

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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| In the Matter of: | : | CFTC Docket No. 99-11 |
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| GLOBAL MINERALS & METALS CORP., | : | OPINION AND ORDER |
| R. DAVID CAMPBELL, and CARL ALM | : | |
| | : | |

The Division of Enforcement (“Division”) seeks interlocutory review of an Administrative Law Judge (“ALJ”) discovery order denying it immediate access to subpoenaed documents. The Division’s subpoena covered, *inter alia*, the civil depositions of respondents R. David Campbell (“Campbell”), and Carl Alm (“Alm”), as well as employees of respondent Global Minerals and Metals Corp. (“Global”).¹ When respondents objected, the ALJ held that production should not be required until the deadline established in Commission Rule 10.42 -- the close of the Division’s presentation of its case in chief at the hearing. The ALJ determined that this would be the appropriate deadline even if the Division subpoenaed the documents at issue from non-parties to this proceeding.

The Division contends there is an important issue of law and policy at issue and that the record shows that there are extraordinary circumstances that warrant immediate review of the production deadline imposed by the ALJ. For the reasons explained below, we conclude that interlocutory review is not warranted in the circumstances at issue.

¹ Global, Campbell and Alm are defendants in separate civil litigation currently pending in federal and state court. During this litigation, plaintiffs deposed respondent Alm in accordance with protective orders issued by the presiding judges. Plaintiffs may also have deposed Campbell and employees of Global Minerals, but the current record does not clearly establish this fact.

BACKGROUND

I.

On June 11, 2001, the Division requested that the presiding ALJ issue four *subpoena duces tecums* pursuant to Commission Rule 10.68.² The requested subpoenas directed the three respondents and a single non-party, Southern California Edison (“Edison”), to produce “all documents received or produced by them in response to formal or informal discovery requests” in two civil actions.³ The documents covered by the subpoenas included depositions (and related exhibits) of respondents Alm and Campbell, as well as various Global Minerals employees. These depositions either had been produced, or were expected to be produced, during the discovery phase of the two civil actions. The ALJ granted the Division’s subpoena applications on the same day he received them. Within the following ten days, respondents filed a motion to stay the subpoenas and requested an opportunity to oppose the Division’s subpoena applications. On June 20, 2001, the ALJ granted respondents’ motion.

Respondents opposed the Division’s subpoenas on several grounds.⁴ They noted that a majority of the depositions sought by the Division are subject to protective orders that generally require a party to obtain court authorization prior to disclosing them to individuals other than the parties or their agents.⁵ Respondents also noted that the Division was seeking to subpoena

² Commission Rule 10.68(a)(2) provides that parties in an enforcement action may apply to the presiding ALJ for a *subpoena duces tecum* “requiring a person to produce specified documentary or tangible evidence.”

³ The two civil actions identified in the Division’s subpoenas are *In re Copper Antitrust Litigation*, MDL No. 1303 (W.D. Wis. consolidated January 13, 2000) (“*Wisconsin* action”), and *Southern California Edison et al. v. Sumitomo Corporation, Global Minerals and Metals Corporation, R. David Campbell, Carl Alm et al.*, No. GIC 736398 (Cal. Super. S.D. Cty. filed October 1, 1999) (“*Edison* action”).

⁴ Global Minerals and Campbell filed a joint opposition brief. Alm filed a separate brief.

⁵ In January 2000, the court in the *Wisconsin* action issued an order directing that confidential information obtained in the discovery phase of that case not be disclosed to non-parties unless otherwise ordered by the court. The court in the *Edison* action entered a nearly identical order in April 2000.

directly from parties information disclosable under Commission Rule 10.42, and argued that permitting such a practice would essentially nullify the production deadline established in Commission Rule 10.42(c).⁶

In its reply, the Division contended that respondents had no standing to oppose the subpoena directed to non-party Edison because Commission Rule 10.68 does not authorize parties to oppose another party's subpoena application. It also insisted that the Commission intended that the Division have the ability to obtain respondents' witness statements through the subpoena process.

II.

After considering the parties' competing positions, the ALJ issued an order modifying the previously issued subpoenas. He found that Rule 10.68(a)(2) allows the parties to seek pre-hearing discovery from each other, that the information sought by the Division was relevant, and that other courts' confidentiality orders do not protect the requested materials from an administrative subpoena. The ALJ emphasized, however, that when the Commission enacted Rule 10.42(c), it "expressly" provided respondents with the right to prevent the disclosure of their witness statements until the close of the Division's case in chief. *In re Global Minerals and Metals Corp., et al*, [2000-2002 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,635 at 52,421 (ALJ Decision Aug. 31, 2001). Accordingly, the ALJ declined to require immediate production of any statements, including deposition transcripts and their attached exhibits, of any individual whom respondents expected to call as a witness in the instant enforcement action. The ALJ

⁶ Commission Rule 10.42(c) requires the parties in an enforcement action to automatically disclose their respective witness statements to the opposing party. The Division is required to disclose its witness statements prior to the hearing date at a time designated by the ALJ. Respondents' disclosure obligation is not triggered until after the Division presents its case-in-chief. Such statements include: transcripts of investigative, deposition, trial or similar testimony given by the witness; written statements signed by the witness; and substantially verbatim notes of interviews with the witness, as well as all exhibits to such transcripts, statements, and notes. Commission Rule 10.42.

required production for all other items requested by the Division.

On September 10, 2001, the Division timely filed a motion for reconsideration and, in the alternative, requested that the ALJ certify the matter to the Commission for interlocutory review. For the first time, the Division argued that the production deadline in Commission Rule 10.42(c) should not prevent it from gaining immediate access to a respondent's witness statements in the possession of non-parties. On October 15, 2001, the ALJ denied both the motion for reconsideration and the request for certification without specific explanation.

III.

The Division timely filed this application seeking interlocutory review of a portion of the ALJ's order that prevents it from obtaining respondents' witness statements from non-party Edison. In the alternative, the Division requests a waiver of Commission Rule 10.42(c)'s timing limitations.

The Division claims that there are extraordinary circumstances warranting immediate review because the ALJ's ruling creates an unnecessary conflict between Rules 10.42(c) and 10.68. Application at 5-6. It also generally contends that immediate access to the witness statements will advance the resolution of issues in the proceeding. *Id.* at 6. Finally, the Division argues that an immediate appeal is needed to avoid both a "lengthy continuance" during the hearing to review and analyze the witness statements and the undue prejudice it will suffer if it is only permitted access to the witness statements at the close of its case. *Id.* at 7.

As to the merits of its claim, the Division argues that the production deadline in Commission Rule 10.42(c) applies only to witness statements that are solely in the possession of respondents. Given that Rule 10.68 does not specifically limit parties' rights to obtain immediate

access to information in the possession of non-parties, the Division reasons that there is no basis for the ALJ to delay Edison's production of respondents' witness statements.

The Division alternatively argues that Alm asserted his Fifth Amendment privilege during its investigation, but then waived that protection in his civil depositions. On this basis, it asserts that the Commission should waive Rule 10.42(c)'s production deadline for all respondents' witness statements.

All respondents oppose the Division's application.⁷ They argue that the relief sought by the Division concerns the issue of when, and not whether, it obtains production of discovery materials. In such circumstances, respondents contend, the Commission has been reluctant to grant interlocutory review. Joint Oppn. at 6, citing *In re Mayer*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,386 at 42,742 (CFTC April 25, 1995). Further, respondents note that the Commission should be reluctant to grant interlocutory review over discovery matters given that the resolution of such disputes usually "does little to advance the ultimate termination of the litigation." *Id.* at 6 n. 2, citing *White v. Nix*, 43 F.3d 374, 378 (8th Cir. 1994); accord *In re Bilello*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,212 at 45,868 (CFTC Dec. 22, 1997).

