

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Dade County Circuit) DOCKET NO. 951270-TI
Court referral of certain issues) ORDER NO. PSC-97-0545-PCO-TI
in Case No. 94-14234-CA-22 (S.H.) ISSUED: May 13, 1997
Dohan & Company, P.A. vs.)
Transcall America, Inc. d/b/a)
ATC Long Distance) that are)
within the Commission's)
jurisdiction.)
_____)

ORDER RESOLVING DISCOVERY MOTIONS

Dohan & Company, P.A., (Dohan) filed this complaint with the Dade County Circuit Court on March 22, 1997, against Transcall America, Inc., d/b/a ATC Long Distance (Transcall) for alleged improper billing. On August 3, 1995, the Court issued I. Order Determining Claim to Be Maintained as Class Action II. Final Order Approving Class Action Settlement III. Order Staying Action and Transferring Same to the Florida Public Service Commission. Therein, the Court stated that Dohan's claims raise issues regarding Transcall's billing system and the application of tariff provisions that are within the specialized expertise and jurisdiction of the Commission. Accordingly, this docket was opened to address the specific issues referred to us. Discovery has ensued and this matter has been set for hearing.

This Order disposes of several pending discovery matters.

Transcall's Motion to Compel Answers to Second Request for Production of Documents and Motion to Compel Answers to Second Set of Interrogatories

On November 8, 1996, Transcall served its Second Interrogatories and Second Request for Production of Documents (PODs) on Dohan. On November 19, 1996, Dohan served its responses. On January 23, 1997, Transcall filed a [Second] Motion to Compel Answers to Transcall's Second Set of Interrogatories and a [Second] Motion to Compel Answers to Transcall's Second Request for Production¹.

¹ Although styled as the Second Motion to Compel Answers to Second Set of Interrogatories and Second Motion to Compel Answers to Second Request for Production of Documents, this is Transcall's first motion to compel with regard to the second round of discovery. Transcall did, however, file motions to compel responses to its first set of interrogatories and PODs. Those motions were granted by Order No. PSC-97-0123-PCO-TI, issued February 3, 1997.

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

On February 4, 1997, Dohan filed its Plaintiff's Agreed Motion for Extension of Time to Respond to Transcall's [Second] Motion to Compel Answers to Interrogatories and Request for Production which was granted by Order No. PSC-97-0171-PCO-TI, issued February 13, 1997. On March 12, 1997, Dohan filed a Response to both Transcall's Second Motion to Compel Answers to Second Set of Interrogatories and Second Motion to Compel Answers to Second Request for Production, along with Supplemental Responses to the interrogatories and PODs. On March 20, 1997, Transcall filed a Renewed Request for Entry of an Order Requiring Dohan to Comply with Pending Discovery. On April 24, 1997, Dohan filed Plaintiff's Supplemental Authority in Opposition to Defendant's Motions to Compel Discovery Regarding Plaintiff's Expert Witness Eric Bott.

Transcall seeks an order compelling Dohan to provide responsive discovery to Transcall's Interrogatories Nos. 27 and 28 and PODs Nos. 8, 9, and 10. Each of these requests seeks either information or documents pertaining to the qualifications and background of Dohan's witness Eric Bott, as well as the basis of his opinions set forth in his testimony.

Dohan argues that it has sufficiently responded to the interrogatories at issue. Furthermore, Dohan argues that Interrogatory No. 28 exceeds the bounds of permissible discovery. Citing Elkins v. Syken, 672 So. 2d 517 (Fla. 1996), Dohan asserts that a party's expert may only be required to identify cases in which the expert actually testified, whether by deposition or at trial. In addition, Dohan argues that Elkins only requires the witness to go back three years in providing such information. As to the pending case, Dohan also argues that the expert may be asked about what he has been hired to do and his compensation. Regarding other cases, however, Dohan asserts that the expert may only be asked to approximate the amount of time he spent working on the case. Dohan argues that under Elkins, the expert does not have to answer questions about how much he makes as an expert or his annual income. Dohan argues that Transcall is seeking just such information. In addition, Dohan has submitted supplemental authority, the recent case of Carrera v. Casas, 22 Fla. L. Weekly D893 (Fla. 3rd DCA 1997). Dohan asserts that this case reinforces the parameters of expert witness discovery established by Elkins and further demonstrates that Transcall's motions to compel should be denied.

Transcall's Motion to Compel answers to its Interrogatory No. 27 and PODs Nos. 8 and 9 to Dohan is granted. The information sought appears relevant to the subject matter of this pending proceeding and reasonably calculated to lead to the discovery of

admissible evidence. As it pertains to POD No. 10, Dohan shall provide any existing documents that are responsive to the request.

With respect to Interrogatory No. 28, Transcall's Motion to Compel is granted, in part. Although I find Elkins v. Syken, 672 So. 2d 517 (Fla. 1996), and Carrera v. Casas, 22 Fla. L. Weekly D893 (Fla. 3rd DCA 1997) persuasive, these cases are not controlling. The facts of both Elkins and Carrera pertain specifically to medical experts. Dohan shall not, however, be required to provide information regarding Mr. Bott's compensation in cases other than this one. Such information is not necessary to determine the witness's probability of bias and does not appear reasonably calculated to lead to the discovery of admissible evidence. Mr. Bott may only be asked to approximate the amount of time he spent working cases other than this one.

Plaintiff's Motion to Compel Discovery from Defendant Transcall and Motion to Compel Answers to Interrogatories

On February 19, 1997, Dohan filed a Motion to Compel Transcall's General Counsel William Anderson to testify as to all facts pertaining to the investigation into this matter, and to compel Transcall to provide all documents it relied upon in conducting its investigation. On March 10, 1997, Dohan filed a supplement to its Motion to Compel Discovery from Transcall wherein Dohan specifically stated the discovery it sought. On March 26, 1997, Dohan filed a Second Supplement to its Motion to Compel Discovery from Transcall. On that same day, Transcall filed its Response to Dohan's Motion to Compel Discovery. On April 10, 1997, Transcall filed a Motion to Strike Plaintiff's Motion to Compel Discovery from Defendant Transcall.

On January 24, 1997, Dohan served interrogatories on Transcall. Transcall served its responses and objections on March 14, 1997. On March 24, 1997, Dohan filed a Motion to Compel Answers to Interrogatories seeking an answer to its Interrogatory number 1. On March 26, 1997, Transcall filed a Response to Dohan's Motion to Compel Answers to Interrogatories. In its Motion to Compel Answers to Interrogatories, Dohan seeks to compel a response only to its Interrogatory No. 1 to Transcall. Dohan's Interrogatory No. 1 is also addressed in Dohan's Motion to Compel Discovery; therefore, I have considered both of Dohan's Motions to Compel together.

In its Motion to Compel Discovery, Dohan asserts that it has been hampered in its ability to discover information regarding

whether Telus² systematically added nine seconds to telephone calls, the mechanics of adding the nine seconds, and the length of time this took place. Dohan argues that its task has been made more difficult because Transcall has no records and because officers and former officers have "collective amnesia." Thus, Dohan seeks an order compelling Transcall's General Counsel Anderson to testify to all facts and circumstances pertaining to Defendant's internal investigation. Specifically, Dohan, in its Supplement to its Motion to Compel Discovery, sets forth three questions asked at Mr. Anderson's January 29, 1997, deposition to which Dohan seeks responses. Dohan also seeks to compel Transcall to produce any documents resulting from Transcall's internal investigation, including the investigative report prepared by Dan Merritt, Dohan's POD No. 1 to Transcall, and all documents relating to when nine seconds were added to customers' bills, Dohan's POD No. 2 to Transcall. Dohan also seeks an order compelling Transcall to respond to Dohan's Interrogatory No. 1 to Transcall which seeks information regarding the period of time over which nine seconds was added to customers' bills.

Dohan further asserts that Transcall has waived any privilege it might assert regarding the internal investigation by voluntarily disclosing the information to a third party. Dohan argues that witness Anderson previously disclosed information about the investigation to a third party, James Holt. Thus, Dohan argues that any privilege attaching to information regarding the investigation was waived. In addition, Dohan asserts that it is not seeking mental impressions or trial strategies of Transcall's counsel. It seeks only information derived from the internal investigation. Dohan also argues that it cannot obtain the requested information any other way, without undue hardship.

Dohan states that if Transcall intends to stand behind its privileges and offer no evidence pertaining to its internal investigation, Dohan will agree to proceed; but, if Transcall intends to rely upon information obtained from its internal investigation in any way, Dohan is entitled to full discovery regarding that investigation. Dohan argues that it would be unfair to allow Transcall to hide behind privilege, yet use information regarding the investigation at trial.

Transcall argues that the information Dohan seeks from Anderson is simply a means of trying to get a response that would result in a waiver of the attorney-client privilege. Transcall

² In 1988, Teltec merged with Long Distance America to form Telus. In approximately 1989, Telus and ATC Long Distance (Transcall) merged.

argues, however, that it has not waived its privileges and that both the attorney-client privilege and the work product privilege attach to the requested information. As for the Motion to Compel responses to Dohan's PODs and Interrogatory No. 1 to Transcall, Transcall asserts that it fully responded to Dohan's requests on March 14, 1997.

In support of its assertions, Transcall states that the protected information that Dohan seeks was communicated only from Dan Merritt to Floyd Self, outside counsel, and William Anderson. The information was transmitted in a memorandum labeled "Confidential" and was prepared at the direction of counsel for Transcall. Transcall asserts that the information was not made available to anyone else. Furthermore, Dan Merritt was instructed not to discuss the information as it was highly confidential. Thus, Transcall argues that the attorney-client privilege and work product privilege apply to information and documents regarding Dan Merritt's report and the information Dohan seeks to elicit from William Anderson.

As for the information requested by Interrogatory No. 1, Transcall argues that the response would require Transcall to adopt the statements made by Signorelli and Resposo. Transcall argues that the interrogatory is, therefore, improper. Furthermore, Transcall argues that it does not have the information necessary to determine the period of time during which nine seconds was added to customers' bills.

On March 27, 1997, Transcall filed the direct testimony of Brian Sulmonetti. Dan Merritt's July 1, 1994, report is attached to Mr. Sulmonetti's testimony as Exhibit BS-1. Thus, Transcall has waived its assertion of confidentiality for the report and Dohan's Motion to Compel, as it pertains to this document, is moot. It is, therefore, unnecessary to rule upon Transcall's Motion to Strike Plaintiff's Motion to Compel.

Transcall shall be required to provide any additional documents pertaining to its internal investigation of the added nine seconds. To the extent that Transcall believes that the attorney-client privilege or work product doctrine attach to any of the compelled documents, Transcall may request an in camera review and ruling upon the documents. Transcall shall also be required to respond to Dohan's POD No. 2 to the same extent.

As Interrogatory No. 1 is currently phrased, Transcall's response to the interrogatory could be construed as adopting the testimony of Signorelli and Resposo. Therefore, Dohan's Motion to

Compel a response to Interrogatory No. 1 is denied, as the interrogatory is written.

Finally, regarding Dohan's request for an order compelling William Anderson to respond to questions asked at his January 29, 1997, deposition, I hereby grant the Motion to Compel only as it relates specifically to information previously disclosed to James Holt and in the July 1, 1994, report produced by Dan Merritt. Any other information relayed between Mr. Anderson and employees or officers of Transcall regarding this matter appears to meet the five-part test set forth in Southern Bell Telephone & Telegraph Co. v. Deason, 632 So. 2d 1377 (Fla. 1994). As such, it is information protected by the attorney/client privilege.

Transcall's First Motion to Compel Answers to Third Set of Interrogatories

On February 5, 1997, Transcall propounded its Third Set of Interrogatories to Dohan. On March 11, 1997, Dohan filed objections to these interrogatories. On March 20, 1997, Transcall filed its First Motion to Compel Answers to Third Set of Interrogatories. On March 27, 1997, Dohan filed its Response to Transcall's Motion to Compel Answers to Third Set of Interrogatories.

In its Motion to Compel, Transcall seeks responses to its Interrogatories Nos. 29 through 70 to Dohan. Transcall asserts that these interrogatories essentially track the deposition of Mr. Eric Bott and are designed to expand on the information regarding Mr. Bott's business relationships and associations mentioned in his deposition. Transcall further asserts that these interrogatories focus solely on Mr. Bott's qualifications as an expert witness in this proceeding. In addition, Transcall argues that it does not seek privileged information, only factual information regarding the witness's training, background, and qualifications.

In its Response, Dohan argues that the interrogatories at issue exceed the scope of permissible discovery, are burdensome and intrusive, and are intended to harass Dohan. Dohan argues that Elkins v. Syken, 672 So. 2d 517 (Fla. 1996) prohibits discovery that invades the personal privacy of an expert witness, causes harassment, and provides little useful information. Dohan argues that Transcall's Interrogatories Nos. 29 through 70 fall within this proscription. Furthermore, Dohan argues that sufficient information regarding Mr. Bott's qualifications is available in the transcript of Mr. Bott's November 4, 1996, deposition. Dohan also submits that the recent case of Carrera v. Casas, 22 Fla. L. Weekly

D893 (Fla. 3rd DCA 1997) further supports its assertions that Transcall's motion to compel should be denied.


Dohan is hereby compelled to respond to Interrogatories Nos. 29 through 32, and 59 through 70. The information sought is relevant to the subject matter of the pending proceeding and appears reasonably calculated to lead to the discovery of admissible evidence. Regarding Interrogatories No. 33 through 58, as previously stated, I find Elkins and Carrera persuasive, but not controlling on the subject. The facts of those cases pertain specifically to medical experts. Thus, Dohan shall be compelled to respond to these interrogatories, in part. Dohan shall not, however, be required to provide information regarding Mr. Bott's compensation in cases other than this one. Such information is not necessary to determine the witness's probability of bias. Mr. Bott may only be asked to approximate the amount of time he spent working cases other than this one. To the extent, however, that the companies referred to in these interrogatories are companies that have employed Mr. Bott in some capacity other than as a telecommunications consultant, Dohan shall not be required to respond. Such information does not appear designed to lead to the discovery of admissible evidence.

Based on the foregoing it is therefore

ORDERED by Commissioner Diane K. Kiesling, as Prehearing Officer, that discovery disputes in this docket are resolved as set forth herein. It is further

ORDERED that compelled answers and documents shall be provided within fifteen (15) days of the issuance of this Order.

By ORDER of Commissioner Diane K. Kiesling, as Prehearing Officer, this 13th day of May, 1997.


DIANE K. KIESLING, Commissioner and
Prehearing Officer

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.