

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Ship Analytics International, Inc) ASBCA No. 50914
)
Under Contract No. N61339-87-C-0128)

APPEARANCE FOR THE APPELLANT: John H. Horne, Esq.
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Atlanta, GA

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
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OPINION BY ADMINISTRATIVE JUDGE DELMAN
ON THE GOVERNMENT'S MOTION FOR RECONSIDERATION

On 21 February 2001, the Government filed a motion for reconsideration of our decision dated 11 January 2001 and mailed to the parties on 12 January 2001. Appellant objects to the motion as untimely, and even if timely, urges that the motion be denied. The Government contends that its motion is timely and should be granted.

On 8 March 2001 the Board issued an Order which stated in pertinent part as follows:

The Government bears the burden of establishing that its motion is timely. In order to assist the Board in making this determination, the Government shall provide the following, no later than 30 March 2001:

1. A notarized copy of the log-in sheet, mail receipt register page, or similar-type document from the Navy Yard mailroom, attesting to the date of receipt of the Board's decision, Article No. 70993400000604779593.
2. An affidavit from the person who acknowledged receipt of the Board's decision (see PS Form 3811, Blocks A and C) explaining mailroom practice in the log-in of official

Government certified mail and why the Navy failed to record the date of delivery on the green card.

3. Any other evidence attesting to the receipt of the Board's decision by the Department of Navy (not the date of receipt by counsel).

On 30 March 2001, the Government replied to the Board's Order, enclosing three notarized declarations in support of the timeliness of its motion.

FINDINGS OF FACT

1. In accordance with Board practice, the Recorder of the ASBCA mailed the Board's decision certified, return receipt-requested, on 12 January 2001 to each of the parties and attached to each mailing a PS Form 3811, known as the "return receipt green card" (the "green card"). Government counsel is located roughly 10 miles from the Board's offices, at the Washington Navy Yard. The Government does not contend that the Board misaddressed the decision or the green card to the Government, and we find that the Board's mailing of the decision and the green card to the Navy Litigation Office was accurate.

2. The green card contained blocks for the recipient's name, signature and date of receipt of the Board's decision. The Board received green cards from each of the parties. Appellant's card was signed and dated, indicating receipt of the decision on 17 January 2001 in Atlanta, Georgia. The Government's green card was signed but did not provide the date of receipt of the Board's decision. (Attachment, Board Order dated 8 March 2001)

3. The U.S. Postal Service delivered the Government's copy of the Board's decision to the Postal Operations Division of the Fleet Industrial Supply Center, Anacostia Annex, Washington, DC, a Department of the Navy mail office, on 17 January 2001 (David Brown declaration, ¶ 2). The record does not show that the U.S. Postal Service delivered the Board's decision to this office in error, and absent evidence to the contrary, we find that this Naval postal office was authorized to receive, and in fact received the Board's decision on behalf of the Navy.

4. The Anacostia Annex office delivered the Board's decision to the Department of Navy Mail Center, Building 36, at the Washington Navy Yard on 18 January 2001 (*id.*, ¶ 3).

5. It is standard office practice in the Navy Litigation Office for one member of the support staff to retrieve the office mail from the Navy Mail Center on a daily basis (Joan Brown declaration, ¶ 2).

6. For some unexplained reason, the Litigation Office either did not retrieve the mail from the mail center on 18 January 2001, or retrieved the mail but failed to retrieve

the Board's decision on that date. Nor did the Litigation Office retrieve the Board's decision from the mail center at anytime during the next day, Friday, 19 January 2001.

7. The Government suggests that Presidential inauguration activities may have played some role in the inability of the Litigation Office to retrieve the Board's decision on either 18 or 19 January 2001. However the record does not show that the Navy Yard Mail Center or the Litigation Office was officially closed on these days. We find that the Board's decision was available for pickup by the Litigation Office from the Navy Mail Center on 18 January and 19 January 2001.

8. A member of the support staff of the Litigation Office retrieved the Board's decision from the Navy Mail Center on Monday morning, 22 January 2001 (Strother declaration, ¶ 4). The Litigation Office stamped the Board's decision as received on 22 January 2001 (*id.*).

