

CCASE:
CONTESTS OF RESPIRABLE
DUST SAMPLE ALTERATION
CITATIONS
DDATE:
19920305
TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, Virginia 22041

IN RE: CONTESTS OF RESPIRABLE
DUST SAMPLE ALTERATION
CITATIONS

Master Docket No. 91-1

ORDER DENYING MOTION TO EXCLUDE EXPERT
WITNESS AND TO IMPOSE THE SANCTIONS
SOUGHT BY THE SECRETARY

ORDER TO U.S. STEEL TO SERVE AMENDED
EXPERT WITNESS REPORT

On February 20, 1992, the Secretary of Labor (Secretary) filed a motion to exclude Andrew McFarland as an expert witness, and to bar U.S. Steel Mining Co., Inc. (U.S. Steel) from participating in expert witness discovery. U.S. Steel filed an opposition to the motion on March 2, 1992.

I

Following a Prehearing Conference on June 19, 1991, I issued a Prehearing Order Adopting Plan and Schedule of Discovery (Discovery Plan) which had been submitted by the Secretary after negotiations with counsel for some of the mine operators. Section II.C. of the Discovery Plan required the Secretary and the other parties to exchange lists of expert witnesses they anticipate using at trial. It also required that the expert witnesses "prepare a written report stating their credentials, all opinions or conclusions to which the expert expects to testify . . . , and a summary of any test, study, results, or evaluations which form the bases for such conclusions or opinions." The Discovery Plan has been amended, most recently on December 3, 1991, (the Fourth Amended Discovery Plan), and the time for exchanging expert witness lists and reports of expert witnesses has been extended, but the language from Section II. C. quoted above has not been changed.

At the Prehearing Conference, counsel for U.S. Steel stated that the Discovery Plan requirement that expert witnesses provide a summary of any tests, studies, results, or evaluations was "a bit burdensome" and was more than required by Rule 26 of the Federal Rules of Civil Procedure. He suggested an amendment to the Discovery Plan to delete the requirement for providing a summary of any tests, etc. After discussion with counsel for the Secretary and U.S. Steel, the requirement was retained. (Prehearing Conf. Tr. 54-57).

II

The Secretary argues that the report of Dr. McFarland submitted by U.S. Steel does not comply with the Discovery Plan in that it fails to state the substance of his opinions and conclusions, and fails to describe "in any detail" the tests he performed, the results of the tests, or his evaluation of those results. Dr. McFarland does not describe the experiments to which he refers in his report, any data related to the experiments, or the results of the experiments. The Secretary argues that U.S. Steel's failure to comply with the Discovery Plan prejudices her case because she is not able to prepare for a deposition of the expert. She contends that U.S. Steel's failure to comply with the order is flagrant and indicative of bad faith. Because of this, she asks for sanctions against U.S. Steel: to exclude Dr. McFarland as an expert witness, to prohibit U.S. Steel from exchanging Dr. McFarland's work with any other party in the case, and to prohibit U.S. Steel from deposing the Secretary's experts.

U.S. Steel contends in its opposition that the four page report submitted by Dr. McFarland contains the opinions and conclusions to which he will testify, and a summary of the experiments conducted under his direction concerning the handling of dust filter cassettes. It asserts that the report complies with the requirements of the Discovery Plan. The opposition also discusses the reports of experts served upon U.S. Steel by the Secretary, although no action is pending before me concerning such reports, only some of which have been filed with me (there is no requirement they be filed).

III

The Discovery Plan mandates an exchange of expert witness lists by the parties so that these witnesses may be deposed during the joint discovery phase of these proceedings. It requires an exchange of the reports of such witnesses to facilitate and expedite the depositions. Although the Plan does not require the reports to include the detail exhibited by some which have been filed with me, it does direct that a summary of any tests, studies, results, or evaluations be furnished. Dr. McFarland's report does not meet this requirement: it does not, in summary or otherwise, state what tests or experiments were performed and what the results of the experiments were. The report is not adequate to facilitate and expedite Dr. McFarland's deposition by the Secretary's counsel. I conclude that it does not comply with Section II. C. of the Discovery Plan.

IV

The fact that U.S. Steel has not fully complied with the Discovery Plan does not in itself show bad faith, and I am not disposed to infer bad faith. The failure to comply is not in my

~525

judgment "flagrant," but it should be remedied. To exclude U.S. Steel's expert from testifying in these proceedings is too drastic a remedy. Although such a sanction would be related to the failure to comply, and would certainly penalize U.S. Steel, it would also penalize the Commission since Dr. McFarland's testimony could be important in resolving the disputed issues. Cases before the Commission are not duels, but attempts to ascertain the truth lying behind factual disputes so that the Commission can apply the provisions of the Mine Act to the facts. To bar U.S. Steel from participating in further expert discovery bears no relation to its failure to comply. I therefore reject the sanctions proposed by the Secretary. U.S. Steel, however, is required to comply with the terms of the Discovery Plan, and I will order it to file with me and serve upon the Secretary, a report from its expert witness, Dr. McFarland, which describes, at least in summary fashion, the tests and experiments which he conducted or directed, the results of such tests and experiments, and his conclusions based upon these tests and experiments.

ORDER

Based upon the above discussion IT IS ORDERED

1. The Secretary's motion to exclude Dr. McFarland as an expert witness is DENIED;
2. The Secretary's motion to bar U.S. Steel from participating in further expert discovery is DENIED;
3. U.S. Steel shall, within 10 days of the date of this order, file with me and serve upon the Secretary a report from its expert witness, which describes the tests and experiments he conducted or directed, the results of such tests and experiments, and his conclusions based thereon.

James A. Broderick
Administrative Law Judge