United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,
Complainant,

v.

HEALY TIBBITTS BUILDERS, INC.
Respondent.

OSHRC Docket No.: 15-1069

AMENDED ORDER

The Court has considered Complainant's *Motion to Compel and Deem Requests for Admission Admitted* ("Motion") and *Respondent's Opposition to Complainant's Motion to Compel Responses and Deem Requests Admitted* ("Response"). As a preliminary matter, it appears that the parties undertook some efforts to resolve the discovery disputes before contacting the Court in compliance with Commission Rule 40 and the Court's *Standard Practices and Procedures*.

Standard on Motions to Compel

Commission Rule 52(b) states, "The information . . . sought through discovery may concern any matter that is not privileged and that is relevant to the subject matter involved in the pending case." 29 C.F.R. § 2200.52(b). The information sought need not be admissible at hearing so long as it appears reasonably calculated to lead to the discovery of admissible evidence. *Id*. When another party refuses or obstructs discovery, the requesting party may apply for an order compelling discovery. *Id.* § 2200.52(f). The Review Commission has stated:

> The decision whether to allow discovery is within the judge's sound discretion. This sound discretion should be guided by the objective of providing a fair and prompt hearing to the parties. Moreover, the judge should consider the need of the moving party for the information sought, any undue burden to the party from whom discovery is sought, and, on balance, any undue delay in the proceedings that may occur. Given the judge's broad discretion, a judge's disposition of discovery matters is reversible only if the judge's actions constitute an abuse of discretion resulting in substantial prejudice.").

It is well-settled that Commission judges are afforded broad discretion in controlling pre-trial discovery issues. *Del Monte Corp*., 9 BNA OSHC 2136, 1981 CCH OSHD ¶25,586 (No. 11865, 1981); *N.L. Industries, Inc.*, 11 BNA OSHC 2156, 1984-1985 CCH OSHD ¶26,997 (no. 78-5204, 1984). It is therefore **ORDERED** that these discovery disputes will be disposed of as follows:

Complainant's Requests for Admission

Complainant served Respondent with Requests for Admission. Both parties are in agreement that the Responses to the Requests for Admission have been filed by Respondent—even though they were filed late. Complainant does not allege any of the Responses to the Requests for Admission are insufficient. Complainant has suffered no prejudice. In addition, Complainant has waited over sixty (60) days to file its Motion to deem the late filed Responses to the Requests for Admission deemed admitted. Pursuant to the Court's Scheduling Order, sufficient time remains for Complainant to conduct further discovery into the issues subject to the Requests for Admissions. Therefore, Complainant's Motion is **DENIED** on this basis.

Complainant's Interrogatories

The Court has reviewed all of Complainant's interrogatories and Respondent's responses. Therefore, the Court's decision as to each disputed interrogatory is outlined below:

Interrogatory No. 8: This interrogatory seeks the names, titles, addresses, and phone numbers of all employees of Respondent having knowledge and/or information about the circumstances regarding the citations issued at the Worksite during the inspection. Respondent answered by stating all of this information was in the OSHA inspection file. Respondent's objections are **OVERRULED**. Complainant's Motion is **GRANTED** as to this interrogatory, and Respondent is **ORDERED** to supplement its response within **TEN DAYS** with specific facts as to the names, titles, addresses, and phone numbers of all Respondent employees having knowledge and/or information regarding the citations issued.

Interrogatory No. 12: This interrogatory seeks the job titles, duties, and responsibilities of eight employees of Respondent. Respondent responded by referring Complainant to the OSHA investigative file. Respondent's objections are **OVERRULED**. Complainant's Motion is **GRANTED** as to this interrogatory and Respondent is **ORDERED** to supplement its response within **TEN DAYS** with specific facts as to the job titles, duties, and responsibilities of the eight

employees identified in the interrogatory. In lieu of setting forth such information in narrative form, Respondent may choose to comply with this **ORDER** by providing a true and correct copy of the job description/personnel record which contains the information requested.

Complainant's Request for Production

Complainant contends that Respondent responding to 32 of the 34 Requests for Admission with the following response is not in compliance with Federal Rule of Civil Procedure 34: "Respondent incorporates by reference herein all documents produced by the U.S. Navy, Truston Technologies, and Respondent during the course of the inspections underlying the instant action. Respondent is not in possession of any additional documents."

Commission Rule 2(b) states that "[i]n the absence of a specific provision, procedure shall be in accordance with the Federal Rules of Civil Procedure." 29 C.F.R. § 2200.2(b); *see also* 29 C.F.R. 2200.52(a)(1)(iii). In other words, if the Commission Rules do not provide for a particular procedure, then the Federal Rules of Civil Procedure ("FRCP") fill in the gaps. The particular rule at issue in this case is Commission Rule 53(b), which indicates the procedure for making and responding to requests for production of documents and things. 29 C.F.R. § 2200.53(b). It states:

> Procedure. The request shall set forth the items to be inspected, either by individual item or by category, and describe each item and category with reasonable particularity. . . . The party upon whom the request is served shall serve a written response within 30 days after service of the request, unless the requesting party allows a longer time. . . . The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to in whole or in part, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, that part shall be specified.

29 C.F.R. § 2200.53(b) Complainant contends that Respondent must provide a separate response to each individual request that indicates which of the produced documents is responsive. Complainant further contends that Respondent's responses do not comply with FRCP 34(b)(2)(E)(i), which provides that a "party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request." Fed. R. Civ. P. 34(b)(2)(E)(i). Accordingly, Complainant contends that Respondent's response to each individual request is insufficient.

In light of the above, there are three questions presented to the Court for review: (1) whether Commission Rule 53(b) allows for the relief sought by Complainant; (2) whether FRCP 34(b)(2)(E)(i) is applicable to Commission proceedings; and (3) whether FRCP 34(b)(2)(E)(i)

provides for the requested relief. Based on what follows, the Court answers each of the above questions in the affirmative and grants relief in accordance with the Order at the conclusion of this discussion.

Contrary to Respondent's assertion, the Court finds that Commission Rule 53(b) requires Respondent to identify which produced documents are responsive to a particular request. First, the rule dictates that the response shall state "with respect to each item or category" that inspection and related activities will be permitted as requested. Read narrowly, and in isolation from the rest of the rule, this clause seems to indicate that compliance can be achieved by merely providing documents or the opportunity to inspect them. However, when read in conjunction with the remainder of the rule, the Court finds that the rule implies a *quid pro quo* between the parties. Insofar as it is incumbent on Complainant to describe each item and/or category of items requested with "reasonable particularity," the Court finds that a reasonable reading of the rule also requires Respondent to respond in kind "with respect to each item or category." Merely providing the Response which Respondent has provided (which refers to some 2100 pages of documents) without providing any indication as to what, if anything, in that series of documents is responsive is as helpful as being told to go to the library when asking a series of questions about American history. While Commission Rule 53(b) does not specifically state that the responding party shall identify which produced documents are responsive to which requests, the Court finds that a comprehensive reading of the entire rule reasonably and clearly contemplates such action on behalf of Respondent.

With respect to the second question, the Court finds that FRCP 34(b)(2)(E)(i) is applicable to the present proceedings. First, Commission Rule 53(b) does not specifically state how responses to requests for production shall be made; rather, it only indicates that "inspection and related activities shall be permitted." In other words, a literal reading of the rule seems to indicate what a responding party's obligations are and not how they are to be accomplished. Thus, the Court finds that there is no specific Commission provision as to the manner of providing responses to specific requests for production. The Commission Rules do not provide procedures for this type of discovery; therefore, the Court finds that FRCP 34(b)(2)(E)(i) is applicable to the present dispute in either case.

Finding that FRCP 34(b)(2)(E)(i) is applicable, however, does not resolve the issue. The Court must also determine what obligations the rule imposes upon the responding party. The rule is written such that a responding party can fulfill its obligation in one of two ways: (1)

providing the documents as they are kept in the normal course of business; or (2) organizing and labeling the documents to correspond to the categories in the request. *See* FRCP 34(b)(2)(E)(i). Thus, a responding party can choose the manner of production insofar as it complies with the options provided. Clearly, the first option would appear to impose a less onerous burden on the responding party; however, more than one court has noted that, "if the business record-keeping system used by the producing party 'is so deficient as to undermine the usefulness of production,' that party may not have met its obligations under Rule 34." *Mizner Grand Condominium Assn. v. Travelers Property Cas. Co. of America*, 270 F.R.D. 698, 700 (S.D. Fla. 2010) (quoting *Pass & Seymour, Inc. v. Hubbell, Inc*., 255 F.R.D. 331, 336 n.2 (N.D.N.Y 2008)); *see also T.N. Taube Corp. v. Marine Midland Mortgage Corp*., 136 F.R.D. 449, 456 (W.D.N.C. 1991) (court expressed doubt that production of 789 bates-stamped documents provided in a box with no discernible order was proper as the documents were kept in usual course of business and directed responding party to organize and label documents to indicate the specific demand to which each related). If a responding party utilizes the first option, they must do more than merely state that the documents were kept in the usual course of business; rather, courts typically require the producing party to provide some "modicum of information" regarding how documents are ordinarily kept in the course of business, which would ideally include "the identity of the custodian or person from whom the documents were obtained . . . , assurance that the documents have been produced in the order in which they are maintained, and a general description of the filing system from which they were recovered". *Id.* at 701 (quoting *Pass & Seymour*, 255 F.R.D. at 337).