As for the merits of the ALJ's ruling, respondents argue that Commission Rule 10.42(c) bars disclosure of respondents' witnesses' statements, under any circumstance, until after the Division presents its case in chief. Respondents also argue that the Commission should not waive the timing limitations of Rule 10.42(c) in this matter.

⁷ Global Minerals and Campbell filed a joint opposition memorandum. Alm filed a separate brief.

DISCUSSION

I.

Because the ALJ denied certification, the Division's first task is to show that the denial amounts to an abuse of discretion.⁸ The Division properly focused its argument on the three factors Rule 10.101 required the ALJ to consider in determining the certification issue.⁹ The Division relies on its arguments regarding the Rule 10.101 factors to support both its claim that the ALJ abused his discretion and its claim that the record shows that there are extraordinary circumstances warranting review. However, the record in this case does not establish the requisite extraordinary circumstances required as a condition for immediate review, nor does it indicate that the ALJ abused his discretion by denying certification.

II.

Commission precedent indicates that a determination of extraordinary circumstances involves a balancing of:

[T]he benefits of immediate intervention against those flowing from our policy of discouraging piecemeal appeals, including conservation of Commission resources and preservation of the orderly conduct of Commission proceedings.

In re Bilello, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,032 at 41,311 (CFTC March 24, 1994). Rulings that resolve important questions of first impression likely to have a

⁸ Commission Rule 10.101 generally requires two different showings from a petitioner when seeking interlocutory review: (1) that the ALJ has certified his ruling as appropriate for immediate review; and (2) that the record shows that there are extraordinary circumstances. While the language of the rule does not contemplate immediate Commission review when an ALJ denies certification, precedent allows an appealing party to substitute a showing that the ALJ's denial of certification was grossly improvident for a showing that certification was granted. Precedent indicates that a denial of certification is grossly improvident when it amounts to an abuse of discretion. *See In re Global Minerals & Metals Corp.*, [2000-2002 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,655 at 52,559 (CFTC Oct. 3, 2001).

⁹ The three factors are: (1) whether the ruling at issue involves a controlling question of law or policy; (2) whether an immediate appeal may materially advance the ultimate resolution of the issues in the proceeding; and (3) whether subsequent reversal of the ruling would cause unnecessary delay or expense to the parties.

material impact on other proceedings are more likely to warrant immediate intervention than rulings resting on judgments involving facts and circumstances that vary from case to case.¹⁰

Most discovery disputes fall into the latter category.

The ALJ's ruling in this case does not raise an important question of first impression likely to have a material impact on other proceedings. Indeed, in the circumstances of this case, the ALJ's imposition of a production deadline consistent with Rule 10.42(c) was within the discretion granted in Rule 10.68.

Rule 10.68(c) specifically authorizes the ALJ to issue protective orders upon a showing of good cause. The rule generally instructs the ALJ to "weigh the harm resulting from disclosure against the benefits of disclosure." At a minimum, persons seeking a protective order must show that absent protection, they "will suffer a clearly defined and serious injury." Once this showing is made, the ALJ must balance the potential harm against "the public's right of access to judicial records." Finally, the ALJ must ensure that any protective order he issues does not prevent a party from "adequately presenting its case."

A straightforward application of Rule 10.68's balancing test for issuing protective orders supports the result reached, although not the reasoning employed, in the ALJ's decision.¹¹ For example, in considering whether respondents showed that absent a protective order they would suffer "a clearly defined and serious injury," we believe it was appropriate to consider the Commission's recognition of the policy underlying Rule 10.42(c) that respondents have an

¹⁰ *In re Global Minerals & Metals Corp.*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,655 (CFTC Oct. 3, 2001) (vacating order compelling Division's production of materials obtained from the government of the United Kingdom); *In re Global Minerals & Metals Corp.*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,189 (CFTC July 13, 2000) (vacating debarment).

