Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

APPELLANTS' REQUEST FOR REDACTIONS DENIED: May 15, 2002

GSBCA 13298-REM, 13507-REM, 13508-REM,
13509-REM, 13510-REM, 13511-REM

ACE-FEDERAL REPORTERS, INC.,

ANN RILEY & ASSOCIATES, LTD.,

ARTI RECORDING, INC.,

CALIFORNIA SHORTHAND REPORTING,

EXECUTIVE COURT REPORTERS,

and

MILLER REPORTING CO., INC.,

Appellants,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Ronald K. Henry and Mark A. Riordan of Kaye Scholer LLP, Washington, DC, counsel for Appellants.

Michael J. Noble, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **NEILL**, and **WILLIAMS**.

WILLIAMS, Board Judge.

This matter comes before the Board on appellants' request for redactions in the Board's opinion issued under protective order in these consolidated appeals.[1] In the underlying opinion, the Board, on remand from the United States Court of Appeals for the Federal Circuit, granted the appeals and awarded each of the six appellants damages.[2] Appellants seek to redact the amounts of the individual damages awards as well as each appellant's individual market share in the court reporting industry over ten years ago, claiming that disclosure of this information among the appellants themselves would cause competitive harm.

Because there is a longstanding legal presumption favoring public access to judicial documents and proceedings, appellants have a heavy burden to persuade us to keep confidential the amount of their individual damage awards and their market shares which give rise to the calculation of those awards. Here, appellants have not demonstrated why their individual judgments and their over ten-year-old market share data should not be public. We, therefore, deny the request for redactions. We will not publish our decision until ten working days from the date of the issuance of this opinion, however, in order to permit appellants to seek any appropriate relief from this decision.

Background

The Board issued a protective order in the underlying appeals on July 25, 1995, permitting the parties to designate protected material and providing that the parties' designation of protected material would be accepted if there was no opposition "unless otherwise ordered by the Board." In the instant case, the Board was never called upon to resolve any objections to the designation of protected material. Therefore, to date there has been no adjudication of the validity of the designation of appellants' market share information as protected material.

The Board issued its opinion on the merits in this case on March 26, 2002. In the notice accompanying the opinion, the Board stated: "Because the protected material is over ten years old, the Board requires particularized justification as to why it should remain protected."

In response to the Board's notification, appellants sought redaction of the amounts of the individual damages awards and each appellant's market share. Appellants' sole and complete justification for the requested redactions is as follows:

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[1] Respondent does not object to appellants' proposed redactions.

[2] Although the Board consolidated these appeals for processing because they involve common questions of law and fact, the Board made separate individual damages awards to each contractor. The appeals could not have been brought as one case originally since each appellant claimed breach of its individual contract with the General Services Administration (GSA), and each contract had its own discrete price, geographic area, and duration. The causes of action did not merge, and a consolidated damages award would have been inappropriate.

> The redactions are requested because of the fiercely competitive nature of the court reporting market and the continued competition of these appellants among themselves for market share in the court reporting industry. Each of the companies is privately held and fiercely protective of its financial information. Each company knows the algorithm used to determine damages and disclosure of the damage amount to each appellant with [sic] permit competitors to understand the cost structure of each company. Even though the information is more than ten years old, the close scrutiny to which these companies subject one another is a competitive risk. Disclosure of a starting point, even a starting point ten years old, allows competitors to draw inferences and conclusions from observed data and trends in the intervening years. As the Board is aware, the algorithm used to determine damages is very mathematically precise and allows disaggregation of the various inputs of the calculation if the damage award is revealed.
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> These cases were tried and decided on a consolidated basis. Disclosure of the consolidated award amount is fully sufficient to satisfy any public interest in the case.

Letter to the Board from Ronald K. Henry, Esq. (Apr. 4, 2002) (Henry Letter). Appellants did not submit any affidavits or declarations in support of their request for redactions. Nor did they cite any legal authorities.

