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SERVICE DATE - AUGUST 31, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42022

FMC WYOMING CORPORATION AND FMC CORPORATION

v.

UNION PACIFIC RAILROAD COMPANY

STB Ex Parte No. 346 (Sub-No. 29A)

RAIL GENERAL EXEMPTION AUTHORITY—SELECTED COMMODITIES

PETITION FOR PARTIAL REVOCATION  
OF EXEMPTION FOR COKE

Decided: August 25, 1998

In STB Docket No. 42022, we are denying the motion of defendant Union Pacific Railroad Company (UP) to compel responses to discovery requests. We are also denying the motion of complainants FMC Wyoming Corporation and FMC Corporation (FMC) to defer consideration of, and stay discovery relating to, product and geographic competition. We are instituting a proceeding in STB Ex Parte No. 346 (Sub-No. 29A), consolidating that docket with STB Docket No. 42022 subject to a preexisting protective order, and denying as moot FMC's motion for a separate protective order. Finally, we are deferring judgment on UP's motion to dismiss the complaint in STB Docket No. 42022 with respect to the transportation of coke and FMC's countervailing petition in STB Ex Parte No. 346 (Sub-No. 29A) for partial revocation of the class exemption for coke.

BACKGROUND

This case involves a challenge by FMC to the reasonableness of the rates assessed by UP for the transportation of FMC's mineral products<sup>1</sup> between certain origins and destinations and/or interchanges in Wyoming, Idaho, Missouri, Illinois, Oregon, and Kansas. FMC's verified complaint, seeking reparations for past movements and a prescription of rates for the future, was filed on October 31, 1997, but the procedural schedule has been substantially delayed while the parties litigate over discovery issues. By decisions served February 5 and 12, 1998, the discovery disputes were assigned to an Administrative Law Judge (ALJ), who conducted a conference and

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<sup>1</sup> Soda ash, phosphorus, phosphate rock, coke, and sodium bicarbonate (including sodium sesquicarbonate).

issued various rulings on March 17, 1998. In decisions served April 17 and May 5, 1998, in response to appeals by FMC, we furnished guidance regarding the role and permissible scope of discovery relating to product and geographic competition, based on existing market dominance guidelines and our understanding of the parties' factual dispute as reflected in the record. Practical resolution of the disputed matters was left to the parties and to the ALJ.

In Review of Rail Access and Competition Issues, STB Ex Parte No. 575 (STB served Apr. 17, 1998), we announced that we would reconsider whether issues of product and geographic competition should be removed from the market dominance analysis. Shortly thereafter, we instituted a proceeding, Market Dominance Determinations—Product and Geographic Competition, STB Ex Parte No. 627 (STB served Apr. 29, 1998) (Ex Parte No. 627), to obtain public comment on that issue. FMC's motion to defer consideration of, and stay discovery relating to, product and geographic competition ensued on May 13, 1998, and UP replied in opposition to the motion on June 2, 1998. On May 18, 1998, UP filed and served on FMC a motion to compel production of documents and information related to product and geographic competition.<sup>2</sup>

In a separate matter, UP filed on July 13, 1998, a motion to dismiss the complaint with respect to coke, an exempted commodity.<sup>3</sup> FMC filed a reply in opposition on August 3, 1998, and, separately, a petition for partial revocation of the exemption for coke, along with a motion for a protective order in that proceeding. Additional submissions ensued, as discussed below.

#### DISCUSSION AND CONCLUSIONS

1. The Coke Exemption. FMC, in its opposition to UP's motion to dismiss in STB Docket No. 42022, asks that we either defer consideration of UP's motion until after we decide FMC's petition for partial revocation of the exemption for coke in STB Ex Parte No. 346 (Sub-No. 29A), or consolidate the proceedings. In a reply filed August 10, 1998, UP opposes both alternatives. UP contends that no rate challenge with respect to coke may be brought unless and until the exemption is revoked. We disagree. We have previously held that a rate complaint and a related revocation petition may be heard simultaneously.<sup>4</sup> UP also contends that no consolidation is possible because a revocation proceeding has not been and cannot yet be initiated. According to UP, the decision to initiate a proceeding must await the conclusion of discovery and evidence that it expects to present showing that a proceeding should not be initiated. UP provides no support for this contention, and, under the circumstances, we see no reason to delay the decision to initiate a proceeding to consider

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<sup>2</sup> In a decision served June 5, 1998, FMC was granted an extension of time, until 10 days after disposition of its motion to defer, to respond to UP's motion to compel.

<sup>3</sup> 49 CFR 1039.11.

