

**UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

Secretary of Labor,)	
)	
Complainant,)	
)	
v.)	OSHRC Docket No. 14-1325
)	
Anheuser Busch,)	
)	
Respondent.)	
)	
)	

**ORDER DENYING WITHOUT PREJUDICE RESPONDENT’S
AMENDED MOTION TO COMPEL**

I. FACTS

A compliance officer of the Occupational Safety and Health Administration (OSHA) conducted inspections of Respondent’s worksite, and on August 1, 2014 OSHA issued three citations containing alleged Repeat, Serious, and Other-than-Serious items. Thereafter, Respondent filed a notice of contest. On October 28, 2015, Complainant filed his complaint. Respondent served its answer on the Secretary on November 18, 2014, and filed its answer with the Court on February 9, 2015. On February 24, 2015, the Court accepted Respondent’s pleadings. On March 23, 2015, the Court conducted a pre-hearing scheduling conference and issued its Notice of Hearing and Scheduling Order.¹

On about August 13, 2015, Respondent served its First Set of Interrogatories, containing 24 interrogatories, upon the Secretary. The Secretary’s answers to Respondent’s First Set of

¹ The Scheduling Order stated, in part: Motions will not be entertained unless accompanied by moving counsel’s certification that the parties have discussed the matter and that there is either no objection to the motion or that the parties have made a good faith effort to settle the matter and have been unable to do so. The certificate must include, *inter alia*, the names of the parties who conferred or attempted to confer, the manner by which they communicated, the dispute at issue, as well as the dates, times, and results of their discussions, if any. The Court will generally ignore correspondence from counsel that should properly be the subject of motion practice. Scheduling Order, at pp. 3-4, n. 6.

Interrogatories were originally due by September 14, 2015. By agreement among the parties, the due date for Complainant's responses was extended through October 5, 2015.

On October 5, 2015, Complainant served his responses to Respondent's First Set of Interrogatories upon Respondent.² The Secretary's responses to nearly all Respondent's interrogatories was "Refer to Violation Worksheet."³

On October 6, 2015, Respondent timely filed its Motion to Compel and later that day its Amended Motion to Compel.⁴ Respondent alleges Complainant's answers to its First Set of Interrogatories are: 1) not made in "good faith", 2) incomplete, and 3) not fully responsive. In its Amended Motion to Compel, Respondent provides many examples where it asserts Complainant's responses were not complete, and asserts that there are other examples, as well.⁵ Respondent asserts that "the Secretary's blatantly bare bones response to avoid a motion to compel are insufficient and harm Respondent's ability to prepare for trial." Respondent seeks an order from the Court that compels the Secretary to produce full and complete responses to its interrogatory requests by October 8, 2015.

Respondent's Motion to Compel did not include a certification that it has in good faith conferred or attempted to confer with the Secretary about his alleged failure to make full and complete disclosures or discovery in an effort to obtain such things without court action.

On October 21, 2015, Complainant timely filed his Response to Respondent's Motion to Compel Interrogatory Answers (Response to Amended Motion to Compel). The Secretary asserts that answers to Respondent's Interrogatory Nos. 1 through 20 may be determined by Respondent through its examination of the violation worksheets, prepared by OSHA's

² Complainant's responses did not include any objections and were not made by anyone under oath. His responses were signed by his counsel. *See* Fed. R. Civ. P. 33(b)(3) through (5); 29 C.F.R. § 2200.55.

³ The Court views these repeated responses to be incomplete and near flippant. More will be required.

⁴ The Court's Scheduling Order called for all motions, including motions to compel, to be filed by October 8, 2015.

