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OFFICE OF HEARINGS
U.S. DEPARTMENT OF TRANSPORTATION

In the Matter of:)
AXALTA COATING SYSTEMS) FAA-2020-0958
)
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TELEPHONIC PREHEARING CONFERENCE

Thursday, September 9, 2021
11:00 a.m.

The Honorable Douglas M. Rawald
Administrative Law Judge

ON BEHALF OF THE FAA:
JAMES H. DUNFEE, JR., ESQ.

ON BEHALF OF THE RESPONDENT:
JERRY W. COX, ESQ.

Reported telephonically by:
Karen Willoughby, CER

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9/9/2021

1 P R O C E E D I N G S

2 (11:00 a.m.)

3 JUDGE RAWALD: Okay. Let's go ahead and go on
4 the record. This is a prehearing conference in the case
5 of Axalta Coating Systems, docket number FAA-2020-0958.
6 Administrative Law Judge Doug Rawald, September 9, 2021.

7 We are joined on the call by the Government
8 Counsel, Mr. Dunfee, and Respondent's Counsel, Mr. Cox.
9 Also on the call is my attorney advisor, Jackie Booker,
10 and my staff assistant, Kelly Ort.

11 Okay, folks. You helpfully provided a joint
12 status report that laid out what your thoughts were as to
13 setting a schedule. I just want to go through the
14 schedule.

15 Just so you know, as you're talking, or as
16 we're talking, I'll be typing and then when this is all
17 over, Kelly will send out a prehearing conference report
18 to you folks that will lay out the dates and deadlines,
19 so in case you missed anything while we're talking, it
20 will be in writing for you.

21 Okay. So let's talk first about venue. So it
22 looks like from both the complaint and the answer, the
23 parties -- if it was in person -- want to have the
24 hearing in Washington, D.C. Is that right, Mr. Dunfee?

25 MR. DUNFEE: Your Honor, we could. Washington,

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1 D.C., we're fine with that. We're not sure with COVID,
2 but we're also fine with a Zoom hearing.

3 JUDGE RAWALD: Right. So, but if it -- just to
4 be clear, if it was in person, D.C. would be fine with
5 the Government; is that correct?

6 MR. DUNFEE: That is fine with the Government,
7 yes.

8 JUDGE RAWALD: Okay. And, Mr. Cox, I
9 understand it would be your preference to also have it be
10 in the Washington, D.C. area; is that right?

11 MR. COX: That is correct.

12 JUDGE RAWALD: Okay. And just so -- further,
13 the Complainant, Mr. Dunfee, you're willing to waive any
14 objection to having it in person, so you are comfortable
15 having it virtually; is that correct, Mr. Dunfee?

16 MR. DUNFEE: Yes, Your Honor.

17 JUDGE RAWALD: Okay. And, Mr. Cox, you would
18 reserve the right to object to any virtual hearing,
19 asserting that there is some sort of a right to a live,
20 in-person hearing, rather than having it virtual,
21 correct?

22 MR. COX: Correct.

23 JUDGE RAWALD: Okay. So hopefully by the time
24 we get around to having the hearing, it will happen, this
25 won't be an issue anymore, but I'll certainly keep in

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1 mind the fact that that's the decision on the virtual
2 versus not.

3 I have been having virtual hearings since COVID
4 started. Obviously, the big difficulty from my
5 perspective is getting space, even though no travel would
6 be required for me to go to Washington, D.C., there is
7 some difficulty in obtaining space because folks who own
8 the space are reticent to give it out, given all the
9 COVID concerns. But we'll talk as it comes to it. And
10 we'll look around. Okay, thank you both for that.

11 Let's turn to a schedule then. So it looks
12 like the parties set out a pretty detailed back and forth
13 discovery schedule. For my purposes, what's most
14 important for me to know is that the parties look like
15 they want to have everything done with discovery by April
16 1st, 2022. Is that right, Mr. Dunfee?

17 MR. DUNFEE: Yes, Your Honor.

18 JUDGE RAWALD: Okay. And, Mr. Cox, that was
19 your thought as well?

20 MR. COX: Yes.

21 JUDGE RAWALD: Okay. And I don't typically get
22 involved in the back and forth in discovery, unless
23 something comes up that you need my help with, where you
24 feel like the one party is not being helpful, then you
25 could file a motion, I'll get involved.

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1 But what I'll note here is that discovery will
2 be completed by April 1st, 2022.

3 And then the parties for prehearing motions
4 wanted to file any dispositive motions by April 29th,
5 2022. Does that still work for you, Mr. Dunfee?

