POSTON LOGGING,	)	**AGBCA No. 2000-157-V**
	)	
Appellant	)	
	)	
Representing the Appellant:	)	
	)	
Alan I. Saltman	)	
Saltman & Stevens	)	
1801 K Street, N.W.	)	
Suite ─110	)	
Washington, D.C. 20006	)	
	)	
Representing the Government:	)	
	)	
James L. Rosen	)	
Office of the General Counsel	)	
U. S. Department of Agriculture	)	
33 New Montgomery Street, 17th Floor	)	
San Francisco, California 94105-4511	)	

RULING ON JOINT MOTION TO VACATE DECISIONS

June 15, 2000

Before HOURY, POLLACK (presiding), and VERGILIO, Administrative Judges.

Opinion for the Board by Administrative Judge VERGILIO. Dissenting opinion by Administrative Judge POLLACK.

VERGILIO, Administrative Judge.

On December 15, 1998, the Board granted in part the appeal of Poston Logging, of Sonora, California, the purchaser under a timber sale contract, No. 058302, with the U. S. Department of Agriculture, Forest Service (Government). The Board agreed with the contract interpretation of the purchaser, that the contract included the disputed timber. The Government had not exercised its termination rights in accordance with the contract provisions, such that the Government actions constituted a breach entitling the purchaser to damages supported in the record. The Board awarded the purchaser $167,911.60, which was less than the amount it sought. Poston Logging, AGBCA No. 97-168-1, 99-1 BCA ¶ 30,188. On March 10, 2000, the Board denied a motion submitted by each party requesting reconsideration of the decision. Poston Logging, AGBCA Nos. 99-143-R, 99-145-R, 00-1 BCA ¶ 30,829.

On May 24, 2000, the Board received a joint motion from the parties requesting that the Board vacate the earlier decisions. The request is based upon a settlement agreement. Under the agreement, the Government is to pay the purchaser $167,911.60, interest, $102,077.02 (which the parties describe as attorney fees), and an additional daily amount if payment is not received within 30 days of the Board's vacating the underlying decisions. Payment is conditioned on the Board's agreement to vacate the underlying decisions. After the purchaser receives payment it will file a motion to dismiss the appeal with prejudice.

The Board concludes that the circumstances do not support vacatur of the underlying decisions. Accordingly, the Board denies the motion to vacate.

DISCUSSION

The motion specifies that "the parties have yet to expend the time and money that will be necessary for an appeal to the Federal Circuit, such that settling at this time will generate great savings to the parties." Motion at 5. The parties conclude their motion with the following:

> Rather than continue to spend substantial amounts of money and time on an appeal to the Federal Circuit, the parties have decided to compromise. Both parties are willing to forego their prospects of winning on appeal, and the Government is willing to compensate Appellant for the damages it has suffered as a result of this dispute. All that is required to resolve this dispute to the satisfaction of both parties is for the Board to agree to vacate its decisions of December 15, 1998 and March 10, 2000. Therefore, the parties respectfully request that the Board endorse the parties' settlement and vacate its decisions in this case.

The parties recite the recognized policy of supporting and encouraging dispute resolution through voluntary settlements. The parties remark that there is clear precedent for vacatur in what they describe as a remarkably similar case, Federal Data Corp. v. SMS Data Products Group, Inc., 819 F.2d 277 (Fed. Cir. 1987). They also attempt to distinguish a Supreme Court case, U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18 (1994), issued subsequent to Federal Data.

Regarding the role of vacatur in fostering dispute resolution through voluntary settlement, the Supreme Court found "it quite impossible to assess the effect of [its] holding, either way, upon the frequency or systemic value of settlement." Vacatur, after the judgment under review has been rendered and an appeal filed, "may *deter* settlement at an earlier stage. *Some* litigants, at least, may think it worthwhile to roll the dice rather than settle in the district court . . . if, but only if, an unfavorable outcome can be washed away by a settlement-related vacatur." 513 U.S. at 27-28. Vacatur at this stage may or may not benefit the overall contract dispute resolution system or the administration or performance of contracts. The parties have not demonstrated that the equities favor vacatur.

The dictates found in Federal Data (the court found that a board's failure to vacate the underlying protest decision which preceded settlement constituted an abuse of discretion; it stated: "When the

parties have settled their differences, then the appropriate course of action is for the appellate court to dismiss the action and to vacate the judgment below," 819 F.2d at 280) are tempered by the rationale in Bancorp, wherein the Supreme Court held

> that mootness by reason of settlement does not justify vacatur of a judgment under review. This is not to say that vacatur can never be granted when mootness is produced in that fashion. As we have described, the determination is an equitable one, and exceptional circumstances may conceivably counsel in favor of such a course. It should be clear from our discussion, however, that those exceptional circumstances do not include the mere fact that the settlement agreement provides for vacatur–which neither diminishes the voluntariness of the abandonment of review nor alters any of the policy considerations we have discussed.

513 U.S. at 29. After a settlement, to vacate or not involves an equitable determination, as the Court remarked, "Where mootness results from settlement, however, the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering his claim to the equitable remedy of vacatur." 513 U.S. at 25.[1]

The parties have failed to describe circumstances which sufficiently support vacatur. While the parties assert that vacatur will save them substantial time and money, as they forego an appeal, neither party is compelled to appeal. As the Supreme Court specified, "exceptional circumstances do not include the mere fact that the settlement agreement provides for vacatur." 513 U.S. at 29. The record reveals no "exceptional circumstance" sufficient to support the equities of the request.

Moreover, under the Contract Disputes Act of 1978, as amended, 41 U.S.C. §§ 601-613 (CDA), the decision of the Board is final unless an appeal is taken to the United States Court of Appeals for the Federal Circuit. 41 U.S.C. § 607(g)(1) (1994). By statute, the determination is binding on the Government and contractor, given that no appeal has been taken. In proceeding with the appeal under the CDA, the purchaser chose a forum and process that provides a three-judge, precedential decision. The parties did not opt for resolution through a non-binding alternative dispute resolution

---

[1] The Federal Circuit appears to have applied this principle in Dyncorp v. O'Leary, 47 F.3d 1180 (table) (Fed. Cir. 1995) (Rather than direct vacatur, the court instructed a board "to consider whether it should vacate its decision in light of the parties' settlement of this matter.").

(ADR) technique. The joint request now seeks to convert the process from a precedential CDA determination to non-binding ADR. Although the parties agree to be bound by the dollar amount determined on the merits, they insist upon vacatur to avoid the precedent. The parties seek to reopen a matter which the Board has decided. The equities of the circumstances do not support a vacatur.

The pending motion does raise exceptional circumstances, even if not so denoted by the parties: the parties request the Board to endorse the settlement. The settlement specifies that the Government will pay the purchaser $167,911.60 in damages (plus interest from the date the claim was filed until paid), $102,077.02 in attorney fees, and $25 per day for every day beyond 30 after the AGBCA grants the motion before which the purchaser receives payment. What is extraordinary in the request is that the parties ask the Board to endorse the payment of what are said to be attorney fees (entitlement and quantum), without a supporting record, and of interest at a rate which may not coincide with statutory provisions (the principal is unstated, such that the percentage is not verifiable, and the daily amount for non-prompt payments may represent interest on interest). That the settlement is not self-effectuating, and requires Board endorsement, sufficiently distinguishes this matter from that in Federal Data. The dissent here undervalues the ramifications of what it endorses.

RULING

The Board denies the motion to vacate.

_____

JOSEPH A. VERGILIO
Administrative Judge

I concur:

_____

EDWARD HOURY
Administrative Judge

POLLACK, Administrative Judge, dissenting.

I respectfully dissent from the decision of the majority.

The decision to vacate is a discretionary decision. That said, it is not a decision that should be taken lightly or without substantial cause and benefit. Our legal process provides a procedure where a party or parties who are not satisfied with a decision, can take that matter up on appeal and have an appellant court consider the matter. That is the most orderly and preferred approach. However, the

law does allow for a tribunal such as this Board to vacate a decision under appropriate circumstances. The discretion must be exercised by weighing public policy considerations against the benefits to be derived from vacating the particular decision.

The points raised by the majority as to the potentially negative impact of vacatur on settlement are not without some merit. I agree that by considering vacatur, the Board opens "another bite at the apple." The availability of this additional step or remedy may indeed have the effect of deterring settlement at some earlier stage, however, as noted by the Supreme Court in U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18 (1994) that is clearly not a certainty. As the court stated, "it is quite impossible to assess the effect of (its) holding, either way, upon the frequency or systematic value of settlement." Thus, although I can recognize the potential of effecting settlement as an issue, I see it as only one element to be weighed against the potential benefits of vacating. We need to look at the overall situation before us and decide what is best in the context of those overall circumstances.

Simply put, the parties in Poston are willing to end their litigation if the Board grants vacatur. If the Board refuses, then the parties may very well proceed to the Court of Appeals for the Federal Circuit to litigate both entitlement as well as quantum issues. The parties have requested a speedy decision, so as to have time to appeal should we deny vacating. As the majority points out, neither party has to appeal, that, however, begs the question. Here, each party is willing to give up its right to appeal, and stop at this point, provided the Board vacates the decision. I have given the matter careful consideration and but for "protecting the process" (by requiring a party to follow conventional procedures, as opposed to the remedy of vacatur), and but for some possible benefit in encouraging earlier settlement, I see no compelling reason not to vacate the judgment.

The decision we rendered was based on narrow facts. While it provides certain guidance on the issues addressed, it does not for precedent purposes, provide a particularly needed beacon. This is not a situation where the precedent set forth in Poston is needed to forestall future litigation between the Forest Service and its contractors. Thus, in weighing the benefits and negatives associated with vacatur, I keep coming back to "protecting the process" as the primary reason to not grant such a motion. When weighed against the benefits, particularly the parties' desire to end litigation and the elimination of this potential appeal on the Court of Appeals' workload, I am compelled to conclude that granting vacatur is the more reasonable and prudent action.

The Contract Disputes Act (CDA) provides at 41 U.S.C. § 607(e) that Boards "shall provide to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes, and shall issue a decision in writing or take other appropriate action on each appeal submitted." That mandate goes to the heart of the Board process and existence. I cannot reconcile denying vacatur with that CDA mandate. To require the parties to continue with litigation that both are willing and wish to stop, simply because of protecting the process is not, in my view, warranted or consistent with our obligation under the CDA.

Further, the situation before us in this case is remarkably similar to the matters addressed in Federal Data Corp. v. SMS Data Products Group, Inc., 819 F.2d 277 (Fed. Cir. 1987) and Nestle Co. v.

Chester's Market, Inc., 756 F.2d 280 (2d Cir. 1985). In Federal Data, the court overturned a decision of the GSBCA, where that Board had concluded that despite the policy which strongly favors settlement, the Board was not required to accept a settlement agreement when vacatur was not equitable and would contravene other important policy considerations. The court found that the Board had abused its discretion by "subordinating" the parties' interests and the public interest in settlement to what the Board considered to be overriding public considerations. The court emphasized, "Courts favor dispute resolution through voluntary settlements," and stated that it saw "no reason to force parties to continue the litigation," when they had no desire to do so. The decision in Federal Data, is still good law and where as here, a settlement is dependent on vacatur and not already moot, that decision clearly tells us to grant the motion to vacate.

The majority in denying vacatur relies on U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18 (1994) and finds that the decision of the Supreme Court in that case supercedes or limits the Court of Appeals decision in Federal Data. I find that Bonner, as pointed out by the parties in this case, presents very different factual and legal circumstances and therefore, the reasoning and warnings included therein do not apply to this type of situation (which is clearly covered by Federal Data). Bonner has nothing to do with a trial court vacating its own decision nor does Bonner have anything to do with a situation where effectuating the settlement is dependent on the Board vacating its earlier decision.

Although Bonner provides that vacatur should only be used in "exceptional circumstances," those exceptional circumstances are in reference to an appellate court vacating a lower court decision and not in reference to the power or discretion of the trial court in vacating its own decision. Second, the requested vacatur before the court in Bonner was requested as part of an already effectuated settlement. The settlement stood, irrespective of whether the court did or did not grant vacatur. There was no quid pro quo to be gained by the court granting vacatur and overturning a lower court decision. Settlement between the parties was not at stake and from an objective standpoint, there was nothing to be gained by the court granting vacatur, other than to avoid some precedent feared by one of the parties. When one analyses the benefits of an appellate court vacating a lower court decision, which has already been settled (as was the case in Bonner), against the public policy of "order within the system," the logic of the court in Bonner rings true. However, in Poston, there is a clear benefit that did not exist in Bonner. In Poston, there is no settlement unless we vacate and if we vacate, then we put an end to the litigation.

Here, by granting vacatur, we would end the litigation and by not granting vacatur, we set the table for litigation to continue. By granting vacatur, we save both parties additional expense as well as time and effort and save the appellate court from dealing with a matter that the parties were otherwise willing to end. What we would be giving up is the potential risk that in some future case, the possibility of a vacatur will inhibit an earlier settlement in the process. I am willing to accept that trade-off.

Finally, unlike Bonner, where only one party was pursuing the vacatur, here, both parties have asked for vacatur and tied that to their ability to settle.

When I balance the benefits to be gained in granting vacatur against the detriments, and I look at the decision in Federal Data, supra and Nestle Co., supra, I find that vacatur is the proper and appropriate action. This is precisely the type of situation where vacatur should be used.

The majority suggests that allowing vacatur would be inconsistent with the provision in the CDA, 41 U.S.C. § 607(g)(1) (1994), that a decision is final unless an appeal is taken to the United States Court of Appeals for the Federal Circuit. I disagree. This Board, as is the case with other trial tribunals, has the inherent authority to vacate its own decisions. That right and its use was cited in the concurring opinion in Ordnance Devices , Inc., ASBCA No. 42709, 99-1 BCA ¶ 30,304, where the concurring judge cited to a list of cases in which the Armed Services Board has either vacated or used similar or analogous powers.

Moreover, the CDA also provides at 41 U.S.C. § 607(d), that "In exercising this jurisdiction, the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the United States Court of Federal Claims." That court clearly has the right to vacate its decisions and to suggest that a litigant choosing a board loses that potential right is simply not supported.

I also must comment upon the statement of the majority that the granting of vacatur endorses the settlement and that somehow, the granting of this motion would be inappropriate without the Board reviewing a supporting record. It is not the role of this Board to look behind the settlement of the parties and to critique or even question what dollars and conditions the parties chose to set as settlement. Where the parties agree to a settlement, the Board has no business or role in questioning how they got there. There might be an exception, if the settlement on its face shows a blatant violation of the law, but that is not the case here.

As to the settlement not being self-effectuating, the majority creates a catch-22. If the settlement stands without the Board agreeing to vacate, then under Bonner the settlement is already in place and therefore, the test for vacating would be "extraordinary circumstances." However, if the settlement is not self-effectuating, then according to the majority, it cannot be granted without the Board apparently studying the record and giving its blessing as to dollars. I find the situation created by the majority to be unreasonable and do not believe it would be viewed favorably by any court.

Finally, in making this decision, I base it on the particular circumstances of this case. It is not my intention nor do I think it should be the practice of this Board to vacate, other than in an extremely limited manner. I believe we have broad discretion and under Federal Data, the use of that discretion should be used here.

_____

HOWARD A. POLLACK
Administrative Judge

Issued at Washington, D.C.
June 15, 2000