

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

*Memorandum
Rm 7471-A*

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FILE: B-139703

DATE: FEB 6 1979

MATTER OF: **[Payment of court-appointed expert
witness in land condemnation proceedings]**

DIGEST: Generally, fees and expenses of expert witnesses appointed by the court in land condemnation proceedings, whether on motion of the court or at request of a party, are considered to be expenses of litigation and are therefore pursuant to Rule 706, Federal Rules of Evidence, payable by the litigating agency. 52 Comp. Gen. 621 (1973) will no longer be followed. However, where Tennessee Valley Authority (TVA) is the litigating agency, courts have held that costs in condemnation case cannot be assessed against TVA. Courts have also held that costs may not be assessed against the condemnee. Since neither party may pay such costs, if court so orders, the Administrative Office of the United States Courts may pay litigation expenses from Judiciary appropriations.

The Deputy Director, Administrative Office of the United States Courts, has requested our decision as to the availability of Judicial Branch appropriations for the payment of compensation and expenses to Mr. Tom Seagroves, a court-appointed expert witness. Mr. Seagroves testified on the valuation of land to be taken by the Federal Government in a condemnation action initiated by the Tennessee Valley Authority (TVA), United States ex rel. TVA v. 190 Acres of Land, 404 F. Supp. 1392 (E.D. Tenn. 1975). The expenses involved, which were allowed by the Court, total \$531.10 and cover the appraisal fee, per diem for one day in court, and transportation costs. For reasons set forth below, we conclude that Judicial Branch appropriations are available for such payment.

BACKGROUND

Mr. Seagroves was appointed by the Court in order to provide the jury with an impartial witness because the court felt that it was not in the best interest of justice to expect lay persons, as jurors, to undertake to reconcile the widely divergent opinions of expert witnesses offered by the respective counsel. (E. D. Tenn., No. CIV-4-74-40, Order of March 13, 1975). The appointment was made by the Court under its inherent power to do so, and prior to the effective date of the Federal Rules of Evidence (enacted on January 2, 1975, effective 180 days later on July 2, 1975). 404 F. Supp. 1392.

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The Federal Rules of Evidence became effective before the case went to trial (on July 28, 1975) and applied to proceedings then pending. Pub. L. No. 93-595 (January 2, 1975), 88 Stat. 1926. Rule 706(b) specifically provides that compensation for the services of independent expert witnesses appointed by the court "is payable from funds which may be provided by law in * * * proceedings involving just compensation under the fifth amendment." Emphasis added.

In a Memorandum and Order dated July 31, 1975, the court, noting that Rule 706(b) was now effective, directed TVA to pay the compensation and expenses of the expert witness. TVA filed a motion urging the Court to reconsider and set aside the Memorandum and Order, arguing that Rule 706(b) does not authorize the taxation of court-appointed experts' fees against either TVA or the United States in "just compensation" cases, but, as in criminal cases merely authorizes payments of such amounts out of the Judiciary's appropriations. Plaintiff's Brief in Support of Motion to Reconsider and Set Aside Memorandum and Order on Taxation of Costs, at 2.

In October, 1975, the Court vacated and set aside the July 31 Order and directed the Administrative Office of the United States Courts to pay the expert witness compensation and expenses from the Judiciary's current (fiscal year 1976) appropriation "for necessary travel and miscellaneous expenses." The Administrative Office advised the court that it had no funds available from which to pay the fee and expenses of the expert witness. Subsequently, after a reconsideration of the October Order, the Court entered an Order on August 2, 1976, requiring the Director of the Administrative Office to show cause why he should not be held in contempt of Court for failing to comply with the October Order. Thereafter, the Administrative Office requested this decision.

SUMMARY OF POSITIONS

In its submission, the Administrative Office maintains that the compensation of the expert witness is an expense of litigation governed by Federal Rule of Evidence 706(b) and as such, is payable by the litigating agency rather than from funds appropriated to the Judicial Branch. The Administrative Office believes TVA should pay the fees of the court-appointed witness in this case because the litigation was initiated and prosecuted by TVA attorneys.

The Department of Justice, whose opinion was solicited in this matter, agrees with the Administrative Office that fees of expert witnesses appointed under Rule 706(b) are expenses of litigation payable by the litigating agency (normally, but not always, the Justice Department). However, in this particular case, since the expert witness was appointed

before the Federal Rules of Evidence were enacted into law and "[u]nder [the court's] inherent power so to do * * * as an aid to the Court in discharging its official duty", the Department believes that the Administrative Office should pay the compensation of the witness as an expense of maintenance of the courts.

TVA also submitted extensive comments. TVA agrees with the Department of Justice that the Administrative Office should pay the fees in this case. However TVA disagrees with the Department's more generalized conclusion that the costs of experts appointed by the court under Rule 706 in condemnation cases should be paid by the agency initiating and litigating the action. Citing prior decisions of this Office, TVA argues that such expenses are in all cases expenses of maintenance of the courts and as such should be paid by the Administrative Office from funds appropriated to the Judiciary.

QUESTIONS PRESENTED

The questions presented in this case are as follows:

1. The effect of Rule 706(b), Federal Rules of Evidence, with respect to the source of funds for the payment of fees in condemnation cases;
2. Whether the compensation of a court-appointed expert witness in a land condemnation case is a litigation expense chargeable to the parties, or an expense chargeable to Administrative Office (Judiciary) appropriations.

