

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In Re:)
)
PATRIOT COAL CORPORATION, *et. al.*,) Case No. 12-51502-659
) Chapter 11
)
Debtors.) Jointly Administered
) Mtn. 1995
)
) **PUBLISHED**

ORDER

The matter before the Court is Debtors Patriot Coal Corporation, et al.'s, Motion for Authorization to (i) Assume or (ii) Reject Unexpired Leases of Nonresidential Real Property and Payne-Gallatin Company Objection to Debtors' Motion for Authorization to (i) Assume or (ii) Reject Unexpired Leases of Nonresidential Real Property With Respect to Contract ID LND 323.¹ A hearing was held on May 21, 2013, at which Debtor Panther LLC and Creditor Payne-Gallatin Company were represented by counsel and presented oral argument. The matter was taken under submission. Upon consideration of the record as a whole, the Court rules as follows.

¹ Also submitted for the Court's consideration is Panther LLC's Memorandum of Law Upon the Debtors' Motion to Assume Leases and Cure Defaults and In Opposition to the Payne-Gallatin Objection to Debtors' Motion for Authorization to (i) Assume or (ii) Reject Unexpired Leases of Nonresidential Real Property With Respect to Debtors' Contract ID LND 323, Payne-Gallatin Company Initial Hearing Brief in Support of Its Objection [ECF 2056] to Debtors' Motion for Authorization to (i) Assume or (ii) Reject Unexpired Leases of Nonresidential Real Property [ECF 1995], Panther LLC's Reply Memorandum of Law in Further Support of Its Opposition to the Payne-Gallatin Objection to Debtors' Motion for Authorization to (i) Assume or (ii) Reject Unexpired Leases of Nonresidential Real Property With Respect to Debtors' Contract ID LND 323, Payne-Gallatin Company Reply Brief to Panther Memorandum of Law [ECF 3948] and in Further Support of Its Objection [ECF 2056] to Debtors' Lease Assumption Motion [ECF 1995], Andrew A. Payne, III, Declaration in Support of Payne-Gallatin Company Initial Hearing Brief in Support of Its Objection [ECF 2056] to Debtors' Motion for Authorization to (i) Assume or (ii) Reject Unexpired Leases of Nonresidential Real Property [ECF 1995], Patricia D. Clark, CPA, Declaration in Support of Payne-Gallatin Company Initial Hearing Brief in Support of Its Objection [ECF 2056] to Debtors' Motion for Authorization to (i) Assume or (ii) Reject Unexpired Leases of Nonresidential Real Property [ECF 1995] and Stipulation of Facts for Purposes of a Hearing on Payne-Gallatin Objection [Doc 2056] to Debtors' Motion for Authorization to (i) Assume or (ii) Reject Unexpired Leases of Nonresidential Real Property [Doc 1995].

FINDINGS OF FACT

Debtor Panther LLC (hereinafter "Panther") is a West Virginia limited liability company that was organized in 1998. On July 9, 2012, Debtor Patriot Coal Corporation and a number of its affiliates filed Voluntary Petitions for relief under Chapter 11 of the Bankruptcy Code in the Southern District of New York. Panther is an affiliate of Debtor Patriot Coal Corporation. These Chapter 11 cases are being jointly administered pursuant to Federal Rule of Bankruptcy Procedure 1015(b) as well as the Joint Administration Order entered on July 10, 2012. Debtor Patriot Coal Corporation and its affiliates are authorized to operate their businesses and manage their properties as Debtors In Possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code. On December 19, 2012, the cases were transferred to the Bankruptcy Court for the Eastern District of Missouri following the Southern District of New York's Memorandum Decision entered on November 27, 2012, which instructed that the cases would be transferred.

Creditor Payne-Gallatin Company (hereinafter "Payne-Gallatin") is a West Virginia Corporation incorporated in 1925. Payne-Gallatin and Panther are counterparties to a lease dated October 15, 1976 (hereinafter the "Lease"). The Lease was recorded in the Office of the Clerk of the County Commission of Kanawha County, West Virginia (the "Kanawha County Clerk's Office") in Lease Book 198 at page 638. The Lease is governed by the laws of the State of West Virginia. Lease, Arts. XI, XX. The original parties to the Lease were Payne-Gallatin Mining Company as lessor, to which Payne-Gallatin is the successor by change of name, and OCAMCO as lessee. Panther became the lessee under the Lease pursuant to an Assignment, Assumption, Consent and Release Agreement, made effective March 16, 1999 (hereinafter the "Panther Assignment"). The Panther Assignment is recorded in the Kanawha County Clerk's Office in Assignment Book 182, at page 551. On September 8, 2006, Payne-Gallatin and Panther renewed the Lease under the same terms for an additional 15 years.

