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UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D C 20548

IN REPLY
REFER TO

COMMUNITY AND ECONOMIC
DEVELOPMENT DIVISION

APR 27 1977

Mr. Bruce Flohr
Deputy Administrator
Federal Railroad Administration
Department of Transportation

Dear Mr. Flohr

As you know we are currently reviewing the management of the Alaska Railroad Site work in Anchorage, Alaska, has been completed and a proposed report to Congress is being prepared. During the course of our audit we reviewed various aspects of the railroad's administration including transportation payments made to railroad employees. This letter concerns relocation allowances paid to the railroad's General Manager, William L. Dorcy. We are bringing the matter to your attention now so that it may be promptly resolved.

We believe Mr. Dorcy is not entitled to \$5,385.59 paid to him in connection with his appointment as General Manager, effective April 1, 1976, and recommend that you initiate action to collect this amount. In addition, you should also consider whether Mr. Dorcy should be charged annual leave for excess travel time from St. Louis to Anchorage during the period June 17 to 27, 1976. His voucher for that period should be adjusted to limit reimbursement to travel by the most direct route, and to include Mrs. Dorcy's entitlement for travel at 8 cents per mile. Results of these adjustments could be netted against the \$5,385.59 of improper payments. Our recommendation for collection of improperly paid relocation allowances and adjustments of other items, is based upon the following.

The record indicates that by letter dated March 26, 1976, the Alaska Railroad Personnel Officer advised Mr. Dorcy that he was authorized reimbursement for the following expenses in connection with his move to Anchorage.

1. Movement of up to 11,000 pounds of household goods,
2. payment of real estate fees not to exceed \$5,000,
3. transportation for him and his wife to Anchorage with per diem enroute,
4. shipment of one automobile from Missouri to Anchorage,
5. storage of household goods in Anchorage for up to 30 days,
6. temporary quarters in Anchorage not to exceed 30 days, and
7. a house hunting trip for him and/or his wife

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By letter dated April 20, 1976, the Alaska Railroad Personnel Officer requested that the Deputy Administrator, Federal Railroad Administration (FRA), confirm his agreement with Mr Dorcy concerning payment of the items listed on the previous page. The Deputy Administrator did so by endorsing a copy of the March 26, 1976, letter to Mr. Dorcy. Attached to the personnel officer's April 20, 1976, letter to the Deputy Administrator was the Alaska Railroad Chief Counsel's opinion that the costs could be paid. This opinion was based upon the conclusion that a valid contract had been executed between the General Manager and the Deputy Administrator of the FRA. It was the view of the Chief Counsel that the authority for such a contract was contained in the Alaska Railroad Act of March 12, 1914, 38 Stat. 305, now codified at 43 U.S.C. 975 (1970). In particular, the Chief Counsel placed reliance upon 43 U.S.C. 975 which provides that:

"The President of the United States is empowered, authorized, and directed * * * to employ such officers, agents, or agencies, in his discretion, as may be necessary to enable him to carry out the purposes of said sections, to authorize and require such officers, agents or agencies to perform any or all of the duties imposed upon him by the terms of said sections; * * * to fix the compensation of all officers, agents, or employees appointed or designated by him; * * * to make such other contracts as may be necessary to carry out any of the purposes of said sections * * *."

Based upon this authority, and upon the similar provisions of 43 U.S.C. 975f, the Chief Counsel concluded.

"In our opinion, therefore, he had authority to agree to such fringe benefits, to recruit and to prevent the loss to the General Manager candidate in selling his home, to authorize temporary quarters in Anchorage for the period agreed to, as well as to authorize a house-hunting trip as an alternative to temporary quarters, in part or as a whole in order to secure the type of individual which the Administrator felt was necessary to fill the job and accomplish the task to the advantage of the United States."

"The verbal contract was made, and the General Manager has performed."

The statutory provisions relied upon by the Chief Counsel give the President or his designee the authority to employ necessary agents and to fix their compensation. In this regard, we have held that the word "compensation," in its broad sense, includes remuneration in any form for services rendered (53 Comp Gen. 355 (1973); 39 id. 140, 144 (1959), 26 id. 501, 502 (1947)). Relocation expense benefits are not, however, payment for services rendered, but are, instead, designed to reimburse an employee for out of pocket expenses incurred incident to an official change of station (See 5 U.S.C 5724, 5724a (1970).)

Further, while the Alaska Railroad is excluded by 5 U.S.C. 5102(a) (1) (iii) and 5 U.S.C. 5331(a) from the provisions governing the classification of positions and rates of pay, no similar exclusion is found in Chapter 57 of Title 5, United States Code, or any subchapter thereof, which governs travel, transportation, and subsistence of Federal employees. Thus, while under the provisions cited by the Chief Counsel, compensation of Alaska Railroad employees may be administratively established within the limits set by the annual appropriation acts for the Department of Transportation, such provisions do not provide authority to fix relocation or other travel and transportation benefits. (See also the provision in the Alaska Railroad appropriation for fiscal year 1976, 89 Stat 704 (P.L. 94-134), limiting the salary of the General Manager to the rate for a GS-17.) Identical language has appeared in appropriation acts for prior years.

Relocation benefits for Federal employees may be authorized and paid only in accordance with the statutes and regulations which authorize such entitlements. For the reasons set forth below, we have determined that the Federal Travel Regulations (FPMR 101-7, May 1973) which provide such benefits are applicable to employees of the Alaska Railroad. Because these regulations have the force and effect of law, they may not be waived either by the head of the agency concerned or by this Office (49 Comp Gen. 145, 147 (1969), B-187677, December 3, 1976). Accordingly, although under the provisions of the Alaska Railroad Act, the President or his designee may have the authority to make certain necessary contracts, such contracts may not have the effect of nullifying the regulations by expanding an employee's entitlement beyond the rights granted in the statutes and implementing regulations (B-180010.09, December 9, 1976, 56 Comp. Gen. ___)^{1/} Further, the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or to cause to be done what the law does not sanction or permit (Utah Power & Light Co. v United States 243 U.S. 389 (1917), B-186218, supra).

^{1/} Page number to be assigned when printing of the published decision is completed .

Concerning the applicability of the Federal Travel Regulations to employees of the Alaska Railroad, we note that the Alaska Railroad is a separate office in the Federal Railroad Administration, Department of Transportation (DOT). Paragraph 1-1.2 of the Federal Travel Regulations (FPMR 101-7, May 1973) provides

"These regulations apply to the travel of civilian officers and employees of the United States, * * * as authorized under 5 U.S.C. 5701-5709. * * *"

Under 5 U.S.C. 5701(2) "employee" means an individual employed in or under an agency, which, pursuant to 5 U.S.C. 5701(1) (A), includes an executive agency. Since DOT is an executive agency under 5 U.S.C. 105, it is clear that the Federal Travel Regulations (FTR) apply to all DOT employees, including those of the Alaska Railroad. (See also B-158876, July 27, 1966, wherein we concluded that Alaska Railroad employees are civilian officers or employees in the executive branch of the Government.)

Furthermore, travel order No. 10-54 authorizing Mr. Dorcy to travel to Anchorage states that reimbursement of travel expenses would be in accordance with DOT travel manual and Alaska Railroad Order 1500.1B. Section 3 of Alaska Railroad Order 1500.1B, dated June 9, 1975, provides that all official travel in the Alaska Railroad "shall be performed in accordance with the provisions of the Federal Travel Regulations * * *." Section 2 of the Order states that "The provisions of this order apply to all Alaska Railroad personnel, including experts and consultants." There is no doubt, then, that the provisions of the Federal Travel Regulations are applicable to Mr. Dorcy's travel.

With respect to the relocation benefits which may properly be paid to Mr. Dorcy, FTR paragraph 2-1.2a(3) provides that the provisions for relocation expenses are applicable to new appointees to any position outside the conterminous United States. The term "conterminous United States" is defined in paragraph 2-1.4a as the 48 contiguous States and the District of Columbia.

Regarding the entitlements of new appointees to positions outside the conterminous United States, FTR para. 2-1.5g(2) provides as follows

"(2) New appointees

"(a) Residence at time of appointment A new appointee to a position outside the conterminous United States is eligible for certain travel and transportation benefits under these regulations if his residence at the time of appointment is in an area other than the area in which his official station is located.

Under this rule 'area' means a foreign country, the conterminous United States, Alaska, Hawaii, the Commonwealth of Puerto Rico, the Canal Zone, or a territory or possession of the United States.

- "(b) Allowable expenses. Allowances and the parts of this regulation which apply are as follows
- (i) Travel and per diem for appointees as set forth in 2-2.1,
 - (ii) Travel for the appointee's immediate family but not per diem as set forth in 2-2.2,
 - (iii) Mileage to the extent travel is performed by privately owned automobile as set forth in 2-2.3;
 - (iv) Transportation and temporary storage of household goods as set forth in 2-8;
 - (v) Nontemporary storage of household goods as set forth in 2-9.2,
 - (vi) Transportation of mobile homes in limited circumstances as set forth in 2-7, and
 - (vii) Transportation of employee's personal automobile as set forth in 2-10.
- "(c) Expenses not allowable Items of expense not listed above which are authorized for reimbursement under these regulations in the case of transfers, for example, per diem for family, cost of house-hunting trip, subsistence while occupying temporary quarters, miscellaneous expense allowance, residence sale and purchase expenses and lease-breaking expenses, may not be authorized for appointees eligible under 2-1 5g."

ANALYSIS OF TRAVEL COSTS AND CONCLUSIONS

In light of the above authority, we have reviewed the items of reimbursement set forth in the March 26, 1976, letter from the Alaska Railroad Personnel Officer to Mr. Dorcy and concluded that the following relocation allowances totaling \$5385.89 were improperly paid.

Per diem of spouse Voucher 76-1237	\$ 72.53
House-hunting trip of spouse TR #D3570332	225.52
#D3570291	227.45
Temporary living allowance Voucher 86-0938	1,393.74
Miscellaneous expense allowance Voucher 76-1237	200.00
Real estate fees Residence sale Cash payment 9/27/76	2,857.25
Residence purchase Cash payment 10/22/76	<u>409.10</u>
Total for collection	<u>\$ 5,385 59</u>

Items (1) and (5) in the March 26, 1976, letter providing for transportation and temporary storage of up to 11,000 pounds of household goods may, if otherwise proper, be legally paid under FTR para 2-1.5g(2)(b)(iv). However, Mr. Dorcy would not be entitled to \$200 miscellaneous expenses. (See paragraph 2-1 5g(2)(c).) Likewise under paragraph 2-1 5g(2)(c), items (2), (6), and (7) regarding real estate fees, temporary quarters, and house-hunting trips may not lawfully be paid. In addition, we note that the Alaska Railroad paid Mr. Dorcy \$409.10 for expenses incurred in the purchase of his Anchorage residence. By reason of FTR para 2-1.5g(2)(c), this expense was likewise improperly paid. If otherwise proper, item (4), the shipment of the automobile, may be reimbursed in accordance with paragraph 2-1.5g(2)(b)(vii). Concerning item (3), under paragraph 2-1 5g(2)(b)(i), travel and per diem may be paid for Mr. Dorcy for his initial travel in April 1976, to the permanent duty station. However, travel for Mr. Dorcy's family is limited under paragraph 2-1.5g(2)(b)(ii) to reimbursement for travel only, and not for per diem. (For computation of allowable expenses, see FTR para. 2-2.2a.)

Mr. Dorcy first traveled from St. Louis, Missouri, to his permanent station in Anchorage on April 5-6, 1976, and was reimbursed for this travel. He subsequently made a second trip for his permanent change of station from June 17-27, 1976, accompanied by his wife in their privately-owned vehicle. This trip was apparently performed immediately upon the conclusion of certain official business which required Mr. Dorcy to travel from Anchorage to St. Louis during June 13-17, 1976.

