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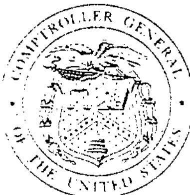
DECISION



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

9580

FILE: B-192974

DATE: MAR 29 1979

MATTER OF: Yellow Freight System, Inc. CNG02016

[Review of GSA Setoff Action Against Carrier]

DIGEST:

1. We agree with claimant and GSA that allowable bills payable to the carrier arising after filing carrier's petition in bankruptcy cannot be used to satisfy Government's pre-petition transportation overcharge claims by setoff.

2. Transportation overcharge claims not filed and proved in bankruptcy are discharged and carrier retains only a moral obligation for repayment of debt after bankruptcy.

3. Where carrier merges with another corporation, successor corporation acquires only outstanding obligations of merged company, and therefore there is no legally enforceable obligation on successor to pay pre-petition transportation overcharge claims discharged in bankruptcy.

Yellow Freight System, Inc. (Yellow Freight) successor-in-interest to Braswell Motor Freight Lines, Inc. (Braswell), by letter dated September 18, 1978, requests review of the General Services Administration's (GSA) action in setting off an allowable claim of Braswell's against several transportation overcharge claims against Braswell. Yellow Freight argues that the Government's overcharge claims were barred by the bankruptcy of Braswell and that therefore the setoff of $5,141.05 from funds otherwise owed by the Government to Braswell was improper.

On December 2, 1976, Braswell filed its petition for relief under the provisions of Chapter XI of the Bankruptcy Act. GSA filed a Proof of Claim for transportation overcharges of $1,430.24 on January 28, 1977. On July 20, 1977, the debtor's Plan of Arrangement was confirmed by the bankruptcy court. After confirmation, the Office of Transportation Audits within GSA developed additional transportation overcharges of $7,473.08 by Braswell that arose from freight charges for transportation performed prior to the petition in bankruptcy. In order to satisfy these additional overcharge claims, GSA set off the additional overcharge claims against bills payable to Braswell which arose before and after the petition for relief was filed under the Bankruptcy Act (Certificate of Settlement, dated September 20, 1977). The transportation overcharge claims were set off against $2,147.59 of pre-petition bills payable and against $5,141.05 of post-petition bills payable to Braswell.

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On September 21, 1978, Braswell was merged into Yellow Freight. As the successor-in-interest to Braswell, Yellow Freight contends that the overcharge claims arising prior to the petition in bankruptcy may not be properly set off against the post-petition bills payable to Braswell. Therefore, the carrier asserts that $5,141.05 is now due Yellow Freight. GSA, after reviewing the circumstances of this case, now agrees that its settlement action was improper. We agree with both Yellow Freight and GSA that the post-petition bills payable to Braswell, and now to Yellow Freight, cannot be used to satisfy the Government's pre-petition transportation overcharge claims against Braswell.

Section 68 of the Bankruptcy Act, 11 U.S.C. § 108, relating to the subject of setoffs, provides in part as follows:

> "(a) In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

Under section 68, the mutuality of debts and credits between the bankrupt and the party claiming the right of setoff must exist when the petition in bankruptcy was filed; the latter date being the time when the right of setoff is measured. Desser, Rau & Hoffman v. Goggin, 240 F.2d 84 (9th Cir. 1957), cert. den. 355 U.S. 813 (1957); McDaniel Nat. Bank v. Bridwell, 74 F.2d 331 (8th Cir. 1934); Avant v. United States, 165 F. Supp. 802 (E.D. Va. 1958). When one obligation arises prior to the filing of the bankruptcy, and the other subsequent thereto, the requisite mutuality is lacking and a setoff is not appropriate under section 68. In re North Atlantic and Gulf Steamship Company, Inc., 204 F. Supp. 899, 911 (S.D.N.Y. 1962), affirmed, Schilling v. A/S/D/S Dannebrog, 320 F.2d 628 (1962); Avant v. United States, supra; 4 Collier on Bankruptcy § 68.10[1]. Therefore, in order to satisfy the mutuality requirements, both debts and credits must have arisen prior to the petition for bankruptcy or both must have arisen subsequent to the petition.

