

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,)	
)	
Complainant)	
)	
v.)	Docket No. 08-1104
)	
IMPERIAL SUGAR COMPANY;)	
IMPERIAL-SAVANNAH, L.P.,)	
)	
Respondents.)	
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RESPONDENTS' RESPONSE TO COMPLAINANTS' MOTION TO COMPEL

Respondents Imperial Sugar Company and Imperial-Savannah, L.P. (collectively "Imperial") respond to Complainant's Motion to Compel Responses to Interrogatories and Requests for Production of Documents, stating the following:

I. INTRODUCTION.

Complainant's motion seeks to compel Imperial to do three things: (1) identify the specific discovery requests to which documents previously produced to Complainant during the OSHA investigation (in response to Complainant's six investigative subpoenas) are responsive; (2) identify all "persons with knowledge" regarding the various subject areas described in Complainant's interrogatories; and (3) produce documents to which Complainant was already provided unlimited hands-on access to, but did not request copies of, during the OSHA investigation.

Imperial disagrees with Complainant's contention that she has, in good faith, conferred with counsel for Imperial in an effort to secure, without Commission action, the information and material described in her motion. In fact, Imperial is surprised by Complainant's filing of this motion. The written communications attached to Complainant's motion demonstrate that the

parties have been in continuous communication about discovery issues, that Imperial has worked diligently to respond to the extremely ambitious discovery requests served by Complainant, and that Imperial has *already agreed* to comply with the three demands described in Complainant’s motion. In fact, by letter on April 24, 2009, Imperial clearly spelled out its plan to comply with all three of these demands. (*See Exhibit A to Complainant’s Motion to Compel* (hereinafter “MTC”).)

Imperial does concede that it initially hoped to supplement its discovery responses by early May 2009 (for demands 1 and 2) and late May (for demand 3), and that it was unable to do so until early June.¹ Unfortunately, given the extraordinary number of subject matters at stake in this litigation, as well as the vast amount of relevant information accumulated during the investigation and throughout the litigation, the efforts required to respond to discovery requests have taken much more time than either party would prefer. Imperial has, however, diligently worked toward providing Complainant the information she has requested. Yet, prior to filing her Motion to Compel, Complainant raised *no* concern to Imperial about Imperial’s short delay in complying with these three demands. Just as Imperial recently granted Complainant a 45-day extension to respond to its discovery requests, Imperial would have expected the same cooperation from Complainant.

In any event, as explained below, Imperial has already complied with all three of Complainant’s demands in her Motion to Compel, and thus the motion is moot. Imperial regrets that the Commission has had to become involved in these issues that were, we believe, already resolved among the parties’ counsel.

¹ It should be noted that the time for Imperial to comply with Complainant’s demands following its April 24 letter—about 45 days—is the same amount of time Imperial recently granted Complainant as an extension of time in order to respond to Imperial’s second discovery requests.

II. BACKGROUND.

As the Commission is aware, Complainant conducted lengthy and comprehensive investigations at Imperial's facilities in Port Wentworth, Georgia and Gramercy, Louisiana. Each investigation lasted over four (4) months. Over twenty (20) OSHA officials were directly involved in the investigations. Throughout the investigations, OSHA conducted numerous walk-around inspections, employee interviews, consultant visits, and reviews of Imperial's documentary records. OSHA conducted over 200 interviews of Imperial employees, former employees, and contractors—and some of these interviews were repeated two or three times. OSHA also conducted thirteen (13) sworn interviews (via deposition) of company managers and corporate personnel—including Imperial's Chief Executive Officer, Senior Vice President of Human Resources, Vice President of Operations, Vice President of Sugar Technology, Risk Manager, and Corporate Safety Director. OSHA investigators had virtually unlimited access to both facilities and the equipment within those facilities—including the damaged areas at the Port Wentworth site. OSHA took over 1,000 photographs of relevant facilities and equipment.

Meanwhile, Complainant propounded six subpoenas *duces tecum* containing 160 separate requests for documents (some containing multiple subparts). During the investigation, Imperial provided to Complainant over 30,000 pages of documents in response to these requests. In addition, throughout the investigation, Imperial provided OSHA with virtually unlimited access to various repositories of historical records that were responsive to the subpoenas. By agreement reached between Complainant and Imperial, OSHA's several investigators at the Port Wentworth site were permitted, at any time they requested over the course of their four-month investigation, to comb through several thousand pages of company records—including company correspondence, engineering diagrams, construction plans, specifications lists, contract records, equipment manuals, etc.

Imperial expended an extraordinary amount of time, effort, and money responding to OSHA's numerous demands for documents and other information, coordinating and defending witness interviews, and otherwise supporting OSHA's comprehensive investigations. Thus, to the extent that Complainant's current discovery requests in this litigation require Imperial to repeat these efforts, Imperial's position has been that such a requirement would impose an unreasonable burden on Imperial and would waste the resources of both Imperial and the U.S. Government.² Accordingly, Imperial has generally objected to discovery requests seeking information or documents that are duplicative of or redundant to the information or documents it already produced or provided access to throughout Complainant's comprehensive investigations.

Nevertheless, Imperial has worked with Complainant to come to an agreement regarding the types of discovery that are necessary and reasonable in this case. Thus far, the parties have worked through these issues, *including* the issues now addressed in Complainant's motion.³

III. RESPONSE TO COMPLAINANT'S ARGUMENT

A. Interrogatories.

1. **Complainant's Demand that Imperial Specify the Discovery Requests to Which Documents Previously Produced During the OSHA Investigation Are Responsive.**

Complainant argues that, where Imperial has elected to rely on FRCP 33(d) and has referred to documents in response to particular interrogatories in lieu of providing written

² One reason Imperial cooperated so fully with Complainant's investigations and at so much expense was so that Imperial would not have to repeat the entire process in subsequent litigation.

³ It should also be noted that Complainant has incorrectly characterized the amount of document production Imperial has provided to date in this litigation. Complainant states that, since receiving her discovery requests in December 2008, Imperial has produced only 303 pages of responsive documents relating to its former Vice President of Operations, Graham H. Graham. (Complainant's MTC at 7.) It is not clear how Complainant has come to this conclusion. In fact, since January 2009 (and before Complainant filed her MTC), Imperial has made eight (8) separate document productions directly responsive to her discovery requests, with a total page count of 9,687. In addition, Imperial has indicated to Complainant on several occasions in recent months that it was diligently working on a large production of responsive documents (*see* Exhibit A to Complainant's MTC), and on June 12 it produced 63,113 pages of documents directly responsive to her requests.

responses, it must describe the documents that contain responsive information in “sufficient detail” to enable Complainant to locate such documents. (Complainant’s MTC at 9.) Thus, with respect to the over 30,000 pages of documents Imperial previously produced during the OSHA investigation (in response to Complainant’s 160 subpoena requests), Complainant contends that Imperial must now re-visit those documents and identify which interrogatory or production request each document is responsive to, and identify each such document by Bates label.

Imperial has objected to this demand, pursuant to 29 C.F.R. § 2200.52(c), on grounds that (1) it is “unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive”; (2) Complainant has “had ample opportunity to obtain the information sought” by other means; and (3) the request is “unduly burdensome or expensive.” First, requiring Imperial to provide information or documents that are duplicative of or redundant to the information or documents it already produced during Complainant’s comprehensive investigation and in response to Complainant’s six subpoenas *duces tecum* is “unreasonably cumulative and duplicative.” Second, Complainant “had ample opportunity to obtain the information sought” (having had no limit on the number of subpoenas issued or other investigative authority). Finally, these requests are “unduly burdensome or expensive”—Imperial is being asked to entirely repeat its review of documents it already produced to Complainant in response to very similar requests set forth in Complainant’s six subpoenas.

Despite these valid objections, and in the interest of cooperative discovery, Imperial has already agreed to review its previous productions and identify the specific document requests and interrogatories to which each previously produced document is responsive. (See Exhibit A

to Complainant's MTC, Letter Dated April 24, 2009.)

Imperial counsel initially believed this process would be completed by early May 2009. Unfortunately, the process was extraordinarily time consuming and was not completed until June 3, 2009, at which time the information was immediately provided to Complainant. (See Exhibit 1, Imperial Letter Dated June 3, 2009). Accordingly, Imperial has complied with these requests, and this portion of Complainant's motion is moot.

2. Complainant's Request that Imperial Identify all Persons with Knowledge Regarding the Subject Areas Identified in Complainant's Interrogatories.