When a transferred employee reports to and enters on duty at his new duty station, the change of station authorized in the travel order is accomplished and his travel expense reimbursement becomes fixed (54 Comp Gen 301, 303 (1974)). Therefore, an employee may be reimbursed only for his initial travel to the new duty station, and not for any subsequent trips. This is so despite the fact that the employee may be unable to complete all necessary arrangements to accomplish his move and notwithstanding agency advice and assurances that the expenses of a second trip may be paid

On June 13, 1976, Mr Dorcy left Anchorage by commercial air for St. Louis where he was on temporary duty until June 17, 1976, when he departed for Anchorage in his privately-owned vehicle accompanied by his wife. Since Mr. Dorcy was in St. Louis on official business he is not entitled to reimbursement for the return trip on the basis of a permanent change of station travel. Section 5733 of title 5 of the United States Code provides that travel of an employee shall be by the most expeditious means of transportation practicable and shall be commensurate with the nature and purpose of the duties of the employee requiring such travel. Also, amendment of May 19, 1975, to the Federal Travel Regulations, paragraph 1-2 2b, provides that travel on official business shall be by the method of transportation which will result in the greatest advantage to the Government, cost and other factors considered. In selecting the method of transportation, consideration shall be given to the cost of per diem, overtime, lost worktime, and actual transportation costs.

Paragraph 1-2 2d provides that when an employee uses a privately-owned vehicle as a matter of personal preference, reimbursement is limited in accordance with the provisions of paragraph 1-4. Paragraph 1-4.3 provides for reimbursement at the mileage rate of 15 cents per mile plus the per diem allowable for the actual travel not to exceed the total cost of appropriate common carrier, including constructive per diem by that method of transportation. Since Mr Dorcy traveled by air from Anchorage to St. Louis on June 13, 1976, reimbursement of the cost of return travel to Anchorage via Vancouver, by privately-owned automobile on June 17, 1976, should be limited to the cost of commercial air carrier plus applicable per diem by that method of transportation (54 Comp Gen. 192 (1975)).

As to the travel of Mrs Dorcy incident to her husband's appointment to Anchorage, travel order No. 10-54 dated March 25, 1976, provided for travel by privately-owned automobile and air. Paragraph 2-1 5g(11) provides for reimbursement of travel of new appointee's immediate family but not per diem where the employee is appointed to a position outside the conterminous United States. Since the dependent traveled by privately-owned automobile from St. Louis to Vancouver where the remainder of the trip was made by vessel at apparently no cost to the employee, the

employee would be entitled to reimbursement of mileage for the travel of his dependent by direct route from St. Louis to Vancouver at 8 cents per mile as provided in paragraph 2-2.3 of FTR.

Annual Leave

A further issue involved in Mr. Dorcy's travel from St. Louis to Anchorage during June 17 to 27, 1976, is whether he should be charged annual leave for excess travel time occasioned by his use of his privately-owned automobile for personal convenience. We have held that the charging of leave in such situations is primarily a matter of administrative discretion (54 Comp. Gen. 234, 236 (1974); B-175627, July 5, 1972). Where, however, the employing agency has promulgated regulations requiring a charge to leave for excess travel time not justified as officially necessary, a charge to annual leave is appropriate (54 Comp. Gen. at 237, *supra*). In addition, we note that Subchapter S3-4a(2) Book 630 of the Federal Personnel Manual Supplement 990-2 provides in pertinent part that:

"* * * Absences because of excess travel time resulting from the use of privately-owned motor vehicles for personal reasons on official trips is generally chargeable to annual leave * * *."

RECOMMENDATION

In view of the above, we recommend that you take action to recover from Mr. Dorcy any payments to him or on his behalf which exceed those to which he is entitled under the Federal Travel Regulations. In this regard, it should be noted that under the express terms of 5 U.S.C. 5584, erroneous payment of travel and transportation expenses and allowances and relocation expenses payable under 5 U.S.C. 5724a may not be waived. (See also 4 C.F.R. 91.2(c) and (d) (1976); B-181631, October 9, 1974)

Please advise us of the specific actions you take in this matter. Also, please furnish evidence of collection of the amounts to which Mr. Dorcy has no entitlement.

We will be glad to discuss this matter with you or your designated representative, if you so desire. We are also sending a copy of this letter to Mr. Dorcy.

Sincerely yours,



Hugh J. Wessinger
Associate Director