

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION**

ALAN E. THOMPSON, DARRELL G.
HINRICHSEN, KEITH P. FOGEL,
WALLACE E. ALM and DONALD D.
BOE,

Plaintiffs,

vs.

UNITED TRANSPORTATION UNION,

Defendant.

No. 08-CV-65-LRR

ORDER

NOT FOR PUBLICATION

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I. INTRODUCTION

The matter before the court is Defendant United Transportation Union’s Bill of Costs (docket no. 38).

II. RELEVANT PROCEDURAL BACKGROUND

On December 15, 2008, the court dismissed the Amended Petition (docket no. 1-

3).¹ The court ordered Plaintiffs Alan E. Thompson, Darrell G. Hinrichsen, Keith P. Fogel, Wallace E. Alm and Donald D. Boe to “pay Defendant’s costs.” Order (docket no. 36), at 19.

On December 29, 2008, Defendant filed the Bill of Costs, in which it requests the court tax \$3,292.04 against Plaintiffs, pursuant to Federal Rule of Civil Procedure 54(d)(1) and 28 U.S.C. § 1920. Specifically, Defendant requests \$500.00 for court fees and \$2,792.04 for depositions.

On January 7, 2009, Plaintiffs filed a “Resistance to Taxation of Costs and Objection to Bill of Costs” (“Resistance”) (docket no. 39). Plaintiffs resist the Bill of Costs in its entirety. On January 9, 2009, Defendant filed a “Response to Plaintiffs’ [Resistance]” (docket no. 40).

On January 12, 2009, the Clerk of Court taxed costs in favor of Defendant and against Plaintiffs in the amount of \$500.00. *See* Taxation of Costs (docket no. 41). The Clerk of Court neither specified which costs he decided to tax nor provided any reasoning for his decision. It appears from a comparison of the amounts requested and awarded that the Clerk of Court decided to tax the court fees but not the costs of depositions, but the court cannot be certain on this point.

On January 15, 2009, Defendant filed a “Request for Review of Taxation of Costs” (“Request for Review”) (docket no. 43). Defendant objects to the Clerk of Court’s apparent decision not to award any deposition costs. On January 20, 2009, Plaintiffs filed a “Resistance to Defendant’s [Request for Review]” (“Renewed Resistance”), in which they specifically resist the renewed attempt to tax deposition costs against them. More

¹ The complex procedural history of this case is set forth in prior orders and need not be repeated here.

broadly, Plaintiffs “resist the taxation of costs and object to the Bill of Costs.”² Renewed Resistance at 4.

None of the parties request oral argument, and the court finds oral argument is not appropriate. This matter is fully submitted and ready for decision.

III. JURISDICTION

On January 13, 2009, Plaintiffs filed a Notice of Appeal (docket no. 42), in which they appeal the Order (docket no. 36). The Notice of Appeal “divests [this court] of jurisdiction over aspects of the case that are the subject of the appeal.” *United States v. Queen*, 433 F.3d 1076, 1077 (8th Cir. 2007) (per curiam). To the extent Plaintiffs ask the court to revisit its prior decision to order Plaintiffs to “pay Defendant’s costs,” Order (docket no. 36), at 19, this court lacks subject-matter jurisdiction.

The Clerk of Court’s determination of the proper *amount* of costs to award, however, is not a subject of the Notice of Appeal. Therefore, this court retains jurisdiction to review the Clerk of Court’s determination of costs, make an award of costs and render final judgment upon the Bill of Costs. *See, e.g., Lorenz v. Valley Forge Ins. Co.*, 23 F.3d 1259, 1260-61 (7th Cir. 1994) (Easterbrook, J.) (“[C]osts are appealable separately from the merits; a district court may award costs even while the substantive appeal is

