

29815
EB

SERVICE DATE - JUNE 7, 1999

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. MC-F-20941

GROENDYKE TRANSPORT, INC., MANFREDI MOTOR TRANSIT CO., MILLER TRANSPORTERS, INC., SUPERIOR CARRIERS, INCORPORATED, AND TRIMAC TRANSPORTATION, INC. — POOLING AGREEMENT

Decided: June 1, 1999

Pursuant to 49 U.S.C. 14302(c), we are approving the instant pooling application, reserving jurisdiction to require submission of additional information should we find it necessary in the future.

BACKGROUND

By application filed on November 20, 1998, nine motor carriers¹ (Applicants) seek authority to pool some of their services, traffic, and revenues pursuant to 49 U.S.C. 14302 and our implementing regulations at 49 CFR 1184. The carriers are all licensed by the United States Department of Transportation (DOT) to carry bulk commodities that are often classified as “hazardous materials” by DOT. Applicants transport primarily chemical products that cannot be mixed with other cargo in the same load and require specialized equipment and handling procedures. The equipment must usually be cleaned after each delivery.

By their pooling agreement, Applicants plan to establish a “joint venture corporation” (JVC) that will (1) coordinate their operations so as to avoid traffic imbalances and empty mileage and (2) provide for the shared use by the Applicants of the cleaning facilities owned or controlled by each. The pooling agreement has no expiration date. Each of the five owners of the JVC will have a 20% equity interest in it, and representation on the JVC’s Board of Directors will be distributed equally among the five owners.² Each of the five owners will make an initial contribution to the JVC to cover expenses associated with its formation and initial operations. The JVC’s board will hire its own staff.

¹ The nine motor carriers are: Groendyke Transport, Inc.; Manfredi Motor Transit Co.; Miller Transporters, Inc.; Superior Carriers, Inc., and Central Transport, Inc., both wholly owned subsidiaries of Superior Carriers, Incorporated, a noncarrier; and Liquid Transporters, Inc., Quality Services Tanklines, Inc., Trimac Transportation Services (Western), Inc., and Universal Transport, Inc., all four of which are wholly owned subsidiaries of Trimac Transportation, Inc., a noncarrier.

² The parent owners will act on behalf of their subsidiary regulated carriers. See n.1 above.

The operations of the JVC can be summarized as follows:

1. Load Balancing. Each carrier will regularly notify the JVC about the points where it will have empty equipment or where it needs loads and the points where it cannot handle the loads offered to it. The JVC will endeavor to reconcile available equipment with needs “in a fair and equitable manner.” Not less than monthly, the JVC will report to its carrier members as to “the number of loads transported under the joint venture corporation arrangement along with the volumes and points served.”

2. Cleaning equipment. The carrier members will assist each other in the provision of cleaning equipment, making such equipment available on an equal basis, establishing procedures for the use and cleaning of such equipment, and sharing information and compiling records concerning such use. In addition, “[m]ember carriers owning or controlling particular cleaning facilities will be responsible for the safe and efficient operation of such facilities”

3. Funding. The JVC may establish charges to its member carriers to fund its operations.

4. Participation. A carrier member may terminate its participation by giving 30 days’ notice, subject to fulfillment of its prior obligations, and, if its permit is revoked by DOT, the carrier member’s operational participation will be automatically suspended.

5. Shippers. The carriers assert that the rates set under the agreement do not contravene the restrictions on collective ratemaking in 49 U.S.C. Subtitle IV and our regulations. Each carrier member will deal separately with shippers as to rates, contracts, and service. Rates will not be set by the JVC or its staff and will not be subject to discussion or agreements between JVC members.

Under the pooling agreement, carriers will sometimes have to collect charges from their customers for services that will actually be performed by other carriers. The particular carrier member responsible for contractual arrangements with a particular shipper will collect charges from the shipper and compensate the carriers that actually perform the services. The JVC will facilitate such compensation, acting as a clearinghouse and record keeper.

