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SURFACE TRANSPORTATION BOARD LIMITS DISCOVERY OF INFORMATION ON PRODUCT, GEOGRAPHIC COMPETITION IN RAIL RATE CASES

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SURFACE TRANSPORTATION BOARD
LIMITS DISCOVERY OF INFORMATION ON PRODUCT,
GEOGRAPHIC COMPETITION IN RAIL RATE CASES

Surface Transportation Board (Board) Chairman Linda J. Morgan announced today that the Board has limited the information on product and geographic competition that a railroad can seek through discovery in a proceeding challenging the reasonableness of railroad rates.

The Board has jurisdiction to consider a challenge to a railroad's rates only if the carrier has market dominance over the traffic involved. Market dominance refers to an absence of effective competition that constrains the carrier's pricing. In evaluating whether a railroad can exercise market dominance, the Board considers, when raised by a railroad, whether other railroads (intramodal competition) or other modes of transportation (intermodal competition) can provide the transportation services needed by the shipper. In addition to these direct competitive alternatives, the Board considers whether product or geographic competition effectively constrains a carrier's pricing. Product competition results from the availability of suitable substitute products that can be acquired without relying on the services of the same carrier. Geographic competition exists where the shipper can conduct its business by obtaining the product it needs from a different source and/or by shipping its goods to a different destination using another carrier.

In a proceeding challenging the rates charged by the Union Pacific Railroad Company (UP) for transporting mineral products from several western and midwestern sites, UP had sought broad discovery from the complaining shipper on alternative sources available to it, as well as possible substitute products and end-product uses. The shipper resisted 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 the carrier itself ought to know if such competition actually constrained the challenged rate level without needing discovery from its customer.

Finding that the issues presented "are central to the administration of our market dominance guidelines," the Board explained that its long-established guidelines place "both the burden to identify [product and geographic] competition and to prove that it is effective on the rail carrier in all cases." Concluding that UP's broad discovery requests improperly attempted to shift the burden of identifying product and geographic competition back to the shipper through the discovery process, the Board 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."

The Board's decision was issued today in FMC Wyoming Corporation and FMC Corporation v. Union Pacific Railroad Company, Docket No. 42022. The decision may be viewed on the Board's website at www.stb.dot.gov.

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