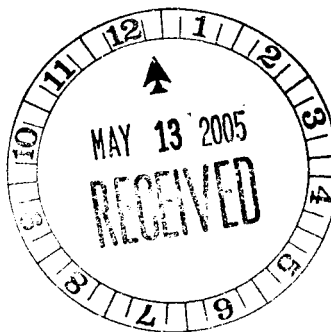


May 13, 2005

BY HAND

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001

Mayer, Brown, Rowe & Maw LLP
1909 K Street, N.W.
Washington, D.C. 20006-1101

Main Tel (202) 263-3000
Main Fax (202) 263-3300
www.mayerbrownrowe.com

Robert M. Jenkins III
Direct Tel (202) 263-3261
Direct Fax (202) 263-5261
rmjenkins@mayerbrown.com

Re: STB Docket No. Ex Parte No. 230, Sub-No. 9
Improvement of TOFC/COFC Regulation,
WTL Rail Corporation,
Petition for Partial Revocation of Exemption

STB Docket No. 42092,
WTL Rail Corporation,
Petition for Declaratory Relief

ENTERED
Office of Proceedings

MAY 13 2005

Part of
Public Record

Dear Secretary Williams:

I am writing on behalf of BNSF Railway Company ("BNSF") in response to the Petition for Partial Revocation of Exemption ("Revocation Petition") and Petition for Declaratory and Interim Relief ("Declaratory Request") filed by WTL Rail Corporation ("WTL") in the above-referenced proceedings pending before the Surface Transportation Board ("STB" or "Board"). In its Revocation Petition, WTL requests the partial revocation of the exemption from the provisions of Subtitle IV of Title 49 of the U.S. Code originally granted in Ex Parte No. 230 (Sub-No. 5), Improvement of TOFC/COFC Regulation, 364 I.C.C. 731 (1981). WTL seeks the partial revocation in order to challenge through its Declaratory Request the recent notices given independently by BNSF and four other Class I railroads¹ to terminate their "Trailer Use Agreements" with WTL. Pursuant to those agreements, WTL makes its fleet of 950 owned or leased TOFC trailers available to the railroads for use in common carrier service.² WTL asserts that BNSF's (and the other railroads') termination of the Trailer Use Agreements constitutes a

¹ Norfolk Southern Corporation, Union Pacific Railroad Company, Canadian Pacific Railway and Kansas City Southern Railway.

² By letter dated May 6, 2005, WTL submitted corrected pages to its petitions reducing the number of trailers reported in the WTL fleet from 1500 to 950.

The Honorable Vernon A. Williams

May 13, 2005

Page 2

violation of the car service provisions of 49 U.S.C. 11121(a) as well as an unreasonable practice under 49 U.S.C. 10702(2) and 10704(a)(i). BNSF intends to respond to WTL's Revocation Petition and Declaratory Request within twenty (20) days as provided by 49 C.F.R. 1104.13(a), unless its time to reply is extended or otherwise modified.

WTL has, however also requested that the Board issue a "housekeeping" stay during the pendency of these proceedings which would require BNSF and the other railroads to maintain their existing relationships with WTL. WTL seeks to support this request by asserting that there is a substantial likelihood that it will succeed on the merits of its Declaratory Request and that, absent a stay, it will suffer irreparable harm. As set forth below, neither assertion is correct, and WTL is not entitled to a stay.

Initially, controlling Board precedent establishes that WTL will not prevail on the merits of its underlying claims. In American Rail Heritage, Ltd. D/B/A Crab Orchard & Egyptian Railroad, et al. v. CSX Transportation, Inc., No. 40774 (served June 16, 1995), the Interstate Commerce Commission held that the complainants failed to meet the standards for revocation under 49 U.S.C. 10505(d) (now, 49 U.S.C. 10502(d)). In that proceeding, the complainants sought revocation of the TOFC/COFC exemption to the extent necessary to require mandatory interchange of trailers or containers between railroads in intermodal service. The request was based on CSX Transportation, Inc.'s ("CSXT") termination of certain trailer interchange agreements it had previously entered into with the complainants, and the complainants sought an order requiring CSXT to continue TOFC/COFC interchanges with them. However, the Commission held that the burden was on the complainants to demonstrate that the regulation of such interchanges is required and that the basis of the TOFC/COFC exemption – that competition in the area of TOFC/COFC may be relied upon to realize the goals of the rail transportation policy – is incorrect, at least as applied to them. Slip op. at 3. The Commission held that the complainants had failed to adequately respond to the railroad's testimony that trailer owners or lessees (such as WTL here) are not captive to the railroads and that they may lease or sell their trailers to motor carriers in the event the terms and conditions offered by a railroad are unacceptable to them. Specifically, the Commission cited testimony submitted by the Association of American Railroads that "[t]railers are by purpose and design bimodal and capable of moving over a highway as well as rail. Indeed, a trailer, if not accepted by a railroad can simply be lifted off a railroad and simply be put on a truck for transportation." Id. at 4. Accordingly, the Commission rejected the complainants' petition, and its decision governs WTL's Revocation Petition here – i.e., WTL will not be able to show that partial revocation is needed in order to preserve TOFC competition as it relates to its fleet of trailers since WTL is free to shift its trailers to highway or highway/rail movements. Moreover, WTL has not asserted in its pleadings that its fleet of trailers cannot be used over-the-road; indeed, WTL concedes that these trailers previously were used by trucking companies in "over-the-road" service. Lombardo V.S. at 1 n. 1.

Further, WTL cannot justify a stay on the basis that it will incur irreparable injury. As WTL recognizes, BNSF's notice does not indicate that BNSF will no longer accept WTL's

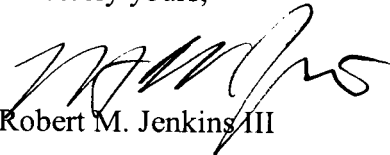
The Honorable Vernon A. Williams
May 13, 2005
Page 3

trailers on its trains. Rather, what BNSF has indicated that it intends to do is to no longer treat WTL trailers as "rail controlled" trailers. Specifically, BNSF's notice (attached as Exhibit F-1 to WTL's Declaratory Request) states that, effective May 18, 2005, WTL's trailers and those of other equipment leasing companies "will be able to move on BNSF" with proper revenue billing. Thus, the only consequence that will potentially accrue to WTL once BNSF's notice goes into effect is that WTL's trailers will be considered and handled by BNSF as private equipment. Moreover, even that consequence need not be harmful to WTL since WTL is, as discussed above, free to put its trailers on trucks for transportation on the highways. In addition, shippers will be able to continue to use WTL's trailers as well as other privately-owned trailers to move their traffic. Even if there were something unique about WTL's fleet – which there is not – its 950 trailers represent less than 2% of the 60,000 "rail controlled" trailers that WTL itself estimates are presently in use. See Revocation Petition at 8.

It bears emphasizing here that intermodal transportation has "flourished" under the TOFC/COFC exemption (American Heritage, slip op. at 5) and that WTL must present a compelling justification for partial re-regulation of this exempt traffic. Slip op. at 4. The concerns that WTL has about its trailers being treated as private equipment, just like other trailers moved by the railroads in intermodal service, do not present the kind of compelling circumstances that could warrant revocation.

In sum, WTL has demonstrated neither substantial likelihood of success on the merits nor irreparable injury. Accordingly, BNSF respectfully submits that WTL is not entitled to the "housekeeping" stay or any other interim relief it has requested.

Sincerely yours,



Robert M. Jenkins III

cc: Mr. David M. Konschnik
John D. Heffner, Esq.