If the documents were not acquired in the normal course of business but were instead acquired during a "specific, non-routine occurrence," then the responding party cannot resort to the first option of FRCP 34(b)(2)(E). *See id*. (documents acquired in underlying litigation were, by their very nature, not maintained in the usual course of business); *Wagner v. Dryvit Syst., Inc.*, 208 F.R.D. 606, 611 (D. Neb. 2001) (finding that repository of documents maintained for purposes of separate litigation involving defendant in class action lawsuit not maintained in ordinary course of business).

After reviewing the discovery responses provided by Respondent, the Court finds that Respondent is not eligible to elect to produce the documents as they are kept in the ordinary course of business as it relates to the U.S. Navy or Truston Technologies. First, the vast majority of the documents produced are not kept by Respondent in the ordinary course of business. Many

of these documents were acquired from outside sources during the course of the other proceedings involving the inspection of the Worksite. Second, even if this is the manner in which Respondent maintains documents obtained in the ordinary course of business, which the Court doubts, the manner of production "is so deficient as to undermine the usefulness of production." *Pass & Seymour*, 255 F.R.D. at 336 n.2. Accordingly, the Court finds that Respondent is required to respond to the production requests in conformity with the second part of FRCP 34(b)(2)(E)(i). *See* Fed. R. Civ. P. 34(b)(2)(E)(i) ("[A] party must organize and label [the responsive documents] to correspond to the categories in the request.")

In addition, the Court also notes that it has broad discretion regarding discovery. *See Del Monte Corp*., 9 BNA OSHC 2136 (No. 11865, 1981). As noted, the Court's discretion should be guided by the objective of providing a fair and prompt hearing. Unloading an amalgamation of unsegregated, relevant and non-relevant documents does not comport with the twin goals of fairness and promptness. Although Respondent has argued that Complainant's request imposes an undue burden, the Court notes that "[i]t is not sufficient to simply state that the discovery is overly broad and burdensome, nor is a claim that answering the discovery will require the objecting party to expend considerable time and effort analyzing 'huge volumes of documents and information' a sufficient factual basis for sustaining the objection." *Dryvit*, 208 F.R.D. at 610 (quoting *Roesberg v. Johns-Manville Corp*., 85 F.R.D. 292, 296–97 (E.D. Pa. 1980)). By granting Complainant's Motion to Compel, the Court asks no more of Respondent than it would already have to undertake in order to prepare for a trial on the merits; namely, segregating and indexing the material according to the issues in the case.

In light of the foregoing, the Court **GRANTS** Complainant's Motion to Compel and **ORDERS** Respondent to provide amended responses to Respondent's Production of Document discovery requests, within **TWENTY (20) DAYS**

as follows:

1. Respondent shall review all produced documents/materials for relevant, responsive information;

2. With respect to relevant and responsive information, Respondent shall identify where those documents are located within the provided references/documents by providing an index, which contains the title/identification of the document, the date (if any), bates stamp numbering, and the specific request that the document is responsive to; and

3. To the extent that a privilege is claimed with respect to a particular document, or any

portion thereof, Respondent shall provide Complainant with a privilege log that supplements the above-mentioned index.

4. Respondent shall conduct and **CERTIFY** to the Court, within **TWENTY (20) DAYS** that it has conducted a thorough search of its business records, documents and files for responsive documents which were previously not provided to the Occupational Safety Health Administration during its inspection which contain relevant, responsive information subject to the citations at issue in this litigation. Failure to produce such document will subject Respondent to sanctions pursuant to FRCP 37.

SO ORDERED.

/s/ Patrick B. Augustine
PATRICK B. AUGUSTINE
Judge, OSHRC

Dated: February 25, 2016