UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

September 10, 1992

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. 1324b Proceeding OCAHO Case No. 90200336
NORTHWEST AIRLINES, INC., Respondent.	)	

ORDER GRANTING IN PART AND DENYING IN PART
RESPONDENT'S MOTION TO COMPEL DISCOVERY

On December 26, 1991, respondent filed a four-part Motion to Compel Discovery. In the first part of its motion, respondent requested that the undersigned compel complainant's counsel, Daniel W. Sutherland, Esquire, to attend a deposition and answer questions relating to events and communications which occurred prior to completion of the investigation of the charge and filing of the Complaint herein. In the second part of its motion, respondent requested that the undersigned compel complainant to answer Interrogatory No. 19, Respondent's Interrogatories to United States (Set I) and Interrogatory No. 8, Respondent's Interrogatories to United States (Set II). In the third part of its motion, respondent requested that the undersigned compel complainant to produce all documents responsive to Respondent's Request for Production of Documents to the United States (Set I), Document Request Nos. 1 and 2 and Respondent's Request for Production of Documents to Enderle (Set I), Document Request Nos. 1, 3, 5, 7, 11 and 12. In the fourth part of its motion, respondent requested that the undersigned compel complainant to produce Hans Enderle's 1990 personal calendar pursuant to Document Request No. 3, Respondent's Request for Production of Documents to Enderle (Set I).

As grounds for its requests, respondent asserts that this discovery is necessary to develop and present its defenses.

On January 22, 1992, complainant responded by filing a Memorandum in Opposition to Northwest's Motion to Compel Discovery, in which complainant urged that while both parties have produced a great deal of information and documents in a good faith effort to expedite the litigation of this matter, it has denied several of respondent's discovery requests because those requests called for disclosure of privileged information, were not relevant, or were inappropriate.

On February 14, 1992, respondent filed a pleading captioned Respondent's Reply to the United States' Memorandum in Opposition to Motion to Compel Discovery, alleging therein that complainant's memorandum substantially overstated the breadth of the material sought by respondent and also misstated applicable legal principles.

On April 15, 1992, a hearing was held on respondent's motion. At the outset of the hearing, the parties advised that complainant had produced Enderle's 1990 personal calendar, eliminating the need for consideration of the fourth part of respondent's motion.

Addressing the first part of respondent's motion, it is noted that by letter dated October 25, 1991, respondent requested that a date be fixed for the taking of the deposition of Daniel W. Sutherland, Esquire, counsel for complainant. On October 29, 1991, complainant responded to respondent's request, stating that it would oppose any attempt to depose Sutherland. Respondent served a Notice of Deposition on Sutherland on December 12, 1991. Complainant subsequently advised respondent that Sutherland's appearance for deposition would be inappropriate, prompting respondent to file its Motion to Compel Discovery.

Neither the governing procedural regulations nor the Federal Rules of Civil Procedure exempts a party's attorney from being deposed. The pertinent procedural rule governing discovery in these proceedings provides that "(p)arties may obtain discovery by ... depositions upon oral examination or by written questions." 28 C.F.R. §68.18(a). The Federal Rules of Civil Procedure, which are to be used as a guideline in any situation not provided for in the procedural rules governing these proceedings, provide that "any party may take the deposition of any person, including a party, by deposition upon oral examination." Fed. R. Civ. P. 30.

However, federal courts have held that, because deposing opposing counsel is both burdensome to the opposing party and disruptive to the

proceedings, a party seeking to depose opposing counsel bears the burden of demonstrating that it has met the applicable standard for the deposition. See N.F.A. Corp. v. Riverview Narrow Fabrics, Inc., 117 F.R.D. 83, 85 (M.D.N.C. 1987).

Complainant correctly asserts that Shelton v. American Motors Corp., 805 F.2d 1323 (8th Cir. 1986), provides the standard for determining whether the undersigned may order the taking of complainant's counsel's deposition. In Shelton, the Court of Appeals for the Eighth Circuit held that before a court may order the taking of opposing counsel's deposition, the party seeking the deposition must show:

1. That no other means exist to obtain information than to depose opposing counsel;
2. That the information sought is relevant and nonprivileged; and
3. That the information sought is crucial to that party's preparation of its case.

Id. at 1327.

At the hearing on respondent's Motion to Compel Discovery, respondent asserted that its purpose in deposing complainant's counsel is two-fold. First, respondent seeks to obtain information regarding conversations between complainant's counsel and respondent's manager of EEO compliance for use in preparing its "authorization" defense (Transcript, p. 15, hereinafter T. 15). Next, respondent seeks to obtain information from complainant's counsel regarding conversations between complainant's counsel and the charging party, as well as between complainant's counsel and the "injured class", for use in preparing its statute of limitations defense. (T. 16).

Respondent has failed to demonstrate that deposing complainant's counsel provides the only means by which respondent can obtain this information. The other parties to the relevant conversations with complainant's counsel, those that respondent maintains are critical to its defense, are available by the use of routine discovery. Respondent has already deposed the charging party, and had the opportunity to question him as to the nature and content of the conversations between himself and complainant's counsel, in order to prepare its "statute of limitations" defense. In addition, respondent may obtain the deposition testimony of those members of the "injured class" whose conversations with complainant's counsel are also relevant to

respondent's "statute of limitations defense". Moreover, respondent's manager of EEO compliance is also available to respondent as a witness in its "authorization" defense.

Because respondent has failed to show that no other means exist to obtain the information it seeks other than deposing complainant's counsel, its request for an order compelling the deposition of complainant's counsel is hereby denied.

Regarding the second part of respondent's motion, on March 25, 1991, respondent served complainant with Respondent's Interrogatories to Complainant (Set I). In propounding Interrogatory No. 19 of Set I, respondent sought information regarding those positions for which the charging party or other members of the "injured class" applied in 1988, 1989 and 1990. In response, complainant contended that this information is not relevant to the litigation. On August 16, 1991, respondent served the charging party with Respondent's Request for Production of Documents to Hans Enderle (Set I). Request No. 12 sought all documents relating to any application for employment filed by the charging party with other prospective employers from June 1989 to the present. Complainant objected to this request on grounds that it fails to seek documents that are reasonably calculated to lead to admissible evidence. Respondent now requests that the undersigned compel complainant to answer Interrogatory No. 19, Respondent's Interrogatories to United States (Set 1), and compel the production of those documents sought in Document Request No. 12, Respondent's Request for Production of Documents to Enderle (Set I).

In its Memorandum of Law in Support of Respondent's Motion to Compel Discovery, respondent contends that this discovery is relevant to the issue of mitigation of damages, and directly relevant to determining whether respondent's requirements actually resulted in any injury to the applicants in question. In complainant's Memorandum in Opposition to Northwest's Motion to Compel Discovery, complainant argued that answering these discovery requests would result in a substantial detour in this litigation, that the existence of applications submitted to other airlines is irrelevant to mitigation of damages, and that it is impossible for these inquiries to lead to the discovery of admissible evidence on the question of whether the pilots would have been hired by Northwest. In Respondent's Reply to that Memorandum in Opposition to Motion to Compel Discovery, respon-

dent reiterated its contention that the information on "injured class" members' applications is relevant.

The pertinent procedural provision, 28 C.F.R. §68.18(b), provides: "the parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding...."

Interrogatory No. 19 and Document Request No. 12 are directly relevant to the issue of injuries suffered by the members of the "injured class", and to the issue of mitigation of damages by the charging party and members of the class. In addition, the information and documents to be discovered could reasonably lead to additional evidence which would be admissible at trial, or be useful to the respondent in organizing its defenses. Complainant contends, however, that answering these discovery requests would result in a deviation in this litigation, and should therefore be denied. Where, as here, the information sought is directly relevant to issues raised in the case, the tribunal should avoid a weighing of the hardships imposed on the party to whom the request is made, and should honor the discovery request. Carlson Companies, Inc. v. Sperry & Hutchinson Co., 374 F. Supp. 1080, 1088 (D. Minn. 1974).

For these reasons, respondent's request for an order compelling complainant to answer Interrogatory No. 19, Respondent's Interrogatories to United States (Set I), and to produce all documents responsive to Document Request No. 12, Respondent's Request for Production of Documents to Enderle (Set I), is hereby granted.

Concerning the third part of respondent's motion, on February 2, 1991, respondent served complainant with Respondent's Request for the Production of Documents (Set I). In Request No. 1, respondent requested all documents that relate in any way to the allegations contained in the Complaint. In Request No. 2, respondent requested all documents identified in Respondent's Interrogatories to Complainant. Complainant objected to both requests on the grounds that they were overbroad, vague and ambiguous, and argued that the documents requested and not produced were protected as attorney work product, by the attorney-client privilege, or by the joint prosecution privilege.

On August 16, 1992, respondent served the charging party with Respondent's Request for Production of Documents to Hans Enderle (Set I). In Request No. 1, respondent sought all documents prepared

by the charging party describing conversations or events alleged in the Complaint or in the charge, including documents referring to or describing communications with respondent or complainant. Complainant and the charging party objected to this request on grounds that the request is overbroad and seeks documents protected by attorney work product, attorney-client privilege or by the joint prosecution privilege. In Request No. 3, respondent sought all documents reflecting or describing communications with the complainant or other persons concerning the status of the charging party's employment with respondent or the time period for filing a charge with complainant. The complainant and charging party objected to this request on grounds that it is overbroad and seeks documents protected by attorney work product, attorney-client privilege and/or joint prosecution privilege.

In Request No. 5, respondent sought all correspondence between the charging party and any other non-U.S. citizen pilots who applied for employment with respondent, relating to the complaint or the charge. The charging party averred that he had no documents responsive to this request, and the complainant asserted the objections raised by it in response to Requests 1 and 3. In Request No. 7, respondent sought all documents received by the charging party from the complainant relating to any claim asserted in either the charge or the complaint. Complainant and the charging party objected to this on the grounds that the documents requested are protected under the attorney-client privilege and the joint prosecution privilege. In Request No. 11, respondent sought all documents reflecting, relating to or describing the charging party's efforts to investigate the legal significance of those Forms I-772 which were prepared between August 21, 1989 and November 20, 1989. Complainant and the charging party objected to this request on the grounds that the documents requested are protected under the attorney-client privilege and are work product.

On August 24, 1991, respondent served complainant with Respondent's Interrogatories to Complainant (Set II). Interrogatory No. 8 requested that the complainant identify and describe all documents withheld on the basis of attorney-client privilege, the joint prosecution privilege, work product privilege and deliberate process privilege. Complainant objected to the interrogatory on the grounds that it would be overly burdensome to compile, and that the request was vague, overbroad and ambiguous.

Respondent now requests that the undersigned compel complainant to answer Interrogatory No. 8, Respondent's Interrogatories to the United States (Set II), and to produce all documents responsive to Respondent's Request for Production of Documents to the United States (Set I), Document Request Nos. 1 and 2 and Respondent's Request for Production of Documents to Enderle (Set I), Document Request Nos. 1, 3, 5, 7, and 11.

In its Memorandum in Opposition to Northwest's Motion to Compel Discovery, complainant objected to respondent's requests for production of complainant's internal files on the grounds that the files are protected under the work product doctrine.

Complainant also objected to respondent's requests for documents regarding communications between complainant and the charging party and the "injured class" on the grounds that those communications are protected by a form of attorney-client privilege and/or by the co-litigant's privilege.

Finally, complainant denied respondent's assertion that complainant's waiver of attorney-client or co-litigant privilege for the pre-charge period waived all privileges that complainant could assert regarding its communications with the charging party, as well as with the respondent, which took place during the pre-charge period. Specifically, complainant contended that in waiving the attorney-client privilege it did not waive its right to assert the work product privilege over Attorney Sutherland's personal notes.

In its reply, respondent argued that complainant could not assert attorney-client privilege to protect communications in the pre-charge period, reiterated its assertion that complainant had waived any privilege that it might have held with regard to complainant's conversations with the charging party, and contended that attorney notes compiled pre-charge are not protected under the work product privilege.

In its memorandum in opposition, the complainant avers that the only documents responsive to respondent's discovery requests that have not been revealed to the respondent consist of written attorney notes generated by OSC attorneys, internal memoranda discussing various aspects of this litigation including recommendations from OSC attorneys and administrative documents.

As noted above, the pertinent procedural regulation, 28 C.F.R. §68.18(b) provides: "the parties may obtain discovery of any matter, not privileged, which is relevant to the subject matter involved in the proceeding..."

In Request Nos. 1 and 2, Respondent's Request for Production of Documents to the United States (Set I) and Document Request Nos. 1, 3, 5, and 11, Respondent's Request for Production of Documents to Enderle (Set I), respondent seeks various documents prepared both before and after the filing of the charge at issue. Complainant objects to these requests on the grounds that such requests seek materials protected as work product.

The work product doctrine is codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure, which provides:

> A party may obtain discovery of documents and tangible things otherwise discoverable...prepared in anticipation of litigation or for trial or by or for another party or by or for the other party's representative ....only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other measures.

Fed. R. Civ. P. 26(b)(3).

In a recent OCAHO ruling, it was held that attorney notes, including notes of telephone conversations, attorney outlines, and internal memoranda, prepared by OSC attorneys in connection with OSC's investigation of a charge constituted attorney work product, and thus were protected from discovery under the attorney work product doctrine. Westendorf v. Brown & Root, Inc., OCAHO case No. 91200179 (2/21/92)(Order Denying Complainant's Motion for a Subpoena Duces Tecum). That ruling, however, did not address whether documents prepared by OSC attorneys, as here, prior to the filing of a charge are protected under the work product doctrine.

In determining whether any documents or evidence is protected under the work product doctrine, inquiry should initially focus on whether the materials were produced "in anticipation of litigation." See Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 603 (8th Cir. 1977). Materials prepared in anticipation of litigation are protected under the work product doctrine even if no suit has actually been filed. Id. at 604. Where there is only the "inchoate possibility" or the "likely

chance" of litigation, however, the doctrine does not apply. Mission Nat'l Ins. Co. v. Lilly, 112 F.R.D. 160, 163 (D. Minn. 1986).

Determining whether materials are prepared in anticipation of litigation is particularly difficult where the party asserting the applicability of the doctrine is a government agency charged with the enforcement of law and administrative regulations. See generally Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854 (D.C. Cir. 1980), Kent Corp. v. N.L.R.B., 530 F.2d 612 (5th Cir. 1976), cert. denied 492 U.S. 920 (1976). In determining whether materials prepared by an agency in the course of an investigation were protected by the work product doctrine, federal courts have focused on whether, at the time the investigation occurred, "the prospect of litigation was identifiable because of specific claims that had already arisen." Coastal States, 617 F.2d at 865, quoting Kent Corp., 530 F.2d at 623.

Thus, in Kent Corp., the Fifth Circuit held that Board investigations of unfair labor practice charges lodged with the Board were protected under the work product doctrine, even where no complaint was eventually filed. In Coastal States, the court, distinguishing Kent, held that agency audits, performed to ensure compliance with agency regulations, were not protected under the work product doctrine because at the time the audits were performed, no charge had been made against any of the parties audited nor were any of the audited parties suspected of any violations.

Document Request Nos. 1 and 2, Respondent's Request for Production of Documents to the United States and Document Request Nos. 1, 3, 5, 7, and 11, Respondent's Request for Production of Documents to Enderle request documents prepared both before the charging party filed his charge, at a time when the OSC was overseeing respondent's compliance with the "Settlement Agreement", and afterwards. OSC's activities in the pre-charge period appear to be auditory in nature, performed to ensure compliance with the "Settlement Agreement" and with IRCA generally, rather than an investigation of specific charges or suspicions. Because they were not prepared "in anticipation of litigation" within the meaning of Rule 26(b)(3), the work product doctrine does not protect documents prepared by the complainant before the charging party filed his charge on April 12, 1990.

Documents prepared after the charge was filed with OSC, including those prepared during the investigation of the charge, are protected under the work product doctrine. See Brown & Root, supra. Because

respondent has not shown that there are any special circumstances requiring that it be allowed access to any documents prepared after the charge was filed, respondent's motion to compel discovery of materials prepared by the complainant after the charge was filed must be denied.

In Request Nos. 1 and 2, Respondent's Request for Production of Documents to the United States (Set I) and Document Request Nos. 1,3,5,7, and 11, Respondent's Request for Production of Documents to Enderle (Set I), respondent seeks various documents, including communications and documents referring thereto between complainant and the charging party, between complainant and the "injured class", and between the charging party and the "injured class", occurring both before and after the filing of the charge at issue. Complainant asserts in its memorandum in opposition that its communications with the charging party and the "injured class" are privileged under the de facto attorney-client privilege or under the co-litigant privilege, and as such are protected from discovery.

Federal courts have recognized a de facto attorney-client privilege protecting communications between government counsel and injured parties in actions under the Age Discrimination Employment Act (Bauman v. Jacobs Suchard, Inc., 136 F.R.D. 460 (N.D. Ill. 1990)), Title VII (EEOC v. Georgia-Pacific, 11 Fair. Empl. Prac. Cas. 722 (D. Or. 1975)), and the Labor Management Reporting and Disclosure Act (Donovan v. Teamsters Union Local 25, 103 F.R.D. 550 (D. Mass. 1984)).

Attorney-client privilege applies where:

1. The person asserting the privilege was or sought to be a client,
2. The person to whom the communication was made was a lawyer, and in connection with the communication acted as a lawyer,
3. The communication relates to a fact communicated for the purpose of securing assistance in a legal proceeding, and
4. The privilege has not been waived.

Id. at 553. In Bauman, the court held that an attorney-client relationship between a government attorney and an individual existed for purposes of the privilege if a communication between the two was made "for the purpose of securing primarily ... legal services or assistance in some legal proceeding," even if the agency had not yet

filed a complaint. Bauman, 136 F.R.D. at 462, quoting United States v. United Shoe Corp., 89 F. Supp. 357, 358 (D. Mass. 1950).

Where, as here, an individual communicates with a government attorney after filing a charge for the purpose of obtaining legal advice or assistance in the litigation of the charge, those communications are privileged. An additional privilege, the co-litigant privilege, protects communications between government attorneys and individuals represented by other counsel who are asserting the same injury as an individual who has filed a charge with a government agency. Bauman, 136 F.R.D. at 462.

There is no need to determine whether de facto attorney-client privi-lege or co-litigant privilege protects communications between the com-plainant and the charging party and the other members of the "injured class", respectively, occurring before the charging party filed his charge in this action, because complainant admits that it has waived these privileges for communications occurring in the pre-charge period. (Complainant's Memorandum in Opposition, p. 25). De facto attorney-client privilege does, however, protect those communi-cations occurring after the filing of the instant charge between the complainant and the charging party, and co-litigant privilege protects communications occurring after the filing of the charge in this action between the complainant and the "injured class".

For the foregoing reasons, complainant can assert de facto attorney-client privilege to protect communications between it and the charging party which occurred after the filing of the charge at issue. In addition, complainant can assert co-litigant privilege to protect communications between it and the "injured class" occurring after the filing of the charge at issue. Therefore, any documents sought by respondent relating to communications between the complainant and the charging party or the complainant and the "injured class" occurring after the filing of the charge at issue on April 12, 1990, are privileged and not subject to discovery.

In summary, respondent's request for an order compelling Daniel W. Sutherland, Esquire, to attend a deposition is hereby denied.

The remaining requests in respondent's Motion to Compel Discovery, those set forth in the second and third parts of that motion, are being granted in accordance with the foregoing namely, that only those documents, communications, and other discoverable data which

pre-date the April 12, 1990, filing date of the charge at issue, excluding those prepared during the investigation of that charge, are to be supplied by complainant.

Complainant's replies to the foregoing discovery requests are to be filed within thirty (30) days of its acknowledged receipt of this Order.

Accordingly, complainant is hereby ordered to provide to respondent written answers to Interrogatory No. 19, Respondent's Interrogatories to United States (Set I), and to Interrogatory No. 8, Respondent's Interrogatories to United States (Set II).

Complainant is further ordered to provide to respondent copies of all documents responsive to Respondent's Request for Production of Documents to the United States (Set I), Request Nos. 1 and 2 and Respondent's Request for Production of Documents to Enderle (Set I), Document Request Nos. 1, 3, 5, 7, and 11, prepared before April 12, 1990, and relating to communications occurring before April 12, 1990, the date upon which the charge at issue was filed.

Complainant is also ordered to provide to respondent copies of all documents responsive to Respondent's Request for Production of Documents to Enderle (Set I), Document Request No. 12.

JOSEPH E. MCGUIRE
Administrative Law Judge