

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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STB Docket FD 35981

FINCH PAPER LLC — PETITION FOR DECLARATORY ORDER

**APPEAL OF ORDER OF ADMINISTRATIVE LAW JUDGE CLARIFYING
PRIOR ORDER ON MOTION TO COMPEL DISCOVERY RESPONSES**

Delaware and Hudson Railway Company d/b/a Canadian Pacific (“CP”), pursuant to 49 C.F.R. § 1115.9(a) and § 1115.1(c) hereby appeals the January 18, 2017 Order of Administrative Law Judge Clarifying Prior Order on Motion to Compel Discovery Responses (the “ALJ Clarification Order”), and in support of its appeal, states as follows:

BACKGROUND

This is CP’s second appeal of a decision on the same motion to compel. In the first round, CP appealed the Administrative Law Judge’s decision which summarily granted Finch Paper LLC’s (“Finch”) Motion to Compel Discovery Responses (the “ALJ Original Order”).¹ The ALJ Original Order issued a week after the Board assigned the dispute to the ALJ for resolution, without any communication with the parties whatsoever, and without adequate explanation as to the bases for the ALJ’s decision. On January 11, 2017, the Board concluded that it could not “sufficiently discern the basis for the ALJ’s ruling based on the level of detail contained in the written decision.” January 11, 2017 Decision (the “Board Decision”) at 6. Accordingly, the Board remanded the discovery dispute to the ALJ with instructions to “provide

¹ Order of Administrative Law Judge on Motion to Compel Discovery Responses, served August 24, 2016.

a written decision of sufficient clarity and detail to the STB so that the STB can adjudicate any appeal.” *Id.* The Board declared that CP’s appeal was moot in light of the remand. *Id.* Like the ALJ Original Order, the ALJ Clarification Order issued just one week later. Like the ALJ Original Order, it issued without any communication with the parties whatsoever, and most importantly, again without sufficient clarity and detail as to the bases for the ALJ’s decision. Thus, the ALJ Clarification Order suffers from the same infirmities that the Board held warranted remand in the first place.

As with the ALJ Original Order, the ALJ Clarification Order merely discusses general legal standards and fails to provide any detailed explanation of the application of these legal standards to specific discovery requests in the context of this proceeding. It asserts that the information requested is relevant without explaining the basis for this finding. It fails to identify the issue(s) to which the sought information is purportedly relevant, or how such information would assist the Board in deciding the issues properly before it. Indeed, the ALJ Clarification Order states that the ALJ “did/do not consider it necessary to detail those evaluations in narrative,” asserting instead that it “presume(d) the Board has confidence [in] its designated decision-makers.” ALJ Clarification Order at 3. Both the STB’s Memorandum of Understanding (MOU) with FERC and the law demands otherwise.

Turning to the merits, and as previously explained by CP, the discovery requests at issue seek information that has no bearing on any issue or fact of consequence in this proceeding and would otherwise impose an undue burden on CP. There is no reasonable basis to believe that the information that Finch now seeks to compel might be able to affect the outcome of this proceeding. Accordingly, the motion to compel must be denied.

LEGAL STANDARD FOR APPEAL

An administrative law judge's discovery ruling may be appealed on an interlocutory basis when one or more enumerated circumstances in 49 C.F.R. § 1115.9(a) are met. *Finch Paper LLC - Petition for Declaratory Order*, FD 35981, slip. op. at 5 (STB served Jan. 11, 2017). In this case, two of those circumstances are met because, as explained herein, "[t]he ruling grants a request for the inspection of documents not ordinarily available for public inspection," 49 C.F.R. § 1115.9(a)(2) and "[t]he ruling may result in substantial irreparable harm . . . or undue prejudice to a party." 49 C.F.R. § 1115.9(a)(4). Thus, interlocutory review of the ALJ Clarification Order is appropriate.

Additionally, although appeals may not be favored, the Board grants appeals "to correct a clear error of judgment or to prevent manifest injustice." 49 C.F.R. § 1115.1(c); *Finch Paper LLC*, slip. op. at 5-6. As explained more fully below, the ALJ Clarification Order (as was the case with the ALJ Original Order) committed a clear error of judgment for several reasons, and allowing it to stand would permit a manifest injustice. Thus, the Board should grant this appeal and reverse the ALJ Clarification Order.

ARGUMENT

I. THE ALJ CLARIFICATION ORDER FAILS TO PROVIDE A SUFFICIENT BASIS FOR THE ALJ'S RULING.

The ALJ Clarification Order committed a clear error of judgment in that it fails to articulate the basis for the ALJ's conclusion that the discovery requested by Finch is relevant to the issues in this proceeding. Rather than provide any detailed explanation or analysis of why the requested documents or information are relevant, the ALJ Clarification Order again perfunctorily points to general legal standards, summarily concludes that each of Finch's requests meet these standards, and *expressly declines* to go into any level of detail as to why or

how it reaches this result. Without this analysis, the ALJ Clarification Order is a clear error of judgment, both as a matter of administrative law and as being in contravention of the MOU authorizing the referral of discovery matters to FERC ALJs for resolution. Indeed, according to the Board Decision, pursuant to the MOU, “the ALJ is to ‘provide a written decision of sufficient clarity and detail to the STB so that the STB can adjudicate any appeal.’” Board Decision at 6 (citing MOU, Section 1). But neither the ALJ Original Order nor the ALJ Clarification Order provides such a decision.

It is a fundamental tenet of administrative law that a decision must provide enough detail to provide a discernible path from the facts and considerations before it to the ultimate decision reached. *See, e.g., K N Energy, Inc. v. FERC*, 968 F.2d 1295, 1303 (D.C. Cir. 1992) (“[W]e will uphold an agency’s decision if, but only if, we can discern a reasoned path from the facts and considerations before the [agency] to the decision it reached.”) (internal citation omitted); *Brown v. Rock Creek Min. Co.*, 996 F.2d 812, 816 (6th Cir. 1993) (“An administrative law judge is statutorily obliged to consider all of the evidence and make findings of fact and conclusions of law which adequately set forth the factual and legal basis for his decision.”) (internal citation omitted). When an ALJ’s decision consists of conclusory statements without further explanation, it cannot be upheld. *See, e.g., Carpenter v. Astrue*, 537 F.3d 1264, 1268 (10th Cir. 2008) (finding ALJ’s purported analysis was “improper boilerplate” because ALJ “merely recited the factors he was supposed to address and did not link his conclusions to the evidence or explain how [facts] . . . resulted in a conclusion”). The ALJ Clarification Order here consists of precisely such conclusory statements, and offers no reasoned explanation for its summary conclusions.

Instead of stating how the documents and information requested by Finch are relevant to the subject matter of the proceeding or how they might plausibly affect the outcome of a proceeding, the ALJ Clarification Order summarily concludes that “each request clearly satisfied” this standard, and responds that ALJ “did/do not consider it necessary to detail those evaluations in narrative.” ALJ Clarification Order at 3. Such a statement could not be more at odds with the Board’s decision for remand. The ALJ Clarification Order, which refuses to provide CP and the Board a “narrative” of the bases for the ALJ’s adverse ruling, constitutes manifest injustice and clear error of judgment by failing to provide any discernible and reasoned path from the facts and considerations to the decision the ALJ reached. *See, e.g., K N Energy, Inc.*, 968 F.2d at 1303 (“It most emphatically remains the duty of this court to ensure that an agency engage the arguments raised before it—that it conduct a process of *reasoned* decisionmaking. The deference we owe FERC’s expert judgment does not strip us of that responsibility.”) (internal citation omitted).

In an effort to justify its conclusory ruling, the ALJ Clarification Order goes on to state it “presume(d) the Board has confidence its designated decision-makers will conduct appropriate comparative analyses in this regard.” ALJ Clarification Order at 3. However, aside from its own self-assurance in its conclusions, the basis for these comparative analyses is entirely lacking from the ALJ Clarification Order. Nowhere does the ALJ Clarification Order state what the ALJ finds to be the “subject matter involved in [the] proceeding,” or how information from certain documentary evidence or interrogatory responses would be able to affect the outcome of this proceeding. Rather than engage with the facts to supply a rationale for its ruling that all of these categories of discovery sought by Finch are relevant to the limited questions before the Board, the ALJ Clarification Order summarily dispensed with the required analysis.

In sum, the ALJ Clarification Order fails to mend the specific defect that prompted the Board to remand the ALJ Original Order—that the basis for the ruling could not be ascertained due to the lack of detail. As a result, the basis for the decision still remains undiscernible, and reversal is proper.²

II. HAD THE ALJ ANALYZED FINCH’S DISCOVERY REQUESTS IN RELATION TO THE ISSUES IN THIS PROCEEDING, IT WOULD HAVE CONCLUDED THE DISCOVERY DEMANDED IS NOT RELEVANT.

As previously noted in CP’s original appeal and prior filings, although parties are entitled to discovery “regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding,” 49 C.F.R. § 1114.21(a)(1), Board precedent instructs that “more than a minimal showing of potential relevancy” is necessary before granting a motion to compel discovery. *Potomac Elec. Power Co. v. CSX Transp., Inc.*, 2 S.T.B. 290, 1997 WL 274205, at *1 (STB served May 27, 1997). Indeed, the standard is not nearly as broad as the ALJ surmises as the Board has explained that “the requirement of relevance means that the information might be able to affect the outcome of a proceeding.” *Reasonableness of B.N.S.F. Railway Co. Coal Dust Mitigation Tariff Provisions*, FD 35557, 2012 WL 2378133, at *3 (STB served June 25, 2012) (quoting *Waterloo Ry.—Adverse Aband.—Lines of Bangor and Aroostook R.R. and Van Buren Bridge Co. in Aroostook Cnty., Me.*, AB 124 (Sub-No. 2), et al. (STB served Nov. 14, 2003)).³ Moreover, “discovery requests must be narrowly drawn, directed toward a relevant issue, and not

² The ALJ Clarification Order states that the ALJ found “no need to further tax Finch and CP resources” by conducting any hearings on the discovery dispute. ALJ Clarification Order at 1. But the ALJ Original Order and now the ALJ Clarification Order has had the effect of inviting more disputes than it put to rest. This outcome may have been avoided through a hearing process during which Finch’s discovery requests could have been evaluated and ruled on in the context of the issues of the case, or which otherwise could have facilitated a resolution of the discovery dispute that the parties cannot reach on their own.

³ It is unclear why the ALJ felt constrained to “default[] to the Federal Rules of Evidence” after the ALJ’s “review of Board regulations revealed no definition for the term [relevant]” (ALJ Clarification Order at 2) when there is STB precedent on the scope of discovery and relevance.

used for a general fishing expedition.” *Duke Energy Corp. v. Norfolk Southern Ry. Co.*, STB Docket No. 42069, 2002 WL 1730020, at *3 (STB served July 26, 2002). Thus, Finch “must demonstrate a real, practical need for the information.” *See Coal Rate Guidelines, Nationwide*, 1 I.C.C. 2d 520, 548, 1985 WL 56819, at *22 (1985).

As set forth more fully in its appeal of the ALJ Original Order, the full contents of which CP hereby incorporates by reference,⁴ the only questions before the Board in this proceeding are whether certain practices of CP relating to its demurrage charges against Finch violate 49 U.S.C. §§ 10702 and 10746, and whether CP has performed its common carrier obligations to Finch under 49 U.S.C. § 11101. Had the ALJ, either in the ALJ Original Order or the ALJ Clarification Order, engaged in any analysis of the specific discovery requests in the context of this proceeding, it would have reached the inevitable conclusion that the documents and information requested by Finch have no bearing on the questions before the Board, and are not relevant to the outcome of this proceeding.

Significantly, the ALJ Clarification Order does not even distinguish between the different categories of discovery Finch requests, but sweepingly declares that each discovery request satisfies the standard. As set forth in CP’s initial appeal of the ALJ Original Order, notices or enforcement actions by the Federal Railroad Administration pertaining to CP’s rail lines and tracks (Document Request No. 30) in no way relate to the demurrage charges assessed against Finch for Finch’s failure to order in cars in a timely fashion, and Finch has identified no such

⁴ CP’s arguments as to why the underlying motion to compel should have been, and should now be, denied have been previously stated at length in other CP filings, including: (1) CP’s July 21, 2016 Reply to Motion to Compel Discovery and its August 8, 2016 letter reply; (2) CP’s September 13, 2016 Appeal of Order of Administrative Law Judge on Motion to Compel Discovery Responses and CP’s September 19, 2016 letter reply; and (3) CP’s September 29, 2016 Reply to Motion to Hold Procedural Schedule in Abeyance. The arguments made in CP’s previous filings are incorporated herein by reference.

