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**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

FILE: B-190593

DATE: NOV 29 1977

**MATTER OF:** James M. O'Rear - Payment of Compromise Settlement  
For Tort Claim Arising Under Activities of the  
United States Postal Service

**DIGEST:** The Postal Service is responsible for paying settle-  
ments arising from its own activities, pursuant to  
31 U.S.C. § 724a (1976). One of its contractor motor  
carriers had accident due to failure of contractor to  
comply with Federal safety regulations for motor  
carriers. Compromise settlement of lawsuit is con-  
strued as arising under Postal Service activities  
because Postal Service contract required carriers to  
comply with safety regulations and evidence indicates  
that Department of Transportation did not assume  
responsibility for safety inspection of postal carriers  
until after accident.

DLB-00257

This is in response to a request from the Assistant General  
Counsel, Claims Division, Law Department, United States Postal Service,  
for a decision on whether the cost of a compromise settlement in  
O'Rear v. United States, Civ. No. A-74-CA-74, D.C. W.D. Tex, should  
be paid from Postal Service funds or from the permanent indefinite  
appropriation for the payment of judgments and settlements against  
the United States (31 U.S.C. § 724a).

The Postal Service has paid the \$100,000 settlement from its  
funds, pursuant to a Stipulation for a Compromise Settlement dated  
September 21, 1977. This Office has agreed that, should it be deter-  
mined that the payment should have been from the fund established by  
31 U.S.C. § 724a, the Postal Service will be reimbursed from that  
appropriation. However, we find that the settlement is properly  
charged to the Postal Service, as it did arise out of Postal Service  
activities.

The accident which gave rise to the lawsuit and the settlement  
occurred on December 5, 1971, when a trailer became separated from  
the tractor-trailer rig of an independent contractor for the Postal  
Service and crossed a highway, striking an automobile owned and  
operated by the plaintiff, James M. O'Rear. All evidence indicates  
that the accident was due to the failure of the trailer to have  
properly functioning break-away brakes, if indeed it had the required  
break-away brakes at all. Break-away brakes were required of carriers  
subject to the Federal Motor Carrier Safety Regulations, promulgated  
originally by the Interstate Commerce Commission but later the responsi-  
bility of the Department of Transportation.

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Specified tort claims are paid from the permanent indefinite appropriation established by 31 U.S.C. § 724a (1970), as amended by Pub. L. No. 95-26 and Pub. L. No. 95-240, which states in pertinent part:

"There are appropriated, out of any money in the Treasury not otherwise appropriated, and out of the postal revenues, respectively, such sums as may be necessary for the payment, not otherwise provided for, as certified by the Comptroller General, of final judgments, awards, and compromise settlements \* \* \*. Judgments against the United States arising out of activities of the United States Postal Service shall be paid by the Postal Service out of any funds available to it."

The Postal Service's position is that the failure to inspect the tractor-trailer rig gave rise to the Government's liability. In the view of the Postal Service, since the Department of Transportation (DOT) had, before the accident, acknowledged that highway postal contractors were subject to the DOT motor carrier safety regulations, it was DOT's responsibility to inspect. While there was "considerable doubt" which of three agencies -- DOT, the Interstate Commerce Commission (ICC), or the Postal Service (or its predecessor, the Post Office Department) -- was to be responsible for the inspection, the Postal Service says "it had to acquiesce to the actions of the other two agencies", and therefore that the accident should not be categorized as "arising out of activities of the United States Postal Service."

The compromise settlement leaves open the question of the legal basis for liability. Lacking a judicial determination on the merits of the plaintiff's claim, we must decide on the basis of the record before us whether or not the settlement in this case arose out of activities of the Postal Service, within the meaning of 31 U.S.C. § 724a.

According to the United States' "Memorandum in Support of Defendant's Renewed Motion for Summary Judgment" (Memorandum), the plaintiff asserted two theories of negligence by the United States. With respect to the first, that the United States exercised so much control over the activities of its contractors that they should be considered Postal Service employees, the District Court granted summary judgment in favor of the United States, thereby finding that the trucking company was not the employee of the United States but an independent contractor.

The second theory of liability was that, according to the plaintiff, the United States was negligent in failing to inspect or maintain the equipment of its independent contractors. More specifically, the plaintiff argued, as characterized in the Memorandum, that because the United States had notice that its contractors as a class were not abiding by Federal safety standards, it had a duty to inspect each contractor's brakes and that its failure to perform that duty was the cause of the accident.

The United States took the position in response that it had no duty to inspect the equipment of its independent contractors and that, even if it did, failure to perform a duty cannot be the basis for liability under the Federal Tort Claims Act.

With regard to the first point, the Memorandum points out that, to conclude that the United States was negligent in failing to inspect the contractor's equipment, it would have to be found first that the United States had notice, either actual or constructive, and second that the notice created a legally recognizable duty to initiate an inspection.

The Memorandum argues that, because the carrier's contract with the Postal Service required it to comply with the ICC motor carrier safety regulations, any duty that the United States might have had to take precautions against risks to third parties is fulfilled by that provision. The Memorandum then discusses the plaintiff's contention that the United States had constructive knowledge that the mail contractors as a class were operating with equipment that failed to meet the standards set for the carriers subject to the motor carrier safety regulations. The Memorandum argues that

"the United States had a legal right to assume that [the contractor] was complying with all law, including State and Federal safety regulations."

The Assistant U.S. Attorney in charge of the case says that

"The evidence produced during discovery further establishes that the Department of Transportation had knowledge of mal-maintained contractor equipment from at least as early as the 1950's, and that this information was conveyed to the Post Office in time for it to make an investigation and rectify the potential for injury posed by these postal carriers."

However, the Memorandum asserts that, even knowing that the contractor's course of conduct may have been dangerous, the United States had no duty to investigate it and take steps to remedy it.

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The Memorandum argues that the Government had not, under the Federal Tort Claims Act, waived its immunity from claims based upon failure to exercise or perform a discretionary function or duty. 28 U.S.C. § 2680. The Memorandum analyzes the history of Government regulation of contract carriers for the Postal Service, concluding that both the ICC and DOT had made discretionary decisions not to regulate or inspect these carriers; that DOT did not reverse this decision until after the accident; and that these decisions were discretionary policy decisions and therefore cannot be the basis for tort liability of the United States.

The Memorandum concludes that (because the ICC had decided that its safety regulations were not applicable to postal contract carriers) there were no Federal safety standards applicable to the contractor at the time of the accident, except those incorporated by reference in his contract with the Postal Service; that the Postal Service had no duty to inspect; and that, even if it did have such a duty, failure to inspect was a discretionary decision by "executive personnel at the Postal Service who may have had authority to institute a program of inspection."

The Memorandum as discussed above, takes the position that, if there was any duty to inspect, it was a duty of the Postal Service. Significantly, in recommending the settlement, the Assistant United States Attorney, as quoted above, identified the difficulty in his case as being the evidence that the Postal Service had information (conveyed to it by DOT) concerning mal-maintained contractor vehicles in time for the Postal Service to investigate and to rectify the potential for injury.

There is evidence that an official of the Federal Highway Administration, within DOT, in a letter dated before the accident, stated it as the policy of his agency that it would be responsible for inspection of Postal Service contractor vehicles. However, the Memorandum, which presumably represented the official position of DOT (and of the Postal Service), shows that the question of whether DOT would assume jurisdiction was still under discussion after the letter in question and after the accident. The Memorandum dates the assumption of jurisdiction by DOT from the publication of the formal notice of rule-making in the Federal Register, which was after the accident.

In view of the doctrine that the United States is not bound by the unauthorized acts of its agents, we see no compelling reason to assume, contrary to the position taken by the United States in this

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litigation, that DOT was responsible for inspection at the time of the accident. (Moreover, if DOT had assumed jurisdiction at that time, the Postal Service would, under the theory on which this case was settled, have had at least concurrent responsibility by virtue of the provision in its contract with the carrier, which remained in effect, requiring the carrier to observe the standards in the motor carrier safety regulations, even though not required by statute or regulation to do so.)

Accordingly, while the matter is not entirely free from doubt, we believe that it would be most consistent with the circumstances of this litigation and of the settlement to attribute the settlement to activities of the Postal Service, rather than to the inspection activities of DOT and hence not to reimburse the Postal Service from the judgment appropriation for the payment it has already made to the plaintiff.

R.F.KELLER

Deputy Comptroller General  
of the United States.