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MATTER OF:

Transcription Expenses - Land Commission Cases

DIGEST:

1. Whenever a Federal District Judge, pursuant to FRCP 71A(h), appoints a Land Commission to hear suits for just compensation in land condemnation cases, and the order of reference indicates a desire for the proceeding to be recorded, attendance fees of the court reporter are chargeable to the appropriations of the Administrative Office of United States Court since Judiciary determines if reporter shall be in attendance and normally pays attendance fees in other cases.

2. Court reporters are not entitled to payment in addition to their salaries for providing transcripts of land commission proceedings to judges or to land commissioners appointed by judges in land condemnation cases. Accordingly, neither the Department of Justice nor the Administrative Office of the United States Courts may pay for such transcripts from their appropriations. See court cases cited. However, reporters whose services are obtained on a contract basis are entitled to payment, from the Administrative Office, in accordance with the provisions of their contracts.

The Administrative Office of the United States Courts (Administrative Office) requests our decision as to whether Administrative Office or Department of Justice (Department) appropriations is the proper source of payment for attendance charges and transcription fees of court reporters who record proceedings before land commissioners, appointed under Rule 71A(s) of the Federal Rules of Civil Procedure, to determine just compensation in land condemnation suits brought in the Federal district courts.

This request has arisen as a result of vouchers received by the Administrative Office in four separate condemnation cases in which court reporters' claims for reimbursement of either attendance fees, transcription expenses, or both, have been presented. The Administrative Office has declined to make payment on grounds that such expenses are not properly payable from the appropriated funds of the Judiciary. Copies of the vouchers were then directed

to the Department for payment on grounds that such expenses were the normal expenses of the condemnation proceeding and traditionally chargeable to the Department as the legal prosecutor in the condemnation process. The Department also declined to make payment, relying on 28 U.S.C. § 753 (1970) in asserting that it is the responsibility of the Federal courts to make payments from their appropriations. We have been asked to resolve this conflict.

The general principle with regard to costs in land condemnation cases is based on Rule 71A(1), Fed. R. Civ. P. which provides that "costs /In such cases/ are not subject to Rule 54(d)." (Rule 54(d) provides generally that all costs shall be allowed to the prevailing party.) In clarifying the intent of Rule 71A(1), the Advisory Committee on Rules in its Notes states that "Costs shall be awarded in accordance with the law that has developed in condemnation cases." This implements the established rule that the condemnor (i.e. the United States) may not recover its costs against the condemnee, since to charge the latter with the cost of taking would violate the constitutional prohibition against the taking of private property without just compensation. Grand River Dam Authority v. Jarvis, 124 F 2d. 914 (10th Cir., 1942).

The Administrative Office relies heavily on this general rule in maintaining its position. It also notes that the Advisory Committee Notes contain the following quotation from the Lands Division Manual of the Department of Justice:

"Costs of condemnation proceedings are not assessable against the condemnee, unless by stipulation he agrees to assume some or all of them. Such normal expenses of the proceeding as bills for publication of notices, commissioners' fees, the cost of transporting commissioners and jurors to take a view, fees for attorneys to represent defendants who have failed to answer, and witness' fees, are properly charged to the government, though not taxed as costs. Similarly, if it is necessary that a conveyance be executed by a commissioner, the United States pay his fees and those for recording the deed * * *." (Emphasis supplied.)

It is contended that both attendance fees and transcription expenses of court reporters are "normal expenses" as contemplated by the Advisory Committee, and as such are chargeable to the appropriations of the Department of Justice as legal prosecutor and moving party on behalf of the United States in land commission proceedings.

A. Attendance Fees

The first issue concerns the payment of fees to the reporters for attending the sessions. The Department of Justice contends that the so-called Court Reporters Act, as amended, approved January 20, 1944, Pub. L. No. 78-222, 58 Stat. 5, (now codified at 28 U.S.C. § 753 (1970)), controls the payments in these cases and requires payment by the Judiciary. It also contends that funds are appropriated to the Judiciary for these particular expenses, thereby precluding payment by the Department.

Section 753(b), Title 28, United States Code, states in part that:

"One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of the court or by one of the judges, and shall record verbatim by shorthand or by mechanical means which may be augmented by electronic sound recording subject to regulations promulgated by the Judicial Conference: (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court or as may be requested by any party to the proceeding. The Judicial Conference shall prescribe the types of electronic sound recording means which may be used by reporters. * * *

"The reporter shall promptly deliver to the clerk for the records of the court a certified copy of any transcript so made."
(Emphasis added.)

The Department of Justice takes the position that when the appointment of land commissioners is made by the district judge under Rule 71A(h), the attendance of a court reporter at these proceedings is also "ordered by the court," and as such clearly falls within the language of subsection (b)(3). It concludes that attendance fees are the responsibility of the courts.

The Administrative Office, on the other hand, contends that Section 753(b) gives the Federal courts no responsibility to provide a reporter for such proceedings because they are not had in "open court."

In our view, however, it is evident from the above quoted language of the statute that the authority granted by subsection (b)(3) is not restricted by the "open court" requirements of subsections (b)(1) and (b)(2). It was noted in United States v. 1,142.50 Acres of Land, 194 F. Supp. 683, 684 (S.D. Ca. 1961), that proceedings before Land Commissioners are not official sessions of the court and a court reporter is not required to be in attendance to report the proceedings under 28 U.S.C. § 753, unless a rule or order of court is made under subsection (b)(3).

Section 753 contains other provisions applicable to the hiring of outside reporters. Subsection (a) provides in part:

"Each such court, with the approval of the Director of the Administrative Office of the United States Courts, may appoint additional reporters for temporary service not exceeding three months when there is more reporting work in the district than can be performed promptly by the authorized number of reporters and the urgency is so great as to render it impracticable to obtain the approval of the Judicial Conference."

This provision gives the district judge authority to hire additional reporters on an individual basis to meet the temporary demands of the court. In 1970, a second provision was added to the Court Reporters Act, 28 U.S.C. § 753(g),

which expanded the authority of the Judiciary by allowing the contracting with court reporting agencies and firms for services to meet its temporary demands.

These sections, allowing for the contracting for additional reporters, are in accordance with the court reporter concept, as noted by the court in Kasar v. Chesapeake & Chic. R.R. Co., 320 F. Supp. 335 (W.D. Mich., 1970) at 367:

"This section vests supervisory control over the court reporter in the district judge. Implicit in such control, and consistent with § 753(b) above, is the sole authority and responsibility of the district judge to arrange for substitute or additional reporters. The practice in this court is for a party desiring daily copy to contact both the court and the reporter well in advance of trial and make a request for extra personnel. If the court approves, the official reporter arranges, subject to the court's consent, for the necessary additional reporters. This procedure has numerous benefits. It allows the reporter to make any appropriate adjustments in an extremely busy schedule and also to participate, if so desiring, in the added compensation accompanying the furnishing of daily copy. Most importantly, it provides the court an opportunity to pass upon the qualifications of the extra reporters, and the substance of the arrangement made for their participation. To preserve control and avoid any conflict of interest, it is important that reporters are hired by the court and not by the parties. The statute requires nothing less."

See also B-51805, September 28, 1945, and B-22222, March 18, 1946, in which we held that this Act precludes the Department of Justice from procuring stenographic reporting services in conjunction with Lands Division cases when the official reporter was busy with another case. In those cases the matter of obtaining and contracting for additional reporters was solely for the consideration of the judiciary pursuant to § 753(a). Only in those cases where no official salaried reporter has been appointed in the district or the position is

vacant, can the statute be viewed as inoperative, allowing payment by the Department for the reporting service obtained. B-51805, supra. In Morgan v. United States 356 F.2d 17 (8th Cir. 1966), it was held proper for the district court to instruct the Land Commission to assign a court reporter to prepare a transcript.

Since the courts control the appointment of reporters in land condemnation cases and since the courts pay the attendance fees of reporters at other proceedings under 28 U.S.C. 753, it seems appropriate for them to bear the financial responsibility for the attendance of reporters at these hearings. We therefore find that in Land Commission hearings for just compensation where the district judge either directly contracts with a court reporter to attend, or, in its order of reference instructs the Commission to contract for such services, then the attendance fees for these reporters are properly payable from appropriations available to the Judiciary.

B. Transcription Expenses

The second issue is which agency should pay transcription costs incurred for copies filed with the court or the Commission. Subsection (f) of 28 U.S.C. § 753 (1970) sets forth the following guidelines for the charging of transcription expenses by the reporter:

"Each reporter may charge and collect fees for transcripts requested by the parties, including the United States, at rates prescribed by the court subject to the approval of the Judicial Conference. He shall not charge a fee for any copy of a transcript delivered to the clerk for the records of court * * *."

The Administrative Office contends, among other things, that there is no mechanism provided in section 753 for the payment of transcription expenses by the Judiciary for Commission proceedings, even in the case where the official reporter is ordered to record the hearing. It also contends that the granting to the Commission under Rule 71A(h) of the powers of a special master, found in Rule 53, does not include the authority to defray the cost of transcription expenses.