¹¹ While the policies underlying Rule 10.42(c) were an appropriate factor in the ALJ's analysis, that rule does not require that production of respondents' witness statements always be delayed until the close of the Division's case in chief. Had respondent failed to obtain appropriate protective orders, for example, delayed production from third parties may not have been appropriate in this case.

interest in preventing the premature revelation of their strategy and evidence. *See Rules of Practice, Final Rules*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,430 at 47,032 (CFTC Oct. 19, 1998). Moreover, the fact that respondents had sought and received a protective order covering the material in question also supports an inference that the potential harm was clear and serious.¹²

The public's right to access "judicial records" is not implicated in the instant situation because these witness statements have not been filed with the court and might only be filed, if at all, during trial or upon the filing of some dispositive motion. *See United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995) ("Judicial documents" entitled to a presumption of public access are "item[s] filed [with the court that are] relevant to the performance of the judicial function and useful in the judicial process.") Until such time, these witness statements are simply not "judicial records" entitled to the right of public access.

Finally, the Division failed to establish a significant interest in obtaining the documents at issue immediately rather than at the time of the hearing.¹³ Thus, while early receipt would certainly aid in its preparation for the hearing, the disclosure procedure that the Commission adopted in the context of Rule 10.42(c) suggests that it did not view this efficiency interest as sufficiently important to override respondents' confidentiality interest. While the Division suggests that it could be prejudiced if disclosure were delayed until the completion of its case in chief, it has not supported this claim with sufficient detail to establish its reliability. In any case,

¹² Contrary to the ALJ's finding, the Commission will consider a court's protective order in its balancing analysis under Commission Rule 10.68(c).

¹³ The Division's right to an adequate opportunity to review the subpoenaed information and prepare its case is not at issue in this appeal. Rather, the only issue is when that review and preparation will take place. In comparison, at the end of its case in chief, if the ALJ were to deny the Division a continuance sufficient to conduct a meaningful review and analysis of respondents' witness statements and associated exhibits, then the Division might be able to establish that the benefits of an interlocutory review outweigh the Commission's policy against piecemeal appeals.

Rule 10.42(d) provides an avenue for the Division to seek an adjustment in the schedule for producing the pertinent information.¹⁴

In sum, because the policies underlying Rule 10.42(c) play a legitimate role in the application of Rule 10.68(c)'s balancing test for granting protective orders, and the ALJ's ruling primarily involves a type of judgment where facts and circumstances vary from case to case, there is no important question of first impression likely to have a material impact on other proceedings.¹⁵ Further, the ALJ's denial of certification in such circumstances does not amount to an abuse of discretion.

CONCLUSION

For the reasons stated above, the Division's application for interlocutory review and

¹⁴ That provision requires the ALJ to modify the requirements of subsection (c) upon a showing that they are "unduly burdensome or . . . otherwise inappropriate under all the circumstances." 17 C.F.R. § 10.42(d).

¹⁵ In the context of disputes "regarding either production of records or testimony," the Commission has observed that such disputes are "seldom sufficient to establish extraordinary circumstances." *In re Mayer*, ¶ 26,386 at 42,742. Typically, the ALJ is the proper official to resolve the matter and the Commission will intervene only upon a clear showing of manifest injustice, that is, where the ALJ's discovery order was plainly wrong and resulted in substantial prejudice to the aggrieved party. *See id.*; *see also Faigin v. Kelly*, 184 F.3d 67, 84 (1st Cir. 1999).

request for waiver of applicable rules is denied.¹⁶

IT IS SO ORDERED.

By the Commission (Chairman NEWSOME and Commissioners HOLUM, ERICKSON, LUKKEN, and BROWN-HRUSKA).

Jean A. Webb
Secretary to the Commission
Commodity Futures Trading Commission

Dated: September 12, 2002

¹⁶ As explained above, the Division alternatively seeks the waiver of Rule 10.42(c)'s production deadlines for all respondents in this case due to Alm's invocation of his Fifth Amendment privilege during its investigation. Division investigations are conducted in accordance with Part 11, and nothing in those rules suggests that the Division may seek sanctions for a failure to cooperate in the context of a Part 10 proceeding. Accordingly, we decline to waive the application of Rule 10.42(c) on this matter.