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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Expert's Secret Links Scrutinized In Railroad Antitrust MDL

By Allissa Wickham

Law360, New York (November 12, 2014, 7:45 PM ET) -- A D.C. federal judge on Wednesday expressed concerns over revelations that a lead expert for plaintiffs accusing rail freight companies of fuel surcharge price-fixing may have had improper financial ties to the case, telling the parties to consider whether the suit's class certification briefings should now be scrapped.

In a sternly worded order, U.S. District Judge Paul L. Friedman said the court was "deeply concerned" that questions about the credibility of the plaintiffs' lead expert, Dr. Gordon Rausser, would become a distraction in the case, particularly regarding whether the class should be certified.

"Plaintiffs acknowledge that Dr. Rausser's undisclosed business relationships, implicating the issues in this case and kept secret even from plaintiffs' counsel as this case progressed, are a 'serious matter concerning [his] credibility,'" Judge Friedman wrote, before saying that using a new expert could help the court avoid a "side-show."

According to recently unsealed documents, Rausser's credibility was thrown into question during a hearing on Oct. 2, when attorneys for the defendants raised issues about the University of California, Berkeley economist's potential financial ties to a company that may have purchased claims in the case.

Attorney David Cross of Crowell & Moring LLP, who is representing defendant CSX Transportation Inc., said Rausser purportedly paid \$1 million in 2012 for a promissory note from a company called Cascade Settlement Services LLC, which is allegedly involved in the business of buying the claims of absent class members.

Rausser later converted his Cascade promissory note into a note with a company called Spectrum, which purchased claims in the fuel surcharge case, Cross said. Cascade and Spectrum also eventually merged, according to the defendants.

On top of these investment allegations, Rausser's company, OnPoint Analytics, has allegedly had a consulting relationship with Cascade since at least 2010, helping it identify claims to invest in, Cross said. In a deposition errata, Rausser purportedly said that he separates claims he is testifying about from those he isn't, but the defendants called his credibility into question at the Oct. 2 hearing.

"He is a manipulator of facts and an advocate to the extreme," said Dan Wall of Latham & Watkins LLP, an attorney for Union Pacific Railroad Co., according to the hearing transcript.



CFAD Exhibit 1086
CFAD v. NPS

These revelations came just days before the parties were scheduled to hold a class certification hearing on Oct. 6. The case is currently on remand from the D.C. Circuit, which nixed certification of the rail shipper class in August 2013 after finding the Supreme Court's ruling in *Comcast Corp. v. Behrend* put a greater onus on district courts to examine evidence alleging predominant damages.

The appeals panel specifically called into question the validity of the shippers' model proving that they were damaged by the freight companies' price fixing scheme. That model, presented by Rausser, was meant to show the damages caused by the rail companies' alleged scheme of tacking on stand-alone fuel surcharges to their shipping fees from 2003 to 2008.

Following another hearing about Rausser's credibility on Oct. 21, the defendants argued that the hearing transcripts, along with other relevant documents, should be unsealed.

The defendants pointed out in their Oct. 31 motion to unseal that Rausser's damages model and economic analysis were the foundation to the court's initial decision to certify the class in 2012. They also noted that when Rausser was asked in a July deposition if he had any financial interest in Cascade or other companies that had brought claims in the case, he said he did not.

"Dr. Rausser's ongoing financial ties to Cascade, his deposition testimony on this subject, and his subsequent attempt to 'clarify' his deposition testimony via an August 28, 2014 errata, raise serious issues regarding Dr. Rausser's credibility," the defendants said.

The plaintiffs didn't oppose the motion to unseal, but did take issue with its characterizations of the facts in the record. In their own motion filed Oct. 31, the plaintiffs asked for permission to file a report from another economic expert who will address the "integrity" of Rausser's analysis, and if this isn't permitted, asked to be able to substitute a new expert for Rausser.

The plaintiffs also acknowledged that the recent issues about Rausser's credibility were "serious," and said they only learned of OnPoint's business ties with Cascade in September, while responding to the defendants' subpoenas.

Further, the plaintiffs questioned why the defendants waited so long to raise these issues with the court, claiming that attorney Scott Ballenger of Latham & Watkins, who represents Union Pacific, learned about Rausser's potential conflict of interest in an email from a former Cascade employee in March.

The email allegedly stated that Rausser has a 10 percent interest in Cascade, was able to inform the company of all developments in the case and "stands to gain directly from any purchases of claims made in the rail case."

"Had defendants disclosed this information when they first learned of it, the issues that now must be addressed could have been resolved sooner," the plaintiffs argued. "Given their silence, defendants cannot now claim to be prejudiced by a delay necessary to fairly address the situation."

Judge Friedman granted the motion to unseal the transcripts on Nov. 7, along with other related documents. On Wednesday, Judge Friedman said that substituting a new expert for Rausser could allow the court to "avoid the side-show or trial-within-a-trial that plaintiffs' own filing suggests is virtually inevitable."

The judge therefore told the parties to come into Thursday's hearing ready to discuss whether the court should set aside all previous briefings on class certification, and treat previous proceedings on the issue, including appellate rulings, as null.

Attorneys for the plaintiffs and Union Pacific did not immediately respond to a request for comment Wednesday, nor did Rausser, representatives for Cascade or representatives for OnPoint.

The railroad companies are represented by Mayer Brown LLP, Sidley Austin LLP, Gibson Dunn, Steptoe & Johnson LLP, Crowell & Moring LLP, Kaye Scholer LLP, Skadden Arps Slate Meagher & Flom LLP, Latham & Watkins LLP, Jones Day and Covington & Burling LLP.

The class members are represented by Hausfeld LLP and Quinn Emanuel Urquhart & Sullivan LLP.

The case is In re: Rail Freight Fuel Surcharge Antitrust Litigation, case number 1:07-mc-00489, in the U.S. District Court for the District of Columbia.

--Additional reporting by Alex Lawson. Editing by Kelly Duncan.

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