

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -- )  
 )  
The Minesen Company ) ASBCA Nos. 52488, 52811  
 )  
Under Contract No. NAFBA3-93-C-0001 and )  
Lease No. DACA84-1-91-114 )

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LTC David Newsome, JA  
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OPINION BY ADMINISTRATIVE JUDGE PAUL  
ON APPELLANT’S MOTIONS TO PRECLUDE EVIDENCE

On the eve of the first hearing session held in these appeals, appellant The Minesen Company (Minesen) filed a motion, “to preclude Army presentation of evidence and for adverse evidentiary findings against Army for destruction of documents and failure to comply with discovery requests, discovery rules and Board’s Order.” The motion was fully briefed, and the Board subsequently issued an order holding the motion in abeyance until after the hearing was completed. On the eve of the second hearing session, Minesen filed a motion to preclude presentation of evidence and for adverse evidentiary findings against the Army regarding travellers to Oahu, Hawaii. In a subsequent order, the Board stated, in pertinent part:

Because the Board received the motion just prior to the recently completed second phase of the hearing, it did not have sufficient time to issue a scheduling order. The motion has now been briefed.

The Board held the motion in abeyance to be decided in conjunction with Minesen’s earlier motion. The parties then briefed the second motion as part of their

post-hearing briefs. Total briefing materials encompassed approximately 177 pages, as well as voluminous attachments.

### FACTUAL BACKGROUND

Discovery in these appeals took place over a period of several years and even extended through the interim period between the two hearing sessions. Matters came to a head in December 2000 when Minesen filed a motion to compel relating to two motions for production of documents. Although respondent, the U.S. Army Morale, Welfare and Recreation Fund (Fund), had demonstrated reasonable co-operation in its discovery efforts and although the Board recognized that Minesen's requests were extremely broad, the presiding judge granted appellant's motion to compel out of an abundance of caution. Among the categories of documents which the Board ordered the Fund to produce were statements of nonavailability (SNA's), certificates of nonavailability (CNA's) and room status certificates issued at Fort Shafter, Tripler Army Medical Center, and Schofield Barracks. These were installations located on the island of Oahu, Hawaii. The documents themselves were routinely issued when Government housing was unavailable so that a travelling servicemember could recover the lodging portion of his or her *per diem* allowance. The Board also ordered the Fund to redouble its efforts to produce documents relating to the transfer of one of the three brigades comprising the 25<sup>th</sup> Infantry Division (Light). This division was stationed at Schofield Barracks where Minesen had constructed the Transient Lodging Facility (TLF or Inn) which was the subject of the underlying contract. The Board also ordered the Fund to produce reports to Congress and documents in possession of the Office of the Secretary of the Army relating to the Inn.

In attempting to comply with the Board's Order, the Fund provided Minesen with all available SNA's for servicemembers travelling to the three installations in conjunction with permanent change of station (PCS) moves. With respect to any missing SNA's, the Fund informed Minesen that they had either been lost or destroyed in the middle to later 1990's timeframe. Regarding SNA's for servicemembers on PCS status travelling from the three installations, as well as temporary duty (TDY) travellers to Hawaii, the Fund's paralegals located dozens of boxes containing such documents at the Federal Records Center in Dayton, Ohio. They later provided Minesen with the name and telephone number of Mr. Frank Baldwin, the Government employee who was available to assist their representatives with the document production. Minesen did contact Mr. Baldwin by telephone, but, prior to the first hearing session, it did not make any attempt to review or copy the relevant SNA documents.

Also in response to the Board's Order, the Fund provided all reports to Congress relating to the Inn. In addition, it searched the offices of the Secretary of the Army for documents relating to the transfer of the 1<sup>st</sup> Brigade of the 25<sup>th</sup> Infantry Division (Light)

and changes in the Joint Federal Travel Regulations. The Fund was unable to locate any pertinent documents.

The Fund's efforts notwithstanding, on the eve of the first hearing session, Minesen filed its motion to preclude evidence and for sanctions. In effect, Minesen sought severely to limit the Army's presentation of evidence on the principal issues in these appeals. The gravamen of Minesen's initial motion is that the Fund deliberately destroyed SNA's in anticipation of litigation, that it, likewise, destroyed pre-contract documents in anticipation of litigation, and that it failed to exercise due diligence in searching for other categories of documents requested by Minesen.

In its response to Minesen's initial motion, the Army contends that it has produced all of the pertinent SNA's which it could locate in Hawaii. It also notes that Minesen has been unable to locate even one government witness who destroyed SNA's or related documents. The Fund argues further that, even if low level government employees had destroyed SNA's in the middle to later 1990's timeframe, they would not have done so in anticipation of the litigation that arose with the filing of Minesen's first complaint in December 1999. Finally with respect to the SNA's, the Fund contends that Minesen itself made no effort to locate SNA's for TDY travellers to Hawaii and PCS travellers leaving Oahu even though these documents were made available to it at the Federal Records Center in Dayton, Ohio.

The Fund also argues that it did not destroy precontract documents in anticipation of litigation and that it searched all relevant offices for all categories of documents requested by Minesen.

Once again acting out of an abundance of caution, the Board allowed Minesen to continue its discovery efforts in the interim period between the two hearing sessions. On the eve of the second hearing session, Minesen filed a second, much shorter motion to preclude presentation of evidence and for adverse evidentiary findings against the Army regarding travellers to Oahu, Hawaii. The gravamen of Minesen's second motion was that, during its belated discovery efforts, it had located an electronic database of TDY travellers to Oahu of which it had previously been unaware. It contends that the Fund should have disclosed the existence of this database as part of its discovery efforts and that it should be sanctioned for not doing so. The Fund responds that if it had earlier exercised due diligence, Minesen would have had access to this database. Further, the Fund contends that none of its witnesses had any knowledge of the database.

## DECISION

In its brief on the initial motion, Minesen recognizes the grave nature of its request for sanctions. If the Board were to grant its motions, the Fund would, in effect, be denied the opportunity to defend itself on the principal issue in this litigation.

As the Board stated in *Lockheed Martin Corp.*, ASBCA No. 45719, 99-1 BCA ¶ 30,312 at 149,884, “[f]actors for consideration in the imposition of sanctions include the presence or absence of willfulness, the degree of prejudice to the parties, the delay, burden and expense incurred by the movant, and evidence of compliance with other Board orders.” Here, there is no presence of willfulness. Minesen’s arguments notwithstanding, there is no evidence that government employees destroyed documents in anticipation of litigation. Moreover, Minesen has not demonstrated prejudice. Indeed, its own delay in reviewing travel documents was a principal element in its purported inability to obtain timely discovery. In addition, the Fund would be severely prejudiced if we granted Minesen’s motion for sanctions.\* Finally, there is no evidence that the Fund has not complied with the Board’s orders.

## CONCLUSION

The motions are denied.

Dated: 2 November 2006

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MICHAEL T. PAUL  
Administrative Judge  
Armed Services Board  
of Contract Appeals

(Signatures continued)

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\* With respect to any prejudice relating to the electronic database, the Board notes that TDY travellers comprised only a small segment of prospective customers for the Inn.

I concur

I concur

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MARK N. STEMLER  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

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EUNICE W. THOMAS  
Administrative Judge  
Vice Chairman  
Armed Services Board  
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 52488, 52811, Appeals of The Minesen Company, rendered in conformance with the Board's Charter.

Dated:

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CATHERINE A. STANTON  
Recorder, Armed Services  
Board of Contract Appeals