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ALJ

SERVICE DATE - APRIL 13, 1999

SURFACE TRANSPORTATION BOARD

DECISION

ADMINISTRATIVE MATTER NO. 1

STB Loan No. 98-31

RICHARD M. BITER

V.

SURFACE TRANSPORTATION BOARD

Decided: April 9, 1999

APPEARANCE FOR EMPLOYEE: Dennis L. Friedman, Esq.
1515 Market Street
Suite 1200
Philadelphia, PA 19102-1981

APPEARANCE FOR AGENCY: John M. Atkisson, Esq.
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423

DOWD, JUDITH A., Presiding Administrative Law Judge

I. BACKGROUND

On December 31, 1995, Richard Biter (sometimes referred to hereafter as "Petitioner") was separated from his employment at the Interstate Commerce Commission ("ICC") by a reduction in force ("RIF"). Biter and a number of other ICC employees were terminated on that date because the ICC was abolished by Act of

Congress.¹ The functions previously performed by the ICC were transferred under the ICC termination legislation to the newly-created Surface Transportation Board ("STB").² At the time of his separation, Biter was employed in a Senior Executive Service ("SES") position as a Regional Director and was stationed in Philadelphia, Pennsylvania. Neither Biter's position nor the employee himself were transferred to the STB. Upon his termination, Biter was issued his final paycheck and a lump sum payment for all of his accrued annual leave. Biter and other employees appealed their termination actions to the Merit Systems Protection Board ("MSPB"). During the pendency of his appeal before the MSPB Richard Biter obtained employment in a SES position with the Department of Transportation ("DOT").³

II. MSPB PROCEEDINGS

A. MSPB Initial Decision and Appeal

In an Initial Decision dated September 6, 1996, Chief Administrative Judge Lonnie L. Crawford upheld the RIF actions by the former ICC. Docket No. PH-0351-96-0169-I-2. Richard Biter appealed the Initial Decision and the MSPB Board reversed. In an Opinion and Order dated July 29, 1997, the Board found, inter alia, that the ICC had improperly identified employees for transfer to the STB. The Board ordered that Biter's RIF be reversed and he be accorded transfer rights to the STB nunc pro tunc. The Board further ordered that Biter be awarded backpay, interest on backpay, and other benefits according to the regulations of the Office of Personnel Management ("OPM"). Docket Nos. PH-0351-96-0171-I-2, PH-0351-96-0172-I-2.

B. MSPB Enforcement Proceedings

On April 6, 1998, Richard Biter, through counsel, filed a petition for enforcement with the MSPB. The petition alleges that the STB had failed to accord Mr. Biter a make-whole remedy because it refused to credit him, inter alia, with relocation expenses, travel expenses, and per diem expenses. The petition further alleges that the STB improperly refused to allow Mr.

¹ICC Termination Act of 1995, Pub. L. 104-88, 109 Stat. 803 (Dec. 29, 1995).

²Id. § 702.

³Biter was employed by DOT on November 24, 1996, approximately 11 months after his RIF by the ICC.

Biter the option of waiving recrediting of his accrued annual leave in lieu of repaying the lump sum payment he received.

On June 2, 1998, Chief Administrative Judge Lonnie L. Crawford issued an Initial Decision denying Mr. Biter's claim for per diem expenses and finding that the STB was in compliance with respect to restoring his accrued annual and sick leave. Judge Crawford found that Richard Biter was entitled to backpay from December 31, 1995 to February 10, 1998,⁴ and to job search expenses and relocation expenses incurred before February 10, 1998. Since, as noted by Judge Crawford, no documentation of the job search and relocation expenses had been submitted with the petition for enforcement, the judge ruled that Biter's claims for these expenses were dismissed without prejudice to his filing a petition for enforcement of any unresolved expenses which are reimbursable in accordance with 5 C.F.R. § 1201.181 (1998). Judge Crawford also found that 5 C.F.R. § 550.805(a)(2), one of the implementing regulations of the Back Pay Act, requires agencies to recredit annual leave and to recover its value. The judge concluded that STB's actions in deducting the lump-sum payment for annual leave was in accordance with the Back Pay Act and denied Biter's claim of non-compliance on this issue. Docket No. PH-0351-96-0172-C-1.⁵

III. THE DEBT COLLECTION PROCEEDINGS

On April 14, 1998, the undersigned Administrative Law Judge was notified by letter from the STB that OPM had approved her assignment to adjudicate the case of Richard M. Biter, who had requested a hearing under 5 C.F.R. § 550.1104, regarding a debt due the federal government by salary offset.

