



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

June 14, 2007

CBCA 517-RELO

In the Matter of TIMOTHY W. O'BRIEN

Timothy W. O'Brien, Washington, DC, Claimant.

Jeremy Weinberg, Attorney-Adviser, Office of the Legal Adviser, Department of State, Washington, DC, appearing for Department of State.

HYATT, Board Judge.

Claimant, Timothy W. O'Brien, is a Foreign Service security officer employed by the Department of State. In 2003, he was relocated, with his family, to Panama. He returned from Panama to the Washington, D.C., area in June 2006. His claim concerns charges incurred for excess weight of household goods shipped from Panama to Washington, D.C.

Background

When Mr. O'Brien transferred to Panama in 2003, he was authorized to move no more than 7200 pounds of household goods to Panama at government expense. A portion of his household effects was shipped to Panama by airfreight; the largest part of the shipment of household items to Panama was sent by sea. The remainder of claimant's household items was placed in storage in the United States. The contract carrier selected by the Department to facilitate this move committed numerous errors in handling Mr. O'Brien's household effects. The carrier mistakenly told Mr. O'Brien that the effects designated for shipment to Panama did not exceed 6500 pounds in weight. Once Mr. O'Brien arrived in Panama he was informed that his effects were overweight and he had to pay the overweight charges in order to get the shipment underway. Then the goods that had been shipped were not on the vessel they were supposed to be on and were several weeks late in arriving. Finally, once the shipment did arrive, he discovered that the mover had sent items to Panama that had been designated for storage, and had stored other items that were supposed to have been shipped

to Panama. The items thus shipped to Panama -- some of them improperly delivered there -- exceeded the 7200 pound limit by approximately 374 pounds.¹

The Department acknowledged the moving company's errors and required the mover to rectify its mistakes at the company's own expense. Mr. O'Brien was permitted to choose how he wished to resolve the matter. His options included returning the items that had been erroneously shipped to Panama to the United States for storage, and arranging for shipment to Panama of items that had been incorrectly stored in the United States. Mr. O'Brien's only request when offered these options was to ask that four additional boxes be delivered to Panama at no charge to himself. He points out that the additional shipment did not arrive until May 2004, many months after he had arrived in Panama. Mr. O'Brien was well aware that the weight of his household goods in Panama exceeded 7200 pounds at that time, but asserts that the numerous problems he experienced with this carrier justified his decision not to return any items to the United States for storage.

Mr. O'Brien returned to the United States in 2006. His shipment of household goods consisted of the items originally shipped from the United States to Panama along with clothes and toys purchased in Panama for claimant's three growing children. The shipment also included body armor acquired for use in his work and small safes he purchased for his home in Panama to prevent his children from accessing special equipment, such as guns, needed for his job. Consequently, Mr. O'Brien's return shipment weighed 8690 pounds, resulting in the assessment of a surcharge of \$2115 for the weight in excess of 7200 pounds. Mr. O'Brien paid the surcharge, but requested an exception to the charge owing to "significant extenuating circumstances." These included (1) the mistakes made in the original shipping process in 2003, which added some 592 pounds to the shipment; (2) the need for additional clothing and toys for his children, which contributed another 900 pounds; and (3) "professional equipment" acquired in Panama, which accounted for the rest of the excess weight. The Department denied Mr. O'Brien's request that the excess charges be waived. Mr. O'Brien has asked us to review this decision.

¹ Mr. O'Brien states that as a result of the mishandling of his household effects he asked the Department to store his effects remaining in the United States with a different carrier and advised that the Department should no longer do business with this carrier. The Department did not move claimant's belongings to a different facility, but did arrange for an inspection of the items in storage.

Discussion

Under the Foreign Affairs Manual (FAM), which governs the relocation entitlements of Foreign Service members who are transferred overseas with the State Department, the weight allowance for shipment of items overseas (or back to the United States from an overseas location) is limited to 7200 pounds when adequate furnishings are provided at the overseas post. 14 FAM 611.6-1(b). Employees are responsible for costs which are not authorized to be incurred at government expense. *Id.* 612.3. In addition, the FAM provides that “[e]mployees should know their shipment limitations and the net weights involved.” *Id.* 612.3(a); see *Mark Burnett*, GSBICA 16578-RELO, 05-1 BCA ¶ 32,958.

With respect to the 7200 pound limitation, the FAM also recognizes that although employees are generally responsible for strict compliance with the regulations governing shipment of household effects, there are circumstances when excess costs could not have reasonably been avoided and the shipping restrictions may justifiably be increased to accommodate the employee. One example of an appropriate exception is when the employee has need of professional materials related to official responsibilities or career specialization and these professional materials are not otherwise available at the post. 14 FAM 514(a)(2).

The State Department has an Exceptions Committee that reviews requests for relief from charges for excess costs of shipping in cases such as this one, where the weight limitation is set by regulation rather than by statute. 14 FAM 514(b)-(c). The intent is to consider providing relief where the incurrence of excess costs was unavoidable and not attributable to any action of the employee. *Id.*

Mr. O’Brien contends that the Exceptions Committee should have waived the excess costs that were charged to him. First, he maintains that the errors made in the initial process of shipping his household items to Panama should carry over to shield him from paying now to have these items shipped back to the United States. In his view, he did not have an acceptable option to return items to the United States for storage because the moving company had proven to be unreliable. Second, he suggests that additional weight attributable to the needs of his growing children, which he maintains he could not reasonably have avoided, should also be excused. Third, he argues that weight attributable to the body armor and small safes purchased as a safety measure should be given a professional equipment exemption.

In responding generally to Mr. O’Brien’s arguments, the agency points out that it is Department policy to vigilantly enforce the 7200 pound limit on transportation of household goods when applicable and adds that this is well known by members of the Foreign Service.

The Department does not wish to incur continuing expense when one overweight shipment by an employee continues to generate excess costs upon subsequent transfers.

With respect to claimant's first point -- that some excess weight was attributable to the initial errors made by the moving company when he moved to Panama -- the Department, while recognizing that it bears some responsibility for the initial overweight shipment to Panama, points out that claimant knew when he arrived in Panama that his shipment exceeded the weight limitation. He was accorded the opportunity to return items to the United States at that time at no expense to himself. He declined to do so. Although Mr. O'Brien clearly had a bad experience with the carrier hired to move his effects to Panama, and the Department is sympathetic with this situation to an extent, nonetheless, the Department was prepared at that time to rectify the situation and could have done so at the carrier's expense. In electing not to return items that should have been in storage in the United States, Mr. O'Brien ensured that the carrier would not bear the expense of rectifying its mistakes. The Department does not agree that it should absorb that expense now. Thus, the committee did not consider that this circumstance warranted a waiver.

The Exceptions Committee was similarly unpersuaded by Mr. O'Brien's position with respect to purchases of clothing, toys, and the like for his three growing children while the family was stationed in Panama. Mr. O'Brien's circumstances were not regarded as particularly unusual and did not justify an exception to the weight limitation set forth in the FAM. It is the responsibility of the employee to select which items of household goods to dispose of and which to ship in preparing for a transfer so as to remain within the authorized weight limitation. Thus, the Exceptions Committee was not willing to excuse the extra expense attributable to these purchases.

Finally, with respect to the body armor and safes, Mr. O'Brien maintains that these items should be treated under the exemption for professional equipment and not counted against the 7200 pound limited shipment allowance. He tells us that he was informed of this allowance by local staff at the Panama Embassy's shipping office just prior to shipping his household effects back to the United States. Although he states that the professional equipment items were weighed separately at the embassy prior to shipment, he has not specified how much of the excess weight would be attributed to the professional equipment. Nor has he shown that these items had to be shipped to the United States because they would not otherwise be available there.

Both claimant and the Department acknowledge that the FAM does not address the specific issue of whether security officers should be eligible for a professional shipping allowance. Under the FAM, automatic approval of a shipping allowance for professional materials exists only for medical professionals. Employees seeking to avail themselves of

this allowance are encouraged to file their requests for such an exemption in advance of their departure, so as to obtain a resolution of the issue prior to incurrence of the cost. 14 FAM 514(d). Comparable provisions are contained in the Federal Travel Regulation (FTR), which is applicable to most civilian employees of the Federal Government, and in the Joint Travel Regulations, which implement and supplement the FTR for employees of the Department of Defense. The Board has recognized, in interpreting the FTR's exception for shipment of professional materials and equipment, that the decision whether to authorize a separate expense based on this exception is a discretionary one on the part of the agency. *See Mariano G. Aguilar, Jr.*, GSBCA 15903-RELO, 03-1 BCA ¶ 32,178. The exception may be approved only to the extent the materials are necessary to the performance of claimant's responsibilities and are not otherwise available at the location to which they are being shipped.

Mr. O'Brien did not raise this issue until some two months after his return to the United States. Since the Department has not previously recognized that this type of equipment is eligible for a professional equipment allowance, and Mr. O'Brien did not ask for a ruling in advance or show that he could not otherwise have had access to such equipment, the Exceptions Committee was not persuaded that the circumstances warranted excusing the extra expense.

Although Mr. O'Brien disagrees with the Department's rejection of his request for a waiver of the expenses attributable to the excess weight he shipped back to the United States, the Department has considerable discretion in determining whether to excuse repayment of excess shipping expenses incurred by Foreign Service members. The Board cannot find that it abused its discretion when it concluded that none of Mr. O'Brien's arguments justified waiving the surcharge for excess weight of household effects returned to the United States from Panama. Accordingly, the claim must be denied.

CATHERINE B. HYATT
Board Judge