ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Northrop Grumman Corporation	)	ASBCA Nos. 52178, 52784,
	)	52785, 53699
Under Contract No. N00024-92-C-6300	)	

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OPINION BY ADMINISTRATIVE JUDGE DICUS ON APPELLANT'S MOTION REQUESTING FINDING THAT APPELLANT'S POWDER COATING MANUFACTURING EFFORTS WERE NOT DEFECTIVE

Appellant's motion amounts to a Rule 35 motion to sanction the Navy for destroying evidence ("spoliation"). The specific remedy sought - a finding that the efforts of Northrop Grumman Corporation (Northrop) "on the SQQ-89 Contract related to powder coating paint were not defective" - is tantamount to summary judgment on that issue. Appellant also seeks removal from the Rule 4 file of any powder coating paint-related evidence submitted by the Navy. (App. mot. dated 19 March 2003 at 1) In the alternative, appellant proposes the prohibition of the introduction of evidence by the Navy (Rule 4, expert or otherwise) related to destructive paint testing conducted on the Navy's behalf by Automatic Coatings Limited (ACL). We deny the motion.

FINDINGS OF FACT[*]

The following findings are solely for the purpose of resolving the motion.

1. FY92 transducer tubes in this litigation were delivered by Northrop and accepted by the Navy (SUF, ¶ 1).

2. In July 1997, the Navy alleged that the paint on the Northrop transducer tubes was defective and ordered Northrop to strip and repaint all FY92 transducer tubes at Northrop's expense under the contract's warranty clause (SUF, ¶ 2). ACL was Northrop's painting subcontractor during this phase (Navy resp. at 2).

3. FY92 transducer tubes were stripped and repainted by Northrop or the Navy (SUF, ¶ 3). Northrop obtained a copy of the Morton Powder Coatings test specification on 21 October 1997 (Navy resp., ex. C). According to the Navy, and not denied in Northrop's reply, that specification was used in the testing (Navy resp. at 6).

4. On 28 October 1999, the Navy sent Northrop an expression of intent to file a claim related to the FY92 contract. The Navy sent Northrop a final decision and demand for immediate payment of $7,742,125 on 26 April 2000 (SUF, ¶ 4; app. supp. R4, tab 3481). An appeal was taken which was received by the Board on 22 May 2000 and docketed as ASBCA No. 52785.

5. The Navy entered into a cooperative discovery agreement with Northrop on 20 December 2000, which was adopted by the Board. The Discovery Plan was designed to minimize discovery disputes and permit the parties to obtain essential discovery. The discovery of physical evidence was specifically addressed as follows:

> The parties agree that each party will be provided access to the other's physical evidence relevant to the appeals. Accordingly, each party will produce an inventory of its physical evidence that (i) identifies and describes each item of such evidence; and (ii) identifies the location of such evidence.

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[*] The Navy has not excepted to most of Northrop's Statement of Undisputed Facts (SUF) on a paragraph by paragraph basis. Accordingly, we have cited to the appropriate paragraph number of Northrop's SUF to support our findings. However, the support for Northrop's version of the parties' agreement generally comes from an affidavit of Mr. Richard J. Vacura, Northrop's litigation counsel. As Navy counsel disputes the degree of Northrop's involvement to which the parties agreed, we have reflected this in our findings.

> Reasonable access for examining the evidence will be provided upon request. The physical evidence inventories shall be exchanged by February 12, 2001.

(SUF, ¶ 9; Bd. Order of 21 Dec. 2000; Discovery Plan, ¶ 9)

6. On 2 October 2001, the Navy identified twelve (12) "virgin" FY92 transducers on which no testing had been performed. The Navy said that it intended to subject these tubes to destructive paint testing at ACL, a Canadian manufacturing facility, to develop proof that Northrop had painted the tubes in a defective manner. (SUF, ¶ 9)

7. The Navy agreed to allow Northrop to observe testing and agreed that it would consider performing tests for Northrop based on Northrop's written requests or comments, as the Navy wished to eliminate challenges to the testing based on Northrop's lack of opportunity to be part of the process (app. mot., ex. 8, ¶ 3).

8. Northrop accepted the Navy's offer. The Navy stated that it intended to perform the paint testing at ACL in the coming months. The Navy assured Northrop that it would let Northrop know more as details became available (SUF, ¶ 11).

