

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

BUCKEYE DIAMOND LOGISTICS, INC. :
fka BUCKEYE RECYCLERS, INC. :

Plaintiff, :

Case No. C3-01-440

v. :

Chief Judge Walter Herbert Rice

CHEP USA, a general partnership :

Defendant. :

**BUCKEYE DIAMOND LOGISTICS FIRST MOTION TO ENFORCE
DISCOVERY ORDER (WITH RESPECT TO PRODUCTION OF PALLET
DWELL TIME INFORMATION)**

Buckeye Diamond Logistics hereby moves for an order enforcing the Court's Discovery Order of September 10, 2004 (Docket # 111) with respect to the production of pallet dwell time information. A memorandum of law in support of this motion is attached.

s/ James A. Wilson

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MEMORANDUM IN SUPPORT

Buckeye Diamond Logistics (“Buckeye”) seeks an order enforcing the Court’s Discovery Order (Docket # 111) requiring that CHEP produce pallet dwell time information.¹ CHEP has produced documents showing only “cycle time” for pallets sent to non-participating distributors. While CHEP claims that such cycle time information is the equivalent to dwell time, comparison of the calculation of cycle time with CHEP’s own definition of dwell time shows this claim is false. CHEP should therefore be ordered to comply with the Discovery Order immediately.

In its Discovery Order (at p. 5), the Court held as follows:

For the reasons stated in the trial court’s decision and entry dated September 8, 2004 (Doc. # 111), the information sought is relevant and therefore discoverable. CHEP states that a “few of these NPDs have a connection to Buckeye” and thus CHEP appears to know which NPDs have such a connection. CHEP should therefore produce dwell time reports of NPDs that have a connection to Buckeye. In the event that CHEP claims that it does not know which NPDs have a connection to Buckeye, CHEP shall produce dwell time reports of all NPDs within a 150 mile radius of Buckeye’s place of business.

On September 23, 2004, CHEP produced approximately 1100 pages of documents, divided by CHEP periods,² showing shipments of pallets to and collections from non-participating distributors, as well as CHEP’s record of the pallet balance at each entity. These documents have a column for “cycle time,” which CHEP has indicated is calculated by dividing the pallet balance for the entity by the number of pallets sent the entity, and then multiplying by the number of days in the particular CHEP period (i.e.,

¹ Buckeye is still seeking to resolve issues with CHEP regarding the production of utilization rate information. Given the approaching final pretrial conference, Buckeye believes it appropriate to bring the issues raised by this motion to the Court immediately. If a second motion to enforce Discovery Order becomes necessary, Buckeye will file that motion as soon as possible.

² A “CHEP period” is CHEP’s accounting period that corresponds roughly, but not precisely, to a month. CHEP periods consist of full weeks, so would consist variously of 21, 28 or 35 day periods.

“cycle time” = (Balance/Transfers In) x (# of days in CHEP period)). CHEP has taken the position that its cycle time calculation is the same as “dwell time,” and has accordingly refused to provide any further documents showing dwell times for pallets sent to non-participating distributors.

However, in the Discovery Conference Agenda (at p. 7), CHEP defined “dwell time” quite differently: “Dwell time” is the “amount of time that a pallet stay[s] in the distribution channel.” In other words, dwell time for a pallet would be calculated by determining when a pallet was sent to a non-participating distributor and when (if at all) it was returned. Average dwell time would reflect an average of such individual dwell times. CHEP cycle time calculation is neither. While it is unclear what CHEP uses its cycle time calculation for, it is not an attempt to calculate individual or average dwell times. Rather, cycle times are simply a ratio of the volume of new pallets going to an entity against the accumulation of pallets at that entity.

The Discovery Order was clear in what it required of CHEP – production of “dwell time reports of NPDs.” By CHEP’s own definition of dwell times, such reports have not been produced. The Court should order immediate compliance with the Discovery Order.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this Motion was served on
October 4, 2004, by electronic delivery and regular mail upon:

John C. McDonald
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s/James A. Wilson

James A. Wilson