

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42051

WISCONSIN POWER AND LIGHT COMPANY

v.

UNION PACIFIC RAILROAD COMPANY

Decided: June 20, 2000

We deny the interlocutory appeal of complainant Wisconsin Power and Light Company (WPL) and its nonparty consultant, L.E. Peabody & Associates, Inc. (LEPA) (collectively, petitioners), of an Administrative Law Judge's (ALJ's) discovery order served on March 28, 2000. Petitioners' concurrent petition to quash the subpoena duces tecum issued by the ALJ in conjunction with his decision is accordingly moot. We also deny as premature WPL's motion for sanctions against defendant Union Pacific Railroad Company (UP).

BACKGROUND

In this proceeding, WPL challenges the rates assessed by UP to move unit trains of coal from the Powder River Basin of Wyoming (PRB) to WPL's electric generating facility at Sheboygan, WI. In the course of discovery, WPL requested UP's internal projections and forecasts of coal traffic, and UP in turn sought any forecasts previously prepared in the regular course of business by LEPA. Discovery matters were assigned to Judge Joseph R. Nancy of the Federal Energy Regulatory Commission. Judge Nancy conducted an informal hearing on March 22, 2000, and subsequently ruled that:

1. Complainant's motion to compel production of documents, filed on or about February 18, 2000, is granted.
2. Defendant must produce the documents sought by complainant within ten days after the effective date of this Decision.
3. Defendant's petition for subpoena duces tecum directed to L.E. Peabody & Associates, Inc., filed on or about February 11, 2000, is granted.

On March 31, 2000, petitioners filed an interlocutory appeal of the discovery order, and a petition to quash the subpoena duces tecum. UP filed a consolidated reply to the appeal and the

subpoena petition on April 5, 2000. On April 10, 2000, WPL filed a motion for sanctions against UP for failing to comply with the ALJ's discovery order. UP replied on April 19, 2000.

DISCUSSION AND CONCLUSIONS

Interlocutory Appeal and Petition to Quash. Interlocutory appeals of an ALJ's decision are governed by 49 CFR 1115.9.¹ We apply a highly deferential standard of review to such appeals.

According to the parties, the ALJ relied on 49 CFR 1113.2(b)(2) to issue the subpoena duces tecum.² Petitioners contend that the provisions of 49 CFR part 1113 apply only to cases in which an oral hearing is conducted and not to rate complaints handled under the stand-alone cost procedures, which are governed by the provisions of 49 CFR 1111.8. Petitioners further contend that the Board recently precluded UP from obtaining similar document discovery from LEPA in another rate case.³

Our authority to issue subpoenas is not limited to oral hearings, as we have express statutory authority under 49 U.S.C. 721(c) to subpoena witnesses and records related to a proceeding. While our regulations specifically mention subpoenas only in the part of the CFR related to oral hearings, we have reserved the general authority to grant relief not otherwise

¹ UP contends that the appeal and petition to quash must be dismissed as untimely because interlocutory appeals of rulings in rate complaints handled under the stand-alone cost procedures are due within 3 business days of the ruling under 49 CFR 1115.9(b). According to UP, the ALJ's ruling, from which petitioners appeal, was made orally at the March 22 hearing or, at the latest, on March 23 when the ALJ furnished the parties with a facsimile (FAX) copy of his decision. Petitioners contend that the ALJ's action on March 22 was simply an announcement of what his ruling would be, and that the March 23 FAX stated on its face that the decision would be effective on its service date. The only reasonable and administratively workable interpretation of section 1115.9(b) is that the 3-day period for appeals begins on the service date of the decision from which the appeal is taken. Accordingly, petitioners' interlocutory appeal and related petition to quash are timely.

² The ALJ's hearing was informal. Although no transcript was made, the parties do not disagree on what transpired there, and we rely on their representations.

³ FMC Wyoming Corporation and FMC Corporation v. Union Pacific Railroad Company, STB Docket No. 42022 (STB served Feb. 5, 1998) (FMC).

specifically provided for in our rules. See 49 CFR 1117.1. Thus, whether the issuance of a particular subpoena is appropriate requires a case-by-case examination.⁴

Petitioners contend that the subpoena duces tecum at issue here would require the production of documents not ordinarily available for public inspection. Petitioners submit that compliance with the subpoena would be burdensome and would result in substantial irreparable damage to WPL and LEPA and substantial detriment to the public interest. See 49 CFR 1115.9(a)(2), (4). Specifically, petitioners assert that it would divert the attention of WPL's principal consultant from preparation of WPL's opening evidentiary submission. Petitioners argue that this type of discovery would complicate rate cases, involve the Board more deeply in discovery disputes, increase the cost of litigation, and undercut the ability of consultants such as LEPA to be engaged as expert witnesses.

UP responds that at the hearing before Judge Nancy, it had narrowed the scope of its document requests to forecasts prepared after January 1, 1997, that deal with national, regional, or PRB coal demand and/or production and forecasts pertaining to the issue traffic. UP had also agreed to extend the return date on the subpoena to avoid a time conflict with the evidentiary schedule. Thus, it contends that compliance with the subpoena would impose no unreasonable burden on LEPA, but would merely require a modest amount of discovery on a clearly defined topic. UP acknowledges that LEPA's forecasts are highly confidential and that some materials may be covered by confidentiality agreements with other entities, but submits that the Board routinely permits discovery of such materials subject to a protective order.⁵

Petitioners have failed to provide a basis for us to reverse Judge Nancy's discovery rulings. As noted, we accord substantial deference to an ALJ's discovery rulings. Petitioners, in their response filed on February 18, 2000, to the original petition for subpoena duces tecum filed on February 11, 2000, submitted a verified statement of LEPA's president, Mr. Thomas D. Crowley, in which he estimated the quantity of material in LEPA's possession that would be potentially

⁴ In FMC, far from prohibiting third-party discovery, we permitted the taking of depositions of a nonparty consultant (coincidentally, LEPA), but denied incidental document requests because the particular requests were burdensome, redundant, and barred by protective orders in the cases in which the documents had been generated. Slip op. at 5-7.

⁵ The protective order in the instant proceeding (served Jan. 31, 2000) requires that the parties' confidential, proprietary, or commercially sensitive information be used solely for this proceeding and not for other purposes. The protective order already provides the parties control over the designation of the level of confidentiality of the materials produced. Third parties who may have apprehensions regarding disclosure of their extremely sensitive materials can allay their fear by expressing their concern to LEPA, who in turn can, along with WPL and UP, determine what level of confidentiality should be assigned to the material produced.

responsive to the discovery request. As noted, in Mr. Crowley's estimates, UP, at the hearing before Judge Nancy, narrowed the scope of its document requests and extended the time frame for production of such information. Petitioners have presented no updated evidence on the burden of complying with the revised discovery requests.

Moreover, UP's revised discovery requests appear to be narrowly drawn and directed toward the relevant issue of LEPA's credibility the type of issue as to which WPL has obtained discovery from UP. While UP no doubt has its own forecasts, it should not be denied access to materials that may be useful in evaluating the credibility of LEPA's litigation forecasts. Such information would be particularly relevant should LEPA rely on the expertise of its witnesses as support for the validity of the forecasts used in its evidence.

On balance, we conclude that the proposed discovery has not been shown to be overly burdensome and that the objections have not been shown to be substantial enough to outweigh UP's need for potentially relevant information. The interlocutory appeal will be denied. The petition to quash the subpoena duces tecum is accordingly moot. Petitioners must comply with the subpoena duces tecum on or before July 5, 2000.

Motion for Sanctions. WPL contends that UP has failed to fully comply with the ALJ's discovery order to produce traffic and revenue projections. Reportedly, UP produced one document in response to the ALJ's order—redacted excerpts of a verified statement submitted by UP in the FMC proceeding. WPL submits that UP's limited production is likely deficient, given the scope of UP's operations, but acknowledges that it cannot prove the existence of additional documents in UP's files. Accordingly, rather than pursue any further a motion to compel, WPL seeks sanctions under 49 CFR 1114.31(b). Specifically, WPL seeks an order:

1. refusing to allow UP to oppose WPL's evidence as to the future growth of traffic and revenues on WPL's stand-alone railroad;
2. prohibiting UP from introducing in evidence any documents in its possession, and any testimony based on such documents, regarding the future growth of traffic and revenues on WPL's stand-alone railroad; and
3. requiring UP to pay the reasonable expenses, including attorneys' fees, caused by UP's failure to comply with the ALJ's order.

UP responds that the ALJ's order extended only to those documents that it had agreed to produce and that it has produced these and additional documents discovered after WPL filed its

motion for sanctions. UP asserts that it has found no other documents within the scope of the ALJ's order.

As WPL acknowledges, the sufficiency of UP's response cannot be effectively evaluated until after the submission of UP's evidence. Accordingly, we will deny WPL's motion for sanctions without prejudice to WPL's filing an appropriate motion to strike any materials submitted by UP that were inappropriately withheld during discovery.

It is ordered:

1. Petitioners' interlocutory appeal of provisions of the ALJ's discovery order is denied.
2. The motion to quash the subpoena duces tecum issued in conjunction with the ALJ's discovery order is dismissed as moot.
3. LEPA must comply with the subpoena duces tecum on or before July 5, 2000.
4. WPL's motion for sanctions against UP is denied without prejudice.
5. This decision is effective July 5, 2000.

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.

Vernon A. Williams
Secretary