The Department's contention is that it is only responsible for costs which pertain to the preparation of a transcript specifically requested by the litigating United States Attorneys Office, as a party to the proceedings. It does not see any reason for it to pay for a transcript for the use of the court. It states that pursuant to 28 U.S.C. § 753(f), the transcript should be provided either at no charge or as an expense incurred by the court, payable from funds appropriated to the Judiciary.

After carefully considering this matter, we find ourselves in agreement with the reasoning and conclusion of the Fifth Circuit Court of Appeals which in Texas City Tort Claims v. United States, 188 F.2d 900 at 901-902 (1951), stated in pertinent part:

"* * * the question then presented for our consideration is whether the appellant /court reporter/ may charge and collect a fee for services rendered in preparing such transcript requested by the judge. We think not.

"From a consideration of the relevant sections of the statute under which appellant was disallowed his claim, we see that 'upon the request of any party to any proceeding which had been so recorded who has agreed to pay the fee therefor, or of a judge of the court, the reporter shall promptly transcribe the original records of the requested parts of the proceedings and attach to the transcript his official certificate, and deliver the same to the party or judge making the request.' Furthermore, the statute provides that 'The reporter shall promptly deliver to the clerk for the records of the court a certified copy of any transcript so made.' Thus, from these portions of the statute, we see that either a party who has agreed to pay the fee therefor, or a judge, may request and secure delivery of a transcript of the proceedings. The reporter is also required to deliver to the clerk for the records of the court a certified copy of any transcript made; that is, one made for a party paying a fee for same, or one made on the request of the judge. There is no mention of any fee being charged the judge for delivery of a transcript to him upon his request. The statute does provide that a party requesting a transcript must agree to pay a fee before a transcript will be delivered to him.

"Section 753(f) of Title 28 provides the permissible fees that may be collected by a court reporter for transcripts requested by the parties. * * * It is obvious that the reference to the transcripts requested by the parties does not include judges. There is no authority specifically granted to charge and collect fees for transcripts requested by the judges; whereas, express authority is granted to require parties requesting transcripts to agree to pay for them.

"After considering the legislative history of the Court Reporter Act, 28 U.S.C.A. § 753, we are of the opinion that Congress intended that such duties as preparing transcripts for judges and filing copies of transcripts with the clerks were to represent performance of the reporter's statutory duties for which he is duly compensated by his yearly salary, * * *. The Congress, in finally approving the Act, eliminated special payment for certain items such as equipment and supplies, * * * and transcripts furnished for the personal use of the judges, and substituted therefor an increase in the proposed statutory salary, with the evident intent that the statutory salary increase constituted adequate compensation to the reporters for any such items furnished or duties performed, which were not and are not susceptible of definite ascertainment on a piecework or per page basis.¹

"Compensation for copies of transcripts delivered to the clerk is included in the rates fixed for the original.² Thus, if a transcript is purchased by a party, the extra charge for the original thereof compensates the reporter for the copy filed with the clerk. If the transcript is ordered by the judge, the statutory salary likewise compensates the reporter for the copy which the statute requires him to file with the clerk. Therefore, a special payment for a transcript furnished at the request of a judge would constitute dual compensation." (Footnotes omitted. Emphasis supplied.)

We, of course, are aware that courts have indicated that in the discretion of the court, transcription fees for transcripts made for the use of judges may be taxed against the losing party in a case. See, for example, Stacy v. Williams, 50 F.R.D. 52, 56 (N.D. Miss. 1970), Cf. also Wax v. United States, 183 F. Supp. 163 (E.D. N.Y. 1960). However, we find the reasoning of the Fifth Circuit in the Texas City case, supra., to be persuasive and agree with the decision of the court in that case.

Accordingly, it is our view that since the reporter is compensated through his salary for transcripts furnished for the use of a judge or, by extension, for land commissioners appointed pursuant to law by a judge, he is not entitled to additional payment therefor. Thus, in our opinion, neither the appropriations of the Judiciary nor those of the Department are available to pay court reporters for copies of transcripts furnished to judges or the clerk of the court for the records of the court or to land commissioners appointed by the court.

What is stated above concerning payment for transcripts is applicable to official court reporters appointed to salaried positions under the Court Reporters Act. Those reporters whose services are obtained on a contract basis pursuant to 28 U.S.C. § 753(g) are entitled to payment in accordance with the provisions of their contracts. Fees earned by court reporters under such contracts would be for payment by the Administrative Office of the Courts as the contracting agency.

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of the United States