In the instant case, the mutuality required by setoff by the Bankruptcy Act is lacking. The debt of Braswell for the overcharges arose prior to the petition of bankruptcy while the debt of the Government arose subsequent to the filing of the petition. Therefore, the setoff of $5,141.05 from monies otherwise due Braswell was improper. However, the pre-petition bills payable of $2,147.59 owed to Braswell were properly set off against the pre-petition overcharge claims owed to the United States since both obligations were outstanding at the time of the filing of the bankruptcy.

Although the Government may not satisfy the transportation overcharge claims by setoff against post-petition bills payable to Braswell, there

remains the question of Yellow Freight's liability for Braswell's debts. Prior to the merger of Braswell into Yellow Freight, GSA made a determination that Yellow Freight did not acquire a legal liability for the debts of Braswell by the purchase of 100 percent of Braswell's capital stock in 1977. Although there existed a high degree of overlap in executive personnel between the two corporations, GSA concluded that Yellow Freight was not responsible for any of Braswell's pre-petition transportation overcharges since there was insufficient additional evidence that Yellow Freight did treat Braswell as anything other than a separate and distinct entity in which it had an investment. We do not question this determination since the identity of officers and stockholders is not of itself sufficient to render one corporation liable on the obligations of the other and no other evidence indicating liability has been presented. National Oil Transport Company, Inc. v. United States, 18 F.2d 305 (1972); 15 Fletcher Cyc. Corp. (Perm. Ed.) § 7131 (1973).

Following the merger of the two corporations on September 21, 1978, Yellow Freight, as the surviving corporation, retained all of the rights, privileges, liabilities and choses in action that each of the corporations had prior to merger. V.A.T.S. Bus. Corp. Act Ann. art. 5.06 A(4), (5) (Vernon); Ind. Code Ann. Title 23-1-5-5(2)(d), (e) (Burns). Therefore, Yellow Freight is liable for the obligations which Braswell retained at the time of the merger.

At the time of the merger of the two corporations, Braswell no longer had a legal obligation to pay the additional pre-petition transportation overcharge claims of the Government. The Bankruptcy Court discharged Braswell from all claims not filed and proved (See Order Confirming Plan of Arrangement No. BK 3-76-693F, July 20, 1977). Although GSA filed a Proof of Claim for $1,430.24 in transportation overcharge claims on January 28, 1977, the additional overcharge claims were never filed with the Bankruptcy Court. Therefore, the order confirming Braswell's plan of arrangement under Chapter XI had the effect of discharging the overcharge claims not filed with the court.

A discharge in bankruptcy releases a bankrupt from all legal liability to pay debts which are not properly filed and proved in bankruptcy. However, a discharge does not cancel the obligation, but only disables the creditor from enforcing the claim. The bankrupt retains a moral obligation to pay the debt, and may revive the old debt by a new promise to pay the debt. Zavelo v. Reeves, 227 U.S. 625 (1913); Zwick v. Freeman, 373 F.2d 110, 115 (2nd Cir. 1967); In re Innis, 140 F.2d 479 (7th Cir. 1944). Therefore, after confirmation of the plan of arrangement, Braswell had only a moral obligation to pay the additional overcharge claims of the United States.

In accordance with the corporation law of Indiana and Texas, where Braswell was incorporated, Yellow Freight, the surviving corporation of

the merger, retains only the obligations of Braswell outstanding at the time of the merger. V.A.T.S. Bus. Corp. Act Ann. art. 5.06A(4), (5) (Vernon); Ind. Code Ann. Title 23-1-5-5(2)(d), (e)(Burns). Since Braswell retained only a moral obligation to repay the transportation overcharge claims that were not filed in bankruptcy, Yellow Freight acquired no greater obligation as a result of the merger. Since there is no evidence in the record indicating that either Braswell or Yellow Freight has revived the pre-petition debt to the Government, there is no legally enforceable obligation of Yellow Freight for Braswell's transportation overcharges.

In conclusion, the Government's obligations to Braswell arising after the petition for relief was filed under Chapter XI of the Bankruptcy Act may not be properly set off against the Government's pre-petition transportation overcharge claims against Braswell. In addition, Yellow Freight did not acquire a legal obligation to pay Braswell's overcharge claims as a result of their merger. Therefore, GSA should allow Yellow Freight's claim for $5,141.05, if otherwise correct.

R.F.KELLER
Deputy Comptroller General
of the United States