

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 36131

ENTERED
Office of Proceedings
May 3, 2018
Part of
Public Record

UTAH CENTRAL RAILWAY COMPANY, LLC
v.
KENCO LOGISTIC SERVICES, LLC, KENCO GROUP,
AND SPECIALIZED RAIL SERVICE, INC.

**SPECIALIZED RAIL SERVICE, INC.'S RESPONSE IN OPPOSITION TO
UTAH CENTRAL RAILWAY COMPANY'S REQUEST TO VACATE
DECISION SERVED MAY 1, 2018**

Brinton M. Wilkins
Kirton McConkie
50 East South Temple, 4th Floor
P.O. Box 45120
Salt Lake City, UT 84145-0120
bwilkins@kmclaw.com
Attorneys for Specialized Rail Service, Inc.

Dated: May 3, 2018

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. 36131

UTAH CENTRAL RAILWAY COMPANY, LLC
v.
KENCO LOGISTIC SERVICES, LLC, KENCO GROUP,
AND SPECIALIZED RAIL SERVICE, INC.

**SPECIALIZED RAIL SERVICE, INC.’S RESPONSE IN OPPOSITION
TO UTAH CENTRAL RAILWAY COMPANY’S REQUEST TO VACATE
DECISION SERVED MAY 1, 2018**

Specialized Rail Service, Inc. (“SRS”) opposes Utah Central Railway Company, LLC’s (“UCRY”) request to vacate the Surface Transportation Board’s (“STB” or “Board”) decision dated May 1, 2018. UCRY’s request does not provide any legal or logical basis for vacating the decision. Moreover, UCRY continues to obstruct the discovery process by providing incomplete discovery responses and producing documents in piecemeal long after the production deadline has passed.

I. FACTUAL BACKGROUND

1. As noted in the Board’s decision, SRS served its discovery on UCRY on February 22, 2018 and the parties mutually agreed to an extension, until March 20, 2018, to respond to discovery. This discovery included document requests, interrogatories, and requests for admission.

2. UCRY did not provide any responses on March 20, nor did UCRY provide a basis for its failure to respond. On the other hand, SRS and its co-respondents Kenco Logistics

Services, LLC, and Kenco Group (collectively, “Kenco”) timely served their discovery responses on UCRY on March 20, 2018.

3. Because UCRY failed to respond to SRS’s discovery, SRS filed a motion to compel on March 29, 2018, which included, among other things, a request that the Board deem UCRY as having admitted SRS’s requests for admission.

4. UCRY did not respond to this motion.

5. On April 16, nearly a month after the deadline to provide responses and without any explanation as to why the responses were untimely, UCRY finally submitted written responses to SRS’s discovery requests. However, UCRY refused to respond to seven of SRS’s requests for production of documents and provided inadequate to various interrogatories.

6. When it served its late discovery responses, UCRY made only a partial document production. UCRY did not provide any explanation for why its late production was not complete.

7. On April 27, 2018, over a week after submitting its opening statement, and well over a month after the production deadline, UCRY provided additional documents in response to SRS’s discovery requests. UCRY again offered no explanation for the delay.

8. On May 1, 2018, the Board granted SRS’s unopposed motion to compel and to have the Requests for Admissions deemed admitted, as required by 49 C.F.R. § 1114.27(a).

9. On May 1, 2018, UCRY asked the STB to vacate its May 1, 2018 decision to the extent it is inconsistent with UCRY’s untimely responses to SRS’s requests for admissions. UCRY’s basis for this request is that it eventually submitted written responses on April 17, 2018, four weeks after they were due, and that in its opinion, some of the Requests for Admission were irrelevant.

10. UCRY still does not provide any explanation for its four week delay in responding to the written discovery. The time for making this explanation has passed.

