

PSBCA

APPEALS OF SOUTHERN MAIL SERVICE, INC., ET AL

Under Contract No. HCR 75124, et al.

June 16, 2010

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OPINION OF THE BOARD ON MOTION FOR RECONSIDERATION [FN1]

Respondent has filed a timely motion seeking reconsideration of that part of the Board's Opinion (Southern Mail Service, Inc., et al., PSBCA Nos. 5322, 5375, 5377-5382, 09-2 BCA ¶ 34,244) in which the Board found ineffective the contracting officer's attempted revocation of contract adjustments previously allowed by authorized contracting officer's representatives (CORs). As a result, the Board granted the appeals in PSBCA Nos. 5375 and 5377- 5382, and Respondent seeks reconsideration of that outcome. [FN2] Familiarity with the facts set out in the original Opinion is assumed.

Respondent maintains that the Board's Opinion on this issue was an error of law, in that it would prevent Respondent from recovering payments made by it as a result of mistake. Respondent contends that this outcome is in contravention of Respondent's common-law authority to recover such payments and would effectively overrule 39 U.S.C. § 2605. [FN3] Recognizing that it could have made these arguments during the Board's consideration of the parties' summary judgment motions, Respondent maintains that its new arguments should be considered in any event to avoid what it contends is the "manifest injustice" of the Board's decision.

Appellants argue that the Board should not consider the arguments at this stage of the proceeding, as they could have been made earlier. In addition, Appellants argue that the Board found that the payments at issue had not been made by mistake. Therefore, Appellants argue, in effect, that there is no basis for Respondent's concern about the ramifications of the Board's Opinion on Respondent's ability to collect mistaken payments.

As Respondent recognizes and Appellants argue, arguments that could have been made earlier are not normally a proper basis for seeking reconsideration. E.g., *Montgomery-Ross-Fisher, Inc.*, PSBCA No. 1096, 84-3 BCA ¶ 17,607. Nevertheless, and as we have done in other cases, e.g., *West Wilson Enterprises*, PSBCA Nos. 5203, 5219, 08-2 BCA ¶ 33,977; *Erol A. Guvenoz*, PSBCA Nos. 5150 et al., 08-2 BCA ¶ 33,960; *Nova Express*, PSBCA Nos. 5091 et al., 07-2 BCA ¶ 33,660; *Loyd V. Lovell*, PSBCA Nos. 4766, 4811, 03-1 BCA ¶ 32,070, we exercise our discretion to consider Respondent's arguments.

Respondent challenged the granting of the adjustments at issue by contracting officer's representatives who were specifically authorized to consider and decide adjustments of the size at issue and to whom consideration of these adjustment requests was assigned. Respondent contends the CORs erred in granting adjustments as large as they did. The contracting officer issued final decisions overturning the actions taken by the CORs, substituting his (lower) calculation of the adjustments, and seeking to recover from Appellants the difference between his and the CORs' calculations. The Board ruled that, under the circumstances of these appeals, the contracting officer was not authorized to rescind the approvals given by the CORs.

On reconsideration, Respondent argues that the Board's decision "would ... negate the Respondent's common-law authority to recover payments that were made by mistake." (Resp. Mot. p. 2). We have recognized the Postal Service's common-law right to recover funds erroneously paid. E.g., *E & G Trucking*, PSBCA No. 5092, 09-1 BCA ¶ 34,073, citing *United States v. Wurts*, 303 U.S. 414, 415-416 (1938); *American Fidelity Fire Ins. Co. v. United States*, 513 F.2d 1375, 1381 (Ct. Cl. 1975); *Fansteel Metallurgical Corp. v. United States*, 172 F. Supp. 268, 270 (Ct. Cl. 1959); *Russell and Ruby M. Lambert*, PSBCA Nos. 2287, 2300, 89-3 BCA ¶ 22,227. However, to recover under this theory, Respondent must prove that it paid funds by mistake. In these appeals, Respondent did not prove that the CORs made mistakes in awarding adjustments in the amounts they did. Moreover, there was no showing that the payments were made in violation of unambiguous contract terms or in violation of any statute or regulation.

Respondent's other argument is that the Board's ruling on this issue "would effectively overrule a currently valid Act of Congress, 39 U.S.C. § 2605, and strip from the Respondent an undisputed statutory right . . . to recover payments made by the Postal Service as a result of mistake, regardless of who authorized the payments." (Resp. Mot. pp. 1-2). We note first that the Board is not a forum for interpreting the cited statute and that, in any event, Respondent did not elect to utilize that statute to recover the allegedly erroneous payments at issue in this proceeding. In addition, as with recovery under common law, in order to recover under the statute, Respondent would still have to show, in the context of this dispute, that the payments it seeks to recover were made "as a result of ... mistake." [FN4]

Finally, allowing Respondent to rescind its contractual decisions fairly made by authorized officials after due consideration undermines the need for finality in contractual dealings, "since finality in contract relations is important not only in light of the parties' expectations but as a matter of economic efficiency. It is in the interest of both the contractor and the Government to be able to rely on de-

cisions fairly made." URS Consultants, Inc., IBCA No. 4285-2000, 02-1 BCA ¶ 31,812, at 157,225, recon. denied, 02-2 BCA ¶ 31,917.

Respondent's common-law (and statutory) right to recover payments erroneously made remains intact, notwithstanding our Opinion in these appeals, in appropriate cases where Respondent proves it made a payment by mistake and circumstances warrant allowing recovery. In these appeals it did not prove it paid excessive adjustments by mistake.

Neither of Respondent's arguments persuades us that the Opinion of the Board should be reversed on reconsideration. Accordingly, Respondent's motion for reconsideration is denied.

David I. Brochstein

Administrative Judge

Vice Chairman

I Concur:

William A. Campbell

Administrative Judge

Chairman

I Concur:

Norman D. Menegat

Administrative Judge

Board Member

FN1. Administrative Judge Gary E. Shapiro took no part in the Board's consideration of this matter.

FN2. Respondent does not seek reconsideration of the Board's decision in PSBCA No. 5322.

FN3. "The Postal Service shall request the Attorney General to bring a suit to recover with interest any payment made from moneys of, or credit granted by, the Postal Service as a result of -

- (1) mistake;
- (2) fraudulent representations;
- (3) collusion; or
- (4) misconduct of an officer or employee of the Postal Service."

FN4. See footnote 3, above.