

Sixth Circuit Throws Out Lost Profits Claim, Requires Disclosure of Cost Savings

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[Richard D. Porotsky Jr.](#)

In *Bessemer & Lake Erie Railroad Co., et al. v. Seaway Marine Transport, et al.*, 6th Cir. Nos. 08-4676/4678 (Feb. 25, 2010), the Sixth Circuit threw out a Plaintiff's lost profits claim, citing failure to follow initial disclosure requirements.

The case involved a Plaintiff ship loader who had its equipment damaged by defendant's cargo ship on Lake Erie. The damage took five weeks to repair. During that time, Plaintiff claims, it experienced a loss of profit. Defendant Seaway conceded some fault for what happened, and admitted responsibility for some of the damages. However, it disputed that it had any responsibility to pay for lost profits under the circumstances.

Seaway argued that Plaintiff failed to disclose or otherwise provide the details that were needed to calculate the amount of the alleged losses. The Sixth Circuit agreed, citing Fed. R. Civ. P. 26(a)(1)(A)(iii). The Court granted summary judgment and dismissed the lost profits claim. It found that Plaintiff fell short of the rule's requirements by "not disclosing the costs it saved during the time its machinery was under repair."

To further its arguments, Defendant Seaway presented an uncontested opinion from its economic expert to highlight inadequacies in the data. The expert stated that Plaintiff failed to turn over payroll journals, payroll tax returns, financial statements, financial summary reports, and general ledgers that were "necessary to verify and analyze Bessemer's claim for lost profits." The Court agreed with the expert that Plaintiff provided "insufficient data" for a proper determination of avoided costs, precluding calculation of the actual amount of damages.

The Court noted that Plaintiff's failures extended well beyond an initial failure to disclose. There was a repeated refusal to provide the relevant, requested data throughout the course of discovery. The initial disclosures simply listed a figure of \$1.6 million owed for managers' time, trains diverted, and other items. However, there was "no explanation and no supporting documentation to back up the calculations." When Seaway requested additional documents, Plaintiff responded by referring simply to "documents previously provided." Plaintiff further stated that "no . . . documents exist" to address "overhead savings."

In depositions, Plaintiff's corporate representative confirmed that the claimed losses related to "lost gross revenue, not its lost profits." The representative had no information about costs saved and did not know of anyone who would. When Seaway issued a detailed follow-up deposition notice regarding the "loss of revenue claim, including savings realized," Plaintiff failed to provide any information. Asked about saving due to not having to assemble, load, and fuel train cars, Plaintiff's representative could not say whether this was a cost saved. He also could not point to any documents relating to savings.

Against this background, the Court quoted Civ. R. 26. The Rule requires a party to provide "a computation on each category of damages claimed" as well as "the documents or other evidentiary material... on which each computation is based, including materials bearing on the nature and extent of injuries suffered."

Finding that Plaintiff failed to meet this obligation, and in light of Defendant's repeated efforts to obtain the data, the Court granted summary judgment.

The decision is a warning to counsel who are pursuing business-related damages: initial disclosure requirements must be taken seriously. Good faith disclosures should be provided up-front and supplementation should be added to fully support the claim. Counsel opposing damages claims will benefit by building a record of attempts to obtain the relevant information with proper explanation, including expert input, of the need for this information. If disclosures are not properly provided, Civ.R. 26 may provide a basis, as in this case, for the Court to strike the claim.