

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
T&G Aviation, Inc.) ASBCA No. 40428
)
Under Contract No. DAN 0000-C-00-9010-00)

APPEARANCE FOR THE APPELLANT: Stephen L. Joseph, Esq.
San Francisco, CA

APPEARANCES FOR THE GOVERNMENT: Gary M. Winter, Esq.
Assistant General Counsel
Rumu Sarkar, Esq.
Trial Attorney
U.S. Agency for International
Development
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE LIPMAN
ON MOTION FOR RECONSIDERATION

Appellant seeks reconsideration of our decision (00-2 BCA ¶ 31,147), in which we denied its appeal from the contracting officer's decision denying its claim to recover costs incurred as a result of loss of one aircraft and damage to another from hostile fire from the Polisario Front over the Western Sahara on 8 December 1988 (the Incident). The Incident occurred on a flight (Transfer Flight) from Dakar, Senegal, the location of the captioned contract (the Senegal Contract) with the United States Agency for International Development (AID or the Government) to Agadir, Morocco, where appellant was performing another contract with AID (the Morocco Contract). Both contracts were for the spraying of locusts. The Government opposes the motion.

Procedural Contentions

Appellant's counsel has requested the opportunity to present oral argument to the deciding panel of judges and alleges that "at the end of the evidentiary hearing" he "asked for an opportunity to present oral argument, but he was not given that opportunity." The only request on the record for a post-hearing oral statement of any kind was made by the Government, inquiring whether the presiding judge was "willing to hear post-hearing motions." The presiding judge noted that the Board would be issuing a panel decision and that any appropriate motions could be included in post-hearing briefs. (Tr. 6/200-01)

Appellant's counsel did inquire off the record whether the Board would be hearing oral argument at the conclusion of the hearing. The presiding judge replied that it was the Board practice, in lieu of oral argument, to require extensive post-hearing briefs, with appropriate citations to the record. Following six days of hearing evidence, the presiding judge afforded the parties the opportunity for post-hearing briefs. The parties filed two sets of briefs, with appellant's briefs totaling 234 pages and the Government's briefs totaling 199 pages. The parties have added yet additional argument in two sets of submissions in connection with the motion for reconsideration. Appellant has provided us with no convincing reason for the need for oral argument and its request is denied.

We note that, in connection with its request for oral argument, appellant, for the first time in its reply to the Government's opposition to the motion for reconsideration, makes the following allegation:

There has never been any briefing by either party of legal points and authorities prior to or after the evidentiary hearing. The parties were instructed only to present proposed findings of fact, and nothing else. (Emphasis in original)

The allegation is startling in view of the presiding judge's briefing instructions to the parties at the conclusion of the hearing, in pertinent part, as follows:

Besides introduction and any special sections dealing with motions, the briefs should contain two sections.

The first section is limited to proposed findings of fact in separately numbered paragraphs.

. . . .

The other section is where your argument, including case citation, should be located.

. . . .

As to the content of the reply briefs, I want a response to . . . each of the other party's proposed findings of fact

Then, of course, the argument section should contain your response to the other party's legal arguments on the merits, or with respect to any motions.

(Tr. 6/226-27)

Appellant's allegation that it was limited to presenting only proposed findings of fact is especially puzzling because its briefs did include sections for legal argument, which included case citation.

The Merits

The general crux of appellant's claim underlying the appeal is that (a) AID failed to pass along to appellant information the Agency possessed about the Polisario and its conflict with Morocco in the Western Sahara and (b) appellant's lack of knowledge of that information was the proximate cause of the Incident.

We have concluded that AID's Mission Director in Morocco, Mr. Charles Johnson, unreasonably failed to communicate to other AID personnel in Morocco and to appellant information regarding the Polisario he had received in briefing sessions which other AID personnel and appellant had not attended. We have also concluded, however, that (a) we had no basis upon which to find that Mr. Johnson or any other AID official should have anticipated the flight plan of the Transfer Flight or have made any connection between their knowledge of the Polisario and the Transfer Flight, and (b) the proximate cause of the Incident was appellant's Transfer Flight crew either failing to obtain and read pertinent aviation notices, which contained warnings, or failing to adhere to their restrictions.

In moving for reconsideration, appellant's counsel primarily repeats, albeit this time intemperately, arguments it had previously advanced and we have previously considered. They are no more persuasive in their second rendition and we will not discuss those arguments further.

Appellant contends that we applied an incorrect causation standard in concluding that the actions and omissions of appellant's pilots were the proximate cause of the Incident. In their respective arguments on that issue, appellant and the Government take positions which rely, in part, upon their widely differing characterizations of Mr. Johnson's failure to communicate information about the Polisario.

AID, while not formally moving for reconsideration, would like us to modify our conclusion that Mr. Johnson acted unreasonably in failing to communicate that information. It is concerned that “it would be ill advised, improper and possibly dangerous” for [its] employees, “not in the military and not working for the FAA, who have no training, expertise or authority in such matters as aviation or navigation, to nevertheless elect to impart information to the public concerning that particular subject.” AID proceeds to suggest a scenario under which (a) appellant’s aircraft is shot down during the Transfer Flight following reliance upon Mr. Johnson’s information regarding the Polisario, (b) appellant takes legal action against Mr. Johnson in his individual capacity, and (c) the Department of Justice declines to represent Mr. Johnson based on a finding that he was not acting within the scope of his employment in providing “information relating to military operations of foreign factions.” (Opposition to motion at 10)

AID appears to have misunderstood our findings and conclusions regarding the nature and extent of Mr. Johnson’s obligations. Mr. Johnson was the AID Mission Director in Morocco. In that capacity, he attended briefing sessions, which appellant or even other AID personnel did not attend, at which he received military information. To the extent that he became privy to information relevant to appellant’s performance under the Morocco Contract, we found that he acted unreasonably in failing to provide that information to appellant, either directly, or indirectly through other AID officials. Once again, that finding was made with regard to appellant’s performance of the Morocco Contract (00-2 BCA ¶ 31,147 at 153,842), was consistent with the Government’s duty to cooperate in performance (*id.* at 153,847), and was not an imposition upon Mr. Johnson of obligations transcending his duties in his official position.

Appellant, while taking exception to our application in this contract action of causation concepts usually applied to tort actions, would at the same time have us treat Mr. Johnson’s failure to communicate information as being a “wrongful act” or “negligent,” thereby, under tort law cited by appellant, rendering less stringent the required showing of foreseeability and any supervening causes less significant. Appellant errs on both accounts.

We do not generally have jurisdiction over actions sounding in tort. *See, e.g., Alfred Bronder*, ASBCA No. 29938, 86-3 BCA ¶ 19,102. Nevertheless, it is entirely appropriate to apply to a contract action principles of causation more frequently employed in tort analysis. *Exxon Company, U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 839 (1996). We have done so in the past, *see, e.g., PAE International*, ASBCA No. 45314, 98-1 BCA ¶ 29,347, and the facts with which we are faced here, which we examine more closely below, make the application of those principles appropriate. In any event, the application of causation principles is in no way tantamount to a determination that a tort was committed. We have not concluded that any action or omission by Mr. Johnson was either “wrongful” or “negligent,” only that he had unreasonably failed to meet the Government’s contractual obligation to communicate information which could facilitate performance.

Appellant contends, at one point, that the “most important fact in the case” is that AID, in its safety briefings, represented to appellant that the area in which it was instructed to spray, north of 26 degrees north latitude, was safe and that that representation (a) overrode and constituted a nullification of the pertinent aviation notices containing the warnings, and (b) estopped the Government from relying on the aviation notices in “disavowing and disowning its own conduct and representations after the damage has been done.”

Our original opinion reflects the limited nature of the safety briefings provided by AID to appellant in its performance under the Morocco Contract and the substantial differences between appellant’s flight operations in connection with spraying, even including the limited flight to the spray areas, and those involving the Transfer Flight. In view of those factors, as well as appellant’s pilot’s obligations detailed in our original opinion, we are unable to conclude that the nature and extent of AID’s safety briefings can provide the basis for imposing upon AID responsibility for the Transfer Flight.

Appellant further contends that our findings and decision are inconsistent in that we allegedly found that: (a) AID failed to pass along to appellant information about the Polisario and its conflict with Morocco in the Western Sahara; (b) had appellant’s Mr. Grantham possessed that information he would have conveyed it to the crew of the Transfer Flight and would have advised them to take another route; and, (c) the Transfer Flight would have taken another route and the Incident would not have occurred.

Appellant is correct only with regard to (a), above. With respect to Mr. Grantham, our original opinion reflects only that he testified that he would have conveyed the information and advised the crew to take another route. That testimony is speculative and we made no finding that he would have done so. We simply do not know what connections, if any, Mr. Grantham would have drawn between the information and the Transfer Flight. Similarly, we have not found, and we do not know, what action the Transfer Flight crew would have taken upon being apprised of the information. What we have found was that the Transfer Flight crew did not adequately seek or research pertinent FAA and State Department notices, that those notices contained sufficient information to have alerted pilots to a potential missile threat in the Western Sahara, and that a pilot having knowledge of those notices would not reasonably have made the Transfer Flight pursuant to appellant’s flight plan.

Having reconsidered our decision, we affirm it.

Dated: 27 February 2001

RONALD JAY LIPMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 40428, Appeal of T&G Aviation, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals