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SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42092

WTL RAIL CORPORATION
PETITION FOR DECLARATORY ORDER AND INTERIM RELIEF

STB Ex Parte No. 230 (Sub-No. 9)

WTL RAIL CORPORATION
PETITION FOR PARTIAL REVOCATION OF EXEMPTION

Decided: February 15, 2006

WTL Rail Corporation (WTL) has asked the Surface Transportation Board to partially revoke the class exemption for intermodal transportation and to declare that certain railroads may not cancel their trailer rental agreements with WTL and similarly situated lessors. However, as discussed in this decision, WTL has failed to persuade us that the relief it seeks is warranted.

BACKGROUND

Most aspects of trailer-on-flatcar (TOFC) and container-on-flatcar (COFC) transportation have long been exempted from economic regulation. 49 CFR part 1090. The Board's predecessor agency, the Interstate Commerce Commission (ICC), exempted the rail portion of TOFC and COFC service from regulation 25 years ago.¹ A few years later, the ICC extended the exemption to the portion of intermodal service provided by motor carriers;² and then exempted from economic regulation virtually all remaining motor pickup and delivery service for TOFC/COFC traffic.³ The basis for the ICC's exemption of TOFC/COFC traffic from economic

¹ Improvement of TOFC/COFC Regulation, 364 I.C.C. 731 (1981), aff'd in relevant part sub nom. American Trucking Ass'ns v. ICC, 656 F.2d 1115 (5th Cir. 1981).

² Improvement of TOFC/COFC Regulations (Railroad-Affiliated Motor Carriers and Other Motor Carriers), 3 I.C.C.2d 869 (1987).

³ Improvement of TOFC/COFC Regulations (Pickup and Delivery), 6 I.C.C.2d 208 (1989), aff'd sub nom. Central States Motor Freight Bureau, Inc. v. ICC, 924 F.2d 1099 (D.C. Cir. 1991).

regulation was the agency's finding that transportation of these intermodal shipments is market-driven and subject to widespread and effective competition from both motor carriers and other railroads. Shippers can truck their freight to any railroad intermodal ramp, or move it entirely over the highways, enabling them to choose the most effective and commercially responsive service and price offerings.

WTL, a privately owned noncarrier company formed in 1992, is in the business of renting truck trailers to railroads for use in TOFC service. WTL owns or leases about 950 trailers, which it has been furnishing to various railroads pursuant to individual "Trailer Use Agreements." Recently, some of these railroads notified WTL that they were exercising their contractual rights to cancel their individual Trailer Use Agreements. WTL came to the Board requesting regulatory intervention in an effort to prevent these cancellations.

Specifically, on May 5, 2005, WTL filed a petition in STB Docket No. 42092 seeking an order declaring that the carriers' cancellations of their agreements with WTL violate their car supply obligations under 49 U.S.C. 11121(a)(1), and constitute unreasonable practices under 49 U.S.C. 10702(2) and 10704(a)(1). WTL also sought interim relief to preserve the status quo until the Board ruled on its petition. At the same time, WTL filed a petition in STB Ex Parte No. 230 (Sub-No. 9), asking the Board to partially revoke the TOFC/COFC exemption in order to allow this regulatory relief.

Supporting statements were filed by San Andreas Fast Forwarding, Inc. (San Andreas) and Alliance Shippers, Inc. (Alliance), Cornerstone Systems, Exel Transportation Services, Golden Eagle Express, Inc. (collectively, the supporting intermediaries). WTL also filed a letter on May 5, 2005 containing legal argument relating to its petition for interim relief, and attached a letter of support from the National Onion Association (NOA).

On May 25, 2005, replies in opposition were filed by BNSF Railway Company (BNSF), Canadian Pacific Railway Company (CPR), Kansas City Southern Railway Company (KCS), Norfolk Southern Railway Company (NS), and Union Pacific Railroad Company (UP). On June 14, 2005, WTL filed a supplement to its petitions for interim relief and revocation of the exemption.

By decision served on June 23, 2005 (June 2005 Decision), the Board found that WTL had failed to demonstrate that a stay or other injunctive relief was warranted and therefore denied WTL's request for interim relief. On August 3, 2005, the Board instituted this proceeding pursuant to 49 U.S.C. 10502(d) to consider WTL's petition for partial revocation of the TOFC/COFC class exemption.

DISCUSSION AND CONCLUSIONS

We find that the statutory standard for revocation of an exemption has not been met, so we will deny WTL's petition for partial revocation of the TOFC/COFC class exemption. We also conclude that WTL has not shown that declaratory relief is warranted here, so we will deny its request for a declaratory order.

Exemption Revocation Request

The statute favors exemptions from regulation whenever appropriate, and directs us to grant exemptions "to the maximum extent consistent with [the Interstate Commerce Act]." 49 U.S.C. 10502(a). Once an exemption has been granted, we may revoke it when we find that regulation is necessary to carry out the rail transportation policy (RTP). 49 U.S.C. 10501(d). In connection with a request to revoke an exemption, our analysis of the RTP focuses on the particular section(s) of that policy that relate to statutory provisions that would apply if the exemption were revoked. Minnesota Comm. Ry., Inc. – Trackage Exemp. – BN RR. Co., 8 I.C.C.2d 31, 35-37 (1991). Reconciling the RTP with the statutory admonition to be liberal in granting exemptions when regulation is not necessary to protect against abuse of market power, we have held that the extent of railroad market power is an essential issue in exemption revocation proceedings. Rail Exemption Misc. Agricultural Commodities, 8 I.C.C.2d 674, 682 (1992). We may decline to revoke an exemption if application of the underlying statutory provision(s) that the party seeks to reinstate would not ameliorate the alleged harm. Id. at 676-77.

Here, WTL alleges that the railroads have sufficient market power to require application of statutory protections that cover the provision of service and equipment by railroads to shippers, i.e., 49 U.S.C. 11121(a), 10702, and 10704(a)(1). Accordingly, we focus on sections of the RTP relevant to these statutory provisions.

The RTP favors efficiency and promotes competition among railroads, and between railroads and other modes. 49 U.S.C. 10101(1), (3), (4), (5), and (12). In the largely deregulated environment that has existed since 1981, the sources of supply of TOFC trailers has changed in response to competitive forces. In 1981, the railroad-controlled pool administered by the Association of American Railroads contained 117,000 trailers, most of which were owned by 48 railroads, with a small minority supplied by non-railroad entities. By 1991, the railroad-controlled pool had shrunk to 95,000 trailers, with 40% owned by 20 railroads, and 60% supplied by 9 non-railroad entities. Today the railroad-controlled pool contains 55,000 trailers, 73% of which is supplied by two non-railroad entities, XTRA Intermodal (XTRA) and General Electric's TIP Leasing/Rental (TIP), which, according to WTL, together account for 44,000 trailers. Two Class III railroads — the Kankakee, Beaverville & Southern Railroad (KBS) and

the Vermont Railway (VTR) — together account for another 6,000 trailers in the pool.⁴ None of these companies (XTRA, TIP, KBS or VTR), which together supply 50,000 of today's 55,000 pool trailers (over 90%), supports WTL's petition.⁵

The railroads that are canceling their Trailer Use Agreements explain that they have concluded that it is no longer efficient for them to operate a pool of leased trailers because of: (1) the growing preference of non-rail providers of intermodal transportation for using privately owned trailers; (2) the increasing replacement of trailers by containers, which, unlike trailers, can be stacked on railcars, on water vessels, and in storage areas; and (3) the difficulty the railroads have managing the costs of empty movements, storage, and overhead.⁶ Forcing railroads to maintain a fleet of leased trailers in the face of these realities could increase the cost and decrease the efficiency of rail service, contrary to RTP goals.

After cancellation of the railroads' Trailer Use Agreements and phase-out of these leased trailers from the railroad-controlled pool, the railroads will continue to transport them as private equipment (equipment outside the pool).⁷ About 90% of BNSF's intermodal business (both trailers and containers) already moves in private equipment.⁸ Shippers can purchase or lease private equipment for rail use outside the rail-operated pool. Indeed, WTL's website indicates that the company already offers to sell or to lease certain of its trailers directly to shippers.⁹ Shippers can also obtain private equipment through third party logistics providers such as Alliance, Hub Group, and Pacer Global Logistics. Equipment lessors, such as XTRA and TIP, make significant amounts of private intermodal equipment available. Shippers can also obtain trailers from motor carriers or freight forwarders, or they can use remaining railroad-controlled pool trailers. Thus, even after the lease cancellations, shippers will have an array of competitive options for obtaining TOFC service and equipment. These options effectively constrain the railroads' market power with respect to TOFC service and equipment.

Another RTP goal is adequacy of service. 49 U.S.C. 10101(4). WTL has not shown that intermodal service today is inadequate. On the contrary, the record amply documents that intermodal service is characterized by rapid growth and commercial innovations to meet customer demands. WTL suggests that the lease cancellations could cause service problems in

⁴ Verified Statement of Richard M. Lombardo, attached to WTL's Petition for Declaratory and Interim Relief (V.S. Lombardo) at 4-5.

⁵ KCS Reply at 7 n.4.

⁶ Verified Statement of Edward Zajac, attached to BNSF Reply (V.S. Zajac) at 2; NS Reply at 3, CPR Reply at 9-10.

⁷ BNSF Reply at 18, V.S. Zajac at 3-4, CPR Reply at 7, NS Reply at 4, UP Reply at 3.

⁸ V.S. Zajac at 2.

