

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
The Boeing Company) ASBCA Nos. 58030, 58593, 58594
) 58660, 59212, 59220
) 59813, 60376, 60403
) 60411, 60522, 60736
)
Under Contract No. 000000-00-0-0000 *et al.*)

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OPINION BY ADMINISTRATIVE JUDGE NEWSOM ON
APPELLANT'S MOTION TO SUSPEND PROCEEDINGS OR IN THE
ALTERNATIVE, DISMISS APPEALS WITHOUT PREJUDICE

Before the Board is the motion filed by The Boeing Company (Boeing) to suspend these 12 appeals pursuant to Board Rule 18(a), or in the alternative to dismiss them without prejudice pursuant to Board Rule 18(b). The government concurs with the motion.

These appeals have a long tenure at the Board. Boeing filed the oldest in 2012 and the newest in 2016. Since it initiated the appeals Boeing, with the government's concurrence, has repeatedly filed motions to suspend proceedings. The justification for this latest motion is that Boeing wishes to stay these appeals while it pursues three newly-filed cases at the U.S. Court of Federal Claims (COFC). For the reasons

explained below, we conclude that Boeing's motion does not meet the standards in Board Rule 18 and is denied.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

The Nature of the Appeals and Their Procedural History

1. Each of these appeals concerns a government claim for the cost impacts from multiple, simultaneous changes made unilaterally by Boeing to its cost accounting practices. Some of these changes resulted in cost savings for the government, which the government gets to keep. Other changes resulted in cost increases to the government, for which Boeing must compensate the government. (*See generally* ASBCA No. 58030, compl. ¶¶ 6-18; app. ltr. dtd. 5 January 2018)¹

2. While the facts in each case vary, each appeal raises a common legal issue: whether the impacts from these cost accounting changes should be aggregated or calculated in isolation. Boeing calls this issue "Cost Impact Aggregation" (app. ltr. dtd. 5 January 2018). Boeing argues that applicable legal standards require the government to aggregate impacts from multiple, simultaneous changes, so that costs saved as a result of one change offset costs increased as a result of another change. The government argues that the impact of each change must be calculated separately, so that savings from one change would not offset cost increases from another. (*E.g.*, R4, tab 29 at 530) We infer that the government's methodology would result in higher amounts due from Boeing than would Boeing's methodology.

3. Each appeal also presents case-specific disputes over materiality or quantum calculations (app. ltr. dtd. 23 March 2018; tr. 1/49-50). This is because each appeal involves different sets of accounting changes, with different impacts, affecting different years and different elements of Boeing's businesses (*compare, e.g.*, ASBCA No. 58030, compl. ¶¶ 16-21, *with* ASBCA No. 58660, compl. ¶¶ 9-22; tr. 1/42-43, 49-50, 56).

4. All 12 appeals have been pending at the Board for years. The parties have done little to progress the litigation, instead choosing to request repeatedly that the Board suspend proceedings.

5. The oldest of these appeals, ASBCA No. 58030, is illustrative. Filed in March 2012, this appeal has been pending at the Board *for six years*. In 2012, the parties filed pleadings and Rule 4 materials (compl. filed 23 April 2012; answer filed 23 May 2012; gov't ltr. dtd. 17 May 2012; app. ltr. dtd. 18 June 2012). Thereafter, by

¹ Unless otherwise noted, citations to correspondence or filings in Board appeal records derive from the record in ASBCA No. 58030.

letter dated 9 July 2012 the parties filed the first of many requests to stay proceedings. When the first stay expired, the parties requested another stay. When that stay expired, they requested another, and so on. In ASBCA No. 58030, the parties filed nine separate serial motions to stay proceedings. Until recently, the Board granted each request. (App. ltrs. dtd. 9 July 2012, 16 January 2014, 23 June 2014, 13 August 2015, 20 September 2016, 7 December 2016, 7 March 2017, 5 June 2017, 5 September 2017)

6. The parties followed this pattern in each appeal: shortly after Boeing initiated each appeal, the parties sought to stay proceedings. The Board granted the stay. In all but two appeals,² proceedings were stayed before either party could file pleadings. (See, e.g., ASBCA No. 58593, app. ltr. dtd. 12 April 2013)

7. The parties justified each request for a stay on the ground that an expected decision in another litigation, also involving Cost Impact Aggregation, may streamline resolution of these appeals. At first, in 2012 and 2013, they argued for a stay on the ground that a Board decision in a different Boeing appeal, ASBCA No. 57549, might resolve the present appeals (see, e.g., app. ltr. dtd. 9 July 2012). We granted the stay.

8. The Board issued the expected decision on 6 September 2013. *The Boeing Co.*, ASBCA Nos. 57549, 57563, 13 BCA ¶ 35,427. The *Boeing* decision did not resolve these appeals. Rather, the parties then requested that the stay be extended to await an expected decision on cross-motions for summary judgment in an appeal brought by Raytheon Company (ASBCA No. 57801 *et al.*) (app. ltr. dtd. 23 June 2014). We extended the stay.

9. The Board issued the expected *Raytheon* decision on 7 May 2015, granting summary judgment in part and denying it in part. *Raytheon Company, Space & Airborne Systems*, ASBCA No. 57801 *et al.*, 15-1 BCA ¶ 36,024 (*Raytheon I*). That decision also did not resolve these appeals. Rather, the parties requested that the stay be extended again, this time “pending the issuance of a *final* decision in the *Raytheon* case” (app. ltr. dtd. 13 August 2015 (emphasis added)). We extended the stay.

10. The Board issued a final decision in *Raytheon* on 9 August 2016. *Raytheon Company, Space & Airborne Systems*, ASBCA No. 58068, 16-1 BCA ¶ 36,484 (*Raytheon II*). At the parties’ request, we extended the stay to the end of the period for seeking appellate review on 7 December 2016 (app. ltr. dtd. 20 September 2016). Neither party appealed; the stay expired.

² The parties filed pleadings in ASBCA No. 58030 and in ASBCA No. 58660 before the first stay was requested (ASBCA No. 58660, compl. dtd. 17 June 2013, answer dtd. 26 July 2013).

11. *Raytheon II* also did not resolve these appeals. Rather, the parties requested that the stay remain in place for 90 days while the parties discussed settlement. The Board granted a 90-day stay. When that stay expired, the parties requested another 90-day stay to continue settlement discussions. It was granted. This pattern repeated for about a year. (App. ltrs. dtd. 7 December 2016, 7 March 2017, 5 June 2017, 5 September 2017) No settlement was reached.

12. On 7 September 2017, the Board notified the parties that it would no longer allow these appeals to remain inactive. It directed that, after the then-current stay expired on 4 December 2017, the parties “shall submit a firm schedule” for proceeding or “explain why [the appeals] should not be dismissed under Board Rule 18.”

13. The parties did not submit a schedule. Rather, on 1 December 2017, the parties asked for another stay until 5 January 2018. They represented that the parties wanted to identify one case – a “test case” in effect – in which to litigate the Cost Impact Aggregation issues while the remaining cases were stayed. They advised that a month was needed to allow the parties “to identify the case they will litigate,” but that “[n]o later than January 5, 2018 the parties will submit a joint report advising the Board of the case they wish to litigate.”

14. Discussions about a test case did not advance, if indeed they occurred at all.³ Rather, during December 2017 – when the parties were supposed to be selecting a test case – Boeing filed three complaints at the COFC⁴ (app. ltr. dtd. 23 March 2018).

15. On 5 January 2018, instead of reporting its selected test case, Boeing filed the present motion to suspend proceedings or in the alternative dismiss all of these appeals without prejudice. The government initially opposed the motion, then later withdrew its opposition⁵ (gov’t ltr. dtd. 8 March 2018). At that point, these appeals were assigned to an administrative judge.

16. In the three COFC complaints, Boeing challenged the government’s Cost Impact Aggregation methodology, just as it had in the Board appeals. In addition,

³ Government counsel explained that the parties “had not made a lot of progress” in discussing a test case. They “broached the idea” but that was “about as far as [it’s] gone.” (Tr. 1/61)

⁴ *The Boeing Co. v. United States*, No. 17-1969 (Fed. Cl. filed Dec. 18, 2017); *The Boeing Co. v. United States*, No. 17-1981 (Fed. Cl. filed Dec. 19, 2017); *The Boeing Co. v. United States*, No. 17-1983 (Fed. Cl. filed Dec. 19, 2017).

⁵ Boeing initially requested that the appeals be stayed or dismissed for four years, but subsequently shortened it to one year (app. ltr. dtd. 23 March 2018).

Boeing alleged an affirmative claim “based on the Fifth Amendment to the U.S. Constitution,” which we understand to be a Takings claim (app. ltr. dtd. 5 January 2018). See *The Boeing Co. v. United States*, No. 17-1969 (Fed. Cl. filed Dec. 18, 2017), compl. ¶¶ 101-04, ECF No. 1. Boeing seeks to suspend, or dismiss without prejudice, its Board appeals for one year while it pursues its COFC litigation, and later, an appeal at the Federal Circuit (app. ltr. dtd. 5 January 2018). Arguing that claims founded upon the Constitution are not within the Board’s jurisdiction, Boeing asserts that the COFC is the “best forum to decide all of the issues” (*id.*; tr. 1/7).

17. Below is a chart summarizing the 12 Board appeals and salient facts about their procedural histories.

ASBCA Number	Date of Contracting Officer's Decision	Date Board Appeal Filed	Age at the ASBCA (as of 30 March 2018)	Rationales Used to Justify Suspension of Proceedings		
				Await Board decision in <i>Boeing</i> , No. 57549	Await Board decision in <i>Raytheon II</i>	Settlement discussions
58030	12/22/2011	3/16/12	6 years	✓	✓	✓
58593	12/19/12	3/18/13	5 years	✓	✓	✓
58594	12/19/12	3/18/13	5 years	✓	✓	✓
58660	2/8/13	5/8/13	Nearly 5 years		✓	✓
59212	12/19/13	3/14/14	4 years		✓	✓
59220	12/20/13	3/18/14	4 years		✓	✓
59813	11/19/14	2/3/15	3 years		✓	✓
60376	12/16/15	12/18/15	2.5 years		✓	✓
60403	12/22/15	1/6/16	2 years		✓	✓
60411	12/24/15	1/8/16	More than 2 years		✓	✓
60522	3/31/16	4/6/16	Nearly 2 years		✓	✓
60736	8/4/16	8/11/16	1.5 years			✓

DECISION

Board Rule 18(a) authorizes the Board to suspend proceedings, in relevant part, “for good cause shown.” In appropriate cases, if a suspension “has continued or may continue for an inordinate length of time,” Rule 18(b) authorizes the Board to dismiss the appeal without prejudice and allow the parties to move to reinstate the appeal later.⁶ The Board’s determination whether to suspend or dismiss an appeal under Rule 18 is discretionary. *WEDJ/Three C’s, Inc.*, ASBCA Nos. 53747, 53756, 05-2 BCA ¶ 33,070 at 163,896; *Boeing Computer Services*, ASBCA No. 41649, 92-3 BCA ¶ 25,157 at 125,398. A party does not have a *per se* right either to a suspension or a dismissal without prejudice. *WEDJ/Three C’s*, 05-2 BCA ¶ 33,070 at 163,896.

We do not reflexively grant Rule 18 motions. Our precedent shows that we make case-by-case judgments as to whether good cause exists. *Compare, e.g., Kellogg Brown & Root Services, Inc.*, ASBCA Nos. 57530, 58161, 13 BCA ¶ 35,243 (granting dismissal without prejudice); *WEDJ/Three C’s*, 05-2 BCA ¶ 33,070 (same); *Adventure Group, Inc.*, ASBCA No. 53097, 01-2 BCA ¶ 31,623 (same), *with Tele-Consultants, Inc.*, ASBCA No. 58129, 14-1 BCA ¶ 35,622 (denying suspension or dismissal); *Ebasco Services, Inc.*, ASBCA No. 48349, 95-2 BCA ¶ 27,635 (same); *E. Huttenbauer & Son, Inc.*, ASBCA No. 48290 *et al.*, 97-2 BCA ¶ 29,104 (same).

Where, as here, the movant seeks a suspension/dismissal of Board appeals because of parallel litigation, the moving party must demonstrate either a “clear case of hardship or inequity in being required to go forward,” *TRW Inc.*, ASBCA Nos. 51172, 51530, 99-2 BCA ¶ 30,407 at 150,332, or “a demonstrable need for the requested suspension that would outweigh the resultant delay.” *Kaman Precision Products, Inc. formerly dba Kaman Dayron, Inc.*, ASBCA No. 56305 *et al.*, 10-2 BCA ¶ 34,499 at 170,152. We examine factors such as: (1) whether the facts, issues, and witnesses in both proceedings are substantially similar; (2) whether proceeding with the Board appeal would compromise the parallel court litigation; (3) whether the proposed stay could harm the nonmoving party; and (4) whether the duration of the

