

**United States Bankruptcy Court
Western District of Wisconsin**

Cite as: [Unpublished]

In re Lenan Corporation, Debtor
Bankruptcy Case No. MM11-90-00868

United States Bankruptcy Court
W.D. Wisconsin

July 26, 1991

Michael E. Kepler, Kepler & Peyton, Madison, WI, for debtor.
Ann Ustad Smith, Michael, Best & Friedrich, Madison, WI, for M & I Bank of
Cambridge.
Steven J. Kirschner, Ross & Stevens, S.C., Madison, WI, for Ru-Mar and Bayertown
Furnace.

Robert D. Martin, United States Bankruptcy Judge.

MEMORANDUM DECISION

I.

On March 29, 1990 the debtor, Lenan Corporation, filed for protection under chapter 11 of the United States Bankruptcy Code. The debtor objects to the following claims for accrued vacation pay filed as priority claims under 11 USC § 507(a)(3), seeking to reclassify each of the claims as twenty-five percent (25%) Section 507(a)(3) priority, and seventy-five percent (75%) unsecured:

Thomas Howe	\$1,248.00 (96 hours at \$13.00 per hour)
Erik Bailey	\$ 210.00 (40 hours at \$ 5.25 per hour)
Marion Shepard	\$ 581.04 (72 hours at \$ 8.07 per hour)
Rita Downing	\$ 668.00 (80 hours at \$ 8.35 per hour) ⁽¹⁾
Michael Rucker	\$ 650.00 (52 hours at \$12.50 per hour)
Keith Monty	\$2,000.00 (portion of 183 hours at \$17.79 per hour) ⁽²⁾

According to the debtor's records, claimants "earned" as of January 1, 1990 the following amounts of vacation and, after in two instances using up some of that vacation time, have the following "balance" due them as of April 4, 1990 (in hours):

<u>Claimant</u>	<u>Earned</u>	<u>Balance</u>
Howe	120	96
Bailey	40	40
Shepard	72	72
Downing	80	80

Rucker	80	52
Monty	120	120 ⁽³⁾

Claimants assert that because the above-listed vacation was "earned" as of January 1, 1990 and thus within 90 days of the filing of the debtor's petition on March 29, 1990, the entire amount up to \$2,000.00 is entitled to priority under Section 507(a)(3).

The following claimants were "laid off" by the debtor prior to the petition date:

<u>Claimant</u>	<u>Layoff Date</u>
Bailey	1-5-90
Shepard	1-12-90
Downing	2-20-90
Rucker	3-2-90

II.

Claimants are entitled to Section 507(a)(3) priority for that vacation pay actually "earned" within 90 days of the filing of the debtor's bankruptcy petition. Section 507(a)(3) provides:

(a) The following expenses and claims have priority in the following order:

(3) Third, allowed unsecured claims for wages, salaries, or commissions, including vacation, severance, and sick leave pay--

(A) earned by an individual within 90 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only

(B) to the extent of \$2,000 for each such individual.

In Matter of Northwest Engineering Co., 863 F2d 1313 (7th Cir 1988), the Seventh Circuit Court of Appeals was faced with a contention by employees that because their entitlement to vacation pay for the year 1982 depended upon their working at least one day in 1983, all of the vacation pay was "earned" for bankruptcy purposes on that day of vesting, within 90 days of the debtor's filing of its bankruptcy petition on April 1, 1983. The Court rejected the employees' contention "because it gives employees a year's priority [if the petition is filed within 90 days of the vesting date] or none [if the petition is not filed within 90 days of the vesting date], missing the statutory mark in every case." Northwest Engineering, 863 F2d at 1318.

The Court also rejected the option of awarding 90 days' priority in every case, stating:

The option of awarding 90 days' priority in every case is jarring because it sets up a disjunction between the debt (which may be attributable to work done more than 90 days before the filing) and the standard of priority (which depends on the work done in the last 90 days).

Id.

Instead, the Court divorced the work requirement from the vesting requirement, and held that "vacation pay is 'earned' continuously." Northwest Engineering, 863 F2d at 1316. This holding enabled the Court to determine that "[d]uring January to March 1983, the employees of Northwest Engineering 'earned' three months' vacation pay, because they did the work required for that boon." Id.

In closing, the Court reiterated its holding, stating:

Vacation pay is "earned" continuously as work is done. The worker receives third priority treatment for benefits "earned" in the 90 days before filing--provided always that the employer is indebted to the worker in at least this sum, a question that depends on the contract and state law.

Northwest Engineering, 863 F2d at 1319; see also In re Eye Contact, Inc., 97 BR 990, 993 (Bankr WD Wis 1989).

According to Northwest Engineering, the claimants herein are entitled to third priority treatment under Section 507(a)(3) for vacation benefits earned within 90 days of the filing of the debtor's petition, i.e., that earned between December 30, 1989 and March 29, 1990. Each claimant's weekly vacation allowance may be determined by dividing his or her yearly allowance by fifty-two (52), the number of weeks in the year. By multiplying the particular claimant's weekly vacation allowance by the number of weeks that claimant actually worked within the 90 day period, one arrives at the total number of vacation hours the claimant "earned" during the relevant time period. The amount of vacation hours so "earned" must be reduced by the number of those hours, if any, which the claimant took as vacation during the 90 day period, as the debtor is no longer indebted to the claimant for this amount. By multiplying the claimant's resulting total hours "earned" during that time period by the claimant's hourly wage, one calculates the amount of the claimant's claim entitled to Section 507(a)(3) priority. The remainder of the claimant's claim is unsecured.

The results of these calculations are as follows:⁽⁴⁾

<u>Claimant</u>	<u>Priority</u>	<u>Unsecured</u>
Howe	\$ 78.00	\$1,170.00
Bailey	\$ 4.04	\$ 205.96
Shepard	\$ 22.35	\$ 558.69
Downing	\$ 95.06	\$ 572.94
Rucker	\$ 0.00	\$ 650.00
Monty	\$533.70	\$1,466.30 ⁽⁵⁾

These Section 507(a)(3) priority amounts are equal to neither those indicated on the claimants' proofs of claim, nor those requested by the debtor. They are, however, the amounts compelled by the holding of the Circuit Court of Appeals in Northwest Engineering.

END NOTES:

1. Rita Downing and Keith Monty each filed duplicate claims. The debtor's request that these duplicate claims be stricken must be granted.
2. Keith Monty simultaneously filed an unsecured claim in the amount of \$1,250.00 for the remaining vacation pay due to him.
3. This table includes only vacation "earned" as of January 1, 1990, and thus omits Keith Monty's 63 hours of vacation carried over from 1989.
4. See Appendix for calculations.
5. Keith Monty possesses an additional unsecured claim of \$1,250.00, for a total unsecured claim of \$2,716.30.

APPENDIX

Howe:

120 hours of vacation entitled to for one year	
÷ 52 weeks per year	
2.3076923 hours of vacation earned per week	
× 13 weeks worked during 90 days preceding filing	
29.999999 hours of vacation earned during 90 day period	
- 24 number of those hours taken as vacation	
5.9999999 total hours entitled to § 507(a)(3) priority	
× \$13.00 hourly wage	
\$77.999987 dollar value of hours entitled to priority	
\$1,248.00 Total claim	
- 78.00 Priority claim	
\$1,170.00 Unsecured claim	

Bailey:

40 hours of vacation entitled to for one year	
÷ 52 weeks per year	
0.7692307 hours of vacation earned per week	
× 1 weeks worked during 90 days preceding filing	
0.7692307 hours of vacation earned during 90 day period	
- 0 number of those hours taken as vacation	
0.7692307 total hours entitled to § 507(a)(3) priority	
× \$ 5.25 hourly wage	
\$4.0384611 dollar value of hours entitled to priority	
\$ 210.00 Total claim	
- 4.04 Priority claim	
\$ 205.96 Unsecured claim	

Shepard:

72 hours of vacation entitled to for one year	
÷ 52 weeks per year	
1.3846153 hours of vacation earned per week	
× 2 weeks worked during 90 days preceding filing	
2.7692306 hours of vacation earned during 90 day period	
- 0 number of those hours taken as vacation	
2.7692306 total hours entitled to § 507(a)(3) priority	
× \$ 8.07 hourly wage	
\$22.34769 dollar value of hours entitled to priority	
\$ 581.04 Total claim	
- 22.35 Priority claim	
\$ 558.69 Unsecured claim	

Downing:

80 hours of vacation entitled to for one year	
÷ 52 weeks per year	
1.5384615 hours of vacation earned per week	
× 7.4 weeks worked during 90 days preceding filing	
11.384615 hours of vacation earned during 90 day period	

-	0	number of those hours taken as vacation	
	11.384615	total hours entitled to § 507(a)(3) priority	
×	\$ 8.35	hourly wage	
	\$95.061535	dollar value of hours entitled to priority	
	\$ 668.00	Total claim	
-	95.06	Priority claim	
	\$ 572.94	Unsecured claim	

Rucker:

	80	hours of vacation entitled to for one year	
÷	52	weeks per year	
	1.5384615	hours of vacation earned per week	
×	9	weeks worked during 90 days preceding filing	
	13.846153	hours of vacation earned during 90 day period	
-	28	number of those hours taken as vacation	
	-0-	total hours entitled to § 507(a)(3) priority	
	\$ 650.00	Total claim	
-	0.00	Priority claim	
	\$ 650.00	Unsecured claim	

Monty:

	120	hours of vacation entitled to for one year	
÷	52	weeks per year	
	2.3076923	hours of vacation earned per week	
×	13	weeks worked during 90 days preceding filing	
	29.999999	hours of vacation earned during 90 day period	
-	0	number of those hours taken as vacation	
	29.999999	total hours entitled to § 507(a)(3) priority	
×	\$17.79	hourly wage	
	\$533.69998	dollar value of hours entitled to priority	
	\$3,250.00	Total claim	
-	533.70	Priority claim	
	\$2,716.30	Unsecured claim	