On January 7, 1999, Schneider National Bulk Carriers, Inc. (Schneider) filed a letter reply in opposition to the agreement, urging us to set the matter for hearing. On January 15, 1999, Liquid Transport Corporation (LTC) filed a petition urging us to reject the agreement or to request comments from the public. By notice served on January 29, 1999, and published in the Federal Register on the same day at 64 FR 4743, we requested public comments on the pooling agreement and suspended operation of the pooling agreement pending a final decision on the application.

Supporting comments were received from the following parties: Air Products and Chemicals, Inc.; Elf Atochem North American, Inc.; The Lubrizol Corporation; Master Builders, Inc.; Reichold Chemicals, Inc.; and Rohm and Haas Company. Opposing comments were received from the following parties: Aristech Chemical Corporation; Enterprise Transportation Company;

LTC; Initial DSI Transports, Inc. (DSI); and Schneider. LTC and Enterprise Transportation Company (Enterprise) also argue that the application must be dismissed because the pooling would be an unregulated transaction. On March 17, 1999, Applicants filed a reply to the comments.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 14302(a), our approval is required before motor carriers of property may “pool or divide traffic or services or any part of their earnings.” Under section 14302(c)(2), if we find that the proposed pool is not of major transportation importance and that there is not a substantial likelihood that the agreement will unduly restrain competition, we are required to approve the agreement. Otherwise, we must hold a hearing under 49 U.S.C. 14302(c)(3) to determine whether the proposed pool “will be in the interest of better service to the public or of economy in operation and will not unduly restrain competition,” and we may impose such terms and conditions as we find “just and reasonable.”³

In this case, we find that the pooling agreement (1) will not restrain competition and (2) will be in the interest of better service to the public or of economy in operation. Accordingly, we approve the application.

I. Impact on Competition

The agreement does not provide for collective ratemaking. It is limited to the creation of operational economies. Despite this limited stated purpose of the agreement, protestant DSI asserts (Comments, at 14) that the sought approval would allow Applicants to engage in unapproved collusive activity that contravenes antitrust law. At this point, we cannot assume, in the absence of evidence, that Applicants will use the JVC for a collusive purpose for which it is not chartered. In any event, our decision does not approve such activity, and any such unapproved activity would be

³ In view of the objections that had been received in this case, we were not prepared to make the findings that would have been required to approve this proposal without a public hearing (i.e., without public notice and opportunity to comment). Applicants argue that, having thus failed to make an explicit determination within the time frame provided by statute (i.e., prior to the proposed effective date of February 1, 1999) that the proposal is of major transportation importance and/or that it would likely unduly restrain competition, we are statutorily foreclosed from making such threshold determinations now. Our Federal Register notice, however, was premised on our concern that the proposal was of major transportation importance, and that is why we sought comment. Therefore, we now proceed to examine the proposal under the two. Since we did not make the threshold findings that would have rendered a public hearing unnecessary, we must proceed to examine the proposal under the two statutory criteria applicable to proposals that have been subjected to a public hearing. That examination includes an inquiry into whether the proposal will unduly restrain competition, as that inquiry covers one of the two criteria for consideration of proposals that have been subjected to a public hearing.

subject to antitrust law. Moreover, we will retain jurisdiction over the agreement, thereby affording parties an opportunity to petition us to reopen and withdraw our approval if they can show that the JVC is being used for an unapproved collusive purpose.

Rather than lessen competition between carriers for the business of shippers, the agreement will allow Applicants to increase their ability to compete with carriers that are considerably larger.⁴ The recent merger of Chemical Leaman Tank Lines, Inc. (1997 revenues of \$306.9 million) and Montgomery Tank Lines, Inc. (1997 revenues of \$286.2 million) has resulted in the creation of a bulk carrier whose pre-merger component parts were both considerably larger in terms of gross revenues than the gross revenues of the individual carriers comprising the pool.⁵ Protestant LTC has also made several significant recent acquisitions. Protestant Schneider is, as Applicants allege, part of one of the motor carrier giants of America.⁶ The operational economies created by the pool will enable Applicants to compete more effectively against these and other large carriers without the use of collective ratemaking.

Because entry into the market served by the nine carriers is not restricted to protect existing carriers, but rather is regulated by DOT only for safety purposes, competitive service alternatives will be available to ensure that the actions of these carriers do not have an adverse effect on the rates and services available to shippers. There are at least 144 other motor carriers transporting bulk

⁴ The carriers estimate that, for the first 12 months of operation, the volume of traffic handled through their joint venture will be 1500 shipments, representing revenue of \$2.2 million.

