OFFICE OF ADMINISTRATIVE LAW JUDGES
U.S. DEPARTMENT OF LABOR
WASHINGTON, D.C. 20001

In the Matter of

U.S. DEPARTMENT OF LABOR, OFFICE OF APPRENTICESHIP TRAINING, EMPLOYER AND LABOR SERVICES, Prosecuting Party, v. CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, Respondent.	)	Case No. 2002-CCP-1

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U.S. DEPARTMENT OF LABOR, OFFICE OF APPRENTICESHIP TRAINING, EMPLOYER AND LABOR SERVICES, Prosecuting Party, v. CALIFORNIA APPRENTICESHIP COUNCIL, Respondent.	)	Case No. 2003-CCP-1

RESPONDING PARTY CDIR'S OPPOSITION TO MOTION FOR LEAVE TO FILE A REPLY BRIEF

Responding Party California Department of Industrial Relations ("CDIR") responds to the motion of OATELS to file a reply brief as follows:

CDIR has taken the unusual step of filing an "Opposition" to OATELS' request to file a "Reply Brief" because the Reply is itself unusual in that it adds new matter and new requests for relief. Rather than request permission to file a response to the Reply, CDIR has filed this Opposition because CDIR believes it would be more appropriate to bring a halt to OATELS' attempt to expand its discovery motion, rather than to make proceedings even more complicated by a new response to the new matter and new relief. CDIR believes that there have been misunderstandings about the documents it has produced but that its Response demonstrated that there was no need to ask for an Order to compel CDIR to provide discovery. CDIR believed that it was clear what documents its initial production concerned. Rather than contact CDIR for clarification, OATELS filed its motion. Now, despite getting clarification both informally and in the CDIR Response, OATELS seeks to expand its Motion in the guise of a "Reply" brief. This is a very inefficient use of judicial resources and wasteful way to conduct discovery.

ARGUMENT

A. Reply Briefs Should Not Be Used To Add New Matter Or New Requests For Relief.

CDIR's Response corrected certain erroneous factual assumptions on which OATELS based its motion. The Reply does not contradict those factual statements. OATELS now says that even if the factual predicate for its motion was flawed, it has new demands for discovery that should be heard. Many of these are issues which with better communication between Washington and its local counsel – about such issues as what documents were going to be produced in response to Interrogatories 4 and 18, what documents that were produced were responsive to what requests, how documents to be copied were to be arranged and what other documents then (and now) await OATELS decision to copy – could have been resolved before filing this motion. Discovering facts in your opponent's response that a party could have (and in CDIR's view should have) known before filing a motion to compel is not a suitable ground for filing a reply that changes the original motion.

B. OATELS Is Trying to Move The Goal Line After The Game Has Started.

In its Proposed Reply, OATELS asks for new relief concerning new issues. It is instructive to see how OATELS has changed its requests for relief in response to being presented with facts showing that it had no basis for its motion as originally framed.

THEN:

In its Motion OATELS asserted it was seeking to compel answers to Interrogatories 4 and 18 and in particular to require CDIR to prepare a summary of

information about Apprenticeship Program approval. OATELS asserted retrospective CDIR wrongdoing:

> "Instead of this summary, CDIR has produced almost 15,000 pages of documents, which, contrary to OATELS' request, have not been related to the discovery requests in any way." (Motion, pg. 9.)

NOW:

In its Proposed Reply, OATELS asserts that *prospective* CDIR non-compliance is the true issue:

> "Secondly, far from mooting OATELS' motion to compel, CDIR's *impending production* of many thousands of pages of program files in response to Interrogatories 4 and 18 *accentuates the need* for compelled proper identification and explanation of responsive documents. Unless CDIR provides the requested summaries explaining the disposition of rejected and long-pending applications and specifies, by Bates-stamped page number, where the summarized processed applications are located, the produced materials *will be* unintelligible and unusable. So far, CDIR has refused to give any assurance that the state agency *will identify and locate* the responsive applications *and explain* how they were disposed." (Reply, pg. 5. emphasis added)

Thus, OATELS seems to have realized that the "15,000 pages of documents" were not intended to be responsive to Interrogatories 4 and 18, as asserted in its motion, and that the "program files" that were responsive are now in the process of being inspected. Instead of dropping its motion, OATELS now asks for a different order about what it speculates may be a problem in understanding those documents.

THEN:

OATELS sought an order to compel the labeling of the 15,000 pages of discovery already produced.

> "Accordingly, OATELS asks the ALJ to order CDIR to identify the documents responsive to each request, either by citing the Bates-stamped page numbers of the documents already produced, if applicable, or by producing these documents, properly labeled by discovery request number, at CDIR's own expense." (Motion, pg. 16.)

NOW:

OATELS now also seeks an order to compel production of additional documents even though CDIR has not refused to produce additional documents and OATELS has not proposed a time or place for production.

> "OATELS also asks the ALJ to order CDIR to say which of the 37 pending OATELS requests (Interrogatories 2, 4-5, 18, and 20 and Requests for Production 1-32) are not addressed by the state agency's May 1 production and when CDIR will produce the materials responsive to these outstanding requests." (Reply, pg. 16.)

THEN:

OATELS sought to compel answers to interrogatories 4 and 18.

> "OATELS sets out below each discovery request in question," [4 & 18], "the insufficient CDIR and/or CAC response, OATELS' explanation of the insufficiency of CDIR's response, and CDIR's reply." (Motion, pg. 6.)

NOW:

OATELS now seems to expand the discovery request to include interrogatories 2, 20 and 5, which were not in the original motion.

> "First, excluding Interrogatories 4 and 18, which CDIR now says were not addressed in its May 1 production, the state agency explicitly invoked the "business records" option of Federal Rule of Civil Procedure 33(d) in lieu of an answer to at least two pending requests (Interrogatories 2 and 20), and also appears to have proposed to produce supplemental material when available in response to another (Interrogatory 5)." (Reply, pg. 13.)

This is not a proper use of a Reply.

C. Factual Issues Asserted by OATELS' Reply Are Not Supported By Admissible Evidence.

Some of the issues in question concern what OATELS San Francisco counsel was told about documents. CDIR has demonstrated that it produced six boxes of documents as an initial production, and that those documents were in fact identified and that OATELS counsel was shown both those boxes ready for production and other boxes (and boxes) of files that were being reviewed for production, the dozens and dozens of tapes that were (and are) ready to be copied, as well as the file room and cabinets containing the "program files" responsive to Interrogatories 4 and 18. See Dec. Lonsdale at p.2.

OATELS' Reply seems to now assert that it was not told that the "program files" were available for inspection.

> "Mr. Wilkinson had no authority to modify or rescind OATELS' discovery requests, but even if CDIR believed that he had, CDIR was still bound to inform OATELS, by discovery request, exactly what the state agency was producing and what it was leaving out, and precisely where the responsive materials to each request could be found." (Reply, pg. 11.)

Likewise, at page 3 OATELS asserts:

> "Contrary to CDIR's assertion, OATELS' motion to compel is not the result of a failure to seek further non-required pre-motion conferences but of CDIR's much earlier failure, at the May 1 production, to disclose properly which responsive documents the state agency was producing and which it was leaving out." (Reply, pg. 3.)

The Reply is not, by itself, competent evidence that supplies a factual basis for this claim. It should not be filed without such evidence.

As the above shows, a major argument on a contested point presents the testimony of other counsel (Jones, Wilkinson) that is not supported by declaration. While we are willing to take Mr. Glabman's representations in a course of argument on things known by him personally (or cited to correspondence) without technical compliance because this is an administrative proceeding, things for which his papers show neither knowledge nor foundation should not be accepted without a declaration. This opposition is not to argue the issue of what Mr. Wilkinson (who appeared to us to be an experienced litigator having been hired into the Solicitor's Office from the firm of Seyfarth Shaw) did have as apparent authority to order copying and receive information, but rather to point out that if OATELS' argument is going to be that this person had no authority, and failed to communicate the fact that CDIR had identified the "program files," the Reply is pointless without sworn testimony. (Contrast Decs. Lonsdale and Belcher supporting factual assertions.)

D. Request For Oral Argument.

If the Court grants OATELS' motion, we would request oral argument, because it would be our only chance to address the new relief raised in the Proposed Reply.

Respectfully submitted,

Dated: August 7, 2003

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of August, 2003, I served a copy of the foregoing Responding Party CDIR'S Opposition To Motion For Leave To File A Reply Brief by electronic transmission, facsimile and overnight mail, on the following:

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