

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
January 30, 2017
Part of
Public Record

STB Docket FD 35981

PETITION FOR DECLARATORY ORDER - FINCH PAPER LLC

**REPLY IN OPPOSITION TO APPEAL OF CLARIFYING ORDER OF
ADMINISTRATIVE LAW JUDGE ON MOTION TO COMPEL DISCOVERY
RESPONSES**

Having already wasted the time of the Board and Finch Paper LLC (“Finch”) on a prior untimely and baseless interlocutory appeal of the discovery dispute at issue, Delaware and Hudson Railway d/b/a Canadian Pacific (“CP”) now seeks to review Administrative Law Judge Peter Young’s (“ALJ’s”) June 18, 2017 clarifying interlocutory discovery order (“Clarifying Order”) requiring CP to provide documents in response to Finch’s Motion to Compel. The appeal should be denied because, as the ALJ elaborated in the Clarifying Order: (1) the information sought is clearly discoverable; (2) CP has failed to come forward with evidence establishing that the interlocutory appeal satisfies the stringent standards set forth in 49 CFR § 1115.9; and (3) the appeal does not present “exceptional circumstances” for which an immediate appeal of an interlocutory order is necessary to correct a clear error of judgment or to prevent manifest injustice. 49 CFR § 1115.1. Indeed, after careful analysis, and reanalysis, of the issue, the ALJ correctly concludes that “CP offered nothing of substance to balance against Finch’s right to discovery.” Clarifying Order at 3. The present appeal is frivolous, and a transparent attempt by CP to further unnecessarily delay resolution of this matter and to further impose

unnecessary costs and expenses on Finch. The appeal should be summarily rejected and CP should be ordered to immediately comply with the ALJ's Order.

Procedural History

On July 1, 2016, Finch sought to compel discovery responses from CP. Finch specifically sought to compel full responses to certain Document Requests included in Finch's First Set of Document Requests, Interrogatories and Second Set of Document Requests. The Director of the Office of Proceedings accepted the motion on August 16, 2016, and referred it to the ALJ. After a careful review of the disputed discovery requests, the Finch motion, and the CP reply in opposition, the ALJ issued an Order on August 24, 2016 ("Original Order") granting the Motion to Compel in its entirety.

Twenty (20) days later, CP filed an appeal of the Original Order, erroneously pursuant to 49 CFR § 1115.2, which governs appeals of Initial Decisions. The basis for CP's appeal was that no hearing or conference was held on the motion, that the ALJ's Order provided insufficient explanation as to the relevance of the discovery requests, and that the Original Order did not address CP's argument that the discovery sought was unduly burdensome. Finch replied in opposition to CP's appeal three days later on the grounds that the appeal was untimely, did not meet the standards of review under § 1115.1 or § 1115.9, and in any event, as determined by the ALJ, the discovery sought is relevant and CP's claims of undue burden were without merit.

On January 11, 2017, the Board issued a decision on the appeal ("Board Order"). The Board initially recognized that while there was some uncertainty as to whether the appeal was governed by 49 CFR § 1115.9 (which has a 7 day appeal deadline), or 49 CFR § 1115.1 (which

has a 10 day appeal deadline), § 1115.2 governing Initial Decisions clearly was *not* applicable and CPs' attempt to rely upon that provision was "misplaced." Board Order at 4.

CP Rail's appeal is not of an "initial decision." In the context of § 1115.2, an "initial decision" means an initial decision on the merits by the ALJ Because a ruling by a FERC ALJ on a discovery issue is not a determination on the merits, such a ruling is not an initial decision under § 1115.2. Thus, the § 1115.2(3) standards related to such appeals are not applicable.

Id.

Thus, the Board expressly recognized that CP's appeal was untimely. *Id.* at p. 6. Indeed, regardless of whether § 1115.1 or § 1115.9 applied, the appeal was at least 10 days, and perhaps as much as 13 days, out of time. Nonetheless, the Board generously chose to overlook CP's obvious gaffe and to accept the appeal.

The Board further held that it could not sufficiently determine the basis for the ALJ's ruling and therefore would return the matter to the ALJ for further clarification of the basis for his Order. In so doing, the Board spelled out the legal standards governing appeals of interlocutory orders. The movant first must establish as a threshold matter, whether the appeal satisfies the enumerated circumstances under § 1115.9: (1) terminating party participation; (2) request for inspection of documents not ordinarily available for public inspection; (3) overrules objection based on privilege; or 4) would cause substantial irreparable harm. *Id.* at 5. If the §1115.9 threshold is satisfied, the merits of the appeal must then be analyzed pursuant to the strict standard outlined in § 1115.1(c). *Id.* Such appeals "are not favored," and "will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice." *Id.* at 5-6.

On January 18, 2017, the ALJ Issued the Clarifying Order affirming his prior ruling and expanding on his rationale pursuant to the Board's request. CP now frivolously seeks to appeal that interlocutory Clarifying Order.

The ALJ's January 18, 2017 Clarifying Order

The Clarifying Order first recognizes that the Motion to Compel filed by Finch and subsequent filings by CP and Finch clearly defined the discovery disputes between the parties and thus there was no need to further tax the parties by requiring them to present redundant oral argument concerning the disputed discovery issues. *Id.* at p. 1. It also noted that CP did not request oral argument despite having the opportunity to do so. *Id.* The Order further reflects that given the Board's acceptance of the motion because it determined that discovery was ongoing throughout the relevant time period and resolution of the underlying discovery dispute should not unduly delay the proceeding, any CP objection to the ALJ that the discovery request underlying the Motion to Compel were untimely was inconsistent with the Board's dispositive determination. *Id.* at 2.

The ALJ then engages in a careful analysis of the law governing discovery. The Order recognizes that Board regulations permit discovery "regarding any matter not privileged, which is relevant to the subject matter involved in the proceeding," which is a liberal standard. *Id.* The term "relevant," consistent with Board regulations, is also broadly construed to permit Finch to request any information or documents having any tendency to make any facts of consequence to the Board's final determination more or less probable than it would be without the information or documents. *Id.* at 2.

The ALJ then carefully evaluates the discovery request at issue in accordance with the broad standard governing discovery requests “and conclude[s] that each request clearly satisfied it.”¹ The Order notes that it was not necessary to detail its evaluations in a narrative and there was a presumption that the Board has confidence in its designated decision-makers to engage in appropriate analysis. *Id.*

The Order then considers, and appropriately rejects, CP’s objections to producing responsive discovery on the grounds that it is unduly burdensome. In this regard, the ALJ first focuses on CP’s objection to having to produce Customer Audit Safety forms on the grounds that it would have to conduct a “special study” to compile information in this regard. The Order recognizes that this assertion is baseless because the August 24, 2016 Order specifically provides that “CP was not required to conduct any special study to satisfy the requests” but instead merely had to produce responsive material in whatever form it had them. *Id.* at p. 3.

The Order then considers CP’s objection that the Order failed to consider whether the discovery sought was unduly burdensome in relation to the likely value of the information sought. *Id.* The assertion is easily rejected. The ALJ points out that the only support CP offers for its contention that the burden of production was too high was CP’s own opinion that the “bare *volume* of information CP already had produced was sufficient. . . .” *Id.* (emphasis in original). The Order further recognizes that CP’s argument suffers from a number of fundamental flaws: (1) it conflates volume of discovery with probative value; (2) it fails to address probative value; and (3) it substitutes CP’s opinion as to what information is needed to

¹ The Order recognizes that CP’s objections primarily were directed to the scope of the information requests rather than their actual relevance, *i.e.*, their potential to make any fact of consequent more or less probable. Clarifying Order at n. 5.

decide on the merits of the case for that of the Board. *Id.* “In sum, CP offered nothing of substance to balance against Finch’s right to discovery.” *Id.*

Finally, the Order recognizes that while discovery always imposes a burden, and often a significant one, on the responding party, it is only if such discovery imposes an undue burden that discovery should be denied. *Id.*

I. The ALJ’s Decision is Correct

A. The Discovery Sought Is Relevant

1. Federal Railroad Administration (“FRA”) Notices or Enforcement Actions

The discovery the ALJ ordered CP to produce falls into three broad categories. The first category (Document Request No. 30), seeks documents relating to enforcement actions by the Federal Railroad Administration *regarding the rail lines CP used to provide service to Finch’s facility*. This information, which extends to tracks “upstream” of the tracks immediately commended to Finch’s facility, is highly relevant because it goes to the ability of CP to provide regular and adequate rail service to Finch after the fall of 2012, as CP promised to do when it reduced the days it provided switches to Finch from five days per week to three days per week. Further, whether FRA compliance issues caused delays in CP delivering cars to Finch’s facility or picking them up is relevant in determining whether the demurrage charges that CP seeks to assess against Finch are reasonable and appropriate. Finally, the discovery is relevant because CP precipitously and substantially restricted service to the Finch facility due to alleged defects in Finch’s plant tracks, which resulted in massive demurrage charges being assessed against Finch. The condition of CP’s track used to provide service to Finch, as reflected in FRA notices or enforcement actions, is relevant to the issue of whether the assessment of demurrage in these

circumstances was reasonable and whether CP's reduction of service to the Finch facility violated 49 U.S.C. § 11101.

2. Consumer Safety Audit Forms

The second category of documents sought (Document Request No. 24) is CP's Customer Audit Safety forms. These are relevant because they will provide information related to the impact on Finch and other CP customers of CP's decision beginning in mid-2012 to substantially reduce costs, personnel and equipment over CP's rail system. This goes to the issue of whether CP's reduction in service to Finch constituted a violation of CP's obligations as a common carrier to provide safe and efficient rail service.

3. CP's Drastic Reduction in Personnel and Equipment

The third category of discovery (Interrogatory Nos. 15, 16, 17, 18 and 19, and Document Request Nos. 40, 41, 42, and 44) seeks information regarding CP's business plan and operations beginning in mid-2012 whereby it reduced the number of its employees -- including conductors, train crews and personnel -- to manage its customer service department nationally and locally in the New York service area where Finch's mill is located, and reduced the number of locomotives in use by CP.

B. CP's Discovery Objections Are Baseless

CP asserts a variety of justifications for its refusal to provide responsive discovery. None have merit.

Most astoundingly, although it has tried to tidy up its argument from its prior appeal,² CP reasserts that whether it had sufficient resources allocated to provide adequate rail service to Finch is irrelevant and thus Finch is not entitled to discovery in this regard. CP's blanket assertion that Finch is not entitled to any of CP's business plans, personnel staffing and equipment changes is specious. *See, e.g.* CP Appeal at p. 8 ("CP's internal allocation of resources and personnel – is entirely irrelevant . . ."). CP's contention fails because CP's ability to satisfy its common carrier obligations under 49 U.S.C. § 11101 goes to the heart of Finch's claims.

CP castigates the ALJ for not having a hearing on the motion to compel, suggesting that if he had only done so, the protracted appeals process it has initiated might not have been necessary. Yet, as the ALJ notes, CP never requested that a hearing be convened. Further, the record reflects that the unnecessary delay in resolving the issues before the Board are entirely due to CP's willful failure to comply with its discovery obligations based upon CP seeking to arrogate to itself the issue of what matters the Board appropriately could consider in ruling on Finch's Petition. The notion that there would have been no need for an appeal (actually two appeals) if the ALJ had only explained to CP why the discovery is relevant is baseless.

CP also contends that responsive documents need not be produced because they might contain competition sensitive information. The Clarifying Order, however, appropriately rejected CP's argument that responsive documents need not be produced because they might contain competition sensitive information. As the Order expressly holds, the fact that certain

² *See* prior CP Appeal at p. 9, n. 6, in which CP baldly asserts that the Board lacks jurisdiction to determine whether CP had appropriate staffing and equipment levels to service its customers. CP's suggestion that the Board is toothless and lacks authority to ensure that rail carriers have sufficient staffing and equipment to satisfy their common carrier obligations is entirely without basis.

safety audit materials “*may* contain information about CP’s other rail customers’ facilities that those customers *might* consider to be competition sensitive” is rank speculation and provides no support for CP’s position. Clarifying Order at p. 2, n. 2. This conclusion is only buttressed by the fact that discovery produced is governed by a protective order which permits information to be designated as “Highly Confidential.”

CP’s argument that Finch is not entitled to discovery because Finch has not met its burden of showing that CP violated its common carrier obligations is ludicrous. CP Appeal at p. 8. First, the evidence in Finch’s Opening Statement, which is largely unrefuted by CP in its Reply, is flatly to the contrary. Moreover, CP is clearly putting the cart before the horse. A party cannot withhold discovery and then argue that the other party is not entitled to discovery because it has not proved its case.

CP’s argument that the discovery sought is not proportional to the amount in dispute is also baseless. Here, CP seeks to recover in excess of \$1,300,000 in demurrage charges against Finch. Thus, this clearly is not an instance where the cost of producing relevant documents exceeds the amount in dispute in the litigation. Having decided to sue Finch for well over a million dollars, CP cannot now complain that it is somewhat burdensome to provide relevant information regarding its claims and CP’s defenses to Finch’s counterclaims. Further, as the ALJ Clarifying Order makes clear, the mere fact that CP may have produced other documents in discovery does not excuse its obligation to provide other relevant information. *See* Clarifying Order at 3 (rejecting argument that Finch not entitled to discovery because the “bare *volume* of information CP already had produced was sufficient. . . .”) (emphasis in original). Indeed, the Clarifying Order recognizes that one of the many fundamental flaws in CP’s argument is that it “conflates volume of discovery with probative value.” *Id.*

II. CP's Appeal Does Not Satisfy the Stringent Standards Governing Interlocutory Appeals

As the Board recognized in its January 11, 2017 Order, both 49 C.F.R. §§ 1115.1(c) and 1115.9(a) set forth stringent criteria for appeals of decisions delegated by the Board, and of interlocutory decisions. Although CP gives lip service to these standards, its argument largely ignores the exacting standards it must meet to justifying the interlocutory relief sought.

Section 1115.9 provides that interlocutory appeals may only be granted if, in relevant part, the order grants a request for the inspection of documents³ or may result in “substantial irreparable harm, substantial detriment to the public interest or undue prejudice to a party.” Consistent with federal courts and other agencies, the Board recognizes that the burden of establishing irreparable harm is exceedingly high. *See, e.g., Colorado Wheat Administrative Committee v. V and S Railway, LLC*, 2015 WL 2151403 at *4 (STB 2015) (irreparable harm requires showing of unredressable actual and imminent harm); *ITT Corp v. Transcon Lines*, 1993 WL 244265 at *2 (ICC 1993) (appeal of discovery order should not be considered, “[c]onsistent with the handling of interlocutory appeals in the Federal courts”; *see also Wisconsin Power and Light Co. v Union Pacific Railroad Co.*, 2000 WL 799085 at * 2 (Board accords substantial deference to ALJ discovery rulings). The most that CP can even suggest in terms of harm is that it might incur additional costs if it has to produce the discovery sought by Finch. That does not constitute irreparable harm.

³ Finch submits that any document request could be construed to satisfy this requirement, so more is required to meet the exacting standards reflected in § 1115.9. That is particularly true here, given that any sensitive documents produced would, if appropriate, be subject to a protective order.

Only if these standards are satisfied does the Board then look to determine whether 49 C.F.R. § 1115.1 has been satisfied. Section 1115.1(c) expressly provides that “such appeals are not favored; they will be granted only in exceptional circumstances to correct clear errors of judgment or to prevent manifest injustice. Board Order at 5-6; *see also Canadian National Railway Co., Grand Trunk Corp, and Grand Trunk Western Railroad Inc. – Control- Illinois Central Corp., Illinois Central Railroad Co., Chicago, Central and Pacific Railroad co. , and Cedar River Railroad Co.*, 1998 WL 721112 (STB 1998) (applying stringent standard of 49 CFR § 1115.1(c) and denying appeal).

As the Interstate Commerce Commission recognized in *ITT Corp v. Transcon Lines*, the Code provisions regarding the appeal of interlocutory decisions are entirely consistent with federal court authority. The Supreme Court in *Mohawk Ind., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009), recognized that the general rule against interlocutory appeals reflects a healthy respect for the final judgment rule. Permitting piecemeal, prejudgment appeals undermines efficient judicial administration. *Id.* Thus, even if a ruling may burden litigants in ways that are only imperfectly reparable by appellate reversal of a final judgment, interlocutory appeal is still unwarranted. *Id.* at 107. Accordingly, the Court emphasized the settled rule that almost all discovery rulings are not final and thus not appealable. *Id.* at 108; *see also Holt-Orsted v. City of Dickson*, 641 F.3d 230, 236 (discovery orders are not generally appealable even under the collateral order doctrine); *Hardy v. Knapp*, 27 Fed. Appx. 24, 2010 WL 1398475 (2d Cir. 2001) (generally, discovery orders are interlocutory orders that must await final judgment for appellate review); *Tullius v. Washington Fed. Savings*, 500 Fed Appx., 286, 2012 WL 6101863 (5th Cir. 2012) (overwhelming weight of authority that discovery orders are interlocutory decisions from which there is no immediate right of appeal).

Further, as the Federal Trade Commission recognized in *In re Bristol-Myers Co.*, 90 FTC 273, 1997 WL 189043 at * 1 (FTC 1977), although all interlocutory appeals are disfavored as intrusions on the orderly and expeditious conduct of administrative proceedings, interlocutory appeals from discovery orders merit particularly skeptical treatment.

In the absence of close and decisive supervision by the administrative law judge, the discovery process in any but the simplest case can be productive of endless dispute, sincere or contrived, to the point that any eventual remedial order relates only to history. Further, any perception on the part of our administrative law judges that the Commission will exercise broadly its undisputed authority to review interlocutory rulings will tend toward the atrophy of their sense of responsibility for the impact of their ruling on the proceedings before them.

Id.

The need for such limited review of interlocutory discovery orders due to the disruptive effect they have on administrative and legal proceedings is readily apparent here. CP counsel submitted an appeal of an interlocutory order – albeit wrongly framing it as an appeal of an Initial Decision -- in September of 2016. Through this simple device, CP has successfully ground this proceeding to a halt. But for CP’s failure to timely produce discovery, the record in this case would be closed and the matter submitted to the Board for decision.

Here, because CP has not shown, and cannot show, that complying with its discovery obligations would: (1) impose substantial irreparable harm; (2) be of substantial detriment to the public interest; or (3) unduly prejudice it, CP’s appeal should be dismissed. Further, even if CP could meet those stringent criteria, dismissal would be appropriate because the ALJ’s Clarifying Order does not present “exceptional circumstances” where an immediate appeal is necessary to “correct clear errors of judgment or to prevent manifest injustice.”

CONCLUSION

CP's appeal is frivolous. The ALJ has now explained twice why discovery sought by Finch is clearly relevant and not unduly burdensome. Further, CP does not come close to establishing that its appeal presents the type of "exceptional circumstances" and the risk of substantial irreparable harm that would justify the relief sought. CP's refusal to comply with its clear discovery obligations and its repeated baseless appeals of the order to compel directing it to so comply, have unnecessarily dragged this proceeding to a halt. Accordingly, Finch requests that the Board summarily deny CP's appeal and expeditiously issue an order requiring CP to immediately comply with the Clarifying Order in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on this the 30th day of January, 2017, I have served copies of the of the foregoing Reply in Opposition to Appeal of Clarifying Order of Administrative Law Judge on Motion to Compel Discovery Responses by email and/or by first class mail to:

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