A. The Prehearing Conference

On May 22, 1998, the Presiding Administrative Law Judge issued an order directing that a Prehearing Conference be held in

⁴For the period after Biter became employed by DOT on November 24, 1996, until he declined to report for work at STB on February 10, 1998, his backpay consisted of the difference between his former ICC salary and his salary at DOT. Hearing Transcript ("Hrg. Tr.") 24.

⁵A Petition for Review of Judge Crawford's Initial Decision denying employee Biter's petition for enforcement was filed on July 21, 1998. The petition for review is currently before the MSPB for decision.

this case on June 8, 1998, at 10:00 a.m., in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. On June 5, 1998, counsel for the Petitioner requested that he be allowed to participate in the conference by speaker phone. John Atkisson appeared in person at the

Prehearing Conference on behalf of the STB. Dennis L. Friedman, counsel for the Petitioner, participated by speaker phone.

Shortly after the commencement of the Prehearing Conference, a fax of a letter dated June 8, 1998, from Mr. Friedman to the Administrative Law Judge, was delivered to the hearing room and read into the record. In the letter Mr. Friedman stated, in pertinent part, that the STB "was neither responsible for . . . any lump sum payment for accrued annual leave to Mr. Biter nor was the Surface Transportation Board involved in the restoration of that leave to Mr. Biter."⁶ The letter also stated that Mr. Biter was a current employee of DOT, that the STB collection letter was sent to him when he was under the administrative authority of DOT, and "that there is no basis in law for the Surface Transportation Board to assert this present claim against Mr. Biter. Its claim must be dismissed."⁷ Mr. Friedman agreed on the record that he would re-formulate his letter into a motion to dismiss, serve it upon the opposing party, and allow sufficient time for that party to respond prior to any scheduled hearing.⁸ During the course of the Prehearing Conference, counsel for both parties agreed to waive the STB regulation requiring the Administrative Law Judge to issue a final written decision no later than 60 days after the filing of a petition requesting a hearing.⁹ The parties also agreed that a verbatim transcript of the Prehearing Conference and the hearing should be prepared.¹⁰ Counsel for Richard Biter was requested to suggest a

⁶Prehearing Conference ("PC") Tr. p.9.

⁷Id. at pp.9-10.

⁸Id. at p.10.

⁹49 C.F.R. § 1017.5(j); PC Tr. p.13.

¹⁰ STB regulations governing hearings in debt collection cases provide that "[a]ll significant matters discussed at the hearing shall be documented, although a verbatim transcript of the hearing shall not be made." 49 C.F.R. § 1017.5(b).

In light of the jurisdictional and other significant legal issues raised by counsel for employee Biter, the Presiding

hearing date that would be convenient for him and his client. Mr. Friedman suggested August 7, 1998, and counsel for the STB agreed to that date."¹¹ A cutoff date for filing motions prior to the hearing was set for August 3, 1998.¹² It was agreed by attorneys for both parties that there would be a 15-day response time for all motions.¹³

B. The Hearing

1. Procedural issues

On August 6, 1998, counsel for the Petitioner called the Presiding Administrative Law Judge and stated that he was faxing some documents on that date. On the morning of August 7, 1998, a number of faxed documents from Mr. Friedman were delivered to the Presiding Administrative Law Judge. The hearing in this matter commenced at 10:00 a.m. Present in the hearing room were, inter alia, counsel for the STB, John Atkisson, and his witness. Neither Richard Biter nor his attorney, Dennis Friedman, made an appearance.

At the beginning of the hearing, the Presiding Judge and counsel for the STB reviewed documents they had received by fax from Mr. Friedman. It was determined that they had both received identical documents. The documents consisted of a two-page letter addressed to the Presiding Administrative Law Judge, a five-page "Petition For Stay Of Proceedings Pending Issuance of Final Decision By MSPB On Enforcement Petition", and a one-page "Petition Of Richard M. Biter To Dismiss Debt Collection Action

Administrative Law Judge determined that a record of all proceedings should be made. Counsel for the STB stated that he had no objection to a transcript being prepared and counsel for the employee supported production of a transcript. PC Tr. pp.13-14.

¹¹Mr. Friedman commented that "the August 7th date is a date that I am indicating that I am available for a hearing. I do not suggest that by giving you that date, that I believe you are, that you have the authority to decide a debt collection matter raised by the Surface Transportation Board." Id. at p.46.

¹²Id. at pp.47-48.

