

BEFORE THE
SURFACE TRANSPORTATION BOARD

245770

Docket No. FD 36131

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May 18, 2018
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Public Record

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

**RESPONDENTS' COMBINED RESPONSE IN OPPOSITION TO UTAH CENTRAL
RAILWAY COMPANY'S PETITION TO WITHDRAW OR AMEND ADMISSIONS
UNDER 49 C.F.R. 1114.27(b)**

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Dated: May 18, 2018

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Respondents Kenco Logistic Services, LLC and Kenco Group (collectively, "Kenco") and Specialized Rail Service, Inc. ("SRS") oppose Utah Central Railway Company, LLC's ("UCRY") petition to withdraw or amend admissions under 49 C.F.R. 1114.27. UCRY has not presented any facts or evidence to show good cause for why the deemed admissions should be withdrawn and/or amended.

INTRODUCTION

The factual backdrop set forth below is not disputed. UCRY admittedly failed to respond to the Respondents' discovery requests until nearly one month after they were due. UCRY also failed to oppose the Respondents' motion to have the Board ratify that requested admissions were deemed admitted under the self-executing rule set forth in 49 C.F.R. § 1114.27(a). UCRY does not explain why it failed to respond to those motions.

UCRY's entire justification for failing to timely respond falls on the unremarkable fact that it was apparently busy. This convenient, after-the-fact justification is provided by UCRY now, for the first time, without any foundation or evidence. Had UCRY really been too busy to

respond then it could have simply asked the Respondents, or the Board, for an extension. UCRY could have also opposed the Respondents' motions by presenting this same argument and asking the Board to reverse the self-executing rule on these grounds. UCRY failed to do either. UCRY also failed to assert this new justification in its earlier request to have the Board's May 1, 2018 order vacated. UCRY waited until long-after the proverbial clock stuck midnight to seemingly create grounds upon which it hopes the deemed admissions will be withdrawn. UCRY's unsupported excuse is suspect at best and does not constitute as good cause. Its petition should be denied.

I. FACTUAL BACKGROUND.¹

The Respondents have presented the Board with the same factual backdrop in their motions to have the requested admissions deemed admitted and also in opposition to UCRY's motion to vacate. UCRY has not opposed the facts in any way. The Respondents set forth the facts again for the Board's convenience.

1. The Respondents served their discovery requests on UCRY on February 22, 2018. After discussion with UCRY's counsel regarding extensions to the response deadline, UCRY's counsel suggested that the parties agree to March 20, 2018 as the mutual response deadline. (*See* Email correspondence attached hereto as Exhibit A.)

2. UCRY did not provide any responses on March 20, nor did UCRY provide a basis for its failure to respond. The Respondents, on the other hand, both timely served their discovery responses on UCRY on March 20, 2018.

3. On March 22, 2018, counsel sent UCRY's counsel an email and inquired as to when UCRY's discovery responses and documents would be served. (*See* Email correspondence

¹ In the Board's May 15, 2018 Decision denying UCRY's request to vacate, there is reference to a fact that the parties did not agree to mediation. To be clear, the Respondents both agreed to mediation and requested the same. It was UCRY that refused to mediate and insisted that this matter proceed forward.

attached hereto as Exhibit B.) UCRY's counsel responded by stating "[w]e are working on providing documents with our client. I will check with them on production and let you know.") (*Id.*)

4. UCRY thereafter never followed-up to provide the Respondents with an update on when it would provide discovery responses and documents.

5. To that end, on March 29, 2018, SRS filed and served its Motion to Compel and to have its requested admissions deemed admitted (effectively asking the Board to ratify the self-executing rule). (*See* STB Docket.)

6. On March 30, 2018, Kenco filed and served its Motion to Compel and to have its requested admissions deemed admitted (also effectively asking the Board to ratify the self-executing rule). (*Id.*)

7. UCRY did not oppose the Respondents' respective motions. (*Id.*)

8. On April 16, nearly a month after the discovery response deadline and without any explanation as to why the responses were untimely, UCRY submitted written responses to SRS's discovery requests. (*See* UCRY Petition at Ex. A.)

9. On April 17, also nearly a month after the discovery response deadline and without any explanation as to why the responses were untimely, UCRY submitted written responses to Kenco's discovery requests. (*See* UCRY Petition at Ex. B.)

10. 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.

11. On April 20, 2018, UCRY filed its opening statement without referring to the pending motions to compel. (*See* STB Docket.)