<sup>4</sup> Rail General Exemption Authority—Nonferrous Recyclables, STB Ex Parte No. 561, slip op. at 7 (STB served Apr. 21, 1998).

the partial revocation petition, which we can do on our own motion. See 49 U.S.C. 10502(b). UP also suggests that an adversarial proceeding should not be consolidated with a rulemaking proceeding. The partial revocation proceeding, however, is in essence an adversarial adjudication that is limited to the traffic (and parties) involved in the rate complaint. Thus, consolidating the proceedings makes sense for administrative convenience, and we will do so.

The protective order imposed in STB Docket No. 42022 on November 24, 1997, will apply with equal force in STB Ex Parte No. 346 (Sub-No. 29A). The protective order that FMC requests in connection with its partial revocation petition is essentially identical, but UP proposes certain modifications (in its response filed August 4, 1998), some of which are concurred in by FMC (in its reply filed August 7, 1998). First, UP would prohibit disclosure of confidential information to third parties. Under Paragraph 1(b), however, absent the producing party's consent, only persons who will use the information in this proceeding or who have been authorized by the Board or the presiding ALJ may obtain confidential information. This would appear to satisfy UP's third-party concerns.<sup>5</sup> Second, UP seeks to make the information in the partial revocation proceeding available in the complaint proceeding, and vice versa. As noted, consolidation accomplishes this implicitly. Third, UP would allow in-house counsel for both parties to retain file copies of confidential pleadings after the completion of this proceeding. This approach, however, was not followed in the complaint proceeding (with a far more voluminous record), or in other comparable proceedings, and FMC has objected to it here. We find the prior protective order adequate, and the motion for an additional protective order will be denied as moot.<sup>6</sup>

We intend to render our decision on FMC's petition to partially revoke the exemption in STB Ex Parte No. 346 (Sub-No. 29A) and UP's motion to partially dismiss the complaint with respect to coke in STB Docket No. 42022 in our decision on the merits of the rate complaint, unless subsequent developments make this procedure impractical.<sup>7</sup> We recognize that the market power review for revocation petitions<sup>8</sup> is not necessarily the same as the market dominance test in a rate complaint, but the entire evidentiary package in the complaint with respect to coke movements will

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<sup>5</sup> Notwithstanding UP's fears, we do not expect significant third-party participation in the revocation proceeding.

<sup>6</sup> The undertakings attached to the protective order in STB Docket No. 42022 reflect only that docket number. Parties executing the undertaking(s) should insert the appropriate docket number(s).

<sup>7</sup> We stress that this procedure is available only under the type of circumstances presented herein. It would not be appropriate in the case of a petition to revoke the entire class exemption, which would require notice and the opportunity for public comment. (As noted above, the narrowly framed, partial revocation petition in this case is adversarial and adjudicatory in nature.)

<sup>8</sup> See Rail Exemption Misc. Agricultural Commodities, 8 I.C.C.2d 674, 682 (1992).

be more than adequate to render a decision on whether to revoke the exemption for the particular coke traffic at issue. In other words, if the evidence shows that UP is market dominant and its rates unreasonable with respect to FMC's coke traffic, that same evidence will provide a basis for revoking the exemption as it applies to that traffic. On the other hand, if the evidence does not support FMC's request for regulatory relief in the complaint case, then it is unlikely that there will be a need to revoke the exemption for FMC's coke traffic.

In response to FMC's petition for partial revocation, on August 6, 1998, UP filed a motion for clarification of the date for filing a substantive reply. UP points out that the redacted copy of FMC's motion, which was filed and served pending issuance of the protective order, provides an insufficient basis for reply. UP further notes that FMC's motion does not include workpapers or related documents.<sup>9</sup> FMC has promised to furnish UP with a confidential copy of its motion upon entry of the protective order, but in a reply filed August 14, 1998, FMC resists the production of its underlying evidence. In the interest of a complete record, FMC will be required to file and serve its supportive evidence including workpapers and related documents. UP's reply, if any, will be due 20 days thereafter.<sup>10</sup>

Under this procedure, discovery requests with respect to the partial revocation petition will not be entertained. Finally, the parties will not be unduly burdened by having to separately present for purposes of the revocation proceeding market power and rate evidence with respect to coke, because FMC's coke traffic will be included in the rate complaint presentation.<sup>11</sup>

2. FMC's Motion to Defer. The underlying premise of FMC's motion to defer is that we will decide to change our market dominance guidelines relating to the use of product and geographic competition during the pendency of STB Docket No. 42022. FMC argues that deferring consideration of product and geographic competition issues in its rate complaint would: (1) allow the case to go forward on other substantive issues while we decide in Ex Parte No. 627 whether to remove product and geographic competition from the market dominance analysis; (2) spare the parties from undertaking enormously expensive and time-consuming discovery and preparation of

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<sup>9</sup> The confidential copy filed here likewise lacks supporting documentation.

