

UNITED STATES OF AMERICA

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ARMED SERVICES BOARD OF CONTRACT APPEALS

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HEARING

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IN THE MATTER OF:

THE APPEAL OF

Wesleyan Company, Inc. ° ASBCA Docket No.
 ° 53896

Under Contract No. °
DAAK60-84-p1116, et al. °

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VOLUME 3

Thursday
April 17, 2008
VTC Hearing Room
3rd Floor

Skyline Six
5109 Leesburg Pike
Arlington, Virginia

The above-entitled matter came
on for hearing, pursuant to notice, at 9:00
a.m.

BEFORE:
THE HONORABLE MONROE E. FREEMAN, JR.
Administrative Law Judge

Neal R. Gross & Co., Inc.
(202) 234-4433



objects and Judge sustains objection but fails to compel Clarke to produce physical prototypes

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1 what is on those pages?

2 A Yes. Those are photographs of the which he
3 three devices -- the -- the three Fist devices said
4 that I found in that storage area. earlier he
needed for
all other
ASBCA
Judges to
see!

5 Q Okay. And you -- you stated that
6 you found two complete, or what you thought
7 were complete, and one incomplete. Can you
8 identify which ones those are?

9 A Yes. That which is designated as
10 one and two are essentially the complete -- I
11 would -- I would call them the complete Fist
12 device. And the item designated as three as
13 the partial.

14 Q Okay. Do you have -- do you have
15 those prototypes available there? The
16 physical prototypes available?

17 A Yes, we do.

18 Q All right. Can you hold those up
19 while you're -- while you're looking at the
20 ones in the -- in the Rule 4?

21 A Okay. This is --

22 MR. MOORHOUSE: I'm going to object,
23 Your Honor, on the basis of never having seen
24 these. All the Army produced, sir, were these
25 photographs. They would not give us those

Army Attorney Clarke
lies in ASBCA hearing to keep prototypes

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1 prototypes because they said they had
2 purchased them and they would were the Army's

from
Physical
Cross-
examination
as required
by law.

3
4 MR. CLARKE: That's not true. I
5 made them available to you in my office. And
6 we substituted these pictures. I think you
7 came over and looked at it.

Judge Freeman
fair to

8 MR. MOORHOUSE: No, we did not look
9 at them.

Compel
Army to
produce
suppressed
key
physical
evidence

10 MR. CLARKE: Well, I made them
11 available in my office.

12 MR. MOORHOUSE: That's not my
13 recollection. They should have been brought
14 into the hearing.

15 MR. CLARKE: I made them available -
16 - I made them available to be on site in my
17 office. We had them in my office for months.
18 We just moved them back to the --

19 JUDGE FREEMAN: I guess this is one
20 of the problems in not -- in doing it this
21 way. Not getting people involved --

22 MR. CLARKE: We're not going to
23 enter them into evidence. We're just going to
24 show you what the pictures --

25 JUDGE FREEMAN: Well, it's typical

Judge Freeman knows this is wrong to
proceed without evidence as mandated by a previous CAFC
2006 ruling that the focus of the ASBCA

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1 for them to cross examination on basis of
2 something they're looking at on -- on this
3 tube. I'll sustain the objection.

4 MR. PRITCHARD: All right.

5 JUDGE FREEMAN: Proceed.

6 BY MR. PRITCHARD:

7 Q Mr. Pentheny, pull the -- take the --
8 - take the prototypes away, please. Okay.
9 Please look at the -- at the first page of tab

10 A Okay.

11 Q Is that -- is that one of the
12 prototypes you found in the storage area? Uh-
13 oh. It froze.

14 MR. CLARKE: You faded out.

15 MR. PRITCHARD: You froze. Did you
16 answer that question? Were you able to hear
17 the question?

18 WITNESS PENTHENY: Yes, I did. And
19 yes, that is one of the prototypes.

20 MR. CAMP: Would you just please
21 repeat the question, Captain Pritchard,
22 because you did lock up on this end too.

23 MR. PRITCHARD: Okay. The question
24 was the -- the first page, there's a
25 prototype. And below the prototype, there's

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is about
the physical
prototypes.

Judge Freeman
lets Army

Suppress
evidence --
because he
is an

"Army
appointed
Judge"