UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

January 30, 1997

IRONWORKERS LOCAL 455, Complainant,	)	
v.	)	8 U.S.C. §1324b Proceeding
	)	OCAHO Case No. 95B00165
LAKE CONSTRUCTION & DEVELOPMENT CORPORATION, Respondent.	)	

ORDER GRANTING COMPLAINANT'S MOTION TO COMPEL DISCOVERY

Procedural Background

Ironworkers Local 455 filed a complaint pursuant to the Immigration and Nationality Act, 8 U.S.C. §1324b (INA) , as amended by the Immigration Reform and Control Act (IRCA), in which it alleged that Lake Construction and Development Corporation (Lake) discriminated against seven qualified United States citizen applicants and in favor of a non-United States citizen in filling an ornamental ironworker position. Discovery was thereafter undertaken.

Presently pending is complainant's Motion to Compel Discovery, filed October 24, 1996, which sets forth the following chronology of events leading up to the filing of the motion: Complainant served its first set of interrogatories and document requests on May 24, 1996, to which the initial answers were received on June 21, 1996. Complainant promptly notified respondent that its responses did not comply with applicable rules, and an exchange of correspondence followed. Complainant modified a number of its requests in an effort to address respondent's concerns, and respondent agreed by letter to

supplement its answer. On August 29, 1996, respondent made "supplemental responses" in the form of a letter from respondent's attorney. After further communications with respondent, the complainant filed the instant motion to compel discovery responses. The motion sets forth a certification that good faith efforts were made to secure answers and production prior to the filing of the motion, and my review of the record persuades me that this is true.

Subsequent to the filing of the motion to compel on October 24, 1996, respondent sent complainant another document on October 28, 1996, and on October 31, 1996, in lieu of a response to complainant's motion, respondent filed the affidavit of George Lucey, respondent's current president. The affidavit asserts in conclusory terms that respondent "has done everything possible" to locate documents (without elaboration as who did what), denies generally that Lake engaged in discrimination, comments upon various depositions, refers back to the answer, characterizes what information Lucey believes the complainants to be already aware of, argues the merits of the case, and asserts generally that "the documents and information the complainants seek are not readily available" and that the motion should be denied. Some additional documents were thereafter sent on November 5 and November 27, 1996.

In view of the piecemeal nature of the document production, I issued an inquiry on December 11, 1996, requesting the parties to update their respective positions as to which particular items of discovery were still outstanding. Respondent stated that all requests had been answered completely, while complainant alleged that all of the matters which were subject to the motion to compel were still inadequately addressed.

Responses to Complainant's First Set of Interrogatories

The complainant's motion complains of inadequate or non-existent responses to complainant's first set of interrogatories, referring specifically to interrogatories 7, 8, 14, and 15.

Interrogatory No. 7

Complainant's initial Interrogatory number 7 requested the names of respondent's employees, including contract employees since 1992, and information including their citizenship or immigration status, alien registration numbers, national origin, and pay

rates. When respondent objected on the basis of overbreadth, the interrogatory was modified to limit it to construction worker employees (non-administrative employees) since 1994.

The "supplemental response" was: "Concerning Interrogatory No. 7, thank you for limiting your request. Your request has been transmitted to the Respondent to compile the information you request as soon as possible, if it is in the Respondent's possession, custody and control."

In a letter dated December 26, 1996, in response to my inquiry, Lake stated its position that its Production of Documents was responsive to interrogatory no. 7, citing 28 C.F.R. §68.19(d), and asserted that the request was "extremely burdensome" even as modified.

Interrogatory No. 8

Complainant's initial Interrogatory requested the identification of all persons for whom respondent had sought or was seeking alien labor certification. The initial response stated: "Upon information and belief Lake is not presently seeking labor certification for any of its employees. Lake is attempting to determine whether it has sought labor certification for any of its employees in the past and will promptly supply such information if and when it becomes available."

The "supplemental response" stated: "Concerning Interrogatory No. 8, same response as No. 7 above." Respondent's letter of December 26, 1996 did not address this interrogatory.

Interrogatory No. 14

Interrogatory No. 14 requested that respondent state the basis of its general denial found in paragraph 1 of respondent's amended answer. The initial response stated: "The basis for the General Denial pleaded in the Amended Answer is the subjective legal determination arrived at by Respondent's attorney predicated upon the facts imparted by the Respondent, through its officers, within the capacity of the attorney-client relationship."

