

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36131

UTAH CENTRAL RAILWAY COMPANY, LLC V. KENCO LOGISTICS SERVICES, LLC;  
KENCO GROUP; AND SPECIALIZED RAIL SERVICE, INC.—PETITION FOR  
DECLARATORY ORDER

Digest:<sup>1</sup> This decision denies a request to vacate in part the May 1, 2018 decision issued by the Acting Director of the Office of Proceedings. Also, this decision requires that any petition filed under 49 C.F.R. § 1114.27(b) to withdraw the admissions at issue here be filed no later than May 17, 2018.

Decided: May 15, 2018

BACKGROUND

Upon referrals from the U.S. District Court for the District of Utah, Northern Division, Utah Central Railway Company, LLC (UCRY) filed this case with the Board on June 27, 2017. UCRY requests that the Board issue a declaratory order in its favor regarding unpaid demurrage charges assessed to the following shippers: Kenco Logistics Services, LLC, and Kenco Group (collectively, Kenco); and Specialized Rail Service, Inc. (SRS). On July 10, 2017, the Board granted a joint request for a 60-day extension of the deadline for replies to UCRY's petition. The Board also served a separate decision on November 27, 2018, directing the parties to confer on the possibility of mediation or arbitration. The parties did not agree to mediation or arbitration, and in a decision served December 14, 2017, the Board instituted a proceeding and adopted a procedural schedule, which included a period for discovery. On April 13, 2018, the Board adopted a revised procedural schedule.

On February 22, 2018, SRS and Kenco each served UCRY with a separate but similar "First Set of Requests for Production, Interrogatories and Requests for Admissions to Petitioner." (SRS Mot., Ex. 1; Kenco Mot., Ex. 1.) Both sets of requests asked UCRY to respond in writing within 15 days; thereafter, however, the parties agreed that responses would be due on March 20, 2018. (SRS Mot., Exs. 1 & 2; Kenco Mot., Exs. 1 & 2.)

On March 29 and 30, 2018, SRS and Kenco, respectively, filed motions to compel, asserting that to date they had received no responses to their discovery requests.

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

The deadlines to reply to the SRS and Kenco motions were April 18, 2018, and April 19, 2018, respectively. See 49 C.F.R. § 1114.31(a)(1). UCRY did not reply to either motion, but it filed an opening statement on April 20, 2018. The opening statement did not refer to the pending motions to compel.

On May 1, 2018, the Board's Acting Director of the Office of Proceedings (Acting Director) granted, in part, the unopposed motions filed by SRS and Kenco. By operation of the Board's regulations at 49 C.F.R. § 1114.27(a), UCRY was deemed to have admitted the requests for admission served by SRS and Kenco on February 22, 2018. Further, UCRY was directed to respond to the shippers' interrogatories and requests for production of documents, to the extent it had not already done so, by May 8, 2018.

Following that decision, UCRY filed what it called a "request to vacate" on May 1, 2018. In its filing, UCRY states that it provided responses to requests for admissions, interrogatories, and requests for production to SRS beginning on April 16, 2018, and to Kenco beginning on April 17, 2018. (UCRY Mot. to Vacate 3.) UCRY requests that the Board vacate the May 1, 2018 decision "to the extent that it is inconsistent with UCRY's responses to requests for admissions . . . ." <sup>2</sup> (Id.) Also, UCRY argues that the admissions regarding interchange with other carriers are irrelevant to whether UCRY is entitled to collect demurrage on cars retained by Kenco and SRS. (Id.)

Both SRS and Kenco filed replies to UCRY's request to vacate on May 3, 2018. The shippers argue that UCRY still has not explained its four-week delay in responding to discovery, nor why it failed to respond to their motions to compel. As such, SRS and Kenco argue that UCRY has not shown good cause, as required by 49 C.F.R. § 1114.27(b), to permit a withdrawal or amendment to the admissions. (SRS Reply 4-5, May 3, 2018; Kenco Reply 3-5, May 3, 2018.) <sup>3</sup>

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<sup>2</sup> UCRY did not contest the remainder of the May 1, 2018 decision, which directed UCRY to respond to the interrogatories and document production requests served upon UCRY by Kenco and SRS, to the extent it had not already done so, by May 8, 2018.

<sup>3</sup> Both shippers also state that there are deficiencies in the discovery produced by UCRY that provide additional grounds for denying the request to vacate, though as noted, UCRY only seeks to vacate the May 1, 2018 decision with regard to the requests for admission, not interrogatories and document requests. (SRS Reply 5-6, May 3, 2018; Kenco Reply 5-6, May 3, 2018.) Accordingly, UCRY is still required to comply with that aspect of the May 1, 2018 decision.

## DISCUSSION AND CONCLUSIONS

UCRY has styled its pleading as a request to vacate, but it is properly viewed as an interlocutory appeal of the Acting Director's decision. The Board applies a two-part test when considering an interlocutory appeal of a ruling by a Board employee on a discovery issue. See Finch Paper LLC—Pet. for Declaratory Order, FD 35981, slip op. at 2 (STB served Jan. 11, 2017). First, under 49 C.F.R. § 1115.9(a), a Board employee's ruling on discovery may be appealed on an interlocutory basis only if the ruling:

- (1) denies or terminates any person's participation;
- (2) grants a request for the inspection of documents not ordinarily available for public inspection;
- (3) overrules an objection based on privilege, the result of which is to require the presentation of testimony or documents; or
- (4) may result in substantial irreparable harm, substantial detriment to the public interest, or undue prejudice to a party.

Id. If one of these circumstances is satisfied, the Board then proceeds to the second part of the analysis, which is a review of the merits of the appeal under the standard outlined in 49 C.F.R. § 1115.1(c). Id. Under that standard, an appeal "will be granted only in exceptional circumstances to correct a clear error in judgment or to prevent manifest injustice." 49 C.F.R. § 1115.1(c).

Based on the circumstances here, the Board finds that UCRY has satisfied one of the criteria for the Board to consider its interlocutory appeal. Specifically, because the Acting Director's ruling could, if incorrect, result in undue prejudice to UCRY, the Board will consider UCRY's appeal on the merits. See 49 C.F.R. § 1115.9(a).

The Board finds that UCRY has not met either criteria of the standard for granting of the appeal under 49 C.F.R. § 1115.1(c). First, there was no "clear error in judgment" by the Acting Director. The Board's rules state that 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." 49 C.F.R. § 1114.27(a) (emphasis added). The parties agreed upon March 20, 2018, as the date to serve discovery responses, including responses to the request for admissions. (SRS Mot., Ex. 2; Kenco Mot., Ex. 2.) UCRY did not respond to discovery by the agreed-upon deadline, nor did UCRY reply to the subsequent motions to compel—which specifically sought to have the admissions deemed admitted—filed by Kenco and SRS. In granting an unopposed motion that merely asked the Board to ratify a self-executing rule, the Acting Director's decision was not an error in judgment.

Second, the Acting Director's decision will not result in manifest injustice. The Board's rules specify a process for the relief UCRY is seeking, yet UCRY has not availed itself of that process. Specifically, under 49 C.F.R. § 1114.27(b), the Board may permit withdrawal of admissions made by a party under these discovery rules "upon petition and a showing of good cause," but here, UCRY has not filed a petition under § 1114.27(b) claiming good cause, let alone demonstrating it. Under these circumstances, the Acting Director's decision will not result in manifest injustice. UCRY's request will therefore be denied.

Kenco claims that UCRY has waived its right to petition to withdraw its admissions under § 1114.27(b). The Board's regulations at § 1114.27(b), however, do not specify a time limit, nor are they waived by filing an appeal; therefore, UCRY may still file a petition to withdraw the admissions.<sup>4</sup> Nonetheless, given that Kenco and SRS's reply evidence is due on June 5, 2018, and may be impacted by the resolution of this issue, the Board will direct that any petition under 49 C.F.R. § 1114.27(b) to withdraw the admissions at issue here must be filed no later than May 17, 2018.

It is ordered:

1. UCRY's request is denied.
2. Any petition under 49 C.F.R. § 1114.27(b) to withdraw the admissions at issue here must be filed no later than May 17, 2018.
3. This decision is effective on its date of service.

By the Board, Board Members Begeman and Miller.

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<sup>4</sup> In their replies to UCRY's appeal, Kenco and SRS also argue that UCRY's claim that the requests for admission are "irrelevant" does not constitute good cause. These arguments are noted but premature since UCRY has not yet filed a petition under § 1114.27(b) asserting a "good cause" basis. If UCRY files a petition alleging good cause, Kenco and SRS may reassert these and other arguments in their replies.