

EXPEDITED ACTION REQUESTED

241585

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
September 27, 2016
Part of
Public Record

STB Docket FD 35981

PETITION FOR DECLARATORY ORDER – FINCH PAPER LLC

MOTION TO HOLD PROCEDURAL SCHEDULE IN ABEYANCE

Finch Paper LLC (“Finch”) hereby files this motion asking the Surface Transportation Board (“STB” or “Board”) to issue an order holding the procedural schedule in this proceeding in abeyance pending final resolution of the matters arising from CP’s Appeal of the Administrative Law Judge (“ALJ”)s August 24, 2016 Order granting Finch’s Motion to Compel Discovery, and CP’s refusal to provide any responsive documents pending resolution of that appeal.

1. Finch’s Motion to Compel Discovery from CP was filed on July 1, 2016 and, despite CP’s opposition to it, accepted by the STB’s Director of the Office of Proceedings on August 16, 2016. The Director also referred consideration of the merits of the Motion to Administrative Law Judge H. Peter Young pursuant to the Memorandum of Understanding the Board has with the Federal Energy Regulatory Commission (“FERC”) to employ FERC ALJ’s on a case-by-case basis to resolve discovery matters.

2 In the August 16 Decision, the Director stated that “resolution of the discovery dispute should not unduly delay the proceeding.” Decision at 1. Because Finch’s Opening Submittal was due eight days later, on August 24, 2016, and the Director did not extend that due date or hold the schedule in abeyance, Finch reasonably interpreted the August 16 Decision to contemplate the supplementation of its Opening Statement with whatever information and documents CP was ordered to produce in response to the Motion. Finch then proceeded to file its Opening Statement on August 24, 2016, reserving the right to supplement it if circumstances required.

3. On August 24, 2016, as Finch was finalizing its Opening Statement and preparing it for filing, Judge Young issued an order granting Finch’s Motion to Compel “in its entirety.”

4. CP refused to produce any documents to Finch in response to the ALJ’s August 24, 2016 Order. Instead, CP waited until September 13, 2016 and filed an appeal of the ALJ’s interlocutory order. Finch promptly replied three days later on September 16, 2016, asserting that CP’s appeal was untimely under the Board’s regulations governing appeals of decisions of the Director and of ALJs, and also asserting that the appeal was meritless.

5. Although the procedural schedule called for CP’s reply to Finch’s Opening Statement to be filed on September 23, 2016, CP did not accompany its appeal with either a request that the date for its reply be extended, or that the procedural schedule be held in abeyance pending resolution of CP’s appeal and the issues arising from Finch’s Motion to Compel.

6. On September 23, 2016, CP filed an extremely voluminous, six volume Reply Statement in response to Finch’s Opening Statement.

7. Throughout this time period CP has refused to produce any documents responsive to the discovery requests included in the Motion to Compel that the ALJ granted “in its entirety” on August 24, 2016.

8. Under the current schedule, Finch’s rebuttal filing to CP’s Reply Statement is due on October 13, 2016.

9. The pendency of the Motion to Compel and CP’s appeal of the ALJ’s Order granting it in its entirety warrant the Board issuing an order holding this proceeding in abeyance until all issues surrounding the Motion and the production of documents it encompasses are resolved. As the ALJ found in its interlocutory order, all of the documents sought by Finch through its motion are relevant and discoverable. CP’s appeal of the ALJ’s decision was untimely, and is baseless in any event as it lacks substantive merit and does not satisfy the stringent criteria governing such appeals.

10. The Board has yet to rule on CP’s appeal during the 20-day period currently allotted Finch to prepare its rebuttal filing. This time period is insufficient to accommodate (1) CP’s production of the documents that are responsive to the discovery requests encompassed by the Motion; (2) the review of those documents by Finch and any necessary follow up; (3) any necessary supplement to Finch’s Opening Statement, and (4) any supplements to CP’s Reply Statement in response to Finch’s supplemented Opening Statement.

11. Under these circumstances, the reasonable course for the Board to take is to hold the schedule in abeyance pending resolution of all of the issues surrounding the Motion to Compel and related document production. Finch counsel contacted CP counsel to request CP’s concurrence with this motion, but CP declined.

WHEREFORE, Finch respectfully requests that the Board immediately issue an order holding this proceeding in abeyance pending the resolution of CP's appeal and all of the issues related to that appeal and Finch's Motion to Compel Discovery.

Respectfully submitted,

/s/ Thomas W. Wilcox
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Dated: September 27, 2016

CERTIFICATE OF SERVICE

I do hereby certify that on this 27th day of September, 2016, I have served copies of the of the foregoing Motion to Hold Procedural Schedule in Abeyance by email and/or by first class mail to:

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/s/ Thomas W. Wilcox