The "supplemental response" stated: "Concerning Interrogatories No. 14 and 15, the basis for the Respondent's General Denial and Affirmative Defense as pleaded in its Amended answer is the

Respondent's belief and contention that it has committed no discriminatory or unfair immigration related employment practice under §1324(b), or any other applicable title regarding the Complainants. The Complainant has now conducted depositions of the Respondent's officers, Tobio and Lucey. The basis for the Respondent's denial of actionable conduct are set forth more fully in the transcripts to which the Complainant is referred."

The letter of December 26, 1996 did not address this interrogatory.

Interrogatory No. 15

Interrogatory No. 15 requested that the respondent state the basis of its first affirmative defense found in its amended answer. The initial response was: "See Response to Interrogatory No. 14."

The "supplemental response" was the same as made to No. 14. The letter of December 26, 1996 did not address this interrogatory.

Adequacy of the Responses

Both sets of responses are signed by respondent's counsel; neither appears to have been signed under oath by the client. Elsewhere in the record is a document captioned "Corporate Verification" which states that the signers are corporate officers, that they have reviewed the responses to Interrogatories, Requests for Admission, and Requests for Production of Documents and that they know the "contents" to be true except as to matters stated on information and belief.

The most obvious of the many defects in the responses is that they fail to comply with even the minimal requirements of either the OCAHO rules[1] or the Federal Rules of Civil Procedure. First, under both 28 C.F.R. §68.19(b) of the OCAHO rules and Rule 33(b)(1) of the federal rules, interrogatories are to be answered fully by a party in writing under oath or affirmation, a requirement not met here, either as to the full answer or as to the oath. Answers to interrogatories are to be made by the party, not by the party's attorney reciting "upon information and belief," or by letters from the attorney stating what the client told him. Under both sets of rules, when the party is

[1] Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. Pt. 68 (1996).

a corporation, any authorized officer or agent may under oath answer for the corporation, 28 C.F.R. §68.19(a) and rule 33(a). A statement that the party has reviewed someone else's answers does not satisfy the rules, even if made under oath. The obvious reason for the requirement is that properly executed answers to interrogatories by a party not only provide information, they bind the party and have evidentiary value as well; they may provide the basis for contradiction or impeachment of witnesses at trial, or support a motion for summary judgment. Answers by counsel, whether reviewed by the client or not, do not serve these purposes.

Responses to interrogatories 7 and 8, moreover, are so lacking in information as to not be responses at all. Rather, they are merely promises to search for and produce information at some other unspecified time. These non-responses demonstrate total disregard for both the letter and the spirit of the OCAHO rules and the Federal Rules of Civil Procedure. No explanation is provided as to why Lake, a company with 35–40 employees, would be unable to provide a list of the names of its construction workers. In the likely event that Lake lacks knowledge of the names of its construction workers and has no reasonable means of ascertaining this information, complainant is at minimum entitled to a sworn statement to that effect by a responsible corporate officer setting forth what efforts were made, and by whom, to ascertain the names. The same applies to their immigration status, registration numbers, national origin, and pay rates. Similarly, where, as here, it is known to a certainty that Lake sought labor certification not only for the individual whose employment gave rise to this lawsuit but also for two others as recently as October, 1993 (welder-fitter) and July 1994 (stonemason), complainant is entitled to a sworn statement by a responsible corporate spokesman if Lake has no knowledge about these events and no means of acquiring it. For all that can be discerned from the record, these individuals may be employed at Lake.

While no specific objections were made to Interrogatories 14 and 15, two general objections were initially made to all the interrogatories with the indication that they would be incorporated in the response to each separate interrogatory: 1) objection to discovery beyond the permitted limits of federal rule 33 and the "Local Rules of this Court," and 2) objection to the extent that the interrogatories seek discovery of privileged communication or attorney work product. No elaboration was given as to the manner in which *facts* are

claimed to be attorney work product, and the statement is so lacking in specificity that it fails to set forth any proper objection.

Responses to Complaint's Requests for Production of Documents

Request for Production No 7.

Complainant requested "all documents regarding the qualifications of any person on whose behalf respondent sought a labor certification including but not limited to the personnel file, employment application, resume, test scores, W–2, 1099, and I–9 forms, references and interview notes." Initial production consisted of Jose M. Hermo's personnel file.

