

September 19, 2016

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VIA E-FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

ENTERED
Office of Proceedings
September 19, 2016
Part of
Public Record

Re: Docket No. FD 35981, Finch Paper LLC - Petition for Declaratory Order

Dear Ms. Brown:

On September 13, 2016, Delaware and Hudson Railway Company d/b/a Canadian Pacific ("CP") filed an Appeal of the decision, served on August 24, 2016, of Administrative Law Judge H. Peter Young of the Federal Energy Regulatory Commission (the "ALJ Decision"). The ALJ Decision granted the July 1, 2016 Motion to Compel Discovery filed by Finch Paper LLC ("Finch"). CP filed its Appeal pursuant to 49 C.F.R. § 1115.2. The plain language of that rule states that "[a]n appeal of right is permitted" from "the initial decision of an administrative law judge, individual Board Member, or employee board." 49 C.F.R. § 1115.2.

On September 16, 2016, Finch filed a Reply in Opposition to CP's Appeal. In its Reply, Finch asserts that CP's Appeal pursuant to 49 C.F.R. § 1115.2 is "untimely" and seeking relief under a less stringent standard. Finch asserts that any appeal must have been brought under 49 C.F.R. § 1115.1(c) or 49 C.F.R. § 1115.9. Unlike 49 C.F.R. § 1115.2, however, both 49 C.F.R. § 1115.1(c) and 49 C.F.R. § 1115.9 expressly reference appeals from rulings of "employees" of the Board. See 49 C.F.R. § 1115.1(c) ("Appeals from the decisions of employees acting under authority delegated to them by the Chairman of the Board pursuant to § 1011.6 will be acted upon by the entire Board."); 49 C.F.R. § 1115.9(a) ("Rulings of Board employees, including administrative law judges, may be appealed prior to service of the initial decision . . ."). Moreover, the cases cited in Finch's Reply contain conflicting statements as to which rule may govern. For example, one case states: "Interlocutory appeals from discovery decisions issued by [the Administrative Law] Judge [] are governed by the stringent standard of 49 C.F.R. § 1115.1(c)[.]"¹ But

¹ *Canadian National Railway Co., Grand Trunk Corp., and Grand Trunk Western Railroad Inc. --Control--Illinois Central Corp., Illinois Central Railroad Co., Chicago, Central and Pacific Railroad Co., and Cedar River Railroad Co.*, 1998 WL 721112, at *3 (STB 1998).

another case looks to a different rule: "Interlocutory appeals of an ALJ's decision are governed by 49 CFR 1115.9."² Thus, there is a lack of uniformity in precedent.³

Nevertheless, should the Board ultimately conclude that CP's appeal of the ALJ Decision may not be had under 49 C.F.R. § 1115.2, CP asserts that accepting its Appeal as having been timely filed under either 49 C.F.R. § 1115.1(c) or 49 C.F.R. § 1115.9 does not unduly prejudice Finch. Indeed, although Finch spends considerable effort arguing CP's Appeal is "untimely," it never once proffers that accepting the Appeal under a 20-day standard as opposed to a 7 or 10-day standard in any way prejudices Finch. Moreover, Finch downplays that in accepting the underlying Motion to Compel, the Director of the Office of Proceedings accepted Finch's Motion well after the 10-day period under 49 C.F.R. § 1114.31. See Order of the Director of the Office of Proceedings, served August 16, 2016.

Additionally, for the same reasons stated in its Appeal for finding that the ALJ Decision should be reversed under 49 C.F.R. § 1115.2, CP's Appeal meets the standards under either 49 C.F.R. § 1115.1(c) or 49 CFR § 1115.9, even if they are more stringent. The ALJ Decision contains a clear error of judgment and resulted in manifest injustice. Without rehashing the arguments in the Appeal, simply put, the ALJ Decision ignored STB precedent on the very scope of discovery. And, most importantly, and why CP filed its Appeal in the first place, the ALJ Decision provides no explanation as to why the information sought is relevant or even to what issues before the Board they relate.

Nor does the ALJ Decision provide any explanation as to why the information sought does not unduly burden CP or require CP to provide a host of materials relating to other customers of CP. Thus, the ruling similarly imposes substantial irreparable harm and undue prejudice and it requires CP to allow Finch to "inspect[] documents not ordinarily available for public inspection," see 49 C.F.R. § 1115.9(a)(2), which is not simply mitigated by the presence of a protective order. The fact that

² *Wisconsin Power and Light Co. v. Union Pac. Railroad Co.*, 2000 WL 799085, at *1 (STB 2000).

³ Further, Finch's suggestion that there can be no dispute that any appeal must have been brought under 49 C.F.R. § 1115.1(c) or 49 C.F.R. § 1115.9 is conflicted by the *K.C. Railway, Inc.* I.C.C. decision it cites. That decision suggests that the entire Part 1115-Appellate Procedures "could not apply" when no hearing is required by law or commission action. *K.C. Railway, Inc.—Feeder Line Application—Union Pac. Railroad in Kansas and Colorado*, 1992 WL 88098, at *2 (I.C.C. 1992) ("[T]he appellate procedures allegedly relied upon by KC could not apply to the matter at issue here, an appeal of a discovery ruling, because the rules at 49 CFR Part 1115 apply 'where a hearing is required by law or commission action.' That is not the case here."). Thus, *K.C. Railway, Inc.* is inconsistent with both *Wisconsin Power and Light Co.* and *Canadian National Railway Co.*—both of which looked to rules within Part 1115 (although not the same rule)—and only further adds to the lack of consistency among precedent.

there is a protective order entered in this proceeding does not absolve Finch of its obligation to serve appropriately tailored discovery requests. Moreover, Finch's perfunctory dismissal of the very real concerns raised by CP as to other customers' information by stating that "CP marked every single document that it produced in discovery as either 'Confidential' or 'Highly Confidential,'" Reply at 10 n.6, is concerning. Not only is that simply not a true statement, categorical assertions such as these go to the very heart of the issue raised by CP in objecting to allowing Finch unchecked discovery. And notably, as explained in its Appeal, on that issue the ALJ Decision is completely silent.

In short, CP respectfully submits that the ALJ Decision lacks a reasoned justification for why Finch should be allowed to delve into a host of irrelevant (or, at most, marginally relevant) topics and require CP to bear the undue burden of Finch's fishing expedition. Accordingly, CP respectfully requests that this letter be accepted,⁴ CP's Appeal be deemed timely filed, and that the Board reverse the ALJ Decision.

Respectfully submitted,



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⁴ CP respectfully asks that it be afforded the same courtesy in allowing this letter as was afforded to Finch when Finch's August 3, 2016 letter reply to CP's July 21, 2016 Reply to Finch's Motion to Compel was accepted "in the interest of compiling a more complete record." See Order of the Director of the Office of Proceedings, served August 16, 2016.