

DECISION



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

FILE: B-217475

DATE: May 5, 1986

MATTER OF: Deobligation of National Mediation Board
Salary and Expense Payments

DIGEST:

1. National Mediation Board may deobligate and return to the Treasury the amounts it estimates are owed to an arbitrator for compensation and expenses that are barred from his collection by the 6-year period of limitation in section 3702(b) of title 31.
2. An Internal Revenue Service levy for delinquent taxes filed with the National Mediation Board on estimated amounts the Board owes to an arbitrator for his professional services cannot be honored at this time since the arbitrator has never submitted a claim or vouchers showing the actual amount due. As the Board can only roughly estimate the amounts due, they are not fixed or determinable as required by the Internal Revenue Code and Treasury Regulations. 26 U.S.C. § 6331; Treas. Reg. § 301.6331-1.
3. If, at any future time, the arbitrator files a timely claim, supported by the requisite vouchers and other documentation, the IRS is entitled to assert a lien on all compensation and expenses to which he might then be entitled, up to the amount of the tax debt. 26 U.S.C. § 6321; Treas. Reg. 301.6321-1.

The National Mediation Board (Board) asks whether it can deobligate that portion of its "M" account representing the accrued estimated compensation and expenses earned more than 6 years ago by Mr. Arthur W. Sempliner for his arbitration services, or whether it should pay over those funds to the Internal Revenue Service (Service) pursuant to the Service's tax levy filed with the Board on August 23, 1983. For the reasons given below, we find that the Board can deobligate and return to the Treasury that portion of Mr. Sempliner's accrued compensation and expenses that are barred from his collection by the 6-year period of limitation in section 3702 of title 31. As the amount of the compensation and expenses owed cannot be fixed with any certainty, the tax levy did not attach to them so as to toll the 6-year period of limitations. However, a tax lien

035339

could be honored if or when Mr. Sempliner submitted a timely claim, supported by the necessary documentation to show the exact amount due to him for his services.

BACKGROUND

The Board informs us that under the Railroad Labor Act, 45 U.S.C. §§ 151-188, disputes about the interpretation of collective bargaining agreements must be submitted to binding arbitration. In the railroad industry the vast majority of these cases have required the assistance of neutral arbitrators who, for the most part, are selected by the parties to the dispute. The Act provides that each arbitrator either selected by the other arbitrators or named by the Board shall receive from the Board "such compensation as the Mediation Board may fix, together with * * * necessary traveling expenses and expenses actually incurred for subsistence." Id. § 157(e); 29 C.F.R. § 1207.3 (1985). The Board states that these neutral arbitrators perform their duties as independent contractors and that payments for their services and associated expenses are made upon the submission of standard vouchers. The reimbursable expenses include out-of-pocket costs allowable under the Federal Travel Regulations for transportation, lodging and meals.

Subsequent to November 30, 1976, Mr. Sempliner discontinued submitting compensation and expense vouchers for his arbitration services. The Board states that until those vouchers are presented, it has no way of determining how much is owed Mr. Sempliner. To cover its potential liability, over the years the Board has been obligating monies it estimates might be due to him for compensation and expenses. The Board estimates its total potential liability to Mr. Sempliner to be in excess of \$250,000. The Board's estimates are based on the average number of days it thinks Mr. Sempliner and other arbitrators usually work on one of its cases. Although its estimates for compensation are based on the rate allowed for a GS-18 employee^{1/} and the rate for expenses is based on the per diem rates applicable to Government employees,^{2/} the Board has suggested the likelihood that its estimates are off by thousands of dollars. Among other things, the Board has no way of ascertaining how much Mr. Sempliner has spent on travel over the 9 1/2-year period involved.

^{1/} The rates are set forth in a note to 5 U.S.C. § 5332.

^{2/} The rates are described in 5 U.S.C. § 5702 and implementing regulations.

