UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

AMMEX INC.,

Plaintiff,

v.

JENNIFER GRANHOLM, Michigan Attorney General,

Defendant.

MISC. NO. 01-42 (RHK/JMM)

ORDER

The above matter came on for hearing before the undersigned on July 18, 2001 upon the Motion of the Minnesota Attorney General for Sanctions. [Docket No. 20]. Thomas L. Kimer, Esq. and J. William Koegel, Esq. appeared on behalf of Plaintiff; Prentiss Cox, Esq. appeared on behalf of the Minnesota Attorney General. There was no appearance for Defendant.

The Court, being duly advised in the premises, upon all of the files, records and proceedings herein, now makes and enters the following Order.

IT IS HEREBY ORDERED that the Motion of the Minnesota Attorney General for Sanctions [Docket No. 20] is granted. Plaintiff and Plaintiff's counsel shall pay to the Minnesota Attorney General a sanction in the amount of $9,150.80 no later than August 31, 2001.

Dated: August 16, 2001

JOHN M. MASON
United States Magistrate Judge

MEMORANDUM

This matter originally came before the Court on the Motion of the Minnesota Attorney General to Quash Non-party Subpoena [Docket No. 1]. Plaintiff had issued a subpoena to the State of Minnesota requesting production of all documents from January 1, 1990 through the present related to any application or enforcement of state laws by the State of Minnesota against any "Bonded Warehouse or Duty-Free Sales Enterprise." Prior to the Court's hearing of the Motion to Quash, Plaintiff withdrew the subpoena.

At the hearing, the Court found that the Minnesota Attorney General's Office ("Attorney General") had made a *prima facie* showing that in issuing the subpoena, Plaintiff had violated Rule 45(c)(1) of the Federal Rules of Civil Procedure. The Attorney General now moves for sanctions to be imposed against Plaintiff pursuant to Rule 45(c)(1).

Rule 45(c)(1) provides:

> A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

The Attorney General seeks a total award of $9,150.80, representing fees incurred in dealing with the subpoena and preparing the instant Motion for Sanctions.

The language of Rule 45(c)(1) is mandatory - the Court "shall" enforce the issuing party's duty to avoid imposing undue burden or expense on the party subject to the

subpoena. In re Digital Resource, LLC, 246 B.R. 357, 372-73 (B.A.P. 8th Cir. 2000). As another District Court aptly stated:

> The question is not whether the subpoenas were issued in "good faith." Rather, the issue is whether issuance of the subpoenas violated the duty imposed by Rule 45(c)(1), Fed. R. Civ. P. A subpoena may be issued in "good faith" but still may be improper if the party serving the subpoena has failed to "take reasonable steps to avoid imposing undue burden or expense on the person subject to the subpoena."

Liberty Mut. Insur. Co. v. Diamante, 194 F.R.D. 20, 23 (D. Mass. 2000).

When the Federal Rules of Civil Procedure were amended in 1983, Rule 26(g)(2) was added to require that a party seeking discovery certify that the request was proper.[1] As the Advisory Committee noted:

> If primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to act responsibly and avoid abuse. With this in mind, Rule 26(g), which parallels the amendments to Rule 11, requires an attorney or unrepresented party to sign each discovery

---

[1] "(2) Every discovery request, response, or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is:

> (A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;
>
> (B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and
>
> (C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation."

request, response, or objection.

Rule 45, which governs the issuance of subpoenas, was amended in 1991. Paragraph (c)(1) of Rule 45 "gives specific application to the principle stated in Rule 26(g)." Notes of Advisory Committee. See also 9A Wright & Miller, Federal Practice and Procedure, § 2463, p. 68 ("With the expanded power of the attorney to issue subpoenas, the liability of the attorney for misusing Rule 45 has been expanded accordingly . ... Rule 45(c)(1) makes explicit the principle of accountability stated in Rule 26(g)"); 5A Moore's, Federal Practice, ¶ 45.08[1], pp. 45-56.

The amendments to the Rules encourage the courts to impose sanctions against discovery abuses, in order to deter such conduct.[2] The comments to the Rules also make clear the intention that the Court actively consider sanctions.

> Rule 26(g) is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions. The subdivision provides a deterrent to both excessive discovery and evasion by imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection.

Notes of Advisory Committee to Rule 26(g).

---

[2] Rule 26(g)(3) provides:

> "(3) If without substantial justification a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification . . . an appropriate sanction."

Rule 45(c)(1) provides:

> "The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction . . .."

The Rules of Civil Procedure provide to parties powerful tools for the discovery of information from both parties and non-parties. The purpose of this is to permit the full disclosure of information which will have a bearing upon the issues in the litigation, in order that the broad objective of securing the "just, speedy and inexpensive determination of every action" may be achieved. This power is subject to abuse, however.

The Rules no longer require court involvement before a subpoena is issued, but the Rules impose safeguards of their own. One of those safeguards is the requirement that attorneys and parties regulate themselves by limiting their use of the subpoena procedures to those which are reasonably necessary to the litigation. This is a particularly important requirement as it relates to the use of discovery against persons who are not parties to the litigation. Quashing a subpoena is warranted when the issuing party and its attorney did not fulfill their duty under Rule 45 to "take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena." Miscellaneous Docket v. Miscellaneous Docket, 197 F.3d 922, 927 (8th Cir.1999). As the Eighth Circuit has noted, "concern for the unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs." Miscellaneous, 197 F.3d at 927 (quoting Cusumano v. Microsoft Corp., 162 F.3d 708, 717 (1st Cir.1998)); see also Exxon Shipping Co. v. United States Dept. of Interior, 34 F.3d 774, 779 (9th Cir.1994) (non-parties are afforded "special protection against the time and expense of complying with subpoenas").

We conclude that sanctions are appropriate in this case for two reasons. First, it was made to appear to the Court that Plaintiff's true goal with the subpoena was

not to obtain the many documents commanded, but rather to seek to establish a different point by demonstrating the absence of responsive documents. Counsel for Ammex himself made this observation at oral argument. The Attorney General also points out that as an alternative to doing the actual work necessary to respond to the subpoena, he was offered the option of declaring that there were no such documents. Whether or not the use of the subpoena was intended to provide extra leverage for the purpose of obtaining such a statement, (which the Attorney General appropriately declined to make), the use of a subpoena to prove the absence of documents, or any of the other "negative facts" sought to be proved, was not warranted.

To the extent the subpoena was in fact designed to obtain documents for any purpose, it was overbroad, and not tailored in a fashion to reduce burden. Plaintiff failed to comply with its obligations under Rule 45(c). Plaintiff's request for documents was extremely broad; it sought every document related in any way to the application or enforcement of Minnesota's laws against any bonded warehouse or duty-free enterprise by any person in any branch of the State's government since January 1, 1990. In addition, Plaintiff left it to the Attorney General to figure out which businesses, if any, in the State of Minnesota might be the subject of the subpoena. The subpoena itself contains only the broadest of definitions:

> "Bonded Warehouse" means any facility designated by the Secretary of the Treasury as a bonded warehouse in accordance with 19 U.S.C. §1555(b).
>
> "Duty-Free Sales Enterprise" means any entity authorized to sell and deliver for export from the customs territory duty-free merchandise in accordance with 19 U.S.C. §1555(b). This

> definition shall include any entity operating as a duty-free store or holding itself out as a duty-free store.

In order to comply with the subpoena, the Attorney General would have to discern if, over the past eleven years, there have been any enterprises in the State designated by the federal government to do a certain type of business, as well as any enterprises holding themselves out as having that designation. This would be an onerous burden to place on anyone, but it is especially oppressive when directed at a non-party to the suit.

The subpoena was also overly broad in that Plaintiff sought not only information about any enforcement actions taken by the State of Minnesota, but every document possessed by every branch, agency, and office within the state government related in any way to those enforcement actions. Plaintiff's stated purpose for seeking this information from the Attorney General was to learn if Minnesota had historically regulated certain businesses. If that was the case, there would have been no need for such a far-reaching and burdensome request.

We conclude that Plaintiff failed to take reasonable steps to avoid imposing undue burden or expense on the Attorney General, thereby violating its duty under Rule 45(c)(1). The next question is, what sanctions should the Court impose as a result of that violation.

The Attorney General asks that the Court award the amount of fees it incurred in opposing Plaintiff's subpoena and making the instant Motion for Sanctions. The total amount of fees requested by the Attorney General is $9,150.80. Plaintiff does not

object to the hourly billing rate used to calculate this figure[3], but does argue that the number of hours billed by attorneys working for the Attorney General is excessive and "inherently unreasonable."

The hours for which the Attorney General seeks reimbursement can be grouped as follows:

- 19.6 hours spent opposing the subpoena, including telephone conferences with Plaintiff's counsel and the offices of the Attorneys General of Michigan, Wisconsin, and New York, legal research, and drafting and editing the Motion to Quash.
- 25.4 hours researching and preparing the instant Motion for Sanctions, supporting legal Memorandum, and Reply Memorandum.

Plaintiff does not object to the number of hours billed in connection with the Motion for Sanctions, but asserts that the 19.6 hours spent opposing the subpoena were unnecessary, because the Attorney General could simply have served a written objection to the subpoena. Adopting this reasoning would require us to make the further assumption that if the State had objected formally, Plaintiff would not have pursued enforcement of the subpoena. In fact, the correspondence and other evidence show that Plaintiff persisted

---

[3] The Attorney General calculated the requested fees based on prevailing law firm billing rates in Minnesota. This was the appropriate method of determining the amount of fees to award. See United States v. Kirksey, 639 F. Supp. 634, 637 (S.D.N.Y. 1986)("The hourly rate properly charged for the time of a government attorney is the 'amount to which attorneys of like skill in the area would typically be entitled for a given type of work on the basis of an hourly rate of compensation.'")(quoting City of Detroit v. Grinnell Corp., 495 F.2d 448, 471 (2d Cir. 1974)).

in its effort to enforce the subpoena (or to obtain the alternative of the desired statement) long after the Attorney General objected informally, and Plaintiff only withdrew its efforts at the last minute, after a Court hearing on the Attorney General's Motion to Quash became inevitable. We are satisfied that the Attorney General took all reasonable steps to minimize cost, expense and attorneys fees, and conclude that the hours billed and fees requested by the Attorney General are reasonable.

J.M.M.