Pursuant to the Lease, Payne-Gallatin granted certain mining rights to Panther on 994 acres of land located on Wet Branch of Cabin Creek of Kanawha River, in Kanawha County, West Virginia

(hereinafter the "Lease Premises"). As permitted by the Lease, Panther mines coal from other lands and transports that coal across the Lease Premises by conveyor belt to Panther's Coal Clean Preparation Plant Complex (hereinafter the "Coal Clean Plant") which is also located on the Lease Premises. The Coal Clean Plant encompasses raw and clean coal stockpiles, incoming and outgoing conveyor belt systems, the coal preparation plant and a truck loading facility. At the Coal Clean Plant, the coal that is wheeled across the Lease Premises (hereinafter the "Wheeled Coal") is processed in that it is crushed, washed, dried and then transported by conveyor belt to a stockpile. The processed Wheeled Coal is reclaimed to a structure on the Lease Premises after which the Wheeled Coal is loaded onto trucks at the truck loading facility. The trucks haul the Wheeled Coal to various sites off the Lease Premises.

The various sites off the Lease Premises where the Wheeled Coal is hauled includes: a barge loading facility located on the Kanawha River at Chelyan, Kanawha County, West Virginia, a barge loading facility located on the Kanawha River at Marmet, West Virginia, a barge loading facility located on the Kanawha River at Winifrede, Kanawha County, West Virginia, a barge loading facility located on the Kanawha River at Port Amherst, Kanawha County, West Virginia and a barge loading facility located on the Kanawha River at Quincy, Kanawha County, West Virginia (hereinafter collectively the "Kanawha River Docks"). The Wheeled Coal is ultimately loaded into a barge at one of the Kanawha River Docks. The Wheeled Coal is also hauled from the Lease Premises to a railroad loading facility located on Tom's Fork of Wet Branch of Cabin Creek (hereinafter "Tom's Fork Loadout"). At Tom's Fork Loadout, the Wheeled Coal is unloaded into stockpiles, loaded into rail cars and transported by rail to various sites for further loading and unloading. The Wheeled Coal initially brought to the Tom's Fork Loadout is either transported to a barge or it is transported to a rail loading facility on the Ohio River at Ceredo, Cabell County, West Virginia where the Wheeled Coal is ultimately moved by conveyor belt for loading into a barge or onto a ship at one of two ship loading terminals at Newport News, Hampton Roads, Virginia. The Wheeled Coal is thereafter transported to Panther's customers.

In addition to rent and other royalties, the Lease requires Panther to pay Payne-Gallatin a Wheelage Royalty² for Wheeled Coal “transported over, through, under and upon the [Lease] premises or processed through a cleaning plant on the demised premises” (hereinafter “Wheelage Royalty” or “Wheelage Royalties”). Lease, at Art. II.2. Article II.2 of the Lease provides that:

Lessee shall pay to Lessor as wheelage royalty the sum of one - half of one percent (1/2%) of the gross sales price as hereinabove defined but in no event less than ten cents (10¢) per net ton of coal mined from other lands and transported over, through, under and upon the demised premises or processed through a cleaning plant on the demised premises, payable at the same time and upon the same basis as tonnage royalties are hereinabove provided to be paid.

Lease, Art. II.2, at 10. The Lease further states that the “gross sales price” of the Wheeled Coal should be calculated based on:

the actual price paid for coal sold to a bona fide purchaser f.o.b. the loading plant after final preparation and loading, less any sales tax imposed thereon, but without any deduction for selling commissions, advertising, credit losses or other expenses, but with deductions for discounts or allowances actually allowed to arms - length wholesalers or middlemen.

Lease, Art. II.1, at 8.

Panther argues that “gross sales price” under the Lease means the price at which Panther could sell the Wheeled Coal after it has been processed and loaded onto trucks for transportation off the Lease Premises. Panther argues that the Wheeled Coal is finally processed and loaded at the Coal Clean Plant, immediately after the Wheeled Coal is loaded onto trucks at the truck loading facility. As such, pursuant to the Lease, the gross sales price is calculated by subtracting all transportation costs incurred after the Wheeled Coal leaves the truck loading facility at the Coal Clean Plant from the total price paid for the Wheeled Coal by a bona fide purchaser. The Wheelage Royalty Detail Schedules provided by Panther to Payne-Gallatin show deductions from gross sales for transportation-related expenses which are itemized under the following headings:

