

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

241620

ENTERED
Office of Proceedings
September 29, 2016
Part of
Public Record

STB Docket FD 35981

PETITION FOR DECLARATORY ORDER – FINCH PAPER LLC

**REPLY TO
MOTION TO HOLD PROCEDURAL SCHEDULE IN ABEYANCE**

Delaware and Hudson Railway Company d/b/a Canadian Pacific (“CP”) hereby replies in opposition to the Motion to Hold Procedural Schedule in Abeyance (the “Motion”)¹ filed by Finch Paper LLC (“Finch”) on September 27, 2016 and, in support of its opposition to the Motion, states as follows.

INTRODUCTION

CP filed its Reply Statement to Finch’s Opening Statement last Friday. Seeing that robust Reply, Finch now asks the Board to pause this proceeding under the guise of needing resolution of a tangential discovery matter which has no bearing on the issues properly before the Board in this proceeding. But even accepting Finch’s premise of why it seeks to hold the procedural schedule in abeyance, it provides no explanation as to why this request could not have been made weeks ago or, at the very minimum, before CP filed its Reply Statement. The suspicious timing of Finch’s request only underscores the very concern that CP has repeatedly

¹ Finch’s Motion is itself unclear as to exactly what relief Finch is asking the Board to order. Although its Motion is titled as a motion to hold the “*procedural schedule* in abeyance,” the requested relief in the Motion’s prayer for relief is for an order “holding *this proceeding* in abeyance.” *Compare* Motion at 1 *with* Motion at 4 (emphasis added). Regardless of the specific relief being requested, however, as explained herein, Finch’s motion should be denied.

expressed—the discovery dispute is being used as a delay tactic by Finch to hinder timely resolution of this matter, and to continue to avoid paying the demurrage Finch indisputably owes CP for failing to maintain its own rail tracks and using CP’s service yard as a storage yard.

RELEVANT BACKGROUND

On July 1, 2016, Finch filed a Motion to Compel Discovery (the “Motion to Compel”) seeking to compel documents and information in response to discovery requests to which CP objected back in March and April. CP filed a Reply on July 21, 2016 asserting, *inter alia*, that the discovery is irrelevant, unduly burdensome, and seeking other customers’ information. Finch responded by letter to that Reply on August 3, 2016, to which CP replied on August 8, 2016.

By Order served August 16, 2016, the Director of the Office of Proceedings accepted Finch’s Motion to Compel and referred it to Administrative Law Judge H. Peter Young of the Federal Energy Regulatory Commission. No hearing or conference was held on that motion. Instead, by decision served August 24, 2016, the ALJ granted the Motion to Compel (the “ALJ Decision”). As explained in more detail in CP’s appeal, the ALJ Decision ignored Board precedent on the scope of discovery and instead looked primarily to the Federal Rules of Evidence before stating—without any explanation as to which issue(s) the sought information is purportedly relevant—that: “Each of the discovery requests at issue satisfies this broad standard.” ALJ Decision at 1. The ALJ Decision also did not address the unduly burdensome nature of the discovery (particularly since it is not centrally maintained), nor conduct any proportionality analysis or balance of the burden of providing the information against its likely value (if any) in resolving the issues properly before the Board. The ALJ Decision is similarly silent on the confidentiality issues as to providing Finch with other customers’ confidential information, particularly where that information has no bearing on CP’s service to Finch.

On September 13, 2016, CP appealed the ALJ Decision, to which Finch filed a Reply on September 16, 2016 asserting that any appeal pursuant to 49 C.F.R. § 1115.2 would be “untimely” and seeking relief under a less stringent standard. On September 19, 2016, CP filed a letter response to Finch’s Reply noting, *inter alia*, an inconsistency in precedent on appeals but nonetheless requesting that the appeal be accepted as timely as Finch did not, and could not, assert that it was prejudiced by CP filing under a 20-day standard as opposed to a shorter standard. CP also noted that the underlying Motion to Compel had been accepted well after the 10-day deadline in 49 C.F.R. § 1114.31(a). CP further explained that for the reasons already stated in its appeal for finding that the ALJ Decision should be reversed under 49 C.F.R. § 1115.2, the appeal meets the standards under either 49 C.F.R. § 1115.1(c) or 49 C.F.R. § 1115.9.