¹³Id. at pp.49-50.

by Surface Transportation Board."¹⁴

The Presiding Administrative Law Judge noted that the letter from Mr. Friedman dated August 6, 1998, is essentially a motion for a two-week extension of time for holding the hearing and that she had previously ruled that all motions must be filed by August 3. The Judge further observed that Mr. Friedman himself had chosen August 7th as the hearing date and that he had indicated that he and his client would be available for hearing on that date.¹⁵ The Judge denied Petitioner's request for a continuance of the hearing date.

With respect to the petition to dismiss and the petition for stay of the proceedings, the Judge found that both petitions were untimely filed and unmeritorious. The Judge observed that the petitions were in the nature of motions and that, as noted above, all motions had to be filed in this case on or before August 3, 1998.¹⁶ The Judge also stated that there was no reason for staying proceedings in the instant matter pending the outcome of any appeal of the denial of Mr. Biter's Petition for Enforcement in the related MSPB case.¹⁷

2. The testimony of STB witness Anthony Jacobik

During the course of the hearing, counsel for the STB called his only witness, STB Chief Financial Officer Anthony Jacobik. Witness Jacobik testified under oath and was examined by counsel for the STB, as well as by the Presiding Administrative Law Judge. Counsel for the STB also introduced certain documentary evidence into the record as exhibits.¹⁸ Witness Jacobik credibly testified in pertinent part as follows:

Prior to becoming Chief Financial Officer of the STB, he served as a financial officer of the former ICC from 1985 until

¹⁴Hrg. Tr. 5. The letter and petitions are appended to this decision as Appendix A.

¹⁵Hrg. Tr. 6.

¹⁶Id.

¹⁷Id.

¹⁸The STB exhibits are appended at the end of the hearing transcript.

its termination on December 31, 1995.¹⁹ All ICC employees whose employment was terminated because of the agency dissolution were paid their last salary payment as well as a payment for any unused annual leave.²⁰ ICC employee Richard Biter was paid in excess of \$41,000.00 for over 700 hours of accumulated annual leave at the end of January 1996.²¹

As part of the MSPB order of July 29, 1997, overturning the RIF termination of Richard Biter, the STB was directed to transfer the employee nunc pro tunc as of December 31, 1995.²² Jacobik reconstructed Biter's termination and created a record showing that the employee was transferred from the ICC to the STB as of January 1, 1996.²³ Biter's duty station was designated as Washington, D.C., since the STB is located there.²⁴ Under the ICC Termination Act all of the functions previously performed by the ICC were transferred to the STB.²⁵

Because of the reversal of Biter's RIF by the MSPB, the STB determined that Biter, like the other ICC employees who were transferred to the STB when the ICC closed, had no break in service.²⁶ The STB also determined that an employee who did not experience a break in service was not entitled to a lump sum payment for his accrued annual leave pursuant to 5 C.F.R. § 550.804.²⁷ Richard Biter's accrued leave as of the date of his separation from the ICC was credited and transferred to the STB

¹⁹Hrg. Tr. 11-12.

²⁰Id. at 12.

²¹Id. at 13. As an SES employee Richard Biter was exempt from the 240 hour cap on annual leave that is applicable to other federal employees. Id.

²²Id. at 14-15; Exhibit ("Ex.") 2.

²³Hrg. Tr. 15.

²⁴Id.

²⁵Hrg. Tr. 30; Ex. 7.

²⁶Hrg. Tr. 16.

²⁷Hrg. Tr. 16; Ex. 1.

by Chief Financial Officer Jacobik.²⁸ By letter dated February 6, 1998, Jacobik notified employee Biter, inter alia, that he must report for duty at STB by February 10, 1998.²⁹ Biter failed to report for work as directed.³⁰

Following Biter's failure to report for work at the STB, Jacobik issued a letter to employee Biter on February 13, 1998, notifying him that after restoring his annual leave and deducting the lump-sum payment from his backpay award, Biter owed the amount of \$42,480.25. Jacobik enclosed a copy of his financial calculations and demanded payment of the debit amount.³¹ By letter dated March 18, 1998, Jacobik informed employee Biter that the STB intended to proceed with administrative offset to collect the debt.³² In response to this letter from the STB, attorney Dennis L. Friedman sent a letter indicating that he would be representing Mr. Biter in this matter and requested a hearing.³³ The STB stopped all collection efforts pending the conclusion of the instant debt collection proceedings.³⁴

The most recent summary of credits and debits prepared by Chief Financial Officer Jacobik shows that employee Biter owes the STB a total of \$39,861.94.³⁵ This calculation shows a lesser amount of employee debt than previous calculations because it credits Mr. Biter with the differential between his previous salary with ICC and the salary he has been earning at his current position with DOT.³⁶ Jacobik made the change pursuant to the June 2, 1998 decision of MSPB Judge Lonnie Crawford on Richard

²⁸Hrg. Tr. 20; Ex. 3.