relation. Nor can the Customer Audit Safety forms, *i.e.*, records of rail safety inspections that CP performs at its customers' facilities, that CP maintains *for its other customers*⁵ (Document Request No. 34) possibly be connected to resolving the issues before the Board concerning either demurrage charges or service to Finch. Nevertheless, Finch seeks all such forms from across CP's rail system and dating back to 2013.⁶

Finch's other discovery requests (Interrogatory Nos. 15-19 and Document Request Nos. 40-42 and 44) are even more attenuated from the issues before the Board, seeking documents and information relating to CP's management strategies, business plans, personnel staffing, and equipment changes. Finch fails to appreciate that whether CP provided Finch adequate service in accordance with its common carrier obligations is an objective question determined by reference to the service CP provided. The means by which CP accomplished its service obligations—CP's internal allocation of resources and personnel—is entirely irrelevant, and discovery into this topic serves no purpose other than to obfuscate the issues before the Board, cause further unnecessary delay, and impose undue burden on CP.

Indeed, as should now be absolutely clear following the filing of Opening and Reply evidence, Finch has not carried its burden of showing that CP violated its common carrier obligation in the first place. Finch did not dispute that three-day a week service was adequate to handle its weekly volumes and CP showed that Finch received at least three-day a week service virtually every week over the past several years, and that many of Finch's claims to the contrary

⁵ Moreover, as noted in CP's prior filings, safety audits may contain information about CP's other rail customers' facilities that those customers might consider to be competition sensitive. Absent a compelling need for this information, the Board should not risk potential harmful disclosure of other rail customers' information.

⁶ Furthermore, CP already produced information that reflects the conditions of CP's track used to serve the Finch facility and any delays in servicing Finch, including the crew exception reports which detail issues encountered in providing service to Finch, FRA Form 97 Incident Reports, and CP's maintenance records for CP tracks used to serve Finch.

were either flat out wrong or half-truths. *See, e.g.,* CP Reply Statement, Table 1 (p. 36), Table 2 (p. 37); Jason LaValla Verified Statement, including Appendix A and Appendix B thereto. How many crew members CP employed in Enderlin, North Dakota, Chicago, Illinois, or anywhere else on CP's system, including New York; the number of locomotives in inventory; FRA enforcement notices; and the condition of other customers' private tracks over the years, have no bearing on whether three-day a week service was sufficient to handle Finch's weekly volumes, whether CP delivered three-day a week service, or on any other issue in this proceeding.

Had the ALJ Clarification Order considered the limited topics before the Board and engaged in the appropriate and necessary analysis, it would have been obvious that these documents and information sought simply have no bearing on those questions and in no way affect the outcome of the proceeding. As a result, they fail to meet the Board's standard for relevancy, and Finch's motion to compel should have been denied. *See Norfolk S. Ry. Company Acquisition & Operation of Certain Rail Lines of the Delaware & Hudson Ry. Co., Inc.*, FD 35873, 2015 WL 2360282, at *9 (STB served May 15, 2015) (denying motion to compel lease agreement where movant had not shown how any information contained in the lease would affect the outcome of the proceeding).

III. THE ALJ CLARIFICATION ORDER DOES NOT ENGAGE IN THE PROPER PROPORTIONALITY AND BURDEN ANALYSIS.

"All discovery requests entail the balancing of the relevance of the information sought against the burden of producing that information." *Reasonableness of BNSF Ry. Co. Coal Dust Mitigation Tariff Provisions*, 2012 WL 2378133, at *4. "Under 49 CFR 1114.21(c), discovery may be denied if it would be unduly burdensome in relation to the likely value of the information sought." *Canadian Pac. Ry. Co.—Control—Dakota, Minn. & E. R.R. Corp.*, STB Docket No. FD 35081, 2008 WL 820744, at *1 (STB served March 27, 2008). Moreover, the Board's

discovery rules “parallel” those of the Federal Rules of Civil Procedure. *See Westinghouse Elec. Corp v. Alton & Southern Sy. Co.*, 1 I.C.C.2d 182, 195 n.7 (1984). The federal rules specifically require that discovery be “proportional to the needs of the case” and provide several factors that should be considered in evaluating this proportionality, including whether the burden or expense outweighs the likely benefit. Fed. R. Civ. P. 26(b)(1).

The ALJ Clarification Order, however, fails to conduct a proportionality and burden analysis, balancing between the significant burden posed to CP in gathering, reviewing, and providing the sought discovery and the value (or, in this case, lack thereof) of the discovery sought. As noted in previous filings, some of the discovery is maintained in yard offices across the CP system and has not been specifically collected. Similarly, the ALJ improperly ignored that CP had already produced significant probative information, including discovery that reflects the conditions of CP’s track used to serve the Finch facility and any delays in servicing Finch.

Further, the burden analysis should take into account the increased burden resulting from the timing of the motion to compel and the posture of the proceeding.⁷ Given Finch’s delinquency in moving to compel after CP’s unequivocal objections to the discovery requests at issue, these categories of documents have not been specifically collected or reviewed. Accordingly, producing the discovery at issue would require CP to initiate new and costly collections across its offices nationwide. And this would occur even as Finch has filed its

⁷ The ALJ adopted the acceptance of the filing of the motion to be “dispositive” on the timeliness issue and declined to issue any findings on this point. *See* ALJ Clarification Order at 2. In “accepting” Finch’s motion for filing, the Director of the Office of Proceedings’ decision did not, however, indicate that CP’s arguments regarding Finch’s lack of diligence were to be disregarded; in fact, it specifically noted that whether CP had continued to produce documents responsive to the disputed request was a factual issue that had not been resolved. *See Finch Paper LLC - Petition for Declaratory Order*, FD 35981, slip. op. at 1 (STB served Aug. 16, 2016) (“[A]ccording to Finch, CP continued to produce responsive documents (*though CP claims those documents were not responsive to the disputed requests*) as late as June 30, 2016.”) (emphasis added).

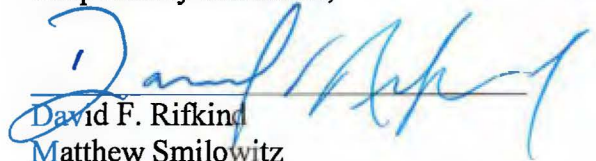
opening evidence and CP its reply evidence, perhaps leading to supplemental rounds of briefing, all of which would only further delay resolution of this proceeding without aiding the Board in any way in deciding Finch's claims.

CONCLUSION

CP respectfully requests that the Board reverse the ALJ Clarification Order and issue an order denying Finch's Motion to Compel.

Dated: January 25, 2017

Respectfully submitted,



David F. Rifkind

Matthew Smilowitz

STINSON LEONARD STREET LLP

1775 Pennsylvania Avenue N.W., Suite 800

Washington, DC 20006

Telephone: (202) 785-9100

Facsimile: (202) 785-9163

david.rifkind@stinson.com

matthew.smilowitz@stinson.com

John K. Fiorilla

Capehart & Scatchard P.A.

800 Midlantic Drive, Suite 200S

Mt. Laurel, NJ 08054

Telephone: (856) 914-2054

Facsimile: (856) 235-2796

jfiorilla@capehart.com

*Attorneys for Delaware and Hudson Railway
Company d/b/a Canadian Pacific*

CERTIFICATE OF SERVICE

I hereby certify that, on this 25th day of January, 2017 a copy of the foregoing Appeal of Order of Administrative Law Judge Clarifying Prior Order on Motion to Compel Discovery Responses was served by first class mail, postage pre-paid, and by electronic mail on:

Thomas W. Wilcox (twilcox@gkglaw.com)
Brendan Collins (bcollins@gkglaw.com)
Svetlana Lyubchenko (slyubchenko@gkglaw.com)
GKG Law, P.C.
1055 Thomas Jefferson Street, NW, Suite 500
Washington, D.C. 20007

And by first class mail, postage pre-paid, on:

The Honorable H. Peter Young
Federal Energy Regulatory Commission
Office of Administrative Law Judges
888 First Street, N.E.
Washington, DC 20426


David F. Rink