⁶ Rule 18(b) provides:

In certain cases, appeals docketed before the Board are required to be placed in a suspense status and the Board is unable to proceed with disposition thereof for reasons not within the control of the Board. Where the suspension has continued or may continue for an inordinate length of time, the Board may dismiss such appeals from its dockets for a period of time without prejudice to their restoration. Unless either party or the Board moves to reinstate the appeal within the time period set forth in the dismissal order, or if no time period is set forth, within one year from the date of the dismissal order, the dismissal shall be deemed to be with prejudice.

requested stay is reasonable. *Public Warehousing Company K.S.C.*, ASBCA No. 56116, 08-1 BCA ¶ 33,787 at 167,227-29; *Kellogg Brown & Root Services, Inc.*, ASBCA Nos. 56358, 57151, 11-1 BCA ¶ 34,614 at 170,603-05. Each factor is considered below.

A. The Duration of the Requested Delay

We address the fourth factor first, because it reveals the problem in fuller context. Boeing requests a one-year suspension or dismissal (app. ltr. dtd. 23 March 2018). These appeals have already been suspended – at the parties’ request – for periods between two and six years (SOF ¶¶ 5-6, 17). Thus, the question is not whether a single delay of one or even two years is reasonable. The question is whether a *further* delay, on top of the two to six years of *previous* delay, is reasonable. Even where good cause exists, the Board disfavors delays of extended or indefinite duration. *See, e.g., Kellogg Brown & Root Services*, 13 BCA ¶ 35,243 (refusing to extend a three-year dismissal because of a parallel False Claims Act action).

We are skeptical that the delay would actually only last one year. Boeing states that it intends to litigate the Cost Impact Aggregation issue to decision at the COFC, then pursue or defend an appeal at the Federal Circuit (app. ltr. dtd. 23 March 2018). It seems extremely unlikely that Boeing could complete litigation at the COFC, obtain decisions, appeal and brief the appeal at the Federal Circuit, and obtain an appellate decision, all within one year’s time. More likely, a one-year delay will evolve into follow-on requests for further delays. Adding to our skepticism is the fact that all of the previous requests for stays turned into follow-on requests for stays.

Accordingly, we conclude that Boeing’s requested stay is more accurately viewed as a multi-year stay and potentially a stay of indefinite duration. To grant Boeing’s requested delay, we would need to see a strong demonstration of need. As explained below, we do not find one.

B. Similarity of the Board Appeals and the COFC Cases

Turning to the first factor, Boeing argues that efficiency warrants a stay to allow the parties to obtain a Federal Circuit decision on the Cost Impact Aggregation issue common to all the Board appeals and the COFC cases. Boeing asserts that it is more efficient for the parties to obtain an appellate decision on that issue before proceeding with any Board appeals, both to avoid risk that a Board decision may be contradicted by the Federal Circuit, and to save litigation costs. Boeing argues that litigating the Board appeals at the same time as it pursues the court litigation would cost “unnecessary time and resources.” (App. ltrs. dtd. 5 January 2018, 23 March 2018 at 1). The “most efficient” path to the Federal Circuit, says Boeing, runs through the COFC (app. ltr. dtd. 23 March 2018 at 1-2; tr. 1/16).

While there is some superficial appeal to this argument, it does not withstand scrutiny, for three reasons. First, if anything is clear from the procedural history, it is that this litigation cannot easily be predicted. Each one of Boeing's previous predictions have proved overly optimistic (SOF ¶¶ 7-11, 17). We are no longer willing to accept predictions that some future event will make it easier to resolve these disputes. We cannot presume that the COFC will decide the Cost Impact Aggregation issue sooner than the Board, nor can we presume that the COFC decisions will be appealed, nor that, if they are appealed, the Federal Circuit will resolve the issue on the merits, nor that its decision will resolve the issue more definitively than the previous Board decisions addressing this issue.

Second, a Federal Circuit decision on Cost Impact Aggregation will not fully resolve the Board appeals. Apart from that single legal issue, the cases are different. Each involves different accounting changes, with different impacts, affecting different years and different elements of Boeing's businesses, and involving different government contracting offices (SOF ¶¶ 2-3). Whether or not the Federal Circuit decides the Cost Impact Aggregation issue, the parties and the Board will still have to resolve case-specific disputes over calculation details and materiality. We are not persuaded that efficiency can be achieved or that costs can be saved by kicking the can down the road again.⁷

Third, that the Federal Circuit could decide an issue differently from the Board is insufficient, at least in the circumstances presented here, to justify a lengthy or indefinite stay. That risk is faced by *every single litigant in every single appeal* pending at the Board.

