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DECISION

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

10,771

FILE: B-189652 [Source of Funds for] DATE: July 17, 1979

MATTER OF: Alaska Railroad - administrative settlement of tort claims by Alaska Railroad]

DIGEST: ~~1. Federal~~ Tort Claims Act (FTCA), as amended, repealed Act of June 24, 1946, 60 Stat. 304, insofar as it authorized Alaska Railroad (ARR) to settle tort claims cognizable under FTCA. Tort claims arising from 1975 train collision which were administratively settled by ARR for amounts greater than $2,500 but less than $100,000 are therefore payable from permanent appropriation established by 31 U.S.C. § 724a rather than from ARR funds.

2. Although ARR did not follow procedures set forth in 28 C.F.R. Part 14 for a number of claims arising from 1975 railroad collision and paid several from its own funds, since the claims could have been paid from permanent appropriation if properly presented, in this instance reimbursement will be permitted, except for payments in excess of $100,000. Since permanent appropriation contained in 31 U.S.C. § 724a was not available for payments in excess of $100,000 at time awards were made, reimbursement for these payments, if desired, must be obtained from Congress.

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This decision to the Secretary of Transportation concerns the source of funds for payment of tort claims administratively settled by the Alaska Railroad (ARR). The question is whether these claims are payable from the permanent indefinite appropriation established by 31 U.S.C. § 724a or from ARR funds. For the reasons that follow, we conclude that awards in excess of $2,500 are payable from the permanent appropriation.

Federal agencies are authorized to settle tort claims administratively under the Federal Tort Claims Act. 28 U.S.C. § 2672 (1976). Awards of $2,500 or less must be paid by the agency involved from its own appropriations. Awards greater than $2,500 are paid pursuant to 31 U.S.C. § 724a, which provides in pertinent part:

"There are appropriated, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary for the payment, not otherwise

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> provided for, as certified by the Comptroller General, of final judgments, awards, and compromise settlements, which are payable in accordance with the terms of section 2414, 2517, 2672, or 2677 of Title 28 * * *."

Prior to May 4, 1977, the permanent appropriation was limited to awards not in excess of $100,000. The $100,000 limitation was removed by Pub. L. No. 95-26 (May 4, 1977), 91 Stat. 61, 96. The appropriation is thus now available to pay awards over $2,500 without regard to amount, unless payment is "otherwise provided for."

The claims in question arose from a collision on July 5, 1975, involving two ARR trains. Although there are a number of related claims, we will summarize two for purposes of illustration--Marion L. Lach and Anthony Anzevino, administrator of the estate of Antoinette Anzevino. In late 1976, a Federal Tort Claims Act voucher in favor of Marion L. Lach in the amount of $91,453.66 was submitted to our Claims Division by ARR and was certified for payment. Subsequently, ARR sought reimbursement from the permanent appropriation for $8,235.81, not included in the voucher, apparently paid by ARR on behalf of claimant Lach prior to the tort claim settlement, for such items as necessary transportation, lodging, and medical services. The Anzevino claim, a wrongful death claim, was settled in the amount of $152,000 and paid by ARR in 1976. A memorandum from the ARR Chief Counsel, dated March 25, 1976, states that the "Alaska Railroad is authorized to pay this amount under the authority of the Act of June 24, 1946, 60 Stat. 304." ARR now seeks reimbursement for this payment also.

Our Claims Division sought advice on whether there was legal authority to comply with ARR's request, using the Lach claim as a reference case. In a memorandum to the Claims Division dated September 28, 1977, the Office of General Counsel concluded that there was no legal basis for the requested reimbursements, for the following reasons:

> "The Railroad's request for reimbursement of the amounts paid from its appropriations must be denied for two reasons. First, and most fundamentally, the Act approved June 24, 1946, ch. 465, 60 Stat. 304, makes funds available for operations of the Alaska Railroad available for, inter alia, 'payment of claims for losses and damages arising from [its] operations * * *.' We have recognized that this Act authorizes the Railroad to pay from its appropriations claims in the nature of tort damages. * * *

"The Act of June 24, 1946, is still in effect, and we find no indication that it has been superseded by the statutory provisions which generally govern payment of tort claim settlements. Thus 31 U.S.C. § 724a makes the judgment appropriation available for payment 'not otherwise provided for' of judgments, awards and compromise settlements 'payable in accordance with the terms of' 28 U.S.C. § 2672 (1970) (agency Tort Claims Act settlements). In short, it appears that the 1946 Act makes the Railroad's appropriations available for payment of tort claims settlements to the exclusion of the judgment appropriation.

"In any event, even if the 1946 Act did not apply, the payments here involved would not be reimbursable from the judgment appropriation since they are not 'payable in accordance with the terms of' 28 U.S.C. § 2672, as required by 31 U.S.C. § 724a, supra. As noted previously, these payments were made prior to and independent of the ultimate Federal Tort Claims Act settlements. It does not appear that either the Railroad or the injured parties considered such payments to constitute Tort Claims Act settlements as such; nor did they comply with the procedural regulations for Tort Claims Act settlements. See 28 C.F.R. §§ 14.1 et seq. (1976)."

The Act of June 24, 1946, 60 Stat. 304, provides that--

"[F]unds available for the operation of the Alaska Railroad shall be available for maintenance and operation of river steamers and other boats on the Yukon River and its tributaries in Alaska; for purchase of stores for resale; and for payment of claims for losses and damages arising from operations, including claims of employees of the railroad for loss and damage resulting from wreck or accident on said railroad, not due to negligence of the claimant, limited to clothing

> and other necessary personal effects used in connection with his duties and not exceeding $100 in value." (Emphasis added.)

In view of this statute, a question arose whether administrative tort settlements by ARR were payable at all from the permanent appropriation. To finally resolve the issue, with respect to both the requested reimbursements and future settlements, comments were solicited from the Department of Transportation (DOT).

The DOT General Counsel responded, asserting that the permanent appropriation was the proper source of payment for the following reasons:

(1) The "losses and damages" language in the 1946 statute should be construed as limited to "claims for property damage arising from a contract." The railroad industry, DOT points out, has historically distinguished between the terms "loss and damage" and "injury to person." ARR reports that "it has always maintained separate accounts for 'loss and damage' (freight and baggage) and for 'tort claims' limited to $2,500 (injury to person and unchecked property.)"

(2) To the extent that the 1946 statute authorized the payment of tort claims, it was repealed by the Federal Tort Claims Act.

DOT further asserts that reimbursement for those payments made by ARR prior to the Federal Tort Claims Act settlements (e.g., the $8,235.81 to claimant Lach) should not be precluded by ARR's failure to proceed in accordance with applicable regulations (28 C.F.R. Part 14). DOT states in this connection:

> "The actions of the ARR in promptly settling and paying these lodging and medical bills unquestionably saved the Government substantial sums of money. Unfortunately, the need for immediate action did not permit the ARR to follow the procedures for FTCA settlements (28 C.F.R. 14) in making such payments. The intent of these procedural regulations is to protect the interests of the Government by having the Department of Justice or GAO, as the case may be, review the merits of tort claims against the Government before payments are made from the judgment appropriation. Such review has or will be made in this instance, fully meeting the substantive requirements of the regulations."

Although we agree that there is some merit to DOT's argument that the term "losses and damages" as used in the ARR statute refers only to property damage, we doubt that there is sufficient basis to conclude that it must be given that meaning as a matter of law. See, e.g., the Supreme Court's use of the term in Michigan Central R.R. Co. v. Vreeland, 227 U.S. 59, 68 (1913). In any event, we need not resolve that issue since we conclude that the Federal Tort Claims Act did repeal the ARR statute to the extent of tort claims.

The Federal Tort Claims Act was originally enacted as title IV of the Legislative Reorganization Act of 1946, Pub. L. No. 601, 79th Cong., 60 Stat. 812, 842. Part 2 of the original Act, 60 Stat. 843, subsequently codified at 28 U.S.C. § 2672, authorized agency heads to settle and pay tort claims, with certain exceptions, not in excess of $1,000. Repealer provisions were contained in section 424, 60 Stat. 846-47. Subsection 424(a), cited by DOT as having repealed the Act of June 24, 1946, provides:

> "All provisions of law authorizing any Federal agency to consider, ascertain, adjust, or determine claims on account of damage to or loss of property, or on account of personal injury or death, caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, are hereby repealed in respect of claims cognizable under part 2 of this title and accruing on and after January 1, 1945, including, but without limitation, the provisions granting such authorization now contained in the following laws: * * *."

In the ensuing list of laws specifically repealed, the Act of June 24, 1946 is not mentioned. However, subsection 424(b) further provides:

> "Nothing contained herein shall be deemed to repeal any provision of law authorizing any Federal agency to consider, ascertain, adjust, settle, determine, or pay any claim on account of damage to or loss of property or on account of personal injury or death, in cases in which such damage, loss, injury, or death was not caused by any negligent or wrongful act or omission of an employee of the Government while acting within the scope of his office or employment, or any other claim not cognizable under part 2 of this title."

The question thus becomes whether the tort claims paid by the ARR are cognizable under part 2 of the FTCA.

"Cognizable" in law has been defined as "capable of being tried or examined before a designated tribunal." State v. Wilmot, 4 P.2d 363, 364 (Idaho 1931). A legislative grant to a court of subject matter jurisdiction often involves both a limit on the nature of the case and a monetary limit. Therefore, in determining whether a claim is cognizable before a court, or by analogy, before an agency, both the character of the claim and the sum in dispute must be considered. See 40 Op. Atty. Gen. 527, 529-30 (1947).

The FTCA provided an exclusive statutory remedy for agency settlements of tort claims against the United States. 28 U.S.C. § 2679(a) (1976). Thus, after its enactment, the losses and damages part of the Alaska Railroad statute was repealed for tort claims up to $1,000, authority to settle claims above that amount not being repealed since they were not then cognizable under part 2 of the FTCA. Subsequently, the monetary limitation in part 2 twice has been raised; once, in 1959 to $2,500, and again in 1966 to $25,000 without prior approval of the Attorney General and to an unlimited amount with the Attorney General's approval. Although the statutes providing for the monetary increases were not accompanied by a specific repealer, the language of section 424(a), repealing all statutes empowering Federal agencies to make tort claim settlements "cognizable under part 2," must be construed consistently with these increases. Since tort claims in an unlimited amount are now "cognizable" under part 2, we conclude that the loss and damages provision of the Alaska Railroad statute, insofar as it authorized the settlement of tort claims, has been repealed completely. Thus, tort claims against the ARR cannot be paid under the authority of that statute but rather must be paid pursuant to the FTCA and relevant procedures.

As noted previously, DOT has suggested that the ARR's failure to follow the procedural requirements of 28 C.F.R. Part 14 is essentially immaterial since the intent of the regulations is to protect the interests of the Government by having the Department of Justice or GAO review the merits of the claims prior to payment. This is not correct. Our function under 31 U.S.C. § 724a is to certify the awards for payment. If a voucher submitted for payment under 28 U.S.C. § 2672 and 28 C.F.R. Part 14 is proper on its face, if it presents a claim cognizable under the FTCA, and if there is no question about the source of funds for payment our certification function is largely ministerial. It does not extend to reviewing

the "merits" of an award. Thus, the safeguarding of the Government's interests is dependent not on a review of the merits by GAO but on strict compliance with the regulations by the adjudicating agency.

Although the ARR did not follow the proper procedures in a number of these cases, since the source of payment may have been unclear to the Railroad and the claims could have been paid under 31 U.S.C. § 724a if properly presented, in this instance we will permit reimbursement consistent with 28 U.S.C. § 2672 and 31 U.S.C. § 724a for both the voluntary pre-settlement claims and settlement claims in excess of $2,500 but under $100,000. Claims settled for $2,500 or less, of course, must be paid by ARR. Our answer is different with respect to payments in excess of $100,000, such as the Anzevino claim. Since the permanent appropriation was not available for payments in excess of $100,000 at the time the payments were made, there is no basis for using it now to reimburse the Railroad. If the Railroad desires reimbursement for the payments in excess of $100,000, it must seek the funds from the Congress.

We emphasize that our decision is not to be considered precedent for similar requests for reimbursement from the Alaska Railroad or from other Federal agencies. If, in the future, Federal agencies do not comply with the requirements of the Federal Tort Claims Act and relevant procedures, we will not certify the claims for payment.

Deputy Comptroller General
of the United States