UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
CARL ANDERSON, Inc.,	)	CASE NO. BK86-1900
	)	
DEBTOR	)	

MEMORANDUM OPINION

This matter came on for hearing on September 15, 1986, on application by the trustee in this Chapter 11 case to employ Clay Rogers of Smith & Rogers of Omaha, Nebraska, as attorney for the trustee. Clay Rogers appeared on behalf of the trustee and on his own behalf. Richard Anderl appeared on behalf of Wells Fargo Business Credit.

This is a Chapter 11 case which was filed by Mr. Rogers on behalf of the debtor. The debtor, a corporation, has been for many years a major distributor of auto parts within the Midwest. Within the past couple of years it encountered serious financial difficulty and, as part of its ongoing financing, made certain agreements with a group of trade creditors (trade creditors) by which the trade creditors would be enabled to take control of the business if the debtor failed to make certain projections or payments. Prior to the filing of the bankruptcy petition, the trade creditors had exercised their rights to take control of the business and thereby held the position as majority shareholders of Carl Anderson, Inc.

The debtor was represented by a Washington, D.C. law firm which employed the services of Clay Rogers, while he was with the firm of Erickson & Sederstrom in Omaha, Nebraska, as local counsel. Mr. Rogers, with the cooperation of the Washington, D.C. law firm, filed the Chapter 11 petition, appeared before this Court in support of a motion for use of cash collateral and a motion for the appointment of a trustee to operate the business pending a total liquidation of the business pursuant to Chapter 11.

On the record during a hearing on the appointment of the trustee, the Court inquired of Mr. Rogers if he intended to become the attorney for the trustee. He indicated that the trustee would probably need the services of an attorney and that it would not be unlikely that the trustee would request him to provide those services. The Court further inquired concerning the propriety of such representation following the representation of the debtor and Mr. Rogers made it clear to the Court that he believed that the Code permitted such dual or successive representation.

At the request of Mr. Rogers on behalf of the debtor and at the request of other creditors, including the major secured creditor, Wells Fargo, the trustee, Merle Nicola, was appointed by this Court. Mr. Rogers then filed a request for permission to withdraw as attorney for the debtor, which this Court set for hear

Mr. Rogers also filed, on behalf of the trustee, an application for the appointment of Mr. Rogers as attorney for the trustee. This Court also set that matter for hearing. Notice of both hearings was mailed to all of the creditors, which apparently includes approximately 2,700 secured and unsecured creditors of the debtor.

At the hearing on the application to withdraw as attorney for the debtor, Mr. Rogers and his former firm, Erickson & Sederstrom, were permitted to withdraw. No party in interest objected to the appointment of Mr. Rogers as attorney for the trustee.

From the time of the initial hearing on the appointment of the trustee and the securing of credit or use of cash collateral, Mr. Rogers, without Court authority, has acted as attorney for the trustee. He has engaged in activities on behalf of the trustee which have resulted in the sale of numerous assets, has filed applications for permission to sell, has filed applications to reduce the time for notice and the number of people required to receive notice and has performed legal services that are probably of benefit to the estate.

At the hearing on the trustee's application for appointment of Mr. Rogers as attorney for the trustee, Mr. Rogers argued strenuously that his appointment was perfectly legal, was not a conflict of interest nor was even the appearance of conflict of interest involved. Mr. Anderl on behalf of Wells Fargo recited factual circumstances concerning the whole case which were provided to the Court apparently in support of Mr. Rogers' appointment.

Mr. Rogers' argument is apparently as follows:

1. The Bankruptcy Code does not prohibit the appointment of an attorney for a trustee just because he has previously represented creditors as long as his representation of the creditors ceases.

2. The fact that he previously represented the debtor does not prohibit him from being appointed as attorney for the trustee because the debtor really was not an entity independent of its creditors prepetition. Therefore, his representation of the debtor was really in the best interest of the estate and of all of the creditors and the new representation for the trustee is also in the best interests of the estate.

3. That it is unfair to require the trustee to obtain counsel who may be unfamiliar with this case when Mr. Rogers has been with it from the beginning and can and has provided significant services to the trustee and to the estate already.

This Court is not convinced that it should exercise its discretion permitting Mr. Rogers to represent the trustee and, therefore, refuses to do so. The application of the trustee for the appointment of Clay Rogers as attorney for the trustee is hereby overruled.

The reason for overruling such application is the letter and the spirit of the Bankruptcy Code. Section 327 of the Bankruptcy Code provides that the trustee may appoint, with the Court's approval, an attorney that does not hold or represent

an interest adverse to the estate and an attorney that is disinterested. The Code further provides at §327(b) that the trustee may maintain the employment of certain professionals who had been on salary with the debtor if such employment is necessary to the operation of the business. Finally, §327(c) states that a person is not disqualified for such employment solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor.

This Court has found no authority in the Statute or case law, nor any support for the position of the trustee and Mr. Rogers in the commentaries. Mr. Rogers has provided the Court with a letter brief citing several cases which permit lawyers to represent a trustee even though they had previously represented a creditor. No case has been cited which provides that a lawyer may represent a trustee after he has previously represented the debtor.

Section 327(e) of the Bankruptcy Code provides that the trustee may employ the services of an attorney that has represented the debtor, but such employment may only be for a special and specified purpose, other than to represent the trustee in conducting the case. In this case the trustee has not requested such a special limited representation by Mr. Rogers. He has requested that Mr. Rogers be authorized to represent the trustee in administering the case. This Court believes that §327(e), by providing a special exception for the employment of a debtor's attorney in limited circumstances can and should be read to prohibit any other type of representation by the debtor's attorney when requested by the trustee.

There are other problems with this application. First of all, there is an appearance of conflict of interest. Mr. Rogers represented the debtor when the debtor shut its doors without making full payment of wages to its employees. Mr. Rogers was quoted in the newspapers concerning the matter. Further, Mr. Rogers was deeply involved in the negotation of ongoing financial arrangements with the secured creditor, Wells Fargo. Such negotiations may or, may not have been in the best interest of the other unsecured creditors. This Court found after hearing that such financing should be approved, but it was only after such approval that the trustee was appointed. The trustee may have a different point of view concerning the continuation of the financing or the best interests of the creditors.

Finally, Mr. Rogers was a member of the firm of Erickson & Sederstrom when he represented the debtor. He has left his employment with Erickson & Sederstrom and that firm has now withdrawn as counsel for the debtor. However, that firm will still have the opportunity to request an award of attorney fees for the services it rendered prior to the appointment of the trustee and thereafter, if any. If Mr. Rogers were appointed as attorney for the trustee, he would be in the position of reviewing, on behalf of the trustee, his own work and recommending to the trustee whether or not to file an objection to the application for fees.

The final analysis of this Court is that there are too many problems with the proposed representation of the trustee by Mr. Rogers. The trustee and Mr. Rogers went forward without Court approval as if Mr. Rogers had been formally approved by this Court. Such actions by the trustee and Mr. Rogers seem quite strange in light of the questions the Court asked at the original hearings on the appointment of the trustee. Mr. Rogers was put on notice that the Court felt there was a problem with his appointment as attorney for the trustee.

In addition, Mr. Rogers became aware at the time the application was filed that, contrary to local practice, this Court set the application for hearing and required notice to all parties. Even with all of these hints by the Court, Mr. Rogers proceeded to file pleadings and motions in the name of the trustee. He now claims that it is unfair to prohibit him from such representation and perhaps prohibit him from being paid for such representation because he did everything in good faith. It is the opinion of this Court that he acted as a volunteer despite warnings from this Court that he might not be appointed. Such an attitude will not be rewarded by this Court.

In conclusion, this Court believes that the appointment of Mr. Rogers cannot be approved as a matter of law. Section 327 of the Bankruptcy Code does not permit it. However, if the Court is incorrect in the interpretation of the Statute, the Court finds based upon the facts as outlined above, that it is not appropriate to exercise the discretion of the Court and authorize the appointment of Mr. Rogers to represent the trustee.

The application is, therefore, overruled. See Journal Entry of this date.

DATED: September 22, 1986.

BY THE COURT:

Timothy J. Mahoney

U.S. Bankruptcy Judge

Copies to:

Clay M. Rogers, Attorney, Shaker Place, 10730 Pacific Street, Suite 234, Omaha, NE 68114

Richard Anderl, Attorney, 1900 First Nat'l. Center, Omaha, NE 68102