6 MR. DUNFEE: Yes, Your Honor.

7 JUDGE RAWALD: And, Mr. Cox?

8 MR. COX: Yes.

9 JUDGE RAWALD: Okay. And you folks agreed on
10 having any responses to the motions filed by May 16th,
11 2022. Is that still good for you, Mr. Dunfee?

12 MR. DUNFEE: Yes, Your Honor.

13 JUDGE RAWALD: And, Mr. Cox?

14 MR. COX: Yes.

15 JUDGE RAWALD: And then you folks do want to
16 file a reply, if possible, so you did reserve until May
17 31st, 2022, to file any replies to the responses in this
18 prehearing motion. That still works for you, Mr. Dunfee?

19 MR. DUNFEE: Yes, Your Honor.

20 JUDGE RAWALD: And, Mr. Cox?

21 MR. COX: Yes.

22 JUDGE RAWALD: Okay. I did have the parties
23 verify the date that would work for them for a motions
24 argument. I do prefer to have those telephonically, just
25 because of the cost and expense of trying to obtain a

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1 space. It's difficult for those purposes. But what I
2 would do is set aside June 14th for that. That would be
3 a date that would be after the filing of all the motions,
4 give us time to review it, then talk about it
5 intelligently. We'd only have those argument sessions if
6 the parties requested it. If not, then we'll just take
7 it off the calendar.

8 Is June 14th open for you, Mr. Cox?

9 MR. COX: You're asking Mr. Dunfee or you're
10 asking Mr. Cox?

11 JUDGE RAWALD: I asked you. I went out of
12 order this time, I know I surprised you.

13 MR. COX: Okay. No, that's fine. Flag Day is
14 good.

15 JUDGE RAWALD: Okay. And June 14th, Mr.
16 Dunfee, that works for you?

17 MR. DUNFEE: Yes, Your Honor.

18 JUDGE RAWALD: Okay. And, I mean, we don't
19 have to take up the whole day, but once we get close to
20 that date, if we have it, I will then put in an order
21 with the actual time for that. That will work.

22 Okay. And it looks like the parties agreed to
23 having the witness and evidence list exchanged by the
24 parties and submitted to me 45 days before the hearing,
25 as well as subpoena requests 45 days before the hearing,

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1 and also giving me all -- along with that, then I want
2 the parties to give me, and each other, digital copies of
3 all of your Exhibits 45 days before the hearing.

4 Does that all work for you, Mr. Cox?

5 MR. COX: Yes.

6 JUDGE RAWALD: Okay. And, Mr. Dunfee?

7 MR. DUNFEE: Yes, Your Honor.

8 JUDGE RAWALD: Okay. And the reason why this
9 is helpful is because if folks want to do a motion in
10 limine deadline 30 days before the hearing, that gives
11 you a full 15 days to review the material and file any
12 motions. And then we can be smart about it and deal with
13 that before we get to the hearing, which is my preferred
14 practice. I do appreciate you folks for doing that.

15 So with that being said, you propose motion in
16 limine 30 days before the hearing. That still works for
17 you, Mr. Cox?

18 MR. COX: Yes.

19 JUDGE RAWALD: And, Mr. Dunfee?

20 MR. DUNFEE: Yes, Your Honor.

21 JUDGE RAWALD: Okay. And as you both probably
22 are aware, in the course of the FAA regulations it does
23 allow parties to file post-hearing briefs. I don't do
24 that in all cases. I only do that in cases where the
25 facts or the law are so complicated that even after the

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1 hearing, having something in writing explaining what we
2 heard in the hearing and why this is -- I should decide
3 something is helpful.

4 I do give the parties a chance to tell me at
5 the hearing, hey, I think, Judge Rawald, this is why we
6 should have this brief or why I don't need the brief.
7 And then go from there.

8 So just so I'll note in this report that the
9 parties will have the opportunity at the hearing to let
10 me know whether they want to file a pre-hearing -- or,
11 post-hearing, sorry, post-hearing brief.

12 That make sense, Mr. Cox?

13 MR. COX: Yes.

14 JUDGE RAWALD: Okay. And, Mr. Dunfee?

15 MR. DUNFEE: Yes, Your Honor. One quick
16 question on that. Do you normally do a set number of
17 days on that or will you set that at the hearing, too?

18 JUDGE RAWALD: If it's something very minor, it
19 can take less time. If it's something that's major,
20 we'll use the full 30 days allowed under the regulations.

