

May 26, 2023

HAND DELIVERED

Mr. Steve Kahl
Executive Secretary Director
North Dakota Public Service Commission
600 E. Boulevard, Dept. 408
Bismarck, ND 58505-0480

**RE: SCS Carbon Transport LLC
Midwest Carbon Express Project
Case No. PU-22-391**

Dear Mr. Kahl:

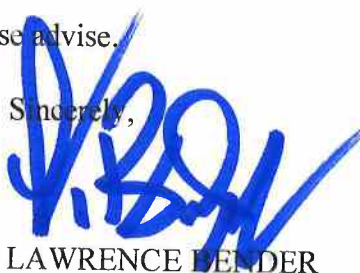
Please find enclosed herewith for filing with the North Dakota Public Service Commission, an original and five (5) copies of the following:

1. SCS Carbon Transport LLC's Response to The Laborers District of Minnesota and North Dakota's Motion to Compel; and
2. Certificate of Service.

Also enclosed herewith, please find a Compact Disc (CD) containing this letter and the above-referenced documents in PDF format.

Should you have any questions, please advise.

Sincerely,



LAWRENCE BENDER

LB/caj
Enclosures

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**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF NORTH DAKOTA**

IN THE MATTER OF THE APPLICATION
OF SCS CARBON TRANSPORT LLC FOR
A CERTIFICATE OF CORRIDOR
COMPATIBILITY AND ROUTE PERMIT
FOR THE MIDWEST CARBON EXPRESS
PROJECT IN BURLEIGH, CASS, DICKEY,
EMMONS, LOGAN, MCINTOSH,
MORTON, OLIVER, RICHLAND AND
SARGENT COUNTIES, NORTH DAKOTA

CASE NO. PU-22-391

**SCS Carbon Transport LLC's Response to The Laborers District of Minnesota and North
Dakota's Motion to Compel**

INTRODUCTION

Intervenor The Laborers District of Minnesota and North Dakota ("LIUNA") recently served Applicant SCS Carbon Transport LLC with a set of interrogatories, which SCS objected and responded to on May 15, 2023. Four days later, LIUNA filed a motion to compel now pending before Administrative Law Judge Hope Hogan.

Rule 37(a)(1) of the North Dakota Rules of Civil Procedure required LIUNA to confer with SCS in good faith before filing its motion to compel. LIUNA never met and conferred with SCS, so it failed Rule 37(a)(1)'s requirements. As a result, ALJ Hogan should deny LIUNA's motion.

ARGUMENT

This case is an adjudicative proceeding. *See* N.D.C.C. § 28-32-01(1). "In an adjudicative proceeding, discovery may be obtained in accordance with the North Dakota Rules of Civil Procedure." N.D.C.C. § 28-32-33(1).

Under Rule 37 of the North Dakota Rules of Civil Procedure, every motion to compel "must include a certification that the movant has in good faith conferred or attempted to confer

with the person or party failing to make discovery in an effort to obtain it without court action.” N.D.R.Civ.P. 37(a)(1). The Rule’s drafters believed that “no motion to compel should be brought without an attempt by the parties to resolve the discovery dispute.” *See* Minutes of Meeting of Joint Procedure Committee, January 30–31, 2003, at 15–16.¹ In their view, requiring parties to confer would help “weed out minor discovery problems before making a motion to compel” and thereby “save time and money for the parties and the court.” *Id.*²

In *PHI Fin. Servs. v. Johnston Law Office, P.C.*, 2016 ND 114, 881 N.W.2d 216, the North Dakota Supreme Court explained how a party can satisfy Rule 37(a)(1)’s good-faith conferral requirement. According to the Court, the good-faith conferral requirement “contemplates, among other things, honesty in one’s purpose to meaningfully discuss the discovery dispute, freedom from intention to defraud or abuse the discovery process, and faithfulness to one’s obligation to secure information without court action.” *Id.* at ¶ 11. “Accordingly, good faith cannot be shown merely through the perfunctory parroting of statutory language on the certificate to secure court intervention; rather it mandates a genuine attempt to resolve the discovery dispute through non-judicial means.” *Id.*

¹ The Minutes of Meeting of Joint Procedure Committee, January 30–31, 2003, are available at <https://www.ndcourts.gov/Media/Default/Committees/JointProcedure/2003/Minutes1-30-03.pdf>.

