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ALJ

SERVICE DATE - APRIL 7, 2000

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33407

DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION CONSTRUCTION
INTO THE POWDER RIVER BASIN

Decided: April 4, 2000

The following discovery dispute requires resolution:

October 27, 1999: By formal preliminary objection, Dakota, Minnesota & Eastern Railroad Corporation (Applicant) objected to the Fourth Set of Interrogatories and Requests for Production of Documents served on it by the City of Rochester, Minnesota (Rochester).

February 2, 2000: A Decision sustaining Applicant's objection was served.

February 4, 2000: Rochester moved for (1) reconsideration of the order sustaining Applicant's objection and (2) an order compelling Applicant to respond to the discovery requests. No timely reply to that motion was filed, 49 CFR 1104.13(a).

March 1, 2000: Applicant's President and Chief Executive Officer (in the absence of counsel, who had withdrawn by a document dated February 3, 2000) addressed a letter to the undersigned administrative law judge, replying to Rochester's February 4, 2000, motion. That letter-reply does not bear any indication that it was filed for record with this Board, nor was it accompanied by a certificate of service.

March 3, 2000: A Decision granting Rochester's February 4, 2000, motion was served. Applicant was ordered to respond to Rochester's Fourth Set of Interrogatories and Requests for Production of Documents within 10 days after service of that Decision.

March 7, 2000: Applicant's letter-reply was actually received by the undersigned administrative law judge.

March 10, 2000: Rochester (1) moved for rejection of Applicant's March 1 letter; (2) moved for leave to file a reply to a reply; and (3) replied to Applicant's March 1 letter-reply.

No timely reply to Rochester's March 10, 2000, motion has been filed, 49 CFR 1104.13(a).

Applicant's letter-reply must be rejected and disregarded for at least four reasons:

1. Applicant's letter-reply is untimely, having been dated and delivered after the expiration of the time allowed for filing replies by 49 CFR 1104.13(a) in the absence of a motion for an extension of that time.
2. Applicant's failure to furnish the required certificate of service indicating service of copies of its letter-reply on all parties to the proceeding violates the terms of 49 CFR 1104.12(a).
3. In the context of this discovery dispute, Applicant's letter-reply is an ex parte communication prohibited by 49 CFR 1102.2.
4. Since Applicant's letter-reply was not filed with this Board, it is not a pleading herein and may not be considered in the resolution of any issue or dispute.

It is, therefore, ordered:

1. Rochester's motion to strike Applicant's letter-reply is granted.
2. Applicant's letter-reply is rejected and will be disregarded in this proceeding.
3. Rochester's motion for leave file a reply to a reply is denied as moot and its tendered reply to a reply is rejected.

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This decision is effective on the service date.

By the Board, Joseph R. Nancy, Administrative Law Judge.

Vernon A. Williams
Secretary