BENCH MEMO: Detroit Edison Co. v. Decker Coal Co., et al., In re A.T. Massey Coal Co., Inc. CA 87-0527-AR

ATTORNEYS

Massey Coal: F. William Kirby, Jr. (Manning, Davis & Kirby)

Decker Coal: Lori M. Silsbury (Dykema, Gossett, of Detroit, Mich.)

Judge, this case comes before you on Massey Coal's motion to quash a deposition subpoena served upon it by Decker Coal, a defendant in the Detroit Edison lawsuit pending in the Eastern District of Michigan. Decker has subpoenaed Massey for a Rule 30(b)(6) deposition and for production of documents, relating to any contracts which Massey entered into with the plaintiff, Detroit Edison. The underlying action between Detroit Edison and Decker Coal involves claims and counterclaims for breach of a coal supply contract and for racketeering.

Through counsel, Massey requests that you quash the subpoena requiring it to appear for a Rule 30(b)(6) deposition and to produce documents. In the alternative, Massey requests a protective order preventing the taking of the deposition of any designee, and shielding it from producing any documents requested by the subpoena. Decker Coal has filed a brief opposing Massey's motion, along with a protective order which would allow its counsel, and employees, agents and experts, to review the requested documents. (See Exhibit 3, attached to Decker's brief.) Neither party has filed a protective order allowing access only to Decker Coal's counsel.

Massey presents four arguments for quashing the subpoena and denying access to its documents. In conversations with me and counsel, you have already seen through three of these arguments as technical in nature and mere smoke screen. Here is a summary of Massey's four objections; only the last of these presents a legitimate point of contention:

(1) The subpoena is invalid because it was improperly issued in violation of Local Rule 19(G) for the E.D.Va., which requires local counsel to request any subpoena. No local counsel was employed to do so.

(2) The service of the subpoena on Massey's switchboard operator was improper and defective, making the service invalid. The service should have been made on an officer, managing agent or general agent of Massey, as required by the case law.

(3) The requested information is not relevant to the main litigation and cannot lead to the discovery of any relevant evidence. Neither party to the main case has made any allegation concerning Massey Coal.

(4) Finally, the requested information concerns confidential commercial information which is not relevant to the underlying lawsuit. This is crucial, since Massey and Decker Coal are direct competitors in the coal industry.

In brief, Decker Coal responds to Massey's four arguments to quash the subpoena as follows:

(1) Local counsel is not required for a subpoena issued to a nonparty witness, because the Local Rules of the E.D.Va. do not apply to such a request resultingfrom an action pending in a foreign federal district (here, the E.D.Mich.). Decker Coal also says that it could readily correct this defect if it exists.

(2) Decker says it has already requested the Clerk of Court to reissue the subpoena, and the process server to re-serve the same subpoena on an officer, director or managing agent of Massey.

(3) Decker contends that the subpoena seeks relevant, discoverable information in the possession of Massey Coal. It argues that Massey bears the burden of proving the contrary. Decker argues that Massey, as a coal supplier to Edison, may have relevant evidence for the Edison-Decker contract, because Edison's negotiations and course of dealing with Massey are relevant indicators of Edison's knowledge and views about the provisions in the Decker contract. Decker claims that the Massey and Decker contracts contain similar provisions. Finally, it states that Judge Zatkoff, of the E.D.Mich., has already ruled that documents which relate to Edison's coal suppliers are discoverable.

(4) Finally, Decker claims that Massey's response to the subpoena will not require Massey to disclose sensitive commercial information. Decker says that it has proffered a protective order (again, its Exhibit 3) agreed to by Detroit Edison, which should address Massey's concerns. (Here, Judge, I firmly disagree, since the order allows Decker's employees to view all of Massey's documents.) Decker also states that it has informed Massey's counsel that Decker is not seeking sensitive information, such as that regarding Massey's pricing and output projections.

Judge, I recommend (as we discussed) that the first two issues be resolved by a new, and correct, service of subpoena on Massey's officers or agents. The third and fourth issues in dispute can be resolved by an appropriate protective order. You should allow the discovery and perhaps urge the parties to agree to the most obviously sensible protective order: one that permits only Decker's counsel access to the allegedly "confidential commercial information" which Massey claims it will have to produce.

In the alternative, you could restrict the scope of the subpoena by limiting discovery to only essential, non-pricing terms contained in the contract between Massey and Detroit Edison. Perhaps both approaches are called for.

In any event, Judge, these are issues for you to resolve in your own experienced discretion.

DRW