

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

ONEIDA NATION,

Plaintiff,

v.

Case No. 16-CV-1217

VILLAGE OF HOBART, WISCONSIN,

Defendant.

**PLAINTIFF ONEIDA NATION’S RESPONSE TO DEFENDANT
VILLAGE OF HOBART’S OBJECTION TO BILL OF COSTS**

Plaintiff Oneida Nation’s (the “Nation”) Bill of Costs (ECF No. 150) requests that the Clerk tax against Defendant Village of Hobart, Wisconsin (the “Village”) \$43,038.48 in costs pursuant to Fed. R. Civ. P. 54 and Eastern District of Wisconsin Local Rule 54 (“L.R. 54”). The Village has filed an Objection (ECF No. 153) to the Nation’s Bill of Costs pursuant to L.R. 54(a)(3). The Village objects to just two categories of the various items listed in the Nation’s Bill of Costs: (a) \$29,383.00 the Nation seeks as “Other Costs” for fees incurred retrieving, reproducing, and transmitting historical documents required to respond to the Village’s document requests (hereafter the “Nicklason Costs”); and (b) several items of costs amounting to \$2,604.92 that the Nation seeks for exemplification and the costs of making copies necessarily obtained for use in the case (hereafter the “Exemplification and Copying Costs”). (*See generally* Objection, ECF No. 153.) For the reasons provided herein, the Clerk should reject the Village’s objections with respect to all but \$1,772.00¹ of the Nation’s requested costs, and tax \$41,266.48 against the Village.

¹ *See infra* at Response Section II.

Legal Standard

“Rule 54(d) creates a presumption that the prevailing party will recover costs, and that the ultimate decision to award costs is within the district court’s discretion” *M.T. Bonk Co. v. Milton Bradley Co.*, 945 F.2d 1404, 1409 (7th Cir. 1991). In light of this presumption, “the losing party bears the burden of an affirmative showing that taxed costs are not appropriate.” *Beamon v. Marshall & Ilsley Trust Co.*, 411 F.3d 854, 864 (7th Cir. 2005). The Village is generally correct that to be properly taxable as a cost under Fed. R. Civ. P. 54(d) an expense must fall into one of the categories of costs provided for under 28 U.S.C. § 1920, *Cefalu v. Vill. of Elk Grove*, 211 F.3d 416, 427 (7th Cir. 2000), and that L.R. 54(b) provides this Court’s practice regarding certain items of cost not otherwise allowed or prohibited by statute. (*See* Objection 1-3, ECF No. 153.)

Response to Objection

The Village’s Objection consists of two arguments. ***First***, the Village argues that the Clerk should refuse to tax the Nicklason Costs against the Village. (Objection 3-6, ECF No. 153.) The Village argues that taxation of the Nicklason Costs would be improper because (a) the Nicklason Costs do not fit in the categories of taxable costs provided under 28 U.S.C. § 1920, and (b) the Nicklason Costs were not reasonably and necessarily obtained for use in the case. (*See id.*) ***Second***, the Village contends that the Clerk should refuse to tax the various expenses amounting to \$2,604.92 the Nation listed as Exemplification and Copying Costs. (*Id.* at 6-8.) The Village contends the Clerk should refuse to tax \$1,772.00 of these costs for want of sufficient support to establish that the expense was reasonable and used to obtain copies that were necessarily obtained for use in the case. (*Id.* at 7.) The Village contends that the Clerk should

refuse to tax the remaining items listed as Exemplification and Copying Costs because they are expert-related fees that are not compensable under 28 U.S.C. § 1920. (*Id.* at 7-8.)

I. THE CLERK SHOULD TAX THE \$29,383.00 NICKLASON COSTS AGAINST THE VILLAGE BECAUSE THE NICKLASON COSTS WERE REASONABLY AND NECESSARILY OBTAINED FOR USE IN THIS CASE AND ARE TAXABLE UNDER 28 U.S.C. § 1920.

1. The Nicklason Costs Were a Reasonable Expense and Were Used to Obtain Copies of Documents the Nation was Compelled to Produce to the Village.

a. *The Nation expended the Nicklason Costs to obtain copies of records that the Nation was compelled to produce to the Village under Fed. R. Civ P. 34.*

Contrary to the Village's assertion, the Nicklason Costs do not represent the Nation's voluntary election to pay for research to locate documents it did not otherwise need to produce through discovery. The Nation reasonably incurred the Nicklason Costs in order to obtain copies of documents pertaining to "the status of the Oneida Indian Reservation, Wisconsin, for the period between 1934 and 1975." (Nation's Bill of Costs, Attachment at 69, ECF No. 150-1.) The Nation's expenditure of the Nicklason Costs was made necessary when the Court ordered the Nation—over the Nation's objection—to produce "*all* documents and records identifying the lands held in trust by the United States for the benefit of the Nation." (Decision & Order 10, ECF No. 46 (emphasis added).)

The Village's first set of document requests to the Nation requested, *inter alia*, that the Nation produce all "records, documents, and communications that support [its] contention that it is a federally recognized Indian tribe," and "[a]ll Title Status Reports for every parcel that was used, even incidentally, during the 2016 Big Apple Fest." (*See* Pls. Mem. of Law in Supp. of Mot. for Protective Order 4-5, ECF No. 22.) After receiving the Village's first discovery requests, the Nation moved the Court for a protective order relieving the Nation of its obligation to respond, or in the alternative to delay the Nation's deadline to respond until after the Court

had decided the Nation's then-pending motion for summary judgment. (*See generally* Pl.'s Mot. for Protective Order 1-2, ECF No. 21.) The Nation explained that producing copies of the records the Village requested would be "unduly burdensome, expensive, and immaterial under the legal standard governing disposition of this matter," based on the Nation's theory of the case. (*Id.*) The Nation explained that the Village's document requests called for the Nation to produce hundreds of thousands of documents regarding the historical status of its reservation, which were created over the course of hundreds of years. (Pl.'s Mem. of Law in Supp. of Mot. for Protective Order 5, ECF No. 22.)

In response, the Village tacitly acknowledged that the requested documents were not material to the Nation's legal theory, but were material to the Village's affirmative defense that the Nation's reservation had never been established or, if it had been established, has been diminished from its original borders. (Def.'s Mem. of Law in Opp. to Pl.'s Mot. for Protective Order 5-8, ECF No. 36.) The Village further insisted that it needed copies of the requested records to permit its expert witness, Emily Greenwald, Ph.D., to draft an expert report on the foregoing issues. (*Id.* at 6.) In denying the Nation's motion for a protective order, the Court acknowledged that the requested records were material only to the Village's establishment and diminishment theories. (Decision & Order 10, ECF No. 46.) Nevertheless, the Court ordered that "the Nation must provide or make available for copying all documents and records identifying the lands held in trust by the United States for the benefit of the Nation." (*Id.*) The Court did not limit this order, as the Village now contends, to responsive documents then in the Nation's possession, custody, or control. (*See generally id.*)

b. *The Nicklason Costs were a reasonable expense the Nation was required to make to obtain copies of the documents the Nation was compelled to produce to the Village.*

The Village is incorrect to assert that the Nation voluntarily chose to expend the Nicklason Costs. (See Objection 5, ECF No. 153.) Because the Court required the Nation to produce *all* documents and records identifying the lands held in trust by the United States for the benefit of the Nation, the Nation was required to locate records for copying and production in the locations where all such records may be found: the National Archives in Washington, D.C. and College Park, Maryland. The National Archives does not permit an individual member of the public to search or obtain copies of its records unless he or she is a registered researcher with the organization. 36 C.F.R. § 1254.6. Even if the Nation or one of its attorneys had been registered as a researcher with the National Archives, the National Archives recommends against using someone not familiar with the National Archives to attempt to locate and obtain copies of the records it maintains. See Services for Offsite Researchers—Frequently Asked Questions, <https://www.archives.gov/publications/general-info-leaflets/71-07-dc-area-records.html> (last visited Nov. 9, 2020) (“In many instances the complex nature of archival research does not lend itself to long distance navigation of finding aids and voluminous series of records. In these cases we may recommend that you identify someone who can conduct research for you in our research rooms.”). In light of the above, the Nation had no reasonable alternative to utilizing Nicklason Research Associates for help identifying and obtaining copies of the documents the Court compelled the Nation to produce to the Village.

2. The Nicklason costs are taxable under 28 U.S.C. § 1920.

The Village argues that the Nicklason Costs are not properly taxable because they do not fit any of the categories of taxable costs under 28 U.S.C. § 1920. (Objection 4, ECF No. 153.) The Village contends that the Nicklason Costs are more similar to attorneys’ fees or fees for

expert witnesses, neither of which is a taxable cost under 28 U.S.C. § 1920. (*Id.* at 5-6.) Once again, the Village is incorrect.

As an initial matter, the Village's citation to *Harco, Inc. v. Am. Nat. Bank & Tr. Co. of Chi.*, 38 F.3d 1429 (7th Cir. 1994), to suggest that "[r]esearch costs are not a taxable cost" is misleading in light of the circumstances underlying the Nicklason Costs. (*See* Objection 5-6, ECF No. 153.) *Harco, Inc.* dealt specifically with costs for "computerized legal research," which the Seventh Circuit held was akin to attorneys' fees because attorneys typically use computerized legal research, such as Westlaw, to more-efficiently perform work the attorney would otherwise be expected to do. 38 F.3d at 1440-41. This is dissimilar to the facts underlying the Nicklason Costs, where conducting research at the National Archives is restricted to registered researchers and where the National Archives discourages attorneys not trained in its recordkeeping systems from conducting the work to locate and obtain copies of its records. (*See supra.*)

The Nicklason Costs were a reasonable expense—indeed, the Nation's only reasonable option under the circumstances—that the Nation incurred to obtain copies of documents it was compelled to produce in response to the Village's document requests. Costs expended obtaining copies of documents needed for production to the opposing party are taxable under 28 U.S.C. § 1920. *Voight v. Subaru-Izuzu Auto., Inc.*, 141 F.R.D. 99, 103 (N.D. Ind. 1992) ("Photocopying charges attributable to discovery . . . are 'reasonably and necessary for use in the case' and can be awarded."); *Faraca v. Fleet 1 Logistics, LLC*, 693 F. Supp. 2d 891, 996-97 (E.D. Wis. 2010) ("Photocopying is an allowable cost if the copies are necessarily [obtained] for use in the case, which has been interpreted as meaning that the copies are for the Court and opposing counsel.") As such, the Nicklason Costs are permissible under 28 U.S.C. § 1920(4) and L.R. 54(b)(4).

The Village's objection is also difficult to square with the position the Village previously took in this case. In the now-moot bill of costs the Village submitted prior to the Nation's appeal, it requested that the Clerk tax against the Nation \$9,000 that the Village spent to obtain title reports pertaining to the Nation's land at issue in this matter. (*See* Village's Bill of Costs, Attachment at 34, ECF No. 131-1.) The Court compelled the Nation to produce the Nicklason-related historical documents in order to allow the Village to investigate whether the historical treatment of the lands comprising the Nation's Reservation demonstrate that the Reservation had been diminished or disestablished. (Decision & Order 9-10, ECF No. 46.) There is no compelling reason why this should be treated any differently than the \$9,000 expense the Village incurred obtaining a title report with respect to the Nation's lands.

II. THE CLERK SHOULD TAX \$832.92 AGAINST THE VILLAGE FOR THE NATION'S COSTS OF EXEMPLIFICATION AND MAKING COPIES NECESSARILY OBTAINED FOR USE IN THE CASE.

The Village's objection to the Nation's proposed Exemplification and Copying Costs is divided into two separate arguments. The Village first argues that the Clerk should refuse to tax \$1,772.00 the Nation paid to Quantum Legal Services to scan documents necessary for this case. As explained below, the Nation withdraws this expense from its Bill of Costs. However, the Clerk should deny the Village's objection to the remaining \$832.92 that the Nation seeks to tax because the Village has not met its burden to establish that these are improper costs under 28 U.S.C. § 1920.

The Nation requested the Clerk tax against the Village \$1,772.00 it incurred scanning hard copy documents into electronic form for use in this case. (*See* Bill of Costs, Attachment at 28, ECF No. 150-1.) The Village objected to taxation of this cost because, from the record submitted, it cannot discern for what purpose these scans were made. (Objection 7, ECF No. 153.) The Village correctly states that documents created for a party's own use are not

considered to have been necessarily obtained for use in the case, and are therefore not taxable under 28 U.S.C. § 1920. (*See id.* at 7.) Furthermore, once the non-prevailing party objects to taxation of a particular cost, the prevailing party bears the burden to establish that the proffered cost was “‘necessarily incurred and reasonable.’” *Valerio v. Total Taxi Repair & Body Shop, LLC*, 82 F. Supp. 3d 723, 749 (N.D. Ill. 2015 (quoting *Trs. Of the Chi. Plastering Inst. Pension Trust v. Cork Plastering Co.*, 570 F.3d 890, 906 (7th Cir. 2009))). Upon review of its records, the Nation was unable to identify additional documentation demonstrating that these documents were scanned to create electronic copies to produce to the Village, and not for the Nation’s own use. Accordingly, the Nation withdraws this expense from its Bill of Costs.

The Clerk should tax the full amount of the remaining \$832.92 the Nation seeks as costs for exemplification and making copies necessarily obtained for use in the case. These costs relate to expenses incurred for items such as printing, document preparation, and postage that two of the Nation’s expert witnesses incurred and passed through to the Nation. (*See* Nation’s Bill of Costs, Attachment at 29-45, ECF No. 150-1.) The Village argues that these expenses are not taxable under 28 U.S.C. § 1920 because the expenses either relate to postage or were expended on expert-related items. (Objection 6-8, ECF No. 153.)

The Village provides no convincing support for its argument that the Clerk should not tax these costs because they were incurred by the Nation’s experts, and passed through to the Nation. The Village’s argument that these costs are not taxable to the extent they represent fees related to postage fails in light of Seventh Circuit precedent stating that mailing costs are taxable. *See Little v. Mitsubishi Motors N. Am., Inc.*, 514 F.3d 699, 701 (7th Cir. 2008); *Burda v. M. Ecker Co.*, 2 F.3d 769, 779 (7th Cir. 1993). The Village’s attempt to liken these costs to non-taxable expert fees is likewise unavailing. (*See* Objection 8, ECF No. 153.) The relevant material from both

cases the Village cites in support of this argument clearly stand for the proposition that the *fee* charged by an expert witness for his or her testimony is not a taxable cost. *See Heiar v. Crawford Cty., Wis.*, 746 F.2d 1190, 1203 (7th Cir 1984); *Andrews v. Chevy Chase Bank FSB*, 706 F. Supp. 2d 916, 925 (E.D. Wis. 2010). The Nation specifically withheld the fees charged by their experts from the costs for which they seek taxation, and only requested that the Clerk tax the expenses for clerical items that the experts passed through to the Nation. (See Bill of Costs, Attachment at 29-45, ECF No. 150-1.) 28 U.S.C. § 1920(4) plainly permits taxation for costs related to exemplification and making copies of *any* materials necessarily obtained for use in the case. The statute provides no support for the Village's argument that expenses incurred by a third-party and passed through to the prevailing party are not taxable, and the Village has provided no other source to justify such a deviation from 28 U.S.C. § 1920's plain terms.

Conclusion

For the foregoing reasons, the Clerk should tax \$41,266.48 against the Village pursuant to Fed. R. Civ. P. 54 and L.R. 54.

Dated this 9th day of November 2020.

Respectfully submitted,

ARLINDA F. LOCKLEAR, ESQ.
4113 Jenifer Street, NW
Washington, DC 20015
alocklearesq@verizon.net
(202) 237-0933

/s/ James R. Bittorf
ONEIDA LAW OFFICE
James R. Bittorf
Kelly M. McAndrews
N7210 Seminary Road
P.O. Box 109
Oneida, WI 54155
jbittorf@oneidanation.org
kmcandre@oneidanation.org

HANSEN REYNOLDS LLC
Paul R Jacquart
Jessica C. Mederson
301 N. Broadway, Suite 400
Milwaukee, WI 53202
pjacquart@hansenreynolds.com
jmederson@hansenreynolds.com
(414) 455-7676

HOGEN ADAMS PLLC
Vanya S. Hogen
William A. Szotkowski
1935 West County Road B2, Suite 460
St. Paul, MN 55113
vhogen@hogenadams.com
bszotkowski@hogenadams.com
(651) 842-9100

Counsel for Plaintiff Oneida Nation