

**SURFACE TRANSPORTATION BOARD MOVES TO END DISCOVERY DISPUTES, PROCEED WITH FMC CORP.
CHALLENGE TO UNION PACIFIC RATES**

Surface Transportation Board (Board) Chairman Linda J. Morgan announced today that the Board has taken steps to end long-running disputes over discovery in a complaint challenging the reasonableness of rates assessed by the Union Pacific Railroad (UP) for transporting various mineral products for FMC Wyoming Corporation and FMC Corporation (FMC).

The Board has jurisdiction to consider a challenge to a railroad's rates only if the carrier has market dominance over the traffic involved, that is, if there is no effective competition constraining the carrier's pricing. In making a market dominance determination, the Board considers direct competitive alternatives, that is, whether other railroads (intramodal competition) or other modes of transportation (intermodal competition) can effectively provide the transportation services needed by a shipper. In addition, a railroad may ask the Board to consider whether product or geographic competition (the availability of substitute products from other carriers, or the ability to ship the same product from other sources or to other destinations) will be sufficient to effectively constrain a carrier's pricing.

In the proceeding challenging the rates charged for transporting mineral products from several western and midwestern sites, UP had sought broad discovery from FMC on whether FMC could obtain its products from alternative sources, or whether it could use substitute products. Under the Board's procedural regulations, discovery in cases such as this one is generally to be completed within 75 days. Here, FMC objected to UP's broad discovery, arguing that product or geographic competition are relevant to the market dominance inquiry only if they operate as actual constraints on a railroad's ratemaking, and that a carrier should know--without needing discovery from its customers--if such competition actually constrained the challenged rate level. The Board agreed, and, in a decision issued April 17, 1998, 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 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."

Subsequently, UP revised its discovery requests, but the Board found that they were still too broad, and it moved the proceeding forward without requiring FMC to respond to any outstanding discovery concerning product and geographic competition. In moving forward with the rate proceeding--as to which discovery extended well beyond the generally prescribed 75-day period--the Board also denied FMC's request to defer consideration of all product and geographic competition issues until later in the Fall, after the Board completes a pending rulemaking proceeding that could eliminate product and geographic competition from the market dominance determination. The Board noted that the current market dominance guidelines (which include product and geographic competition issues) apply unless and until they are changed, and that the law precludes consideration of a rate complaint unless the railroad is shown to have market dominance.

The Board's decision was issued today in the consolidated cases *FMC Wyoming Corporation and FMC Corporation v. Union Pacific Railroad Company*, Docket No. 42022, and *Rail General Exemption Authority--Selected Commodities*, Ex Parte No. 346 (Sub-No. 29A).

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