⁵ On page 9 of their Reply, Applicants submit the following revenue information:

CARRIER	1998 Revenue (\$million)
Groendyke	125
Manfredi	70
Miller	108
Superior	155
Trimac	101
TOTAL	559

⁶ Schneider's 1998 gross revenue from its bulk operation was \$90 million, but it is a wholly owned subsidiary of Schneider National, with 1998 gross revenue of \$2.7 billion. See Applicants' Reply, at 12 n.8.

commodities.⁷ In addition to service from competing motor carriers, shippers are readily able to use private carriage⁸ and competing modes of transportation.⁹ Moreover, we agree with Applicants that shippers of bulk commodities tend to be large shippers employing specialized transportation staffs that can readily take advantage of competitive options.

We disagree with Schneider's contention (Reply, at 4) that the agreement would allow the establishment of a uniform rate structure for transportation services rendered through the JVC. The agreement allows the JVC to establish charges only for the operational services to be provided to member carriers, not charges for services provided to shippers. Section 14302 is concerned with competition between carriers for the business of shippers, and cooperation between providers of goods and services used by carriers to provide service to shippers, such as cleaning equipment, gasoline, vehicles, etc., would not implicate section 14302 unless it were to produce an adverse effect on the rates that shippers pay.

Finally, we reject Schneider's argument (Comments, at 4) that the agreement is flawed because it is not open to all carriers. The cases cited by protestants as requiring open admission are based on precedent that is obsolete in light of intervening statutory changes.¹⁰ In addition, entry into

⁷ Applicants' Reply at 5 and Appendix A. On page 5 of their application, Applicants allege that "there are at least 144 carriers transporting bulk commodities that are not a party to this application." Contrary to what Schneider maintains (Reply, at 3), Applicants' failure to segment these carriers by size and type of commodity hauled is not significant, because bulk carriers are not subject to economic restrictions on the type of bulk commodities that they may haul. In any event, it is clear that several strong bulk carriers are available to compete with the pool carriers.

⁸ According to data sourced to 1993 census data, presented in Appendix B of Applicants' reply, 63% of petroleum tonnage and 60% of chemical tonnage has moved in shipper-owned trucks.

⁹ In their Reply, at 6, Applicants provide a table showing that motor carriers (for-hire and private) transported only 52.3% of 1997 chemical shipping volumes within the United States. The data from this table are attributed to the Chemical Manufacturers Association.

¹⁰ After enactment of the Motor Carrier Act of 1980, the ICC analyzed these statutory changes, issuing a general policy directive in Policy Statement on Motor Carrier Pooling Applications, 127 M.C.C. 746, 748 (1981):

The Motor Carrier Act of 1980 seeks to encourage pooling arrangements "when such arrangements are in the interest of better service to the public or of economy of operation and when they do not unreasonably restrain competition." [Citation to H. Rep. 96-1069, 96th Cong., 2d Sess. 34 (1980).] In view of this change and the general thrust of that legislation, we have taken care not to impede unnecessarily carriers seeking to enter pooling agreements.

(continued...)

the market for bulk carriage by truck is now unrestricted by economic considerations.¹¹ This keeps carriers from using restrictive pooling agreements to divide up the market among themselves and to engage in predatory conduct against carriers outside their pools. Moreover, Applicants credibly argue (Reply, at 25) that the agreement would be unworkable if it were required to be open to all.

II. Service to the Public and Economy of Operation

The pooling agreement will provide a significant transportation benefit by enabling the applicants to reduce empty movements. The protesting carriers all admit to a general empty movement problem in the industry. We have no reason to believe that this problem is not shared by the Applicant carriers.¹² The avoidance of empty movements should reduce operating costs.

The provisions establishing an equipment cleaning pool should also promote operational economies. We cannot agree with Schneider's response (Reply, at 3) that Applicants can realize such economies without the agreement on the grounds that "[t]here are cleaning facilities for hire in virtually every region of the country." Applicants are willing to incur the expense and risk of creating the cleaning pool. Schneider does not state that it or other large carriers operate only with leased cleaning equipment, and we see no reason to second-guess Applicants' business judgments as to how they can operate efficiently. Schneider's objection would have been more credible if Schneider or other large carriers had responded that they operate only with leased cleaning equipment themselves. We see no reason to second-guess Applicants by accepting Schneider's supposition that the use of owned cleaning equipment is not operationally more efficient.

The effect of the agreement on service to the public is likely to be positive. The operational economies from the agreement will allow Applicants to compete in service as well as price. LTC (Comments, at 4) and DSI (Comments, at 8-9) respond that the agreement will substantially alter their ability to operate economically by taking business from them. This argument, however, improperly presumes that our statutory role is to protect large carriers like LTC from competition by preventing their smaller competitors from attaining operating economies. Such a presumption would be contrary to section 14302's focus on whether the pool will unduly restrain competition,

¹⁰(...continued)

¹¹ Prior to enactment of the Motor Carrier Act of 1980, licensing requirements restricted motor carriers from entering the market anew and extending their operations to compete with existing operators.

¹² Protestant LTC asserts (Comments, at 5) that local and regional carriers like Applicants have less empty mileage than their national competitors. That does not mean, however, that the empty mileage of such smaller carriers ought not to be minimized, where possible.

section 13101(a)(2)'s policy favoring "fair competition,"¹³ and the overwhelming Congressional intent to encourage motor carriers to compete with each other.¹⁴ LTC is also incorrect in presuming that Applicants have a duty to show that service by existing carriers is inadequate; section 14302(c)(3) requires merely a showing that the agreement will be in the interest of better service to the public or economy of operation, without respect to what the current service levels are.

Aristech Chemical Corporation (Aristech), the only shipper (out of 12 commenting shippers) to oppose the application, asserts that the agreement will "compromise efforts to ensure the safe transport of hazardous materials." Aristech expresses its concern that it may have difficulties in auditing and inspecting the carrier cleaning facilities to ensure that they meet appropriate health and safety standards. Aristech, however, has not shown why we should doubt the Applicants' ability or commitment to manage the facilities safely. As Applicants note, the use of shared cleaning facilities is not uncommon. Moreover, according to Applicants, Aristech may direct any pool member with which it deals not to pool Aristech's traffic, and Aristech may direct its traffic to cleaning facilities that it has approved.

Finally, Enterprise argues that the agreement is not subject to our jurisdiction. While not all elements of the agreement may require our approval, the proposal to provide transportation services jointly that the Applicants currently provide individually clearly comes under section 14302.

We will retain continuing jurisdiction to require submission of additional information should we find it necessary in the future. If we find at any time that the pooling agreement has taken on major transportation importance or that it is being used to unduly restrain competition, we retain the power to suspend operation of all or part of the pool and to impose such conditions, if any, as are just and reasonable. Our reservation of jurisdiction will also allow any issues concerning the extent of our jurisdiction to be resolved if and when they actually arise.

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

¹³ Mergers between trucking companies do not require Board approval. It would seem inequitable if protestants, governed by the antitrust laws, were able to freely merge their way into operational economies that enabled them to compete aggressively against smaller carriers while Applicants were restricted from attaining the same operational economies by pooling arrangements.

¹⁴ Denial of pooling to protect established carriers from competition would be difficult to reconcile with Congress' overall policy of dismantling such protection by removing statutory barriers to entry and regulatory approval of mergers. Although section 13101(a)(1)(D) maintains a policy against destructive competitive practices, the agreement will not foster such practices because it does not allow collective ratemaking and the record shows that Applicants do not control enough of the market to be able to engage in predation.

It is ordered:

1. The pooling agreement proposed in this application is approved and authorized.
2. The Board reserves the right to require submission of additional information, to investigate the actual operation this pooling agreement, and to prescribe such terms and conditions as may be necessary to ensure compliance with the terms of this decision and applicable regulations.
3. This decision is effective 30 days from its date of service.

By the Board, Chairman Morgan, Vice Chairman Clyburn and Commissioner Burkes.

Vernon A. Williams
Secretary