² The court construes the Renewed Resistance not only as a resistance to the Request for Review but also as an independent request for review of the Clerk of Court’s Taxation of Costs, pursuant to Federal Rule of Civil Procedure 54(d). It is worth noting that the Renewed Resistance was filed within five court days of the Taxation of Costs (docket no. 41). *See* Fed. R. Civ. P. 54(d) (“On motion served within the next five days, the court may review the clerk’s action.”); Fed. R. Civ. P. 6(a) (excluding weekends and legal holidays, including Martin Luther King Jr.’s Birthday). In any event, the court shall review the entire Taxation of Costs. Meaningful review of the Taxation of Costs is impossible. *Cf. Snyder v. Louisiana*, 128 S. Ct. 1203, 1209 (2008) (finding meaningful review of a lower court’s decision impossible, where the record did not show that the lower court made a precise finding); *McDowell v. Safeway Stores, Inc.*, 758 F.2d 1293 (8th Cir. 1985) (per curiam) (stating that clerk of court provided an explanation for his taxation of costs).

pending.”); *Rothenberg v. Sec. Mgmt. Co.*, 677 F.2d 64, 64 (11th Cir. 1982) (same); *see also Queen*, 433 F.3d at 1077 (stating that the notice of appeal “*only* divests the [district] court of jurisdiction over aspects of the case that are the subject of the appeal” (emphasis added)).

Accordingly, the court shall review the Clerk of Court’s award of costs, make an award of costs and render final judgment upon the Bill of Costs. The court shall not revisit its prior decision to order Plaintiffs to pay costs.³

IV. LAW OF COSTS

In deciding an issue relating to costs, the court must consult both Federal Rule of Civil Procedure 54(d) and 28 U.S.C. § 1920. Rule 54(d) gives the court the power to tax “costs” in favor of a prevailing party, and § 1920 defines “costs.” *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 440 (1987).

Federal Rule of Civil Procedure 54(d) provides that, “[u]nless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney’s fees—should be allowed to the prevailing party.” Fed. R. Civ. P. 54(d)(1). “Rule 54 represents a codification of the presumption that the prevailing party is entitled to costs.” *Martin v. DaimlerChrysler Corp.*, 251 F.3d 691, 696 (8th Cir. 2001) (quotations omitted); *see also Ex Parte Petersen*, 253 U.S. 300, 315-17 (1920) (discussing common law of costs). In other words, “[t]he losing party bears the burden of overcoming the presumption that the prevailing party is entitled to costs . . .” *168th & Dodge, L.P. v. Rave Reviews Cinemas, LLC*, 501 F.3d 945, 958 (8th Cir. 2007).

³ Were the court to reconsider its prior decision, it would still order Plaintiffs to pay Defendant’s costs. Plaintiffs opine it is unfair to make them pay costs when Defendant was not ordered to pay Plaintiffs’ costs after the court twice remanded this case to state court. This argument erroneously assumes the legal standards for cost-shifting in the two contexts are the same. Further, Plaintiffs conceded, prior to the time Defendant filed its Motion for Summary Judgment (docket no. 20), that Plaintiffs’ remaining claim in the Amended Complaint lacked merit. *See Order* (docket no. 36), at 12.

Section 1920 expressly identifies the expenses a court may tax as costs against a losing party. *Crawford Fitting*, 482 U.S. at 440. In relevant part, § 1920 provides:

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk . . . ;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

* * *

28 U.S.C. § 1920 (emphasis in original). The court must limit its award of costs to those costs listed in § 1920. *Crawford Fitting*, 482 U.S. at 441-42. The court does not have discretion to award a prevailing party whatever other costs might seem appropriate under the circumstances. *Id.*

Despite the presumption that a prevailing party is entitled to costs, exactly which costs will be awarded is a matter left to the discretion of the district court. *Poe v. John Deere Co.*, 695 F.2d 1103, 1108-09 (8th Cir. 1982). However, “the district court must provide a rationale for denying the prevailing party’s claim for costs.” *Thompson v. Wal-Mart Stores, Inc.*, 472 F.3d 515, 517 (8th Cir. 2006).

The court reviews the Clerk of Court’s Taxation of Costs *de novo*. *BDT Prods., Inc. v. Lexmark Int’l, Inc.*, 405 F.3d 415, 418-19 (6th Cir. 2005); *Oetiker v. Jurid Werke, GmbH*, 104 F.R.D. 389, 391 (D.D.C. 1982) (citing *Farmer v. Arabian Am. Oil Co.*, 379 U.S. 227, 233 (1964) (holding that, on review of a clerk of court’s taxation of costs, “it was [the district court’s] responsibility to decide the cost question”)); *Am. Steel Works v. Hurly Constr. Co.*, 46 F.R.D. 465, 467 (D. Minn. 1969).

V. ANALYSIS

A. Court Fees

Section 1920(1) allows the court to tax “[f]ees of the clerk” as costs against a losing

party. Defendant requests that the court tax \$500.00 under this provision. Specifically, Defendant asks the court to tax the \$350.00 fee for its third Notice of Removal (docket 1-1) and \$150.00 in *pro hac vice* fees for Attorneys Carmen R. Parcelli and Robert D. Coomber.

A removal fee is taxable under § 1920(1). *See, e.g., Wheeler v. Carlton*, No. 3:06CV00068 GTE, 2007 WL 1020481, *3 (W.D. Mo. Apr. 2, 2007); *McGuigan v. CAE Link Corp.*, 155 F.R.D. 31, 37 (N.D.N.Y. 1994); *Card v. State Farm Fire & Cas. Co.*, 126 F.R.D. 658, 660 (N.D. Miss. 1989). The court shall tax \$350.00 against Plaintiffs and in favor of Defendant.

The district courts are deeply fractured as to whether *pro hac vice* fees are taxable under § 1920(1). *See Schmitz-Werke GmbH + Co. v. Rockland Indus., Inc.*, 271 F. Supp. 2d 734, 735 (D. Md. 2003) (collecting cases). The undersigned recently examined the issue and held that *pro hac vice* fees are not taxable. *Rakes v. Life Investors Ins. Co.*, No. 06-CV-99, 2008 WL 4852932, *4-*5 (N.D. Iowa Nov. 7, 2008) (citations omitted). The court shall adhere to this prior holding. It remains the undersigned's view that "[t]he *pro hac vice* fee is an expense of counsel, not the client, and is thus not recoverable." *Schmitz-Werke*, 271 F. Supp. 2d at 735. The court shall not tax \$150.00 against Plaintiffs and in favor of Defendants for *pro hac vice* fees.

Accordingly, the court shall tax a total of \$350.00 against Plaintiffs and in favor of Defendant, pursuant to § 1920(1).

B. Depositions

1. Authority to tax the requested depositions

Section 1920(2) allows the court to tax "[f]ees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case[.]" 28 U.S.C. § 1920(2). Defendant asks the court to tax \$2,792.04 under this provision. Specifically, Defendant asks the court to tax \$110.20 for the deposition of James Albano; \$626.50 for

the deposition of John Babler; \$229.64 for the deposition of David R. Haack; \$1,303.00 for the depositions of Darrell Hinrichsen, Keith Fogel and Alan Thompson; \$140.05 for the deposition of John Marchant; \$121.80 for the deposition of Richard Meredith; \$140.85 for the deposition of John M. Raaz; and \$120.00 for the deposition of Charles Ralph Wise. Defendant submitted each of these depositions (“the requested depositions”) to the court in connection with the Motion for Summary Judgment (docket no. 20).

Plaintiffs do not dispute that § 1920(2) permits the court to award costs for depositions taken during discovery and used to successfully obtain summary judgment from the district court. Further, Plaintiffs do not dispute that the requested depositions were reasonably necessary to Defendant’s defense of this case. Plaintiffs do not allege the requested depositions were taken purely for investigative purposes. *See, e.g., Smith v. Tenet Healthsys. SL, Inc.*, 436 F.3d 879, 889 (8th Cir. 2006) (“Even if a deposition is not introduced at trial, a district court has discretion to award costs if the deposition was necessarily obtained for use in a case and was not purely investigative.” (Quotations and modifications omitted.)); *Zotos v. Lindbergh Sch. Dist.*, 121 F.3d 356, 363 (8th Cir. 1997) (“[T]he underlying inquiry is whether the depositions reasonably seemed necessary at the time they were taken.”).