Discussion

It is well settled that accessibility of judicial documents and proceedings to the public is a centuries-old component of our legal system. Encyclopedia Brown Productions v. Home Box Office, 26 F. Supp. 2d 606, 610 (S.D.N.Y. 1998). Further, openness of judicial workings is crucial to the citizenry's ability to "keep a watchful eye on the workings of public agencies." Id. (citing Nixon v. Warner Communications, Inc., 435 U.S. 589, 598 (1978)). Thus, while public access to court records and proceedings is not absolute, there has been a longstanding presumption in its favor. Id.

As the Board recognized in AT&T Communications v. General Services Administration, GSBCA 14732 (Oct. 11, 2001), this strong presumption of public access to judicial records applies with equal force to records of the boards of contract appeals. AT&T, slip op. at 5. The presumption is applied on a sliding scale depending on the type of material submitted to the tribunal. United States v. Amodeo, 71 F.3d 1044, at 1048 (2d Cir. 1995); AT&T, slip op. at 2. Even where, as here, the evidence is submitted under a blanket protective order, the presumption of public access is not weakened. AT&T, slip op. at 2 (citing Republic of the Philippines v. Westinghouse Electric Corp., 949 F.2d 653, 661 (3d. Cir. 1991); In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 101 F.R.D. 34, 44 (C.D. Cal. 1984)).

The presumption for access is to be balanced against the countervailing interest of commercial confidentiality. The tribunal must consider whether the proposed redactions involve commercially sensitive information such that disclosure would cause more harm to

the firms' competitive positions than non-disclosure would add benefit to the public's access interest. United States v. Ackert, 76 F. Supp. 2d 222, 224 (D. Conn. 1999); In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 101 F.R.D. at 44; AT&T, slip op. at 2.

Tribunals are required to "skeptically review sealing requests to insure that there really is an extraordinary circumstance or compelling need." Encyclopedia Brown, 26 F. Supp. 2d at 611(citing In re Orion Pictures Corp., 21 F.3d 24, 27 (2d Cir. 1994)). Those seeking to maintain the confidentiality of judicial records have a heavy burden and must show a compelling interest. In re Adobe Systems, Inc. Securities Litigation, 141 F.R.D. 155, 165 (N.D. Cal. 1992); AT&T, slip op., at 2; see generally 28 CFR 50.9 (2001).[3]

As the Board articulated in AT&T, the factors to be applied in reviewing requests for confidentiality include the age of the information and whether there is evidence that disclosure of the confidential information will work a clearly defined and serious injury to the business or create a competitive disadvantage to the party resisting publication. AT&T, slip op. at 2 (citing In re Agent Orange Product Liability Litigation, 104 F.R.D. 559, 575 (E.D.N.Y. 1985), aff'd, 821 F.2d 139 (2d Cir. 1987), cert. denied sub nom. Dow Chemical Co. v. Ryan, 494 U.S. 953 (1987); Parsons v. General Motors Corp., 85 F.R.D. 724, 726 (N.D. Ga. 1980)); United States v. International Business Machines Corp., 67 F.R.D. 40 (S.D.N.Y. 1975).

Applying these factors here, it is evident that appellants have not justified redacting the amount of the individual damages awards each appellant received, based upon its market share. The age of the information here -- market share data from the year these contracts were in effect -- 1988-1989, which is over ten years old -- militates against continued confidentiality. "While staleness of the information sought to be protected is not an absolute bar to issuance of an order, it is a factor which must be overcome by a specific showing of present harm." Deford v. Schmid Products Co., 120 F.R.D. 648, 654 (D. Md. 1987) (citing Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd., 529 F. Supp. 866, 891 (E.D. Pa. 1981), and Parsons, 85 F.R.D. at 726). "Speculative allegations of injury from the

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[3] The Department of Justice's Policy with regard to open judicial proceedings, 28 CFR 50.9, provides:

> Because of the vital public interest in open judicial proceedings, the Government has a general overriding affirmative duty to oppose their closure. There is, moreover, a strong presumption against closing proceedings or portions thereof, and the Department of Justice foresees very few cases in which closure would be warranted. The Government should take a position on any motion to close a judicial proceeding, and should ordinarily oppose closure; it should move for or consent to closed proceedings only when closure is plainly essential to the interests of justice.