Complainant's Motion also seeks to have Imperial identify all "persons with knowledge of the facts" pertaining to several different subject areas addressed in various interrogatories. As noted by Complainant, Imperial initially provided a list (Appendix A of its Responses to Complainant's First Interrogatories) of persons who may have knowledge of facts responsive to the various interrogatories. Unsatisfied, Complainant demanded that Imperial specifically identify all persons who have knowledge of the facts sought in each interrogatory.

Imperial objected to Complainant's demand on several grounds, including the fact that such request is unduly burdensome and duplicative.⁴ During the course of its six-month comprehensive investigation, Complainant interviewed (or had the unrestricted opportunity to interview) every single one of Imperial's employees and any other persons with knowledge of the facts related to this litigation, presumably in order to obtain the very information now sought in the interrogatories. Thus, Complainant has had "ample opportunity to obtain the information

⁴ It should be noted that Complainant attempts to minimize the burden of this request in her Footnote 1, where she provides abbreviated summaries of the subject areas addressed in particular interrogatories. Complainant fails to acknowledge that certain of the interrogatories encompass multiple sub-categories of information. For example, Interrogatory No. 21 alone seeks information relating thirty-two (32) separate citation items, covering such diverse subjects as fall hazards, fixed ladders, man-lifts, portable fire extinguishers, machine guarding, wiring, electrical equipment and disconnects, electrical equipment labeling, signage, electrical exposure, lead exposure, Marine Dock violations, and others.

sought” by other means. 29 C.F.R. § 2200.52(c).

Despite these valid objections, and in the interest of cooperative discovery, Imperial has already agreed to develop a list of those employees and other persons it presently knows to have knowledge regarding the subject areas identified in the interrogatories. (*See* Exhibit A to Complainant’s MTC, Letter Dated April 24, 2009.)

Imperial counsel initially believed this process would be completed by early May. Unfortunately, the process was extraordinarily time consuming and was not completed until June 12, 2009, at which time the information was immediately provided to Complainant. (*See* Exhibit 2, Imperial Letter Dated June 12, 2009). Accordingly, Imperial has complied with these requests, and this portion of Complainant’s motion is moot.

B. Requests for Production of Documents.

Complainant’s Motion to Compel also seeks to have Imperial produce documents to which Complainant was already provided unlimited hands-on access to, but did not request copies of, during the OSHA investigation. (Complainant’s MTC at 12.)⁵ Complainant contends that, even if she had unlimited access to certain documents during the investigation but elected not to request copies of said documents, Imperial is now obligated to go back and review those documents and determine whether any of them are now responsive to her discovery requests.

(*Id.*)

Pursuant to 29 C.F.R. § 2200.52(c), Imperial has objected to providing documents that are duplicative of the documents it already produced or provided access to throughout Complainant’s comprehensive investigation and in response to Complainant’s six subpoenas.

⁵ Complainant also complains that, with regard to the more than 30,000 pages of documents produced during the OSHA investigation, Imperial has “failed to identify what documents they believe are responsive to each request.” (Complainant’s MTC at 12.) This part of Complainant’s motion has already been addressed above in Part II.A.

Throughout the investigation, Imperial provided OSHA with virtually unlimited access to various repositories of historical records (by some estimates, *several hundred thousand pages*) that were responsive to the subpoenas and may now be responsive to many of the current discovery requests. By agreement reached between Complainant and Imperial, OSHA's several investigators were permitted, at any time they requested over the course of their four-month investigation, to comb these repositories—which included company correspondence, engineering diagrams, construction plans, specifications lists, contract records, equipment manuals, etc. In this process, Imperial expended an extraordinary amount of time, effort, and money facilitating the document reviews, responding to OSHA's demands for the documents they identified, and copying and producing the documents. Despite these efforts during OSHA's four-month investigation, Complainant now demands that Imperial return to these repositories and repeat what OSHA has already done.

Despite these valid objections, and in the interest of cooperative discovery, Imperial has already agreed to re-visit the various repositories of documents (again, all of which were *previously accessible to OSHA*) and review the documents for responsiveness to Complainant's current document requests. (*See Exhibit A to Complainant's MTC, Letter Dated April 24, 2009.*) In this process, Imperial has identified and collected several thousand pages of additional responsive documents which Complainant did have access to, but elected not to request copies of, during the investigation.

Imperial counsel initially believed this process would be completed by late May. Unfortunately, the process was extraordinarily time consuming and was not completed until June 9, 2009 (*see Exhibit 3, Imperial Letter Dated June 9, 2009*) and the responsive documents were ultimately provided to Complainant on June 12, 2009 (*see Exhibit 4, Imperial Letter Dated June*

11, 2009). Accordingly, Imperial has complied with this request, and this portion of Complainant's motion is moot.

IV. CONCLUSION.

As noted above, discovery in this case is not like in a typical case before the Commission. The demands on both sides are extraordinary. Both sides are working diligently to move the case forward through the discovery process, and progress is being made. Imperial believes that the demands described in Complainant's Motion to Compel have already been worked out among the parties, and it regrets that the Commission has had to become involved in these matters. Imperial will continue to work toward resolving such issues in the future without the Commission's intervention.

For the foregoing reasons, Imperial respectfully requests that the Commission deny Complainant's Motion to Compel in its entirety.

Respectfully submitted this 15th day of June 2009.

/s/ Matthew J. Gilligan
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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,)
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Complainant)
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v.)
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IMPERIAL SUGAR COMPANY;)
IMPERIAL-SAVANNAH, L.P.)
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Respondents.)
_____)

Docket No. 08-1104

CERTIFICATE OF SERVICE

I certify that all parties have consented that all papers required to be served in this action may be served and filed electronically. I further certify that a copy of RESPONDENTS' RESPONSE TO COMPLAINANT'S MOTION TO COMPEL RESPONSES TO DISCOVERY was electronically served on June 15, 2009 on the following counsel for Complainant:

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Office of the Solicitor
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61 Forsyth Street S.W.
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/s/ Matthew J. Gilligan
Matthew J. Gilligan
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EXHIBIT 1

(to Imperial's Response to
Complainant's Motion to Compel)

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June 3, 2009

Via Email

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61 Forsyth Street, SW
Room 7T10
Atlanta, Georgia 30303

Re: *Secretary of Labor v. Imperial Sugar Company, et al.*, Docket No. 08-1104: Supplemental Response to Letter Dated April 17, 2009

Dear Karen:

This letter supplements my previous response to your letter dated April 17, 2009, regarding Imperial's responses to Complainant's discovery requests.

As you may recall, with respect to documents Imperial previously produced to Complainant during the OSHA investigation, you contend that Imperial must now identify which interrogatory or production request each document is responsive to, and identify each such document by Bates label. I indicated in my previous response that, in the interest of cooperative discovery, Imperial would review its previous productions and identify specific requests to which each previously produced document or collection of documents is responsive.

Enclosed you will find a chart that provides the requested information. This has been an extraordinarily time-consuming process, so I apologize for the delay in getting this to you. For each request for which we have agreed to produce responsive documents, we have listed all documents (by Bates label) which we believe are responsive to the request.

For the record, although it has now complied with your request, Imperial still maintains its objections to this request, as set forth in my April 24 letter. In addition, discovery is ongoing, and Imperial reserves the right to change, amend, or supplement these determinations in the event it learns new information contrary to or in addition to the information provided here.

Karen E. Mock, Esq.
June 3, 2009
Page 2

Thank you for your continued cooperation in working through the discovery process in this matter. Please let me know if you have any questions regarding the above.

Sincerely,

/s/ Matthew J. Gilligan

Matthew J. Gilligan

MJG:mjg

Enclosure

cc : Angela Donaldson, Esq.
Charles H. Morgan, Esq.
Ashley D. Brightwell, Esq.
Jeremy Tucker, Esq.

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EXHIBIT 2

(to Imperial's Response to
Complainant's Motion to Compel)

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June 12, 2009

Via Email

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61 Forsyth Street, SW
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Atlanta, Georgia 30303

Re: *Secretary of Labor v. Imperial Sugar Company, et al.*, Docket No. 08-1104: Third Supplemental Response to Letter Dated April 17, 2009

Dear Karen:

This letter supplements my previous response to your letter dated April 17, 2009, regarding Imperial's responses to Complainant's discovery requests.

As you may recall, Imperial has taken the position that it need not identify, in response to Complainant's interrogatories, "all persons with knowledge of the facts" related to particular subjects. I nevertheless indicated in my previous response (on April 24) that, in the interest of cooperative discovery, Imperial would develop a list of those employees it presently knows to have knowledge regarding the subject areas identified in specific interrogatories.

Accordingly, I have enclosed the list we have compiled. This has been a very time-consuming process, so I apologize for our delay in getting this information to you.

For the record, although it has now complied with these requests, Imperial still maintains its objections to the requests, as set forth in my April 24 letter. In addition, discovery is ongoing, and Imperial reserves the right to change, amend, or supplement its responses to Complainant's discovery requests in the event new information becomes available.

Thank you for your continued cooperation in working through the discovery process in this matter. Please let me know if you have any questions regarding the attached.

Karen E. Mock, Esq.
June 12, 2009
Page 2

Sincerely,

/s/ Matthew J. Gilligan

Matthew J. Gilligan

MJG:mjg
Enclosure

cc : Angela Donaldson, Esq.
Charles H. Morgan, Esq.
Ashley D. Brightwell, Esq.
Jeremy Tucker, Esq.

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EXHIBIT 3

(to Imperial's Response to
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June 9, 2009

Via Email

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Re: *Secretary of Labor v. Imperial Sugar Company, et al.*, Docket No. 08-1104: Second Supplemental Response to Letter Dated April 17, 2009

Dear Karen:

This letter supplements my previous response to your letter dated April 17, 2009, regarding Imperial's responses to Complainant's discovery requests.

As you may recall, Imperial has taken the position that it need not produce documents that Complainant elected not to request and obtain from Imperial despite having unlimited access to such documents during its investigation.¹ I indicated in my previous response that, in the interest of cooperative discovery, Imperial would re-visit these repositories of documents (all of which were previously accessible to OSHA) and collect documents responsive to Complainant's current discovery requests.

We collected several thousand pages of additional documents, all of which are being produced this week. This has been an extraordinarily time-consuming process, so I apologize for our delay in getting these documents to you.

For the record, although it has now complied with your request, Imperial still maintains its objections to this request, as set forth in my April 24 letter. In addition, discovery is ongoing,

¹ As you know, by agreement reached between Complainant and Imperial, OSHA's investigators were permitted, at any time they requested over the course of their six-month investigation, to comb through thousands of pages of historical company records—including company correspondence, engineering diagrams, construction plans, specifications lists, contract records, equipment manuals, etc. Imperial expended an extraordinary amount of time, effort, and money facilitating these document reviews, responding to OSHA's demands for the documents they identified, and copying and producing the documents.

Karen E. Mock, Esq.
June 9, 2009
Page 2

and Imperial reserves the right to change, amend, or supplement its responses to Complainant's discovery requests in the event new information becomes available. In addition, we are continuing to investigate, review company records, and develop our defenses. To the extent we uncover additional documents that are responsive to Complainant's discovery requests, and which have not already been produced to or otherwise made available to Complainant, such documents will be produced.

Thank you for your continued cooperation in working through the discovery process in this matter. Please let me know if you have any questions regarding the above.

Sincerely,

/s/ Matthew J. Gilligan

Matthew J. Gilligan

MJG:mjg

cc : Angela Donaldson, Esq.
Charles H. Morgan, Esq.
Ashley D. Brightwell, Esq.
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EXHIBIT 4

(to Imperial's Response to
Complainant's Motion to Compel)

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June 11, 2009

Via Email & Hand Delivery

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61 Forsyth Street, SW
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Atlanta, Georgia 30303

Re: *Secretary of Labor v. Imperial Sugar Company et al.*, Docket No. 08-1104: Document Production (IMPERIAL-0009688-IMPERIAL-0072800)

Dear Karen:

Enclosed are two CDs containing documents marked "IMPERIAL-0009688 - IMPERIAL-0038799" and IMPERIAL-0038800 - IMPERIAL-0072800," which are responsive to Complainant's Interrogatories and Requests for Production of Documents.

Also enclosed is a chart identifying the document requests to which each document is responsive.

Finally, I have enclosed Imperial's privilege log for the current production.

Thank you for your continued cooperation in working through the discovery process in this matter. Please let me know if you have any questions regarding the enclosed.

Sincerely,

/s/ Matthew J. Gilligan

Matthew J. Gilligan

MJG:mjg

Enclosures (1-3) (enclosures provided by hand delivery only, on Friday a.m., June 12, 2009)

Karen E. Mock, Esq.

June 11, 2009

Page 2

cc : Angela Donaldson, Esq.
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