²⁹Hrg. Tr. 23-25.

³⁰Id. at 31.

³¹Id. at 32-35.

³²Id. at 33

³³Hrg. Tr. 35; Ex. 4. Jacobik's calculations which were entered into the record as Exhibit 4 are also appended to this decision as Appendix B.

³⁴Hrg. Tr. 35.

³⁵Hrg. Tr. 22; Ex.4.

³⁶Hrg. Tr. 24-25.

Biter's Petition for Enforcement, which specifically provides that employee Biter was entitled to backpay from December 31, 1995 to February 10, 1998.³⁷

IV. DISCUSSION OF PETITIONER'S CONTENTIONS

As noted above, Petitioner's letter/motion for continuance and petitions were denied at the outset of the hearing on the grounds that they were untimely filed and unmeritorious. The fact of late filing is clear from the record and these pleadings could be rejected on that ground alone. However, the merits of Petitioner's pleadings have been fully considered as well, as discussed below.

A. The Letter/Motion Seeking a Continuance of the Hearing Date

The letter from Mr. Friedman dated August 6, 1998, seeking a continuance of the hearing dates states, in pertinent part, that Mr. Friedman was out of his office for approximately 40 hours during the "past month" visiting his father who "remained in critical care at Allegheny Hospital . . . for three weeks." The letter further states that his client, Mr. Biter, had contacted the attorney during this period to tell him that he (Biter) was scheduled to be in Vancouver, Canada from August 5-7 "as part of the APEC Intermodal Task Force." Mr. Friedman explained that he did not convey this information to the Presiding Administrative Law Judge at an earlier time due to his "overwhelming workload (due in part, to the unexpected illness of [his] father)." The letter further states that Mr. Biter does not waive his request for an administrative hearing and requested that Mr. Biter be given the opportunity to be present at a hearing, if neither of the two petitions is granted. The letter concludes that Mr. Biter is entitled to credits and/or reimbursement for travel, living and relocation expenses and that Mr. Biter also contends that he is "entitled to waiver under the principles set forth in the Wyatt decision."

The reasons for requesting a continuance of the hearing date are patently insufficient. Mr. Friedman either knew or should have known that the cutoff date for motions was August 3. In his letter of August 6, the attorney states that his father had been in the hospital for three weeks at that time.

³⁷Id. at 24. The STB had previously taken the position that Biter's entitlement to backpay ceased when he became employed at DOT on November 24, 1996. Id.

Accordingly, there was sufficient time before the motions deadline for counsel to have alerted the judge and opposing counsel that a continuance might be needed. A parent's unexpected illness may require an attorney to take time away from his regular duties but a simple phone call to counsel for the STB and the Presiding Judge when the problem arose, would have taken no more than a few moments. Mr. Biter's business travel excuse, without more, is also insufficient. Since the hearing date was known to Mr. Biter's counsel as early as June 8 (the date of the Prehearing Conference), the Petitioner could have requested time off to attend the hearing well in advance of any scheduled travel. Even if the travel was scheduled prior to the hearing date being set, there is no indication on this record that Mr. Biter made any effort to be excused from travel in order to attend the hearing.

In short, the reasons offered by Mr. Friedman on his own behalf, and on behalf of his client, Richard Biter, for seeking a continuance of the hearing date are insufficient. By failing to appear for the hearing or to timely seek a continuance for good cause, Richard Biter waived his right to an in-person hearing. See 49 C.F.R. § 1017.6(b).

Richard Biter's written petitions, discussed below, will be construed as the full explication of his position.³⁸

B. The Petition to Dismiss

In the "Petition Of Richard M. Biter to Dismiss Debt Collection Action By Surface Transportation Board" ("Petition to Dismiss") Mr. Biter simply asserts that the STB "does not have standing to raise the subject debt collection matter, because of the reasons set forth in the letter from Mr. Biter's counsel to Administrative Law Judge Dowd, dated June 8, 1998." In his letter of June 8, Mr. Friedman stated as follows:

By this letter, I wish to raise a fundamental issue

³⁸The Presiding Administrative Law Judge has also read and considered, to the extent they are relevant, Richard Biter's Petition for Review filed with the MSPB on July 21, 1998, and Mr. Friedman's letter to Judge Lonnie Crawford dated April 6, 1998, with the attachments thereto, as requested by Petitioner's counsel in his letter to the Administrative Law Judge of August 6, 1998. Neither document supports any different result from the one that has been reached in the instant debt collection decision.

regarding the standing of the Surface Transportation Board to raise the above-referenced debt collection matter. The Surface Transportation [sic] was neither responsible for the lump sum payment for accrued annual leave to Mr. Biter, nor was the Surface Transportation Board involved in the restoration of that leave to Mr. Biter. Mr. Biter is a current federal employee for the Department of Transportation, Office of the Secretary. The Department of Transportation, Office of the Secretary, as Mr. Biter's employer, is responsible for all leave administration and collection matters. It should be noted that the Surface Transportation Board's debt collection letter was sent to Mr. Biter on February 13, 1998, when Mr. Biter unquestionably was under (and continues to remain under) the administrative authority of the Department of Transportation, Office of the Secretary. Accordingly, there is no basis in law for the Surface Transportation Board to assert this present claim against Mr. Biter. Its claim must be dismissed.

As far as the record in this case shows, employee Biter is correct in alleging that the STB was not responsible for the lump sum payment of annual leave that he received at the time of his RIF. The record reflects that Mr. Biter was employed by the Interstate Commerce Commission when that agency was terminated in December 1995, and that he was given a payment for his accumulated annual leave by the ICC.³⁹ However, as witness Jacobik testified, when the ICC closed, all of the functions previously performed by that agency were transferred to the STB, under the ICC Termination Act.⁴⁰ Those functions actually performed by the STB on behalf of the defunct ICC include representation of the ICC by an attorney for the STB in the MSPB proceedings Richard Biter filed appealing his RIF by the ICC. Richard Biter offered no challenge to the STB's representation of the interests of the ICC during the pendency of the proceedings

³⁹Since the ICC was terminated as of December 31, 1995 and the payment for his accumulated annual leave was sent to Richard Biter in January 1996 (Hrg. Tr. 13), it is reasonable to assume that the STB performed the work of preparing and sending out the payment. Nevertheless, it is clear that the payment was an obligation of the ICC, whichever agency actually issued the payment.

⁴⁰ICC Termination Act of 1995, Pub. L. 104-88, 109 Stat. 803, § 702.

before the MSPB. For example, in his Petition for Enforcement with the MSPB following its order reversing his RIF, the employee never took the position that the STB lacked standing to remedy the ICC's improper actions. Rather, Biter merely complained that the STB's calculation of his backpay failed to include credit for items such as per diem expenses, which the employee claims were due him. Petition for Enforcement, MSPB Docket No. PH-0351-96-0172-C-1, p.4, § 14. Biter's failure to raise the issue of the standing of the STB for purposes of crediting him with claimed expenses in the MSPB proceedings and raising the issue only in the instant debt collection matter, suggests that Richard Biter's "lack of standing" contention is somewhat disingenuous. The standing of the STB to collect the debt for ICC's lump sum payment of accrued annual leave is based on the STB's mandate to perform all of the functions previously performed by the ICC.⁴¹

Mr. Biter's claim that the STB was not involved in the restoration of his annual leave does not appear to be well founded. Under the MSPB order reversing Biter's RIF, the employee was ordered to be transferred to the STB, nunc pro tunc, to the date of his RIF. Apparently Biter declined to report for work at the STB by the deadline of February 10, 1998. By operation of the MSPB remedial order, Mr. Biter is construed to have been employed by the STB from the date of his discharge on December 31, 1995 to the date he failed to report for work at the STB on February 10, 1998. Accordingly, the STB performed the calculations which resulted in the restoration of the accrued annual leave for which Biter was paid upon the dissolution of the ICC. The STB calculation of Richard Biter's annual leave restoration is in the record as Exhibit 3.

The fact that Biter was employed with DOT at the time that the STB initiated the instant debt collection proceedings is irrelevant. Contrary to the implication of Richard Biter's argument, there is nothing in the Debt Collection Act to suggest that one agency cannot collect a debt from an employee of another agency.⁴² On the contrary, the Act clearly encompasses the collection by one agency of a debt due the federal government by

⁴¹Id.