² A wheelage royalty is a royalty paid in exchange for the right to transport coal across a property. See, e.g., *Ark Land Co. v. Harlan Lee Land, LLC*, 2010 U.S. Dist. LEXIS 99390, at *10 (E.D. Ky. Sept 22, 2010).

trucking (fees charged by outside trucking companies to haul the Wheeled Coal from the mine to the dock/rail load out), rail (fees charged by railroads to haul the Wheeled Coal), transloading (fees charged to the mines for loading Wheeled Coal onto barges/trains by a third party), government (Public Service Commission/PSC fee - fees paid to the West Virginia Public Service Commission for the trucking companies to haul the Wheeled Coal on public roads), fuel surcharge (rates included on the rail bills to cover the fuel costs of shipping the Wheeled Coal) and put-thru/terminal fees (rates charged by another coal company to load the Wheeled Coal onto vessels exported from two of the docks located in Newport News, Hampton Roads, Virginia).

Payne-Gallatin argues that Panther has underpaid the Wheelage Royalties for the past ten years in that Panther impermissibly deducted trucking, rail, shipping and other transportation costs in Panther's calculation of the gross sales price and therefore Panther calculated the Wheelage Royalty based on a deflated gross sales price.³ Payne-Gallatin argues that Panther has underpaid the Wheelage Royalty because final loading does not occur at the Coal Clean Plant on the Lease Premises but instead at the last location where the Wheeled Coal is loaded for delivery to Panther's customers. This final point of loading includes different docks, piers and train stations. Thus, Payne-Gallatin argues that Panther's deduction of transportation costs after the Wheeled Coal leaves the Coal Clean Plant violates how the Wheelage Royalty is to be calculated under the Lease. Payne-Gallatin further argues that the Lease only permits deductions for sales tax and discounts or allowances to wholesalers and middlemen and expressly prohibits deductions for selling commissions, advertising, credit losses or other expenses. As such, Payne-Gallatin argues that Panther's deduction of the transportation costs constitutes an "other expense" which cannot be deducted from the price paid to determine the gross sales price.

³See Proof of Claim No. 2257 filed December 14, 2012 in the total amount of \$571,447.32, \$399,658.00 of which Payne-Gallatin argues is for underpaid Wheelage Royalties between July 8, 2002 and July 8, 2012. Payne-Gallatin has also claimed that Panther must cure other unpaid pre-petition property taxes and unpaid Wheelage Royalties in the amount of \$165,034.36, neither of which is the subject of this dispute.

JURISDICTION

This Court has jurisdiction of this matter pursuant 28 U.S.C. §§ 151, 157 and 1334 (2012) and Local Rule 81-9.01(B) of the United States District Court for the Eastern District of Missouri. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (B) (2012). Venue is proper in this District under 28 U.S.C. § 1409(a) (2012).

CONCLUSIONS OF LAW

The Court must determine whether the definition of “gross sales price” under the Lease permits deductions of transportation-related costs beyond the Lease Premises. This determination controls the amount Panther must pay to Payne-Gallatin before Panther can assume the Lease post-petition.

Under West Virginia law, the “plain and unambiguous language” of a lease “should be applied and enforced according to its plain intent and should not be construed.” *Cabot Oil & Gas Corp. v. Pocahontas Land Corp.*, 376 S.E.2d 94, 96 (W. Va. 1988) (citation omitted). Article II.1 of the Lease defines “gross sales price” to mean:

the actual price paid for coal sold to a bona fide purchaser f.o.b. the loading plant after final preparation and loading, less any sales tax imposed thereon, but without any deduction for selling commissions, advertising, credit losses or other expenses, but with deductions for discounts or allowances actually allowed to arms - length wholesalers or middlemen.

Panther believes the loading plant referred to in the Lease is the truck loading facility on the Lease Premises which is the point of disembarkation of the Wheeled Coal from the Coal Clean Plant. Payne-Gallatin believes the loading plant referred to in the Lease is the final point where the Wheeled Coal is loaded en route to Panther’s customers which includes various piers, docks and train stations.

F.O.B. is defined as follows under West Virginia law:

Unless otherwise agreed the term F.O.B. (which means ‘free on board’) at a named place, even though used only in connection with the stated price, is a delivery term under which . . . the seller must at his own expense and risk transport the goods to that place.

W. Va. Code § 46 - 2 - 319(1) (2012); see also U.C.C. § 2 - 319(1) (2012) (which is adopted by the West Virginia statute *verbatim*). The location after the “f.o.b.” term may refer to either the place of shipment, the place of destination or a vessel. W. Va Code § 46-2-319(1)(a)-(c) (2012).

