

STB FINANCE DOCKET NO. 33467

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

Decided December 12, 1997

The Board finds that the Union Pacific Railroad Company must establish unrestricted common carriage rates to Chicago and East St. Louis, IL., that will allow FMC Wyoming Corporation and FMC Corporation to ship it traffic from these gateways to final destination using transportation contracts that it has entered into for that portion of its through transportation.

BY THE BOARD:

On October 22, 1997, FMC Wyoming Corporation and FMC Corporation (FMC) filed an amended petition¹ seeking an order directing the Union Pacific Railroad Company (UP) to show cause why it should not be compelled immediately to establish unrestricted common carriage proportional rates for shipments of soda ash from Westvaco, WY, to the Chicago, IL, East St. Louis, IL, and Memphis, TN gateways for domestic traffic, and, to the Kansas City, MO gateway for both export and domestic traffic. UP filed a timely reply on November 5, 1997. In a rebuttal statement filed November 17, 1997, FMC narrowed the relief it seeks to an order requiring UP to immediately establish unrestricted proportional rates for shipments of soda ash from Westvaco to the

¹ Action on FMC's original petition, filed September 5, 1997, was deferred at FMC's request when UP indicated its willingness to publish rates no later than October 15, 1997. As explained below, the rates subsequently published by UP were not satisfactory to FMC. This amended petition ensued.

Chicago and East St. Louis gateways.² Upon consideration of FMC's amended petition and UP's response, we conclude that UP must establish common carriage rates to Chicago and East St. Louis that allow FMC to ship its traffic from these gateways to final destination using transportation contracts that it has entered into for that portion of its through transportation.

BACKGROUND

FMC ships soda ash by rail, in covered hopper cars, from its exclusively UP-served Westvaco mines through interchanges at the Chicago, East St. Louis, Memphis, and Kansas City gateways to domestic customers throughout the Eastern and Southern United States, and to foreign customers via the Port Arthur, TX ocean terminal. UP's portion of the through movements is now provided under a contract that will expire on December 31, 1997. FMC states that it has been unable to negotiate a satisfactory new contract with UP, but that it has executed contracts with various connecting rail carriers for movement from the gateways to the final destinations.³ FMC has requested UP to establish proportional common carriage rates, to become effective January 1, 1998, from Westvaco to various gateways for use in conjunction with the destination contract service.

On October 15, 1997, UP published certain common carriage proportional rates from Westvaco to the Chicago and East St. Louis gateways.⁴ FMC objects to the fact that these proportional rates are expressly limited to apply only where the subsequent movement beyond the gateway is transported under a common carriage rate.⁵

² By letter filed November 19, 1997, UP contends that FMC's rebuttal is an impermissible reply to a reply. We have found it unnecessary to consider the rebuttal statement except to the extent that it narrows the scope of the relief sought.

³ FMC states that it has contracts with CSX Transportation, Inc. (CSXT), Consolidated Rail Corporation, Canadian National Railway Company, Illinois Central Railroad Company, Kansas City Southern Railway Company, Norfolk Southern Corporation, and Wisconsin Central Ltd.

⁴ UP published these rates as reductions in Tariff ICC-UP-3100-I ("Tariff 3100-I") scheduled to take effect January 1, 1998.

⁵ FMC has also assailed UP's failure to publish proportional rates: (1) to the Kansas City or Memphis gateways; (2) for use with subsequent movements to destinations where FMC is the consignee but did not appear to own a facility; and (3) for use with subsequent movements to consignees that have a contract with UP providing for a through rate. UP in its reply asserts that
(continued...)

DISCUSSION AND CONCLUSIONS

I. *Procedural Matters.*

UP contends that the show cause procedure originally requested by FMC is procedurally inappropriate, that it circumvents the Board's complaint and discovery rules, and that it is superseded by FMC's recently filed rate complaint.⁶ We disagree. The transportation that is addressed in FMC's rate complaint is different from (albeit partially overlapping with) that covered by the show cause petition. The rate complaint covers more commodities and origins, does not cover traffic moving through gateways other than Chicago and Kansas City, and challenges both the local and interline application of UP Tariff 3100-I. More importantly, a rate complaint would not be suitable for obtaining the expedited relief that FMC seeks in this amended petition because of the time required to resolve a rate complaint.

UP also contends that there is no emergency justifying a show-cause approach, because the traffic now moves under UP contracts and the restricted UP common carriage rates at issue are not scheduled to go into effect until 1998. We disagree. With the UP contracts set to expire and the restricted common carriage rates set to go into effect in a matter of weeks, this matter requires immediate attention.⁷

Finally, because the issues have been substantially briefed, we see nothing to be gained from obtaining additional argument through a show-cause order. Accordingly, we will proceed directly to the merits of this dispute.

⁵(...continued)

it has published or will publish rates, with certain restrictions, for movements to all receivers identified by FMC. FMC in its rebuttal states that Board action on these aspects of its petition will be unnecessary if UP publishes these rates as promised. Accordingly, FMC now seeks immediate relief only with respect to the restrictions against use of the Chicago and East St. Louis proportional rates in conjunction with its CSXT contract rates. Thus, this decision only addresses the appropriateness of UP's proportional rates from Westvaco to Chicago and East St. Louis. If FMC and UP are unable to resolve other outstanding matters and FMC wishes to seek additional relief, FMC should notify us.

⁶ *FMC Corporation and FMC Wyoming Corporation v. Union Pacific Railroad Company and Missouri Pacific Railroad Company*, STB Docket No. 42022 (filed October 31, 1997).

⁷ We do not interpret the judicial prohibition in *Burlington N.R.R. v. Surface Transp. Bd.*, 75 F.3d 685 (D.C. Cir. 1996), against requiring a carrier to establish a common carriage rate over a year in advance of when the rate could be used as preventing us from ordering the establishment of a rate that is needed within a matter of weeks.

II. *The Merits.*

This dispute involves the proper interpretation and application of certain fundamental principles set forth in our decisions in *Central Power & Light Co. v. Southern Pacific et al.*, 1 S.T.B. 1059 (1996), (*Bottleneck I*), clarified (*Central Power & Light Co. v. Southern Pacific et al.*, 2 S.T.B. 235 (1997)) (*Bottleneck II*) (collectively, *Bottlenecks*), *pets. for review pending*, Nos. 97-1081 *et al.*, *MidAmerican Energy Co. v. Surface Transp. Bd.* (8th Cir. submitted after oral arg. November 18, 1997), regarding a railroad's obligation to provide rates and routes for "bottleneck segments" of through rail movements.⁸ UP has a bottleneck over the origin portion of the FMC through movements involved in this dispute.

In *Bottleneck I*, we explained that an origin bottleneck carrier (such as UP in this case) cannot refuse to provide the origin portion of transportation to a destination that it does not serve; rather, the bottleneck carrier must tender the traffic to a connecting carrier at a reasonable interchange point and provide a route and rate allowing the transportation to be completed. Here, it is clear that UP cannot provide transportation to FMC's destinations beyond the UP gateways, and there is no dispute over the availability of these interchange points or of the routes involved. Under its existing contracts with FMC, UP provides service to these very gateways for interchange with the same carriers with which FMC has contracted for future destination service.

In *Bottleneck I*, we further determined that, notwithstanding prior precedent generally restricting rate reasonableness challenges to origin-to-destination rates, when the non-bottleneck segment of a through route is covered by a railroad/shipper contract, the rate covering the bottleneck segment is separately challengeable because, under 49 U.S.C. 10709(c)(1), we are without jurisdiction over the contract rates. 1 S.T.B. at 1074. It is this conclusion that has precipitated the dispute here. If not for the possibility that a UP common carriage proportional rate may be separately challenged when used in combination with a contract rate, UP would have no reason to resist establishing an origin proportional rate that could be used in combination with a destination contract rate. As we further explained in *Bottleneck II* (2 S.T.B. at 242-45), however, notwithstanding UP's reluctance to have its proportional rate

⁸ A "bottleneck segment" is the portion of a rail movement for which no alternative rail route is available.

separately challenged, once a shipper has a contract rate for transportation to or from an established interchange, the bottleneck carrier must provide a rate that permits the shipper to utilize its contract with the non-bottleneck carrier.⁹

UP interprets its obligation under *Bottlenecks* to establish a separately challengeable segment rate as applying only to those situations where a contract rate is the only available rate for the non-bottleneck segment. In UP's opinion, it is only in those circumstances that the Board has found that the common carrier obligation to provide service overrides the bottleneck carrier's rate initiative to establish any form of rate it deems appropriate. Because CSXT already maintains common carriage proportional rates, in Tariff TSCSXT 4012, potentially applicable to traffic moving from the Chicago and East St. Louis gateways to the FMC destinations served by CSXT, UP contends that, by providing a proportional rate to be used with CSXT's common carriage rates, it has met its obligation to provide FMC with a rate that enables FMC to complete its movement. While UP's proportional rate would preclude FMC from using its contract rate with CSXT, UP contends that, in these circumstances, it has no duty under *Bottlenecks* to provide a rate in the form sought by FMC (i.e., a proportional rate to be used in conjunction with a subsequent contract movement). UP misinterprets *Bottlenecks*,¹⁰ and it cannot effectively thwart the right of FMC and its destination rail carriers to make separate transportation contracts in this way.

In *Bottleneck II*, we explained that the bottleneck carrier's rate discretion is not absolute, and that where a connecting carrier and shipper have entered into a transportation contract to govern service over the non-bottleneck segment of an established through route, the bottleneck carrier can no longer insist on cooperative common carriage through rate arrangements. 2 S.T.B. at 244-45 n.13&14. Thus, a bottleneck carrier cannot unilaterally impose restrictions that would preclude a connecting carrier from moving the traffic under a contract rate.

⁹ *Bottleneck II* discusses the situation where the bottleneck carrier is the delivering carrier. However, as pointed out in that decision (2 S.T.B. at 240 n.8), the principle is equally applicable "if the bottleneck exists on the origin."

¹⁰ Our language in *Bottleneck II*, requiring a bottleneck carrier "to provide a rate necessary to complete the transportation," was not intended to suggest that the holding is limited to the situation where the contract is the *only* available rate. We simply resolved the hypotheticals then before us.

The fact that, in addition to the contract rate, CSXT here maintains a common carriage proportional rate that is potentially available for the traffic at issue does not warrant a different result. Implicit in *Bottlecks* is the presumption that, where a shipper and a carrier have recently entered into a transportation contract, the contract rate is intended to govern the movement of the traffic. See, *Bottleneck II*, 2 S.T.B. at 244-45. To require, as UP's theory would, that the contracting carrier cancel or condition all its common carriage rates under which the shipper's traffic could potentially move so that those rates could not apply to the shipper's traffic would impose an unnecessary regulatory burden on that carrier. Rather, we regard the execution of a rail transportation contract as ample evidence of the mutual intention of the shipper and connecting carrier to move the traffic under that agreement. Therefore, unless CSXT notifies us by December 23, 1997, that the transportation contract covering the movement of soda ash from the Chicago and East St. Louis gateways is not intended to apply to traffic interchanged with UP, we will presume that the contract rate is the applicable rate here.

Finally, UP argues that its restricted rates are consistent with the policy of limiting rate reasonableness challenges to the entire through movement,¹¹ and do not contravene the Congressional policy with respect to rail transportation contracts. UP suggests that the contract carrier is free to grant equivalent price concessions on its tariff rate, thus preserving for the shipper the economic benefits of the contract. However, there are substantial benefits that derive from a transportation contract that another carrier should not be able to negate. A contract provides commercial certainty for both the shipper and carrier—the shipper has rate certainty for the period of time specified in the contract and the carrier has the traffic commitments contained in the contract. Moreover, as we noted in *Bottleneck I*, Congress broadly “encouraged” shippers and carriers to transact rail transportation in this way. 1 S.T.B. at 1070, citing H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 98-101 (1980).

For all of these reasons, we conclude that, under the circumstances presented here, UP is not permitted to effectively negate a transportation contract negotiated with a connecting carrier, but rather is obliged to provide

¹¹ UP cites *Great Northern Ry. v. Sullivan*, 294 U.S. 458, 463 (1935). That precedent, together with the impact of the more recent statutory provisions regarding contracting, was fully addressed in *Bottlecks*.

proportional rates that could be used by FMC in conjunction with the CSXT rail transportation contracts.¹²

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. A copy of this decision will be served on CSX Transportation, Inc. If CSXT does not intend for its contract with FMC to govern the movements of soda ash through Chicago and East St. Louis, it shall so inform the Board by December 23, 1997.

2. Absent a CSXT statement that the transportation contract it entered into with FMC is not intended to govern the movement of soda ash through Chicago and East St. Louis, UP shall establish by December 30, 1997, a common carriage rate to those gateways that can be used by FMC in conjunction with the CSXT transportation contract.

3. This decision is effective on December 16, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.

¹² Because the Chicago and East St. Louis gateways are traditional interchange points between these carriers for this traffic, we are not faced with a concern that the bottleneck carrier might be shorthauled or required to participate in an inefficient routing.