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Contact: Dennis Watson
(202) 565-1596
FIRS 1 (800) 877-8339
www.stb.gov

SURFACE TRANSPORTATION BOARD DENIES RAILROAD REQUEST FOR RECONSIDERATION OF BOARD DECISION ELIMINATING PRODUCT & GEOGRAPHIC COMPETITION FROM MARKET DOMINANCE RULES

Surface Transportation Board (Board) Chairman Linda J. Morgan announced today that the Board has issued a decision denying the request of the Association of American Railroads (AAR) for reconsideration of the Board's December 1998 decision eliminating product and geographic competition from the Board's market dominance procedures. The Board also denied the request of Union Pacific Railroad Company (UP) for a ruling that evidence of product and geographic competition could be presented in a pending case in which UP is the defendant.

Under the law, the Board may not review the reasonableness of a challenged rail rate unless it first finds that the railroad has "market dominance" over the traffic involved. Market dominance refers to "an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies." In addition to the statutory provision holding that a railroad is not market dominant if its rate does not return more than 180% of its "variable costs," previous Board procedures allowed railroads to prove market dominance by showing competition among railroads (intramodal competition); competition from other transportation modes (intermodal competition); and whether the shipper can avoid using the defendant railroad by shipping or receiving a substitute product (product competition), or by obtaining its product from a different source or shipping it to a different destination (geographic competition).

In its rulemaking proceeding responding to shipper complaints, the Board eliminated the product and geographic competition tests from the market dominance standard. The Board found, based on many years of experience in processing rate complaint cases, and the record developed in its rulemaking proceeding, that consideration of these factors significantly impedes the efficient processing of the Board's rate docket. In making its decision, the Board concluded that the limited impact on the rail industry from its decision is far outweighed by the chilling effect that consideration of product and geographic competition can have on the filing of valid rate complaints by captive shippers, and on the timely resolution of rate complaints.

In seeking reconsideration, AAR argued that the law requires the Board to consider product and geographic competition, and that, in any event, there was not an adequate reason for changing the Board's approach. Focusing on various factors, including the inordinate amount of discovery that has been sought (and allowed) on the basis of the potentially far-ranging nature of the product and geographic competition inquiry, which can deter shippers--particularly smaller shippers--from filing rate complaints, the Board stated:

We do not believe that the relatively modest burden placed on the carriers by our revised policy--the burden of litigating a potentially frivolous case--outweighs the substantial burdens on the administrative process of continued consideration of product and geographic competition. Specifically, we are not persuaded that our revised policy will result in railroads having to defend rates where competition is effective and the resulting rate is reasonable. Disaffected shippers are not likely to pursue a rate complaint when faster, less costly and more effective self-help is available in the marketplace. To the contrary, we have observed that, in the years since the regulatory reform of the late 1970s and early 1980s, shippers have adjusted to a primarily unregulated transportation marketplace and have become quite adept at using competitive leverage to obtain the best transportation rates and services.

Thus, we believe that our revised policy should lead to additional rate complaints only where captive shippers have been deterred from challenging rates on market dominant traffic by the prospect of burdensome and protracted antitrust-style litigation. Given the statutory directive "to maintain reasonable rates where there is an absence of effective competition," defending against regulatory challenges to rates charged on captive traffic is not a new burden but rather one that already has been placed upon the railroads by the statute. Indeed, when existing rules create uneven and unfair burdens on the

parties that come before us, we have the responsibility to amend the rules to level the playing field.

The Board also rejected UP's request that it be permitted to present evidence of product and geographic competition in a pending case--*FMC Corp. and FMC Wyoming Corp. v. Union Pac. R.R*, Docket No. 42022 (*FMC*)--in which UP is the defendant. UP argued that the Board may not legally apply the revised policy to *FMC*, because the complaint there was filed before the policy was changed and therefore the carrier had a right to defend the case under the old procedures. The Board rejected UP's argument, finding that the market dominance provisions were never intended to shield unreasonable rates, and thus that UP's conduct in setting its rates should have been no different regardless of whether the new policy or the old policy had been in effect.

The Board's decision was issued on July 2, 1999 in *Market Dominance Determinations--Product and Geographic Competition*, et al., STB Ex Parte No. 627. It is available on the Board's web site at **www.stb.dot.gov**.

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