12. On April 27, 2018, well over a month after the document production deadline, UCRY provided additional documents in response to the Respondents' discovery requests. UCRY again offered no explanation for the delay.

13. On May 1, 2018, the Board granted the Respondents' unopposed motions and ratified that the requested admissions were deemed admitted, as required by 49 C.F.R.

§ 1114.27(a). (*Id.*)

14. On May 1, 2018, UCRY asked the STB to vacate its May 1, 2018 decision. (*Id.*)

15. In its request to vacate, UCRY did not provide any explanation for its four week delay in responding to the written discovery or for its failure to respond to the Respondents' motions. (*See* UCRY May 1 Request to Vacate.)

16. The Respondents both opposed UCRY's request and on May 15, 2018, the Board denied the same. (*See* STB Docket.)

17. On May 17, 2018, less than three weeks before the Respondents' opening statements are due - and nearly two months after the Respondents' requested admissions were deemed admitted - UCRY filed a petition to have the deemed admissions withdrawn. (*Id.*)

18. In its petition, and for the first time, UCRY identifies the supposed reason that its responses were untimely; namely, that "it took longer than anticipated to gather the information requested by [the Respondents]." (*See* UCRY Petition.)

II. UCRY HAS NOT SHOWN GOOD CAUSE.

The Board is already well-familiar with the standard that UCRY must meet for the deemed admissions to be withdrawn. "Any matter admitted under [49 C.F.R. § 1114.27(a)] is conclusively established unless upon petition and a showing of good cause the Board enters an

order permitting withdrawal or amendment of the admission.” 49 C.F.R. § 1114.27(b).² At issue here is whether UCRY has shown “good cause” that would justify the Board to enter an order permitting the deemed admissions to be withdrawn. As shown above and below, the answer is in the negative.

A. UCRY’s New Justification is Belied by the Facts and the Law.

Despite having multiple opportunities to assert this position, UCRY is claiming now, for the first time, that its responses were untimely because “it took longer than anticipated to gather the information requested by [the Respondents].” (UCRY Petition.) UCRY goes on to argue, without providing any foundation, that many of the individuals with direct knowledge of the information requested were “out in the field conducting railroad operations and not available to review documents and responses in a more timely manner.” (*Id.*) Put another way, UCRY is arguing that it was too busy to respond. But being busy is not good cause to justify failing to timely respond to discovery requests. This is augmented by the fact that UCRY never once identified this new excuse until now, months after the deadline has passed. If UCRY really was unable to timely respond because many individuals were unavailable then it should have said something at the time. UCRY instead sat silent, and even when presented with the Respondents’ motions, which would have been an opportunity for UCRY to defend itself based on its apparent busy schedule, UCRY said nothing. UCRY itself set March 20, 2018 as the discovery response deadline. It is difficult to imagine UCRY suggesting a deadline that it knew was unattainable. And at a minimum, if UCRY later discovered that the deadline it set was unattainable, then

² The Respondents note that the standard for the Board to withdraw a deemed admission – *i.e.*, “a showing of good cause” – is different from the standard applied by federal courts to withdraw a deemed admission under Rule 36(b) of the Federal Rules of Civil Procedure. Indeed, under the Federal Rules of Civil Procedure, courts do not need to consider good cause. FED. R. CIV. P. 36(b), *Gwynn v. City of Philadelphia*, 719 F.3d 295, 298 (3d Cir. 2013) (stating that with respect to the withdrawal of a deemed admission, courts are not required to consider whether the moving party can show good cause for the delay). Thus, the two-prong test applied by federal courts under Rule 36(b) is inapposite to this matter. The Board’s inquiry must focus on “good cause”.

UCRY should have said something at the time. UCRY's new excuse that it was too busy to respond smacks of convenience, is suspect, and should be given little weight by the Board.

The Board has considered "good cause" in an analogous context in another matter. In *In Union Pac. Corp. (Arbitration Review)*, Fed. Carr. Cas. (CCH) ¶ 37181, 2005 WL 122034, at *1-2 (STB Jan 19, 2005), the carrier filed an untimely appeal from an arbitration decision. The carrier argued that its attorney was suffering from medical problems which required the carrier to find and retain other counsel. The Board concluded that the carrier had not shown "good cause" for a waiver of the deadline. The Board reasoned that the carrier is sophisticated, should have been paying attention to the deadline, and, after being informed of the missed deadline, took an additional two weeks to request an extension. *Id.* The same is true here. UCRY is a sophisticated company with in-house and outside lawyers representing it. It should have paid attention to the deadline. And then, after seeing the Respondents' motions filed in late March, it should have opposed them. Instead, UCRY did nothing and waited until May 1, after the Board granted the Respondents' motions, to even make an effort to excuse its behavior. It then waited an additional two weeks to file its petition. This hardly constitutes as good cause.

B. UCRY's Argument that Individuals Were Unavailable Lacks Foundation.

UCRY argues the unavailability of individuals as "good cause" for withdrawing deemed admissions. Yet, UCRY fails to support its argument with any foundation. For instance, UCRY does not identify who these supposed individuals are; UCRY does not establish how or why these particular individuals were necessary for the responses; UCRY does not set forth what attempts (if any) were made to get their attention before the discovery responses were due; and UCRY does not state how or why, from February 22, 2018 through March 20, 2018, all of these particular individuals were unable to give this matter attention. UCRY does not argue that these

individuals were unreachable. Indeed, UCRY does not say that these individuals had no access to a computer, the internet, and/or a cell phone. In reality, it defies logic to presuppose that UCRY simply could not reach these individuals for nearly one full month. UCRY does not even attempt to provide any of this basic information to support its argument. We are left instead with only UCRY's bare assertion that some unnamed individuals who were conducting unspecified railroad operations for an undetermined period of time were necessary for unstated reasons for UCRY's responses but were, for unknown reasons, unavailable until nearly a month after the responses were due. UCRY's unsupported argument should be disregarded for want of foundation. *See e.g. Perry v. Merit Sys. Prot. Bd.*, 397 F. App'x 647, 648 (Fed. Cir. 2010) ("The requirement to establish good cause [to excuse an untimely appeal] cannot be satisfied by argument alone, and, here, Perry failed to furnish any probative evidence to support her contentions"); *Effingham Cty. Bd. of Educ. v. United States*, 7 Cl. Ct. 34, 38–39 (1984) (holding that "good cause" to justify an untimely filing requires more than "bare conclusions constituting bland and cumulative excuses").

UCRY also refers to Request for Admission No. 9 as an example of how UCRY will be supposedly prejudiced if the deemed admissions are not withdrawn. Had UCRY been concerned about the repercussions of failing to timely respond then it could and should have done something about it long before now. *See Horace Mann Ins. Co. v. Nationwide Mut. Ins. Co.*, 238 F.R.D. 536, 538–39 (D. Conn. 2006) (refusing to excuse untimely objections to discovery requests when the plaintiff alleged the delay was due to a need for additional time to review its documents; "If plaintiff needed more time to respond to the discovery requests it should have either contacted the defendant to obtain its consent to an extension or, if defendant was unwilling to acquiesce, apply to the court to for an extension of time."). Moreover, the prejudice that may

follow from UCRY's inattentiveness is not part of the good cause analysis, which should be limited to whether UCRY can show good cause for the delay. And, although UCRY points to one request for admission in its petition, and to the extent it is relevant, UCRY has not demonstrated that it would be prejudiced if any other requests for admission remain admitted.

Finally, despite the fact that the Respondents do not need to show a lack of prejudice, the Respondents will be prejudiced if the deemed admissions are withdrawn. The Respondents' opening statements are due in less than three weeks. While UCRY had plenty of time to present its opening statement, with timely discovery responses from the Respondents, the Respondents are not in the same position. The Respondents' time to prepare their opening statements was cut short because of the Respondents' late responses. Furthermore, at the present time, all the requests for admission are deemed as conclusively admitted. If they are withdrawn at this late stage, especially considering UCRY's lack of good cause, it will impact the Respondents' ability to timely submit their opening statements. The Respondents have also had to incur substantial attorneys' fees in preparing their motions to compel, in opposing UCRY's request to vacate and now in opposing UCRY's petition. These attorneys' fees are not inconsequential and are prejudicial to the Respondents. In fact, the Respondents should be awarded their fees and costs incurred in dealing with UCRY's untimely discovery responses.

CONCLUSION

UCRY's excuse, if sufficient, would render the rule set forth in 49 C.F.R. § 1114.27(a) utterly meaningless. It would effectively permit parties to delay discovery with impunity based only on the unsupported justification that they were too busy to respond. This is not the law, and it defeats the purpose behind the self-executing rule. UCRY is the petitioner in this matter. It cannot now escape the consequences of failing to timely respond to the Respondents' discovery

requests, and failing to oppose the Respondents' motions, in a matter it commenced. UCRY's entire outlook on discovery in this matter has been to disregard the rules and respond whenever it feels like it. Rules have meaning, and to disregard the rules without good cause would be to render the rules ineffective and useless. Therefore, UCRY's petition should be denied.

DATED this 18th day of May, 2018.

KIRTON McCONKIE

/s/ Shawn T. Richards

Brinton M. Wilkins

Shawn T. Richards

Jackie Bosshardt

Attorneys for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of May, 2018, I caused a true and correct copy of the foregoing **RESPONDENTS' COMBINED RESPONSE IN OPPOSITION TO UTAH CENTRAL RAILWAY COMPANY'S PETITION TO WITHDRAW OR AMEND ADMISSIONS UNDER 49 C.F.R. 1114.27(b)** to be served by email and U.S. Mail, postage prepaid, on the following:

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

/s/Terri White _____

Exhibit A

From: Shawn T. Richards
Sent: Thursday, March 08, 2018 3:26 PM
To: 'Louis E. Gitomer'
Cc: Brinton M. Wilkins
Subject: RE: FD 36131 Utah Central v. Kenco and SRS

That works well. Let's plan on Tuesday the 20th.

Thank you,
Shawn

From: Louis E. Gitomer [<mailto:Lou@lgraillaw.com>]
Sent: Thursday, March 08, 2018 3:25 PM
To: Shawn T. Richards
Cc: Brinton M. Wilkins
Subject: RE: FD 36131 Utah Central v. Kenco and SRS

Shawn – How about Tuesday the 20th? I'm traveling at the end of the week. Lou

Louis E. Gitomer
600 Baltimore Avenue, Suite 301
Towson, MD 21204
(410) 296-2250
Lou@lgraillaw.com

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From: Shawn T. Richards [<mailto:srichards@kmclaw.com>]
Sent: Thursday, March 08, 2018 5:23 PM
To: Louis E. Gitomer
Cc: Brinton M. Wilkins
Subject: RE: FD 36131 Utah Central v. Kenco and SRS

Dear Lou:

Would you be amenable to a brief extension of our deadline to serve discovery responses (for SRS and Kenco)? They are due this coming Monday and we'd like to have until Friday, March 16. We'd be happy to have your responses come due the same day.

Please let us know.

Thanks,

Shawn

Shawn T. Richards

Attorney

o 801-328-3600

d 801-323-5931

From: Louis E. Gitomer [<mailto:Lou@lgraillaw.com>]

Sent: Thursday, February 22, 2018 1:04 PM

To: Shawn T. Richards

Subject: FW: FD 36131 Utah Central v. Kenco and SRS

Shawn – I tried to send this yesterday and it bounced back. I'm trying again. Let me know if you receive it. Thanks, Lou

Louis E. Gitomer

600 Baltimore Avenue, Suite 301

Towson, MD 21204

(410) 296-2250

Lou@lgraillaw.com

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From: Louis E. Gitomer

Sent: Wednesday, February 21, 2018 5:01 PM

To: 'Shawn T. Richards'

Subject: FD 36131 Utah Central v. Kenco and SRS

Shawn – Attached are UCRY's discovery requests. Let me know if you have any questions. Thanks. Lou

Louis E. Gitomer

600 Baltimore Avenue, Suite 301

Towson, MD 21204

(410) 296-2250

Lou@lgraillaw.com

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Exhibit B

Subject:

FW: STB Docket No. FD 36131

From: Louis E. Gitomer [<mailto:Lou@lgrailaw.com>]

Sent: Thursday, March 22, 2018 1:47 PM

To: Brinton M. Wilkins

Subject: RE: STB Docket No. FD 36131

Brinton – We are working on providing documents with our client. I will check with them on production and let you know. Lou

Louis E. Gitomer

600 Baltimore Avenue, Suite 301

Towson, MD 21204

(410) 296-2250

Lou@lgrailaw.com

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From: Brinton M. Wilkins [<mailto:bwilkins@kmclaw.com>]

Sent: Thursday, March 22, 2018 3:44 PM

To: Louis E. Gitomer

Subject: STB Docket No. FD 36131

Mr. Gitomer,

I represent Specialized Rail Service ("SRS"). SRS served discovery responses and documentation on Tuesday, March 20. Please let me know when we can expect to receive UCRY's discovery responses and documentation.

Thanks,

Brinton

KIRTON | McCONKIE

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