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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

BURLINGTON NORTHERN & SANTA FE)
RAILWAY COMPANY, as successor to)
THE ATCHISON, TOPEKA & SANTA FE)
RAILWAY COMPANY, et al.,)
)
Plaintiffs,)
)
v.)
)
HERCULES, INC., et al.,)
)
Defendants.)

1:96-cv-5879 OWW DLB
(Consolidated Shafter
Cases)

ORDER ADOPTING FINDINGS AND
RECOMMENDATIONS AND
IMPOSING TERMINATING
SANCTIONS AGAINST THE BROWN
& BRYANT PARTIES

The matter of the motions of the Burlington Northern & Santa Fe Railway Company, as successor to the Atchison Topeka & Santa Fe Railway Company ("BNSF") and the Dow Chemical Company ("Dow") for orders for terminating sanctions against Brown & Bryant, Inc., John H. Brown, an individual, and Ed A. Brown, an individual (collectively the "Brown & Bryant Parties") for said Defendants' repeated willful failure to provide discovery responses and repeated and intentional disregard of the Court's prior discovery orders, was submitted on Findings & Recommendations for adoption by the District Court on February 17, 1999.

1 All parties were advised of the requirement that any
2 objections be filed within ten (10) court days. Any responses to
3 said objections were to be served and filed within ten (10) court
4 days thereafter. The parties were also advised that failure to
5 file objections within the specified time may waive the right to
6 appeal the District Court's order.

7 No objections were filed.

8 A stay of all proceedings was lifted, only as to these
9 motions, by separate Order of July 23, 2010.

10 The Court has fully considered the Magistrate Judge's
11 Findings & Recommendations and finds them to be correct in all
12 respects and that there is no substantial justification or other
13 cause shown why terminating sanctions should not be issued
14 against the Brown & Bryant parties. For the reasons set forth in
15 the Findings & Recommendations,

16 IT IS ORDERED:

17 1. The Magistrate Judge's Findings & Recommendations filed
18 February 17, 1999 ARE ADOPTED;

19 2. BNSF's Motion for Terminating Sanctions is GRANTED:

20 a. The Brown & Bryant Parties' counter-claim against
21 BNSF (including any and all counter-claims of Brown & Bryant,
22 Inc., John H. Brown, and Ed A. Brown against BNSF) are DISMISSED
23 WITH PREJUDICE;

24 b. The Brown & Bryant Parties' answers to BNSF's
25 complaint (including any and all answers of Brown & Bryant, Inc.,
26 John H. Brown and Ed A. Brown to BNSF's complaint) are STRICKEN;
27 and

28 c. Default judgment is entered against the Brown &

1 Bryant Parties (including Brown & Bryant, Inc., John H. Brown,
2 and Ed A. Brown) in favor of BNSF as to the remaining claims of
3 BNSF against them in this matter as follows:

4 I. Thirteenth Claim for Relief: Private Party
5 Cost Recovery under CERCLA § 107; Complaint, ¶¶ 176 through 186,
6 inclusive;

7 ii. Fourteenth Claim for Relief: Contribution
8 under CERCLA § 113; Complaint, ¶¶ 187 through 190, inclusive;

9 iii. Fifteenth Claim for Relief: Contribution under
10 the CHSAA; Complaint, ¶¶ 191 through 197, inclusive;

11 iv. Nineteenth Claim for Relief: Breach of
12 Contract, to the extent the breach of contract claims relate to
13 the CERCLA and CHSAA claims; Complaint, ¶¶ 221 through 247,
14 inclusive; and

15 v. Twenty-Fourth Claim for Relief: Declaratory
16 Relief: Complaint; ¶¶ 281 through 284, inclusive.

17 3. Dow's Motion for Terminating Sanctions is GRANTED and
18 default judgment is entered against the Brown & Bryant Parties in
19 favor of Dow as follows:

20 a. Brown & Bryant Parties' answers to Dow's counter-
21 claim (including any and all answers of Brown & Bryant, Inc.,
22 John H. Brown, and Ed A. Brown to Dow's counter-claim) are
23 STRICKEN; and

24 b. Default judgment is entered against the Brown &
25 Bryant Parties (including Brown & Bryant, Inc., John H. Brown,
26 and Ed A. Brown), as to all claims of Dow against them in this
27 case, as set forth in Dow's counter-claim for cost recovery and
28 contribution filed March 7, 1996 as follows:

1 i. First Counter-Claim for Contribution and Cost
2 Recovery under CERCLA Section 113(f);

3 ii. Second Counter-Claim for Declaratory Relief
4 for Contribution and Cost Recovery under 42 U.S.C. Section
5 9613(g);

6 iii. Third Counter-Claim for Declaratory Relief for
7 Cost Recovery under 42 U.S.C. Section 9607(a) and 9613(g); and

8 iv. Fourth Counter-Claim for Cost Recovery under
9 42 U.S.C. Section 9607(a).

10 3. Plaintiffs BNSF and Dow shall recover their costs of
11 suit against Brown & Bryant Parties (Brown & Bryant, Inc., John
12 H. Brown, and Ed A. Brown).

13
14 IT IS SO ORDERED.

15 Dated: July 23, 2010

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE