Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

February 4, 2004

GSBCA 16038-RELO

In the Matter of JAMES R. WYATT, JR.

James R. Wyatt, Jr., Kathleen, GA, Claimant.

Master Sergeant Karl H. Stanton, Deputy Chief, Excess Cost Adjudication Function, Joint Personal Property Shipping Office, Department of the Air Force, San Antonio, TX, appearing for Department of Defense.

HYATT, Board Judge.

Claimant, James R. Wyatt, Jr., questions the Air Force's claim for excess costs of shipping his household goods (HHG) in connection with his 1999 transfer from Seymour Johnson Air Force Base in North Carolina to Warner Robins Air Force Base in Georgia. The Air Force has requested repayment of $940.91 in connection with this move on the basis that the HHG shipped exceeded 18,000 pounds, which is the maximum amount that the Government can pay to have shipped.

Claimant makes a variety of points in opposition to this claim. First, he notes that he last moved at Government expense only a few years prior to this move to Georgia and at that time had only 13,000 pounds of household goods. He is confident that he did not acquire another 5000 pounds of household goods in the interim. In addition, he points out that the shippers failed to take note of the boxes designated for shipment as professional books, papers, and equipment (PBP&E). It appears that these items were included in the weight of the regular household goods and, thus, might have caused the overage for which the Air Force now seeks payment. Since the Air Force took well over two years to inform Mr. Wyatt of his potential liability for the additional cost of shipping excess goods, claimant asserts that he is no longer in a good position to challenge the accuracy of the Air Force's claim. He thus argues that the Air Force should be precluded from recovering the alleged overpayment by reason of laches and that the claim should be waived.

In response to this claim, the Air Force states that there is no documentation approving separate shipment of claimant's PBP&E, no professional items are noted on the inventory of HHG, and no other basis has been identified to permit a reduction in the excess costs claimed. The Air Force also responds to claimant's frustration with the delay in notification,

explaining that the process has recently been streamlined and further automated to reduce the time required to identify excess costs of shipping that must be paid for by the transferring employee.

Discussion

When an agency transfers an employee from one permanent duty station to another in the interest of the Government, the Government is responsible for the costs of transporting and storing not more than 18,000 pounds net weight of the employee's HHG. 5 U.S.C. § 5724(a)(2) (2000). This statutory limitation is implemented in the Federal Travel Regulation (FTR), which applies to most civilian employees of the Federal Government. 41 CFR 302-7.2 (1999). Because the Government cannot pay for moving any more than 18,000 pounds of HHG, the employee whose goods are moved is responsible for reimbursing the Government for the costs attributable to any weight in excess of 18,000 pounds. Richard D. Grulich, GSBCA 15800-RELO, 02-2 BCA ¶ 31,891. As the Board has frequently noted, these rules leave no room for compromise – if the shipment exceeds 18,000 pounds, the employee must pay for the cost associated with the additional weight. E.g., George W. Currie, GSBCA 15199-RELO, 00-1 BCA ¶ 30,814; Robert K. Boggs, GSBCA 14948-RELO, 99-2 BCA ¶ 30,491.

Although the Government may pay separately for PBP&E as an administrative expense, rather than including those materials as HHG, there are specific regulations setting forth guidelines for such shipments. The relevant provisions, in effect as of the time of claimant's move, are found in section 302-8.2(b) of the FTR and paragraph C8120 of the Department of Defense's Joint Travel Regulations (JTR). Both sets of regulations require that the employee furnish (1) an itemized inventory of PBP&E for review by the appropriate official and (2) evidence that shipment of the items as HHG will cause the weight to exceed the maximum allowance. In addition, an appropriate official must certify that the PBP&E are necessary for the performance of the employee's duties at the new official station and that these or similar items would have to be obtained at Government expense if not transported to the new permanent duty station. The regulations establish that PBP&E shall be shipped as an administrative, rather than as a travel, expense. Id.; see also Mariano G. Aguilar, Jr., GSBCA 15903-RELO, 03-1 BCA ¶ 32,178; Nicholas R. Delaplane, GSBCA 14961-RELO, 99-2 BCA ¶ 30,489; Ingrid Rodenberg, GSBCA 13729-RELO, 97-2 BCA ¶ 29,027. Here, the Air Force states that there is no documentation that any of the items shipped were approved for transport as PBP&E and there is no indication of such on the Government Bill of Lading (GBL). Claimant has not established otherwise. Thus, the regulatory requirements to qualify for shipment of items as PBP&E were not met and all of the items shipped must be treated as HHG.

Mr. Wyatt further contends that for his previous move, two years earlier, he had only 13,000 pounds of HHG and he did not acquire an additional 5000 pounds of HHG prior to the move in issue. A similar contention was squarely rejected in Rodenberg as insufficient to overturn the carrier's documentation. Indeed, the Board has observed that the opportunities for relief in cases such as this are severely constrained. Michael J. Kunk, GSBCA 14721-RELO, 99-1 BCA ¶ 30,164 (1998). In the absence of proven error or fraud, the carrier's reported weight is deemed to be accurate. As we stated in Kunk, the employee may only avoid liability for the cost of transporting weight alleged to be in excess of 18,000

pounds "where the Government's assessment of costs is based on charges proven by clear and substantial evidence to be marred by error." 99-1 BCA at 149,283 (citing Jerry Jolly, GSBCA 14158-RELO, 98-1 BCA ¶ 29,518 (1997) (record contained persuasive documentary evidence that mover's charges were based upon unreliable weight data); Robert G. Gindhart, GSBCA 14288-RELO, 98-1 BCA ¶ 29,405 (1997) (mover's charges were based on weight of household goods which became waterlogged during shipment)). Mere suspicion that the reported weight of the goods is not accurate, which is essentially all that we have here, does not suffice to constitute clear and substantial evidence of error or fraud. Boggs. Accordingly, we conclude that the Air Force has properly established a debt in this case.

Finally, Mr. Wyatt contends that the Air Force was not sufficiently diligent in establishing its claim for repayment and that the agency should be barred from asserting it under the doctrine of laches. He additionally asks the Board to waive repayment of the amount claimed by the Air Force. These are not matters that the Board may appropriately address, however.

The equitable doctrine of laches may be asserted as a defense against stale claims. A matter will not be barred on account of laches unless the party raising the defense proves both (1) unreasonable and unexcused delay on the part of the party asserting the claim and (2) prejudice to the responding party occasioned by the delay. C. I. Whitten Transfer Co., GSBCA 13911-RATE, 97-1 BCA ¶ 28,860. The general rule is that the United States is not subject to a defense of laches. United States v. Summerlin, 310 U.S. 414, 416 (1940); United States v. Popovich, 820 F.2d 134, 136 (5th Cir. 1987). The Court of Appeals for the Federal Circuit has recognized this rule, although it may, in some circumstances, be willing to entertain an argument that the doctrine should apply:

> At the outset we note that it is not entirely clear whether the defense of laches may be asserted against the government. See S.E.R., Jobs for Progress, Inc. v. United States, 759 F.2d 1, 6-9 (Fed.Cir.1985) (discussing apparently conflicting authority in various circuits and in the Court of Claims, and concluding that "we do not think that the thrust of the decisions is that laches is always inapplicable per se in any contract or other claim where a legal rather than an equitable remedy is sought.").

JANA, Inc. v. United States, 936 F.2d 1265, 1269 (Fed. Cir. 1991).

In any event, we need not resolve this issue here. On the record before us, claimant has not established the severe prejudice contemplated to invoke the defense against the Government. Additionally, the Board does not grant equitable relief in claims of this nature. Our review authority is limited to the legal determination of whether the requirements of statute and regulation have been met. Having determined that the debt was properly established under the applicable statutory and regulatory provisions, the Board's review function is ended. We have no authority to waive the indebtedness. E.g., Stephen V. Yates, 15236-RELO (Dec. 19, 2003); Jennings W. Bunn. Jr., GSBCA 15656-TRAV, 02-2 BCA ¶ 31,930.

The authority to waive claimant's indebtedness is vested in the Air Force, which may

exercise that authority if it concludes that collection would be "against equity and good conscience and not in the best interests of the United States" and if there is no indication of "fraud, misrepresentation, fault, or lack of good faith" on the part of the person whose debt is requested to be waived. 5 U.S.C. § 5584(a)(2)(A). Equitable considerations, such as the laches defense asserted here, may thus more appropriately be raised in a properly directed request that the agency exercise its waiver authority in this matter.

_____
CATHERINE B, HYATT
Board Judge