² The North Dakota Supreme Court has explained that “N.D.R.Civ.P. 37(a)(1) is modeled after the Federal Rules of Civil Procedure, specifically Fed.R.Civ.P. 37(a)(1).” *PHI Fin. Servs. v. Johnston Law Office, P.C.*, 2016 ND 114, ¶ 11, 881 N.W.2d 216. Like N.D.R.Civ.P. 37(a)(1)’s good-faith conferral requirement, Fed.R.Civ.P. 37(a)(1)’s good-faith conferral requirement “serves the crucial function of preventing the unnecessary expenditure of the Court’s time and resources on adjudicating a dispute that the parties could have resolved themselves.” *United States v. All Assets Held at Bank Julius Baer & Co., Ltd.*, 202 F. Supp. 3d 1, 6–7 (D.D.C. 2016). And “courts have vigorously implemented this requirement, frequently denying motions to compel.” 8B Charles Alan Wright & Arthur R. Miller, *Fed. Prac. & Proc. Civ.* § 2285 (3d ed.).

The *PHI Fins. Servs.* Court adopted that standard from *Shuffle Master, Inc. v. Progressive Games, Inc.*, in which the United States District Court for the District of Nevada articulated the good-faith conferral requirement:

A party bringing a motion to compel discovery must include with the motion a certification that the movant has in good faith conferred or attempted to confer with the nonresponsive party. Hence, two components are necessary to constitute a facially valid motion to compel. First is the actual certification document. The certification must accurately and specifically convey to the court who, where, how, and when the respective parties attempted to personally resolve the discovery dispute. Second is the performance, which also has two elements. The moving party performs, according to the federal rule, by certifying that he or she has (1) in good faith (2) conferred or attempted to confer.

170 F.R.D. 166, 170 (D. Nev. 1996).

Here, LIUNA did not satisfy either component. First, LIUNA did not satisfy the actual-certification-document component. *See id.* LIUNA did not include *any* document with its motion certifying that it conferred with SCS in good faith, much less a document that “accurately and specifically convey[s] to [ALJ Hogan] who, where, how, and when [LIUNA and SCS] attempted to personally resolve the[ir] discovery dispute.” *Id.*

Second, LIUNA did not satisfy the performance component. LIUNA never conferred with SCS (in good faith or otherwise). LIUNA did not even contact SCS before filing its motion. Instead, LIUNA ambushed SCS by filing a motion to compel without any prior warning.

LIUNA’s conduct is exactly what Rule 37(a)(1)’s good-faith conferral requirement was intended to prevent. Had LIUNA conferred with SCS before filing its motion to compel, the parties could have explained their positions to each other and perhaps resolved some or all issues by themselves. But before the parties could do so, LIUNA filed its motion to compel, forcing the parties and ALJ Hogan to unnecessarily waste time and money litigating this discovery dispute.

* * *

Every motion to compel “must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make discovery in an effort to obtain it without court action.” N.D.R.Civ.P. 37(a)(1). LIUNA did not include that required certification because it did not comply with the Rule. Accordingly, ALJ Hogan should deny the motion.

CONCLUSION

For the foregoing reasons, ALJ Hogan should deny LIUNA’s motion to compel.

Dated this 26th day of May, 2023.

FREDRIKSON & BYRON, P.A.

By: 

LAWRENCE BENDER, ND Bar #03908
1133 College Drive, Suite 1000
Bismarck, ND 58501
(701) 221-8700
lbender@fredlaw.com

Attorneys for SCS Carbon Transport LLC

**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

**SCS Carbon Transport LLC
Midwest Carbon Express CO2 Project
Sitting Application**

CASE NO. PU-22-391

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the following:

1. Letter to S. Kahl forwarding documents for filing; and
2. SCS Carbon Transport LLC's Response to The Laborers District of
Minnesota and North Dakota's Motion to Compel

were, on May 26, 2023, filed with the North Dakota Public Service Commission and served electronically to the following:

Hope L. Hogan
hlhogan@nd.gov

John Hamre
jghamre@nd.gov

John Schuh
jschuh@nd.gov

Zachary Pelham
zep@pearce-durick.com

Randall J. Bakke
rbakke@bgwattorneys.com

Bradley N. Wiederholt
bwiederholt@bgwattorneys.com

Steven Leibel
steve@bismarck-attorneys.com


David Knoll
david@bismarck-attorneys.com

Brian E. Jorde
bjorde@dominalaw.com

Kevin Pranis
kpranis@liunagroc.com

Dated this 26th day of May, 2023.

FREDRIKSON & HYRON, P.A.



By: _____

Lawrence Bender, ND Bar #03908
1133 College Drive, Suite 1000
Bismarck, ND 58501
lbender@fredlaw.com
(701) 221-8700

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