

FINANCE DOCKET No. 11800
WILKES-BARRE & EASTERN RAILROAD COMPANY
REORGANIZATION

Submitted October 29, 1938. Decided November 3, 1938

Upon petitions, maximum limits of final allowances of compensation for services rendered and reimbursement for actual and reasonable expenses incurred, during specified periods, by the Commercial National Bank & Trust Company of New York, as temporary mortgage trustee under the debtor's first mortgage, and Bainton, McNaughton & Douglas and Walter T. Margetts, Jr., counsel and solicitor, respectively, for the temporary mortgage trustee, in connection with the debtor's reorganization proceedings, fixed.

Walter T. Margetts, Jr., for applicants.

George P. Ferguson for bondholders' committee.

REPORT OF THE COMMISSION

DIVISION 4, COMMISSIONERS MEYER, PORTER, AND MAHAFFIE

BY DIVISION 4:

The Wilkes-Barre and Eastern Railroad Company, hereinafter called the debtor, on September 25, 1937, filed in the District Court of the United States for the Middle District of Pennsylvania, in proceeding No. 9660 therein, a petition stating that it was unable to meet its debts as they matured and that it desired to effect a plan of reorganization under the provisions of section 77 of the act of July 1, 1898, entitled "An Act to Establish a Uniform System of Bankruptcy Throughout the United States", as amended. On the same date, the court entered an order approving the petition as properly filed.

By order of the court entered on October 27, 1937, Joseph P. Jennings was appointed trustee of the debtor's property, and his appointment was ratified by our order of November 20, 1937. Pursuant to authority granted by orders of the court entered on December 13, 1937, and January 21, 1938, the firm of Eilenberger & Huffman and Leo W. White were employed by the trustee to represent him as counsel and co-counsel, respectively. By our order of May 18, 1938, we approved maximum reasonable compensation at the rate of \$5,000 per annum to be paid monthly to Jennings, \$4,000 per annum beginning December 13, 1937, to be paid monthly to Eilenberger & Huffman, and \$4,000 per annum beginning December 13, 1937, to be paid monthly to White, such maximum limits of compensation not to be

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applicable for more than 60 days after the Commission should authorize the abandonment of any part or parts of the lines of the debtor.

By order of the court dated June 14, 1938, David Schwartz was appointed co-counsel for the debtor's trustee, to succeed Eilenberger & Huffman, resigned as of April 30, 1938. By our orders of July 30 and August 16, 1938, we approved maximum reasonable compensation at the rate of \$4,000 per annum beginning June 14, 1938, to be paid monthly to Schwartz.

On September 28, 1938, the following petitions for allowances were filed with the court: (1) The Commercial National Bank & Trust Company of New York, as temporary mortgage trustee under the debtor's first mortgage, for allowances of \$1,825 for services rendered and \$253.06 (amended by motion at the hearing before us to \$289.83) for expenses incurred from October 8, 1937, to August 9, 1938; and (2) Bainton, McNaughton & Douglas and Walter T. Margetts, Jr., counsel and solicitor, respectively, for the trust company, for allowances of \$4,000 for legal services rendered and \$405.44 for expenses incurred from October 5, 1937, to August 9, 1938.

Copies of these petitions have been duly received by us from the clerk of the court, so that we may fix maximum limits of allowances of compensation and expenses pursuant to the provisions of section 77 (c) (12) of the Bankruptcy Act, as amended. A hearing has been held.

The Commercial National Bank & Trust Company of New York, petitioner, hereinafter referred to as the trust company, by order of the court entered on October 8, 1937, was appointed temporary trustee under the debtor's first mortgage, dated June 1, 1892, and acted as such until August 9, 1938, when it was appointed by the court as permanent successor trustee.

On or about September 4, 1937, the Guaranty Trust Company of New York resigned as trustee under the debtor's first mortgage. This indenture was given to secure an issue of \$3,000,000, principal amount, of 5-percent bonds, of which \$2,665,000 is now outstanding. These bonds were endorsed with a guaranty of principal and interest by the New York, Susquehanna and Western Railroad Company, hereinafter called the Susquehanna. By agreement dated April 1, 1897, and prior agreements incorporated therein, the line of the debtor has been operated by the Susquehanna, and the latter has guaranteed and paid the debtor's operating expenses, taxes, and fixed charges, and has collected the debtor's revenues. On June 1, 1937, the Susquehanna filed, and the court approved, in the District Court of the United States for the District of New Jersey, a petition for

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reorganization under section 77 of the Bankruptcy Act, as amended. The Susquehanna has not paid the interest on the debtor's bonds which fell due June 1, 1937, or the principal of the bonds which, by reason of the default in payment of interest continuing for three months, also became payable under the provisions of the mortgage. Pursuant to authorization by order of the court, the trustees of the Susquehanna, effective October 1, 1937, disaffirmed all of the above-mentioned contracts with the debtor.

The petitioner, after examination of all pertinent records and with the advice of counsel, decided that the right to prove a claim against the Susquehanna, filed previously by the predecessor mortgage trustee, could be enforced only by the debtor's bondholders themselves, and thereupon prepared and sent a circular letter under date of November 6, 1937, to all known bondholders, numbering 662. Responses to the letter required considerable research and consultation.

Upon the Susquehanna's disaffirmance, the trust company made examinations of the records to ascertain whether the agreement had been made a part of the security for the bonds outstanding, and, with the advice of counsel, determined that the proper party to prepare and file a proof of claim as the result of the disaffirmance was the debtor. The trust company thereupon requested the debtor to prepare and file such a proof of claim. This was done in October 1937.

On January 14, 1938, the trust company again advised all bondholders of the necessity of filing their own individual proofs of claim against the Susquehanna. As a result, many bondholders requested information and advice with respect to the proper method of prosecuting the claim. In connection with the proving of the individual claims, the trust company, with the cooperation of its counsel, prepared the necessary petition to the court for instructions whether or not to declare the principal of the bonds due and payable. Copies of the court's order to show cause with respect thereto and of the petition were printed and mailed to each individual bondholder. Instructions were issued by the court directing the trust company to make such a declaration. This was done.

At the time of the trust company's appointment as temporary mortgage trustee, there was pending before this Commission and the Pennsylvania Public Utility Commission an application filed by the debtor company, later joined in by the debtor's trustee, asking for an abandonment of over 80 percent of the trackage owned by the debtor and subject to the lien of the mortgage. The trust company, after thorough investigation, and after notification by letter of January 19, 1938, to all known bondholders, with the advice of its

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counsel determined to take no position relative to the proposed abandonment, but participated in the hearings thereon. An examiner's proposed report in that proceeding, Wilkes-Barre & Eastern Railroad Company Trustee Abandonment, Finance Docket No. 11791, was issued on September 29, 1938, recommending that we find that the present and future public convenience and necessity permit abandonment as sought by the debtor's trustee.

Pursuant to an order of the court dated March 28, 1938, the trust company filed a proof of claim against the debtor on behalf of the bondholders, and mailed a copy of the order to all known bondholders, a number of whom thereupon requested an opinion whether they should file claims individually. On advice of counsel the trust company advised such bondholders that it would be desirable for them so to file. Considerable time was spent by the trust company in interviewing and replying to bondholders with respect to the form and contents of their proofs of claim.

Other services performed by the trust company related to its intervention in the debtor's reorganization proceedings, examination of the debtor's monthly balance sheets and profit and loss statements and distribution of copies thereof to bondholders requesting them, consideration of the disaffirmance by the debtor's trustee of a lease which the debtor had with the Susquehanna Connecting Railroad Company, consideration and study of a proposed operating contract by and between the debtor's trustee and the trustees of the Erie Railroad Company, and investigation of data relative to alleged traffic diversion by the latter company.

For the services rendered in the capacity of temporary mortgage trustee, the trust company seeks the following allowances: (a) Fee for ordinary routine services \$125, (b) initial fee for setting up books and records \$200, and (c) fee for extraordinary services \$1,500, total allowance for services \$1,825.

Expenses in the sum of \$253.06 are stated in the trust company's petition. By motion made at the hearing, this claim was amended by the addition of an item of \$36.77. These expenses consist of disbursements for preparing and mailing letters, notices, and documents to bondholders, and for filing petitions.

The corporate trust officer of the trust company testified that the work was done largely under his supervision, that it required the services of some 8 to 10 different officers and employees intermittently during the period involved, that no definite record of time was kept, but that he believed upwards of 500 hours were devoted to the work, of which about 100 would represent the time spent by officers and the remainder the time spent by clerks of various grades.

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Bainton, McNaughton & Douglas and Walter T. Margetts, Jr., petitioners, served as counsel and solicitor, respectively, for the trust company in its capacity of temporary mortgage trustee, during the period from October 5, 1937, to August 9, 1938. The general character of services rendered is indicated by the previous statement herein of the subject matter of the trust company's services.

Margetts, a member of the petitioner's firm, testified that he or other members of the firm, on 116 different days, in performing these services spent 257½ hours, not including certain time spent in necessary travel. If the latter were taken into consideration the total time involved would be more than 300 hours. Out-of-pocket expenses in the total sum of \$405.44, summarized in the petition and explained in greater detail by the witness, were incurred by counsel in connection with the services rendered. Both the trust company and its counsel seek final allowances for services and expenses to August 9, 1938.

The debtor's trustee has advised that while the petitioners are no doubt entitled to an allowance from the estate of the debtor, the available surplus at the end of September 1938, amounting to approximately \$1,600, offers little encouragement for continued operation of the road and payment of its expenses, unless additional finances, the source of which is unknown to him, are made available. He suggests that any order of allowance, when made, should provide the means and method of payment.

Counsel for a committee of bondholders stated that he had no objection to the amounts of allowances requested, but he was of the opinion that the petitions were prematurely presented in view of the financial condition of the debtor and the possibility of liquidation.

Under the provisions of the statute, our function is to fix maximum limits of allowances. The financial condition of the debtor and its lack of ability to pay such allowances is a proper factor to be considered in determining such limits, but we do not regard it as a barrier to the fixing of any limits. The making of an allowance within the limits so fixed is the exclusive function of the court. Therefore, our findings and conclusions herein are not to be construed as carrying any implication or intendment that an allowance should be made at this time if the financial condition of the debtor does not warrant it.

Conclusions.—We conclude that, in view of the nature and extent of the services rendered and the benefit therefrom accruing to the debtor's estate, we should fix the following maximum limits of final allowances, to be paid out of the estate of the debtor, as reasonable compensation for all services rendered and reimbursement for all

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actual and reasonable expenses incurred by the petitioners, as designated, in connection with the debtor's reorganization proceedings, such allowances to cover any office or other overhead expenses which should be provided for in connection with such services:

1. For all services rendered by the Commercial National Bank & Trust Company of New York, as temporary mortgage trustee under the debtor's first mortgage, and for actual and reasonable expenses incurred in connection therewith, during the period from October 8, 1937, to August 9, 1938, the sums of \$1,300 and \$289.83, respectively, both sums to be paid to the trust company.

2. For actual and reasonable expenses of the trust company, in its capacity of temporary mortgage trustee, the sums of \$2,400 for all legal services rendered and \$405.44 for expenses incurred by its counsel and solicitor, Bainton, McNaughton & Douglas and Walter T. Margetts, Jr., during the period from October 5, 1937, to August 9, 1938, both sums to be paid to that firm of attorneys.

An appropriate order will be entered.

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