

35866
CO

SERVICE DATE – JUNE 23, 2005

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)¹

WTL RAIL CORPORATION – PETITION FOR PARTIAL REVOCATION OF EXEMPTION

Decided: June 22, 2005

The Surface Transportation Board is denying the petition of WTL Rail Corporation (WTL) for interim relief pending a decision by the Board on the merits of WTL's petition for an order declaring that certain railroads may not cancel their trailer rental agreements with WTL and similarly situated lessors.

BACKGROUND

The Board's predecessor agency, the Interstate Commerce Commission (ICC), exempted railroad trailer-on-flatcar (TOFC) and container-on-flatcar (COFC) service from regulation in Improvement of TOFC/COFC Regulation, 364 I.C.C. 731 (1981), affirmed in relevant part sub nom. American Trucking Assns v. I.C.C., 656 F.2d 1115 (5th Cir. 1981) (TOFC/COFC Exemption), and later extended this exemption to the portion of the intermodal service provided by motor carriers. See Central States Motor Freight Bureau, Inc. v. I.C.C., 924 F.2d 1059 (D.C. Cir. 1991). Because of these exemptions, railroads are currently under no duty to provide such service to shippers, although they still do so.

Motor and water carriers also offer TOFC/COFC service (using their own equipment or equipment owned by their shippers) in cooperation with the railroads, which provide the motive

¹ These proceedings are not consolidated. A single decision is being issued for administrative convenience.

power. Railroads offering TOFC service have been maintaining a trailer pool that is administered by the Association of American Railroads. About 11,000 of the trailers in the railroads' 55,000-car pool are owned by the railroads, and BNSF Railway (BNSF) has announced that it will be retiring its contribution of 5,000 trailers. The remaining cars in the pool are leased by the carriers from firms like WTL. According to WTL, pool cars haul only one-half of the 2.7 million annual originated trailer loads estimated in 2004. WTL's only business is providing leased trailers; it is not a shipper, and it is not a railroad seeking to interchange its trailers with other railroads.

The railroads have notified WTL (and similar firms) that, effective on or about May 18, 2005, they would no longer lease trailers for their pool. The railroads will still accept WTL's trailers as private equipment, but this would effectively require the trailers to be sold or leased to shippers or motor carriers.

On May 5, 2005, WTL filed: (1) a petition for (a) an order declaring that the carriers must continue to lease its cars, and (b) interim relief preserving the status quo until the Board can rule; and (2) a separate petition to revoke the TOFC/COFC exemption to allow this relief. WTL argues that, unless the carriers continue to rent trailers from lessors such as WTL, the railroads will not have enough trailers to be able to fulfill their common carrier obligation to shippers.

On May 13, 2005, BNSF filed a reply in opposition to WTL's request for interim relief. BNSF argues that WTL has not satisfied two of the traditional requisites for such relief – that it is likely to succeed on the merits of its petition and that it will suffer irreparable injury without interim relief.

On May 16, 2005, WTL filed a reply to BNSF's reply and a separate request that it be admitted in the interest of securing a just and speedy resolution of the issues. The reply essentially repeats arguments previously made and, because replies to replies are prohibited under 49 CFR 1104.13(c), it will not be considered.

On June 14, 2005, WTL filed a supplement to its petitions. WTL's filing provides little or no support for its request for interim relief and will be considered to the extent appropriate as a supplement to its revocation petition.

DISCUSSION AND CONCLUSIONS

Under the stay criteria, WTL must show: (1) that there is a strong likelihood that the movant will prevail on the merits; (2) that the movant will suffer irreparable harm in the absence of a stay; (3) that other interested parties will not be substantially harmed; and (4) that the public interest supports the granting of the stay. Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). On a motion for stay, “it is the movant’s obligation to justify the . . . exercise of such an extraordinary remedy.” Cuomo v. United States Nuclear Regulatory Comm., 772 F.2d 972, 978 (D.C. Cir. 1985). The parties seeking a stay carry the burden of persuasion on all of the elements required for such extraordinary relief. Canal Authority of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974). However, “[i]f the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak.” Cityfed Fin. Corp. v. Office of Thrift Supervision, 58 F.3d 738, 747 (D.C. Cir. 1995).

Based on these standards, WTL is not entitled to interim relief. WTL’s argument that it is likely to succeed on the merits of its request for declaratory relief is unpersuasive. Indeed, based on agency precedent, it appears that WTL has little likelihood of showing that the TOFC/COFC exemption should be revoked for purposes of regulating the handling of its trailers. 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., No. 40774 (ICC served June 16, 1995) (Crab Orchard), two Class III railroads unsuccessfully sought revocation of the TOFC/COFC exemption to the extent necessary to require mandatory interchange of trailers or containers in intermodal service to remedy CSX’s cancellation of trailer interchange agreements with them. The ICC refused to revoke the exemption because the Class III railroads failed to show that the equipment could be used only for rail service. Here, as in Crab Orchard, WTL has failed to show that its fleet of trailers is captive to the railroads and must move as rail-controlled equipment. Rather, as BNSF points out, WTL is free to shift its trailers to highway or highway/rail movements.

Nor has WTL shown that revocation of the exemption would likely be necessary to cure a service deficiency. There has been no showing that the carriers are currently providing inadequate service. The Board has only the self-serving prediction by WTL that the railroads will not be able to provide adequate service in the future unless they continue to rent trailers from companies like WTL. This prediction is based on the unrealistic presumption that the entire fleet of trailers owned by firms like WTL will cease being used (even if needed) when the leases are cancelled, rather than being sold or leased to motor carriers or shippers for use outside the rail-controlled pool. If WTL’s trailers are truly needed for transportation, they will continue to be used, albeit under a different arrangement.

Moreover, because there has been no showing that the railroads are not in fact providing adequate service, it is by no means certain that, even if the exemption were revoked, the Board

would find that it can or should dictate where the carriers must obtain the equipment that they need to provide adequate service. For example, in a case even cited by WTL, when issues arose over the extent to which railroads were required to use rolling stock owned by shippers in return for prescribed car use allowances, the ICC held that the carriers were under no duty to accept cars owned by shippers as long as railroad-owned cars were available. Shippers Committee, OT-5 v. The Ann Arbor Railroad, Et Al., 5 I.C.C.2d 856 (1989), aff'd, Shippers Committee OT-5 v. ICC, 968 F.2d 75 (D.C. Cir. 1992). This precedent provides even less support for WTL because WTL is not a shipper.

WTL has also failed to show that it will suffer irreparable harm absent a stay. The railroads will continue to accept WTL's trailers as private equipment, and WTL will be free to shift its equipment to highway or highway/rail movements. While WTL's profitability may be adversely impacted by the termination of its equipment leases to the railroads, monetary damages, if any, would not constitute irreparable harm. However, staying the termination of these leases might result in some harm to the railroads by delaying the economic and operational benefits that the railroads are seeking to realize through their actions.

Finally, there is no persuasive evidence that a stay would be in the public interest. Although several transportation intermediaries and a trade association support WTL, there is no reason to believe at this point that shipper needs will not be met. In sum, WTL has failed to show that its petition for interim relief (in the form of a housekeeping stay or otherwise) satisfies any of the stay criteria or warrants any form of injunctive relief at this time.

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

It is ordered:

1. WTL's request for interim relief is denied.
2. WTL's motion to admit its reply to a reply is denied.
3. This decision is effective on its date of service.

By the Board, Roger Nober, Chairman.

Vernon A. Williams
Secretary