



Via E-Filing

May 25, 2005

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

**RE: Ex Parte No. 230 (Sub- No. 9); WTL Rail Corporation - Petition for
Partial Revocation of Exemption**

**Docket No. 42092; WTL Rail Corporation – Petition for Declaratory
and Interim Relief**

Dear Mr. Williams:

Enclosed for filing in the above proceedings is UP's Reply to WTL's petitions.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Robert T. Opal", written over a light blue circular stamp.

Robert T. Opal
General Commerce Counsel

cc (w/att): Persons shown on Certificate of Service

Robert T. Opal
General Commerce Counsel

UNION PACIFIC RAILROAD
1400 Douglas St., Stop 1580, Omaha, NE 68179-1580
ph. (402) 544-3072 fx. (402) 501-0132
rtopal@up.com

BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 230 (SUB-NO. 9)

WTL RAIL CORPORATION – PETITION FOR
PARTIAL REVOCATION OF EXEMPTION

DOCKET NO. 42092

WTL RAIL CORPORATION – PETITION FOR
DECLARATORY ORDER

REPLY OF
UNION PACIFIC RAILROAD COMPANY

Robert T. Opal
General Commerce Counsel
1400 Douglas Street
Stop 1580
Omaha, NE 68179
(402) 544-3072
(402) 501-0132 (FAX)
rtopal@up.com

Dated and Filed: May 25, 2005

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This Reply is filed on behalf of Union Pacific Railroad Company ("UP"). It is in response to a petition filed by WTL Rail Corporation ("WTL") in Ex Parte No. 230 (Sub-No. 9) seeking partial revocation of the TOFC/COFC exemption and a petition filed by WTL in Docket No. 42092 seeking a declaratory order that UP and other railroads have unlawfully terminated trailer use agreements with WTL. For the reasons stated below, WTL's petitions are without merit and should be denied without further proceedings.

I.

BACKGROUND

WTL is an equipment supplier which is in the business of renting truck trailers. It has a group of 950 old, 48' trailers which were formerly used in over-the-road truck service. WTL has marketed these trailers to UP and other major railroads for TOFC service through a series of "trailer use" agreements which are, essentially, non-exclusive leases. The using railroads have treated the WTL trailers as "railroad controlled" trailers, and each railroad paid WTL a daily rate for the time a trailer is in that railroad's service. In effect, the WTL trailers have been a pool which any of the railroads having an agreement with WTL could use for its shipments.

On April 18, 2005, BNSF Railway ("BNSF") announced that it was terminating its trailer use agreement with WTL, effective May 18, 2005. BNSF did not give UP advance notice of the termination and we do not have first hand knowledge of BNSF's reasons for it. However, BNSF's termination, coupled with a termination by NS, made it imperative for UP to terminate its own use agreement with WTL. If UP did not do so, and shippers billed WTL trailers over BNSF or NS which UP had last used (as they inevitably would), UP would be responsible to pay WTL use charges for the time the trailers spent on these roads. As a result, UP cancelled its use agreement with WTL, effective May 21, 2005. According to WTL's petitions, other major railroads which had been using WTL trailers have taken similar action.

While UP has terminated its use agreement with WTL, it is not refusing to handle the WTL trailers. UP will continue to handle them as "private" trailers if they meet applicable mechanical requirements. The difference from WTL's standpoint is that

it will have to market its equipment directly to the shippers, or to the intermodal motor carriers which serve them, rather than to UP. If there really is customer demand for these trailers, as WTL claims there is, it should have no difficulty in doing so.

II.

DISCUSSION

WTL is requesting that the Board partially revoke the TOFC/COFC exemption and require UP and other railroads to continue renting WTL's trailers under the terms of the now expired trailer use agreements. This is no different than if a locomotive rebuilder asked the Board to require UP to purchase 950 of its old locomotives.

WTL seems to believe that, if the TOFC/COFC exemption were partially revoked, UP could not lawfully refuse to rent WTL's trailers. But WTL has cited no precedent where the STB or the ICC ever required a railroad to purchase or lease rolling stock or trailers from a particular equipment vendors such as WTL. The primary authority it cites, Docket No. 40774, American Rail Heritage LTD D/B/A Crab Orchard & Egyptian R. Co. v. CSXT (served June 16, 1995) ("Crab Orchard") is actually contrary to its position.

Crab Orchard involved the refusal of CSXT to accept CB&E trailers in interchange. This was a more extreme fact situation than the present case, because CSXT was actually refusing to handle the trailers. UP, in contrast, is willing to continue handling WTL's trailers as private equipment. Nevertheless, the ICC refused to revoke the TOFC/COFC exemption and require CSXT to accept the CB&E trailers, finding that CB&E had not met the standards for revoking the exemption. The ICC held that

regulation was not warranted, in part, because the trailers could move over the highways, and because trailer owners and lessees were not captive to railroads when marketing their equipment (“they may lease or sell their trailers to motor carriers; and they may hook up their equipment behind tractors pursuant to any of the myriad of arrangements by which equipment and the cargo they contain move over highways”).

In short, Crab Orchard is a ringing denunciation of the relief WTL is seeking in this proceeding. The only portion of the decision that WTL can cite in support of its position is the ICC’s statement that it might, in an appropriate case, partially revoke the exemption and regulate equipment interchange “to help level the playing field between class I and class III carriers” (Crab Orchard, p. 4). But WTL, is an equipment vendor, not a Class III railroad. Nothing in Crab Orchard indicates that it would ever be appropriate for the ICC to determine the amount of equipment a railroad should acquire from a particular equipment vendor, and require the railroad to purchase or lease it from that vendor.

The other cases cited by WTL in support of its requested relief have nothing to do with WTL’s situation. Shippers Committee OT-5 v. Ann Arbor R.C., 5 I.C.C.2d 856 (1989), involves railroads’ obligations to use private rail cars supplied by shippers to handle their shipment. WTL, of course, is not a shipper. Moreover, UP is not refusing to handle the WTL equipment as private equipment. Docket No. 41687, Grain Land Coop v. CP (served December 8, 1999), involves potential liability of a railroad for alleged failure to provide service and cars to shippers. WTL is not a shipper seeking to transport anything, and it doesn’t use railroad supplied equipment – it supplies equipment to railroads. Liability for Contaminated Covered Hopper Cars,

10 I.C.C.2d 154 (1994), involves the legality of a railroad tariff imposing liability on shippers for the condition of cars placed for loading by the serving railroad, an issue which has nothing to do with WTL's request in this proceeding. None of these cases even suggest that the ICC or STB should compel a railroad to buy or lease equipment from a particular vendor.

In short, WTL is asking the STB to go where neither the STB nor the ICC has gone before, even during the heyday of regulation. After 118 years of not regulating what equipment railroads buy or lease from particular suppliers, WTL is asking that the STB start regulating these matters. Today, it is WTL peddling old 48' trailers. Tomorrow, it will be a locomotive merchant peddling obsolete locomotives, or a freight car merchant peddling obsolete cars. The STB obviously should not embark on such an ambitious and unwarranted regulatory expansion.

III.

CONCLUSION

For the reasons stated above, UP respectfully requests that the Board (i) deny WTL's Petition for Partial Revocation of the TOFC/COFC Exemption, and (ii) deny WTL's request to institute a declaratory order proceeding.

Respectfully submitted,

UNION PACIFIC RAILROAD COMPANY

By: 

Robert T. Opal
General Commerce Counsel
1400 Douglas Street, Stop 1580
Omaha, NE 68179
(402) 544-3072
(402) 501-0132 (FAX)
E-mail: rtopal@up.com

CERTIFICATE OF SERVICE

I certify that I have this date served a copy of the foregoing Reply on each party of record listed below. Service was made by Overnight Mail as shown below.

John D. Heffner, PLLC
1920 N Street, N.W.
Suite 800
Washington, D.C. 20036

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

Norfolk Southern Railway
Law Department
3 Commercial Place
Norfolk, VA 23510

Michael Leveille
Canadian Pacific Railway
1290 Central Parkway W, Suite 600
Mississauga, ON (Canada)
L5C 4R3

Adam Rodrey
Kansas City Southern Railway
427 West 12th Street
Kansas City, MO 64105

John A. Jelaco
Golden Eagle Express, Inc.
2840 Ficus Street
Pomona, CA 91766

Dated at Omaha, Nebraska this 25th day of May, 2005.



Robert T. Opal