9. On 6 November 2001, the Navy again discussed with Northrop its proposed testing of the existing intact transducers at ACL. At the time, Northrop reaffirmed that it was fully ready to participate with regard to the Navy's destructive paint testing. The Navy also offered to allow Northrop the opportunity to review and comment on the draft Statement of Work for the paint testing, an offer that Northrop accepted. (SUF, ¶ 12)

10. On 8 November 2001, the Navy provided its proposed Statement of Work for paint testing to Northrop and requested that Northrop return its comments by 14 November 2001. Northrop notified the Navy the same day that it needed "copies of the referenced test spec[ifications]" in the Statement of Work in order to "eliminate miscommunication over what the test requires." (SUF, ¶ 13)

11. Telephone discussions regarding the proposed testing followed. During these discussions, Northrop renewed its request for "the test specifications and standards referenced in the [Statement of Work]." The Navy, at all times, agreed it would provide the requested materials. (SUF, ¶ 14)

12. By its letter to the Navy dated 11 December 2001, in which Northrop referenced the earlier e-mail and telephone discussions regarding the Navy's proposed paint testing at ACL, Northrop emphasized to the Navy that it could only "complete its review of the Navy's proposed Statement of Work . . . for the contemplated paint testing of the SQQ-89 transducers after Northrop Grumman ha[d] received the applicable test specifications and standards." Northrop also emphasized that "[w]e look forward to reviewing the

applicable test specifications and standards and providing comments on the proposed SOW as soon as the requested information is provided by the Navy." (SUF, ¶ 15)

13. Over the next several months, Northrop reminded the Navy of the outstanding request for the test specifications and standards. Each time, the Navy expressed surprise that Northrop had not received that information. The Navy consistently advised Northrop that it would have to "check with its people" to obtain that information. The Navy never produced the test specifications and standards. (SUF, ¶ 16)

14. Without notice to Northrop, the Navy began some testing at ACL in February 2002. The Navy's Statement of Work to ACL for this testing is dated 28 November 2001. (SUF, ¶ 18)

15. During a discovery conference call with the Navy in April 2002, Northrop again inquired as to the status of its outstanding request for the Navy's proposed Statement of Work specification and standards. The Navy replied that its paint testing at ACL was "underway." (SUF, ¶ 19)

16. The Navy sent a 26 September 2002 letter to Northrop in which it attached a Statement of Work for testing. The letter informed Northrop that ACL had been testing the surface coating of the tube assemblies, that it intended to remove the coating from 39 tube assemblies commencing 15 October 2002, and offered Northrop the opportunity to view the assemblies before paint was stripped. Northrop was asked to inform the Navy of its interest at Northrop's earliest convenience and stated "[i]f Northrop Grumman is not interested in viewing the tube assemblies ACL is prepared to begin stripping sooner than October 15, 2002." (Navy resp., ex. A at 2)

17. The Navy advised Northrop in October 2002 that it could not actively participate in the testing. Instead, the Navy would allow Northrop to view the "stripped transducer tubes," which already had been tested by the Navy and from which the paint had been mechanically or chemically stripped from the metal. (SUF, ¶ 20; app. mot., ex. 8, ¶ 14)

18. The Navy only allowed Northrop to see what remained of the transducer tubes it subjected to destructive testing in Canada. This inspection occurred on 9-10 January 2003. The Navy produced the ACL test results on 24 January 2003, with its expert report. (SUF, ¶ 22)

19. According to Northrop, in agreeing to participate in the Navy testing, it intended to test the intact transducers in strict accordance with established industry or Federal standards, *i.e.*, American Society for Testing Materials ("ASTM") protocols and methods, which differed from the methods and protocols employed by the Navy. According to Northrop it expected that proper testing would assist in proving that the FY92 transducers were properly manufactured. (SUF, ¶ 24)

20. According to Northrop, if negotiations with the Navy over test methods and protocols failed, Northrop "would have requested relief from the Board in the form of a preservation order or order dividing the remaining intact transducers between the Navy and Northrop." Because of the Navy's offer, Northrop Grumman had no reason to do so. (App. mot., ex. 8 at ¶ 10)

21. Northrop requested the opportunity to test any remaining transducer tubes in September and October 2002. The Navy promised to check, but no transducer tubes were ever produced for Northrop to test. (App. mot., ex. 8, ¶¶ 15, 16)

22. The Navy has submitted an affidavit dated 13 May 2003 stating that it has 12 "unaltered and untested" transducers in its possession (Navy resp., ex. B, ¶¶ 3-7). It also states that destructive testing was done on transducer tube assemblies that had been "autopsie[d]," which we take to mean previously disassembled in an attempt to ascertain the cause or causes of failure (*id.*, ¶ 3).

23. Northrop has had access to and has done testing on transducers with regard to the failure analysis (R4, tab 2344 at 5).

DECISION

Northrop does not make a compelling case for sanctionable spoliation. Sanctions have been found appropriate "if there is a showing of willfulness, bad faith, or fault on the part of the sanctioned party." *West v. Goodyear Tire & Rubber Company*, 167 F.3d 776, 779 (2d Cir. 1999). A discovery order need not be in place, as trial forums have the inherent power to control litigation, and the trial forum has broad discretion in imposing sanctions for spoliation. "The sanction should be designed to: (1) deter parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore 'the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party' [citations omitted]." *Id.* However, before a sanction may be imposed for spoliation, there must be a finding that the destruction prejudiced the opposing party. *Dillon v. Nissan Motor Co.*, 986 F.2d 263, 267 (8th Cir. 1993).

Where a party destroyed physical evidence at the heart of the parties' dispute after conducting its own tests, and the opposing party was thereby denied the opportunity to conduct its own tests on that physical evidence, prejudice has been found. "Perhaps that [destroyed] evidence was an irreplaceable part of GM's defense . . . . Then again, perhaps not. But therein lies the prejudice—GM was denied any opportunity to find out one way or the other." *Marrocco v. General Motors Corp.*, 966 F.2d 220, 223 (7th Cir. 1992).

For the destruction of evidence to be sanctionable, there must also be bad faith, willfulness or fault. *West v. Goodyear Tire & Rubber Co., supra.* Appellant argues that the Navy willfully destroyed the transducers. We believe it is beyond dispute that the Navy would have known that the tests were destructive in that once the paint was removed from the transducer tube assemblies it was gone forever. The Navy does not contend otherwise. We think this is enough to establish that the removal of the paint in the testing process was willful. *Webster's II New Riverside University Dictionary, s.v.* "willful." However, finding prejudice is a more difficult proposition, because denial of the opportunity for testing has not been shown. *Cf. Marrocco v. General Motors Corp., supra.*

The discovery agreement adopted by the Board did not address physical testing, although it did permit access to both parties' inventories of physical evidence (finding 5). The agreement that evolved covering the ACL tests, according to Northrop, was to permit Northrop to comment on the test standards and to participate in the testing. *See, e.g.*, SUF ¶¶ 10, 21. The Navy denies that the agreement contemplated Northrop's participation. It is undisputed, however, that the Navy did not allow Northrop to actively participate in the testing (finding 17). As we read Mr. Vacura's declaration, the extent of Northrop's involvement was to observe testing and submit, for the Navy's consideration, suggested tests (finding 7). Northrop was not, therefore, assured that the tests or the test standards it wanted would be part of the testing process. Northrop asserts that, had its negotiations with the Navy over test methods and protocols failed, it would have petitioned the Board for a preservation order "or order dividing the remaining intact transducers . . ." (finding 20). We think this latter point defines the prejudice, if any, to Northrop.

Under the established facts, we conclude that sanctionable spoliation did not occur because, *inter alia*, the Navy has submitted an affidavit to establish that 12 transducers are in its possession. Moreover, Northrop did its own failure analysis (finding 23) and the motion is not supported by an affidavit or technical evidence to establish why the testing it did was inadequate. Additionally, as manufacturer and, particularly, as remanufacturer of the transducers (findings 1-3), we think it reasonable to infer that Northrop had access to FY92 transducer assemblies for relevant testing. Accordingly, we think this is a discovery dispute and all of the sanctions requested are inappropriate. The motion is denied. Discovery aspects will be handled in a separate order.

Dated: 12 June 2003

CARROLL C. DICUS, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

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. 52178, 52784, 52785, 53699, Appeals of Northrop Grumman Corporation, rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals