



Office of the General Counsel

B-259532

March 6, 1995

Mr. Alan I. Saltman
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1800 M Street, N.W., Suite 700 South
Washington, DC 20036

Dear Mr. Saltman:

The purpose of this letter is to inform you of our decision to withhold payment of the award in favor of your client, Alaska Pulp Corporation (APC), in Alaska Lumber & Pulp., Inc. v. Madigan, 2 F.3d 389 (Fed. Cir. 1993). This is being done pursuant to 31 U.S.C. § 3728, in order to collect the back pay and severance claims presented by the National Labor Relations Board (NLRB) arising from the decision in NLRB v. Alaska Pulp Corporation, 296 N.L.R.B. 1260 (1989), as enforced, No. 90-70614 (9th Cir. 1991) (unpub.). The amount awarded against the United States in Madigan is \$6,915,934.94, plus interest on \$3,745,973.13 from January 1, 1994, until the date of payment at the rate set by the Contract Disputes Act (CDA), 41 U.S.C. § 611. As of today's date, the total amount owed by the United States under Madigan is \$7,203,656.47. On November 14, 1994, an administrative law judge (ALJ) issued an "Interlocutory Determination" in the NLRB matter. Based on the Interlocutory Determination, the NLRB General Counsel has estimated that, including interest through December 31, 1994, APC's back pay and severance obligations will total \$9,037,022.¹

The award in Madigan is payable from the permanent, indefinite appropriation known as the Judgment Fund, 31 U.S.C. § 1304, subject to reimbursement from USDA's appropriations. 41 U.S.C. § 612(c). This Office is directed to "withhold [payment from the Judgment Fund of] that part of a judgment against the United States Government" which is equal to "a debt the plaintiff owes the Government." 31 U.S.C. § 3728(a). Where the plaintiff consents to this withholding, it ripens into a "setoff" and the plaintiff's debt is discharged to the extent of the amount withheld. If the plaintiff refuses to consent to the withholding, the government is required to

¹The ALJ has yet to issue his final, recommended order in this matter. Under 29 U.S.C. § 160, the ALJ's final order will become the final order of NLRB unless the Board decides to review it, or one of the parties files exceptions to it within 20 days of the recommended order.

proceed with the withholding and have a civil action brought to adjudicate the validity of the government's debt claim (if such an action has not already been brought). 31 U.S.C. § 3728(b). Should the plaintiff ultimately win the civil action to adjudicate the government's debt claim, the withheld funds must be refunded with six percent interest. 31 U.S.C. § 3728(c).

Based on our review of the law, the submissions by your firm, and those of the NLRB, we conclude that payment of the Madigan award must be withheld in order to recoup the debt asserted by the NLRB. The reasons for this conclusion are set forth in the discussion below. While the statute normally requires us to seek APC's consent to this action, it is already clear from your firm's submissions that APC does not agree to this setoff. Since APC does not consent, the funds at issue cannot be paid to NLRB at this time. Instead, they must be held in the Judgment Fund, pending final adjudication of the amount of APC's indebtedness. 31 U.S.C. § 3728(b)(2). See Hines v. United States, 105 F.2d 85, 88 (D.C. Cir. 1939) (observing that, where the debt is disputed and not yet finally adjudicated, payment may be withheld but not setoff while the adjudication proceeds).

As noted above, section 3728(b)(2)(B) directs us to "have a civil action brought if one has not already been brought." We believe that, for the purposes of section 3728, litigation of this matter has already been initiated. As you know, the law specifies in great detail the process by which disputes concerning the claims and findings of the NLRB make their way into the federal courts. 29 U.S.C. § 160. The process contemplated by section 160 is already well underway.

Under section 3728(c), the government is liable for interest on any of the withheld amounts which are later found by the courts not due and owing to the United States. APC's award has been accruing interest under the CDA. 41 U.S.C. § 611. Given our action today, interest accrual under the CDA is hereby terminated and replaced with interest under section 3728. Interest accrues under section 3728 at the rate of six (6) percent per annum, and applies to any and all withheld amounts ultimately found not due and owing to the government, including the CDA interest that accrued through today's date.

DISCUSSION

The submissions by your firm challenging the propriety of a setoff against APC under section 3728 raise two questions: First, is there "mutuality" between the parties? Second, is the debt claimed by NLRB "liquidated or certain in amount" within the meaning of the law? Briefly put, we believe that (1) there is mutuality because the federal government, as the only entity authorized by law to enforce collection of NLRB back pay awards, is the creditor for the purposes of those

awards, and (2) this claim is liquidated or certain in amount since it has been reduced to a sum certain by appropriate officials of the NLRB using a rational methodology. These positions are explained in greater detail in the following material.

Mutuality of Parties

It is clear that before setoff may be invoked, there must be mutuality of parties. This means that the judgment creditor must be the same person (in the view of the law) as the party who owes the debt to be collected, and the government must be the same person to whom the debt is owed. You argue that any amounts APC owes in this matter are due, not to the government, but to the affected employees, who happen to be represented by the government. You also suggest that the government would be taking unfair advantage of its position as the employees' representative if it were to take setoff in this matter.

Although all funds collected by the NLRB in this matter will ultimately be turned over to the current and former employees of APC and not to the Treasury of the United States, the NLRB is the only entity which may legally pursue their collection. Not even the awarded employees themselves may sue to recover the back pay. In this regard, although its actions ultimately benefit the individual, injured employees, the NLRB acts primarily in the public's interest to uphold federal labor laws and policies. NLRB v. E.D.P. Medical Computer Systems, Inc., 6 F.3d 951, 954-55 (2d Cir. 1993). Moreover, the NLRB may treat back pay awards as the equivalent of debts owed to the United States. This is because the NLRB acts not as a collection agent for the employees, but as the champion and enforcer of federal labor laws and policies. NLRB v. Deena Artware, 361 U.S. 398, 412 (1960) (Frankfurter, J., concurring) ("[The Board's] primary function . . . is to prevent the conduct defined as unfair labor practices."); National Licorice Co. v. NLRB, 309 U.S. 350, 362 (1940) ("The Board acts in a public capacity to give effect to the declared public policy of the [National Labor Relations] Act."). Consistent with this view, employees who benefit from an NLRB back pay award have no property rights to the award until it is distributed to them by the NLRB.² NLRB v. Sunshine Mining Co., 125 F.2d 757, 761 (9th Cir. 1942).

You have asserted that NLRB v. Nathanson, 344 U.S. 25 (1952), supports the proposition that NLRB back pay awards are neither debts owed the government nor

²Similarly, funds in a federal employee retirement account are not available for setoff until the employee withdraws his contribution or qualifies for an annuity. 58 Comp. Gen. 501, 502-03 (1979).

collectible by setoff.³ In fact, the Court held that the NLRB "is a creditor as respects the back pay awards, within the meaning of the Bankruptcy Act." *Id.* at 27. This conclusion was founded upon the fact that the NLRB is the "public agent chosen by Congress to enforce the National Labor Relations Act. A back pay order is a reparation order designed to vindicate the public policy of the statute." *Id.* (citations omitted). Although the Court also held that back pay awards, because the amounts recovered do not ultimately benefit the Treasury, are not entitled to the same priority in bankruptcy proceedings as are other debts owed to the United States, the Court did not alter their characterization as debts owed the government:

"We do not, however, agree with the lower court that this claim, enforceable by the Board, is a debt due to the United States within the meaning of [31 U.S.C. § 3713], and therefore entitled to priority under . . . the Bankruptcy Act. It does not follow that because the Board is an agency of the United States, any debt owed it is a debt owing the United States within the meaning of [31 U.S.C. § 3713]. The priority granted by that statute was designed 'to secure an adequate public revenue to sustain the public burthens [sic] and discharge the public debts. . . .' There is no function here of assuring the public revenue. The beneficiaries of the claims are private persons"

Id. at 27-28 (citations omitted and emphasis added). (Section 3713 gives the federal government a general priority in the payment of debts owed by persons whose assets are not sufficient to pay all of their creditors in full.) See also E.D.P. Medical Computer Systems, Inc., 6 F.3d at 955, which explains that Nathanson

"did hold that the Board is a creditor because the back pay order is a 'debt, demand, or claim provable in bankruptcy.' The Court stated that the Board is the only party entitled to enforce the award, as designated by Congress. The Court's reasons for not granting the Board the same priority as other debts owing to the United States are different from the Court's reasons for holding that a back pay award is a debt to the Board."

We believe the Court would agree that "[e]ffective debt collection by the government is not only to fill the public coffers and lower the federal budget deficit; we should also consider the importance of effective debt collection as a necessary tool for enforcement of the federal labor laws." *Id.*

³APC's suggestion that GAO has previously viewed Nathanson as precluding setoff by the government is not correct. GAO has previously cited Nathanson on only two occasions. See B-161514, July 7, 1967; B-138525, Apr. 21, 1959. In neither one was it cited for the proposition that setoff could not be taken by the government under these (or any) circumstances; nor for that matter was setoff even an issue in those cases.

As part of questioning whether there is mutuality of parties, you have suggested also that sound public policy would oppose the exercise of setoff under these circumstances because such would improperly benefit the United States by "extinguishing" or "diminishing" its judgment obligations. We disagree. Taking setoff in this case will not alter how much the government will pay out of the Treasury on account of the award won by APC. The only thing that will be altered by setoff is to whom that money will be paid--APC, or the current and former employees to whom APC has already been found liable by the United States Court of Appeals for the Ninth Circuit. For this reason, no improper advantage will come to the government if it is treated as the creditor in this matter.

Liquidated Debt

It is well-settled that to be eligible for setoff, a debt must be "liquidated or certain in amount." B-210600, Sept. 18, 1984. This rule is prescribed in the Federal Claims Collection Standards (FCCS), 4 C.F.R. § 102.3(a), and reflects requirements of the common law. See, e.g., 20 Am. Jur. 2d Counterclaim, Recoupment, and Setoff § 61 (1965). You argue that APC's debt will not be liquidated or certain unless and until the ALJ's recommended order becomes final or the Board itself otherwise establishes the amount due. You have suggested, further, that because the matter is subject to judicial review, it will be several years before this matter is eligible for setoff.

While the phrase "liquidated or certain in amount" does not appear to have been further defined in the case law or the FCCS, it cannot mean that the amount and existence of the debt have been finally determined as a matter of law. The common law has never required that a judgment on the debt must be obtained before setoff can be taken. United States v. American Surety Co., 158 F.2d 12 (5th Cir. 1946); 56 Comp. Gen. 264 (1977). Neither does the setoff statute. As noted above, section 3728(b) specifies that, if such has not already been done, a civil action must be brought after the withholding occurs in order to adjudicate the government's debt claim. Thus, by its very terms, section 3728 contemplates that setoff will often take place before the debt has been finally determined.

Neither can "liquidated or certain in amount" mean that the amount demanded must represent the final determination of the head of the agency to which the debt is owed. Under the FCCS, a debt exists when "an amount of money or property . . . has been determined by an appropriate agency official to be owed to the United States." 4 C.F.R. § 101.2(a). The NLRB General Counsel and Regional Office staffs are authorized to assert and settle claims on behalf of the NLRB. 29 C.F.R. §§ 101.7-101.9. Consequently, the FCCS requirement for a determination by an "appropriate agency official" was satisfied when the NLRB regional staff and General Counsel first pursued their claim against APC for a specific sum of money.

(Alternatively, the FCCS requirement was fully satisfied by the ALJ's "Interlocutory Determination.")

Moreover, we have previously held that setoff is proper even where the amount claimed is only an estimate by the appropriate official. B-193432, B-211194, Jan. 5, 1984. There are, of course, limits on how speculative such estimates may be. In B-210600, Sept. 18, 1984, we held that to qualify for setoff such an estimate must rest on "valid presumptions" which are not "too conjectural in nature to be considered certain or liquidated."

What these authorities suggest is that the common law requirement that a debt be liquidated or certain in amount means only that the claim has been reduced by an appropriate administrative official to a precise amount using a methodology that rationally follows from the evidence in the record. The NLRB's debt claim satisfies this test.

If you have any further questions concerning this matter, please feel free to contact Mr. Neill Martin-Rolsky of my staff, at 202-512-8580.

Sincerely yours,

Robert P. Murphy
General Counsel

B-259532

March 6, 1995

DIGEST

GAO initiates setoff against award entered in favor of Alaska Pulp Corp. (APC) to satisfy debt owed National Labor Relations Board (NLRB) for back pay and severance pay of APC employees. NLRB is the appropriate party to whom the debt is owed. Although NLRB will remit amounts collected to APC employees and not to the Treasury, NLRB is, legally, the only entity who may pursue their collection. Because the amount of the debt has been estimated by a responsible NLRB official, it is sufficiently certain for purposes of setoff.