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CASE NUMBERS: 2005-SDW-004
2005-SDW-005
2005-SDW-006

In the Matter of :

GREGORY A. DANN,
LON A. FULLER, and
THOMAS J. KOSCIK,
Complainants,

v.

BECHTEL SAIC COMPANY, LLC, and
BECHTEL NEVADA
Respondents.

ORDER GRANTING MOTION TO IMPOSE SANCTIONS ON BECHTEL NEVADA

This matter arises from complaints filed against Bechtel SAIC and Bechtel Nevada for alleged violations of various federal whistleblower statutes. The Complainants are three members of Plumbers and Pipefitters Local 525 who were terminated from their jobs with Bechtel SAIC on May 24, 2004.

On August 12, 2004, Complainant Lon Fuller was dispatched by Local 525 to a job with Bechtel Nevada, but denied employment by Bechtel Nevada when he arrived at the job site. On August 17, 2004, Clay Young, the manager of labor relations for Bechtel Nevada, sent Local 525's business manager a letter with a body containing only the following two sentences:

> The following Pipefitters are not eligible for employment with Bechtel Nevada or at the Nevada Test Site:
>
> Lon Fuller
> Greg Dann
> Tom Koscik
>
> Please feel free to contact me at 295-0173 if you have further questions regarding this subject.

Thereafter, the Complainants filed whistleblower complaints against both Bechtel SAIC and Bechtel Nevada with the Occupational Safety and Health Administration (OSHA). In those complaints the Complainants alleged that Bechtel SAIC's termination of their employment and

Bechtel Nevada's subsequent refusal to allow them to work at the Nevada Test Site were motivated by the Complainants' prior safety complaints and by their refusals to sign affidavits that Bechtel SAIC had prepared for the purpose of rebutting a whistleblower complaint filed by Ron Dollens, another member of Local 525. Bechtel SAIC and Bechtel Nevada are separate corporate entities and each of them is being represented in this matter by different attorneys from separate law firms.

Inexplicably, after OSHA received the whistleblower complaints it investigated only the complaints against Bechtel SAIC. Eventually, the complaints were referred to the Office of Administrative Law Judges and a notice was issued scheduling the complaints against Bechtel SAIC for trial in Las Vegas, Nevada, on May 2, 2005. However, when it was determined that Bechtel Nevada should have also been named as a Respondent in this proceeding, the May 2 trial was cancelled. At the same time, a new trial notice was issued naming both Bechtel SAIC and Bechtel Nevada as Respondents. The new trial notice scheduled the trial to begin on July 26, 2005 and directed the parties to exchange discovery requests by May 25, 2005. Responses to the requests were due on or before June 14, 2005.

Unfortunately, the July 26 trial had to be cancelled in response to a motion for continuance filed by the Complainants on June 30, 2005. In that motion, the Complainants alleged that they would be unable to proceed to trial on July 26 because neither Bechtel SAIC nor Bechtel Nevada had provided full responses to the Complainants' discovery requests. The July 5, 2005 Order granting the Complainants' request for a continuance specifically concluded that the materials submitted by the Complainants had shown that Bechtel SAIC had made at least a good faith effort to comply with most of the discovery requests, but that:

> Bechtel Nevada's initial and supplemental responses to the Complainants' discovery requests [were] so evasive and tendentious that the continuance requested by the Complainants should be granted.

In the last sentence of the continuance order, Bechtel Nevada was directed "to be more forthcoming and less argumentative in its responses to the Complainants' discovery requests." In an attached Second Revised Pre-Trial Order, the Respondents were given until July 15, 2005 to provide supplemental responses to the Complainants' discovery requests.

On July 22, 2005, the Complainants filed a motion to compel more complete responses to their discovery request. In the motion the Complainants alleged that Bechtel SAIC and Bechtel Nevada were still refusing to provide all the information within the scope of their discovery requests. In an August 9, 2005 Order granting the Complainants' motion, it was determined that Bechtel SAIC had provided sufficient responses to all but one interrogatory, but that Bechtel Nevada "had not heeded the admonishment to be more forthcoming and less argumentative in its responses to discovery requests." The August 9, 2005 Order further specified that Bechtel Nevada must:

> provide full, non-evasive responses to Complainants' Requests for Admission numbers 12, 13, 15, 16, 36-38, 40, 42, 44, 46 and 47, Complainant Fuller's Interrogatories numbers 13-17, 19, Complainant Dann's Interrogatories 24 and

> 25, and Complainant Koscik's Interrogatories 4, 16, and 20. In addition, to the extent that Bechtel Nevada has withheld information as privileged, it is hereby directed to provide the Complainants with a privilege log consistent with the requirements of the Federal Rules of Civil Procedure no later than August 15, 2005.

Attached to the order was a Third Revised Pre-Trial Order that gave the Respondents until August 15, 2005 to provide the proper responses to the Complainants' discovery requests.

In response to the August 9, 2005 Order, the counsel for Bechtel Nevada submitted an August 11, 2005 letter which asserted that Bechtel Nevada had "grave concerns" about the Order and its characterization of Bechtel Nevada's discovery responses as evasive and argumentative. The letter went on to argue that Bechtel Nevada had denied employment to the Complainants pursuant to the terms of a collective bargaining agreement and asserted that a previously submitted statement signed by Bill Anderson, the business manager of Local 525, substantiates that contention. The letter also argued that the Complainants' discovery requests asking for information about a group of Bechtel Nevada employees who handled labor relations for both Bechtel SAIC and Bechtel Nevada had been sufficiently answered in a declaration previously submitted by Bechtel Nevada's general counsel, Robert Goodwin. In addition, Bechtel Nevada's counsel asserted that Bechtel Nevada had provided all information that "Mr. Young has to share regarding this case" but then suggested that the Complainants be compelled to take the deposition of Mr. Young and another Bechtel Nevada/Bechtel SAIC labor relations employee, Gayla Seymon. Finally, the letter asked that discovery be re-opened so that Bechtel Nevada's counsel can take the deposition of Mr. Dollens and obtain further deposition testimony from each of the Complainants.[1] Attached to the letter was an affidavit signed by former Bechtel Nevada employee Nick Fiore, a copy of a one-page document concerning Bechtel Nevada's August 12, 2004 refusal to employ Mr. Fuller, and a copy of four pages from the transcript of a deposition of Mr. Koscik.

There is no indication in Bechtel Nevada's August 11 letter or in any subsequent submission that Bechtel Nevada has provided the Complainants with full, specific responses to Requests for Admission numbers 12, 13, 15, 16, 36-38, 40, 42, 44, 46 and 47, Complainant Fuller's Interrogatories numbers 13-17, 19, Complainant Dann's Interrogatories 24 and 25, or Complainant Koscik's Interrogatories 4, 16, and 20. Likewise, there has been no indication that Bechtel Nevada has prepared a privilege log concerning information withheld as privileged. Indeed, the only reference to a privilege log in Bechtel Nevada's letter is an assertion that such a log is unnecessary concerning information obtained from Mr. Fiore because "all underlying facts have been disclosed."

On August 17, 2005, the counsel for the Complainants filed a motion seeking the imposition of sanctions against Bechtel Nevada due to its continued refusal to provide full responses to the Complainants' discovery requests. Among other things, the motion contended that "Bechtel Nevada has concocted its own discovery rules wherein it refuses to respond to the discovery prompts provided, but instead provides affidavits from various employees within its

[1] The requests to re-open discovery and to compel the Complainants to take the depositions of Mr. Young and Ms. Seymon have been denied in a separate order.

own company to self-servingly attest to Bechtel Nevada's sole defense in this action." The motion also characterized Bechtel Nevada's August 11 letter as having "the audacity to question the Court's order, going so far as to demand that the Court provide Bechtel Nevada an explanation regarding 'what basis such a conclusion was reached' in regards to the Court's order." According to the Complainants' motion, the August 11 letter and Bechtel Nevada's previous refusals to comply with discovery orders have "made a mockery of the Court, this forum and of the judicial process." The Complainants therefore requested that sanctions be imposed against Bechtel Nevada pursuant to the rule of procedure set forth at 29 C.F.R. §18.6(d). That rule provides, *inter alia*, that if a party to a proceeding before the Office of Administrative Law Judges refuses to comply with an order compelling responses to interrogatories, requests for admissions, or any other order of an Administrative Law Judge, the Administrative Law Judge may "for the purposes of permitting resolution of the relevant issues and the disposition of the proceeding without unnecessary delay despite such failure" impose such sanctions as are "just." Examples of such sanctions include, but are not limited to, the making of inferences adverse to the non-complying party and the issuance of rulings that for the purposes of a proceeding the "matter or matters concerning which the order or subpoena was issued be taken as established adversely to the non-complying party." 29 C.F.R. §18.6(d)(2)(i), (ii).

A letter responding to the Complainants' motion was received from Bechtel Nevada on August 18, 2005. In the response, Bechtel Nevada contended that sanctions should not be imposed because the Complainants had "failed to respond to Bechtel Nevada's invitation to conduct further discovery" and had failed to either informally contact the counsel for Bechtel Nevada or file a second motion to compel discovery responses. As support for this argument, the letter cited various district court decisions that purportedly hold that sanctions should not be imposed in circumstances where a party has failed to make informal attempts to resolve a dispute before seeking sanctions. The letter also asserted that "Bechtel Nevada possesses no other information responsive to Complainants' discovery requests."

Following receipt of Bechtel Nevada's August 18, 2005 letter, further review has been given to its responses to the discovery requests that Bechtel Nevada was directed to fully answer by August 15, 2005. Such further review indicated that the affidavit of Mr. Goodwin was sufficiently responsive to Complainants' Requests for Admissions 13, 15, and 16 and that Bechtel Nevada's responses to Requests for Admissions 38, 40 and 42 are acceptable. However, it has also been determined that Bechtel Nevada's responses to Requests for Admissions 12, 36, 37, 44, 46, and 47 are incomplete and unacceptable. Likewise, it has been concluded that Bechtel Nevada's replies to Complainant Fuller's Interrogatories numbers 13-17, 19, Complainant Dann's Interrogatories 24 and 25, and Complainant Koscik's Interrogatories 4, 16, and 20 continue to be unacceptably incomplete, evasive, or argumentative. Consideration has also been given to arguments and representations that Bechtel Nevada has set forth in other pleadings filed in this case. Examination of these other pleadings indicates that Bechtel Nevada's counsel has all too frequently raised frivolous legal arguments and made factual assertions that are not fully supported by the documents that purportedly substantiate these assertions. For example, Bechtel Nevada has repeatedly advanced the preposterous argument that this proceeding in some way conflicts with the provisions of the National Labor Relations Act. In fact, the judicial decisions that Bechtel Nevada has cited for this proposition are clearly inapplicable to this proceeding. Likewise, Bechtel Nevada has been disingenuous in making the

frequently repeated assertion that the declaration of Mr. Anderson shows that its refusal to allow the Complainants to work at the Nevada Test Site was mandated by a collective bargaining agreement. Although Mr. Anderson's declaration does support some of Bechtel Nevada's assertions, it hardly establishes all the facts that Bechtel Nevada has asserted. Finally, it is noted that Bechtel Nevada is incorrect in asserting that, as a matter of law, the Complainants' failure to file a second motion to compel discovery responses or to informally seek Bechtel Nevada's compliance precludes the issuance of sanctions against Bechtel Nevada. Ironically, one of the decisions on which Bechtel Nevada has based this argument actually holds that sanctions should be imposed in cases where further informal efforts by the party seeking compliance would be "a useless gesture." See *Cuno, Inc. v. Pall Corp*., 116 F.R.D. 279 (E.D. N.Y. 1987). Given Bechtel Nevada's past behavior in this proceeding, it is quite clear that any such additional efforts by the Complainants would have been futile.

It thus appears that Bechtel Nevada has not been acting in good faith and that there has been an intentional effort to deny the Complainants highly relevant information to which they are entitled under the discovery rules. Likewise, it appears that Bechtel Nevada may be intentionally raising frivolous arguments for the purpose of financially and psychologically wearing down the Complainants and the sole practitioner who represents them in this proceeding. Accordingly, it has been determined that sanctions must be imposed on Bechtel Nevada for its failure to comply with the August 9, 2005 Order requiring it to provide full responses to the Complainants' discovery requests. Because many of the discovery requests to which Bechtel Nevada's has refused to fully respond pertain to Bechtel Nevada's motives in barring the Complainants from employment at the Nevada Test Site, it has been determined that the appropriate sanction is to irrebuttably determine for purposes of this proceeding that Bechtel Nevada's actions to bar the Complainants from employment at the Nevada Test Site were motivated at least in part by a intention to retaliate against the Complainants' protected activities, including the Complainants' internal safety complaints and their refusals to sign the affidavits concerning Ron Dollens.

ORDER

As a sanction for Bechtel Nevada's refusal to comply with the August 9, 2005 Order requiring it to provide complete responses to the Complainants' discovery requests, it is hereby irrebuttably determined that Bechtel Nevada's actions to bar the Complainants from employment at the Nevada Test Site were motivated at least in part by an intention to retaliate against the Complainants protected activities, including the Complainants' internal safety complaints and their refusals to sign the affidavits concerning Ron Dollens.

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Paul A. Mapes
Administrative Law Judge