C. Whether the Board Appeals Could Compromise the Court Litigation

Turning to the second factor, we see no risk that the Board appeals would compromise the COFC or Federal Circuit litigation. Boeing argues that its assertion of a Takings claim in the COFC litigation could "moot the Government's position on its claims...and have a direct impact on any proceedings at the Board." Boeing also argues that because the COFC possesses jurisdiction over constitutional claims and the Board does not, the COFC is the "best forum to decide all of the issues." (App. ltr. dtd. 5 January 2018 at 2; tr. 1/7)

⁷ To the extent that Boeing complains about having to litigate in two different forums at the same time, that posture is a consequence of its own choice to file litigation at the same time in two different forums. It is no basis for a finding of good cause for a stay or dismissal in the circumstances presented here.

We are unpersuaded. Boeing stated that it will not assert a Takings claim in the Board appeals (tr. 1/46). It is therefore difficult to imagine how a ruling on a Takings claim that is not before us could impact the Board appeals. Indeed, we fail to see how the COFC could even reach the Takings claims in light of the Supreme Court's admonition that courts must avoid reaching constitutional questions in advance of the necessity of deciding them. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445–46 (1988); see also *Crutchfield v. Secretary of Health and Human Services*, 125 Fed. Cl. 251, 258 (2014) (Braden, J.); cf. *Molina Healthcare of California, Inc. v. United States*, 133 Fed. Cl. 14 (2017) (plaintiff cannot assert Takings claim in breach of contract action).

This situation is unlike previous cases in which a parallel court proceeding warrants a stay or dismissal. For example, in *WEDJ/Three C's*, 05-2 BCA ¶ 33,070, we dismissed an appeal without prejudice because the government – not the appellant – initiated a criminal investigation targeting witnesses in the Board litigation. We found that civil discovery in the Board litigation could compromise the witnesses' rights against self-incrimination, which would impair appellant's ability to prove its case before the Board. The present situation is more akin to *Tele-Consultants*, 14-1 BCA ¶ 35,622 at 174,467, in which appellant sought a stay of the Board appeal, claiming it lacked financial resources to fund the Board litigation and wished to pursue a petition for relief in Congress. We denied that request, noting that appellant "chose to file this appeal and must either timely litigate it or become subject to dismissal for failure to prosecute." *Id.* at 174,468.

D. Whether the Government Would be Prejudiced

Finally, Boeing emphasizes that the government would not be prejudiced if the Board proceedings were stayed, as evidenced by the government's concurrence with the motion (app. ltr. dtd. 23 March 2018 at 1-2). The lack of government prejudice is not sufficient to overcome Boeing's failure in the first instance to demonstrate good cause for a stay or dismissal. Moreover, at oral argument, the government stated that it would also not be prejudiced if the Board appeals proceeded (tr. 1/68-69). The government appears willing to accept either outcome.

E. Alternatives Proposed by the Parties

During oral argument, both parties offered fallback options. Boeing suggested that the Board should stay these appeals, but that the parties would hold discussions to narrow the factual disputes in these 12 appeals and submit periodic reports on their progress (tr. 1/49; app. ltr. dtd. 23 March 2018). We are unwilling to do this. It appears that the parties already attempted to narrow the disputed issues, when they obtained stays to discuss settlement (SOF ¶ 11). That effort was unsuccessful (*id.*). The Board's experience generally, and with these appeals in particular, suggests that the best way to move the proceedings along is to hold the parties accountable to a firm schedule.

The government suggested that the Board could allow one “test” case to proceed at the Board (tr. 1/58-59). The Board accepts a modified version of this option. Recognizing that it would be impractical to expect the parties immediately to commence litigation in all 12 appeals at once, we intend to direct that the appeals shall re-commence, in staggered fashion. A separate order will be issued to that effect.

CONCLUSION

The motion is denied.

Dated: 23 May 2018



ELIZABETH W. NEWSOM
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur



OWEN C. WILSON
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 Nos. 58030, 58593, 58594, 58660, 59212, 59220, 59813, 60376, 60403, 60411, 60522, 60736, Appeals of The Boeing Company, rendered in conformance with the Board’s Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals