



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO COMPEL GRANTED IN PART: December 13, 2007

CBCA 97

WHEELER LOGGING, INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Alan I. Saltman of Saltman & Stevens, P.C., Washington, DC, counsel for Appellant.

James L. Rosen, Office of the General Counsel, Department of Agriculture, San Francisco, CA, counsel for Respondent.

STERN, Board Judge.

The Department of Agriculture (USDA or respondent) moves to compel Wheeler Logging, Inc. (Wheeler or appellant) to respond to interrogatories and to produce documents. During the course of pre-trial proceedings, the Board urged the parties to voluntarily resolve their differences on these discovery issues. The Board even presented some indications of what the likely outcome of the motion would be if the Board needed to resolve it. Simple discovery ought not require a twenty-eight-page motion with over 150 pages of supporting material, as was filed here. The parties should have reached voluntary agreement on the disputed discovery. Yet, the parties advised the Board that they have been unable to resolve any issue. In addition to the motion and supplementary material filed by respondent, the Board has appellant's response and various other submissions by the parties.

The Board's duty is not to police every discovery request so that it is answered as precisely as the one serving the discovery desires. In general, if appellant has made an apparent attempt to respond, the Board accepts that response. Respondent may follow that

request with another, more pointed question. It is respondent's duty to pose a precise question. In addition, if the information sought by respondent does not exist, appellant is not required to create a new record. However, appellant has a duty to fully disclose all responsive material. The evidence that will be permitted into the record at trial may be limited by the extent of the disclosure during discovery. These principles guide us below.

A threshold issue for the Board to resolve is whether Wheeler, in responding to DOA's discovery request, is required to seek documents from third parties. Respondent states that appellant has submitted incomplete responses and must broaden the scope of its document search to include past and present accountants, attorneys, financial institutions, and state and federal tax authorities.

The Federal Rules of Civil Procedure (FRCP) require production of all relevant material which is in control of the party upon whom the request is served. Fed. R. Civ. P. 34(a). A document is in Wheeler's control if Wheeler has a right to obtain the document without compulsory process. In that instance, appellant must make a good faith effort to seek relevant documents from third parties, especially where respondent does not have such a right. *Searock v. Stripling*, 736 F.2d 650 (11th Cir. 1984). "Control is defined not only as possession, but as the legal right to obtain the documents requested upon demand." *Id.* at 653. "[I]f a party has access and the practical ability to possess documents not available to the party seeking them, production may be required." *Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130,138 (2d Cir. 2007).

Here, respondent seeks business records based, in part, on appellant's loss of profit claim. Appellant states that it has produced every paper document related to this appeal in its possession in addition to a "*Quickbooks* CD-ROM" containing its accounting records from 1997 to 2001. While this item may contain a great amount of data, respondent has the right to all responsive information that is within appellant's control. Thus, we find that Wheeler must make a simple request to third parties that it believes may possess relevant documents that respond to respondent's discovery in all instances in which appellant believes it has a right to obtain such documentation. If the third parties refuse to comply with such a good faith effort, then Wheeler has fulfilled its duty, and it is respondent's burden to obtain the documents through its own efforts, including compulsory service if necessary.

Respondent also claims that Wheeler has provided incomplete responses to interrogatories 2, 3, 4, 5, 6, 7, 9, 10, 12, 13, 15, 16, 17, 18, 20, 21, 23, and 24; that Wheeler

improperly relied on FRCP 33(d) with regard to interrogatories 2, 10, 20, 21, 23, and 24;¹ and that Wheeler improperly objected to interrogatories 2, 4, 5, 9, 10, 12, 16, 17, 23, and 24. An additional issue raised by USDA with regard to appellant's interrogatory responses is that respondent claims the business records that Wheeler provided were not produced in the proper manner, as they were disorganized and included non-responsive documents.

The Board notes that while respondent moved to compel more complete responses to eighteen interrogatories, it gave an explanation as to the nature of the incomplete response with regard to only two of those interrogatories, numbers 3 and 15. We deny respondent's request as to all interrogatories with the exception of interrogatory 15, to which we direct appellant to list the names, background, and other information requested by respondent.² DOA may serve additional discovery on appellant if it desires more detail as to the remainder of these interrogatories.

We next address Wheeler's FRCP 33(d) objection to interrogatories 2, 20, and 21. For each of these interrogatories, appellant has referred USDA to its business records. Rule 33(d) permits a party to respond to an interrogatory by reference to its business records which contain responsive information. In this instance, the Board finds appellant's reference to Rule 33(d) to be appropriate, but we also find that appellant's response does not comply with the rule. In accordance with the rule, appellant must specify which of the business records that it has produced are responsive to each interrogatory (2, 20, and 21). Wheeler is to provide this additional information to respondent.

Respondent also claims that appellant improperly objected to ten interrogatories as follows:

1. Appellant objected to interrogatories 5, 9, 10, 12, 16, and 17 on the basis that responses would not be reasonably calculated to lead to the production of admissible

¹ Appellant has subsequently withdrawn its use of FRCP 33(d) in responding to interrogatories 10, 23, and 24. Appellant states that it will furnish the requested information as to those inquiries.

² Though we deny USDA's motion (with the exception of interrogatory 15) based solely on the argument that the response was not sufficiently complete, Wheeler may still be required to provide additional information regarding interrogatories 2-7, 9, 10, 12, 13, 16-18, 20, 21, 23, and 24, as set forth elsewhere in this order.

evidence.³ The Board has reviewed each of these interrogatories and objections and finds that responses to these interrogatories would be calculated to lead to the production of relevant evidence. To the extent that appellant has withheld information in its response to interrogatories 5, 9, 10, 12, 16, and 17, it is directed to fully respond.

2. Appellant objects to interrogatories 2, 4, 5, and 12 on the basis that the information can be more easily obtained from documents in respondent's possession. The Board has reviewed this objection and finds that the interrogatories request relevant information. Appellant's objection on the aforementioned basis is overruled. However, if appellant has already furnished documents containing the requested information, or if appellant is otherwise aware of documents in respondent's possession that contain the information sought by the inquiries, then appellant need only identify those documents that respond to the interrogatories.

Respondent also moves to compel responses to interrogatories 2, 5, 12, 23, and 24 on the basis that appellant's objection, that responding would be burdensome, is improper. The Board has reviewed these interrogatories and denies the motion with respect to interrogatories 2⁴ and 24. The Board directs appellant to respond to interrogatory 12. Appellant is directed to respond to interrogatories 5 and 23 to the extent that it can make available to respondent documents from which respondent can glean the desired information. Appellant need not create records, not now in existence, simply to respond to the interrogatory request.

USDA also claims that Wheeler failed to produce documents in the appropriate manner. USDA states that Wheeler produced documents that were both responsive and non-responsive within the same document production. This caused respondent to spend its own time culling the documents responsive to its request. Appellant has a duty to produce responsive material only and not place the burden on respondent to sift through non-relevant documents. Appellant claims that the documents are now in proper order, while respondent claims that the documents are still in a state of disarray. The Board urges the parties to meet

³ Appellant did not actually object to interrogatory 5 on these grounds, in its response to USDA's discovery. USDA claims that appellant objected in a separate letter to respondent. To the extent that appellant has objected to interrogatory 5 on the basis set forth above, we include it in our holding herein.

⁴ Respondent failed to present an argument with respect to this interrogatory. However, to the extent that Wheeler is aware of existing documents that respond to this interrogatory, as we have held earlier in this decision, appellant must inform USDA which documents contain the information sought.

and work out this difference between themselves. The parties are to report to the Board within twenty days whether they have resolved this issue or require further involvement of the Board.

Finally, USDA requests that the Board impose sanctions on Wheeler for its failure to properly respond to respondent's discovery. This request is denied.

Wheeler is directed to supplement its responses in accordance with the foregoing, within twenty days from the date of this order. The parties are encouraged to voluntarily resolve future discovery disputes.

JAMES L. STERN
Board Judge