The "supplemental response" letter of August 29, 1996 stated "Concerning request for production of documents Nos. 7 and 18, respondent is attempting to determine whether it has sought alien labor certification for any employees in the past and will promptly supply such documents if located."

Request for Production No. 14

Request was initially made for "[a]ll documents relating to the job duties, job titles, citizenship status and pay for each person employed in any capacity with Respondent since 1992." No production was made in response. The request was modified in accordance with respondent's objection to apply only to non-administrative employees since 1994.

The "supplemental response" letter of August 29, 1996 stated "Concerning Request for Production Nos. 14 and 15, thank you for voluntarily agreeing to modify the request. The modified request has been transmitted to the Respondent and it is determining whether it is in possession, custody or control of any responsive documents. If so, they will be provided to you as soon as possible."

Request for Production No. 15

Request was made for "[a]ll payroll documents, including payment for contract services, for employees of Respondent since 1992." No response was made. After modification to apply only to non-administrative employees since 1994, the same "supplemental" non-response made to No. 14 was made.

Request for Production No. 18

Request was made for "[a]ll documents relating to all labor certifications applied for by Respondent since 1990." Produced in response was a Notice of Findings letter from the Department of Labor denying an application for alien labor certification for Jose Manuel Perez Hermo.

Additional Production After the Motion to Compel

Subsequent to the filing of the motion to compel, on November 5, 1996, a letter was sent to complainant stating "...I am enclosing herewith photocopies of 28 I–9 Forms which Lake has today furnished to me. Lake is continuing its investigation to determine if additional I–9 Forms are in its possession and/or control. If I am provided with additional I–9 Forms by Lake, I shall make those available to you forthwith. . . ."

On November 27, 1996 some partial payroll data reports were sent, together with a letter denying there were other responsive documents "that Lake has in its possession or control," but also stating that "the documents you request would appear to number in the thousands and would require an extensive effort by Lake to locate." Some W–2 forms for 1994 and 1995 were provided, but none for 1996. One hundred twenty payroll data reports, none more recent than May of 1996, were also provided. In a letter dated November 27, 1996, respondent's counsel said he was informed that Lake does not keep records as to "job duties" or "job titles." No documents were produced reflecting any information about contract employees.

Adequacy of the Responses

No information whatsoever was provided here as to what efforts, if any, were made to locate the documents, or by whom those efforts were made. I conclude that compliance with requests for production are at best partial, and at worst made in bad faith. My review of the overall record of the progression of discovery in this case in fact discloses a consistent pattern of delay and obfuscation. The first responses, for example, purported to retain the right at any time to "amend, correct, add to, strike, delete, supplement or clarify" any of the responses; in other words, not to be bound by the answers at all. It also sought to limit production of documents to those "in its physical possession" on the date of the response, and contained global

claims of attorney-client and work product privileges giving no clue as to what documents, if any, were claimed to be protected. After negotiating for voluntary modification and narrowing of the discovery requests, respondent then failed to provide meaningful responses even to the modified requests. Not until the motion to compel was filed was there any significant production in response to the requests complained of, and that response is partial only. Lake has failed to explain how it is simultaneously the case that there are no responsive documents yet they are too numerous to locate. Evasive and incomplete answers and production prejudice a party's preparation for hearing where it is abundantly clear that the requestor cannot safely rely on the information disclosed or produced as being either correct or complete.

Applicable Standards

In addressing the motion to compel, I do so bearing in mind and reminding the parties that the purpose of discovery under both the OCAHO rules and the Federal Rules of Civil Procedure, to which OCAHO rules refer as a general guide, is to require the disclosure of all relevant information so that the resolution of disputed issues may be based on a full and accurate understanding of the facts. Lawyers in the discovery process are expected to act in good faith, to follow the rules, and to perform their obligations as members of the court. *Malautea v. Suzuki Motor Co., Ltd.,* 148 F.R.D. 362, 371–74 (S.D. Ga. 1991) *aff'd*, 987 F. 2d 1536 (11th Cir.), *cert. denied* __U.S.__, 114 S.Ct. 181 (1993).

The discovery process thus is subject to the overriding limitation of good faith. *United States v. O'Brien*, 1 OCAHO 142, 984 (1990). If a party is unable to supply requested information, the party must state under oath that he is unable to provide it and set forth the efforts used to obtain the information. *Hansel v. Shell Oil Corp.*, No. CIV.A.95–3631, 1996 WL 663876, at *1 (E.D. Pa. 1996). Where a party cannot provide all the information requested, it must provide what it can and state under oath that it cannot furnish the rest. *NLRB v. Rockwell-Standard Corp.,* 410 F. 2d. 953, 958 (6th Cir. 1969). Inability to furnish all the information is thus not an excuse for failure to reply at all.

Discovery, in other words, is not a game of cat-and-mouse. A litigant seeking discovery is entitled to true, explicit, responsive, complete, candid, and nonevasive answers to relevant interrogatories and to the production of relevant documents. Interrogatory answers are required to be signed under oath by the responding party in ac-

cordance with applicable rules. Answers must be self-contained, without directing the inquirer to depositions or other external material, as caselaw has long held. *See, e.g., Hyster v. Indus. Power Equip. Co.*, 9 F.R.D. 685, 685 (W.D. Mo. 1950). A broad statement that the information is in a document is not a sufficient answer. *Budget Rent-A-Car, Inc. v. Hertz Corp.*, 55 F.R.D 354, 357 (W.D. Mo. 1972). Where the responding party is unable to provide the information, the response must so state under oath and must set forth in detail the efforts expended to obtain the information. *Milner v. Nat'l Sch. of Health Technology*, 73 F.R.D. 628, 632 (E.D. Pa. 1977). While OCAHO rules provide that business records may be submitted in response to an interrogatory, 28 C.F.R. §68.19(d), this is so if, and only if, the records are sufficient to answer the interrogatory. The production of a selected sample of undecipherable records together with a general assertion that there are far too many to provide, or even to find them all, will not suffice.

Any privilege claimed requires particularized information so that the validity of the objection can reasonably be assessed; frivolous or dilatory boilerplate objections and blanket claims of privilege such as "work product" with no work product identified, or "attorney-client" privilege as to all facts provided by a litigant are unacceptable. *Chudasama v. Mazda Motor Corp.*, No. 4:93–CV–61 (JRE), 1995 WL 641984, at *14, *19 (M.D. Ga. 1995).

A corporate party is required to furnish information and documents which it has the right to obtain, whether or not they are physically in its possession at the time responses are made. *Searock v. Stripling*, 736 F.2d 650, 653 (11th Cir. 1984). *See also Zervos v. SS Sam Houston*, 79 F.R.D. 593, 595 (S.D.N.Y. 1978). A corporation, moreover, is presumed to have custody and control of its own records ordinarily required in the course of business and the burden of proving otherwise is on the corporation. *Cooper Indus. Inc. v. British Aerospace, Inc.*, 102 F.R.D. 918, 919 n.2 (2d Cir. 1984), citing *In re Ironclad Mfg. Co.*, 201 F. 66, 68 (2d Cir. 1912). Thus a bald statement by an officer that he cannot find the requested company records, without other explanation, will not do. If a document was in existence but no longer is, respondent is required to explain if it is missing, lost, destroyed, or otherwise disposed of.

Respondent will be ordered to answer Interrogatories 7, 8, 14, and 15 and to make specific, detailed, sworn answers. Where ignorance is claimed, explanation must be given as to precisely what efforts have

been made, when they were made, and by whom they were made in order to obtain the information. Interrogatories are not to be answered by reference to documents but by direct, explicit answers to the questions asked. Respondent will be ordered as well to respond fully to Requests for Production Numbers 7, 14, 15, and 18.

Let me be clear. This order compelling discovery is not an opportunity for further hide-and-seek. It is a one-time opportunity to do what long since ought to have been done: provide answers to interrogatories and produce documents in response to the requests in such a manner as to comply with applicable rules. Interrogatories are to be answered under oath fully and completely. Where information is unavailable, detailed and specific explanation is required as to the efforts made to obtain it. Similarly, with requests for production, detailed and specific explanations are to be made where ignorance or unavailability is claimed with respect to respondent's own records.

Conclusion

Complainant's motion is granted. Respondent is to respond to the requests by February 14, 1997. The question of attorneys fees, costs, and further sanctions is reserved until after discovery is completed. Respondent's attention is directed to 28 C.F.R. §68.23(c) which sets forth the range of sanctions for failure to comply. Complainant is requested to submit an itemized statement detailing the reasonable attorneys fees and costs incurred as a result of having to file the subject motion.

SO ORDERED:

Dated and entered this 30th day of January, 1997.

ELLEN K. THOMAS
Administrative Law Judge