⁹ BNSF Reply at 17.

the future because trailers that are no longer leased by the railroads will be withdrawn from service, making the future supply of TOFC equipment inadequate. However, we find WTL's suggestion that these trailers will be withdrawn from service not credible. The railroads have made it clear that they are willing to haul WTL's trailers as private equipment, as they currently haul other private trailers.¹⁰ The rates offered by the railroads for moving private trailers are generally lower than comparable rates for moving railroad-controlled trailers, because costs of ownership and maintenance are the responsibility of the trailer owner, not the railroad.¹¹ If the leased trailers are needed for transportation, they can be sold or leased to shippers, intermediaries, or motor carriers for continued intermodal use as private equipment. This type of transition appears to be the natural result of competitive market forces at work. Furthermore, the number of trailers affected by the cancellations is relatively small compared to the total TOFC trailer fleet, and BNSF, the carrier triggering the trailer rental cancellations by the other railroads, plans to minimize the possibility of trailer supply disruption during the transition to private equipment by phasing its lease cancellation.¹²

It is possible that some of WTL's trailers may be withdrawn from service when the leases are cancelled if they are obsolete and commercially undesirable. WTL bought most of its trailers used, after they had been retired from over-the-road use by motor carriers.¹³ Thus, WTL's trailers are relatively old, and most are 48 feet long, in contrast to the 53-foot length generally preferred today.¹⁴ We see nothing in the RTP that would favor retention of obsolete equipment if the forces of competition are driving the market in another direction.

The supporting intermediaries and NOA assert that the trailer rental cancellations could lead to less availability of TOFC service and thereby increase demand for COFC service. San Andreas claims that COFC service is not an adequate substitute because difficulty finding motor vehicles with chassis to handle COFC containers at terminals can cause delay. It is not clear, however, why this would not be offset by the need for more rail flat cars for TOFC service, because trailers cannot be stacked like containers can. In any event, if there are shippers that prefer trailer service to container service — because it is faster or for any other reason — then the marketplace can be expected to fill that need. If there is increased demand for COFC service as a substitute for TOFC service, the market can be expected to accommodate this shift as well.

NOA argues that its members need trailer equipment with special ventilation that WTL's trailers apparently provide. The railroads, however, are not declining to handle this equipment.

¹⁰ BN Reply at 9, CPR Reply at 3, NS Reply at 4, UP Reply at 3.

¹¹ V.S. Zajac at 4.

¹² Id. at 3.

¹³ V.S. Lombardo at 1 n.1.

¹⁴ NS Reply at 3.

If NOA's members need this equipment, it can be sold or leased to them, or to motor carriers or other third parties, for use as private equipment.

In its supplement filed on June 14, 2005, WTL stresses the fact that supply of intermodal trailers by railroads has been decreasing. However, as discussed above, increasing numbers of trailers are available from other sources. There is no convincing evidence on this record that TOFC service cannot be adequately provided unless the railroads continue to lease trailers from WTL and other lessors. The fact that trailer supply options are changing is indicative of a competitive market.

WTL cites the ICC's decision in American Rail Heritage, Ltd., d/b/a Crab Orchard & Egyptian Railroad, Transportation Concepts, Inc., and The Grafton & Upton Railroad Company v. CSX Transportation, Inc., Docket No. 40774 (ICC served June 16, 1995), in support of its argument that we should partially revoke the TOFC/COFC exemption. However, in that case the ICC refused to revoke the TOFC/COFC exemption because competitive options were readily available. Thus, as discussed in the June 2005 Decision at 3, this precedent supports our denial of WTL's revocation request, as we find that competitive options are also available here.

Accordingly, we find that the RTP goals are better served by continuing the TOFC exemption, not revoking it.

Declaratory Order Request

We also conclude that reinstatement of regulation would not give WTL the relief that it seeks, because application of the statutory provisions WTL points to — 49 U.S.C. 11121(a)(1), 10702(2) and 10704(a)(1) — would not ameliorate the harm that WTL alleges.

WTL argues that the Board has regulatory authority over its Trailer Use Agreements with the railroads under the railroad car service provisions of 49 U.S.C. 11121(a)(1). These provisions, however, authorize the Board to act only if added cars are “reasonably necessary to furnish safe and adequate car service,” and if the rail carrier “has materially failed to furnish that service.” Here, WTL has not shown that the railroads have been, or are, materially failing to furnish adequate service. As discussed above, if WTL's trailers are needed for transportation, marketplace forces should ensure that this equipment will be sold or leased to motor carriers, intermediaries or shippers for continued use under different arrangements.

Finally, WTL asserts that cancellation of the Trailer Use Agreements by the railroads is an unreasonable practice under 49 U.S.C. 10702(2) and 10704(a)(1). The statute does not specifically define what constitutes an unreasonable practice. Rather, in view of the wide variety of situations that might arise, Congress has committed such determinations to the Board. The agency has developed no single test for judging whether a particular practice is unreasonable, leaving that fact-specific inquiry to a case-by-case analysis. Here, WTL has not convinced us that there is any reason to expect that the need for TOFC trailers will not be met as a result of

cancellation of the Trailer Use Agreements. We conclude that this record would not support a finding that the railroads' cancellation of their Trailer Use Agreements with WTL was an unreasonable practice, even if the TOFC exemption were revoked.

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

It is ordered:

1. In STB Ex Parte No. 230 (Sub-No. 9), WTL's request for partial revocation of the class exemption is denied, and the proceeding instituted in the decision served on August 3, 2005, is discontinued.

2. In STB Docket No. 42092, WTL's request for declaratory relief is denied.

3. This decision is effective on its date of service.

By the Board, Chairman Buttrey and Vice Chairman Mulvey.

Vernon A. Williams
Secretary