28 C.F.R. § 50.9 (2001).

disclosure of years-old information are not sufficient to warrant issuance of a protective order." Deford, 120 F.R.D. at 654 (citing United States v. Exxon, 94 F.R.D. 250 (D.D.C. 1991); United States v. International Business Machines Corp., 67 F.R.D. 40 (S.D. NY 1975)).[4] At most, appellants' allegations that they will suffer competitive risk by the disclosure of their damages and market shares are speculative. Importantly, the identical information of a competitor in the court reporting business was disclosed in a related litigation under the same schedule contract six years ago. In Heritage Reporting Corp. v. General Services Administration, GSBCA 10396, 1992 WL 213932 (Aug. 28, 1992), Heritage filed a similar breach of contract claim to those of appellants, challenging user agencies' procurement of court reporting services in disregard of the same multiple award schedule contract. In the stipulated decision, based upon the parties' settlement in that case, no attempt was made to protect the amount of Heritage's individual judgment. Id.; see also Heritage Reporting Corp., GSBCA 10396, 95-1 BCA ¶ 27,555 (amount of Heritage's award disclosed in decision denying respondent's request to allocate liability among user agencies). In the subsequent proceeding at the General Accounting Office (GAO) on allocating the Board's judgment among user agencies, GAO again published the amount of Heritage's judgment and expressly stated that Heritage's market share was 70%. See Heritage Reporting Corp., B-252754 (Oct. 6, 1994). The Comptroller General's disclosure of this identical information in a published decision, issued more than seven years closer to the date of the 1988-89 market share information -- 1994 as opposed to 2002 -- belies appellants' contention that disclosure would now cause competitive risk due to the "close scrutiny to which these companies subject one another." See Henry Letter.

Nor have appellants demonstrated that the disclosure of their over ten-year-old market share data would "work a clearly defined and serious injury" to their businesses or create a competitive disadvantage. See Deford, 120 F.R.D. at 653 (in context of Fed. R. Civ. P. 26(c), "Where a business is the party seeking protection, it will have to show that disclosure would cause significant harm to its competitive and financial position. That showing requires specific demonstrations of fact, supported where possible by affidavits and concrete examples, rather than broad, conclusory allegations of potential harm" (citations omitted)). Appellants' counsel's conclusory statements in this regard are wholly insufficient to make such a showing.

Finally, we do not accept counsel's suggestion that because these cases were "tried and decided"[5] on a consolidated basis, disclosure of the consolidated award amount is "fully

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[4] Even in the context of the less stringent standard applying exemption four of the Freedom of Information Act, 5 U.S.C. § 552(b)(4) (2000), which allows withholding of Government documents where disclosure would likely result in substantial competitive injury to private business, conclusory and general allegations of competitive harm are insufficient to show that the requested information is confidential. There must be evidence of actual competition and a likelihood of substantial competitive injury. GC Micro Corp. v. Defense Logistics Agency, 33 F.3d 1109, 1113 (9th Cir. 1994); AT&T, slip op. at 2-3.

[5] There was no trial. The parties' cases were presented on the record.

sufficient to satisfy any public interest in the case."[6] The public has a strong interest in access to the amount of damages an individual litigant is paid from the United States Treasury or by an individual Government agency. Further, it is well established that cases consolidated under Fed. R. Civ. P. 42(a)[7] retain their separate identity. Lewis v. ACB Business Services, Inc., 135 F.3d 389 (6th Cir. 1998) (citing Patton v. Aerojet Ordnance Co., 765 F.2d 604, 606 (6th Cir. 1985)). Although "consolidation is permitted as a matter of convenience and economy in administration, [it] does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." Lewis, 135 F.3d at 412 (citing Johnson v. Manhattan Railway Co., 289 U.S. 479 (1933); Boardman Petroleum Inc. v. Federated Mutual Insurance Co., 135 F.3d 750, 752 (11th Cir. 1998) ("[C]onsolidation of cases under Fed.R.Civ.P. 42 does not strip the cases of their individual identities."); In re Massachusetts Helicopter Airlines, Inc., 469 F.2d 439, 441-42 (1st Cir. 1972)). Thus, after consolidation, the separate cases continue to warrant separate judgments. Mutual Life Insurance Co. v. Hillmon, 145 U.S. 285, 293 (1892)[8]; see The Cockatoo, 61 F.2d 889, 892 (2d Cir. 1932) (entry of separate decrees in consolidated case was within discretion of trial court), cert. denied sub. nom. Howard v. Randall & McAllister, 287 U.S. 669 (1932); Willcox v. Goess, 16 F. Supp. 350, 384 (S.D.N.Y. 1936)

