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SEC

SERVICE DATE - JANUARY 8, 1999

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42022

FMC WYOMING CORPORATION AND FMC CORPORATION  
v.  
UNION PACIFIC RAILROAD COMPANY

Decided: January 8, 1999

Opening evidence in this rate reasonableness complaint proceeding is due on January 15, 1999. In a motion filed December 24, 1998, defendant Union Pacific Railroad Company (UP) seeks an order requiring complainants FMC Wyoming Corporation and FMC Corporation (FMC) to furnish specially redacted copies of their opening evidence, specifically, copies from which only FMC's "highly confidential" information, and not UP's "highly confidential" information, or either party's "confidential" information, has been redacted.<sup>1</sup> On December 30, 1998, FMC filed a reply in opposition to UP's motion.<sup>2</sup>

UP contends that it has a "fundamental due process right" to participate in its defense of this action through its in-house counsel and personnel. It states that it has in past cases relied on the experience and expertise of in-house counsel and employee witnesses with respect to stand-alone cost and revenue-to-variable cost issues as well as qualitative market dominance. Under the protective order, unredacted, highly confidential submissions would be unavailable to these persons, and fully redacted (or "public") versions would lack essential data for meaningful analysis. UP further contends that virtually all of the highly confidential information likely to be found in FMC's submissions on revenue-to-variable cost calculations will be UP's own information and that FMC's

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<sup>1</sup> A protective order was served in this proceeding on November 24, 1997, to preserve confidentiality of certain discovery and evidentiary submissions. Materials designated "confidential" by the producing party are to be used solely for this proceeding and any judicial review thereof. Materials designated "highly confidential" are subject to the additional restriction that they be disclosed only to outside counsel or consultants, and not to the parties.

<sup>2</sup> On January 5, 1999, UP filed a letter, purportedly to advise the Board that negotiations on this issue had failed, but also addressing certain arguments regarding the alleged burden of redaction that were raised in FMC's reply. By letter filed January 6, 1999, FMC moves to strike UP's letter as a reply to a reply and at the same time responds to matters contained in UP's letter. FMC is correct that the January 5 letter is a prohibited reply to a reply, but so is its January 6 letter, to the extent that it addresses matters other than striking UP's reply. Both letters simply appear to be an effort to have the last word and will be rejected. See 49 CFR 1104.13(c).

qualitative market dominance evidence may also be based on materials from UP's own files or on FMC's records of UP's conduct.

UP alludes to a practice of the parties in prior rate reasonableness and merger proceedings to provide suitably redacted pleadings, but it fails to point out any precedent or rule of the Board under which FMC could be compelled, over its objection, to do so. In its reply, FMC denies any knowledge of the alleged practice of other parties, and states that its own consultants, who have participated in virtually all prior stand-alone rate cases, have never prepared redacted versions of their SAC or R/VC analyses. FMC contends that the preparation of redacted evidence would be unduly burdensome, particularly with regard to electronic data, worksheets, and models,<sup>3</sup> and suggests that UP's counsel and consultants could undertake the task themselves, just as FMC is prepared to do with regard to UP's submissions.

Under the circumstances, UP's motion will not be granted. UP characterizes the issue as a due process matter, but as FMC notes, it is primarily a question of how to allocate litigation burdens. If, after pleadings have been filed, UP believes that FMC has used the "highly confidential" designation in an unreasonably expansive way, then under the protective order, it may challenge the designation of particular materials as highly confidential. Ultimately, however, the record may contain substantial amounts of material designated highly confidential. And in that event, there is no apparent reason why the Board should in effect create a new responsibility, not currently provided in the agency's rules, under the protective order. Rather, the more sensible approach, and the approach that FMC is undertaking to follow, is that each party should produce its own redacted copies of the portions of the other party's submissions that it believes need to be reviewed by in-house personnel.<sup>4</sup>

It is ordered:

1. The letters filed by UP and FMC on January 5 and 6, 1999, respectively, are rejected.
2. UP's motion for an order requiring the provision of redacted pleadings by FMC is denied.

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<sup>3</sup> Reportedly, FMC had offered to provide UP with redacted versions of its stand-alone cost testimony and related written workpapers, but not its revenue-to-variable cost evidence, quantitative market dominance evidence, or stand-alone electronic data. UP did not accept the proposed compromise.

<sup>4</sup> UP requested expedited action in light of the impending due date for opening evidence and in the alternative requested an extension of the procedural schedule to allow for compliance by FMC. The alternative request is moot except that, if it is intended to seek an extension unconditionally, it is denied.

3. UP's request for an extension of the procedural schedule is denied.

4. This decision is effective on its date of service.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams  
Secretary