STB DOCKET NO. 42022

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

Decided April 15, 1998

The Board limits information on product and geographic competition that a railroad can seek through discovery in a proceeding challenging the reasonableness of railroad rates.

BY THE BOARD:

On March 20, 1998, FMC Wyoming Corporation and FMC Corporation (FMC) filed a timely appeal from an order of an Administrative Law Judge (ALJ) compelling FMC to produce certain discovery materials. Defendant Union Pacific Railroad Company (UP) filed a reply on March 25, 1998, and an errata supplement on March 27, 1998. We find merit in FMC's position, and we are furnishing guidance regarding the role and permissible scope of discovery.[1]

BACKGROUND

By a verified complaint filed October 31, 1997, FMC alleges that UP possesses market dominance over the transportation of FMC's mineral products[2] between certain origins and destinations and/or interchanges in Wyoming, Idaho, Missouri, Illinois, Oregon, and Kansas, and that the rates assessed for this transportation exceed a maximum reasonable level. UP filed an answer on

[1] The specific elements of disputed discovery are not discussed in the parties' submissions. The guidance we provide here is based on our market dominance guidelines and our understanding of the parties' factual dispute as reflected in the record. Practical resolution of the disputed matters is left to the parties and to the ALJ.

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

November 20, 1997, alleging, as pertinent here, that it lacks market dominance because the traffic at issue is subject to effective product and geographic competition.

On November 7, 1997, UP served on complainants broad interrogatories and requests for production of documents, most of which were directed to market dominance issues relating to product and geographic competition.[3] FMC resisted the expansive nature of the discovery requests.[4] UP then filed a motion to compel discovery, on December 12, 1997, and a supplemental memorandum on December 18, 1997. In its motion to compel, UP 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 market dominance allegations. Finally, UP contends that it needs document discovery to prepare for the taking of depositions.[5]

In a December 19, 1997, response to UP's motion to compel, FMC argues that product and geographic competition are relevant to the market dominance inquiry only if they operated as actual constraints on UP's ratemaking.[6] Competitive factors outside UP's prior knowledge assertedly fail this test and could serve only as post hoc rationalizations. UP claims that it seeks such discovery "not for purposes of crafting new competitive theories, but to obtain evidence from a highly probative source — FMC's own internal documents — that will decisively confirm UP's understandings about this competition and its effectiveness." UP reply at 13.

In decisions served February 5 and 12, 1998, these and other discovery matters were assigned to ALJ Joseph Nacy of the Federal Energy Regulatory Commission for resolution. A conference was held on March 17, 1998, wherein

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[3] UP sought generalized information dating back to January 1, 1990, regarding alternative sources, possible substitute products, and end-product uses for each of the commodities at issue.

[4] FMC's General Response No. 9 states: "FMC objects to providing responses to any Interrogatory or Document Production Request that seeks generalized information pertaining to product or geographic competition on the grounds that such information cannot be an effective constraint on the UP's rates unless UP is already aware of the information * * *. Accordingly, such information is irrelevant and production of such information is unduly burdensome." Response of FMC to UP's first set of interrogatories, dated November 24, 1997 (Appendix B to UP's motion to compel).

[5] On December 10, 1997, UP served notice of its intent to take depositions of four named FMC employees, 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. FMC filed a motion for protective order on December 22, 1997, to bar the taking of depositions. UP responded on December 29, 1997.

[6] On December 24, 1997, UP filed a surreply in support of its first motion to compel. It requested permission to file in the document.

Judge Nacy ruled orally on the disputed discovery matters.[7] Specifically, the ALJ ruled that FMC must produce documents and other information relating to product and geographic competition (Transcript at 47), dating back to July 1, 1991.[8] The parties then agreed to attempt to reach an accommodation on revisions to UP's discovery request, with resort to the ALJ in the event of further impasse (Transcript at 55). Negotiations continue during the pendency of this appeal, and UP indicates in its reply that it submitted revised discovery requests to FMC on March 23, 1998.

DISCUSSION AND CONCLUSIONS

Interlocutory appeals of an ALJ's decision are governed by 49 CFR 1115.9. While we generally apply a highly deferential standard of review to such appeals, we will hear this appeal because the issues raised are central to the administration of our market dominance guidelines. *See, Market Dominance Determinations*, 365 I.C.C. 118 (1981) (*MD Guidelines I*), *aff'd sub nom. Western Coal Traffic League v. United States*, 719 F.2d 772 (5th Cir. 1983) (*en banc*), *cert denied*, 466 U.S. 953 (1984), *modified in Product and Geographic Competition*, 2 I.C.C.2d 1 (1985) (*MD Guidelines II*). Initially, these guidelines required that:

> if a railroad seeks a finding of no market dominance based on product or geographic competition it must identify where it believes such competition exists. Once the railroad has made this identification, the shipper has the burden of proving that the product or geographic competition identified by the railroad is not effective.

MD Guidelines I, 365 I.C.C. at 132. The guidelines were later modified to place "both the burden to identify [product and geographic] competition and to prove that it is effective on the rail carrier in all cases." *MD Guidelines II*, 2 I.C.C.2d at 15. This allocation of the burden of proof was intended not only to remove an undue burden from complaining shippers, but also to reduce discovery disputes and to expedite the market dominance phase of rate reasonableness proceedings. *Id.*

Here, it appears that UP is improperly attempting to shift the burden of identifying product and geographic competition back to FMC through the discovery process. For example, interrogatory 13 of UP's first set of

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[7] The ALJ's rulings are contained in the official transcript of the hearing.

[8] This is a compromise cutoff date applicable to any discovery with respect to which a specific cutoff date was not prescribed (Transcript at 119, 129).

interrogatories asks FMC to identify "all products or processes that have or could be used as a substitute for coke in the production of phosphorus." If UP believes that another product could be substituted for coke, its interrogatory should have specifically sought information related to that alternative product. As framed, the interrogatory would inappropriately shift to FMC the burden of identifying product substitutes for coke.

Under our market dominance guidelines, 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. With this further guidance, we urge the parties to move the discovery phase of this proceeding along quickly and we instruct the ALJ to take such steps as necessary to conclude discovery.

It is ordered:

1. Discovery in this proceeding should be conducted consistent with the foregoing guidance.
2. This decision is effective on April 17, 1998.

By the Board, Chairman Morgan and Vice Chairman Owen.