On August 24, 2016, Finch filed its Opening Statement. Finch did not seek to hold the procedural schedule in abeyance before it filed its Opening Statement, or in the month after it filed its Statement. Only after CP filed its Reply Statement on September 23, 2016 did Finch first ask the Board to hold the procedural schedule in abeyance. Under the current procedural schedule, Finch’s Rebuttal Statement is due October 13, 2016.

ARGUMENT

There is no reason for Finch having waited until after opening and reply evidence have been filed to ask for a change in the procedural schedule. To the extent that Finch’s request was warranted -- it is not -- Finch could have asked for this extraordinary relief weeks ago.² Instead

² Indeed, Finch has known that CP intended to appeal the ALJ Decision for nearly a month before Finch filed the instant Motion. On August 31, 2016, CP informed counsel for Finch that CP intended to appeal the ALJ Decision. Counsel for Finch asked counsel for CP when that appeal was due. CP’s counsel advised that CP intended to file its appeal within 20 days from the service date of the ALJ Decision. Notably, counsel for Finch did not challenge that assertion nor mention that Finch would request a delay of the procedural schedule in light of the forthcoming

Finch took the position that its untimely discovery motion would not delay the proceeding. Finch insisted that its Motion to Compel “was not filed for the purpose of delaying this proceeding for the simple reason that Finch did not accompany the motion with a request to extend the procedural schedule in this case.” August 3, 2016 Letter. But that is exactly what Finch is now doing and exactly what CP was concerned would occur.

Nor is the existence of an outstanding discovery dispute a sufficient basis for the Board to grant Finch an unlimited amount of time to file its Rebuttal Statement. Finch’s deadline to file its Rebuttal Statement was set months ago and in accord with the parties’ *jointly-filed* motion to extend the procedural schedule. Joint Motion to Modify Procedural Schedule, filed May 6, 2016, granted May 13, 2016 (“Joint Motion”). Considering that CP objected to providing the discovery at issue in Finch’s Motion to Compel back in March and April, Finch certainly could have raised its concern with the procedural schedule at the time of filing the Joint Motion in May (or in the several months since then). In fact, that Joint Motion specifically requested an extension of time of the procedural schedule “to accommodate the additional time needed for discovery,” including time “to resolve issues regarding certain discovery requests.” *Id.* at ¶¶ 1, 2. Finch neither raised its concerns at that time nor moved promptly to resolve the referenced discovery dispute. The underlying federal court case, which awaits resolution of this proceeding, has been pending nearly a year and a half and it is time for this demurrage dispute to be brought to closure. *See E.I. DuPont de Nemours and Co. v. Norfolk S. Ry. Co.*, Docket No. 42125, 2012 WL 5984483, at *4-5 (STB served Nov. 29, 2012) (considering “fairness” in determining whether to place cases in abeyance and ultimately denying the railroad’s request to do so because

appeal. Only now, a month later, and after having seen CP’s Reply Statement, does Finch first ask for the procedural schedule to be held in abeyance.

“from both a fairness and timing standpoint, we do not believe it is appropriate to put a hold on these long-pending cases”).

Indeed, CP believes that, even if the Board allowed the discovery sought—which it should not do—additional briefing by Finch would neither be warranted nor appropriate as the discovery sought has no bearing on the Board’s determination of any issue in this case.³ According to Finch, the discovery is necessary to determine the contributory causes of CP’s alleged “failures to adequately provide service to Finch in violation of CP’s statutory common carrier obligations.” Motion to Compel at p. 10. Why CP allegedly violated the common carrier obligation presupposes that CP violated the common carrier obligation. But, as should now be absolutely clear following the filing of Opening and Reply evidence, Finch has not carried its burden of showing that CP violated its common carrier obligation in the first place. Finch did not dispute that three day a week service was adequate to handle its weekly volumes and CP showed that Finch received at least three-day a week service virtually every week over the past several years, and that many of Finch’s claims to the contrary were either flat out wrong or half-truths. *See, e.g.*, CP Reply Statement, Table 1 (p. 36), Table 2 (p. 37); Jason LaValla Verified Statement, including Appendix A and Appendix B thereto. How many crew members CP employed in Enderlin, North Dakota, Chicago, Illinois, or anywhere else on CP’s system, including New York; the number of locomotives in inventory; FRA enforcement notices; and the condition of other customers’ private tracks over the years, have no bearing on whether three-day a week service was sufficient to handle Finch’s weekly volumes, whether CP delivered three-day a week service, or on any other issue in this proceeding.

³ If Finch genuinely believed that the information it seeks is important to its case in chief, then it should have asked for the Board to modify the procedural schedule before briefing began, or at the very least before CP’s Reply Statement was due.

Finch is asking the Board to put the proceeding on hold based entirely on a hypothetical situation. Namely, that Finch will prevail on the peripheral discovery dispute and that the sought discovery would warrant additional briefing by Finch. The Board should not delay the proceeding based on a hypothetical. *See DuPont*, 2012 WL 5984483, at *6 (rejecting railroad’s request to hold proceedings in abeyance because railroad’s argument that not doing so risked involving the Board in additional litigation was “purely hypothetical”). The more appropriate course is for the Board not to disturb the procedural schedule, thereby keeping this proceeding on track towards resolution, and to address any need for supplemental briefing by the parties if and when it becomes necessary.⁴

⁴ Finch initially contemplated that, if it prevailed on its discovery motion, it would file a supplemental brief to address any new facts or argument. *See* Motion ¶ 2. Finch offers no explanation why this supplemental briefing approach would no longer be an adequate approach. Further, CP reserves the right to file a response to any supplemental Opening Statement filed by Finch; in fact, Finch recognizes such. *See* Motion at ¶ 10 (referring to “any supplements to CP’s Reply Statement in response to Finch’s supplemented Opening Statement”).

CONCLUSION

For the foregoing reasons, the Motion to Hold Procedural Schedule in Abeyance should be denied so that this proceeding, and the pending federal court case, can move towards resolution.

Dated: September 29, 2016

Respectfully submitted,

/s/ David F. Rifkind
David F. Rifkind
Matthew Smilowitz
Stinson Leonard Street LLP
1775 Pennsylvania Avenue N.W., Suite 800
Washington, DC 20006
Telephone: (202) 785-9100
Facsimile: (202) 785-9163
david.rifkind@stinson.com
matthew.smilowitz@stinson.com

John K. Fiorilla
Capehart & Scatchard P.A.
800 Midlantic Drive, Suite 200S
Mt. Laurel, NJ 08054
Telephone: (856) 914-2054
Facsimile: (856) 235-2796
jfiorilla@capehart.com

*Attorneys for Delaware and Hudson Railway
Company d/b/a Canadian Pacific*

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of September 2016, a copy of the foregoing Reply to Motion to Hold Procedural Schedule in Abeyance was served by first class mail, postage pre-paid, and by electronic mail on:

Thomas W. Wilcox (twilcox@gkglaw.com)
Brendan Collins (bcollins@gkglaw.com)
Svetlana Lyubchenko (slyubchenko@gkglaw.com)
GKG Law, P.C.
1055 Thomas Jefferson Street, NW, Suite 500
Washington, D.C. 20007

And by first class mail, postage pre-paid, to:

The Honorable H. Peter Young
Federal Energy Regulatory Commission
Office of Administrative Law Judges
888 First Street, N.E.
Washington, DC 20426

/s/ David F. Rifkind
David F. Rifkind