⁵ *See* Amended Motion to Compel, ¶¶ 14 through 20, pertaining to Interrogatory Nos. 2, 3a, 5, 6, 16, 22, 23, and 24.

compliance officer in support of the citation items, that Complainant produced to Respondent early in the litigation and referred to in his answers to Respondent's interrogatories. Citing to Federal Rule of Civil Procedure 33(d), the Secretary asserts that the burden of ascertaining answers to Respondent's interrogatories from the violation worksheets are substantially the same for either party. The Secretary's asserts that "[g]enerally speaking most if not all of the facts that support the Secretary's prima facie case are set forth in the violation worksheets."⁶ He concedes that there are no specific segments within the violation worksheets that address the applicability of a cited standard; but argues that a standard's applicability was addressed by OSHA's compliance officer during his two-day deposition completed on September 16, 2015. The Secretary also concedes that the names of employees exposed to hazards, sought by Respondent in its interrogatories, are not identified in the violation worksheets. Complainant admits "there were some delays in providing responses;" but asserts that none of the delays were "intentional."⁷

Discovery closed on October 8, 2015. The trial is scheduled to commence on November 2, 2015.

⁶ In his response to the Amended Motion to Compel, the Secretary attached some examples of what was provided to Respondent. See Exhibit A, Response to Amended Motion to Compel.

⁷ Complainant's counsel asserted that she and OSHA's compliance officer "were dealing with limited resources and other commitments while attempting to respond to these interrogatories...." Complainant asserts that to have done anything other than refer "to the business records per Rule 33(d)" "would have put an extreme time burden on both the compliance officer and the Secretary's counsel." The Court is unpersuaded by this argument.

II. DISCUSSION

Commission Rule of Procedure 52(f) allows a party to apply for an order compelling discovery when another party refuses or obstructs discovery. 29 C.F.R. § 2200.52; *see also* Fed. R. Civ. P. 37(a)(1).

If a Judge enters an order compelling discovery and there is a failure to comply with the Court's order, the Court may make such orders with regard to the failure as are just. Such order may include any sanction stated in Commission Rule 52 and/or Fed. R. Civ. P., 37, including dismissal of Complainant's complaint and underlying citations.

Shortly after receiving Complainant's responses to Respondent's First Set of Interrogatories, Respondent filed its Amended Motion to Compel without filing any certification that it had conferred with the Secretary beforehand in violation of the Court's Notice of Hearing and Scheduling Order, Commission Rules, and the Federal Rules of Civil Procedure. A party bringing a discovery-related motion in this case must include with the motion a certification that the parties have discussed the matter or made a good faith effort to settle the matter. *See* Scheduling Order, pp. 3-4, n 6; 29 C.F.R § 2200.40(a); Fed. R. Civ. P. 37(a). Two components are necessary to constitute a facially valid discovery motion in this case. First is the actual certification document. The certification must accurately and specifically convey to the court who, where, how, and when the respective parties attempted to personally resolve the discovery dispute. Second is the performance. The moving party performs by certifying that he or she has made a good faith effort to settle the matter through conferment. Performance must be manifested by the facts of a particular case in order for a certification to have efficacy and for this Motion to Compel discovery to be considered. *See Shuffle Master, Inc. v. Progressive Games, Inc.*, 170 F.R.D. 166, 170 (D.Nev.1996).

The certification requirement imposed by the Court in its Scheduling Order and Fed. R. Civ. P. 37(a), and the conferment obligation required by Commission Rule 40(a), are intended to encourage litigants to resolve discovery disputes by informal means before filing a motion with the court. The certification must evidence good faith conferment. Counsel seeking an order compelling complete discovery responses to interrogatories, such as here, must adequately set forth in the motion essential facts sufficient to enable the court to pass a preliminary judgment on the adequacy and sincerity of the good faith conferment between the parties. That is, a certificate must include, *inter alia*, the names of the parties who conferred or attempted to confer, the manner by which they communicated, the dispute at issue, as well as the dates, times, and results of their discussions, if any.

The first element of performance is “good faith” in conferring. “Good faith” contemplates honesty in one's purpose to meaningfully discuss the evidentiary dispute at hand. *See Black's Law Dictionary* 624 (5th ed. 1979). “Good faith” is tested by the court according to the nature of the dispute, the reasonableness of the positions held by the respective parties, and the means by which both sides conferred. Good faith cannot be shown merely through the perfunctory parroting of language used in a court order on the movant's certificate to secure court intervention. Rather, it mandates a genuine, substantive attempt to resolve the dispute through non-judicial means. *Shuffle Master*, 170 F.R.D. at 171.

The attempt to settle the matter through “conferment” is the second component of performance. It requires a party to have had or attempted to have had an actual discussion, either in person or by telephone, or through the exchange of detailed letters. Such an obligation is clear from the plain meaning of the word “confer”, which derives from the Latin roots *com* meaning “together” and *ferre* meaning “to bring.” Hence, the word literally translates as “to bring

together.” The Court therefore finds that in order to bring a proper Motion to Compel discovery, as here, a moving party must personally engage in two-way communication with the nonresponding party to meaningfully discuss the matter in a genuine effort to avoid judicial intervention.

Respondent has failed to satisfy these requirements. The confer requirement is more than just a “formalistic prerequisite” to judicial resolution of an evidentiary dispute. Instead, it is meant to be a “sincere effort” where both parties presented the merits of their respective positions and meaningfully assessed the relative strengths of each. Judicial intervention in resolving a pre-hearing discovery dispute regarding responses to interrogatories may be unnecessary unless: (1) informal negotiations reached a substantive impasse, or (2) a party acted in bad faith either by refusing to engage in negotiations or by refusing to provide specific support for its position. Respondent has failed to specify who, when, or how the parties attempted to personally and meaningfully discuss any dispute concerning the Secretary’s October 5, 2015 responses to Respondent’s First Set of Interrogatories. Respondent has not satisfied the requirement set forth in the Court’s Scheduling Order, Commission Rule 40(a), and Fed. R. Civ. P. 37(a).that the movant in good faith confer or attempt to confer with the other party before filing a discovery-related motion. “Conferring” must be a personal or telephonic consultation, or exchange of letters that set forth in detail each other’s positions, during which the parties engage in meaningful negotiations or otherwise provide legal support for their position. Respondent has not demonstrated an interest in resolving the discovery dispute at issue short of seeking Court intervention. Rather than engage in a deliberative process, Respondent quickly came directly to the Court with a premature motion.

III. CONCLUSION

By requiring motions to include a fact-specific certification that the movant has in good faith conferred or attempted to confer with the opposing party, the court will ensure that each movant has genuinely attempted to resolve any evidentiary dispute without court intervention. Furthermore, encouraging parties to personally engage in sincere, substantive discussions regarding evidentiary disputes will lead to fewer evidentiary misunderstandings among the litigating parties and improved judicial economy.

IV. ORDER

WHEREFORE IT IS ORDERED THAT Respondent's Amended Motion to Compel is DENIED without prejudice;

IT IS FURTHER ORDERED THAT, upon Respondent's request of the Secretary, the parties shall meet and confer no later than 1:00 p.m., E.D.T., October 26, 2015, upon any renewed Motion to Compel by Respondent related to it seeking full and complete responses to its First Set of Interrogatories from the Secretary; and

IT IS FURTHER ORDERED THAT, in the absence of any resolution of the discovery dispute by the parties, Respondent may refile its Motion to Compel with the Court by noon, E.D.T., October 27, 2015, provided it is accompanied by a certification that fully complies with the requirements set forth in the Court's Scheduling Order, at pp. 3-4, n. 6. Should that happen, Complainant's response to any such renewed Motion to Compel discovery shall be filed by the Secretary with the Court by noon, E.D.T., October 28, 2015.⁸

SO ORDERED.

/s/
The Honorable Dennis L. Phillips
U.S. OSHRC Judge

Dated: October 22, 2015
Washington, D.C.

⁸ These short deadlines are necessary because of the parties' actions deferring this discovery related matter until the latter stage of litigation in this case; a situation that has arisen through shared responsibility.