Plaintiffs’ only argument against taxation of the requested depositions is solely based upon a quasi-jurisdictional, narrow statutory interpretation of § 1920(2). Plaintiffs point out that Defendant took all of the requested depositions before this case was removed to federal court for the third time, *i.e.*, before the state court granted Plaintiffs’ eleventh-hour request to amend their dismissed state-law petition to assert a federal claim. Plaintiffs contend, therefore, “[t]he depositions were not obtained ‘in the case’” but rather in what they characterize as separate state court proceedings. *Renewed Resistance* (docket no. 44), at 3 (emphasis in original). Plaintiffs maintain “[i]t would be antithetical to the fundamental limitations on federal jurisdiction to allow federal courts to order a litigant to

pay costs incurred in proceedings before state courts.” *Id.* at 2.

Neither party cites any cases on point.⁴ This lack of precedent is not terribly surprising in light of the highly unusual procedural history of this case. Here, the state court—nearly three years after discovery closed and two years after dismissing all of Plaintiffs’ claims on Defendant’s motion for summary judgment—permitted Plaintiffs to amend their dismissed petition to assert a federal claim. Defendant immediately removed the case to this court. The parties thereafter agreed that this court need not reopen discovery but rather set an expedited dispositive motions deadline based upon the discovery concluded while the case was pending in state court.

The court holds that the requested depositions are taxable under § 1920(2). The requested depositions were “necessarily obtained for use *in the case.*” 28 U.S.C. § 1920(2) (emphasis added). The false premise in Plaintiffs’ argument is that depositions were obtained for use in another case. There are not multiple cases here. Although docketed under one case number in state court and three other case numbers in federal court, all along there has only been one case.

The Supreme Court and the Eighth Circuit Court of Appeals have made this principle of the unitary nature of a removed case crystal clear over the years. For example, in one removed case, the Supreme Court stated: “After removal, the federal court ‘takes *the case* up where the State court left it off.’” *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70*, 415 U.S. 423, 436 (1974) (emphasis added) (quoting *Duncan v. Genan*, 101 U.S. 810, 812 (1880)). Quoting from an older case, the Supreme Court continued:

⁴ Prior to enactment of § 1920, it appears it was the custom of a majority of district courts to allow pre-removal costs to be taxed in favor of a prevailing party. *See, e.g., Sawyer v. Williams*, 72 F. 296, 296-98 (C.C.D. Md. 1896); *Trinidad Asphalt Paving Co. v. Robinson*, 52 F. 347, 347-50 (C.C.E.D. Mich. 1892); *Cleaver v. Traders’ Ins. Co.*, 40 F. 863, 863-65 (C.C.E.D. Mich. 1889).

“The petitioner having removed *his case* into [federal court] has a right to have *its* further progress governed by the law of the [federal] court, and not by that of the court from which *it* was removed; and if one of the advantages of this removal was an escape from [state court rules and orders], he has a right to that benefit if *his case* was rightfully removed.”

Id. at 438 (emphasis added) (quoting *Ex Parte Fisk*, 113 U.S. 713, 725-26 (1885)). Similarly, the Eighth Circuit Court of Appeals described the process of removal in a case as follows:

When *the case* was removed, the state court lost jurisdiction and the federal court acquired full jurisdiction of the parties and the subject-matter. . . . The removal terminated the jurisdiction of the state court and invested the federal court with jurisdiction.

Drainage Dist. No. 17 of Miss. Co., Ark. v. Guardian Trust Co., 52 F.2d 579, 588-89 (8th Cir. 1931) (emphasis added).

These cases make clear that there is never more than one case when a case is removed and/or remanded; there are simply two courts jousting for jurisdiction over a single case. *See, e.g., Granny Goose*, 415 U.S. at 437 (“[O]nce a case has been removed to federal court, it is settled that federal rather than state law governs the future courts of proceedings . . .”). Further, Congress has directed that, once a case is removed from state court to federal court, the state court may not proceed any further with that case unless it is remanded. 28 U.S.C. § 1446(e). All prior orders of the state court remain in effect unless the federal court dissolves or modifies them. *Id.* § 1450. “It is settled that a federal court must take *a case* as it finds it on removal,” *Resolution Trust Corp. v. BVS Dev., Inc.*, 42 F.3d 1206, 1212 (9th Cir. 1994) (emphasis added), because “after removal, the federal court . . . treats everything that occurred in state court *as if it had taken place in federal court*,” *Bunter v. Newstadter*, 324 F.2d 783, 785 (9th Cir. 1963) (emphasis added). *See, e.g., Walker v. FDIC*, 970 F.2d 114, 121 & n.12 (5th Cir. 1992); *In re*

Savers Fed. Savings & Loan Ass'n, 872 F.2d 963, 966 (11th Cir. 1989).

Accordingly, the court finds that it has the authority to tax the requested depositions as costs against Plaintiffs. The requested depositions are “[f]ees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case[.]” This is not a situation in which deposition costs were incurred in a separate state court proceeding. By agreement of the parties, the discovery that occurred while this case was pending in state court formed the entire basis for this court’s rulings at the summary judgment stage of the proceedings. It would be an odd result to hold that such discovery was not part of this case.

Pershern v. Fiatallis N. Am., Inc., 834 F.2d 136 (8th Cir. 1987), which the parties do not discuss, is not to the contrary. In *Pershern*, the Eighth Circuit Court of Appeals held that a state court filing fee incurred prior to removal was not compensable under § 1920(1). *Pershern*, 834 F.2d at 140. Unlike § 1920(2), which extends to any deposition “necessarily obtained for use in the case,” Congress specified that the only taxable filing fees under § 1920(1) are fees “of the clerk.” The sentence immediately preceding § 1920(1) makes clear that the antecedent for “the clerk” includes only “a clerk of any court of the United States.” By implication, § 1920(1) does not include the filing fees of state court clerks.

Accordingly, the court holds that it may tax the requested depositions against Plaintiffs, pursuant to 28 U.S.C. § 1920(2).

2. Taxable portions of the requested depositions

Although the requested depositions are taxable as costs under § 1920(2), the court finds that a full award of \$2,792.04 would not be proper based on the evidence Defendant submitted with the Bill of Costs.

The evidence fully supports the requested amounts for the depositions of James Albano (\$110.20), Richard Meredith (\$121.80), John M. Raaz (\$140.85) and Charles

Ralph Wise (\$120.00).

The court declines to award Defendant the requested \$626.50 for the deposition of John Babler. The invoice submitted for such request indicates that the total amount includes a charge in an unknown amount for “Exhibits & Postage” and would be sent to Defendant’s counsel via UPS. Postage and delivery expenses for deposition transcripts are not recoverable under § 1920(2). *Smith*, 436 F.3d at 889 (citations omitted) (citing *Cleveland v. N. Am. Van Lines, Inc.*, 154 F.R.D. 37, 38 (N.D.N.Y.), *rev’d on other grounds sub. nom. Cleveland v. Beltman N. Am. Co.*, 30 F.3d 373 (2d Cir.1994)); *Jones v. Cargill*, No. 05-CV-129-LRR, 2007 WL 1582640, *1 (N.D. Iowa May 31, 2007). Because the amount spent on postage is unknown to the court, the court declines to award anything for this deposition. *Cf. H.J. Inc. v. Flygt Corp.*, 925 F.2d 257, 260 (8th Cir. 1991) (stating that incomplete billing records may make a determination of the amount to cost-shift to be impossible). The court declines to estimate the amount spent on postage. *Cf. Wahl v. Carrier Mfg. Co.*, 511 F.2d 209, 217 (7th Cir. 1975) (“Estimates should be received only upon a showing that such other evidence is not available through no fault of the claimant.”).

The court declines to award Defendant all of the requested \$229.64 for the deposition of David R. Haack. The invoice submitted for such deposition indicates Defendant was billed \$1.75 for “EXHIBITS,” \$20.10 for a “Min-U-Script & Disk,” \$10.00 for “Priority Mail & Handling,” and \$10.94 in late payment fees. The court declines to tax any of these ancillary charges. Postage, handling and late payment fees are plainly not taxable. *See, e.g., Smith*, 436 F.3d at 889 (postage and handling). The “Min-U-Script & Disk” was purely for the convenience of counsel and thus not taxable. *See, e.g., Ochana v. Flores*, 206 F. Supp. 2d 941, 945 (N.D. Ill. 2002) (holding prevailing parties were not entitled to recover charges for ASCII diskettes of deposition transcripts, because such diskettes were purely for the convenience of counsel). The court declines

to award Defendant \$1.75 for “EXHIBITS,” because their nature and necessity is unclear to the court. Accordingly, the court shall only award Defendant \$186.85 for the cost of David R. Haack’s deposition.

The court declines to award Defendant the requested \$1,303.00 for the depositions of Darrell Hinrichsen, Keith Fogel and Alan Thompson. The invoice submitted for such depositions is woefully inadequate for the court to determine the amount of costs to tax. The invoice submits a blanket charge of \$1,447.00 for five persons, including but not limited to Messrs. Hinrichsen, Fogel and Thompson. Defendant states in a footnote that the amount requested “reflects the amount invoiced less the amount charged on a per page basis for the depositions of Donald Boe and Wallace Alm, which were not submitted to the Court in support of Defendant’s summary judgment motion,” Itemization (docket no. 38-2), at 2 n.1, but does not provide the court with any calculations or indicate to the court how many pages were in each deposition. Defendant did not make the depositions part of the record for the Bill of Costs. It is also unclear to what extent the requested amount includes a full charge or pro rata portion of the stated \$13.00 postage fee and \$375.00 reporting fee. Again, the court declines to rectify counsels’ incomplete records or make estimates. *Cf. H.J. Inc. v. Flygt Corp.*, 925 F.2d 257, 260 (8th Cir. 1991) (stating that incomplete billing records may make a determination of cost-shifting to be impossible); *Wahl v. Carrier Mfg. Co.*, 511 F.2d 209, 217 (7th Cir. 1975) (no estimates when fault of counsel).

The court shall award Defendant \$136.30 for the deposition of John Marchant. The court declines to award \$3.75 for “Exhibit(s),” because the nature and necessity of such item is unclear to the court.

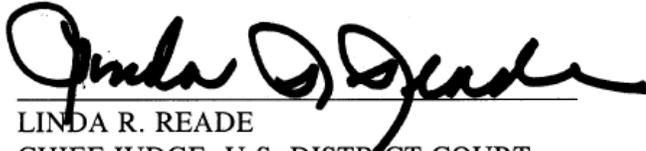
Accordingly, the court shall tax a total of \$816.00 in deposition costs against Plaintiffs and in favor of Defendant, pursuant to § 1920(2).

VI. DISPOSITION

The court **TAXES** a grand total of \$1166.00 against Plaintiffs and in favor of Defendant, pursuant to 28 U.S.C. § 1920. The Clerk of Court is **DIRECTED** to **CLOSE THIS CASE** and **ENTER JUDGMENT** in favor of Defendant.

IT IS SO ORDERED.

DATED this 26th day of January, 2009.

A handwritten signature in black ink, appearing to read "Linda R. Reade", written over a horizontal line.

LINDA R. READE
CHIEF JUDGE, U.S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA