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SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42022

FMC WYOMING CORPORATION AND FMC CORPORATION

v.

UNION PACIFIC RAILROAD COMPANY

Decided: February 4, 1998

In a decision served on January 13, 1998, the deadline for discovery was extended in this proceeding until February 13, 1998, at the request of defendant Union Pacific Railroad Company (UP). The extension was requested by UP so that the parties could complete discovery and we could consider certain motions related to discovery. This decision addresses the pending discovery-related motions.

On December 12, 1997, UP filed its first motion to compel with respect to its first requests for interrogatories and production of documents served on complainants FMC Wyoming Corporation and FMC Corporation (collectively, FMC) on November 7, 1997.<sup>1</sup> In its motion, UP denies that it exercises any market dominance over the traffic at issue in this case and states that it has sought discovery to prepare for rebuttal of evidence to be presented by FMC, as well as to determine what basis, if any, exists for FMC's allegations. According to UP, it is FMC's position that they are not required to respond to discovery requests relating to product and geographic competition and will provide only limited information in response to discovery requests related to other market dominance issues. FMC responded to UP's first motion to compel on December 19, 1997.<sup>2</sup>

On December 15, 1997, FMC filed their first motion to compel with respect to their first set of interrogatories and document requests served on UP on October 31, 1997. According to FMC, all of the information and documents that they requested are directly relevant to, and necessary for,

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<sup>1</sup> On December 18, 1997, UP filed a supplemental memorandum in support of its first motion to compel. It requested permission to file in the document.

<sup>2</sup> On December 24, 1997, UP filed a surreply in support of its first motion to compel. It requested permission to file in the document.

the design, construction, and operation of their stand-alone railroad. UP responded to FMC's first motion to compel on December 22, 1997.<sup>3</sup>

On December 17 and December 22, 1997, FMC filed motions for protective orders in response to notices of depositions served by UP. In each instance, FMC requests an order pursuant to 49 CFR 1114.21(c) to prohibit the taking of depositions. UP responded to the motions on December 22 and December 29, 1997, respectively.

FMC's December 17 motion addresses UP's proposed depositions of Thomas D. Crowley and Phil Burris, employees of L.E. Peabody & Associates, Inc., an economic consulting firm retained by FMC to provide expert assistance in the preparation of FMC's stand-alone cost evidence. UP apparently seeks to examine Mr. Crowley and Mr. Burris regarding: (1) their knowledge and conclusions concerning "general" issues of stand-alone cost methodology; and (2) any conclusions they may have already reached in connection with this case.<sup>4</sup> FMC's December 22 motion addresses UP's proposed depositions of four named FMC employees,<sup>5</sup> previously identified by FMC as knowledgeable about the subject traffic, and any other employees who are the most knowledgeable about 14 areas of inquiry, all relating to product and geographic competition.

On January 20, 1998, in conjunction with the proposed depositions, UP filed its second motion to compel with respect to the production by FMC of the prior testimony of their stand-alone cost expert. FMC replied to the motion on January 26, 1998.

On January 26, 1998, FMC filed their second motion to compel with respect to their document requests Nos. 99 through 101, which call for specific information generated by UP during litigation in Allied Chemical Corp. v. Ann Arbor Railroad System, 1 I.C.C.2d 480 (1985), vacated in part and remanded sub nom. General Chemical Corp. v. U.S., 817 F.2d 844 (D.C. Cir. 1987).

#### DISCUSSION AND CONCLUSIONS

At the core of these discovery disputes is the question of whether the modifications to our discovery rules adopted in Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings, STB Ex Parte No. 527 (STB served Oct. 1, and Nov. 15, 1996) (Expedited Procedures), aff'd sub nom. United Transp. Union-III. Legis. Bd. v. STB, No. 97-1027 (D.C. Cir. Jan. 6, 1998), changed the scope of discovery in rate reasonableness cases. In their

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<sup>3</sup> On December 24, 1997, FMC filed a petition for leave to file a response to UP's reply, and simultaneously filed the reply.

<sup>4</sup> See UP's letter to FMC dated December 10, 1997, attached as Exhibit C to FMC's December 17 motion.

<sup>5</sup> The employees are: George Glaesser; J. Thomas Bernasek; John L. Abbott; and Cynthia Miley.

December 17 and December 22 motions for protective orders, FMC argues that the modifications effected no substantive change in our “longstanding restrictive view of whether depositions should be routinely taken in proceedings before the agency.”<sup>6</sup> Prior to that decision, discovery procedures, other than written interrogatories or requests for admissions, were available only with our approval [49 CFR 1114.21(b)(2)] and, in the case of depositions, required a showing that a failure or delay of justice would be prevented [49 CFR 1114.22(c)]. Expedited Procedures eliminated both of these requirements, as well as the requirement in subsection 49 CFR 1114.22 (b)(1) that the party seeking depositions “set forth the facts it desires to establish and the substance it expects to elicit.”<sup>7</sup> In response to some commenters’ fears that depositions could be used as a harassing tool in litigation, we noted that we were prepared to intervene when necessary. Expedited Procedures, decision served Oct. 1, 1996, slip op. at 10. Thus, the provision in section 1114.21(c) for protective conditions was retained.

Contrary to FMC’s contention, Expedited Procedures changed in a fundamental way our approach to discovery in general and depositions in particular. The party seeking depositions no longer has the burden of justifying them under the “failure or delay of justice” standard; rather, the party opposing depositions must demonstrate, as in other modes of discovery, that the depositions are abusive. This is consistent with our overall goal of expediting the discovery process.<sup>8</sup>

In addition to their general arguments about the nature of discovery, FMC’s December 17 motion discusses the pre-trial deposition of expert witnesses. FMC contends that we expressly declined in Expedited Procedures, decision served Oct. 1, 1996, slip op. at 10, to adopt wholesale the deposition standards in the Federal Rules of Civil Procedure (Federal Rules), and in particular Rule 26(b) governing expert discovery in judicial proceedings. Although we had initially proposed to substitute the Federal Rules for our procedural rules at 49 CFR part 1114, subpart A, General Rules of Evidence, FMC is reading too much into our decision not to adopt that part of our proposal. As we stated in Expedited Procedures, decision served Oct. 1, 1996, slip op. at 10, the existing regulations already allowed for the admission of any evidence governing proceedings in matters not involving trial by jury in the courts of the United States. In any event, the proposal to apply the Federal Rules did not extend to the discovery matters in subpart B. In discovery matters, we are

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<sup>6</sup> Expedited Procedures, as pertinent here, amended title 49, chapter X, part 1114 of the Code of Federal Regulations. Former CFR sections cited herein are in the October 1, 1996 revision.

<sup>7</sup> This information was to be submitted in the petition for a deposition order. The new “notice” procedure contains no comparable requirement.

<sup>8</sup> In the notice of proposed rulemaking in Expedited Procedures, decision served July 22, 1996, slip op. at 8, we acknowledged that our discovery rules had the potential to impede expeditious discovery and had generated too much paperwork. The changes to the rules were designed to ensure that discovery does not unnecessarily protract a proceeding.

neither governed nor limited by the Federal Rules. Thus, FMC's alternative argument, that, if the Federal Rules apply, Federal Rule 26(b)(4) would not permit these depositions, is unavailing.<sup>9</sup>

Nor are we persuaded by FMC's argument that the use of pre-trial depositions of experts is unnecessary.<sup>10</sup> Under 49 CFR 1114.21(a)(1), parties may obtain discovery regarding any non-privileged matter which is relevant to the subject matter. The standards and methodologies of stand-alone costing are at the heart of a rate reasonableness case such as this. Despite FMC's contention that the general principles of stand-alone costing are well-established, it has been our experience that every case brings new theoretical arguments. Thus, we will not prohibit the deposition of expert witnesses regarding the standards and methodologies of stand-alone costing on relevancy grounds. As for the second requirement of the rule, that the matters not be privileged, FMC argues that the underlying knowledge, opinions, and work product of these witnesses are privileged or subject to protective orders in other proceedings. Also, FMC argues that it is improper to examine Mr. Burris regarding the status of his ongoing work in this proceeding. To the extent that the information is confidential or privileged and subject to protective orders, FMC may register appropriate and timely objections to specific inquiries. To the extent UP inquires into work-in-progress, the witness would clearly not be bound by a preliminary position. Subject to these limitations, we conclude that either party is free to depose the persons upon whose expertise the opposing party will rely and, accordingly, FMC's December 17 motion for a protective order will be denied.

In preparation for the proposed depositions, UP, in its second set of discovery requests, served December 23, 1997, Document Request No. 106, sought production of "all written testimony submitted by individuals affiliated with L.E. Peabody & Associates in stand-alone cost proceedings before the Surface Transportation Board, including all appendices and work papers generated in connection with such testimony." In their reply dated January 7, 1998, FMC objected on the grounds that the requested information is outside the scope of the issues presented; is neither relevant nor reasonably calculated to lead to discovery of admissible evidence; is not in FMC's possession, custody, or control; is subject to various protective orders; and is overly broad and unduly burdensome. In its January 20 motion, UP seeks an order compelling production of this material.

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<sup>9</sup> Federal Rule 26(b)(4) permits discovery of "any person who has been identified as an expert whose opinions may be presented at trial." However, as the rule does not directly apply, it is irrelevant that Mr. Crowley has not been identified by FMC as a testifying expert. Moreover, as UP points out, a major presentation by a consulting firm is not ordinarily the exclusive work product of the nominal witness, but reflects broad participation.

<sup>10</sup> According to FMC, the provisions relating to discovery under the Federal Rules were designed to facilitate the conduct of federal trials at which expert testimony is presented orally and the opposing party must be prepared to cross examine the testifying expert immediately upon completion of his direct oral testimony. In rate reasonableness proceedings, FMC argues that such discovery is unnecessary because evidence is submitted through written presentations and each party will have sixty days to review, analyze and reply to the expert testimony submitted by the other side.

UP contends that its ability to take effective depositions of the Peabody firm will be hindered unless the requested documents are produced immediately because the prior testimony will provide important insights into how the Peabody firm has previously treated questions of methodology, data adjustments, and techniques that will be presented, and can be critical to undermining the credibility of expert testimony in this proceeding. It contends that judicial precedent and the Federal Rules support this mode of discovery in Federal litigation; that FMC has constructive possession of the materials through their agent, Peabody; that the materials are not otherwise available because they were filed under protective orders;<sup>11</sup> and that confidentiality can be maintained by filing subject to the protective order in this proceeding.

UP's second motion to compel will be denied. We observe at the outset that the requested discovery is burdensome on its face, a fact that UP does not refute. Accordingly, we will require a substantial showing of relevance and need to outweigh the burden of producing this evidence.

With regard to necessity, we find that production of the prior testimony of the Peabody firm is redundant and unnecessary because, in each case, we have extensively analyzed all such evidence and have accepted or rejected it on the record.<sup>12</sup> The prior testimony is also of limited relevance because the analytical approach in any given case may differ from the approach in other cases due to the factual situation presented or the evolutionary refinement of stand-alone theory.<sup>13</sup>

Production of prior testimony is also barred by the protective orders under which it was rendered. Those protective orders specifically prohibit the use of protected materials in other proceedings, and disclosure of the materials here, even under the protective order in this proceeding, would require the consent of the parties to those proceedings.<sup>14</sup> Nor can we find that the materials sought are even in the possession of FMC. We attach no significance to the "agency" relationship between the Peabody firm and FMC. Peabody is FMC's agent for purposes of this proceeding, but

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<sup>11</sup> UP assails generally the breadth of prior protective orders, contending that they shield entire presentations and not just the confidential material therein.

<sup>12</sup> We also take notice of, but do not rely on, the fact that UP's expert consultant, Klick, Kent, & Allen, participated in the same proceedings as the Peabody firm.

<sup>13</sup> FMC contends that a testifying witness cannot be impeached by inconsistent statements made by his associates. We recognize, however, that the testimony presented by a consulting firm is ordinarily a joint effort and not just the work product of the signatory witness. Thus, we have no means of attributing the disputed testimony to any specific employee(s).

<sup>14</sup> Ironically, the protective order in this proceeding, drafted by UP, contains the same prohibition.

does not possess these confidential materials in that capacity. Rather, it holds them as a fiduciary for its former clients and is not free to produce them to FMC.<sup>15</sup>

Finally, UP has made no showing that this is an “extraordinary circumstance” such as we described in CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company—Control and Operating Leases/Agreements—Conrail Inc. and Consolidated Rail Corporation, STB Finance Docket No. 33388, Decision No. 18 (STB served Aug. 5, 1997), and its reliance on our dictum in that case is accordingly misplaced.<sup>16</sup>

Our denial of UP’s second motion to compel is not at all inconsistent with our authorization, supra, of depositions of FMC’s expert witnesses. In that regard, UP has made only vague allegations that the prior testimony of the Peabody firm will provide important insights and possible impeachment evidence, but has not shown why it cannot take effective depositions without this prior knowledge.

In addition to their general arguments about the nature of discovery, FMC’s December 22 motion for a protective order raises the following specific objections: (1) that the four named witnesses in the deposition notice were not identified by FMC as being knowledgeable about product and/or geographic competition; and (2) that FMC has separately objected to document discovery with regard to product and geographic competition. It appears with regard to the first objection that FMC has misconstrued the scope of the depositions. In its December 18, 1997 letter to FMC, attached as Exhibit C to FMC’s December 22 motion, UP states that “[t]he deposition of the named individuals will cover the areas of their knowledge as identified in FMC’s interrogatory responses, as well as other market dominance issues. . . .” Thus, there is no question that the named individuals are competent to be deposed.

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<sup>15</sup> This dispute is thus distinguished from the one in Grain Land Coop v. Canadian Pacific Limited and Soo Line Railroad Company d/b/a CP Rail System, STB Docket No. 41687 (STB served Dec. 1, 1997), in that the defendant there had rightful possession of the materials subject to third party confidentiality under 49 U.S.C. 11904 and could be compelled to produce them under a confidentiality agreement.

<sup>16</sup> In denying a petition to modify the protective order in the control proceeding to permit the use of confidential and highly confidential information from that proceeding in an unrelated rate proceeding, we noted that we might be willing to permit a party to use newly available information covered by a protective order in extraordinary circumstances, such as where a party seeks use of confidential information that it can demonstrate impeaches, as untruthful, evidence submitted in another proceeding.

In response to FMC's second objection, UP agrees that these depositions should be deferred until a ruling has been made on its first motion to compel.<sup>17</sup> UP's first motion to compel is complex and voluminous, as is FMC's first motion to compel. In the interest of a prompt resolution, both motions to compel will be referred to an Administrative Law Judge (ALJ). We will also refer FMC's second motion to compel to the ALJ as well. Appeals from rulings of the ALJ are not favored and will be strictly limited to the vigorous standards of 49 CFR 1115.9.

The deadline for discovery, which is currently February 13, 1998, will be postponed pending a decision by the ALJ on the remaining discovery matters. The parties are instructed to submit a joint proposal for a new procedural schedule upon the completion of discovery.

It is ordered:

1. UP's first motion to compel, filed December 12, 1997, and FMC's first and second motions to compel, filed December 15, 1997, and January 26, 1998, respectively, are referred to an ALJ for resolution. A copy of all filings and documents, including this decision, will be sent to the ALJ.
2. FMC's motion for a protective order, filed December 17, 1997, is denied. Depositions of Mr. Crowley and Mr. Burris may be taken immediately.
3. FMC's motion for a protective order, filed December 22, 1997, is moot.
4. UP's second motion to compel is denied.
5. 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>17</sup> Because UP has agreed to defer these depositions, FMC's December 22, 1997 motion for a protective order to prohibit the taking of the depositions is moot.