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SERVICE DATE - MAY 11, 1999

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FR-4915-00-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 33685]

Coach USA, Inc.—Petition for Exemption—Intra-Corporate Family Merger and Consolidation Transactions

AGENCY: Surface Transportation Board.

ACTION: Request for comments.

SUMMARY: The Surface Transportation Board (Board) is seeking comments on a petition by Coach USA, Inc. (Coach) to be exempted from 49 U.S.C. 14303 and the regulations at 49 CFR 1182 concerning the merger or consolidation of motor carriers of passengers controlled by Coach.

DATES: Comments are due on June 10, 1999.

FOR FURTHER INFORMATION CONTACT: Beryl Gordon, (202) 565-1600. [TDD for the hearing impaired: (202) 565-1695.]

SUPPLEMENTARY INFORMATION: Coach has filed a petition for exemption requesting that it be exempted from the prior approval requirements of section 14303 for mergers or consolidations of motor carriers of passengers Coach already controls. Under its proposal, Coach would file a notice similar to the one applicable for class exemptions for railroad intra-corporate family transactions that do not result in significant operational changes, adverse changes in service levels, or a change in the competitive balance with carriers outside the corporate family. See 49 CFR 1180.2(d)(3) and 1180.4(g).

When the petition was filed, Coach, a noncarrier holding company, stated that it controlled, inter alia, 73 motor carriers of passengers subject to federal regulation (Operating Carriers). Coach states its plans to transfer direct control of the Operating Carriers to several new, wholly owned, primarily regionally-based subsidiaries (Management Companies), which would manage closely the Operating Carriers assigned to them.¹ As relevant here, each Management Company evidently would examine the Operating Carriers it controls to determine whether consolidations, mergers or other intra-family corporate transactions involving these carriers are warranted.

Coach asserts that there are currently two procedures available for seeking Board approval for mergers/consolidations. First, Coach can file an application under 49 CFR 1182 for merger authority. Under this procedure, an accepted application will be published in the Federal Register within 30 days of filing as a tentative grant of authority, with comments due within 45 days.² If no adverse comments are timely filed, the tentative grant

¹ Tentative approval has been given to these applications. See Coach USA, Inc., and Coach USA North Central, Inc.--Control--Nine Motor Passenger Carriers, STB Docket No. MC-F-20931; Coach USA, Inc., and Coach USA Northeast, Inc.--Control--30 Motor Passenger Carriers, STB Docket No. MC-F-20932; Coach USA, Inc., and Coach USA South Central, Inc.--Control--Eight Motor Passenger Carriers, STB Docket No. MC-F-20933; Coach USA, Inc., and Coach USA Southeast, Inc.--Control--Seven Motor Passenger Carriers, STB Docket No. MC-F-20934; Coach USA, Inc., and Coach USA West, Inc.--Control--14 Motor Passenger Carriers STB Docket No. MC-F-20935; Coach USA, Inc., and Yellow Cab Service Corporation--Control--Four Motor Passenger Carriers, STB Docket No. MC-F-20936 (STB served Nov. 19, 1998); and Coach USA, Inc. and Coach Canada, Inc.--Control and Continuance in Control--Autocar Connaissanceur, Inc., Erie Coach Lines Company, and Trentway-Wagar, Inc., STB Docket No. MC-F-20938 (STB served Dec. 17, 1998).

² A tentative grant does not give the applicant the right to consummate the
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becomes effective automatically. If opposing comments are filed, the applicant can reply within 60 days of the filing of the application. The Board will then determine whether to issue a decision on the record developed or to receive more evidence before issuing a decision.³

In the alternative, a party can file a petition for exemption under 49 U.S.C. 13541 seeking an individual exemption from the prior approval requirements of 49 U.S.C. 14303 for the merger or consolidation. Coach argues that these proceedings take 3 or 4 months from the filing of the petition to complete. We have indicated that we would normally process exemptions as we do applications: we would publish the exemption request within 30 days of filing, and, after the comment period had expired, we would issue a decision on the merits of the petition. See Revision to Regulations Governing Finance Applications Involving Motor Passenger Carriers, STB Ex Parte No. 559 (STB served July 8, 1997) at 6.⁴

Coach contends that, under present procedures, it takes a minimum of two and one half months to be approved or exempted: “During this hiatus, the transaction could not be

²(...continued)
transaction before the end of the comment period. 49 CFR 1182.5(a).

³ Under the statute, evidentiary proceedings are to be concluded within 240 days of publication of the application. The Board must issue a decision within 180 days after the close of the evidence. Time periods may be extended, in total, for up to 90 days. 49 U.S.C. 14303(e).

⁴ This option is made possible by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (ICCTA). Under former 49 U.S.C. 11343(e), the Interstate Commerce Commission could only grant exemptions for finance transactions involving motor carriers of property. Id. at 6, n.10.

consummated and the benefits that would have accrued from the merger or consolidation would not be available to the traveling public or the merged/consolidated entity.” Petition at 2.

Coach proposes that the exemption for Coach intra-corporate family transactions would be similar to the rail exemption for intra-corporate family transactions. Coach and/or one of its subsidiaries would file a verified notice of exemption with the Board for the merger or consolidation of at least two Coach-controlled carriers, which could be consummated no sooner than 7 days after the filing of the notice. Included in the notice would be a summary of the transaction and the purpose of the transaction, of any contracts being entered into concerning the transaction, and of the effects, if any, on employees. A copy of the notice would be sent simultaneously to the Federal Highway Administration (FHWA)⁵ and, when the carriers provide intrastate service, to the applicable state regulatory body. Coach proposes that the Board would publish the notice of exemption in the Federal Register within 30 days of filing. Coach also proposes that, if the notice contains false or misleading information that is brought to our attention, we could revoke the exemption and order divestiture. Coach also submits that petitions for revocation could be filed at any time pursuant to 49 U.S.C. 13541(d).⁶

⁵ Also, approval from FHWA, if needed, for any transfer of operating authorities, would be sought.

⁶ This provision states that the Board “may revoke an exemption . . . on finding that the application of a provision . . . is necessary to carry out the transportation policy of section 13101.”

Coach notes that, under 49 U.S.C. 13541(a), the Board must exempt a transaction or service from regulation when we find that: (1) regulation is not necessary to carry out the transportation policy of 49 U.S.C. 13101; (2) either (a) regulation is not necessary to protect shippers from the abuse of market power, or (b) the transaction or service is of limited scope; and (3) exemption is in the public interest.

Transportation Policy. Coach claims that the operational and efficiency advantages of its intra-corporate merger/consolidation transactions will further the transportation policy goals of 49 U.S.C. 13101(a)(2). The benefits of these transactions “include consolidated management, streamlined operational procedures, elimination of redundancies and better coordinated planning, safety and other management services that will enable the companies to operate more economically and efficiently. . . .” Id. at 10. Coach also maintains that granting an exemption will produce expeditious decisions, enhancing the efficiency of regulation, and is thus consistent with 49 U.S.C. 13101(a)(2)(B).

Abuse of Market Power. Coach argues that there will be no risk of an abuse of market power from the intra-corporate family transactions, because they will not reduce competition: “None of the Operating Carriers today competes to any significant degree, if at all, with any of the other Operating Carriers.” Id. at 11. These companies allegedly face significant competition from other bus carriers, private cars, and other modes of transportation. Coach contends that the Board has already approved Coach mergers in connection with control transactions.⁷ Finally, Coach submits that competitive issues are

⁷ See Coach USA, Inc. and Leisure Time Tours-Control and Merger Exemption-
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more appropriately considered in a control proceeding because carriers under common control will be unlikely to compete with each other, than in a situation where the controlled carriers are seeking to merge for, according to Coach, “there should be no loss of competitive options available to the traveling public.” Id. at 13 (citations omitted).

Limited Scope. Coach contends that the proposed exemption is of limited scope because it involves carriers already under common control. Because, allegedly, the carriers share centralized management, the merger/consolidation “transactions will accordingly be more focused on corporate form than on substantive operational changes.” Id. at 14.

Coach submits that most of the Operating Carriers it controls are relatively small. More than half of them have annual revenues of less than \$8 million, few have annual revenues of more than \$20 million, and most of the Operating Carriers have fleets of less than 75 buses. Coach argues that, consistent with the standards for rail intra-corporate family transactions at 49 CFR 1180.2(d)(3), in the merger or consolidation of its Operating Carriers “there will be no adverse change in service levels, no significant operational changes that would adversely impact the traveling public and no diminution in the level of competitive service available to the public.” Id. at 15.

Public Interest. The exemption is in the public interest, according to Coach, because it will increase regulatory efficiency by reducing potentially burdensome regulatory practices.

Such efficiency, Coach alleges, would save the resources of both petitioners and the Board.

⁷(...continued)

Van Nortwick Bros., Inc. et al., STB Docket No. 33428 (STB served Nov. 3, 1997) and Coach U.S.A., Inc. and K-T Contract Services, Inc. - Control and Merger Exemption - Gray Line Tours of Southern Nevada, STB Docket No. 33421 (STB served Dec. 4, 1997).

In addition to these stated regulatory benefits, Coach claims that there are also commercial reasons for determining that an exemption is in the public interest. By reducing from two and a half months to 7 days the period for consummating a transaction after a filing, the period that the two merged companies are in limbo would be significantly reduced, lowering the danger that the petitioner will miss out on commercial opportunities for improving service. Coach also claims that, under an exemption, the public and the Operating Carriers would sooner enjoy the benefits of the intra-corporate family transaction. Finally, Coach asserts that reducing the regulatory waiting period will lessen uncertainty in vendors and passengers.

DISCUSSION

As Coach's petition raises issues of first impression, we are seeking comment on Coach's petition. Commenters should address whether an exemption for intra-corporate family transactions is warranted and, if so, whether it should be available solely to Coach.

As a preliminary matter, we do not see how a class exemption could apply only to one party. If the exemption criteria are satisfied for Coach, they would also presumably apply to other parties, if any are similarly situated. Parties should address this issue.

We also question whether the concerns raised by Coach cannot be addressed under our current rules at least in those cases where there is a demonstrated need for quick action by the Board. Under 49 U.S.C. 14303(i), pending the Board's consideration of an application, we may grant interim approval to the operation of properties sought to be acquired for not more than 180 days "when it appears that failure to do so may result in the destruction of or injury to those properties or substantially interfere with their future

usefulness in providing adequate and continuous service to the public.” See also 49 CFR 1182.7. If the interim approval request is submitted when the application is filed, the Board will issue its decision with the notice accepting the application, i.e., within 30 days. Section 1182.7(d)(1). This is quicker than the two and one half months that Coach claims is too long and only 23 days longer than the effective date under Coach’s proposal.

Accordingly, commenters should address these issues, as well as the general issue of whether the exemption Coach proposes is in the public interest. Also, a copy of this request for comments will be served on the Department of Justice, Antitrust Division, 10th Street & Pennsylvania Avenue, N.W., Washington, DC 20530.

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

Decided: May 4, 1999.

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

Vernon A. Williams

Secretary