

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Newhall Telecom, LLC) ASBCA No. 57438
)
Under Contract No. W912CJ-06-D-0001)

APPEARANCE FOR THE APPELLANT: Mr. Joseph F. Girard
President & CEO

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
CPT Nicholes Dembinski, JA
Robert T. Wu, Esq.
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE HARTMAN
ON GOVERNMENT'S MOTION TO DISMISS FOR FAILURE TO PROSECUTE

The Department of the Army moves to dismiss this appeal for lack of prosecution. We grant the motion.

STATEMENT OF FACTS

In April 2006, the Army awarded Contract No. W912CJ-06-D-0001 to appellant, Newhall Telecom, LLC (Newhall) to provide cable television service to Fort Hunter Liggett, California (R4, tabs 1, 30, 31, 33; Complaint (Compl.) ¶¶ 15, 21, Answer ¶¶ 15, 21). On 15 July 2010, the Army's contracting officer (CO) sent Newhall a Demand for Assurance and Notice to Cure stating:

Our office and the Fort Hunter Liggett command have been notified by DirecTV and the US Army CID [Criminal Investigative Division] Command Field Office in Sacramento (In coordination with the United States Attorney's Office in San Jose) that your company...is unlawfully retransmitting DirecTV's signal to Fort Hunter Liggett for cable TV service to the installation.... We have been further informed that DirecTV will stop transmitting signals to the accounts and equipment located on Fort Hunter Liggett and/or disconnect Newhall's accounts signal.... Therefore, there is a good reason to believe that Newhall is not only in violation of Section H-4 of the franchise agreement, but [that] Newhall

will be unable to continue providing...TV service to Fort Hunter Liggett.

Because of the above allegations, and what the direct implications those allegations would mean for continued, uninterrupted cable service to this installation, we require Newhall to provide adequate assurance of its continued performance regardless of DirecTV or any other satellite TV service provider's actions to terminate their service to Newhall.

(R4, tab 82; Compl. ¶¶ 29, 30, Answer ¶¶ 29, 30) After exchanging correspondence with Newhall for several weeks, on 26 August 2010, the CO terminated Newhall's contract for default, stating:

This command has repeatedly over the course of the past forty-five days sought assurance of Newhall's ability to lawfully perform [its] obligations under the subject contract. Your letter, dated August 3, 2010, and your attorney's letters and attachments dated August 20 and 25, 2010, are non-responsive to our request for you to provide evidence of Newhall's continued ability to perform under the contract, and that the services provided by Newhall have been legally obtained and retransmitted. Each non-response constitutes a separate basis for this command to terminate the subject contract with Newhall for default.

(R4, tab 98; Compl. ¶¶ 33, 34, 40, 47, 48, 55, 59, Answer ¶¶ 33, 34, 40, 47, 48, 55, 59)

On 13 September 2010, a DirecTV representative wrote 4COM, Inc., which is in the business of purchasing programming rights from DirecTV and re-selling them to cable TV franchises, such as Newhall, that:

On August 27, 2010, DIRECTV advised you that it was investigating account irregularities in connection to a 4COM transport account servicing Fort Hunter Liggett in Jolon, California (DIRECTV Account No. 19347921). Upon further investigation, and after speaking with 4COM affiliate Newhall Telecom LLC and its owner Joe Girard, DIRECTV has determined that its programming services are being improperly received and used at Fort Hunter Liggett and, for that reason, will terminate all service to the identified transport account effective the close of business on Friday, September 17, 2010. [Emphasis in original]

(R4, tab 105) On the same date, a representative from DirecTV wrote Newhall's counsel that:

Thank you and your client, Joe Girard, for making the time to speak to DIRECTV earlier today. In consideration of the matters discussed, and for the reasons previously outlined, DIRECTV has determined to terminate programming service to the transport account servicing Fort Hunter Liggett and to the six satellite receivers that were relocated from The Forum and installed at Fort Hunter Liggett.

(R4, tab 106)

On 23 November 2010, Newhall filed this appeal, alleging the Army wrongfully and improperly terminated Newhall's contract for default (Compl. ¶¶ 5, 7, 67). On 8 March 2011, the Army filed an answer to the complaint asserting that Newhall was providing DirecTV service to Fort Hunter Liggett in excess of and/or in violation of its agreement with its broker (4COM), Newhall did not provide adequate assurances of its ability to continue to perform its contract or cure its licensing problem, and the Army's concerns were realized when DirecTV terminated Newhall's authority to retransmit to Fort Hunter Liggett (Answer at 23-27).

On 31 March 2011, the Army served its first discovery request which contained requests for document production and interrogatories (Government Motion to Dismiss for Failure to Prosecute (Gov't Mot. Dis.) Exhibit (Ex.) 1). The parties agreed that Newhall could have until 24 June 2011 to respond to the Army's discovery request (*id.*, ex. 2), but entered into discussions to amicably resolve the appeal before Newhall responded to the Army's discovery requests (*id.*, ex. 3). After about a year of settlement discussions with no success, on 3 July 2012, the Army requested that Newhall submit its response to the discovery requests on or before 14 August 2012 (*id.*, ex. 4). The Army also advised the Board settlement discussions had failed and it had requested Newhall respond to its discovery requests (*id.*, ex. 5).

