

FINANCE DOCKET No. 11681
 NEW YORK, SUSQUEHANNA & WESTERN RAILROAD
 COMPANY REORGANIZATION

Submitted July 29, 1938. Decided December 12, 1938

Upon petitions, annual rates of compensation to be paid to Walter Kidde, as trustee of the debtor's property, and Ralph E. Lum, as counsel for the trustee, approved as reasonable; maximum limits of allowance of compensation for services rendered by George S. Hobart and Hobart, Minard & Cooper, as counsel for the debtor, fixed, for the time being, without prejudice to the fixing of final maximum limits therefor upon further investigation; and maximum limits of final allowances of compensation for services rendered and reimbursement for actual and reasonable expenses incurred by the Central Hanover Bank & Trust Company, formerly trustee under mortgage indentures, fixed.

Chester W. Fairlie for trustee's interest.

Duane E. Minard and *George S. Hobart* for petitioner and debtor.

Hovey C. Clark, *Curtis Heath*, and *Donald B. Kipp* for former trustee's interest.

Paca Oberlin for debtor.

REPORT OF THE COMMISSION

DIVISION 4, COMMISSIONERS MEYER, PORTER, AND MAHAFFIE

By DIVISION 4:

The New York, Susquehanna and Western Railroad Company, hereinafter called either the debtor or the Susquehanna, on June 1, 1937, filed in the District Court of the United States for the District of New Jersey, in proceeding No. 26175 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 date of filing, the court entered an order approving the petition as properly filed.

By order of the court entered on June 29, 1937, Walter Kidde and Hudson J. Bordwell were appointed trustees of the debtor's property, and their appointments were ratified by our order of July 15, 1937. On November 15, 1937, Bordwell died, and by order of the court entered on December 6, 1937, Kidde was appointed sole trustee, such appointment being ratified by our order of December 22, 1937. By our order

230 I. C. C.

of September 17, 1937, we approved maximum limits of reasonable compensation of \$10,000 and \$6,000 a year for Bordwell and Kidde, respectively, for their services as trustees. By our further order of December 28, 1937, we vacated our order of September 17, 1937, insofar as it related to the maximum reasonable compensation of Kidde, without prejudice to consideration of a maximum limit at a later stage of the proceeding. Compensation at the rate approved by us has been paid to Bordwell and to the executrix of his estate in full compensation for his services as trustee. Kidde has not received any compensation for his services.

By order of the court entered on September 7, 1937, the debtor's trustees were authorized to retain Ralph E. Lum as their counsel. Our order of October 22, 1937, approving a maximum reasonable compensation for Lum at the rate of \$6,000 a year, was vacated by our order of December 28, 1937, without prejudice to the consideration of a maximum limit at a later stage of the proceeding. Lum has not received any compensation for his services.

On June 20 and 21, 1938, the following petitions for allowances, to be paid out of the debtor's estate, were filed with the court:

1. Walter Kidde, trustee of debtor's property, for an allowance of partial compensation, for the time being, for services from July 15, 1937, to June 1, 1938, \$16,000.

2. Ralph E. Lum, counsel for debtor's trustee, for an allowance of partial compensation, for the time being, for services from September 1, 1937, to June 1, 1938, \$19,000.

3. George S. Hobart and others, partners doing business under the firm name of Hobart, Minard & Cooper, attorneys for the debtor, for an allowance of compensation for services from October 22, 1936, to May 31, 1938, \$12,500.

4. Central Hanover Bank & Trust Company, formerly trustee under the debtor's first and refunding, second, and general mortgages, for final allowances of (a) \$2,250 for its services, (b) \$221.67 for its disbursements, (c) \$3,000 for legal services rendered by its attorneys, Larkin, Rathbone & Perry, and (d) \$750 for legal services rendered and \$6.87 for expenses incurred by its attorneys, Pitney, Hardin & Skinner.

