

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

241486

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**STB Docket FD 35981**

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September 13, 2016  
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Public Record

**FINCH PAPER LLC – PETITION FOR DECLARATORY ORDER**

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**APPEAL OF ORDER OF ADMINISTRATIVE LAW JUDGE ON  
MOTION TO COMPEL DISCOVERY RESPONSES**

Delaware and Hudson Railway Company d/b/a Canadian Pacific (“CP”), pursuant to 49 C.F.R. § 1115.2, appeals the Order of Administrative Law Judge on Motion to Compel Discovery Responses, served on August 24, 2016 (the “ALJ Decision”), and in support of its appeal, states as follows:

**BACKGROUND**

Several months after CP objected to certain document requests and interrogatories contained in the first and second sets of discovery requests of Finch Paper LLC (“Finch”), Finch filed a Motion to Compel Discovery (the “Motion”). The Motion sought to compel responses to several of Finch’s incredibly overbroad discovery requests seeking highly irrelevant documents and information. CP had objected back in March and April to the requests on the grounds that they seek irrelevant documents and information, as well as being overbroad and unduly burdensome. CP further objected to producing documents that contained other customers’ competitive information and to conducting a costly and burdensome special study, particularly considering the lack of relevance of the discovery sought to the issues in this proceeding. CP unequivocally reaffirmed its objections during discovery conferences and in correspondence in

March through May. Finch, however, waited until July 1, 2016 to file its Motion.

After CP filed a Reply to Finch's Motion on July 21, 2016 ("CP Reply"), and following Finch's filing of an August 3, 2016 Reply to CP's Reply without prior leave (to which CP responded on August 8, 2016),<sup>1</sup> the Director of Proceedings, by Order served August 16, 2016, referred the Motion to Administrative Law Judge H. Peter Young at the Federal Energy Regulatory Commission for resolution (the "Referral Order"). No hearing or conference was held on the Motion. Instead, a week after referral, the ALJ issued a short order summarily granting the Motion in its entirety. The ALJ Decision, served August 24, 2016, was based on the following misstatement of the Board's discovery standard:

Board regulations permit discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding. . . ." The Board determines relevance in accordance with the Federal Rules of Evidence. Finch therefore may request from CP any information or document(s) having any tendency to make any fact of consequence to the Board's final determination in this proceeding more or less probable than it would be without the information or document(s).

ALJ Decision at 1. As to relevance, the ALJ Decision's entire analysis consisted of a single conclusory sentence: "Each of the discovery requests at issue satisfies this broad standard." *Id.* The ALJ Decision provides no explanation as to which issue(s) the sought information is purportedly relevant or how this information would assist the Board in deciding the issues properly before it. In fact, the ALJ Decision provides no detail at all on any particular disputed request, as would be reasonably expected in a decision resolving a hotly contested motion to compel on several document requests and interrogatories.

As to burden, the ALJ Decision is similarly brief, saying only that "careful review of the discovery requests reveals no request or need for any special CP study." ALJ Decision at 1. The

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<sup>1</sup> CP incorporates herein by reference the arguments made in its July 21, 2016 Reply and its August 8, 2016 letter response.

ALJ Decision does not address CP's arguments as to the unduly burdensome nature of the discovery being requested, including the fact that providing some of the information will require CP to undertake significant search and collection efforts at rail yard offices across CP's system as this information is not centrally located. The ALJ Decision also fails to conduct any proportionality analysis or balance of the burden of providing the sought information against its likely value (if any) in resolving the issues properly before the Board. Moreover, the ALJ Decision is silent on the confidentiality issues raised by CP as to providing Finch with other rail customers' confidential information, particularly where the information as to other customers would have no bearing on the questions of CP's service to Finch.

Accordingly, CP files this appeal of the ALJ Decision with the Board.

### **LEGAL BASIS FOR APPEAL**

An appeal of an administrative law judge's initial decision is permitted as a matter of right. 49 C.F.R. § 1115.2(a). Grounds for an appeal exist where "a necessary finding of fact is omitted, erroneous, or unsupported by substantial evidence of record," a "necessary legal conclusion, or finding is contrary to law, Board precedent, or policy," or where a "prejudicial procedural error has occurred." 49 C.F.R. § 1115.2(b). As explained below, all those grounds exist here. Thus, CP respectfully requests that the Board reverse the ALJ Decision and deny Finch's Motion.

### **ARGUMENT**

#### **I. THE ALJ DECISION IS CONTRARY TO LAW, BOARD PRECEDENT AND POLICY BECAUSE THE ALJ DECISION APPLIES THE WRONG STANDARD AND THE DOCUMENTS AND INFORMATION DEMANDED BY FINCH ARE IRRELEVANT.**

The ALJ Decision is contrary to law, Board precedent and policy and should be reversed. Although parties are entitled to discovery "regarding any matter, not privileged, which is

relevant to the subject matter involved in a proceeding,” 49 C.F.R. § 1114.21(a)(1), as explained in CP’s Reply, Board precedent instructs that “more than a minimal showing of potential relevancy” is necessary before granting a motion to compel discovery. *Potomac Elec. Power Co. v. CSX Transp., Inc.*, 2 S.T.B. 290, 1997 WL 274205, at \*1 (STB served May 27, 1997). Further, “discovery requests must be narrowly drawn, directed toward a relevant issue, and not used for a general fishing expedition.” *Duke Energy Corp. v. Norfolk Southern Ry. Co.*, STB Docket No. 42069, 2002 WL 1730020, at \*3 (STB served July 26, 2002). Thus, Finch “must demonstrate a real, practical need for the information.” *See Coal Rate Guidelines, Nationwide*, 1 I.C.C. 2d 520, 548, 1985 WL 56819, at \*22 (1985).

In fact, the Board’s “discovery rules, which are set out at 49 CFR Part 1114, subpart B, follow generally those in the Federal Rules of Civil Procedure.” *Potomac Elec. Power Co.*, 1997 WL 274205, at \*1 n.5. *See also Westinghouse Elec. Corp. v. Alton & Southern Ry. Co.*, 1 I.C.C.2d 182, 195 n.7, 1984 WL 49384, at \*3 n.7 (1984) (noting that the 49 C.F.R. § 1114.21(a) standard “parallels the provisions of Rule 26(b)(1) of the Federal Rules of Civil Procedure”). Notably, the Federal Rules of Civil Procedure were recently amended to account explicitly for proportionality of discovery requests. Rule 26(b)(1), as amended effective December 1, 2015, provides in relevant part:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Fed. R. Civ. P. 26(b)(1). In discussing the amendment, courts have explained that “[n]o longer is it good enough to hope that the information sought might lead to the discovery of admissible evidence. In fact, the old language to that effect is gone. Instead, a party seeking discovery of

relevant, non-privileged information must show, before anything else, that the discovery sought is proportional to the needs of the case.” *See, e.g., Gilead Scis., Inc. v. Merck & Co, Inc.*, No. 5:13–CV–04057–BLF, 2016 WL 146574, at \*1 (N.D. Cal. Jan. 13, 2016). The Federal Rules Committee has also made it clear that “[t]he present amendment restores the proportionality factors to their original place in defining the scope of discovery” and “reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses or objections.” *See* Fed. R. Civ. P. 26, advisory committee’s note to 2015 amendment.<sup>2</sup>

In granting Finch’s Motion, however, the ALJ Decision ignores the applicable Board precedent and relied on an erroneous application of the law. The ALJ Decision, relying presumably on Federal Rule of Evidence 401,<sup>3</sup> applies the wrong standard as to whether the information sought should be compelled. Relevance under the Federal Rules of Evidence (which speak to issues of admissibility) is not the applicable standard to determine whether documents or information are discoverable. Rather, Board precedent, including the cases cited herein, make it clear that more than a minimal showing of potential relevancy is necessary, discovery requests must be narrowly drawn, and that the scope of discovery is to be guided by the Federal Rules of Civil Procedure, including Rule 26’s proportionality requirements. If relevance under the Federal Rules of Evidence were the entire standard that the Board is to apply to discovery disputes, then there would be virtually no limits on discovery. Certainly that is not the intent behind 49 C.F.R. § 1114.21(a)(1). Nor is such a standard consistent with Board precedent.

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<sup>2</sup> The Committee further explained that “[r]estoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality.” Fed. R. Civ. P. 26, advisory committee’s note to 2015 amendment.

<sup>3</sup> The ALJ Decision does not cite any specific rule. Federal Rule of Evidence 401 provides: “Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” Fed. R. Evid. 401.

The ALJ Decision further errs in not addressing CP's relevance objections on a case-by-case basis and failing to provide any detail on any particular disputed request. Indeed, as explained in detail in CP's Reply, the sought information is irrelevant to the issues before the Board in Finch's Petition for Declaratory Order ("Petition").

A. Finch's First Set of Discovery Requests

Document Request No. 30 broadly seeks "all documents relating or referring to any notices or enforcement actions by the Federal Railroad Administration pertaining to the rail lines and tracks used by [CP] to provide rail service to the [Finch Paper] Facility." Finch argued that these documents are relevant to the demurrage charges it refuses to pay. *See* Motion at 4-5. But the disputed demurrage charges have nothing to do with the conditions of CP's tracks outside Finch's facility. Finch incurred this demurrage because Finch failed to order in rail cars, choosing instead to let them sit for days, weeks, and sometimes months in CP's rail yards. The time that it takes CP to deliver a properly-ordered car is not included in demurrage charged to Finch. Accordingly, the condition of CP's tracks outside Finch's plant does not affect demurrage and simply is not relevant. Moreover, a request for all documents relating to FRA enforcement actions and notices is not a request that is "narrowly drawn" to obtain information about the track conditions or any possible delays in CP's service to Finch. Rather, it appears to be aimed at gathering information regarding CP's safety compliance record which is not at issue in this proceeding.<sup>4</sup>

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<sup>4</sup> Furthermore, as explained in CP's Reply, Finch already has the information to which it claims that it is entitled as CP already produced information that reflects the conditions of CP's track used to serve the Finch facility and any delays in servicing Finch. *See* CP Reply at 6. These documents included the crew exception reports which detail issues encountered in providing service to Finch, FRA Form 97 Incident Reports, and CP's maintenance records for CP tracks used to serve Finch. *Id.*

Document Request No. 34 similarly demands entirely irrelevant information, asking that CP produce “all [its] Customer Audit Safety forms from 2013 to the present.” These are forms that CP uses to document CP’s safety inspections of its customers’ track facilities. CP performed such an inspection of Finch on April 24, 2014 and determined that portions of Finch’s tracks were in unsafe condition and ordered their closure. CP produced the April 24, 2014 Customer Safety Audit Form pertaining to the track closure at Finch’s facility due to the unsafe track conditions. Finch, however, argues that it is entitled to the Customer Safety Audit Form for *all CP customers since 2013* asserting, without any foundation or logic, that these documents will show the impact of CP’s mid-2012 decision to reduce costs across the CP rail system on Finch and other CP customers and whether CP’s 2012 reduction in service frequency to Finch violated CP’s statutory common carrier obligation “to Finch *and other CP customers.*” Motion at 5 (emphasis added). But CP’s service to other CP customers is decidedly not at issue in this proceeding. The Board has been asked to determine only whether CP violated its common carrier obligation to Finch. *See, e.g.,* Petition at 4. Finch is not entitled to conduct discovery into whether CP is meeting its common carrier obligation to any customer other than Finch.<sup>5</sup> Notices or enforcement actions by the FRA and Customer Audit Safety forms pertaining to tracks other than at the Finch facility have absolutely nothing to do with the issues before the Board and would not provide additional information relevant to the issues in this proceeding; asking for these additional irrelevant documents is nothing more than a fishing expedition. Thus, as CP has repeatedly stated since March, there is no legitimate basis for requiring CP to produce the documents requested by Document Request Nos. 30 and 34.

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<sup>5</sup> Further, as noted in its Reply, safety audits may contain information about CP’s other rail customers’ facilities that those customers might consider to be competition sensitive. Absent a compelling need for this information, the Board should not risk potential harmful disclosure of other rail customers’ information. *See* CP Reply at 7.

B. Finch's Second Set of Discovery Requests

Finch's incredibly overbroad requests asked CP to identify, and produce all documents relating to, or referring to, management strategies or business plans over a period of four years that called for the reduction, both nationally and locally in the New York service area, in the number of employees (Interrogatory No. 15 and Document Request No. 40) and in the number of locomotives (Interrogatory No. 17 and Document Request No. 41), and to then identify how many employees and contractors whose positions were eliminated after July 2012 had been involved in providing rail transportation services to Finch (Interrogatory No. 16). Finch further asked CP to describe the extent to which CP allocated train crews, locomotives, and track capacity away from providing rail service to customers in the New York service area and used them for other customers on other parts of CP's system between 2012 and 2015 and to provide all documents relating to or referring to the same (Interrogatory No. 18 and Document Request No. 42).

Additionally, Finch asked CP to describe any changes CP made to its customer service department between 2012 and 2015 and the extent of those changes, including the extent to which these changes altered the customer service department as it applied to Finch (Interrogatory No. 19). Finally, Finch demanded that CP "produce all documents that discuss the extent to which the CP service problems in the Upper Midwestern United States and Chicago that were the primary focus of CP's participation in STB Docket No. EP 724, United States Rail Service Issues, affected CP's ability to provide rail service to Finch Paper and other customers located on the New York service area portion of CP's system." (Document Request No. 44).

The majority of Finch's assertions in its Motion as to why this information is purportedly relevant were nothing more than perfunctory statements that such information is relevant to CP's

“common carrier” and “service” obligations. *See* Motion at 8-10. Finch asserted that the discovery sought is relevant as to “whether CP’s reductions in the number of its employees, including engineers and train crews, adversely impacted CP’s ability to satisfy its service obligations to Finch” and “whether changes to CP’s customer service department and its operations left CP unable to adequately service its customers.” Motion at 8.

Documents and information regarding personnel and equipment changes made by CP are beside the point. The question before the Board is whether the service CP provides violated its common carrier obligations to Finch “by reducing the frequency of CP Rail’s switching services” or “by [allegedly] failing to provide switching services.” Petition at 4. At issue is not whether CP had sufficient resources allocated to provide adequate service to Finch, but whether CP in fact provided Finch adequate service on reasonable request. And the answer to the latter does not turn on the former. How CP internally manages the service it provides to Finch is irrelevant to the questions before the Board.<sup>6</sup> Moreover, Finch’s requests go well beyond service to Finch. Finch asked for documents and information regarding staffing, equipment and other issues at a CP system-wide basis and for documents that discuss impacts on other customers. CP’s service to other customers is not at issue here and Finch’s Motion failed to explain how information regarding other customers is at all relevant to CP’s service to Finch. Accordingly, the documents and information sought by the disputed discovery requests are irrelevant.

The ALJ Decision failed to apply the correct legal standard to the discovery dispute. Applying the correct standard, Finch’s Motion must be denied as the disputed requests seek irrelevant information and, to the extent any information is arguably relevant, the burden of the discovery heavily outweighs its marginal, if any, benefit in resolving the issues before the Board.

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<sup>6</sup> The implications of Finch’s argument are troubling as it suggests that the Board should determine the railroad’s appropriate staffing and equipment levels.

**II. THE ALJ DECISION RESULTS IN PREJUDICIAL PROCEDURAL ERROR BECAUSE IT WAS ISSUED WITHOUT AN EXPLANATION OF THE BASIS BEHIND THE RULINGS ON EACH DISPUTED DISCOVERY REQUEST AND GRANTED FINCH'S MOTION WITHOUT CONSIDERATIONS OF BURDEN AND CUSTOMER SENSITIVITY.**

The ALJ Decision should be reversed as it results in prejudicial procedural error. The ALJ Decision recognized that CP had objected to specific discovery requests on the grounds that they were overbroad, unduly burdensome and untimely (as well as not relevant, as previously discussed) and would require CP to conduct a “special study.” But the ALJ Decision fails to properly consider—and, in some cases, even address—many of CP’s arguments. Indeed, the ALJ Decision did not consider CP’s argument that even if some of the sought information and documents were arguably relevant (which they are not), the Motion should be denied, or at least denied in part, because “the burden of producing that information outweighs its limited value.” CP Reply at 10.

As noted in its Reply, Board precedent instructs that “[a]ll discovery requests entail the balancing of the relevance of the information sought against the burden of producing that information.” *Reasonableness of BNSF Ry. Co. Coal Dust Mitigation Tariff Provisions*, STB Docket No. FD 35557, 2012 WL 2378133, at \*4 (STB served June 25, 2012). “Under 49 CFR 1114.21(c), discovery may be denied if it would be unduly burdensome in relation to the likely value of the information sought.” *Canadian Pac. Ry. Co.—Control—Dakota, Minn. & E. R.R. Corp.*, STB Docket No. FD 35081, 2008 WL 820744, at \*1 (STB served March 27, 2008).

In its Reply, CP detailed the undue burden that responding to Finch’s disputed requests would cause. CP Reply at 10-12. But notably the ALJ Decision focuses only on the “special study” that CP may need to conduct to respond to the disputed requests, stating: “CP is not required to conduct any special study to satisfy the requests, but CP is required to provide any

responsive information and documents CP already may have.” ALJ Decision at 1. By doing so, the ALJ Decision fails to consider the burden on CP, where compliance would, for example, “require CP to undertake search and collection efforts at yard offices across CP’s system.” CP Reply at 11. To the extent this information is even relevant, it was incumbent on Finch (and, if not done by Finch, the ALJ Decision) to properly narrow such overly broad discovery requests. *See Duke Energy Corp.*, 2002 WL 1730020, at \*3 (“[I]t is unduly burdensome to require a party to produce information that is available from public records or through less intrusive means.”).

Similarly, the ALJ Decision does not take into account the fact that the documents and information that CP has already produced provide sufficient information relating to CP’s service to Finch. *See* CP Reply at 6, 10. CP conducted a reasonable search for documents that specifically discuss service to Finch and produced responsive non-privileged documents, if any. These documents include documents related to CP’s restructuring of service to Finch in 2012 and related crew and equipment needs which are arguably responsive to Document Request Nos. 40, 41 and 42. CP also produced documents that identify why CP service to Finch was, on occasion, delayed or not provided. And, as noted, Finch already has the information that reflects the conditions of CP’s track used to serve the Finch facility, including FRA Form 97 Incident Reports and CP’s maintenance records for CP tracks used to serve Finch. CP Reply at 6. Thus, sufficient information had been produced to address the issues referred to the Board in this proceeding and therefore the disputed requests are duplicative and unduly burdensome.

The ALJ Decision also did not consider the confidential nature and sensitivity of the documents and information Finch sought through discovery (which included third-party customer information, such as the Customer Audit Safety Reports), particularly where “CP’s service to other CP customers is decidedly not at issue in this proceeding.” CP Reply at 7. As

explained in CP's Reply, "[t]he Board has been asked to determine only whether CP violated its common carrier obligation to Finch. Finch is not entitled to conduct discovery into whether CP is meeting its common carrier obligation to any customer other than Finch." *Id.* Further, CP explained that some of the information and documents sought by Finch's requests "may contain information about CP's other rail customers' facilities that those customers might consider to be competition sensitive." *Id.* Thus, as CP asserted, the Board should not risk potential harmful disclosure of other rail customers' information. *Id.* The ALJ Decision, however, is completely silent on this issue.

Finally, discovery should generally not be had where it unduly burdens a party or "untimely" raises issues. *See* 49 C.F.R. § 1114.21(c). The ALJ Decision, however, prejudices CP in now requiring it to provide documents and information when Finch waited well after the 10-day time period set forth in 49 C.F.R. § 1114.31 to file its Motion, as discovery was coming to a close. The ALJ Decision effectively reopens discovery, resulting in further delay of this proceeding. A proper burden analysis should have taken into account that evidentiary briefing has already commenced, and a decision granting the request would likely result in supplemental rounds of briefing, as suggested by Finch in its opening statement.

Thus, for all these reasons, the Board should reverse the ALJ Decision because prejudicial procedural error has occurred.

### **III. THE ALJ DECISION FAILED TO PROPERLY RESOLVE A FACTUAL DISPUTE AS TO FINCH'S LACK OF DILIGENCE IN BRINGING ITS DISCOVERY DISPUTE.**

The ALJ Decision should be reversed because it also failed to properly resolve a dispute as to Finch's diligence in bringing its Motion. In its Reply, CP objected to Finch waiting months to file its Motion, particularly where the Board has a rule requiring motions to compel to be

brought promptly. *See* 49 C.F.R. § 1114.31 (stating that a “motion to compel an answer must be filed with the Board . . . within 10 days after expiration of the period allowed for submission of answers to interrogatories”). Moreover, the Motion was filed as discovery was coming to a close, causing even further delay in the resolution of the proceeding before the Board, and thereby resolution of the pending lawsuit in federal court.

In its Reply to CP’s Reply, Finch sought to excuse waiting months after CP unequivocally objected to the discovery requests at issue to file its Motion by referring to documents that CP produced in response to *other discovery requests*—which CP pointed out in its Letter response. Although the Referral Order stated it would “accept” Finch’s Motion despite the “prefer[ence of] prompt filing of motions to compel,” the referral specifically noted that there was a dispute among the parties as to timeliness where Finch asserted, and CP contested, that the Motion should be considered timely because CP had made a document production at the end of June. Referral Order at 1 (stating that “according to Finch, CP continued to produce responsive documents (though CP claims those documents were not responsive to the disputed requests) as late as June 30, 2016”).

The ALJ Decision, however, did not issue any finding of fact with regard to Finch’s diligence (or, in fact, lack thereof) in filing its Motion, instead relying on the statement in the Referral Order that discovery was ongoing and resolution of the Motion would purportedly not unduly delay this proceeding. The ALJ Decision does not attempt to resolve the factual dispute noted by the Referral Order. Nor does the ALJ Decision address the issue of whether Finch acted with appropriate diligence in bringing its Motion, regardless of when discovery officially closed.

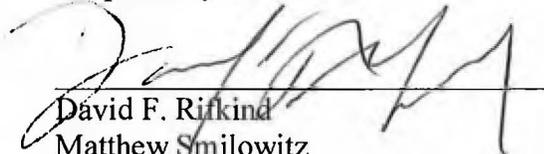
Notably, the concerns expressed by CP in its Reply as to Finch's belated filing are being realized. Due to the lack of diligence by Finch in waiting until July to file its Motion, the parties are now left with the prospect of having ongoing discovery even though discovery is closed. Moreover, Finch has filed its opening statement, CP's statement is due the end of next week, and the prospect of additional rounds of briefing is real.

**CONCLUSION**

For the foregoing reasons, CP respectfully requests that the Board reverse the ALJ Decision and deny Finch's Motion.

Dated: September 13, 2016

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that, on this 13th day of September 2016, a copy of the foregoing Appeal of Order of Administrative Law Judge on Motion to Compel Discovery Responses was served by first class mail, postage pre-paid, and by electronic mail on:

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