

UNITED STATES BANKRUPTCY COURT

DISTRICT OF SOUTH DAKOTA

ROOM 211

FEDERAL BUILDING AND U.S. POST OFFICE

225 SOUTH PIERRE STREET

PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

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May 9, 1988

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Monte Walz, 85g.
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Re: Michael Allen Herrick
184-00041, Chapter 11

Dear Counsel:

The issue in this case is whether Agristor Leasing is entitled to an administrative expense claim arising out of the Debtor's rejection of a lease contract. Monte Walz represents Agristor, and Thomas Tobin represents the Debtor.

Prior to reorganization the Debtor operated a dairy farm in Day County, South Dakota. In October, 1980 the Debtor signed a 96 month lease of a 20' x 87' and a 20' x 42' Harvestore silo and associated equipment. The lease provided for monthly payments of \$2,070.44 for all of the equipment.

The Debtor filed for Chapter 11 relief on March 30, 1984. The Order confirming the Debtor's seconded amended plan was entered June 29, 1987. On September 5, 1984 an order was entered pursuant to stipulation of the parties determining that the rental agreement was a true lease, that the Debtor had rejected the lease, that the stay was lifted as to repossession of the leased property, and that the Debtor would "voluntarily turn over said property to AgriStor Leasing". On June 6, 1986 Agristor filed a claim for an administrative expense, alleging the Debtor's continued use of the equipment. of the parties. This matter was brought on by stipulation of the parties.

Agristor is requesting an administrative expense claim for the period beginning with the filing of the chapter 11 petition and ending at the end of July, 1985, the approximate date the bins were emptied and dismantled. Rounding this period to sixteen months and computing the administrative claim at the contract rate, as

Attorney Walz advocates, comes to \$33,127.04. The creditor's theory is that the Debtor used the equipment for the benefit of the estate throughout this period, and that the criteria of Section 503(b) (1) (A) are satisfied. Attorney Tobin argues that the equipment was not used to benefit the estate, and that after rejecting the lease the Debtor stood ready to empty the silos, but that Agristor failed to properly notify the Debtor as to when the company would repossess the equipment.

Petition - Herd Liquidation Period

This Court grants an administrative expense claim for the period beginning with the filing of the petition until the debtor dispersed his dairy herd. Although the Eighth Circuit has not addressed the issue at hand, *In Re Pickens-Bond Construction Co.*, 17 B.CAJ. 261 (Bkrcty. E.D- Ark. 1988), it is clear that a lessor qualifies for an administrative expense claim under Section 503(b) (1) (A) to the extent the debtor's post-petition use of the rented property actually benefited the estate. *In re Subscription Television of Greater Atlanta*, 789 F.2d 1530 (11th Cir. 1986); *In re Thompson*, 788 F.2d 560 (9th Cir. 1986) (citing additional authorities); Pickens-Bond *In Re Intran Corp.*, 62 B.R. 435 (Bkrcty-D. Minn. 1986) 3 *Collier*, Bankruptcy part. 503.04[iii] (15th ed. 1987).

It was implicit in the testimony of witnesses and argument of both counsel that the dairy herd benefited by the feed in the bins. The larger unit contained alfalfa silage and the smaller contained barley. The dairy cattle were not sold until November, 1984. It is undisputed that the feed would have spoiled rapidly if stored outside the harvest stores. The Debtor testified that he did not remove the feed until the take down crew arrived because the feed would have been wasted. This implies the Debtor had no alternative storage facilities. Retaining the leased property was therefore necessary to preserve the feed. The feed sustained the dairy herd until it was sold and benefited the estate to that date. The Debtor's testimony that he did not use the silos for his own benefit would be in error in light of the above facts.

It follows from the above that Agristor would be entitled to an administrative expense claim for the periods the silos were put to use. The amount of the claim remains in issue. "[I]t is the settled rule that until assumption or rejection of the debtor's lease, the estate is liable only for the reasonable value of the use and occupancy of the premises. Such value may be, but is not necessarily, fixed at the rent reserved in the lease." Collier, para. 365.03(3). In this case the only evidence of the value of the leased equipment is the contract rate. Accordingly, the Court finds this to be the reasonable value of the leased property and the amount of benefit conferred on the estate until the date of the herd sale. See also, Thompson, 788 F.2d at 563, (contract rate is "presumptive evidence of fair and reasonable value" which may be rebutted by proof that the reasonable worth is otherwise); *In re Braniff Airways, Inc.*, 783 F.2d 1283 (5th Cir. 1986).

It bears mention that the above Collier restatement of the rule, and the cases cited above in this opinion deal only with pre-

rejection use of leased property. This case is somewhat of an exception because the Debtor's September and October, 1984 use of the leased property extended beyond the contract rejection date. However, Section 503 requires only preservation of the bankruptcy estate and is not limited to pre-rejection use of leased property. The September and October use of the silos benefitted the estate during the course of the bankruptcy and falls within the language of Section 503. Furthermore, it would be incongruous to award a lessee's holdover by denying the lessor an administrative claim for the holdover period, absent exceptional circumstances. See *In re Rare Coin Galleries of America, Inc.*, 72 B.R. 415 (0. Mass. 1987).

Herd Liquidation - Repossession Period

Agristor requests the Court to continue its administrative claim for a period ending upon the date the units were dismantled and repossession began. It argues that the estate used and benefited from the leased equipment until this time. It is undisputed that the silos could not be dismantled until emptied, and that it was the Debtor's duty to remove the feed. The Debtor argues that Agristor could have dismantled the equipment any time after the contract was rejected. The Debtor testified that had he received notice that a crew was coming to repossess the equipment, he would have emptied the silos. He testified that absent such notice he continued to store the feed so that it would not spoil, and because he was attempting to find a market for the barley.

On the issue of notice, the parties stipulated to the admission of business records of Agristor as substantive evidence. Generally, these records reveal that Agristor representatives travelled to the Debtor's farm, and made other efforts to have the Debtor empty the bins, but at no time gave the Debtor a date certain when it would arrive to dismantle the units. This is consistent with the Debtor's testimony. Because the feed would have spoiled rapidly if removed, it was imprudent for Mr. Herrick to empty the silos until notified of a date certain. He was simply preserving a potentially valuable asset of the estate.

No administrative expense claim will arise from retention of the large bin after the sale of the cattle. The equipment did not benefit the estate after this time. While it is true the Debtor's sister fed her cattle from feed stored in the leased structures after the Debtor sold his herd, the Debtor received no payment for the feed consumed and accordingly there was no benefit to the estate. As a second grounds for denying recovery, the Court finds that Harvestore could have recovered the equipment any time after the Debtor sold his herd upon affording the Debtor proper notice.

An administrative expense claim will be allowed for the post-herd liquidation period regarding the lease of the smaller bin. Unlike the large bin, the debtor did benefit from retention of the smaller bin during this period. The Debtor testified that he was unable to find a market for the barley, but also testified that he sold 1,200 bushels in early July, 1985. Agristor will be allowed an administrative expense claim to the extent this sale benefitted the estate.

Agristor's failure to give proper notice of repossession is not a bar to recovery in this regard. The Debtor testified that had he received proper notice he would have unloaded the barley. However, had he done so the estate would have received no value for the feed because the Debtor stated he was unable to find a buyer. Use of the smaller bin was therefore necessary to preserve the barley until a market was found. The benefit the estate received was the net proceeds realized by the July, 1985 sale.

Agristor is awarded an administrative expense claim at the contract rate for the period beginning with the filing of the bankruptcy and ending when the dairy herd was sold, a seven month period. This sum equals \$14,493.08. The remainder of the priority claim consists of the net proceeds realized from the sale of the barley. If the parties are unable to stipulate as to this value, Agristor will schedule a valuation hearing. The Debtor shall amend his plan to provide for the Agristor administrative expense claim within ten days after entry of the order determining the amount of the claim.

This matter constitutes a core proceeding under 28 U.S.C. 157. Counsel for Agristor is directed to prepare an appropriate order and findings of fact and conclusions of law.

Very truly yours,

Irvin N. Hoyt
Bankruptcy Judge

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CC: Bankruptcy Clerk