The Board now wishes to deobligate that portion of its reserve "M" account attributable to the amounts estimated to be owed to Mr. Sempliner for services performed more than 6 years ago, and return the funds to the general fund of the Treasury. In this regard, the Board suggests that the estimated compensation and expenses accruing for those services are barred from Mr. Sempliner's collection by the 6-year period of limitation set forth in section 3702 of title 31 of the United States Code.

Aside from the statute of limitations question, the Board's position is complicated by an IRS Notice of Levy, dated and filed with the Board on August 23, 1983. The Notice provides that all property, rights to property, money, credits, bank deposits and other obligations in the possession of, or owing from, the Board to Mr. Sempliner, are levied upon for payment of a tax debt owed by Mr. Sempliner.^{3/} The levy amount due is \$640,245.63.

In reliance on section 6331 of the Internal Revenue Code, 26 U.S.C. § 6331, the Treasury regulation promulgated thereunder, Treas. Reg. § 301.6331-1(a)(1), and Reiling v. United States, 77-1 U.S.T.C. ¶ 9269 (N.D. Ind. 1977), the Service maintains that Mr. Sempliner's accrued compensation and expenses are obligations to which the Service's levy attaches, notwithstanding that he cannot receive payment until he submits vouchers showing exactly how much he is owed. In this regard, it quotes Reiling for the proposition that "[a] requirement that the amount of an obligation be beyond dispute and be calculated to the last penny would thwart all IRS attempts to satisfy a taxpayer's obligations and would nullify its power to levy." The Board contends, however, that no legally enforceable right to payment exists regarding independent contractors unless and until a voucher or other claim for payment is filed with the contracting agency. Thus, it questions whether it would be permissible to disburse funds to the Service that represent only a potential liability to Mr. Sempliner.

With regard to the statute of limitations question, the Service informs us that it does not intend to assert any right to funds which the Board determines Mr. Sempliner was barred from claiming as of August 23, 1983, the date the Notice of

^{3/} The levy filed with the Board is a general levy and not a levy on salary or wages as described in 26 U.S.C. § 6331(e). This is so because Mr. Sempliner is an independent contractor and thus is not receiving salary or wages from the Board.

Levy was served on the Board. The Service also states that a tax obligation to the Government is determined as of the date of the levy, and, argues alternatively, that there is no period of limitation which restricts the Service from enforcing its levy, and, if there is, it is the 10-year period for general administrative offsets provided in section 3716(c) of title 31.

LEGAL ANALYSIS

There appears to be no dispute between the Board and the Service^{4/} about the portion of Mr. Sempliner's estimated compensation and expenses that had accrued 6 years prior to the filing of the tax lien with the Board on August 23, 1983. They agree that collection of those monies either by the Service or by Mr. Sempliner is barred by the 6-year statute of limitation set forth in section 3702(b) of title 31. We think this is correct. The Service is levying on amounts which accrued after August 23, 1977 (within a 6-year period before the levy was filed), and subsequent amounts Mr. Sempliner has or will earn on the theory that the filing of the levy "froze" the rights of the parties and effectively tolled the statute of limitations.

Section 3702(b) of title 31 sets forth a 6-year period of limitation for claims against the United States. We have held that when there is no condition precedent to payment of a claim for compensation and related expenses, such as an administrative body's factual or legal determination that an individual is entitled thereto, the claim accrues when the individual performs the work for which the compensation is being paid. 62 Comp. Gen. 275, 276-77 (1983). We do not think any such condition precedent exists here. There is no factual or legal question about Mr. Sempliner being owed the money. The only question is how much he is owed. Thus, that portion of the estimated compensation and expenses that the Board has set aside in its "M" account representing arbitration services performed by Mr. Sempliner between November 30, 1976 and August 23, 1977 would be barred by the 6-year statute: August 23, 1977 is 6 years before the filing of the Notice of Levy on the Board. We think it proper that these funds be returned to the miscellaneous receipts account of the Treasury. With regard to the status of compensation and expenses accruing within a 6-year period of the date of

^{4/} Mr. Sempliner has declined to present his views on the matters raised herein.

the levy and thereafter, we first must determine the effect of the Service's tax levy.

Section 6331(a) of the Internal Revenue Code provides that if a taxpayer fails to pay a tax after notice and demand, the Service may collect by levy upon all property and rights to property belonging to the taxpayer. The levy may extend only to property possessed and obligations existing at the time of the levy. 26 U.S.C. § 6331(b). Treasury regulations issued under section 6331 state that an obligation exists when the liability of an obligor is fixed and determinable, though the right to receive payment may be deferred until a later date. Treas. Reg. § 301.6331-1. As suggested by these provisions, the Government's power to levy is not limited to tangible objects possessed by the person levied on, Reiling v. United States, 77-1 U.S.T.C. ¶ 9269 (N.D. Ind. (1977)), but also extends to intangible property such as a debt, United States v. Eiland, 223 F.2d 118, 121 (4th Cir. 1955), or contract payments owed but not yet paid, Reiling, supra, even where the right to payment is contingent on performance by the contractor. United States v. Ray Thomas Gravel Co., Inc., 373 S.W.2d 333, 337-38 (Tex. Ct. Civ. App. 1963), rev'd on other grounds, 380 S.W.2d 576 (Tex. 1964).

Notwithstanding the broad meaning of property and rights to property set forth in the Internal Revenue Code, the cited Treasury regulation and the interpreting cases, we do not think it covers the amounts the Board has estimated are due to Mr. Sempliner. For the reasons explained before, the Board has informed us that it has no records showing how much Mr. Sempliner has earned. Thus, until he presents his vouchers, the amount cannot be determined with any accuracy. The Board informs us that the amounts estimated to be owed to him could well be off by thousands of dollars. Accordingly, consistent with the cited Treasury regulations, we cannot find that the liability of the Board to Mr. Sempliner is fixed and determinable. This will only occur when (or if) Mr. Sempliner presents his vouchers.

We do not think Reiling v. United States, 77-1 U.S.T.C. ¶ 9269 (N.D. Ind. 1977) compels a contrary conclusion. There the court found that the amount due one of the parties on a contract was determinable since it was fixed in the contract and performance under the contract had been completed. Thus, even though the amount was being contested in an action before a local court, it was subject to a tax levy. It was in this context that the Reiling court said: "[a] requirement that the amount of the obligation be beyond dispute and be calculated to the last penny would thwart all IRS attempts to satisfy a taxpayer's obligations and would nullify its power to levy."

In the present case, however, although the work involved has been performed by Mr. Sempliner, the amounts owed him for compensation and expenses are not fixed in any written document. More significantly, the described potential discrepancy between what Mr. Sempliner actually is owed and what the Board estimates he is owed may far exceed the minimal difference Reiling suggested was permissible and practical.

We also point out a serious potential problem. If we were to find that the levy attached and it was later determined that the amounts owed Mr. Sempliner are substantially less than the amounts turned over to the IRS to satisfy its levy, the result would be that monies appropriated to the Board would be used to satisfy a taxpayer's debt to the IRS, which, of course, was not the purpose for which they were appropriated. This clearly would be an illegal use of Board appropriations.

If Mr. Sempliner ever perfects his claim by presenting his vouchers to the Board showing how much he is owed within the period of the statute of limitations, the IRS, pursuant to section 6321 of title 26, could assert a lien on all compensation and expenses to which he might then be entitled up to the amount of the tax debt. See Treas. Reg. § 301.6321-1. We would expect the Board to notify the IRS, should Mr. Sempliner present his claim in the future.

Consistent with the above, we think the Board may deobligate all monies set aside for the estimated compensation and expenses that are barred from payment to Mr. Sempliner due to the 6-year period of limitation set forth in section 3702 of title 31. These monies should be returned to the Treasury. The same conclusion would apply to amounts obligated for compensation and expenses subsequently barred from collection by Mr. Sempliner. The Board should continue to obligate an estimated amount due to Mr. Sempliner for any future services he performs in case he submits a perfected claim within the allowable period.

Milton J. Fowler

Comptroller General
of the United States