Copies of these petitions have been duly received by us from the clerk of the court, to the end 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. No objection to the petitions has been offered.

The petitioner, Walter Kidde, is of the view that, until he has finished the work, there is no adequate measure of the ultimate value of his services. The partial allowance sought is predicated on the factors of

his earning capacity, the time devoted to the work, and the responsibility of his position. He is an engineer by profession, has extensive and varied private interests, including a general engineering and construction business and the manufacture of fire-extinguishing equipment and specialities. He testified that these activities, which he has continued, require a limited amount of his time and that because of his duties as trustee he has not been able to give them as much attention as previously, but does not claim that he has thereby suffered any monetary loss. Prior to his appointment, he was also active in public affairs in the State of New Jersey, but withdrew from some of these activities to devote more time to his duties as trustee. As a means of conserving his time, he maintains his private offices on the same floor of the building in which the trustee's office is situated.

In consultations, conferences, inspections, planning, etc., Kidde has spent 448 recorded hours, not including 62 hours prior to July 15, 1937, spent in preparing to assume his duties. An undetermined amount of time devoted to discussions and planning is not reflected in the recorded hours. He testified that on the average he has devoted at least two hours of practically every working day to his duties as trustee and that he has spent from a third to a half of his time on this work, his responsibilities having increased beginning about a month prior to the death of Bordwell, an officer of the Erie Railroad system, who was also general manager of the Susquehanna. After Bordwell's death, Henry K. Norton, who, since July 24, 1937, had served as an analyst for the Susquehanna trustees, was appointed executive officer in the trustee's organization, his duties embracing the general supervision of accounting previously performed by Bordwell, as well as the work of analyst. Norton's salary is \$1,000 a month. Other employees in the trustee's organization are a chief clerk, an assistant clerk, and three stenographers or typists at monthly salaries of \$400, \$175, and \$100 to \$130, respectively. From time to time, other persons are employed to perform special services. Salaries of the trustee's administrative staff are approved by the court and are paid directly by the debtor company, which also furnishes office facilities for the trustee.

Pursuant to the court's direction that the Susquehanna's management be divorced from that of the Erie, the debtor's trustee set up his own executive organization. It is Kidde's opinion that the increased cost of the administrative staff is more than offset by arrangements which he has effected, or expects to effect, with the Erie, with respect to the reduction of overhead charges. Prior to the filing of the section 77 petition, the debtor's railroad was operated as part of the Erie, which controls the Susquehanna through stock ownership. Under an agreement between the two companies, expenses of the ad-

230 I. C. C.

ministrative and operating organizations common to both were allocated to the Susquehanna primarily on the basis of comparative gross revenues. Since the inception of the trusteeship this allocation has been adjusted in the Susquehanna's favor. Kidde testified that he has given much attention to the debtor's relationship with the Erie, as well as to other important problems which affect the income of the debtor company and its proper reorganization.

Kidde believes that, as partial compensation for his services to June 1, 1938, he should be paid at the rate of about \$18,000 per annum, or \$16,000 for the 10.5 months involved. If the reorganization proceedings are concluded within a year, he would file a petition for a final allowance at that time. Otherwise, he would expect to make further application six or eight months hence for the period after June 1, 1938. His present application does not include any claim for expenses, which have been paid by order of the court.

The petitioner, Ralph E. Lum, who also seeks a partial allowance for his services, was not present at the hearing, but Chester W. Fairlie, a partner in the firm of Lum, Tamblyn & Fairlie and who, with Lum, also a partner, performed a major portion of the services, testified in support of this claim. Although the court's order authorizing the retention of Lum by the trustees was not entered until September 7, 1937, the petitioner actually began work on August 23, 1937, in pursuance of the judge's announcement that he would name Lum as attorney to the trustees. The claim as presented in the petition embraces services beginning on September 1, 1937. Fairlie testified that no complete or adequate record of time spent was kept by his firm, but that he and Lum, each, had devoted not less than one-third of their time to this work during the nine months ended June 1, 1938. In addition to their services, one junior attorney devoted a considerable part of his time to keeping the files pertaining to this work. Also they have utilized the assistance of stenographers and clerks in their office organization.

The nature of the services performed by Lum and Fairlie may be summarized substantially as follows: Examination, study, and interpretation of documents, records, trust indentures, contracts, financial and accounting statements, petitions and orders, proofs of claim, etc.; preparation of petitions and orders, briefs, and other papers; investigation of questions of law; preparation and rendition of opinions; participation in numerous conferences with attorneys and interested parties; maintenance of daily contact with and giving advice to the trustee; appearance in court at least once each week and more frequent participation in conferences with the judge; conduct of examinations and attendance at hearings; conduct of telephone conversations many times daily; and handling correspondence, comprising some 700 letters written by the petitioner and as many received by him.

230 I. C. C.

The allowance of \$19,000 sought by Lum includes or reflects office overhead expense in the approximate sum of \$10,000, computed at \$50 a day for 200 days. While not asking for reimbursement for overhead expense as such, the petitioner regards it as a necessary element to be taken into consideration in evaluating the services rendered. Fairlie testified that the firm's office overhead amounts to from more than one-third to nearly one-half of the total income, and that such overhead is very high. He also stated that services for the trustee were performed only to a minor extent by the firm's young attorneys, one of them having kept the files. Other than that, practically all of the work was done by Lum and Fairlie, partners, who are not on a salary basis but participate as proprietors. The petitioner expects to make application at an appropriate time for a final allowance in full for all services rendered. In the present petition, no claim is made for minor disbursements and personal expenses aggregating about \$190.

The amount of office overhead expenses allocated by this petitioner to his services is disproportionately large in that it reflects charges for all salaried employees of the firm, including 14 junior attorneys, although the evidence shows that the services of only one such junior attorney were utilized to any appreciable extent.

The petitioners George S. Hobart and his partners in the firm of Hobart, Minard & Cooper seek a final allowance for services rendered as counsel for the debtor for the period from October 22, 1936, to May 31, 1938. On or about the former date, the petitioners, then known as Hobart & Minard, who, under that or predecessor firm names or as individuals, have represented the debtor company as local counsel in New Jersey for many years, were consulted by the debtor in connection with a proposed extension of the debtor's bond maturities, due January 1 and February 1, 1937. The petitioner's firm name was changed on April 2, 1937, to Hobart, Minard & Cooper. Although the court has entered no formal order authorizing the petitioners' employment in the reorganization proceedings, they have continued to represent the debtor with the court's knowledge and consent. The extension plan, which appears to have been initiated by officers of the Erie, was not consummated. Prior to about January 8, 1937, at which time it became apparent that the extension plan would fail, the petitioners' services related almost exclusively to that plan. Early in January 1937 the petitioners gave consideration to the possibility of invoking section 77 relief for the debtor. About May 28, 1937, the conclusion was reached that the deposits of bonds under the extension plan were insufficient to justify its consummation, and the initiating petition, which had been prepared by the petitioners, was filed in the reorganization court on June 1, 1937. They also prepared the initial orders and attended to all preliminary matters, including the collec-

230 I. C. C.

tion, study, and preparation of essential data and information. From June 1, 1937, until Lum assumed his duties as counsel for the trustees, on or about September 1, 1937, Hobart and his partners, as counsel for the debtor, performed all services involved in the initial stages of the reorganization proceedings, and, at the request of the court, handled all legal matters requiring immediate attention by the trustees. Subsequent to Lum's appointment, the petitioners have continued to represent the debtor in all phases of the proceeding. Of 86 orders entered in the proceedings to May 31, 1938, Hobart prepared 41, and of 45 petitions filed he prepared 13.

From October 22, 1936, to May 31, 1938, Hobart and his partners and associates devoted a total of 759 recorded hours to this work, divided 605 and 154 between senior and junior members of the firm. The total stated includes about 20 hours of senior members' time spent prior to January 8, 1937, on the unsuccessful extension plan. From that date to June 1, 1937, about 70.5 hours of senior members' time and 7 hours of junior members' time were spent prior to the filing of the section 77 petition.

The schedule of services submitted by the petitioners does not include those rendered by the firm under an annual retainer of \$1,140.75 received from the Susquehanna for trial of accident cases and other local matters in New Jersey. Actual disbursements in connection with such services have been paid. At the time of the hearing the monthly installment of the Susquehanna retainer had been paid for the month of May.

The petitioners' request for an allowance of \$12,500 is based on hourly rates of \$20 for senior members and \$10 for junior members. Reflected in this claim is an indeterminate amount of office overhead expense. It was Hobart's opinion that of the firm's total gross receipts not less than 40 percent were absorbed in overhead prior to April 2, 1937, when the firm was reorganized, and that thereafter the overhead was materially reduced. No claim is made for disbursements and personal expenses, these having been paid monthly by the trustee as current expenses. For services rendered after June 1, 1938, the petitioners expect to file another application at an appropriate time.

The Central Hanover Bank & Trust Company, petitioner, hereinafter referred to as the trust company, prior to and at the date of filing of the debtor's petition under section 77 was serving as corporate trustee under the first and refunding, the second, and the general mortgages of the Susquehanna, as well as two other mortgages. On or about March 12, 1938, because of a possible conflict of interest, the trust company resigned as trustee under the three Susquehanna mortgages, effective at the end of 90 days or upon the prior appointment of a successor. By order of the court dated March 23, 1938, the ap-

230 I. C. C.

pointment of successor trustees was approved. The trust company continues to act as trustee under the so-called Midland and Paterson extension first mortgages. Its request herein for final allowances relates only to its services under the three Susquehanna mortgages. These services did not cease on the date of its resignation but continued for some time thereafter while the mortgage res were being turned over to the successor trustees.

Beginning about November 1936 the officers of the trust company began to inquire into the status of the debtor's first and second mortgage bonds, maturing, respectively, on January 1 and February 1, 1937. Various conferences and discussions were held and consideration was given to the proposed extension of maturity of these two bond issues. Notices regarding the proposal were published and many inquiries from bondholders, by letter and personal call, were received and answered. About May 28, 1937, sufficient bonds not having been deposited, the plan was declared to be nonoperative. The trust company did not act as depository under the extension plan. After default in payment of the principal of the first and second mortgage bonds, the trust company made demand, successively, on the debtor company for payment of the bonds, and, upon default in payment of interest due on August 1, 1937, on the general-mortgage bonds, unmatured as to the principal, made demand also for payment of the installment of interest due thereon. Upon the filing of the debtor's petition under section 77 on June 1, 1937, the trust company, with the advice and aid of its attorneys, took steps to protect the interests of the holders of bonds under the three Susquehanna mortgages, petitioning at appropriate times for leave to intervene, to require the debtor and its trustees to impound for the benefit of the bondholders the income received from the property subject to the liens of the mortgages, to prepare a formula for the segregation of earnings and expenses between the various mortgage and leased-line districts, and for other relief.

Other services performed by the trust company related to the preparation of proofs of claim under the three Susquehanna mortgages; consideration of the court's order directing suspension of payments of interest coupons due prior to, but not presented for payment until after, June 1, 1937; the application of the debtor and its trustees for release from the Susquehanna mortgage liens of certain property proposed to be sold; preparation and filing of objections to certain claims filed against the debtor's estate which asserted priority over the claims of bondholders; negotiations leading to compromise with respect to certain claims; attendance at hearing before the court on proofs of claim filed by the trust company on behalf of bondholders; analysis of and preparation of report on segregation-of-income formula prepared by the debtor and numerous discussions thereof with bondholders;

230 I. C. C.

conferences and consideration relative to the possibility of a conflict of interest in the trust company's capacity as trustee under five mortgage indentures, resulting in its resignation under the three Susquehanna mortgages; review of all files pertaining to these trusts, conferences with successor trustees and their counsel, and correspondence regarding the status of the trusts and the transfer of the property and documents; attendance at and participation in hearings before the court with respect to the execution and delivery of the second and the general mortgages and the issue of bonds thereunder; assistance given to the successor trustee under the first mortgage in preparing a stipulation with reference to the issue of bonds under that mortgage; and giving information and advice to bondholders in reply to numerous inquiries by letter, telephone, and personal visit.

An assistant secretary and three chief clerks in the corporate trust department of the trust company devoted a substantial part of their time to this work, at various times utilizing also the services of the security analysis, filing, stenographic, and vault departments. In addition, it was necessary frequently to consult senior officers of the company with respect to matters of policy. No definite record of time spent was kept. Since June 1, 1937, by reason of increased activities due to the reorganization proceedings, the assistant secretary has devoted to the work a great deal more time than previously, and the work performed is not at all comparable to the ordinary administrative duties as mortgage trustee. Although no definite allocation of services to various phases of the work was made, the testimony shows that from 10 to 15 percent of the total fee sought represents services rendered in connection with the unsuccessful maturity-extension proposal, the major portion of all services having been performed after January 1, 1937.

Expenses in the total sum of \$221.67, itemized in the affidavit filed with the petition, were incurred by the trust company in connection with the services rendered. No allowance has been made to the petitioner for the services rendered or for the expenses incurred. However, in accordance with mortgage provisions, the following annual fees for general administration of the trusts have been paid to the trust company: (a) First mortgage \$50, (b) second mortgage \$150, and (c) general mortgage \$150. Fees under the first and second have been paid by the debtor to January 1, 1937, and under the general to January 1, 1938. Balances due to March 12, 1938, the date of the trust company's resignation, are \$59.72, \$179.17, and \$29.17, respectively, a total of \$268.06, which is not included in and does not constitute a part of the claim of \$2,250 herein for services. Our findings and conclusions herein with respect to the claim of this petitioner do not reflect the

230 I. C. C.

inclusion of any allowance for the unpaid balances of annual fees for general administration of the trusts.

The trust company has employed two firms of attorneys, Larkin, Rathbone & Perry, of New York, N. Y., and Pitney, Hardin & Skinner, of Newark, N. J. The reason stated therefor is that New York attorneys are not allowed to appear before the Federal bar in New Jersey without having New Jersey counsel associated with them.

The general character of the services rendered by both firms of attorneys is indicated by the previous statement of the subject matter of the trust company's services, and is more particularly described in the affidavits of members of these firms filed with the trust company's petition.

In rendering legal services for the trust company solely in connection with the three Susquehanna mortgages, Larkin, Rathbone & Perry spent 110.75 recorded hours. In addition thereto, services rendered in connection with all five mortgages, including the Midland and the Paterson extension, required 307 hours. Allocation on the pro rata basis of three-fifths of the total time to the three Susquehanna mortgages, which also is approximately the ratio on the basis of the principal amount of bonds outstanding, produces about 184 additional hours, making a total of 294.75 hours chargeable to the services for which compensation is sought. The major portion of these services was performed by partners or senior associates of the firm. No compensation therefor has been paid, but disbursements of the firm have been paid by the trust company in the sum of \$39.31, which is included in the latter's claim for expenses hereinbefore stated. The allowance sought as compensation for services reflects office overhead expenses, but no separate or distinct charge is made therefor.

By a similar method of allocation of time spent in rendering legal services for the trust company in connection with the three Susquehanna mortgages, the firm of Pitney, Hardin & Skinner records about 40 hours, of which 35.5 represent partners' time and 4.5 clerks' time. No compensation has been paid for these services. Disbursements of the firm allocated to the services amount to \$6.87.

A representative of the vice president and general counsel of the debtor stated at the hearing that the debtor had no representations to make concerning the requested allowances and had no reason to believe the services were other than as stated by the petitioners.

As hereinbefore stated, certain of the services performed by the petitioners Hobart and the Central Hanover Bank & Trust Company relate to the unsuccessful maturity-extension plan which was proposed several months prior to the institution of the reorganization proceedings. While we construe the provisions of section 77 (c) (12) as not necessarily limiting compensation authorized thereby to services

230 I. C. C.

rendered after the institution of the reorganization proceedings, it is our view that, to be compensable, services, whether rendered before or after that stage, must be shown to have a direct and proximate relation to the formulation and consummation of a plan and to the furtherance of the proceedings, to be valuable, and to be in the interest of the debtor's estate. As a corollary to the foregoing view, services expended in promoting an unsuccessful plan, which served in no way to further any other plan, should not be compensable out of the debtor's estate. To the extent that the petitioners' services herein were solely of value in furtherance of the unsuccessful maturity-extension plan they do not appear to have been essential to the reorganization proceedings or compensable out of the debtor's estate.

We are of the opinion that the services of a trustee and his counsel in proceedings of the nature of these involve a continuing responsibility for which compensation may best be gaged on an annual basis, such compensation to represent also a reasonable return for the services performed, whether continuously or intermittently during the period covered. We conclude that the interests of all parties will best be served by the fixing of maximum limits of compensation for these two officers on an annual basis rather than by interim allowances. We find that the evidence does not warrant the fixing of a final allowance for the petitioners Hobart and the firm of Hobart, Minard & Cooper. In their case an interim allowance will be fixed.

Conclusions.—We conclude:

1. That we should approve as reasonable a maximum compensation at the rate of \$12,000 a year, beginning July 15, 1937, to be paid to Walter Kidde, for his services as trustee of the debtor's property, payment thereof to be made monthly after arrears in payments have been overcome;

2. That we should approve as reasonable a maximum compensation at the rate of \$12,000 a year, beginning September 1, 1937, to be paid to Ralph E. Lum, for his services and those of his associates, as counsel for the debtor's trustee, payment thereof to be made monthly after arrears in payments have been overcome, such allowance to cover any office or other overhead expenses which should be provided for in connection with such services;

3. That, in view of the nature and extent of the services rendered, we should, for the time being, and without prejudice to the fixing of final maximum limits therefor upon further investigation, fix as the maximum limit of allowance to be paid out of the estate of the debtor to George S. Hobart and the firm of Hobart, Minard & Cooper, as attorneys for the debtor, as compensation for services rendered from October 22, 1936, to May 31, 1938, inclusive, the sum of \$5,000, such

230 I. C. C.

allowance to cover any office or other overhead expenses which should be provided for in connection with such services; and

4. 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, to the petitioner the Central Hanover Bank & Trust Company or its attorneys, as designated, as reasonable compensation for all services rendered and reimbursement for all actual and reasonable expenses incurred in connection with the debtor's reorganization proceedings and plan, such allowances to cover any office or other overhead expenses which should be provided for in connection with such services:

(a) For services rendered by the Central Hanover Bank & Trust Company, as trustee under the debtor's first and refunding, second, and general mortgages, and for actual and reasonable expenses incurred in connection therewith, the sums of \$2,000 and \$221.67, respectively, both sums to be paid to the trust company;

(b) For actual and reasonable expenses of the trust company, the sum of \$3,000 as compensation for legal services rendered by Larkin, Rathbone & Perry in connection with the foregoing trusts, such sum to be paid to that firm of attorneys;

(c) For actual and reasonable expenses of the trust company, the sums of \$500 for legal services rendered and \$6.87 for expenses incurred by Pitney, Hardin & Skinner, in connection with the foregoing trusts, both sums to be paid to that firm of attorneys.

An appropriate order will be entered.

230 I. C. C.