<sup>10</sup> On August 24, 1998, UP furnished under seal certain confidential workpapers without prejudice to its objections regarding discovery and other disclosure.

<sup>11</sup> In light of our conclusions here, eleventh-hour pleadings filed on August 17 and 24, 1998, by FMC, on August 18 and 20, 1998, by UP, and on August 20, 1998, by the Association of American Railroads (AAR) are moot. In these pleadings, FMC seeks a protective order barring the taking of depositions by UP in STB Ex Parte No. 346 (Sub-No. 29A); UP, respectively, (1) requests leave to file a tendered reply to FMC's August 14, 1998 reply regarding workpapers and discovery, and (2) replies to FMC's August 18, 1998 motion and moves to compel discovery; FMC replies to UP's motion to compel; and AAR comments in support of UP's August 18, 1998 filing.

evidentiary submissions on potentially irrelevant issues; (3) obviate numerous discovery motions regarding the proper scope and propriety of discovery on these issues; and (4) significantly shorten the procedural schedule in this case.

UP disagrees with FMC's assumption that we will decide to change our market dominance guidelines in Ex Parte No. 627 and, in any event, questions whether any new rules that may be adopted in that case could be applied to FMC's claim for reparations in this rate complaint case. UP submits that the requested deferral is inconsistent with existing law, inefficient, and likely to cause, not reduce, delay.

FMC's proposal, to have us defer a portion of our market dominance analysis indefinitely pending a decision in Ex Parte No. 627 and proceed directly to the rate reasonableness phase of the case, is contrary to 49 U.S.C. 10707(c), which deprives this Board of jurisdiction to determine whether rates are reasonable unless we have first found market dominance. While our rules generally provide for simultaneous submission of evidence on both market dominance and rate reasonableness issues,<sup>12</sup> we cannot consider rate reasonableness in advance of finding market dominance. This does not mean that, under appropriate circumstances, we are precluded from bifurcating the market dominance and rate reasonableness phases of a proceeding to consider market dominance issues first. As FMC points out, this is exactly what we did in Sierra Pacific Power Company and Idaho Power Company v. Union Pacific Railroad Company, STB Docket No. 42012 (STB served Jan. 26, 1998) (Sierra Pacific), where we departed from our usual procedure and postponed the submission and consideration of rate reasonableness evidence because there was substantial doubt as to the complainant's ability in that case to demonstrate market dominance.<sup>13</sup> What we cannot do, however, is to reverse the order, as FMC suggests, and deal with rate reasonableness issues before addressing all market dominance issues raised under the existing guidelines. Such a procedure is precluded under the statutory framework. Moreover, our guidelines as to the scope of market dominance issues apply unless and until they are changed.<sup>14</sup> Our proposal

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<sup>12</sup> Under 49 U.S.C. 10704(d), we were directed to include in our rules appropriate measures for avoiding delay in the discovery and evidentiary phases of these proceedings. To this end, we adopted the simultaneous filing procedures at 49 CFR 1111.8, in order to move cases to completion as quickly as possible. See Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings, STB Ex Parte No. 527, slip op. at 5 (STB served Oct. 1, 1996) (Expedited Procedures). As we noted in Expedited Procedures, slip op. at 4, "[s]hippers generally do not want to have rate cases bifurcated, preferring instead a procedural schedule that requires the simultaneous submission of market dominance and rate reasonableness evidence."

<sup>13</sup> Sierra Pacific has since been settled and the proceeding dismissed. Sierra Pacific (STB served July 17, 1998).

<sup>14</sup> We expect to issue a decision in Ex Parte No. 627 this fall.

to reconsider the role of product and geographic competition does not suspend or invalidate the existing rules. If FMC wishes to proceed with its complaint, it must do so under the existing rules.<sup>15</sup>

3. UP's Motion to Compel. In our April 17 decision in STB Docket No. 42022, we stated (slip op. at 3):

Under our market dominance guidelines, UP is not entitled to any discovery on matters relating to product and geographic competition unless it (1) first identifies, with specificity, the product and geographic competition it asserts is effective; (2) explains the basis for that assertion (so as to ensure against use of discovery requests as a general fishing expedition); and (3) narrowly tailors its discovery requests to information needed to assist in proving the effectiveness of the specific competition that it has identified.

On April 24, 1998, UP served on FMC supplemental discovery requests concerning product and geographic competition. The supplemental requests contained a preamble assertedly responsive to the guidance in our April 17 decision. In its preamble, UP described: (1) for soda ash, three sources of geographic competition, two competing products, and three end-product substitutes; (2) for sodium bicarbonate and sodium sesquicarbonate, four sources of geographic competition; and (3) for phosphorus, phosphate rock, and coke, three competitive producers of an end product. UP then propounded 24 document requests and 15 interrogatories related to these sources of competition. In a May 8, 1998 response, FMC objected generally and individually to UP's discovery requests on grounds of noncompliance with our guidelines, lack of relevance, and undue burden. UP's motion to compel ensued.

FMC asserts (in its motion to defer discovery)<sup>16</sup> that UP's subsequently revised discovery requests in this case continue to be overreaching. As discussed below, we find that UP has not fully complied with the instructions in our April 17 decision. Because we remain concerned that the discovery process in rate cases not be misused to avoid a railroad's evidentiary burden with respect to product and geographic competition, and because the resolution of this dispute may have far-reaching implications regarding the nature and extent of discovery in this case on issues of product and geographic competition, we will consider the pending motion to compel now, rather than have the ALJ consider it in the first instance.<sup>17</sup>

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<sup>15</sup> We note that our rulings on discovery, discussed later, should address many of FMC's expressed concerns that apparently motivated its motion to bifurcate.

<sup>16</sup> As noted, FMC's reply to the motion to compel is not yet due.

<sup>17</sup> In adjourning the March 17, 1998 conference, the ALJ directed the parties to negotiate  
(continued...)

UP contends that its discovery requests, as modified, meet our guidelines and that it is entitled to discovery. We disagree. Viewed as a whole, UP's discovery requests continue to be overreaching. While giving lip service to the discovery criteria enumerated in our April 17 decision, and arguing that its preamble complies,<sup>18</sup> UP ignores the fundamental premise of our April 17 decision—that the evidentiary burden not be shifted to the shipper under the guise of discovery.<sup>19</sup> This premise affects both the degree of specificity required (to meet the first criterion) and the amount of substantiation needed (to meet the second criterion). Here, UP has named possible sources of product and geographic competition and baldly asserted that they provide effective competition. It then seeks to compel FMC to produce evidence to substantiate those assertions, by asking the shipper to provide very broad information about domestic and foreign markets for FMC's products and the alleged substitute products and end products.

The discovery requests likewise fail to meet our third criterion. They are not “narrowly tailored;” to the contrary, they essentially ask for all documents (except freight bills, invoices, and the like) that address potential product and geographic competition.<sup>20</sup> Nor does the information sought appear to be needed from the shipper. UP has not shown that this information is unavailable from other sources or otherwise articulated a compelling need to obtain this information from FMC.<sup>21</sup>

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<sup>17</sup>(...continued)

over narrowing the scope of UP's discovery requests concerning product and geographic competition, subject to further hearing in the event of an impasse.

<sup>18</sup> The supplemental discovery requests are similar to UP's earlier requests.

<sup>19</sup> The carrier was assigned the burden of proof with respect to product and geographic competition for three reasons: (1) it is especially difficult for shippers to prove the ineffectiveness of these two forms of competition; (2) it was already the carrier's choice whether to introduce product and geographic competition as an issue; and (3) the burden of proof allocation was expected to reduce discovery disputes and expedite the market dominance phase. See Product & Geographic Competition, 2 I.C.C.2d 1, 15 (1985).

<sup>20</sup> These discovery requests would likely be considered unduly burdensome under ordinary, broad discovery standards. Under the restrictive discovery limitations described in our April 17 decision, that conclusion is inescapable.

<sup>21</sup> Given the evidentiary and burden of proof assignments with respect to product and geographic competition, we require a showing of compelling need for discovery from the shipper on these matters.

Accordingly, we will deny UP's motion to compel and, unless the parties have other unresolved discovery disputes, terminate the discovery phase of this proceeding.<sup>22</sup>

It is ordered:

1. A proceeding is instituted in STB Ex Parte No. 346 (Sub-No. 29A). On or before September 8, 1998, FMC must file its workpapers and any other supporting evidence, must serve on UP an unredacted copy of its petition for partial revocation with supporting evidence, and must certify to the Board that it has done so. UP's reply, if any, will be due 20 days thereafter.

2. These proceedings are consolidated. The protective order imposed by decision served November 24, 1997, applies in equal force to the consolidated proceeding. FMC's motion for an additional protective order is denied as moot.

3. FMC's motion to defer consideration of, and stay discovery relating to, product and geographic competition in this proceeding is denied.

4. UP's motion to compel discovery with respect to product and geographic competition is denied.

5. On or before September 10, 1998, the parties must notify us as to whether they will require resolution of any other pending discovery matter. Any remaining discovery issues will then be referred to the ALJ. Otherwise, discovery will be terminated and a new procedural schedule provided.

6. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary

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<sup>22</sup> The ALJ also denied certain discovery requests without prejudice to their revision and resubmission. Accordingly, it is unclear whether the parties will require his further services apart from the instant dispute. If the parties expect to bring any further matters before the ALJ, they should notify us promptly.