

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 36131

ENTERED
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May 3, 2018
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Public Record

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

**KENCO LOGISTIC SERVICES, INC.'S RESPONSE IN OPPOSITION TO UTAH
CENTRAL RAILWAY COMPANY'S REQUEST TO VACATE
DECISION SERVED MAY 1, 2018**

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Dated: May 3, 2018

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Kenco Logistic Services, LLC and Kenco Group (collectively, “Kenco”) opposes Utah Central Railway Company, LLC’s (“UCRY”) request to vacate the Surface Transportation Board’s (“Board”) decision dated May 1, 2018. UCRY’s request does not provide a legal or logical basis for vacating the decision.

I. FACTUAL BACKGROUND.¹

1. As noted in the Board’s decision, Kenco 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. UCRY did not provide any responses on March 20, nor did UCRY provide a basis for its failure to respond. UCRY was silent. Kenco, on the other hand, and its co-respondent Specialized Rail Service, Inc. (“SRS”), both timely served their discovery responses on UCRY on March 20, 2018.

2. On April 17, nearly a month after the discovery deadline and without any explanation as to why the responses were untimely, UCRY finally submitted written responses to

¹ In the Board’s decision, there is reference to the fact that the parties did not agree to mediation. For purposes of clarity, Kenco and SRS were both agreeable to mediation and requested the same. It was UCRY that refused to mediate and insisted that this matter proceed forward.

Kenco's discovery requests. However, UCRY refused to respond to more than a dozen requests for production of documents on the grounds that those requests, among other things, sought irrelevant information (in UCRY's opinion).

3. 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.

4. 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 Kenco's discovery requests. UCRY again offered no explanation for the delay.

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

6. 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 Kenco'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.

7. UCRY still does not provide any explanation for its four week delay in responding to the written discovery or for its failure to respond to Kenco's motion. And 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.” “Any 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.” 49 C.F.R. § 1114.27(b) (emphasis added).

UCRY failed to submit written answers to Kenco’s requests for admissions until 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 shortly after the March 20 deadline. Despite all that, UCRY ignored the deadline and failed to respond for four weeks. And when the issue was put squarely before it, UCRY ignored Kenco’s motion and failed to file an opposition or response. As such, the Board properly concluded that Kenco’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.” 49 C.F.R. § 1114.27(b). UCRY did not even attempt to 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 requested admissions are irrelevant. This cannot be “good cause.” Indeed, if eventually responding to a request for admission constituted as 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 Kenco’s motion. Moreover, UCRY cannot decide what is or is not relevant to

Kenco's defense. That is for the Board to decide. UCRY had its opportunity to show good cause and it ignored it.

Simply stated, UCRY ignored the discovery deadline and further ignored Kenco's motion to compel. And still, UCRY has failed to explain its untimely responses. Thus, UCRY has failed to provide the Board with any semblance of "good cause" that would justify reversing the deemed admissions. The Board should not countenance UCRY's behavior and should uphold its decision. After all, UCRY did not even oppose Kenco's motion to have those requests deemed admitted. UCRY has waived its right to ask for that relief now.

III. UCRY'S DISCOVERY DEFICIENCIES PROVIDE ADDITIONAL GROUNDS FOR DENYING ITS REQUEST TO VACATE.

UCRY eventually provided untimely written responses and produced (in piecemeal) some documents. But the written responses were deficient and UCRY did not provide everything requested. UCRY even blatantly refused to produce categories of documents. Apparently UCRY believes it should be the final arbiter of whether a request seeks relevant information.² In total, UCRY refused to produce documents in response to more than a dozen requests for production. On April 27, well over a month after the deadline and a week after it filed its opening statement, UCRY produced yet another set of documents. This piecemeal production is prejudicial to Kenco because it delays Kenco's response and makes it impossible for Kenco to know whether it must reassert its already-filed motion to compel or whether UCRY will eventually provide all requested documents in time for Kenco to submit its opening evidence. UCRY's conduct puts Kenco at a significant disadvantage as it cannot adequately defend itself, in the way it wants to, against UCRY's claimed demurrage. UCRY should not be

² It is important to note that relevancy is not a proper objection to a discovery request. The standard instead is whether the information sought "appears reasonably calculated to lead to the discovery of admissible evidence." 49 C.F.R. 1114.21(a)(2).

able to dictate what is or is not relevant to Kenco's defense. That decision is for the Board. Moreover, because UCRY was so untimely in providing discovery responses, it should be deemed to have waived any and all objections to Kenco's discovery requests.

Kenco likely needs to reassert its already-filed 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. The deemed admissions should not be reversed.

III. CONCLUSION.

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

DATED this 3rd day of May, 2018.

KIRTON McCONKIE

/s/ Shawn T. Richards

Shawn T. Richards

Jackie Bosshardt

Attorneys for Kenco

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of May, 2018, I caused a true and correct copy of the foregoing **KENCO LOGISTIC SERVICES, 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:

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