21 MR. DUNFEE: Okay.

22 JUDGE RAWALD: So it just depends on what the
23 issue is and how it all develops, and also, what's going
24 on. So, in the past, you know, there were things when
25 the hearing is maybe right before the holidays and we

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1 have to be smart about that, so we'll just -- we'll look
2 at it when the hearing is and what's going on there, work
3 out a schedule from there.

4 And, of course, the schedule is triggered by
5 the actual service of the transcript, so that's also kind
6 of a thing to keep in mind, the amount of time it takes
7 to file a post-hearing brief.

8 MR. DUNFEE: Thank you, Your Honor. Then, yes,
9 that's fine with me.

10 JUDGE RAWALD: Okay. So's let's turn to the
11 hearing date. The parties proposed three weeks in
12 December.

13 Based upon my schedule, which seems to be
14 pretty good in December, I would propose the parties set
15 aside the week of December 19th to 23rd. It's likely
16 that if we have a hearing in person we start on a
17 Tuesday, that way we have the Monday to kind of get
18 witnesses in town or anything else figured out and then
19 actually start on a Tuesday.

20 We'd reserve a space for multiple days, in case
21 we needed it. I'm just not sure how complicated the case
22 will be until we get closer to a hearing, but I do like
23 to have a whole week, so folks have that blocked off in
24 their schedule.

25 Mr. Cox, is that week still available on your

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1 schedule?

2 MR. COX: It is.

3 JUDGE RAWALD: Okay. And, Mr. Dunfee?

4 MR. DUNFEE: It is, Your Honor.

5 JUDGE RAWALD: Okay. Great. Then the last
6 question I have on my thing to take care of is just kind
7 of an update of settlement. I always encourage the
8 parties to discuss settlement. Whether you reach
9 settlement or not is up to you folks. I do not mind
10 adjudicating the case at all, I enjoy it. But I do want
11 folks to understand obviously that settling cases puts it
12 on your terms, as opposed to on my terms or on the appeal
13 to the Administrator or the appeal at Federal court's
14 terms, which makes the case go longer and take longer
15 resolving it.

16 So I do want to encourage the parties to be
17 open with one another in talking about settlement.

18 So that being said, Mr. Dunfee, have you been
19 having some discussion with Mr. Cox?

20 MR. DUNFEE: We did have a settlement
21 discussion, Your Honor, but we're pretty far apart, so I
22 do not believe it will be happening any time soon, at
23 least.

24 JUDGE RAWALD: Okay. Mr. Cox, you agree with
25 that position?

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1 MR. COX: I agree it will not be happening.

2 JUDGE RAWALD: Okay. Understood. Okay, so
3 once again, both parties are just encouraged to be civil
4 and cordial during the course of discovery and motion
5 filing. And if you have the opportunity and your client
6 is amenable on either side to discussing settlement
7 further, please do. Obviously if they can't, well,
8 that's understood as well. That's totally -- that's the
9 way this works.

10 So, okay. Let me open it up to any questions.

11 MR. COX: For what it's worth, Judge, I would
12 have to say that Mr. Dunfee and I have had an extremely
13 cordial relationship throughout the entire almost six
14 years that this thing has been working.

15 JUDGE RAWALD: Okay. And I appreciate that.
16 And I expect that from folks. And I think generally by
17 and large, the practice attorneys here are very civil
18 here, which I appreciate.

19 So, okay, so let's turn to what questions you
20 may have for me. Mr. Cox, I'll give you the floor first.
21 Anything you want to ask me about?

22 MR. COX: No, Judge.

23 JUDGE RAWALD: Okay. And, Mr. Dunfee, any
24 questions for me?

25 MR. DUNFEE: No questions, Your Honor.

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1 JUDGE RAWALD: Well, wonderful. I appreciate
2 both of you taking your time today to be here. As I
3 said, I will issue a report later on today and that will
4 go out to both parties by email, because we are still
5 finding that service by typical mail is somewhat
6 difficult in this environment. And we will go ahead and
7 have that to you so you'll have the dates lined up.
8 Okay?

9 One last chance. Any questions from anybody?
10 Mr. Cox, Mr. Dunfee?

11 (No response.)

12 JUDGE RAWALD: Okay, I'm not hearing any. I'll
13 go ahead and go off the record. Thank you all.

14 MR. DUNFEE: Thank you, Your Honor.

15 MR. COX: Thank you.

16 (Whereupon, at 11:10 a.m., the hearing was
17 concluded.)

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CERTIFICATE OF REPORTER

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Karen Willoughby

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