II. UCRY HAS NOT SHOWN GOOD CAUSE FOR VACATING THE ORDER.

Under 49 C.F.R. § 1114.27(a), a request for admission “is admitted unless, within a period designated in the request, not less than 15 days after service thereof, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or his representative or counsel.” Furthermore, “[a]ny matter admitted under this rule is conclusively established unless upon petition **and a showing of good cause** the Board enters an order permitting withdrawal or amendment of the admission.”¹

UCRY failed to submit written answers to SRS’s requests for admissions until one day shy of four weeks after the stipulated, extended deadline of March 20. UCRY clearly knew of the deadline as its counsel proposed March 20, and because Kenco and SRS both timely responded on March 20. UCRY then received a reminder from co-counsel. Despite this, UCRY never requested additional time and never explained the reason for its delay. UCRY simply ignored the deadline. When the issue was put squarely before it in SRS’s motion to compel, UCRY ignored the motion and did not file an opposition or response. As such, the Board properly concluded that SRS’s Requests for Admission are deemed admitted as a matter of law.

As stated above, a deemed admission can be reversed only “upon petition and a showing of good cause.”² UCRY did not even address this standard in its request to vacate. Rather, UCRY simply states that the deemed admissions should be reversed because it eventually provided the required responses (four weeks late) and because it believes that some of the

¹ 49 C.F.R. § 1114.27(b) (emphasis added).

² 49 C.F.R. § 1114.27(b).

requested admissions are irrelevant. This cannot be “good cause.” Indeed, if eventually responding to a request for admission constituted good cause, then the regulation’s requirement that responses be timely would be rendered meaningless. Good cause is something more and must, at a minimum, include a meaningful justification for the untimely responses. In UCRY’s case, it should also include a meaningful justification for failing to respond to SRS’s motion. Moreover, UCRY cannot decide what is or is not relevant to SRS’s defense. That is for the Board to decide. UCRY had its opportunity to show good cause and has not done so.

Simply stated, UCRY ignored the discovery deadline and further ignored SRS’s motion to compel. To date, UCRY has not explained its untimely responses. Thus, UCRY has failed to provide the Board with any semblance of “good cause” that would justify reversing a deemed admission. The Board should not countenance UCRY’s behavior and should uphold its decision.

III. UCRY’S DISCOVERY RESPONSES ARE DEFICIENT.

UCRY eventually provided untimely written responses and produced (in piecemeal) documents. But the written responses were deficient and UCRY did not provide everything requested. UCRY even explicitly refused to produce certain categories of documents. Apparently UCRY believes it should be the final arbiter of whether a request seeks relevant information or not.³

In total, UCRY explicitly refused to produce documents in response to six requests for production. It also objected to and did not produce documents in response to another document request. Furthermore, UCRY’s responses to interrogatories were for the most part so cursory as to be no response at all. On April 27, well over a month after the deadline and a week after it

³ Relevancy is not a proper objection to a discovery request. The standard is instead whether the information sought “appears reasonably calculated to lead to the discovery of admissible evidence.” 49 C.F.R. 1114.21(a)(2).

filed its opening statement, UCRY produced yet another set of documents. This piecemeal discovery is prejudicial to SRS because it delays SRS's response and makes it impossible for SRS to know whether a further motion to compel is necessary or whether UCRY will provide requested documents in time for SRS to prepare a response. UCRY has given no indication of whether it plans to produce more documents later. Its strategy seems to be to delay production until SRS files a motion, then produce a few documents and wait for SRS to file another motion.

SRS may very well need to file a subsequent motion to compel given the deficient responses received from UCRY. However, the point of raising these issues here is to identify for the Board additional grounds on which to deny UCRY's request to vacate. UCRY should not be rewarded for ignoring its deadlines and hindering the discovery process in this matter.

III. CONCLUSION

For the reasons set forth above, SRS requests that the Board deny UCRY's request to vacate the May 1 decision.

DATED this 3rd day of May, 2018.

KIRTON McCONKIE

/s Brinton M. Wilkins
Brinton M. Wilkins
Attorneys for Specialized Rail Service, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of May, 2018, I caused a true and correct copy of the foregoing **SPECIALIZED RAIL SERVICE, INC.'S RESPONSE IN OPPOSITION TO UTAH CENTRAL RAILWAY COMPANY'S REQUEST TO VACATE DECISION SERVED MAY 1, 2018** to be served by email and U.S. Mail, postage prepaid, on the following:

Louis E. Gitomer
LAW OFFICES OF LOUIS E. GITOMER, LLC
600 Baltimore Avenue, Suite 301
Towson, Maryland 21204-4022
lou@lgrailaw.com

/s/Diane Olson _____