The Lease specifically states “f.o.b. the loading plant after final preparation and loading” and as such, the costs related to the transportation of the Wheeled Coal are Panther’s expense as the seller until the loading plant after final preparation and loading. Therefore, all costs until the loading plant are included in the ‘gross sales price’ upon which the Wheelage Royalty is based.

The Court does not accept the arguments advanced by Payne-Gallatin for several reasons. First, the Lease contemplates a loading plant where the Wheeled Coal is “finally prepared and loaded.” Payne-Gallatin seeks to disjoint this phrase through its argument that the Wheeled Coal is finally prepared at the Coal Clean Plant, however, it is merely loaded for the first time at the Coal Clean Plant but ‘finally loaded’ at one of various other points. The difficulty is that the Lease contemplates *a loading plant* and there is no dispute that the Coal Clean Plant encompasses a single truck loading facility. Thereafter however, the Wheeled Coal is transported and transloaded⁴ at several different places – train stations, docks, piers – each of which Payne-Gallatin argues is a potential ‘loading plant’ pursuant to the Lease. In the case where the Wheeled Coal is loaded onto a vessel, under West Virginia law, the Lease should state ‘f.o.b. vessel’ and the buyer of the coal is required to name the vessel. See W. Va. Code § 46 - 2 - 319(1)(c) (2012). Payne-Gallatin mentions several piers where the Wheeled Coal may potentially be loaded onto a vessel, however, for Payne-Gallatin’s interpretation of the Lease to be accurate, the description in the Lease is necessarily deficient under West Virginia law, at least for every time the Wheeled Coal is transloaded on a vessel.

In essence, Payne-Gallatin’s argument is that the entirety of the term “f.o.b. the loading plant after final preparation and loading” should be deleted from the Lease. If indeed the loading plant

⁴The processes of unloading and transferring coal from truck or rail into a barge or ship is commonly known as transloading in the coal industry.

referred to in the Lease is the last location where the Wheeled Coal is loaded en route to Panther's customers, which encompasses the various train stations, docks and piers, there would be nothing to effect a difference between a) the price paid by a bona fide customer less other permissible deductions not in issue, and b) the price paid by a bona fide customer where the contract states f.o.b. the loading plant less other permissible deductions not in issue. In both of those scenarios, the seller would incur all transportation costs up to the delivery point. Consequently, the definition of gross sales price for purposes of calculating the Wheelage Royalty would be the price paid for the Wheeled Coal by a bona fide purchaser, less other permissible deductions not at issue. If this were the intended result, the Lease would not include a f.o.b. clause. It is a well settled rule of general application in contract law that words and clauses are not to be rendered meaningless or discarded "if any reasonable meaning consistent with the other parts of the contract can be" rendered. See *Moore v. Johnson Serv. Co.*, 219 S.E. 2d 315, 321 (W. Va. 1975) (citing *Wood Coal Company, Inc. v. Little Beaver Mining Corp.*, 145 W. Va. 653, 657 (1960) (citation omitted)). Payne-Gallatin's reading of the Lease renders the entirety of the term 'f.o.b. the loading plant after final preparation and loading' meaningless.

Second, under the rule of *ejusdem generis*, when certain items are enumerated followed by a more general phrase used to include other things, those other things are confined to things *ejusdem generis* – of the same kind as those items enumerated. See *In re Spring Grove Livestock Exchange, Inc.*, 205 B.R. 149, 160 (Bankr. D. Minn. 1997); see also *U.S. v. Gilliland*, 321 U.S. 86, 91, 93, 61 S. Ct. 518, 522, 85 L.Ed. 598 (1941). The Lease states that no "selling commissions, advertising, credit losses or other expenses" should be deducted from the gross sales price. The Wheelage Royalty Detail Schedules provided by Panther to Payne-Gallatin shows deductions from gross sales for transportation-related costs which are itemized as trucking fees, rail fees, transloading fees, government (Public Service Commission) fees, fuel surcharges and put-thru/terminal fees. None of these transportation costs can reasonably be deemed to be of the same kind as selling commissions, advertising or credit losses, all of which are selling or marketing

expenses. The Lease does not prohibit deductions for transportation costs in the calculation of gross sales price.

The Court concludes that “f.o.b. the loading plant after final preparation and loading” refers to the truck loading facility encompassed in the Coal Clean Plant where the Wheeled Coal is finally prepared and loaded onto the trucks. As such, “f.o.b. the loading plant after final preparation and loading” describes a finite point in time and at a single geographical location – the Coal Clean Plant which is located on the Lease Premises. There is no dispute that the Coal Clean Plant encompasses a truck loading facility, at which the Wheeled Coal is loaded onto trucks. Therefore, to obtain the gross sales price as defined by the Lease, mathematics requires the deduction of the transportation costs incurred after the Wheeled Coal leaves the Lease Premises from the total price paid by the bone fide purchaser. The sum that remains is the price (or value) of the Wheeled Coal at the point of departure from the truck loading facility located on the Lease Premises. The Lease thereafter allows the subtraction of any sales tax imposed on the Wheeled Coal as well as any discounts or allowances actually allowed to arms-length wholesalers or middlemen. The Lease however restricts deductions for selling commissions, advertising, credit losses or other like expenses. Transportation costs are not “other expenses” like selling commissions, advertising expenses or credit losses. Therefore, the Lease does not prohibit the deduction of transportation costs incurred after the Wheeled Coal departs the Lease Premises in the calculation of gross sales price for purposes of calculating the Wheelage Royalty. Panther appropriately deducted the transportation costs incurred after the Wheeled Coal departed the Lease Premises and therefore calculated the Wheelage Royalty based on the gross sales price as defined by the Lease, otherwise stated, the market value of the Wheeled Coal after its final preparation and at the moment the Wheeled Coal is loaded on trucks at the truck loading facility for departure from the Lease Premises. The purpose of a wheelage royalty is to compensate a landowner for the transportation of coal across the landowner’s land. See, e.g., *Ark Land Co. v. Harlan Lee Land, LLC*, No. 10-09-GFVT, 2010 U.S. Dis. LEXIS 99390, at *10 (E.D. Ky. Sept. 22, 2010); cf. *In re Lodestar Energy*,

Inc., 16-415-KSF, 2007 WL 2903036, at * 1 (E.D. Ky. Sept. 27, 2007). Panther has paid Payne-Gallatin the Wheelage Royalty based on the amount paid by a bona fide purchaser less all transportation costs that were incurred after the Wheeled Coal left the Lease Premises and less other undisputably permissible deductions. Panther has not underpaid the Wheelage Royalty. Therefore,

IT IS ORDERED THAT Payne-Gallatin Company Objection to Debtors' Motion for Authorization to (i) Assume or (ii) Reject Unexpired Leases of Nonresidential Real Property With Respect to Contract ID LND 323 is **OVERRULED** and Debtors Patriot Coal Corporation, et al.'s Motion for Authorization to (i) Assume or (ii) Reject Unexpired Leases of Nonresidential Real Property is **GRANTED** in that Debtors may assume the Lease.



KATHY A. SURRATT-STATES
Chief United States Bankruptcy Judge

DATED: November 13, 2013
St. Louis, Missouri

Copies to:

Office of the United States Trustee
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Suite 6.353
St. Louis, MO 63102

Thomas Moers Mayer
Kramer Levin Naftalis & Frankel LLP
1177 Avenue of the Americas
New York, NY 10036

Marshall Huebner
Davis Polk & Wardwell LLP
450 Lexington Avenue
New York, NY 10017

Patriot Coal Corporation
12312 Olive Boulevard
Suite 400
St. Louis, MO 63141

Leonora S. Long
Office of United States Trustee
111 S 10th St, Ste 6353
St. Louis, MO 63102

Laura Uberti Hughes
Bryan Cave LLP
One Metropolitan Square
211 N. Broadway, Suite 3600
St. Louis, MO 63102

Brian C. Walsh
Bryan Cave LLP
211 N. Broadway, Suite 3600
St. Louis, MO 63102

Michelle M. McGreal
Davis Polk & Wardwell LLP
450 Lexington Avenue
New York, NY 10017

Howard S. Smotkin
Stone, Leyton & Gershman
A Professional Corporation
7733 Forsyth Boulevard, Suite 500
St. Louis, MO 63105

Gregory D. Willard
Carmody MacDonald P.C.
120 South Central
Suite 1800
St. Louis, MO 63105-1705

Jonathan D Martin
Davis Polk & Wardwell LLP
450 Lexington Avenue
New York, NY 10017

Meredith Thomas Persinger
Thomas Persinger PLLC
179 Summers Street, Suite 622
P. O. Box 2828
Charleston, WV 25330-2829

Paul Bradley O'Neill
Kramer, Levin, Naftalis & Frankel LLP
1177 Avenue of the Americas
New York, NY 10036

Angela L Schisler
Carmody MacDonald P.C.
120 S. Central Ave., Suite 1800
St. Louis, MO 63105