9. In accordance with Litigation Office practice, the support person who retrieves certified mail is expected to sign, date and mail the green card when the office receives the document (Joan Brown declaration, ¶ 2). The support person signed her name to the green card on 22 January 2001 but did not date the green card. She admitted that this was a mistake. (Strother declaration, ¶ 4)

10. The Government's trial counsel notified the Board that he received the Board's decision on 22 January 2001. The Government filed its motion for reconsideration on 21 February 2001, which was 35 days after the Board's decision was received by the Navy at the Anacostia Annex, and 34 days after it was received by the Navy's Mail Center at the Washington Navy Yard.

11. Board Rule 29 provides in pertinent part as follows:

29. Motion for Reconsideration

. . . [T]he motion shall be filed within 30 days from the date of the receipt of a copy of the decision of the Board by the party filing the motion.

DECISION

Under the Board's rules, a motion for reconsideration must be filed within 30 days from the date the decision was received by the moving party. This time limit is strictly enforced. *Swanson Products, Inc.*, ASBCA No. 48002, 96-2 BCA ¶ 28,486. The moving party here was the Department of the Navy. In accordance with our precedent, we hold that the Navy received the decision when the agency office authorized to receive the mail from the U.S. Postal Service on behalf of the agency received the decision in the ordinary course of business, not when it was later received by counsel. *Vap-Air Division, Vapor*

Corporation, ASBCA No. 14411, 72-1 BCA ¶ 9240. If the rule were otherwise, Government counsel could defer, for his own convenience, picking up a Board decision actually received by the Navy. This would violate the spirit as well as the letter of the Board's Rules.

Under the facts presented here, we conclude that the authorized agency office was the Navy's Anacostia Annex. As far as this record shows, the Annex properly and lawfully received the Board's decision from the U.S. Postal Service on behalf of the Department of Navy as represented by the Chief Trial Attorney. Normally, we rely on the completed green card as evidence showing the date a party receives a Board decision from the U.S. Postal Service, *see, e.g., Corbett Technologies, Inc.*, ASBCA No. 49477, 00-2 BCA ¶ 30,922. We cannot do so in this appeal since the Navy did not put a date on the green card. However, our record clearly shows that the Navy actually received the Board's decision from the U.S. Postal Service at the Anacostia Annex on 17 January 2001 (findings 3, 9).

The record establishes that the Navy's Anacostia Annex received the Board's decision from the U.S. Postal Service in the ordinary course of business on 17 January 2001, and delivered it to the Navy Yard Mail Center on 18 January 2001. Measuring the 30-day reconsideration period from date of receipt by the Anacostia Annex, this period expired on Friday, 16 February 2001. Even if we assume, for argument's sake, that the reconsideration period began from date of receipt by the Washington Navy Yard Mail Center, the period expired on Saturday, 17 February 2001, and given the intervening weekend and Federal holiday on Monday, 19 February 2001, the last date for filing the motion for reconsideration was Tuesday, 20 February 2001. We conclude that the Government's motion, filed on Wednesday, 21 February 2001, was untimely.

Even if we were to exercise our discretion to allow this filing, *nunc pro tunc*, we would deny it. While the Government takes exception to the Board's passing reference to Enzian's manufacture of the visual trainer upgrade as a "complete" system in the decision section of the opinion (slip. opinion at 15), the Board's findings of fact related to Enzian (slip opinion at 7) - upon which the Board's overall conclusions are based - are fully supported by the record and the Government does not suggest otherwise. As the Board's decision makes clear, this appeal was not decided on the state of "completeness" of Enzian's system, but rather on contract interpretation and the parties' understanding of their agreements at the time they negotiated them. The Government failed to show that these findings and conclusions were unsupported by the record.

The Government's motion is dismissed, and the Board's decision is affirmed.

Dated: 2 May 2001

JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur (see concurring opinion)

I concur (see concurring opinion)

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

CONCURRING OPINION BY JUDGES STEMLER AND THOMAS

We concur in the dismissal of the motion and therefore find it unnecessary to reach the merits of the motion.

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. 50914, Appeal of Ship Analytics International, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ

Recorder, Armed Services
Board of Contract Appeals