DISCUSSION

Prior to the enactment of Rule 706 of the Federal Rules of Evidence, Pub. L. No. 93-595, Jan. 2, 1975, 88 Stat. 1938, it was our view that expenses incurred by a court on its own motion to provide services deemed necessary to determine a matter before it were properly chargeable to funds appropriated to the Judiciary. 52 Comp. Gen. 621 (1973).

The enactment of the revised Rules of Evidence has provided us with guidance from Congress on the compensation of court appointed expert witnesses in Rule 706. That rule provides, in pertinent part, as follows:

"Rule 706. Court Appointed Experts

"(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert

witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.

"(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs." (Emphasis added.)

In civil actions generally, the costs of expert witnesses are to be charged "in like manner as other costs"--i. e. treated as litigation expenses and divided among the litigants in whatever way the court directs. The Rule recognizes, however, that this cannot be done in two situations--criminal and condemnation cases.

Condemnation actions differ from other civil actions in that costs cannot be assessed against the condemnee. The reason for this is as follows:

"The general principle with regard to costs in land condemnation cases is based on Rule 71A(1), Fed. R. Civ. P. which provides that 'costs [in such cases] are not subject to Rule 54(d).' (Rule 54(d) provides generally that all costs shall be allowed to the prevailing party.) In clarifying the intent of Rule 71A(1), the Advisory Committee on Rules in its Notes states that 'Costs shall be awarded in accordance with the law that has developed in condemnation cases.' This implements the established rule that the condemnor (i. e. the United States) may not recover its costs against the condemnee, since to charge the latter with the cost of taking would violate the constitutional prohibition against the taking of private property without just compensation. Grand River Dam Authority v. Jarvis, 124 F. 2d 914 (10th Cir., 1942)."
55 Comp. Gen. 1172, 1173 (1976)

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Therefore, where the Federal Government is the condemnor, costs of a court-appointed witness must be borne in some manner by the Government.

While this necessarily affects the available sources of funds for payment (by eliminating one of the parties), it does not change the nature of the expense. Further, the Rule makes no distinction between expert witnesses appointed by the court on its own motion or upon request by one of the parties. We therefore agree with the Justice Department and the Administrative Office of the Courts that the Rule was intended to treat expert witness costs as litigation expenses rather than court expenses. Our prior decision in 52 Comp. Gen. 621 (1973) rendered before clarification on this point by the Rule, will no longer be followed.

Generally, litigation in land condemnation cases is conducted by the Department of Justice. Where the Department of Justice has control over the institution of proceedings, all expenses necessarily incurred by the Government in preparing and prosecuting its case are properly chargeable to appropriations made available to the Justice Department for this purpose. However, where another Government agency or entity has specific authority to resort to litigation in the performance of its duties, the expenses of such proceedings, including special fees, when ordered by the court to be paid, are payable from the appropriations of that agency. 15 Comp. Gen. 81 (1935); 46 Comp. Gen. 98 (1966). Even where the Justice Department prosecutes the case on behalf of an agency that has such specific authority, we have held that that agency rather than the Department of Justice should bear the expenses of the litigation. 38 Comp. Gen. 343, 344 (1958).

Thus, as a general proposition, we concur with the Department of Justice and the Administrative Office of the Courts that fees of expert witnesses appointed by the Court under Rule 706 in condemnation cases are properly payable by the Department of Justice as expenses of litigation where Justice is the litigating agency. It follows that, where Justice is not the litigating agency, the agency that actually prosecutes the case should bear the expenses.

In United States ex rel. TVA v. Pressnell, 328 F.2d 580 (6th Cir. 1964), the Court held that although TVA "may cause" condemnation proceedings to be instituted, the proceedings are actually instituted by the United States which is the real party in interest and the actual condemnor of the property. The Court stated that it could find "no authority for assessing costs against one who is

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not the condemnor in the proceeding" and therefore concluded that the cost of such proceedings could not be assessed against TVA. Id., at 582

The basic authority for the taxation of costs in the Federal courts is 28 U.S.C. § 1920 (1976). Pursuant to 28 U.S.C. § 2412, a judgment for costs as enumerated in § 1920 may be taxed against the United States when it is a party in any civil action. Costs so assessed are payable from the permanent indefinite appropriation established by 31 U.S.C. § 724a. However, the judgment must--

" . . . be limited to reimbursing in whole or in part the prevailing party for the costs incurred by him in the litigation." 28 U.S.C. § 2412 (1976).

The District Court here noted (404 F. Supp. at 1393) that 28 U.S.C. § 2412 does not authorize such payment in an eminent domain proceeding. United States ex rel. TVA v. Easement and Right-of-Way, 452 F. 2d 729 (6th Cir. 1971).

There is also no basis for charging the fees in the present case to the Justice Department since the Justice Department had no role in the litigation.

In these unusual circumstances, i. e., where neither party to the proceeding can properly be charged with the litigation expense, if the Court orders the Administrative Office of the United States Courts to bear the expense, the Administrative Office would be authorized to make payment out of its appropriation for "Travel and Miscellaneous Expenses".

R. F. KELLER

~~Harry~~ Comptroller General
of the United States