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SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42022¹

FMC WYOMING CORPORATION AND FMC CORPORATION

v.

UNION PACIFIC RAILROAD COMPANY

Decided: March 10, 1999

This case involves a challenge by complainants FMC Wyoming Corporation and FMC Corporation (collectively, FMC) to the reasonableness of the rates assessed by defendant Union Pacific Railroad Company (UP) for the transportation of FMC's mineral products² between certain origins and destinations and/or interchanges in Wyoming, Idaho, Missouri, Illinois, Oregon, and Kansas. FMC's complaint was filed on October 31, 1997. The general procedural schedule provided in 49 CFR 1111.8 has been substantially delayed while the parties litigated over discovery issues involving, among other things, issues relating to product and geographic competition.³ A substitute procedural schedule was established, in a decision served September 21, 1998, under which opening evidence by both parties was submitted on January 15, 1999, reply evidence is due March 31, 1999, and rebuttal evidence is due April 30, 1999.

This decision addresses two issues that have arisen regarding the opening evidentiary submissions on which interlocutory rulings have been requested.

Evidence Regarding Product and Geographic Competition. UP's opening submission in this case includes evidence relating to product and geographic competition. In Market Dominance Determinations—Product and Geographic Competition, STB Ex Parte No. 627 (STB served Dec. 21, 1998) (Ex Parte No. 627), we decided that we would no longer consider evidence of product and geographic competition in market dominance determinations. Accordingly, on January 25, 1999, FMC filed a motion to strike the evidence relating to product and geographic competition and to require UP to resubmit its opening presentation with the assailed evidence excised. UP replied to

¹ This proceeding embraces the petition for partial revocation of the exemption for coke in Rail General Exemption Authority—Selected Commodities, STB Ex Parte No. 346 (Sub No. 29A).

² Soda ash, phosphorus, phosphate rock, coke, and sodium bicarbonate (including sodium sesquicarbonate).

³ When FMC filed its complaint, the market dominance guidelines for cases challenging the reasonableness of rail rates included consideration of product and geographic competition factors. See Product and Geographic Competition, 2 I.C.C.2d 1 (1985).

FMC's motion on February 8, 1999, and FMC filed a surreply on February 12, 1999, along with a petition for leave to file that pleading.⁴

UP maintains that our new guidelines cannot be applied to this case because the complaint covers rates that were in effect prior to the issuance of the Ex Parte No. 627 decision. Alternatively, UP asks that we interpret our new guidelines as not applying to this case, for the reasons offered in its pending petition for clarification or reconsideration of the decision in Ex Parte No. 627,⁵ or waive the guidelines in this case pursuant to 49 CFR 1110.9. UP argues broadly that the rationale underlying the new guidelines, i.e., to prevent a "chilling effect" on the filing by shippers of rate complaints, does not apply here because: (1) FMC has not been burdened to provide discovery on product and geographic competition; (2) UP has voluntarily provided discovery on these matters; and (3) there is no threat that consideration of these issues will require a complex antitrust-type trial.

We will defer ruling on the admissibility of UP's tendered evidence of product and geographic competition in view of the pending petitions for reconsideration and clarification submitted in the Ex Parte No. 627 proceeding, which embrace the same issues raised here. Indeed, action on the requests concerning product and geographic competition evidence in this case would be premature before we have considered the broader issues raised in Ex Parte No. 627. Therefore, we will consider the issues raised here (regarding the admissibility of product and geographic evidence) together with that case. In order to minimize any unnecessary delay in handling of this case, however, we will proceed with all other evidentiary aspects of this case under the current schedule. Product and geographic competition are discrete issues that can be addressed separately later if we should ultimately determine that their consideration is appropriate either in this case or in all cases.⁶

⁴ We will exercise our discretion under 49 CFR 1100.3 and accept FMC's surreply. (Surreplies are generally prohibited under 49 CFR 1104.13(c).) FMC's surreply is addressed to UP's argument, which was presented for the first time in its reply, that product and geographic competition is relevant to the market power determination in the embraced petition to revoke the class exemption for coke. See supra note 1. In our decision served August 31, 1998, we explained that our decision on the exemption revocation request will turn on whether the evidence supports FMC's request for rate relief. Therefore, there is no need for separate evidence addressed only to the revocation issue.