On 20 July 2012, the Army asked Newhall for dates Joseph F. Girard, Newhall's Chief Executive Officer (CEO) and President, would be available for deposition (Gov't Mot. Dis., ex. 6), but was never given such information. About three weeks later, on 10 August 2012, the Army obtained from the Board a subpoena for DirecTV's custodian of records (*id.*, ex. 7). The same day, counsel for Newhall notified the Board and the Army that they were withdrawing as Newhall's counsel in this appeal. In advising the Army and Board of its withdrawal, counsel stated "all future correspondence" regarding the appeal should be directed to "Mr. Joseph F. Girard," Newhall's CEO and President, at a post office box address in King City, CA. (*Id.*, ex. 8)

Board Rule 15 provides 45 days for responding to discovery requests and the Army was expecting Newhall to respond to its discovery request on or before 14 August 2012, but received no responses or any request for additional time to respond (Gov't Mot. Dis. at 5). While Army counsel attempted to reach Mr. Girard via telephone and left a voicemail with information on how to reach counsel, he did not receive any response by 18 September 2012 (*id.* at 5-6). On that date, Army counsel sent to Mr. Girard at the King City address by certified mail a letter explaining the Army was seeking responses to its discovery requests served on Newhall (*id.*, ex. 10). While the letter was signed for by Ms. Rose Ellen Hughes, the Army received no response to its letter (*id.* at 6). During October, Army counsel again attempted to reach Mr. Girard by telephone and left a voicemail for Mr. Girard providing contact information. Counsel, however, received no response to his call and voicemail. (*Id.*)

By letter dated 27 November 2012, the Board ordered the parties to jointly propose three hearing dates, estimate the expected length of a hearing and supply a proposed location if a location other than the Board's offices was desired for a hearing. The Army subsequently advised the Board it had been unable to reach Mr. Girard to discuss the issues that the Board ordered be addressed jointly by the parties.

On 17 January 2013, the Army filed a Motion to Compel responses from Newhall to its discovery requests with this Board and sent the motion to Mr. Girard at the King City, CA address by certified mail (Gov't Mot. Dis., ex. 11). The motion, however, was returned to the Army by the Postal Service in mid-February (*id.*).

During February, Board staff attempted unsuccessfully to reach Mr. Girard by telephone at numbers listed for him and Newhall, left a message asking Mr. Girard to contact the Board, and furnished information on how Mr. Girard could contact the Board. The Board, however, received no response. The Army attempted to reach Mr. Girard by telephone in March of 2013 but received no answer (Gov't Mot. Dis. at 6).

In May 2013, after several attempts, a Board paralegal reached Mr. Girard by telephone, asked Mr. Girard for emails where he could be contacted, and asked if he could participate in a conference call with the assigned administrative judge and opposing counsel. Mr. Girard furnished the paralegal two emails for contacting him, said he would participate in a conference call at 2 p.m. (EDT) on 21 May 2013, and gave the paralegal a telephone number where he could be reached for the call. At the designated time of the call, the number furnished by Mr. Girard simply played a recording that the voicemail box associated with the number was full. When the Board's paralegal attempted to reach him at the first email address he supplied (mark@[email provider]), she received a return message stating "No such user here." When she attempted to reach him at the second email address he supplied (sofakingbad@[email provider]), she received a return message stating "[t]he email account you tried to reach does not exist."

On 24 May 2013, this Board issued a Show Cause Order directing Mr. Girard to file with the Board a response to the Army's Motion to Compel and a document setting forth cause why its appeal should not be dismissed for failure to prosecute. The Board sent its order to Mr. Girard at the King City, CA post office box address by certified mail. The Order was returned to the Board by the Postal Service on 15 July 2013 as "UNCLAIMED" and "UNABLE TO FORWARD." The Postal Service did NOT indicate the Post Office Box to which the letter was sent had been closed by Mr. Girard or anyone else.

On 29 May 2013, the Army filed a motion to dismiss this appeal for failure to prosecute, which it served on Mr. Girard at the King City, CA post office box address. To date, Newhall has not responded to the Army's discovery request, the Board's order regarding scheduling of a hearing, the Army's Motion to Compel, the Board's Show Cause Order, or the Army's Motion to Dismiss for Failure to Prosecute. Further, the Board has received no communication from Mr. Girard or Newhall by mail, phone, or email in response to various efforts to contact Newhall and its representative.

DECISION

Board Rule 31 provides:

Whenever a record discloses the failure of either party to file documents required by these Rules, respond to notices or correspondence from the Board, comply with orders of the Board, or otherwise indicates an intention not to continue the prosecution or defense of an appeal, the Board may, in the case of a default by the appellant, issue an order to show cause why the appeal should not be dismissed.... If good cause is not shown, the Board may take appropriate action.

A Board Order to Show Cause is intended to give a party the opportunity to explain the circumstances surrounding its failure to move its appeal forward before action is taken by this Board with respect to the failures. *Government Therapy Servs., Inc.*, ASBCA No. 53972, 04-2 BCA ¶ 32,774 at 162,063; *Scorpio Piping Co.*, ASBCA No. 34073, 89-2 BCA ¶ 21,813 at 109,764. A dismissal with prejudice for failure to prosecute pursuant to Rule 31 "is a harsh measure operating as an adjudication on the merits, and we employ it sparingly." *Sykes Commc'ns, Inc.*, ASBCA Nos. 53842, 54077, 05-1 BCA ¶ 32,864 at 162,853; *Government Therapy Servs.*, 04-2 BCA ¶ 32,774 at 162,063; *Generator Techs., Inc.*, ASBCA No. 53206, 03-1 BCA ¶ 32,058 at 158,461; *David's Econo-Move, Inc.*, ASBCA Nos. 49105, 49562, 00-1 BCA ¶ 30,621 at 151,156; *Ellis Constr. Co.*, ASBCA No. 50091, 98-1 BCA ¶ 29,552 at 146,501.

In response to the Board's Show Cause Order and inquiries, Newhall has furnished the Board no information regarding its failure to move this appeal forward since Joseph F. Girard became its representative one year ago. We understand that the appellant is now proceeding *pro se*. However, we have held previously that legal counsel, although desirable, is not necessary to answer discovery or otherwise prosecute a Board appeal. *Ellis Constr.*, 98-1 BCA ¶ 29,552 at 146,501; *Airborne Indus., Inc.*, ASBCA No. 45491 *et al.*, 95-1 BCA ¶ 27,496 at 137,032, *aff'd on recon.*, 95-1 BCA ¶ 27,411. Under Board Rule 26, a Board appellant may prosecute its appeal by a company officer, such as Mr. Girard. Moreover, the less stringent standard accorded *pro se* litigants does not allow a Board appellant, such as Newhall, to "disregard" the deadlines set by Board Rules or Orders, communication attempts by Board personnel, or a Show Cause Order. *See, e.g., Brown v. United States*, 22 Cl. Ct. 211, 213 (1990) (more lenient standard for a *pro se* does not allow setting of own deadlines and fabricating own rules; "latitude" does not equal "free rein"), *aff'd*, 935 F.2d 280 (Fed. Cir. 1991) (table).

We have examined the entire record here and there is no evidence that Newhall has been "unable" to comply with the Board's Orders or Rules. Rather, there simply exists an unexplained refusal by Newhall to do anything to advance the appeal since Mr. Girard became its representative. The record here demonstrates the appellant's intent to abandon prosecution of this appeal through its failure to respond to the Army's requests for discovery, file a status report, respond to Army motions, and comply with the Board's orders discussed above. *See, e.g., Ellis Constr.*, 98-1 BCA ¶ 29,552 at 146,500-01. Mr. Girard's furnishing to a Board paralegal of "non-existent" email addresses and a telephone number that promptly went to a full voicemail message box precluding conduct of a conference call set by the Board shows Newhall does not plan to pursue its challenge to the contract default termination. *See Batalas Indus., Inc.*, ASBCA No. 44071, 98-1 BCA ¶ 29,456 (appeal dismissed for failure to prosecute where no address for appellant, representative failed to communicate with Board, and appellant did not respond to order to show cause); *Antonio Iglesias Mateos*, ASBCA No. 42967, 95-2 BCA ¶ 27,681 (appeal dismissed for failure to prosecute where appellant failed to respond to motion to dismiss and show cause order, and Board correspondence returned unopened); *All South Supply, Inc.*, ASBCA Nos. 38996, 39275, 90-2 BCA ¶ 22,931 (appeals dismissed for failure to prosecute where the appellant failed to respond to motion to dismiss, mail was returned, and the appellant failed to notify Board of its whereabouts); *Mac-In-Erny, Inc.*, ASBCA No. 28689, 88-1 BCA ¶ 20,359 (appeal dismissed for failure to prosecute because the appellant disregarded Board correspondence and orders and failed to notify Board of its whereabouts), *aff'd*, 862 F.2d 321 (Fed. Cir. 1988) (table).

In sum, during the past year, the appellant has evidenced a lack of "meaningful effort" to advance resolution of this appeal establishing "a pattern of conduct constituting a failure to prosecute" the appeal. *See Sykes Commc'ns*, 05-1 BCA ¶ 32,864 at 162,853; *Government Therapy Servs.*, 04-2 BCA ¶ 32,774 at 162,063; *Tech-Tron Constructors*,

ASBCA No. 46367, 97-1 BCA ¶ 28,746 at 143,478; *Scorpio Piping*, 89-2 BCA ¶ 21,813 at 109,764. Under the circumstances here, a dismissal with prejudice is appropriate.

CONCLUSION

The government's motion to dismiss for failure to prosecute is granted. The appeal is dismissed with prejudice under Board Rule 31.

Dated: 15 August 2013



TERRENCE S. HARTMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



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

I concur



JOHN J. THRASHER
Administrative Judge
Acting 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 No. 57438, Appeal of Newhall Telecom, LLC, rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals