

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**ENTERED
Office of Proceedings
September 16, 2016
Part of
Public Record**

STB Docket FD 35981

PETITION FOR DECLARATORY ORDER - FINCH PAPER LLC

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

Finch Paper LLC (“Finch”) hereby replies in opposition to the appeal of Delaware and Hudson Railway d/b/a Canadian Pacific¹ (“CP”) of the August 24, 2016 Order of the Administrative Law Judge (“ALJ”) granting Finch Paper’s Motion to Compel fails because: (1) it is untimely; (2) CP’s interlocutory appeal of the ALJ’s discovery does not present “exceptional circumstances” where an immediate appeal is necessary in order to “correct a clear error of judgment or to prevent manifest injustice;” and (3) the ALJs’ decision is well founded.

I. CP’s Appeal is Untimely

CP’s appeal is procedurally and substantively defective. First, although CP purports to rely upon the twenty day time period for appeal set forth in 49 C.F.R. §1115.2 as justification for waiting until September 13, 2016 to appeal the ALJ’s August 24, 2016 discovery order, the law is clear that its reliance was misplaced. While there may be some uncertainty as to whether the

¹ As Finch noted in its Opening Statement in this proceeding filed on August 24, 2016, the party who filed the complaint against Finch in federal court in New York seeking collection of demurrage charges was identified as “Delaware and Hudson Railway Company, a Delaware Corporation t/a CP Rail.”

seven day time period for appeal of interlocutory appeals pursuant to 49 C.F.R. § 1115.9 applies, or the ten day time period prescribed in section 1115.1(c) for appeals of decisions of employees acting under authority delegated to them by the Board, there is no legitimate dispute that section 1115.2's twenty day time limit is inapplicable.

In *K.C. Railway Inc. - Feeder Line Application – Union Pacific Railroad in Kansas and Colorado*, 1992 WL 88098 (I.C.C. 1992), the Interstate Commerce Commission considered and rejected the very argument asserted by CP here. There, the railroad sought to appeal an ALJ's order granting a motion to compel pursuant to 49 CFR § 1115.2, the same Code provision that CP relies upon. The appeal was denied by the Chairman of the Commission on the grounds that the appeal had been filed late because it was not in compliance with the requirement that appeals from decisions of employees acting under delegated authority must be filed within ten days. The Chairman also denied the appeal on the grounds that such appeals are not favored and will be granted only in exceptional circumstances to correct clear errors of judgment or to prevent manifest injustice.² The full Commission affirmed the Chairman's Order holding that the appeal was untimely and further did not meet the "exceptional circumstances" requirement. *Id.* at * 2. In so holding, the Commission flatly rejected the railroad's argument that discovery orders were governed by the twenty day time limitation set forth in section 1115.2. *Id.* Indeed, the Commission chastised the railway for even arguing that section 1115.2 applied given that "it should be clear, by a reference to the relevant rules, that the appellate procedures allegedly relied upon by [the railway] could not apply to the matter at issue here, an appeal of a discovery ruling. . . ." *Id.*

² See 49 C.F.R. § 1115.1(c).

The Board subsequently confirmed that appeals of ALJ’s interlocutory discovery orders are governed by 49 C.F.R. § 1115.1(c), which contains the ten day time limitation. *See, e.g., CSX Transp. Inc. Norfolk Southern Corp. and Norfolk Southern Railway Corp. – Control and Operating/ Lease Agreements – Conrail, Inc. and Consolidated Rail Corp.*, 1997 WL 429074 (S.T.B. 1997) (“Appeals from discovery decisions of the ALJ are to be granted only ‘to correct a clear error of judgment’ or to ‘prevent a manifest injustice.’ 49 C.F.R. 1115.1(c)”); *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 (STB 19989) (interlocutory appeals from discovery decision are governed by stringent standards of 49 C.F.R. § 1115.1(c).)

In other decisions, however, the Board held that interlocutory appeals of an ALJ’s decision are governed by 49 C.F.R. § 1115.9. *See FMC Wyoming Corp v. Union Pacific Railroad Co.*, three S.T.B. 88, 1998 WL 177709 (STB 1998); *Wisconsin Power and Light Co. v Union Pacific Railroad Co.*, 2000 WL 799085 (STB 2000). Section 1115.9 provides that appeals of interlocutory decisions shall be filed within seven calendar days after the ruling.

Here, regardless of whether the ten day limitation set forth in section 1115.1(c) or the seven day limitation contained in section 1115.9 applies, CP’s appeal is time barred. By waiting until September 13, 2016 to appeal the ALJ’s August 24, 2016 Order, CP slept on its rights under either of the potentially applicable Code provisions and its untimely appeal should be rejected.³

³ Ignoring its own failure to timely appeal the ALJ’s ruling, CP argues that the ALJ erred in granting the motion to compel because Finch was tardy in seeking relief from CP’s failure to comply with its discovery obligations. As reflected below, CP’s argument is both substantively and procedurally defective. First, the Director of the Office of Proceedings issued an Order (Service Date August 16, 2016) in which the Director rejected CP’s argument in that regard and

II. CP's Appeal Does Not Satisfy the Stringent Standards Governing Interlocutory Appeals

Both 49 C.F.R. §§ 1115.1(c) and 1115.9(a) set forth stringent criteria for appeals of decisions delegated by the Board, and of interlocutory decisions. CP simply ignores these standards in arguing that it should not have to produce the discovery sought because it is unduly burdensome.

49 C.F.R. § 1115.1(c) expressly provides that “such appeals are not favored; they will be granted only in exceptional circumstances to correct clear errors of judgment or to prevent manifest injustice.” *See 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 (STB 1998) (applying stringent standard of 49 CFR § 1115.1(c) and denying appeal).

Section 1115.9 is, if anything, even more stringent, stating that interlocutory appeals may only be granted if, in relevant part, the order will result in substantial irreparable harm, substantial detriment to the public interest or undue prejudice to a party.⁴ Recognizing that the standards for such review are very narrow, “[c]onsistent with the handling of interlocutory appeals in the Federal courts,” the Interstate Commerce Commission in *ITT Corp v. Transcon Lines*, 1993 WL 244265 (ICC 1993), held that an appeal of a discovery order should not be

accepted Finch's Motion to Compel. Thus, CP's complaint about the Director's rejection of CP's untimeliness claims should have been directed to the Board pursuant to 49 C.F.R. §1011.6(b), which requires appeals of decisions by the Director to be submitted to the full Board within ten days of the Director's action. Having slept on its rights to appeal the Director's order, CP cannot now try to do so in its otherwise untimely appeal of the ALJ's ruling.

⁴ Interlocutory review may also be available in instances in which a party's rights or interests in a proceeding may be terminated by a ruling, the ruling grants a request for documents not ordinarily available for public inspection, or the ruling overrules an objection based upon privilege. CP has not asserted that any of those exceptions apply here, nor could it.

considered. Indeed, the Commission recognized that if ITT thought the matter was appropriate for interlocutory review, it should have asked the ALJ to certify the question. *Id.* at * 2. Having failed to do so, the Commission would not grant the appeal. *Id.*; *see also Wisconsin Power and Light Co. v Union Pacific Railroad Co.*, 2000 WL 799085 at * 2 (Board accords substantial deference to ALJ discovery rulings).

As the Commission recognized in *ITT Corp v. Transcon Lines*, the Code provisions regarding the appeal of interlocutory decisions are entirely consistent with federal court authority. The Supreme Court in *Mohawk Ind., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) recognized that the general rule against interlocutory appeals reflects a healthy respect for the final judgment rule. Permitting piecemeal, prejudgment appeals undermines efficient judicial administration. *Id.* Thus, even if a ruling may burden litigants in ways that are only imperfectly reparable by appellate reversal of a final judgment, interlocutory appeal is still unwarranted. *Id.* at 107. Accordingly, the Court emphasized the settled rule that almost all discovery rulings are not final and thus not appealable. *Id.* at 108; *see also Holt-Orsted v. City of Dickson*, 641 F.3d 230, 236 (discovery orders are not generally appealable even under the collateral order doctrine); *Hardy v. Knapp*, 27 Fed. Appx. 24, 2010 WL 1398475 (2d Cir. 2001) (generally, discovery orders are interlocutory orders that must await final judgment for appellate review); *Tullius v. Washington Fed. Savings*, 500 Fed Appx., 286, 2012 WL 6101863 (5th Cir. 2012) (overwhelming weight of authority that discovery orders are interlocutory decisions from which there is no immediate right of appeal).

Here, because CP has not shown, and cannot show, that complying with its discovery obligations would: (1) impose substantial irreparable harm; (2) be of substantial detriment to the public interest; or (3) unduly prejudice it, CP's appeal should be dismissed.

III. The ALJ's Decision is Correct

A. The Discovery Sought Is Relevant

For the reasons set forth above, *i.e.*, that CP's appeal is untimely and does not present the "exceptional circumstances" necessary to justify an immediate appeal of the ALJ's Order, the appeal should be denied. Even if the Board were to consider the merits of CP's untimely appeal, however, the ALJ's Order should be affirmed.

1. Federal Railroad Administration ("FRA") Notices or Enforcement Actions

The discovery the ALJ ordered CP to produce falls into three broad categories. The first category (Document Request No. 30), seeks documents relating to enforcement actions by the Federal Railroad Administration *regarding the rail lines used to service Finch's facility*. This information is highly relevant because it goes to the ability of CP to provide rail service to Finch without fail, as CP promised to do when it reduced the days it provided switches to Finch from five days per week to three days per week. Further, whether FRA compliance issues caused delays in CP delivering cars to Finch's facility or picking them up is relevant in determining whether the demurrage charges that CP seeks to assess against Finch are reasonable. Finally, the discovery is relevant because CP precipitously and substantially restricted service to the Finch facility due to alleged defects in Finch's plant tracks, which resulted in massive demurrage charges being assessed against Finch. The condition of CP's track, as reflected in FRA notices or enforcement actions, is relevant to the issue of whether the assessment of demurrage in these circumstances was reasonable and whether CP's reduction of service to the Finch facility violated 49 U.S.C. § 11101.

CP asserts that discovery in this regard is not relevant because the demurrage charges at issue arose because Finch failed to order in rail cars. CP Appeal at p. 6. This assertion is flatly contradicted by the contemporaneous documents and other evidence compiled and discussed in Finch's Opening Statement. Moreover, in determining whether a party is entitled to discovery, the ALJ is not obligated to blindly accept CP's unfounded assertion that the discovery is not relevant because CP's safety compliance record could not impact CP's ability to provide reliable rail service to Finch. CP's objection that Document Request No. 30 is not "narrowly drawn" ignores the fact that it is limited to FRA notices and enforcement actions regarding rail lines to Finch's facility.

2. Consumer Safety Audit Forms

The second category of documents sought (Document Request No. 24) is CP's Customer Audit Safety forms. These are relevant because they will provide information related to the impact on Finch and other CP customers of CP's decision beginning in mid-2012 to substantially reduce costs, personnel and equipment over CP's rail system. This goes to the issue of whether CP's reduction in service to Finch constituted a violation of CP's obligations as a common carrier to provide safe and efficient rail service.

Here CP asserts that whether CP had sufficient resources allocated to provide adequate rail service to Finch is irrelevant. CP Appeal at p. 7. Such an assertion is ludicrous on its face, as CP's ability to satisfy its common carrier obligations under 49 U.S.C. § 11101 goes to the heart of Finch's claims.

3. **CP's Drastic Reduction in Personnel and Equipment**

The third category of discovery (Interrogatory Nos. 15, 16, 17, 18 and 19, and Document Request Nos. 40, 41, 42, and 44) seeks information regarding CP's business plan and operations whereby it reduced the number of its employees -- including conductors, train crews and personnel -- to manage its customer service department nationally and locally in the New York service area where Finch's mill is located, and reduced the number of locomotives in use by CP.

CP again baldly asserts that whether CP had sufficient resources allocated to provide adequate service to Finch is irrelevant. Appeal at p. 9. CP then goes even further, however, arguing that it is beyond the proper scope of the Board's jurisdiction to determine whether CP had appropriate staffing and equipment levels to service its customers. *Id.*, n. 6. CP's suggestion that the Board is toothless and lacks authority to ensure that rail carriers have sufficient staffing and equipment to satisfy their common carrier obligations is baseless. Such unfounded and unsupportable contentions certainly do not justify reversing the ALJ's Order, particularly given that here CP personnel admitted that CP often lacked sufficient crews and staff to service Finch. *See* Finch Opening Statement - Verified Statement of Stuart Alheim at ¶ 16 (CP admitting that it was understaffed and had an insufficient number of conductors and crews to maintain its service); Verified Statement of Deborah Taylor at ¶ 15 (CP admitting that it did not have enough operational personnel to properly run its operations because CP was having trouble hiring and retaining staff.)

B. **CP Fails to Articulate Any Exceptional Circumstances Warranting an Immediate Appeal of the ALJ's Interlocutory Order**

Far from establishing that its appeal presents "exceptional circumstances," where an immediate appeal is necessary in order to "correct a clear error of judgment or to prevent

manifest injustice” or is needed to avoid substantial irreparable harm, CP objects to the Order on boilerplate legal and factual grounds. First, CP argues that the ALJ did not sufficiently balance the need for the discovery against the burden CP faces in producing such discovery. In making this argument, CP baldly assumes that the ALJ did not consider the importance of the issues at stake in the action, the amounts in controversy, and the burden to CP in producing relevant information. CP’s assumption is wholly unfounded. The ALJ’s Order correctly cites the Board’s rule governing the scope of discovery. Further, there is simply no legitimate basis for assuming, as CP does, that the ALJ ignored the Federal Rules of Civil Procedure.⁵ The discovery sought is directly relevant to claims and defenses asserted in an action in which CP is seeking in excess of \$1,300,000 in demurrage charges and Finch has asserted damages in the approximate amount of \$500,000. Thus, it cannot legitimately be argued that the discovery sought is disproportionate to the amount in dispute. Further, as a Class I railroad, CP cannot claim with a straight face that it lacks the resources to produce relevant discovery in a case where it is seeking more than a million dollars in demurrage charges from its customer.

CP next asserts that it should not have to provide additional discovery because it has already produced some documents that are “arguably responsive” to the discovery sought. Appeal at p. 11. The fact that CP might “arguably” have produced some documents responsive to Finch’s discovery requests does not satisfy CP’s discovery obligations, as the ALJ implicitly recognized. CP also asserts that some of the documents sought in discovery contain confidential

⁵ The fact that the Order granting the Motion to Compel is brief reflects the merits of CP’s claims and the attention they required, rather than suggesting that the ALJ was somehow derelict in his analysis.

information. While that may be true,⁶ there is a Protective Order in place in this proceeding. Thus, that does not justify CP's refusal to produce responsive documents.

CP further asserts that the motion to compel should have been rejected because it was untimely. The Board, through the Director of the Office of Proceedings, already rejected CP's argument in that regard, however, in its August 16, 2016 Order referring the matter to the ALJ. The Director expressly held that "given that discovery was ongoing through the period, and resolution of the discovery dispute should not unduly delay the proceeding, we will accept Finch's motion to compel." As noted above in footnote 3, the Board's regulations at 49 C.F.R. §1011.6(b) require appeals of decisions of the Director to be filed within ten days of the employee's action. CP did not do so. Thus, CP's attempt to question the Director's decision in its untimely appeal of the ALJ's decision in this regard is also untimely, as CP again slept on its rights.

Finally, CP trots out the standard argument parties make when seeking to avoid discovery obligations, *i.e.*, it is burdensome. Having decided to sue Finch for over a million dollars, however, CP cannot now complain that it is somewhat burdensome to provide relevant information regarding its claims and defenses to Finch's counterclaims. At any rate, such rote objections clearly do not constitute "exceptional circumstances" or pose the risk of substantial irreparable harm sufficient to justify an immediate appeal of the discovery ruling at issue.

CONCLUSION

CP's appeal is frivolous. Having slept on its rights, CP now seeks review of the ALJ's interlocutory order in an appeal that is untimely on its face. Further, CP does not even attempt to

⁶ Though not to the extent that CP probably asserts, given that CP marked every single document that it produced in discovery as either "Confidential" or "Highly Confidential."

argue that the appeal presents the type of “exceptional circumstances” or the risk of substantial irreparable harm that would justify the relief sought. Thus, the Board need not even consider the purported merits of the argument CP now asserts. Should, however, the Board ignore CP’s failure to timely file its appeal and to even argue that its appeal meet the stringent criteria necessary for relief from an interlocutory order, the Board should affirm the ALJ’s Order because it correctly rejects CP’s contention that the discovery sought is irrelevant and unduly burdensome.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on this 16th day of September, 2016, I have served copies of the of the foregoing Reply in Opposition to Appeal of Order of Administrative Law Judge on Motion to Compel Discovery Responses by email and/or by first class mail to:

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