STB EX PARTE NO. 627

MARKET DOMINANCE DETERMINATIONS--PRODUCT AND GEOGRAPHIC COMPETITION

Decided December 10, 1998

The Board decides that it will no longer consider evidence of product and geographic competition in market dominance determinations.

BY THE BOARD:

In a notice of proposed rulemaking (NPR) served May 12, 1998,[1] we solicited comments on whether product and geographic competition should be eliminated as factors in determining in a rail rate case whether the defendant railroad has market dominance over the traffic involved. Market dominance "means an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies," 49 U.S.C. 10707(a), and is a prerequisite to our jurisdiction to review the reasonableness of a challenged rail rate, 49 U.S.C. 10701(d)(1), 10707(b), (c). We currently consider four types of competition in our market dominance analysis:

- *intramodal* (*i.e.*, whether the complaining shipper can use other railroads to transport the same commodity between the same points);
- *intermodal* (*i.e.*, whether the complaining shipper can use other transportation modes, such as trucks or barges, to transport the same commodity between the same points);
- *geographic* (*i.e.*, whether the complaining shipper can avoid using the defendant railroad by obtaining the same product from a different source, or by shipping the same product to a different destination); and
- *product* (*i.e.*, whether the complaining shipper can avoid using the defendant railroad by shipping or receiving a substitute product).

[1] Published at 63 Fed. Reg. 24,588 (1998).

As both the record here and many years of experience in rail rate cases demonstrate, consideration of product and geographic competition significantly impedes the efficient processing of such cases. Accordingly, to comply with both the recent legislative directive to process rate complaints more expeditiously and the long-standing Congressional intent that market dominance be a practical determination made without delay, we will limit the evidence that can be considered to only that required by the statute, *i.e.*, competition "for the transportation to which a rate applies." We believe that the limited impact on the rail industry from this decision is far outweighed by the chilling effect that inclusion of product and geographic competition can have on the filing of valid rate complaints by captive shippers and on the resolution of rate complaints in a timely manner. And we also believe that negating this chilling effect will further level the playing field between railroads and shippers to the extent that disputes will be resolved in the private sector.

BACKGROUND

Prior to 1976, all rail rates were subject to government oversight to enforce the statutory requirement that rates be "just and reasonable." In Section 202(b) of the 4R Act,[2] Congress limited regulatory jurisdiction over the reasonableness of railroad rates to those instances where the railroad involved has market dominance.[3] The 4R Act delegated to our predecessor -- the Interstate Commerce Commission (ICC) -- the task of establishing standards and procedures for determining market dominance in rate cases, but expressly directed that those standards and procedures be "designed to provide for a practical determination without administrative delay."[4] Protracted antitrust-type litigation was not envisioned.[5] The determination of market dominance was "not designed to be an ultimate regulatory standard," but rather was intended only to serve as "a threshold test to direct the [agency's] regulatory activities into areas where the public interest needs protection."[6]

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[2] Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976).

[3] Former 49 U.S.C. 1(5)(c)(i) (1976), recodified at former 49 U.S.C. 10709(a) (1995) and now set forth in current 49 U.S.C. 10707(a) (1996). Unless described as "former," all statutory references in this decision are to the current provisions of the law.

[4] Former 49 U.S.C. 1(5)(d) (1976).

[5] S. Rep. No. 499, 94th Cong., 1st Sess. 47 (1976), *reprinted in* 1976 U.S.C.C.A.N. 61.

[6] *Id.*

In 1976 the ICC adopted its *Market Dominance I* rules,[7] setting out the factual situations that would trigger a rebuttable presumption of market dominance. In developing the rebuttable presumption test, the ICC explained that the 4R Act granted the agency broad discretion to devise rules to implement the market dominance concept, and that any rules need to be practical and capable of prompt administrative application.[8] Accordingly, the ICC declined to consider the effects of product and geographic competition on a railroad's ability to set its rates, out of concern that the introduction of such considerations would require extensive fact-finding and produce lengthy antitrust-type litigation.[9]

On judicial review, the United States Court of Appeals for the District of Columbia Circuit upheld the ICC's general approach but remanded the case for the limited purpose of clarifying one of the presumptions.[10] Against arguments that it was error for the ICC not to consider product and geographic competition, the court found "sufficient basis in the statutory language and purpose to merit our deferral to the [ICC's] view."[11] The court recognized that consideration of product and geographic competition could embroil the agency in highly complex evidentiary proceedings, thereby delaying the market dominance determination.[12]

The ICC changed its approach regarding product and geographic competition in 1979. Believing that consideration of product and geographic competition evidence would not necessarily conflict with the statutory directive to make practical market dominance determinations without administrative delay, the agency sanctioned the introduction of such evidence in rebuttal to show that effective competition exists.[13]

In January 1980, the ICC proposed to revamp its market dominance regulations by employing a single revenue/variable cost test as a threshold indicator of market dominance and by considering any relevant evidence, including evidence of product and geographic competition, to demonstrate the existence of effective competition.[14] While that proceeding was underway,

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[7] *Special Proc. for Findings of Market Dominance*, 353 I.C.C. 875 (1976).
[8] *Id.* at 886.
[9] *Id.* at 905-06, 942-43.
[10] *Atchison T.&S.F. Ry. v. ICC*, 580 F.2d 623 (D.C. Cir. 1978).
[11] *Id.* at 634.
[12] *Id.*
[13] *Special Proc. for Findings of Market Dominance*, 359 I.C.C. 735, 736 & n.7 (1979).
[14] *Rail Market Dominance and Related Considerations*, Ex Parte No. 320 (Sub-No. 1) (ICC served January 17, 1980), 45 Fed. Reg. 3533 (1980).

Congress enacted the Staggers Act[15] to further reform railroad regulation. In the Staggers Act, Congress added a new provision exempting from regulation rail rates yielding revenue/variable cost ratios below certain levels,[16] but otherwise left it to the agency's discretion how to administer the market dominance test.[17]

Following enactment of the Staggers Act, the ICC withdrew its earlier proposal and, in 1981, replaced its original presumptive scheme for making market dominance determinations with guidelines that explicitly provide for evidence on intramodal, intermodal, product and geographic competition.[18] The ICC addressed in detail its reasons for reversing its original 1976 ruling declining to consider the impact of product and geographic competition on a rail carrier's pricing discretion.[19] Examining the statutory language, the ICC first found that consideration of product and geographic competition was not precluded.[20] The ICC reasoned that, if evidence of product and geographic competition could practically be submitted and evaluated, Congress would want that evidence considered.[21] The ICC then concluded that, with appropriate guidelines, evaluation of product and geographic competition could be manageable.[22]

The decision to consider product and geographic competition was judicially challenged. A panel of the United States Court of Appeals for the Fifth Circuit initially held that the statute "limits the definition of market dominance to transportation of the same product from the same origin to the same destination,"and overturned the ICC's decision to consider product and

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[15] Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980).

[16] Former 49 U.S.C. 10709(d)(2); current 49 U.S.C. 10707(d)(2). Introduction of the revenue/variable cost threshold was not intended "in any way to restrict the ability of the [ICC] to apply [the market dominance] concept, both in its regulations and individual cases." H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 89 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4120.

[17] Congress considered, but did not adopt, a legislative proposal that would have imposed specific statutory criteria expressly requiring the ICC to consider product and geographic competition in the market dominance determination. H.R. Rep. No. 1035, 96th Cong., 2d Sess. 55-56 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4000-01.

[18] *Market Dominance Determinations*, 365 I.C.C. 118 (1981) (*Market Dominance II*).

[19] As noted, the ICC had effectively reversed its original approach in 1979 (*see, Special Proc. for Findings of Market Dominance*, 359 I.C.C. at 736 n.7) and had been considering product and geographic competition since then (in rebuttal evidence). Indeed, the ICC was criticized by a Congressional oversight committee for accomplishing that result without proceeding by rulemaking. *Railroad Coal Rates and Public Participation: Oversight of ICC Decisionmaking, Report of the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce*. Print 96-IFC40, 96th Cong., 2d Sess. (1980).

[20] *Market Dominance II*, 365 I.C.C. at 129.

[21] *Id.* at 130.

[22] *Id.* at 130-31.

geographic competition in making the market dominance determination.[23] On *en banc* review, the full court concluded that the statute did not preclude consideration of evidence on product and geographic competition and reversed the earlier panel decision.[24] In sanctioning the use of product and geographic competition evidence in the market dominance determination, the court stated (719 F.2d at 779) that in:

> [r]efusing to set forth a rigid standard for determining when effective competition exists, Congress authorized the ICC to establish appropriate standards and procedures for determining when market forces suffice to regulate rail rates. The ICC is in the best position to determine whether product and geographic competition play a role in the day-to-day fluctuation in rail rates and whether consideration of such evidence is feasible within the requirements of the 4R Act.

The court cautioned (*id.* at 780), however, as especially pertinent here, that:

> only experience will demonstrate the ability of the [agency] to manage its new guidelines. As the D.C. Circuit noted in *Atchison, T. & S.F. Railroad v. ICC*, 580 F.2d at 640, 'the courts remain open if the [agency] is * * * unwilling to undertake appropriate reconsideration and fine tuning in the light of experience.'

Under *Market Dominance II*, the complainant had the burden of establishing that intramodal and intermodal competition do not effectively constrain rail rates, as well as the burden of demonstrating that any product and geographic competition that has been identified by the railroad would not effectively limit the defendant carrier's rates. However, shippers encountered difficulty trying to prove a negative proposition -- that product or geographic competition identified by a railroad was not an effective constraint on rail rates. To address this problem, the ICC in 1985 modified the market dominance procedures to make them more practical, by shifting the burden of establishing the effectiveness of product and geographic competition to the railroads.[25] The agency hoped that this reallocation of the burden of proof would "reduce discovery disputes and expedite the market dominance phase of maximum rate reasonableness proceedings."[26]

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[23] *Western Coal Traffic League v. United States*, 694 F.2d 378, 382 (5th Cir. 1982).

[24] *Western Coal Traffic League v. United States*, 719 F.2d 772 (5th Cir. 1983) (*en banc*).

[25] *Product and Geographic Competition*, 2 I.C.C.2d 1 (1985).

[26] *Id.* at 15. That objective has not been entirely successful. *See, FMC Wyoming Corp. & FMC Corp. v. Union Pacific RR Co.*, 3 S.T.B. 88 (1998), pet. for clarification denied (May 5, 1998), motion to compel discovery denied (August 31, 1998) (*FMC*) (finding that through discovery the

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In applying its revised market dominance guidelines, the ICC in fact found that product or geographic competition provided effective competition for certain traffic in several cases.[27] However, in each case, it took years to collect the evidence and make that determination.

In the *ICCTA*,[28] Congress retained both the market dominance requirement and broad agency discretion to revise the market dominance guidelines as appropriate.[29] Congress also stressed the need to expedite cases. It added a new provision to the national rail transportation policy calling for the "expeditious handling and resolution of all proceedings." 49 U.S.C. 10101(15). It further instructed the Board to establish "procedures to ensure expeditious handling of challenges to the reasonableness of railroad rates. The procedures shall include appropriate measures for avoiding delay in the discovery and evidentiary phases of such proceedings." 49 U.S.C. 10704(d). Congress also placed time limits on our deliberations in rate reasonableness cases. 49 U.S.C. 10704(c).[30]

In response to the statutory directive to find ways to expedite rail rate cases, we imposed new documentation and processing requirements on parties, altered the evidentiary and discovery procedures, and eliminated layers of administrative review.[31] We also considered conducting the market dominance

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[26](...continued)
burden of identifying and developing evidence on product and geographic competition was being improperly shifted onto the shipper).

[27] *E.g., Consolidated Papers, Inc. v. Chicago & N.W. Transp. Co.*, 7 I.C.C.2d 330 (1991); *Coal Trading Corp. v. Baltimore & O.R.R.*, 6 I.C.C.2d 361 (1990); *Westmoreland Coal Sales Co. v. Denver & Rio Grande W.R.R.*, 5 I.C.C. 2d 751 (1989).

[28] *ICC Termination Act of 1995*, Pub. L. No. 104-88, 109 Stat. 803 (1995).

[29] *See*, H.R. Conf. Rep. No. 422, 104 Cong., 1st Sess. 173 (1995), *reprinted in* 1995 U.S.C.C.A.N. 858:

> Although the conference provision does not disturb the existing statutory standard or the current agency regulations implementing the market-dominance standard, the Conference recognizes that the agency has broad discretion to consider additional factors such as the availability of other forms of transportation and other economic alternatives, and to revise and supplement its existing standards and regulations as appropriate.

[30] In addition, Congress instructed us to quickly complete a rulemaking "to establish a simplified and expedited method for determining the reasonableness of challenged rail rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case." 49 U.S.C. 10701(d)(3). *See, Rate Guidelines-Non-Coal Proceedings*, 1 S.T.B. 1004 (1996), *pet. for review dismissed sub nom. Association of Am. Railroads v. Surface Transp. Bd.*, 146 F.3d 942 (D.C. Cir. 1998).

[31] *Expedited Procedures For Processing Rail Rate*, 1 S.T.B. 754 (1996), and 1 S.T.B. 859 (1996), *aff'd sub nom. United Transp. Union-Ill. Legis. Bd. v. Surface Transp. Bd.*, 132 F.3d 71 (D.C. Cir. 1998).

phase of a case first, bifurcating it from the rate reasonableness phase, so that we could better meet the original Congressional objective of a practical determination made without administrative delay.[32] However, shippers expressed their fear that such an approach would further delay, rather than expedite, rate cases. The railroads also objected to that approach, arguing that market dominance evidence could not be developed that rapidly because discovery (often extensive) had to be undertaken in order to present evidence of product and geographic competition.[33] Therefore, we decided not to make that change, but instead provided that parties should complete all discovery within a 75-day period at the outset of a case.[34]

Despite our earnest efforts, rail rate cases have been difficult to expedite. In the *West Texas* case,[35] for example, it took nearly 2 years just to build the evidentiary record, and in the *Arizona* case,[36] it took well over 2 years. The product and geographic competition issues contributed significantly to the length and complexity of both of those cases. And in *FMC*, the first rate case filed after the *Expedited Procedures* rules were put into place, disputes over product and geographic competition materials have extended the discovery period for almost a full year — far beyond the 75-day period contemplated in *Expedited Procedures* — and concomitantly delayed evidentiary submissions.

The result is not simply administrative delay. The record indicates that the prospect of protracted litigation on issues of product and geographic competition discourages captive shippers from seeking legitimate rate relief through the regulatory avenue that Congress has provided. This was a recurring complaint voiced by rail shippers at the hearings that we conducted in April 1998, at the request of Congress, to examine issues of rail access and competition in today's railroad industry.[37] Consideration of product and geographic competition issues, shippers charge, has transformed the threshold market dominance phase of a rail

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[32] *Expedited Procedures For Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings*, Ex Parte No. 527 (STB served July 22, 1996) (*Expedited Procedures*).

[33] *Ex Parte No. 527*, August 22, 1996 comment of AAR at 23-27.

[34] *Expedited Procedures For Processing Rail Rate*, 1 S.T.B. at 760. Parties have not been able to adhere to this 75-day time frame for discovery. *See, FMC* (STB served October 28, 1998) (notice announcing resolution of discovery disputes almost a full year after the underlying rate complaint was filed).

[35] *West Texas Utilities Company v. Burlington Northern RR Co.*, 1 S.T.B. 638 (1996), *aff'd sub nom. Burlington N.R.R. v. Surface Transp. Bd.*, 114 F.3d 206 (D.C. Cir. 1997).

[36] *Arizona Public Service Co. v. Atchison, T. & SF. Ry .Co.*, 2 S.T.B. 367 (1997), modified at 3 S.T.B. (1998).

[37] *Review of Rail Access & Competition Issues*, 3 S.T.B. 92 (1998) (summarizing hearings).

rate complaint into separate, full-blown antitrust-style litigation of its own that has chilled pursuit of rate relief as envisioned by Congress.

The concerns voiced at the hearing, together with our own recent experiences in attempting to expedite rail rate cases, prompted us to reexamine whether the ICC had been correct in the first instance, in *Market Dominance I* — that consideration of product and geographic competition so complicates rail rate cases as to be administratively impractical.[38] We are concerned, as Congress was in adopting the market dominance requirement, that captive shippers have real (and not merely theoretical) access to the Board for legitimate complaints. Accordingly, we instituted this proceeding.

POSITION OF THE PARTIES

In response to the NPR, we received comments from 20 interested parties.[39] In general, the railroad interests, UTU-IL and DOT favor retaining product and geographic competition in the market dominance analysis, while shipper interests support its elimination. Within these seemingly polarized views, however, is significant common ground.

Many shippers acknowledge that product and/or geographic competition can effectively constrain a railroad's rates, especially when such competition provides a direct transportation alternative.[40] However, in such circumstances,

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[38] *Review of Rail Access & Competition Issues*, 3 S.T.B. 92 (1998), *modified* (May 4, 1998).

[39] Opening comments ("Open.") were filed by the Association of American Railroads (AAR); AG Processing, Inc. (AGP); Chemical Manufacturers Association (CMA); Consumers United For Rail Equity (CURE); Edison Electric Institute and The Fertilizer Institute (EEI/Fertilizer); FMC Corporation (FMC); Martin Marietta Materials, Inc. (Martin Marietta); National Grain and Feed Association (NGFA); National Industrial Transportation League (NITL); North Dakota Public Service Commission, North Dakota Grain Dealers Association, and North Dakota Wheat Commission (N. Dakota Group); Northern States Power Company, Northern Indiana Public Service Company, TUCO, Inc. and New Century Energy (N. States Group); PP&L, Inc. (PP&L); Shell Oil Company and Shell Chemical Company (Shell); The Society of the Plastics Industry, Inc. (Plastics); Texas Municipal Power Agency, City Utilities of Springfield, Missouri, and Salt River Project Agricultural Improvement and Power District (Texas Pwr. Group); U.S. Clay Producers Traffic Association (Clay); U.S. Department of Agriculture (USDA); U.S. Department of Transportation (DOT); United Transportation Union-Illinois Legislative Board (UTU-IL); and Western Coal Traffic League and The National Mining Association (WCTL).

Reply comments ("Reply") were filed by AAR; DOT; EEI/Fertilizer, Plastics, CMA, and N. States Group jointly; FMC; Martin Marietta; NGFA; NITL and Clay jointly; N. Dakota Group; PP&L; Shell; UTU-IL; and WCTL and Texas Pwr. Group jointly.

[40] They concur in AAR's example (AAR Open. at 2) of a utility that is served by two railroads, where each railroad serves a different mine capable of providing suitable coal to the utility. *See, e.g.*,

(continued...)

AAR agrees that rate complaints are unlikely to be filed with the Board, because rate litigation is a costly, time-consuming and thus an ineffective means of obtaining competitive rates when actual competitive options give shippers negotiating leverage.[41]

Similarly, the railroads do not dispute that the development and presentation of evidence on product and geographic competition can be complicated and prolong a rate case.[42] The parties differ, however, on how this problem should be addressed. AAR suggests that the problems can be addressed satisfactorily through procedural reforms, such as our recent attempts in the *FMC* case to discipline the discovery process.[43] DOT agrees and suggests more specifically that railroads not be permitted to engage in any discovery as to product and geographic competition.[44] The shippers respond that merely eliminating discovery would not avoid the burdens of addressing product and geographic competition in a case.[45] They maintain,[46] and AAR appears to agree,[47] that sufficient data is available in the public domain to permit the crafting of elaborate antitrust-type arguments as to the existence of indirect competitive pressures (such as a shipper's ability to change its operations so as not to be dependent on rail service) and that it would thus remain quite costly and burdensome for a complaining shipper to respond to such arguments.

DISCUSSION AND CONCLUSIONS

We must first consider whether the statute requires that evidence of product and geographic competition be considered in the market dominance analysis, as AAR suggests.[48] Section 10707(a) asks only whether any mode of transportation provides effective competition "for the transportation to which a

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[40](...continued)
Martin Marietta Reply at 6, 8; FMC Reply at 7; WCTL Reply at 7-9.

[41] AAR Reply at 17.

[42] AAR Reply at 18; NGFA Reply at 8 (quoting AAR comments in *Expedited Procedures*).

[43] AAR Open. at 4, 30; AAR Reply at 19-21.

[44] DOT Open. at 5-6; DOT Reply at 3. DOT reasons that, if product and geographic competition have limited a railroad's pricing ability, the carrier must be aware of such constraining factors and does not need to burden the shipper with discovery. AAR counters that being aware of competitive pressures on rates and having the evidence to prove that matter to the Board are quite different matters and that discovery is needed for the latter. AAR Reply at 21-22.

[45] FMC Reply at 11; NITL Reply at 4.

[46] PP&L Open. at 25-27; FMC Reply at 11.

[47] AAR reply at 12; V.S. Sansom at 10.

[48] AAR asserts that product and geographic evidence "could only be ignored if the statute forbade the consideration of these categories of competition." AAR Reply at 8.

rate applies." Thus, the plain language of the statute only requires that we consider alternatives for moving the same product between the same origin and destination points. *Accord, Market Dominance I*, 353 I.C.C. at 904 ("[l]imiting [the market dominance] consideration to direct carrier competition is consistent with the express language of the legislative definition, and is essential to making practical determinations in a short time period."); *Market Dominance II*, 365 I.C.C. at 129 ("Congress did not explicitly include or exclude geographic and product competition [*i.e.*, indirect competition] from its definition of market dominance."). In other words, inclusion of product and geographic competition, although permissible (if it can be practicably considered), is not required. *Atchison T.&S.F. Ry. v. ICC*, 580 F.2d at 633-34; *Western Coal Traffic League v. United States*, 719 F.2d at 778-799. Indeed, Congress has repeatedly declined to impose further specificity, leaving it to the agency's discretion as to how to practically apply the market dominance concept. *See,* n. 17 and n. 29, *supra*.

Given the broad discretion we have to administer the market dominance provisions of the statute in a practical manner, we now consider how we should exercise that discretion. The issue before us is not whether product and geographic competition are potentially relevant factors,[49] but whether their consideration is unduly burdensome and, if so, how best to reform our market dominance process.

Based on both the record here and the many years of experience that have been gained from including product and geographic competition in the market dominance analysis, there can be no question that the inclusion of these factors imposes substantial burdens on both the parties and this agency.[50] The added burden on the parties is amply demonstrated by the approximately 400 discovery requests made by the defendant railroad in the *FMC* case — most of which were addressed to product and geographic competition. That case is not unusual; in many rate cases the number of discovery questions that have been posed in order to develop evidence on product and geographic competition have numbered in the hundreds.[51]

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[49] We have no doubt that in certain circumstances product and geographic competition effectively limit railroad pricing, as the ICC in fact found in several cases. *See,* n.17, *supra; see also,* USDA Open. at 4; CURE Open. at 11; EEI et al. Reply, V.S. Schmitz at 2. Indeed, many commenting shippers agree with the examples of product and geographic competition set forth in the AAR's comments. *See,* n.40, *supra*.

[50] AGP Open. at 2-3 (litigation involving product and geographic competition issues is one of the more costly aspects of rate litigation).

[51] NITL Open. at 7; PP&L Open. at 2; NGFA Open. at 7; Shell Open. at 5; FMC Reply at 10-11; EEI et al. Reply at 10.

Consideration of product and geographic competition also imposes substantial burdens on us that extend the processing of rate cases. For example, in several recent cases challenging the rates charged for transporting coal to a utility,[52] the railroads asserted that a utility's ability to substitute power from different plants, either within or outside its immediate system, effectively disciplined the railroads' rates because a utility could in theory idle or reduce power production at the plant at issue. The argument was also made that a utility could switch coal types (*e.g.*, from low sulfur coal to mid-sulfur coal, coupled with the purchase of emission allowances to comply with the Clean Air Act). These arguments required us to examine in depth the economics associated with producing and distributing electric power. It has also been suggested that, because utilities are interconnected via the power grid, the ability to burn fuel and produce power at various plants gives rise to effective geographic competition. Again, these arguments have required us to address complex non-transportation issues, such as the functioning of the power transmission grid, thus significantly complicating and prolonging an analysis of the record. As PP&L correctly observed,[53] engaging in this type of analysis requires us to "second-guess" shipper management about issues of fuel supply, environmental compliance and plant design and operation. Pursuing such analyses makes it very difficult for us to expedite the market dominance determination.

The need to delve deeply into industrial operations that are far removed from the transportation industries that we regulate, in order to properly consider product and geographic competition, is not limited to the utility industry. For example, the ICC's market dominance analysis in one case turned upon the ability of a paper manufacturer to alter its production process to use locally available wood rather than the wood brought in by railroad.[54] Similarly, in two cases involving the transportation of aluminum, the agency examined whether end users of the shipper's aluminum containers could switch to plastic or glass containers.[55]

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[52] *West Texas, Arizona*, and *Potomac Electric Power Co. v. CSX Transportation, Inc.*, No. 41989 (STB served June 18, 1998) (case settled after completion of evidentiary record).

[53] PP&L Open. at 27.

[54] *Consolidated Papers, Inc. v. Chicago & N.W. Transp. Co.*, 7 I.C.C.2d 330 (1991). In that decision, the ICC reversed earlier ALJ and Review Board decisions. As the joint reply of WCTL and Texas Pwr. Group points out (at 16), there has often been a lack of consensus over what constitutes effective product or geographic competition and findings on the subject have often been modified on administrative appeal, thus prolonging the ultimate resolution of the proceeding.

[55] *Aluminum Co. of America v. Burlington N., Inc.*, No. 37715S (ICC served April 11, 1983); *Aluminum Ass'n v. Akron, C.&Y.R.R.*, 367 I.C.C. 475 (1983).

In short, the time and resources required for the parties to develop, and for us to analyze, whether it would be feasible for a shipper to change its business operations (by changing its suppliers, customers, or industrial processes) so as to avoid paying the challenged rail rate can be inordinate.[56] We conclude that we can more expeditiously, efficiently and effectively carry out our mandated functions by limiting the market dominance inquiry to the scope expressly required by the statute.[57]

In reaching this conclusion, we are mindful of the impacts of our action on both the rail industry and the shipper community. We recognize that, by excluding product and geographic competition, railroads potentially could have to defend themselves against challenges to some rates that have been affected by indirect competition. But this should not result in substantial hardship to the rail industry for several reasons. First, as the parties acknowledge, if there are product and geographic competitive alternatives that are obviously effective, a shipper would be unlikely to pursue a regulatory rate challenge. Second, having to defend the reasonableness of the rate in cases where product and geographic competition arguably could be found to effectively constrain the rate level imposes no additional burden on the railroads, because under our present procedures we generally do not bifurcate rate cases into separate evidentiary phases for the market dominance and rate reasonableness issues.[58] Therefore, a carrier is generally required to fully defend the reasonableness of its rate before we make the market dominance determination.[59] Finally, a rate level that is constrained by effective competitive alternatives would doubtless be found reasonable, as AAR acknowledges.[60]

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[56] *Accord, Market Dominance I*, 353 I.C.C. at 906.

[57] *Cf. Intramodal Rail Competition*, 1 I.C.C.2d 822, 830 (1985), where the ICC adopted rules declining to consider product competition in evaluating the need for competitive access. There, the agency observed that:

> [b]ecause product competition is the least direct of all forms of competition, it tends to be both the most difficult to demonstrate and the least often shown to be effective. Subissues regarding the substitutability of products are not within our primary area of expertise and divert significant time and effort (both by the parties and the [agency]) away from consideration of the many issues more likely to affect our ultimate determination in the case.

[58] *See, e.g.*, 49 CFR 1111.8.

[59] As noted above, both shippers and railroads objected to our earlier proposal to bifurcate the market dominance and rate reasonableness phases of rate cases.

[60] *See,* AAR Open., Joint V.S. of Kalt and Willig at 17. When effective product or geographic competition is present but difficult to demonstrate, the carrier will be no worse off if the effectiveness of this competition is determined by a complicated antitrust-type market dominance analysis or (continued...)

In sharp contrast to the limited effect on railroads from eliminating product and geographic competition from the market dominance determination, the harm to the shipper community from continuing to consider such evidence can be substantial and irreparable.[61] The shipper interests that have participated in this proceeding, representing both larger shippers and smaller shippers, are unanimous in their representations that the prospect of engaging in substantial threshold litigation relating to product and geographic competition is an overwhelming obstacle that dissuades shippers from bringing valid rate complaints to the Board. In other words, it appears that the burdens associated with litigating product and geographic competition issues may serve to deny captive shippers with valid claims access to the Board and thus their only avenue of rate relief.[62]

On balance,[63] there is no question that the scale tips in favor of limiting the market dominance inquiry to the literal statutory requirement. Any harm to railroads is minimal and must give way in order to remove a substantial obstacle to the shippers' ability to exercise their statutory rights. By this leveling of the playing field, it is not our intent to encourage shippers to file more complaints with the Board. As the parties here recognize, litigation is the least efficient manner for shippers and railroads to set rate levels.[64] Rather, we expect the primary result of our action here, giving shippers real access to relief, will be to encourage more private-sector resolutions of disputes between captive shippers and the railroads serving them.

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[60](...continued)
confirmed by the rate reasonableness analysis. Conversely, if there is not effective competition, then a protracted examination of product and geographic competition, followed by an expensive and time-consuming rate analysis, works to the detriment of all parties. Only if the prospect of such an onerous regulatory process deters the filing of a rate complaint would the railroads benefit. However, the market dominance requirement should not be used as a litigation weapon, and Congress certainly does not intend for it to be used to chill pursuit of legitimate rate relief as envisioned under the statute.

[61] FMC Open. at 3, 8 (product and geographic discovery in *FMC* likely to cost in excess of $1 million); PP&L Open. at 16 (consideration of product and geographic competition prices relief out of shippers' reach); Shell Reply at 7 (litigation costs can prevent rate challenges by small companies).

[62] 49 U.S.C. 10501(b) (Board's jurisdiction over rates is exclusive).

[63] AAR argues (reply at 8) that a balancing test "is neither envisioned by nor permitted under the statutory scheme." But Congress envisioned a balancing test from the beginning by instructing the agency to develop procedures to provide for a "practical" determination of market dominance. *Atchison T.&S.F. Ry. v. ICC*, 580 F.2d at 633 (statute requires that the market dominance process be manageable).

[64] WCTL Reply at 9 (elimination of product and geographic competition should not lead to a "rash of new rate cases").

We certify that this action will not have a substantial adverse impact upon a significant number of small entities. To the extent that small entities may be affected, the impact will be beneficial, because it will enable the affected shippers to avail themselves of their statutory rights more quickly and at reduced cost.

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

It is ordered:

(1) The Board will no longer consider evidence of product and geographic competition in market dominance determinations.

(2) This decision will be effective January 17, 1999.

By the Board, Chairman Morgan and Vice Chairman Owen.