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SERVICE DATE - MAY 5, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42022

FMC WYOMING CORPORATION AND FMC CORPORATION

v.

UNION PACIFIC RAILROAD COMPANY

Decided: May 1, 1998

On April 20, 1998, complainants FMC Wyoming Corporation and FMC Corporation (FMC) filed a petition for clarification of our decision served April 17, 1998 (April 17 decision). That decision provided guidelines in response to FMC's interlocutory appeal of an Administrative Law Judge's (ALJ) determination that FMC must produce for defendant Union Pacific Railroad Company (UP) documents and other information relating to product and geographic competition dating back to July 1, 1991.¹ Under our market dominance guidelines, we found that "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." April 17 decision, slip op. at 3.

FMC now contends that we failed to reach an issue it had raised on appeal, namely, whether it must produce documents dating back to July 1, 1991, and seeks clarification accordingly. UP filed a reply in opposition on April 22, 1998, supporting the ALJ's discovery cut-off date.

In our April 17 decision, we neither affirmed nor rejected the ALJ's cut-off date.² Instead, we provided general guidelines, the clear import of which is that a defendant must justify whatever discovery it requests regarding product and geographic competition. Thus, if UP is prepared to show, without further delaying this proceeding, that it has a need for documents this old to assist in proving the existence of product and geographic competition during the period at issue in the

¹ The ALJ elicited an agreement from the parties to attempt to reach an accommodation on revisions to UP's discovery request, with resort to the ALJ in the event of further impasse. UP submitted revised discovery requests to FMC on March 23, 1998.

² The cut-off date bears no special relationship to the disputed issues of product and geographic competition, but was determined by compromise and imposed as the generally applicable default date. As such, it is an appropriate subject for the parties' negotiations.

complaint, we will not prematurely deny it the opportunity to do so.³ Nor will we interfere with the parties' negotiations or the ALJ's delegated authority to resolve the dispute in the first instance. As UP points out, its revised discovery requests, to which FMC has not responded, predated our April 17 decision, and it will shortly submit new discovery requests consistent with the guidelines provided there.

It is ordered:

1. The petition for clarification is denied.
2. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

³ If UP cannot make this showing, it is irrelevant that FMC may have demanded, and UP provided, comparable discovery dating back to the cut-off date and beyond.