

Docket No. FD 35842

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Date: March 4, 2016

Case: In Re: New England Central Railroad



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FEDERAL ENERGY REGULATORY COMMISSION

IN RE:

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NEW ENGLAND CENTRAL : CASE NO: FD-35842

RAILROAD :

- - - - -X

HEARING TAKEN BEFORE THE HONORABLE STEVEN GLAZER

Friday, March 4th, 2016

888 First Street, Northeast

Washington, D.C. 20426

The hearing in the above-entitled matter was convened at
10:02 a.m., pursuant to Commission notice.

REPORTED BY:

Alexandria Kaan

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1 Hearing before the Honorable Steven Glazer
2 called for examination pursuant to notice, on Friday,
3 March 4th, 2016, in Washington, D.C., at the Offices of
4 the Federal Energy Regulatory Commission, 888 First
5 Street, Northeast, Hearing Room 7, at 10:02 a.m., before
6 ALEXANDRIA KAN, a Notary Public within Washington,
7 D.C., when were present on behalf of the respective
8 parties:

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1 P R O C E E D I N G S

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3 JUDGE GLAZER: We'll go on the record. Good
4 morning. This is a Surface Transportation Board case,
5 New England central Railroad finance docket No. 35842.
6 Welcome to the Federal Energy Regulatory Commission's
7 courtrooms. And I would like to start with taking the
8 appearances of the parties. So if we start on this
9 side.

10 MR. HOCKY: Good morning, Your Honor. My
11 name is Eric Hocky, I'm counsel for New England Central
12 Railroad.

13 MR. MULLINS: Your Honor, my name is Bill
14 Mullins, or William Mullins but I go by Bill.
15 Representing Southern, law firm of Baker and Miller.

16 MS. ZORBAUGH: My name is Crystal Zorbaugh,
17 I'm also representing Southern, law firm of Baker and
18 Miller.

19 JUDGE GLAZER: Okay, and so I take it that
20 is the sum total of all the parties in this case?

21 MR. MULLINS: It is.

22 JUDGE GLAZER: Now, we have a motion to

1 compel on the table, that is the only open motion that
2 I'm aware of. Is there any others?

3 MR. MULLINS: It's actually been decided in
4 our favor, Your Honor. I don't know: Is your practice
5 that we stand in your courtroom?

6 JUDGE GLAZER: Usually they do stand, but
7 I'll leave it to you.

8 MR. MULLINS: I haven't been here since
9 about -- last time I was in front of a FERC ALJ in an
10 STB matter was about 1999 when they were doing all the
11 railroad mergers in the '90's and the early 2000's and
12 we had to use FERC ALJ's because STC doesn't have ALJ's.
13 So I think it was Judge Nelson maybe.

14 JUDGE GLAZER: Judge Nelson, Jerome Nelson.

15 MR. MULLINS: Is he still around?

16 JUDGE GLAZER: No, he retired many years
17 ago. I still see him at University of Maryland School
18 of Law where we teach. And he's doing very well.

19 MR. MULLINS: Well, you should ask him about
20 handling railroad matters when you see him.

21 JUDGE GLAZER: Okay.

22 MR. MULLINS: So we had filed a motion to

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1 compel and that motion to compel was actually ruled upon
2 and granted. So the issue really is: How much, since
3 it was granted -- we then met and confirmed about okay,
4 they had produced a certain --

5 JUDGE GLAZER: When was it granted, just so
6 I know?

7 MR. MULLINS: It was granted and distinction
8 issued on February the 12th.

9 MS. ZORBAUGH: Did you make a copy of the
10 subpoena?

11 JUDGE GLAZER: Well, the one I'm aware of is
12 -- maybe I'm just not aware of it -- February 12 I have
13 a decision No. 44759, it's on the upper left-hand.

14 MR. MULLINS: Yes.

15 JUDGE GLAZER: And what I'm seeing there is
16 that this motion was -- this order basically just
17 assigns this matter to me to entertain and rule upon
18 discovery matters and resolve all disputes concerning
19 discovery in this proceeding. The order is to assign
20 the case to me; then send a copy of filings to me; then
21 add me to the service list; then serve a copy of the
22 decision on OPN; and the effective date. So as I read

1 it I do not read this as a grant of the motion to
2 compel, I believe that that is still pending. I believe
3 what this says is that I am to facilitate this discovery
4 matter and rule.

5 MR. MULLINS: Eric, how do you --

6 MR. HOCKY: Your Honor, I would also say --
7 I don't read them as granting the motion to compel. I
8 see the order as them having denied part of our
9 response, which was to seek a supplemental protective
10 order on this methodology thing. And they denied those
11 portions of our defense but not our general -- they
12 didn't rule on our general objections and on the motion,
13 as I read it.

14 MR. MULLINS: I agree with him, actually.
15 Technically, you're correct. But in denying his request
16 to be protected from discovery, which is what they were
17 doing, they effectively said we're entitled to all of
18 the discovery on the methodology. They actually said
19 that in the order that we had our own methodology, which
20 in effect was, you're right, it's technically not going
21 down directly to every component to the motion to
22 compel. But the motion to compel was to compel

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1 production of the stuff that he was refusing to produce
2 because of his argument that he should only have to
3 produce evidence on one methodology. The board said no,
4 you have to produce evidence on all methodologies, which
5 was the intent on our motion to compel. So in effect
6 our view was that it was a complete granted motion to
7 compel. He's correct that it was not a didn't go by
8 each every little discovery item and say okay, we're
9 granting 1 and granting 5 and denying 7. So, I don't
10 know how you want to read that.

11 MR. HOCKY: Right.

12 JUDGE GLAZER: Let's be clear on the
13 procedure at least, because I am a procedure hound and I
14 want to know that I'm following the exact procedure that
15 the Board orders. And how I read these orders that came
16 about, so you're aware, is you had a protective order
17 that was granted back in June of 2015. Then you, New
18 England, filed a motion for the Board to make a
19 preliminary determination as to which valuation method
20 to use. That was decided on -- an order was issued on
21 July 29th which basically just held all the deadlines in
22 abeyance. Then -- and you all filed replies to the

1 motion. Then on February 9th, 2016, the Board denied
2 New England's methodology motion, which was strictly to
3 have the Board determine what the methodology was.
4 Okay. It also denied New England's request for a
5 protective order and supplemental protective order,
6 okay. And then it said within ten days of service of
7 the ALJ's notice that "discovery disputes have been
8 resolved", which we have not done yet. "The parties
9 shall jointly submit a proposed procedural schedule to
10 the Board that will govern the deadlines for PAS's reply
11 in evidence," in other words the case will proceed after
12 the discovery is taken care of. That's what the Board
13 ordered on February 9th. Then on February 12th the
14 Board issued the order that assigned this discovery
15 dispute to me. So the posture where you're at, as I
16 understand it, the Board has decided that, for discovery
17 purposes at least, all four valuation methods are on the
18 table, discovery must proceed as to all four valuation
19 methods.

20 MR. MULLINS: Right.

21 JUDGE GLAZER: They made no ruling as to
22 specific objections that New England made to specific

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1 data requests. That is something that you must deal
2 with in a meet-and-confer. Now, what has been done is,
3 to the extent that you've made any objections on the
4 basis of the evaluation question, those are gone. And
5 what you need to do now is to broaden the discovery
6 production to include all those documents. As to any
7 other discovery disputes you have on that, I expect you
8 to have the meet-and-confer and to iron all of those
9 out.

10 And by the way, I asked you folks to produce
11 a procedural schedule today. Do you have it?

12 MR. MULLINS: We do.

13 MR. HOCKY: Yes, we do.

14 JUDGE GLAZER: Then we'll get to that in a
15 minute. The documents have been produced, okay. In
16 addition to producing the documents, and I also mean the
17 documents that are subject to the protective order,
18 okay, you cannot refuse to produce documents strictly on
19 the basis of confidentiality. The protective order
20 takes care of the confidentiality. Produce all those
21 documents. You also produce a privilege log claiming
22 privilege, and of course in the privilege log in

1 accordance with Rule 26 of the federal rules you state
2 -- you identify the document by a number, make sure it's
3 bates stamped, you produce -- it's a chart, you put in
4 the chart a reasonable description of the document
5 that's sufficient for the other side to be able to tell
6 what it's about; identify who the parties; who received
7 the documents, who produced the document, identify
8 whether any of them are attorneys; and also identify
9 specifically which privilege you're claiming,
10 attorney-client, work product, whatever. Okay. The
11 other side then has an opportunity to ask for those
12 specific particular documents that it wants and it
13 thinks are not privileged, at which point those
14 documents will be turned over to me under seal for
15 in-camera inspection. I will then look at the documents
16 and determine whether they are in fact privileged, and
17 only if they are privileged. If they are not
18 privileged, I warden their release; if they are
19 privileged they will not be released. That is the
20 methodology and that's what I want the proceeding
21 schedule to cover today.

22 MR. MULLINS: Right.

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1 JUDGE GLAZER: Okay.

2 MR. MULLINS: I thank you for that.

3 JUDGE GLAZER: You're welcome.

4 MR. MULLINS: That was excellent. Thank you
5 for the clarification. We have actually met and
6 conferred already.

7 JUDGE GLAZER: Oh, good.

8 MR. MULLINS: This is a very small world.
9 Our bar, Eric and I have known each other; it's the old
10 school way of having a beer the night before and
11 drinking together and then you're fighting the next day,
12 so. We have already spoken and met; they have agreed to
13 produce and un-redact probably 90 percent of what we've
14 requested, maybe 95 percent. It's been very productive,
15 and I would like to thank him for his cooperation and
16 his willingness to do it and his clients.

17 And there's two minor disputes remaining,
18 and one of those may not even have to go in front of
19 you. And that would really leave one dispute. Now,
20 that's at this time.

21 And, Eric, I don't know, do you want to
22 explain the process and what you're going to do?

1 MR. HOCKY: Sure.

2 What we had agreed in our meet-and-confer,
3 recognizing that we don't have the methodology defenses
4 anymore, so we're supplying some of the documents we had
5 previously submitted, we're un-redacting certain
6 portions, we're producing some additional documents.
7 And the way we had talked about the schedule was we'll
8 produce the documents, then they'll take some time to
9 look at them and figure out -- because we still may
10 redact some things that we think are not appropriate or
11 not, although I don't actually think there will be
12 redaction issues -- but they'll look at them and see
13 whether they think it's complete or not complete or
14 whether they think we've provided what they want. And
15 we will meet and confer again at that point and see if
16 we have any additional disputes.

17 As Bill mentioned, we have one where we've
18 said we won't produce something because it's not clear
19 from my discussions with my client so far that we have
20 the information available. He thinks it should be
21 available; I've agreed to talk to them further about
22 whether it's available, and so that -- and if it is,

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1 then we'll talk about what we can produce or not or what
2 form. So that one I think we're in the middle of still
3 conferring about, I don't know if that's an issue.

4 And then there is one other potential issue
5 about one document that we don't think is relevant.
6 We've identified it in the privilege log type of thing,
7 and not on a privilege basis. But we've identified it
8 to them to be open about it and we haven't agreed about
9 whether it should be produced or not. So that is one
10 that I am not sure we have further discussions yesterday
11 even, and I have not had a chance to hear back from my
12 clients about whether they're changing their mind on
13 that, so right now I think that's going to be an open
14 issue we might have to have you decide. But I don't
15 know how we want to handle the timing of that, whether
16 we would do that today or Tuesday. We could submit
17 something early next week if it's not going to be
18 resolved. But I don't have an answer at least as of
19 9:50 this morning when we came in here.

20 JUDGE GLAZER: Okay. Well, this is all
21 pretty straight-forward and fairly standard for me to
22 deal with. It sounds like you guys have it well under

1 control, and I'm very grateful for you to do that and
2 hear that 90 percent of this has been resolved is music
3 to my ears. And what I expect you will do at this point
4 is there will be some deadline date on which you will
5 produce the documents as you have all agreed to now.
6 Your procedural schedule should then have on it a
7 certain time period over which you, PAS, can review the
8 documents -- I don't mean PAS, as counsel -- can review
9 the documents to determine whether they are fully
10 responsive. If there are unresponsive parts, then PAS
11 will send a letter back to New England, say, within a
12 certain number of days, identifying the matters that
13 have been responded to, and then you will set a date on
14 that procedural schedule for another meet-and-confer, to
15 work it out at that point. If the meet-and-confer
16 succeeds then go ahead and act accordingly; if it does
17 not succeed, you can supplement your motion to compel.
18 I think that would probably be the best way to handle
19 it. And we will deal with it that way.

20 You may file a reply to the motion to compel
21 within whatever time period you agree with in your
22 procedural schedule, and I'll rule on it, and then

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1 you'll act accordingly. And I think that should be
2 everything. So with that are you prepared to turn into
3 me a full procedural schedule today or do you need some
4 time?

5 MR. MULLINS: Eric, why don't you submit --

6 MR. HOCKY: I'll show you what I have. I'm
7 not sure it quite covers that last portion of the motion
8 to compel.

9 The other thing I just wanted to mention to
10 Your Honor is I'm not sure the Board's orders quite said
11 this, but right now we're meeting and conferring about
12 disputes of Pan Am's discovery to NECR. NECR has not
13 served discovery on Pan Am and will not do so until they
14 file their opening statement somewhere down the line.
15 And then we will presumably -- Your Honor will be
16 attending to this matter. So although we're resolving
17 all these disputes now, sometime down the road there may
18 be other discovery issues, which again we would treat in
19 the same manner, we will meet and confer and we'll serve
20 them. But we don't know when that will be because we
21 haven't done the rest of the procedural schedule with
22 the Board until we get through this initial discovery.

1 JUDGE GLAZER: Let me see here. I think --
2 well, the order that the Board sent out was this
3 proceeding is assigned to Judge Glazer for handling of
4 all discovery matters and initial resolution of all
5 discovery disputes.

6 MR. HOCKY: Yeah.

7 JUDGE GLAZER: So I read that as being
8 entirely -- - they don't need more information. Just
9 send motions to me.

10 MR. HOCKY: I just wanted to clarify that we
11 haven't served this discovery already.

12 JUDGE GLAZER: Right.

13 MR. HOCKY: The way procedures work, we
14 generally don't -- it's not like simultaneous discovery
15 going on like in a normal court case. In our
16 proceedings that's how we've handled it generally.

17 JUDGE GLAZER: That doesn't sound like a
18 problem.

19 So, initial discussions between the parties
20 to resolve discovery disputes March 1 through 2.

21 MR. HOCKY: So we have already done that.

22 MR. MULLINS: Yeah.

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1 JUDGE GLAZER: Next, discussions between
2 parties to resolve any remaining discovery disputes week
3 of March 28th. You will all need a whole week of
4 discussions?

5 MR. HOCKY: We just didn't know when we
6 would be speaking when we went out together.

7 JUDGE GLAZER: Okay.

8 MR. HOCKY: To schedule some time to look
9 into this, we could get back to them.

10 JUDGE GLAZER: So I expect that by "this" to
11 mean that the entire week is the deadline and that's the
12 time period to which you would take care?

13 MR. MULLINS: Yes.

14 MR. HOCKY: Yes.

15 JUDGE GLAZER: Next, conference with the
16 ALJ, if any unresolved issues, April 7th. Let's see
17 what we got on April 7th.

18 MR. HOCKY: We only suggested that date
19 because I have to be in Washington the day before.

20 JUDGE GLAZER: Unfortunately, I am not
21 available.

22 MR. HOCKY: Okay.

1 JUDGE GLAZER: And I have a big decision I
2 have to get out by April 12. And then the rest of the
3 week is a mess, and I am not available until starting
4 April 18th, Monday April 18th. If you want to set a
5 date on that for April 18th, Monday, or April 19th,
6 Tuesday, that's fine with me.

7 MR. MULLINS: Your Honor, what about the
8 before the 7th? He'll be in town for a Shoreline
9 conference, as I will be attending as well. And it's at
10 the Gaylord. So we can probably skip out on half of
11 that and come over here if you had any issues, if you
12 had time before that. Depends on your schedule, Judge.

13 JUDGE GLAZER: Let's see. This is, like I
14 say, a very, very busy month. The only time right now
15 that I have available is on April 5th.

16 Are you available that day, Andrew?

17 CLERK: The judge has a hearing on that day.

18 JUDGE GLAZER: I'm available to handle it on
19 that day, in any event. So if you want to do it on
20 April 5th.

21 MR. MULLINS: Which day is that?

22 JUDGE GLAZER: It's a Tuesday.

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1 MR. MULLINS: Is that the day we're doing
2 our presentation?

3 MR. HOCKY: I don't know. We're each
4 presenting separately at this conference. We can look.

5 JUDGE GLAZER: I can recommend one other
6 thing, it doesn't usually work as well. I can recommend
7 a teleconference or a videoconference, but like I say it
8 usually doesn't work as well. In person it works much
9 better.

10 MR. HOCKY: I can look at the schedule. I
11 don't know.

12 MR. MULLINS: I think I'm presenting on that
13 day, but I think in the morning at like 10:30 or
14 something. I don't know when you're presenting.

15 MR. HOCKY: I don't know either.

16 MR. MULLINS: Are you available in the
17 morning? What do you normally prefer?

18 JUDGE GLAZER: On Tuesday morning?

19 MR. MULLINS: Yes. I'm available starting
20 about 10 a.m.

21 JUDGE GLAZER: What about late afternoon?

22 MR. HOCKY: Oh, yeah, I'm available late

1 afternoon.

2 MR. MULLINS: I think I present my
3 presentation to the conference that morning, and then,
4 Eric, I don't know if you present that day?

5 MR. HOCKY: Or Wednesday.

6 MR. MULLINS: Or Wednesday.

7 MR. HOCKY: It's a weird schedule.

8 MR. MULLINS: It'd probably be afternoon is
9 what I'm suggesting.

10 JUDGE GLAZER: All right. Why don't we set
11 it tentatively for -- and I'm assuming it's going to
12 require maybe an hour or two. If you've only got one
13 docket then it's going to be more than an hour. I'm
14 assuming that we can set it tentatively for 2 p.m. on
15 Tuesday the 5th, how does that sound?

16 MR. MULLINS: I think that's pretty good.

17 JUDGE GLAZER: Okay, so let's to that.

18 MR. HOCKY: If we're going to do --

19 MR. MULLINS: We might not even need it.

20 JUDGE GLAZER: Right. By all means, call
21 Andrew, if you will; he will set that up. But I'm going
22 to set it now for 2 p.m. that day.

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1 MR. HOCKY: So before the 5th if we wanted
2 -- then we would want a supplemented motion to compel
3 and answer?

4 MR. MULLINS: Let me -- Your Honor, so we
5 normally -- it's up to you -- if we have this
6 disagreement continuing by that date, from what I
7 understood you just said you actually want us to file a
8 renewed motion to compel for those few documents maybe
9 that we're having a dispute over. Is that what you
10 prefer?

11 JUDGE GLAZER: Yeah, I only have something
12 -- a written record for the Board, so I need it to be in
13 writing.

14 MR. MULLINS: Okay.

15 JUDGE GLAZER: I would prefer it doesn't
16 have to be long, letter format, that's fine with me.
17 But at least two or three business days before the
18 conference I would like to have a supplement to the
19 motion and a reply.

20 MR. HOCKY: That would probably mean you
21 would file by Wednesday the 30th and I would file by
22 Friday.

1 MR. MULLINS: Right, right. So the 30th
2 would be the deadline.

3 JUDGE GLAZER: So add that too.

4 MR. HOCKY: The 30th and the 2nd. We'll
5 know before that whether probably I think other than
6 whether questions we have, further questions he had
7 about that initial stuff.

8 JUDGE GLAZER: So that's the supplemental
9 motion is 3/30 and the reply is 4/1. Okay, that's good.

10 MR. HOCKY: Your Honor, do we send those --
11 I'm not clear how we file things, whether we file them
12 with the Board or we file them just with you or just
13 send them to you?

14 JUDGE GLAZER: What's been the procedure on
15 that.

16 CLERK: File them with the Court and e-mail
17 them to myself and the Judge at the same time.

18 MR. MULLINS: We will follow your procedure.
19 The Board has its own discovery rules about when you
20 file a motion to compel.

21 JUDGE GLAZER: Yeah, follow that.

22 MR. MULLINS: Well, it wouldn't really work.

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1 Because under their rules you file a motion to compel
2 they have like 15 days to reply. So we would rather
3 just try to do it according to your schedule rather than
4 follow those formal rules that are in the Board's.

5 JUDGE GLAZER: By all means. At this point
6 with regard to this dispute, my rulings control. And
7 this is for the specific purpose of expediting this
8 discovery proceeding stuff.

9 MR. MULLINS: That would be our preference.

10 JUDGE GLAZER: That's how it's going to
11 work. That motion has already been considered filed.

12 MR. HOCKY: Okay.

13 MR. MULLINS: I will also just take a point
14 in saying: It's very unusual to have FERC judges handle
15 these matters. As I said, it hadn't been done in a long
16 time. But the last time was my other case which was
17 BNSF and KCF Lake Charles matter. You were assigned and
18 just your mere assignment allowed us to work it out. So
19 you didn't have to hold the hearing. Everyone was like
20 Oh, no, we got to do ALJ's, okay, work it out, work out.
21 So I think I remain optimistic that we'll be able to
22 resolve a lot of issue, but we might have to.

1 JUDGE GLAZER: Most of that case, as I
2 recall, have to do with trying to arrange when we were
3 going to schedule the actual conference. And my law
4 clerk and I were kind of at sea as to how it was that
5 railroad attorneys could not arrange a schedule.

6 MR. HOCKY: We are not the railroad. The
7 railroad can set schedules all they want; the railroad
8 attorneys are like any other attorney.

9 JUDGE GLAZER: Well, you all worked it out,
10 without my having to interfere, and was very grateful
11 for that. And I am hopeful that this will work out too.
12 It sounds very much like you're very far along in the
13 process, much further in the process than some energy
14 attorneys I know.

15 So okay, that's great. So are there any
16 other matters that we have to cover today?

17 MR. HOCKY: I don't think so, Your Honor.

18 MR. MULLINS: No.

19 JUDGE GLAZER: Okay. We will issue an order
20 that reflects this joint proposed -- this now procedural
21 schedule. If there is any question with that when you
22 see it, contact Andrew, we'll get an errata out if we

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1 have to and go to work.

2 MR. HOCKY: Thank you.

3 JUDGE GLAZER: Thank you for your
4 cooperation.

5 MS. ZORBAUGH: Thank you.

6 MR. MULLINS: Thank you.

7 JUDGE GLAZER: Have a good day. We're
8 adjourned.

9 (Whereupon the hearing is concluded at 10:31 a.m.)

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