⁵ The Association of American Railroads has also filed a petition for reconsideration in Ex Parte No. 627.

⁶ This action is fully consistent with our decision served August 31, 1998, wherein we denied FMC's request for a similar deferral of matters relating to product and geographic competition. The guidelines that were in effect at the time of our August 31 ruling called for consideration of such competition, whereas now they exclude such matters.

Disclosure of Classified Information. In a motion filed on December 24, 1998, UP asked for an order requiring FMC to furnish specially redacted copies of its opening evidence (which was due on January 15, 1999) so that UP could share FMC's redacted evidence with its in-house personnel.⁷ In a decision served on January 8, 1999, the motion was denied because such a requirement was found to be unduly burdensome. Instead of requiring FMC to prepare redacted evidence, the decision found that a more sensible approach would be for each party to produce its own redacted copies of any portions of the other party's submissions that in its view would need to be reviewed by in-house personnel. As the evidence at issue had not even been filed at the time, we did not in that decision make any finding that any particular document, as redacted, would be suitable for disclosure to in-house personnel.

On January 26, 1999, UP filed a motion to permit disclosure to UP's in-house counsel and employees of the market dominance evidence and arguments contained in FMC's opening presentation, as redacted by UP. FMC replied to that motion on February 1, 1999. FMC objects to the disclosure of any part of the market dominance presentation (except for a redacted verified statement of FMC witness Joyce Stratis and unspecified legal discussions).

UP asserts that the materials in question discuss the modal options at a relatively high level of generality and do not reveal any secret aspects of FMC's operations, its future plans, or its negotiating strategies. FMC counters that UP is seeking to reveal FMC's internal analysis of its competitive options, which it characterizes as the most commercially sensitive information in rate negotiations with its rail carriers. Specifically, FMC contends that a rail carrier that knows why its shipper believes it has no competitive alternatives—including the technical, cost, logistical, political, environmental, or other factors that render possible alternatives noncompetitive—gains a substantial negotiating advantage for the future.

We understand UP's contention that it does not seek to disclose "shipper-specific rate data, cost data, or similar information." We also understand FMC's concern that other "competitively sensitive information" unrelated to rates and costs is within the scope of our protective order served November 24, 1997, and we understand its fear that improper disclosure could alter the commercial relationship between the parties. Our January 8 decision, which focused on litigation burdens rather than determining which particular information could be disclosed, was largely successful in accommodating the concerns of each party while protecting the sanctity of the protective order. Indeed, the parties have reached agreement regarding confidentiality and disclosure of FMC's stand-

⁷ The materials at issue were covered by a protective order that permits disclosure of certain highly confidential information only to outside counsel or consultants, and not to the parties themselves. In light of our longstanding policy of protecting highly confidential information, UP's in-house personnel could obtain access to certain documents only if the protected information they contained was redacted.

alone cost and variable-cost presentations, and FMC has consented to disclosure of UP's redacted versions of all evidence other than that relating to market dominance.

With respect to the outstanding market dominance issue still in dispute, we could direct FMC to now go through the documents, as redacted by UP, and redact further information that it deems not suitable for disclosure, but that process would likely prove fruitless, as FMC would undoubtedly redact essentially the entire analysis. And although it could be argued that such a position would be too extreme, we cannot say that FMC's concerns are unreasonable. Indeed, it does not appear to be feasible to separate out the portions of FMC's market dominance evidence that may not merit highly confidential treatment. For example, UP's redacted version of the verified statement of FMC witness John L. Abbott still contains specific rate quotes and cost data. It may be inconvenient for UP to work around the prohibitions on disclosure, but under the circumstances, we do not view this as such a burden on UP as to outweigh the potential harm to FMC that the protective order was intended to safeguard against. Accordingly, UP's motion will be denied.

It is ordered:

1. FMC need not reply to the issues regarding product and geographic competition at this time. The procedural schedule in this proceeding remains in force as to all other aspects of this case.
2. UP's motion to permit disclosure to in-house personnel of redacted versions of FMC's market dominance presentation is denied.
3. This decision is effective on its date of service.

By the Board, Chairman Morgan, Vice Chairman Clyburn and Commissioner Burkes.

Vernon A. Williams
Secretary