

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

GENERAL DRIVERS AND HELPERS)	Case No. 1549	
UNION, LOCAL NO. 554,)		
Petitioner,)		
v.)	ORDER FOR ATTORNEY FEES AND	
)	COSTS	
DUET formerly known as ENCOR OF)		NEBRASKA COMMISSION
THE EASTERN NEBRASKA HUMAN)		OF INDUSTRIAL RELATIONS
SERVICES AGENCY,)		FILED
Respondent.)		OCT 18 2024
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)		CLERK

On June 20, 2024, the Commission entered its Findings of Fact and Order in this matter which found, in part, that Petitioner willfully negotiated in bad faith in violation of Nebraska Revised Statute §48-824(1); as well as filed this case in bad faith. The Commission further found that Respondent is entitled to relief as provided for in Commission Rule 42(B)(2). See also Neb. Rev. Stat. §48-825(2). The Commission ordered that such reimbursement shall include costs, expenses, and fees that were incurred by Respondent in the investigation, preparation, presentation, and conduct of this proceeding, including reasonable counsel fees, transcript and record costs, printing costs, travel expenses and per diems, and other reasonable costs.

Pursuant to that Order, on July 3, 2024, Respondent submitted its request for such attorney fees, costs, and expenses in the amount of \$47,964.50 (Affidavit of Addison C. McCauley for Respondent's Attorneys' Fees). Petitioner's Motion and Brief for More Response Time were filed on July 5, 2024, and granted on July 9, 2024. Petitioner responded on July 10, 2024, with its Motion to Obtain Detailed Attorney Fee Data. Respondent's Brief in Opposition to Petitioner's Motion to Obtain Detailed Attorney Fee Data was filed on July 16, 2024. Petitioner filed an additional brief on July 17, 2024. The Commission issued its Order for Motion to Obtain Detailed Attorney Fee Data on July 22, 2024. Petitioner's Attorney Fee Affidavits were filed August 8,

2024. Respondent's Reply Brief in Support of Affidavit of Addison C. McCauley for Respondent's Attorney Fees was filed August 20, 2024. Petitioner's Reply Brief to Respondent's Reply Brief in Support of Addison C. McCauley's Affidavit (with Attached Affidavit of Michael Amash) was filed August 23, 2024.

The Commission considers these filings regarding attorney fees as a CIR Rule 20 Motion, and as such may make its ruling without further hearing. *Employees United Labor Union v. Douglas County* (17 CIR 229 (2011)); *County of Hall v. United Food and Commercial Workers District Local 22*, 15 CIR 167 (2006). As stated in the Findings of Fact and Order, these filings are received as evidence solely for the purpose of determining an appropriate remedy.

When the Commission finds that a party has violated the Industrial Relations Act, Neb. Rev. Stat. §§ 48–819.01 and 48–825(2) grant the commission authority to issue such orders as it may find necessary to provide adequate remedies to the parties to effectuate the public policy enunciated in Neb. Rev. Stat. § 48–802. *Int'l Union of Operating Engineers Loc. 571 v. City of Plattsmouth*, 265 Neb. 817 (2003); *Omaha Police Union Loc. 101, IUPA, AFL-CIO v. City of Omaha*, 274 Neb. 70, 88 (2007); *County of Hall v. United Food and Commercial Workers District Local 22*, 15 CIR 167 (2006); *County of Hall v. United Food and Commercial Workers District Local 22*, 15 CIR 197 (2006). The Commission's authority to order the payment attorney fees pursuant to CIR Rule 42 has been previously addressed by the Nebraska Supreme Court. *Omaha Police Union Loc. 101, IUPA, AFL-CIO v. City of Omaha*, 274 Neb. 70, 88, (2007).

Except as modified by the Commission or the other provisions of the Industrial Relations Act, proceedings before the Commission shall conform to the code of civil procedure applicable to the district courts of the state pursuant to Neb. Rev. Stat. § 48-812. Neb. Rev. Stat. § 25-824 provides that allegations which are frivolous or made in bad faith shall subject the party or attorney

pleading the same to the payment of expenses including attorney's fees.

“As a general rule, attorney fees and expenses may be recovered in a civil action only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees. When an attorney fee is authorized, the amount of the fee is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.”

Eicher v. Mid Am. Fin. Inv. Corp., 270 Neb. 370, 381–82, (2005), (internal citations omitted).

Pursuant to the Findings of Fact and Order, Respondent submitted an Affidavit and invoices for August 2023, September 2023, October 2023, November 2023, December 2023, and January 2024 showing the billing details, hours expended, and total fees incurred by Respondent for this matter. (Affidavit of McCauley, ¶7 and Exhibit A). Neb. Rev. Stat. § 25-1244. The Nebraska Supreme Court held in *Nicholas Family* that the submission of affidavits was an acceptable way to introduce evidence in a motion for attorney fees. *TransCanada Keystone Pipeline, LP v. Nicholas Fam. Ltd. P'ship*, 299 Neb. 276, 284, 908 N.W.2d 60, 66 (2018). The Court also found that evidence presented by the landowners was insufficient to support the award of attorney fees where no written fee agreement or *invoice for legal services* was offered as evidence in support of the motions for attorney fees and costs. Nor did the landowners, in their affidavits, aver any specific amount owed by them to counsel. *TransCanada Keystone Pipeline, LP v. Tanderup*, 305 Neb. 493, 498 (2020) (emphasis added).