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[6] Throughout the Board proceedings, appellants had requested a consolidated award to be divided among them. On appeal, appellants provided a breakdown of the individual damages which each allegedly had proved, stating:

> Since the appeals had been consolidated, it was thought to be appropriate for appellants to formally confirm their willingness to accept a consolidated award which would be subsequently apportioned among them. . . . If a consolidated award is inappropriate for any reason, the Court (or Board) is obviously free to enter individual awards for each appellant's damages in accordance with the stipulated formula and stipulated data.

Appellants' Record Submission on Remand, Exhibit 3 at 63-64.

[7] Rule 42(a), like Board Rule 126, permits consolidation when cases involve common questions of law or fact.

[8] Although Mutual Life was decided prior to the adoption of the Federal Rules of Civil Procedure, the deliberations of the Advisory Committee "show that consolidation practice under a new Rule 42(a) was intended to remain unchanged from consolidation practice under 28 U.S.C. § 734, as construed in Johnson [289 U.S. 479 (1933)] and, under identical Section 921 of the Revised Statutes, as construed in Mutual Life [145 U.S. 285, 293 (1892)]. Consolidation in the federal courts still would not merge the consolidated cases, and consolidated cases would continue to require separate judgments." Gaylord A. Virden, Consolidation Under Rule 42 of the Federal Rules of Civil Procedure: The U.S. Courts of Appeals Disagree on Whether Consolidation Merges the Separate Cases and Whether the Cases Remain Separately Final for Purposes of Appeal, 141 F.R.D. 169, 174 (1992).

(entry of seven final decrees appropriate in consolidated case), modified, 92 F.2d 8 (2d Cir. 1937), cert denied, 303 U.S. 647 (1938).[9]

Consolidation of cases for processing is a matter of administrative convenience which should not impact the substantive legal rights of the parties or the longstanding legal presumption favoring access to judicial records. See Mississippi Publishing Corp. v. Murphree, 326 U.S. 438 (1946); United States v. Sherwood, 312 U.S. 584, 589-590 (1941) (Federal Rules of Civil Procedure shall neither abridge, enlarge, nor modify the substantive rights of any litigant). Here, appellants seek to maintain the confidentiality of the essence of the tribunal's decision -- the amount of damages paid to a contractor from the public treasury -- based upon an amorphous claim of competitive harm to the appellants themselves. Each appellant claimed damages in these appeals individually and publicly, and the amount of damages they have been awarded should not under the circumstances here be kept confidential.[10]

Decision

Appellant's request for redactions is **DENIED**. The Board will defer publishing the unredacted opinion until May 30, 2002.

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MARY ELLEN COSTER WILLIAMS
Board Judge

We concur:

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[9] Spraytex Inc. v. DJS&T, 96 F.3d 1377 (Fed. Cir. 1996), does not require a different result. There, the United States Court of Appeals for the Federal Circuit held in a patent case that a judgment which disposed of fewer than all actions consolidated by the district court into one case generally may not be separately appealed. However, the court noted that it treated a consolidated case as one merged unit "for certain [appellate] jurisdictional purposes," Id. at 1382, and did not address the issue of whether a tribunal may in its discretion issue separate judgments for different litigants with separate contracts in a consolidated case.

[10] The Federal Rules of Civil Procedure which reference judgments suggest that the amount of a judgment is a matter of public record, since it is to be entered and maintained. Fed.R.Civ.P. 54, 58, 79. In cases such as these where the judgments may be paid from the permanent indefinite judgment fund, the problem may arise of how each such judgment logistically can be paid if its amount cannot be disclosed. 31 U.S.C. § 1304. This logistical difficulty may not be overcome by payment of a consolidated award to appellants' counsel since the Board intentionally did not grant appellants a consolidated award and clearly exercised its discretion to enter a separate award for each appellant.

STEPHEN M. DANIELS
Board Judge

EDWIN B. NEILL
Board Judge