerial task as opposed to the legal tasks identified. Taking into account counsel's expertise, the issues involved, the time expended, and the problems the court identified with respect to the time records produced, a 30% reduction of the attorney's fees requested is reasonable under the circumstances.

Conclusion

Based upon the foregoing, the court concludes that the Petitioners are entitled to an administrative priority claim pursuant to §§ 503(b)(1)(A) and 507(a)(1). Accordingly, the court grants the Petitioners request for an administrative claim for unpaid contributions in the amount of $46,677.41, plus $6,805.52 in liquidated damages, and $512.01 for post-petition, pre-conversion interest, and $10,338.30 in attorney's fees pursuant to the terms of the collective bargaining agreement between the parties.

It is SO ORDERED.

Dated:
Albany, NY

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Honorable Robert E. Littlefield, Jr.
United States Bankruptcy Judge - N.D.N.Y.