As to the amount of attorney fees incurred by the Respondent, the Commission finds the Respondent's Affidavit Exhibit A invoices to be sufficient proof as to the fees actually charged to and owed by the Respondent. The Commission further finds that time entry detail contained in the “Description” column of each invoice to be sufficient for purposes of determining reasonableness

of hours expended on this matter and rejects Petitioner's assertions of vagueness or "block billing". The record indicates Respondent's counsel were diligent and effective in presenting Respondent's case, and they obtained a favorable result for the Respondent. However, our analysis must go further.

The Nebraska Supreme Court has stated that the time and labor devoted by attorneys to the case and the customary charges for such services are two of the factors to be considered in arriving at a fee award under Nebraska case law. Other factors may be considered which may form the basis of a court-ordered attorney fee under existing Nebraska law, which include the nature of the litigation, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, and the character and standing of the attorney. *Eicher v. Mid Am. Fin. Inv. Corp.*, 270 Neb. 370, 383–84, (2005). The fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates. *Hensley v. Eckerhart*, 461 U.S. 424(1983). The determination of what is a reasonable attorneys' fee is a matter peculiarly within the court's discretion. *Marshall v. Anderson Excavating & Wrecking Co.*, 8 F.4th 700, 712 (8th Cir. 2021). "Although there is no one methodology for calculating an award of fees, it is important 'for the district court to provide a concise but clear explanation of its reasons for the fee award.'" *Jet Midwest Int'l Co. v. Jet Midwest Grp., LLC*, 93 F.4th 408, 421 (8th Cir. 2024) (quoting *Marez v. Saint-Gobain Containers, Inc.*, 688 F.3d 958, 966 (8th Cir. 2012), in turn quoting *Hensley*, 461 U.S. at 437). See, e.g. *Benson v. City of Lincoln*, 2024 WL 2155139, (D. Neb. May 13, 2024).

One method used by the court is the "lodestar method," which begins by determining the number of hours reasonably expended at a reasonable hourly rate, then making other adjustments if appropriate in the circumstances of the case.

The starting point in determining attorney fees is the lodestar, which is calculated by multiplying the number of hours reasonably expended by the reasonable hourly rates. As a general rule, a reasonable hourly rate is the prevailing market rate, that is, the ordinary rate for similar work in the community where the case has been litigated. The court has great latitude to determine a reasonable hourly rate because it is intimately familiar with its local bar.

Jet Midwest Int'l Co. v. Jet Midwest Grp., LLC, 93 F.4th 408, 420 (8th Cir. 2024) (internal quotations and citations omitted)

Respondent's filings contain the hourly rates charged for each of its three attorneys involved with this case and that of two paralegals (Affidavit of McCauley, ¶4, 5 and 6; Respondent's Brief in Opposition to Petitioner's Motion to Obtain Detailed Attorney Fee Data, pg.3). Respondent provides no evidence that the hourly rate of \$220 is both fair and reasonable for the 3.6 hours submitted for the work of paralegals Casey L. Grennan and Tanya L. Kuenning. Accordingly, these entries have been excluded from the Commission's calculations. Further, Respondent provides insufficient evidence as to the reasonableness of the different rates charged by each of its attorneys. In consideration of the affidavits of two non-party attorneys submitted by Petitioner, and the affidavit of Mr. McCauley, the Commission finds that a reasonable hourly rate to be applied to the entries for work performed by George E. Martin and Mark E. McQueen is \$250 per hour. (See Petitioner's Affidavit of Duncan A. Young, ¶6.) The entries billed for Mr. McCauley will continue to be calculated at his actual rate of \$215 an hour. The Respondent's submission includes 5.5 hours for attorney McQueen on October 18, 2023. Mr. McQueen participated at trial as a fact witness, and attorney Martin's time at trial to represent the Respondent is included in a separate entry. The time entry for Mr. McQueen for October 18, 2023, does not show sufficient detail for each element of the entry and therefore, the Commission does not award any fees for Mr. McQueen for that date. The Respondent's submission also includes 0.2 hours by attorney Martin on October 24, 2023, relating to "Appellant's Petition to Bypass", which could

only have related to a different case. Both of these entries have been excluded from the Commission's calculations.

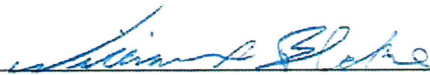
After applying the reasonable hourly rate modification and the specific exclusions stated above, the Commission finds that Respondent's request is otherwise fair and reasonable for the amount of work performed, taking into consideration the skill and experience of the attorneys in presenting the case, the nature of the case and issues involved, and the result obtained for the purpose of making the Respondent whole and not as a sanction against the Petitioner.

IT IS THEREFORE ORDERED that Petitioner shall pay Respondent the amount of \$32,630.50 for attorney fees and costs in this matter.

All panel members join in the entry of this Order.

Entered October 18, 2024.

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

A handwritten signature in blue ink, appearing to read "William G. Blake", is written over a horizontal line.

William G. Blake, Presiding Commissioner