⁴²Debt Collection Act of 1982 (Pub. L. 97-365 and 4 C.F.R. § 101.1 et seq.), Collection By Offset From Indebted Government Employees (5 C.F.R. § 550.1101 et seq.), Federal Claims Collection Standards (4 C.F.R. § 101.1 et seq.), and Administrative Offset (31 U.S.C. § 3716).

an employee of another agency.⁴³

C. The Petition for Stay of Proceedings

In the "Petition for Stay of Proceedings Pending Issuance of Final Decision By MSPB On Enforcement Petition" ("Petition for Stay of Proceedings"), counsel for Petitioner primarily sets out some of the issues pending before the MSPB on appeal and asserts that a stay in the debt collection proceedings is appropriate because:

(a) Mr. Biter is alleging a substantial offset of any alleged indebtedness - for travel, living and relocation expenses. See Naekel v. Department of Transportation, FAA, 850 F. 2d 682, 686 (Fed. Cir. 1988); see also In the Matter of Donald C. Smaltz, GSBCA 14328 (1997).

(b) Mr. Biter is alleging his entitlement to a waiver of the reimbursement of the lump-sum payment representing accrued annual leave which he received at the time of his unlawful separation on December 31, 1995, with the concomitant canceling of the leave. See Wyatt, Cassandra B., Army B-231943 (Comptroller General Decision, dated 7/14/89)(this case is an attachment to Exhibit E STB letter, dated 10/31/97).

(c) The issues set forth in the preceding paragraphs [(a) and (b)] are those which are presently before the MSPB.

(d) The STB is attempting to bifurcate the causes of action and is attempting to collaterally pursue the issues which are presently pending before the MSPB.

(e) Although the STB has alleged that the MSPB is without jurisdiction to decide the issues of relocation, travel and living expenses ([PC] Tr. [pp.] 23, 24), its assertion is without merit. See Clemmons v. Smithsonian Institute, 54 MSPR 1 (1991).

(f) In the letter, dated April 2, 1998, from Mr. Biter's counsel, to Mr. Jacobik, STB's Financial Manager [Exhibit L to letter, dated April 6, 1998, from

⁴³See 5 U.S.C. § 5514(a)(1).

Mr. Biter's counsel to CAJ Crawford], Mr. Biter's counsel stated that "Any MSPB decision will have a material bearing upon the validity of the STB's claim." Mr. Biter's counsel further stated that the STB should defer the collection of the debt in the "interest of fairness and administrative economy." At the prehearing conference of June 8, 1998, STB's counsel stated that Mr. Biter and his counsel have "gotten a lot of money out of [the STB]. "He further stated that settlement was out of the question and that Mr. Biter's successful litigation (leading to his reinstatement) had" a lot to do with the agency's motives to go further." [PC] Tr. [pp.] 34,35. The STB may have engaged in a prohibited personnel practice in violation of 5 U.S.C. § 2302(b)(9)(A).

(g) The STB does not have standing to raise the debt collection matter because it was neither responsible for any lump-sum payment for accrued annual leave to Mr. Biter, nor was it involved in restoration of that leave to Mr. Biter. Mr. Biter incorporates herein by reference his counsel's letter to ALJ Dowd, dated June 8, 1998.

Petitioner's counsel concluded the petition with a request that the Administrative Law Judge issue a stay of proceedings pending the issuance of a final decision by the MSPB on the enforcement petition.

In paragraphs 8(a), -(c), -(d) and -(e) Petitioner asserts that a stay in the debt collection process is appropriate because Mr. Biter is alleging a substantial offset of any claimed indebtedness based on his claim for travel, living and relocation expenses; that those issues are pending before the MSPB; that the STB is attempting to bifurcate the causes of action and collaterally pursue the issues which are presently before the

MSPB; and that contrary to the position of the STB, MSPB has jurisdiction to decide the issues of relocation, travel and living expenses.

The issues of Mr. Biter's entitlement to travel, living and relocation expenses during the period when he was improperly terminated have all been heard and denied by the MSPB. Although Richard Biter filed a petition for review of Judge Crawford's ruling, the ruling is final unless it is overturned on appeal.

If the Board reverses Judge Crawford, Mr. Biter may be credited with those expenses and the STB would be obliged to recalculate Mr. Biter's backpay computation. However, the fact that Mr. Biter may, through the appellate process, receive additional credits does not foreclose the STB from collecting a debt that is currently owed to that agency for the lump-sum annual leave payment made to Mr. Biter upon his termination from ICC. Indeed, since the STB apparently intends to proceed through salary offset (Hrg. Tr. 63), it will take some time for the debt to be fully liquidated.⁴⁴

In paragraphs 8(b), -(f) and -(g) Petitioner raises issues that are more directly relevant to the instant debt collection action, since they challenge the validity of the claimed debt. In paragraph 8(b) Petitioner alleges that he is entitled to a waiver of reimbursement of the lump-sum payment he received at the time of his termination on December 31, 1995. In support of this position, petitioner cites Matter of: Cassandra B. Wyatt, 1989 U.S. Comp. Gen., LEXIS 835 (1989). This case does not support Petitioner's position. In the Wyatt case the Comptroller General ruled that an employee who was retroactively restored to duty and awarded backpay did not have the option of retaining the lump sum payment and canceling the annual leave restoration. The decision states: "With regard to the lump-sum payment of annual leave, our decisions have held that an employee who is retroactively restored to duty and awarded backpay in accordance with the Back Pay Act, 5 U.S.C. § 5596 (1982), may not retain the payment since the statute authorizing the lump-sum payment 5 U.S.C. § 5551 (1982), expressly conditions payment on an employee's separation from government service." Id. at *4.⁴⁵ The decision further states that erroneous lump sum payments of annual leave are "subject to waiver only to the extent that the deduction of the payment from the backpay award results in a net indebtedness to the government." Petitioner may contend that this language supports his claim of a right to a waiver. Contrary to Petitioner's contention there is no employee right to a waiver, it is purely a matter within the discretion of the government official authorized to grant waivers of debts to the federal government. See Pub. L. 104-316 (1996), 5 U.S.C. § 5584

⁴⁴Installment pay deductions cannot exceed 15 percent of the employees' disposable pay. 5 U.S.C. § 5514(a)(1).

⁴⁵To the extent that Petitioner has argued, in his Petition for Stay of Proceedings, that he has the option of keeping the lump-sum payment in lieu of having his leave restored, the Wyatt case clearly holds to the contrary.

(1998); John G. Collins v. United States Postal Service, 64 MSPR 684 (1994); Matter of: Angel F. Rivera, 64 Comp. Gen. 86 (1984); Matter of: Vincent T. Oliver, 59 Comp. Gen. 395 (1980). At the hearing, STB's witness, the Chief Financial Officer of the agency, testified that the Chair of the STB currently has the authority to waive claims. Mr. Jacobik further testified that to the best of his knowledge, no formal request had been made by Mr. Biter for waiver of repayment. Moreover, the record in this case contains no evidence that Mr. Biter or his counsel ever formally sought waiver of repayment from the Chair of STB or her designee. In any event, it is clear that the STB has never agreed to waiver of repayment of the lump-sum payment of annual leave.⁴⁶

In paragraph 8(f) Mr. Friedman quotes from the transcript of the Prehearing Conference in this case statements by counsel for the STB that Mr. Biter and his counsel have "gotten a lot of money out of us"⁴⁷ and that the history of the previous litigation and the money spent by the STB "has a lot to do with the Agency's motives to do--go further with you."⁴⁸ Mr. Friedman suggests that this language indicates that the STB may have engaged in retaliatory prosecution in violation of 5 U.S.C. § 2302(b)(9)(A). These comments were made by counsel for the STB in the context of the suggestion by the Presiding Administrative Law Judge that the parties attempt to settle this matter. Though the comments made by counsel for the STB may have been ill-advised, they do not, in themselves, show that the STB is engaging in retaliatory prosecution. Under OPM regulations and the Debt Collection Act, the STB is affirmatively obligated to pursue this action.⁴⁹ The rather heated exchange at the

⁴⁶Hrg. Tr. 38-41. It should be noted that counsel for the STB volunteered that Petitioner's attorney had raised the issue of waiver during the course of settlement negotiations. Raising the issue of waiver in settlement negotiations with counsel for the STB does not, of course, constitute an actual request for waiver by the head of the agency. There is no assertion in the record of this case that counsel for the STB agreed on behalf of the agency to waive repayment.

⁴⁷PC Tr. p.34.

⁴⁸Id. at p.35.

⁴⁹See David G. Eaton v. Department of the Air Force, 55 MSPR 12 (1992) (erroneous lump-sum payment of annual leave must be set off against backpay award); Smithsonian Institution, 54 MSPR 1 (1992) (same).

Prehearing Conference between counsel for the STB and counsel for the Petitioner, though unfortunate, amounts to nothing more than animosity between two lawyers who have been on opposite sides of the issues during protracted litigation. Even if these comments might be construed as evidence of retaliatory prosecution, such issues are not properly raised in the context of the instant debt collection action. In any event, the statements by counsel for the STB do not constitute grounds for staying the debt collection pending appeal of the decision on enforcement by the MSPB.

In paragraph (g) counsel for the Petitioner raises the issue of the standing of the STB to pursue this debt collection matter. The issue of standing is discussed extensively supra in Part IV.B. Moreover, the question of standing in this case does not serve as a reason to stay the instant proceedings pending the outcome of Mr. Biter's latest appeal to the MSPB.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. This action was brought under the Debt Collection Act of 1982 (Pub. L. 97-365 and 4 C.F.R. § 101.1 et seq., Collection by Offset From Indebted Government Employees (5 C.F.R. § 550.1101 et seq.), Federal Claims Collection Standards (4 C.F.R. § 101.1 et seq.), and Administrative Offset (31 U.S.C. § 3716), and the implementing regulations of the STB, 49 C.F.R. Part 1017.

2. Richard Biter is a former employee of the ICC whose employment was improperly terminated by RIF at the time that agency was closed by Act of Congress. ICC Termination Act of 1995, Pub. L. 104-88, 109 Stat. 803 (Dec. 29, 1995). On November 23, 1996, Richard Biter was hired by DOT, where he was still employed at the time of the hearing in the instant matter.

3. In a case brought before the MSPB, Richard Biter's RIF was reversed and he was ordered to be transferred nunc pro tunc to the STB. In compliance with the order of the MSPB, the STB offered Richard Biter employment and computed his backpay.

4. Richard Biter did not accept the employment offer extended by the STB but continued his employment at DOT. The STB calculated the backpay due Richard Biter under the MSPB remedial order and concluded that the backpay owed the employee by the STB must be offset by the lump-sum payment for annual leave the employee received upon the termination of his employment with the ICC. The offset resulted in an amount due the STB.

5. On at least two dates, the Chief Financial Officer of the STB sent Richard Biter certified letters demanding repayment

of the lump-sum annual leave payment. In response to the collection letters from the STB Richard Biter requested a hearing under the provisions of 49 C.F.R. § 1017.4(b)(8).

6. After a prehearing conference on June 8, 1998, this matter was, by agreement of counsel for Richard Biter and counsel for the STB, set for hearing on August 7, 1998. A cutoff date for filing pre-hearing motions was set for August 3, 1998.

7. On August 6, 1998, the day prior to the hearing date, counsel for Richard Biter, Dennis L. Friedman faxed two petitions and a letter to the Presiding Administrative Law Judge. The letter states a number of reasons why neither Richard Biter nor his counsel could be present at the hearing.

8. On the hearing date of August 7, 1998, neither Richard Biter nor his attorney appeared at the appointed time and place. Counsel for the STB appeared at the hearing with his witness. The undersigned Administrative Law Judge considered the reasons offered by Richard Biter in his faxed letter requesting a continuance of the hearing and found that they were untimely made and insufficient. The Administrative Law Judge further found that the petitions faxed by Petitioner were also untimely filed and unmeritorious. The hearing proceeded and counsel for the STB called and examined his witness and offered documentary evidence.

9. The evidence presented at the hearing shows that Richard Biter was paid a lump-sum in excess of \$41,000.00 for the accrued annual leave he had acquired at the time of his termination by the ICC on December 31, 1995. When the MSPB ordered that Richard Biter be transferred to the STB with backpay, that agency performed a financial calculation. The calculation showed that after Richard Biter was credited with backpay and his annual leave was restored, he continued to owe the STB the portion of the lump-sum payment for annual leave that exceeded that amount of backpay owed by the STB. The STB offered its most recent calculation of backpay into evidence at the hearing. The calculation was made in conformity with the remedial orders of the MSPB and in accordance with regulations governing the calculation of backpay following reinstatement of an employee. The calculation shows that Richard Biter owes the STB the sum of \$39,861.94.

10. The petition of Richard Biter is denied. The STB may proceed to collect the sum of \$39,861.94, with interest accruing in accordance with 49 C.F.R. § 1017.14.⁵⁰

JUDITH A. DOWD
Presiding Administrative Law Judge

⁵⁰Counsel for the STB stated near the conclusion of the hearing that he was also seeking administrative costs. However, he offered no evidence to support that claim and indicated that he would be willing to waive it. STB regulations authorize the assessment of administrative costs against the debtor by the agency. 49 C.F.R. § 1017.14(b). Since no evidence was offered at the hearing as to STB's method for calculating administrative costs or the amount to be assessed, no ruling on administrative costs could be made in this decision, nor does there appear to be any need for a finding by an administrative law judge to support the agency's assessment of such costs.

APPENDIX A TO BE SCANNED

APPENDIX B TO BE SCANNED