

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. MC-F 19309 (Sub-No. 1)

WHEATON VAN LINES, INC. ET AL.—POOLING

Digest:<sup>1</sup> The Board finds that a national carrier of household goods may modify the collective agreement it maintains with its individual local affiliates regarding the responsibilities of each party for different types of movements.

Decided: December 23, 2011

On November 10, 2011, Wheaton Van Lines, Inc. (Wheaton), for itself, its wholly owned carrier agents, and certain of its other carrier agents holding interstate operating authority<sup>2</sup> (collectively, applicants), filed an application with the Board under 49 U.S.C. § 14302 and 49 C.F.R. pt. 1184 for approval of a revised pooling agreement.<sup>3</sup> Wheaton is a motor carrier engaged in the interstate transportation of household goods (HHG). In this decision, we approve the revised pooling agreement.

BACKGROUND

Under the current pooling agreement that Wheaton is seeking to amend here,<sup>4</sup> Wheaton's carrier agents have 3 options for using their interstate operating authority: they may elect to (1) use Wheaton's authority for all interstate HHG shipments; (2) use their own authority for

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> Motor carriers register with the Federal Motor Carrier Safety Administration (FMCSA) of the U.S. Department of Transportation (DOT) for authority to transport goods in interstate commerce. See 49 U.S.C. § 13901, et seq.

<sup>3</sup> Appendix A to the application is a list of pooling carrier agents under the original agreement; Appendix B lists Wheaton's wholly owned carrier agents; and Appendix C lists non-wholly owned carrier agents of Wheaton that Wheaton states have indicated that they wish to participate in the amended pooling agreement.

<sup>4</sup> That agreement was approved by the Board's predecessor, the Interstate Commerce Commission (ICC), in Wheaton Van Lines, Inc., et al.—Pooling Application (Wheaton 1989), MC-F 19309 (ICC served Jan. 10, 1989).

interstate HHG shipments moving up to 500 miles; or (3) use their own authority for interstate HHG shipments moving up to 1,000 miles. For lengthier shipments, the carrier agents must book and transport the shipment under Wheaton's motor carrier authority. Wheaton states that over the years it has encouraged its carrier agents to cease using their individual operating authority for all non-government shipments, but has encouraged them to expand their individual government businesses.

The primary modification sought in the application is the removal of carrier agents' ability to ship under their individual operating authority for all non-government shipments, thereby requiring them to tender those shipments exclusively to Wheaton (i.e., move the shipments under Wheaton's authority only). Applicants also seek to modify the original pooling agreement to remove mileage restrictions on carrier agents' use of their individual operating authority for government and military business, giving carrier agents the freedom to carry such movements under their own authority regardless of length.<sup>5</sup> Applicants further seek to allow a written notice to the Board to effect the addition of carrier agents to the pooling agreement. Finally, applicants seek to remove policies pertaining to the distribution of revenue and utilization of equipment from the pooling agreement, which will become matters of contract under Wheaton's agency agreement.

#### DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 14302(a), motor carriers providing transportation subject to the Board's jurisdiction may not pool or divide traffic or services or any part of their earnings without the approval of the Board. Under 49 U.S.C. § 14302(c)(2) and our implementing regulations at 49 C.F.R. § 1184.3, in reviewing an application for such approval, the Board must determine whether the proposed pooling agreement is of major transportation importance and whether there is a substantial likelihood that the agreement will unduly restrain competition. If the Board determines that neither of these two factors exists, it must approve the agreement without a hearing. Id.

Where either factor exists, however, the Board must hold a hearing under 49 U.S.C. § 14302(c)(3) to determine whether the agreement (1) will be in the interest of better service to the public or of economy in operation, and (2) will unduly restrain competition. Section 14302(c)(4) directs the Board to presume that HHG pooling agreements will be in the interest of better service to the public and of economy in operation and will not unduly restrain

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<sup>5</sup> Wheaton specifically notes the relevance of the requested pooling agreement modification to HHG service for the military under the Department of Defense/Surface Deployment and Distribution Command. This suggests that, like other pooling agreement modifications approved in the past, Wheaton's revised agreement is designed in part to account for a Department of Defense requirement that all carriers hold their own authority in order to qualify for the awarding of military HHG traffic. See Atlas Van Lines, Inc., et al.—Pooling Agreement (Atlas 2005), MC-F 21010 (STB served Feb. 23, 2005).

competition, if the practices proposed to be carried out under the agreement are the same as or similar to practices carried out under HHG pooling agreements approved by the ICC prior to January 1, 1996.

We conclude, on the basis of the record presented, that the proposed modification to Wheaton's pooling agreement is not of major transportation importance and will not unduly restrain competition. The proposal should, therefore, be approved without a hearing.

First, the proposed transaction is not of major transportation importance. The volume of traffic affected will be a very small percentage of all general commodities motor carrier traffic; applicants state that, historically, Wheaton's market share has been less than 5% of the national HHG moving market. Moreover, the number of carrier agents that will participate in Wheaton's pooling agreement is very small compared with the number of carriers nationwide that provide similar services, including large motor carrier companies and networks that already provide service nationwide, in addition to entities providing service via other modes of transportation. Cf. Wheaton 1989 (finding that Wheaton's original pooling agreement was relatively small compared to the national market).

Second, we find that the modified pooling agreement will not unreasonably restrain competition. Under the special rules, discussed above, that apply to pooling agreements between HHG motor carriers under § 14302(c)(4), a HHG pooling agreement is presumed not to restrain competition unduly if the practices proposed to be carried out under the agreement are the same as or similar to practices carried out under HHG pooling agreements approved by the ICC prior to January 1, 1996. That is the case here. The primary modification requiring carrier agents to tender all non-government interstate movements to Wheaton is similar to other practices approved by the ICC and the Board that limit the ability of carrier agents to compete with their core carrier to transport HHG. For example, in 1983, the ICC approved the pooling agreement of Atlas Van Lines, Inc., under which the participating carrier agents were not permitted to possess their own operating authority, except to transport HHG for the government (including the military).<sup>6</sup> Furthermore, both the ICC and the Board have found<sup>7</sup> that the public would be

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<sup>6</sup> Atlas Van Lines, Inc., et al.—Pooling Application, MC-F 15004, slip op. at 2-3, 9 (ICC served July 21, 1983); see also Atlas 2005 (approving a similar revision allowing carrier agents to possess broad operating authority, but precluding them from using their own authorities except for military traffic).

<sup>7</sup> See, e.g., Mayflower Transit, LLC—Pooling Application, MC-F 17950 (STB served Dec. 3, 2009); Atlas 2005; United Van Lines, Inc.—Pooling Application, MC-F 4901, et al. (ICC served June 5, 1984).

better served by improving the core carrier's ability to compete with its non-agent competitors than by increasing the level of competition within the core carrier's system.<sup>8</sup>

Likewise, the proposed process permitting a written notice to the Board to effect the addition of carrier agents to the pooling agreement is sufficiently similar to practices approved by the Board in Mayflower Transit, LLC, and by the ICC in Wheaton 1989, and is consistent with 49 U.S.C. § 14302(c)(5). Under this process, the written notice will include: the identity of the new participant; confirmation of the agency relationship with Wheaton; evidence of the carrier agent's HHG operating authority through its current MC number; and indicia of the carrier agent's approved participation in the pooling arrangement.

The remaining revision proposed by applicants removes from the pooling agreement specific details about the distribution of revenue and utilization of equipment. The Board has recently approved very similar modifications on the premise that no pooling agreements that have been the subject of Board decisions have contained as high a degree of detail on the subjects that applicants seek to remove from their agreement.<sup>9</sup>

In short, the Board concludes, on the basis of the record presented, that the proposed agreement would not be of major transportation importance and would not unduly restrain competition. Accordingly, the Board approves the proposed agreement without hearing, pursuant to 49 U.S.C. § 14302(c)(2) and 49 C.F.R. § 1184.3.

Finally, we have the authority to require submission of additional information should we find it necessary in the future. If we find at any time that the transaction has become an anticompetitive one, we can suspend operation of the pool during the pendency of a public hearing concerning the criteria set forth in 49 U.S.C. § 14302 and impose such terms and conditions, if any, as are just and reasonable.

It is ordered:

1. The request to modify the pooling agreement as set forth in the application is approved and authorized.

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<sup>8</sup> The other presumption under § 14302(c)(4) pertains to a finding—that the agreement will be in the interest of better service to the public and of economy in operation—that only arises if a hearing is required. See 49 U.S.C. § 14302(c)(3). Because we find under § 14302(c)(2) that the pool is not of major transportation importance and will not unduly restrain competition, no hearing is required and that other presumption is not material here. We note, however, that because the pooling agreement at issue is indeed similar to agreements approved before January 1, 1996, if a hearing were required, that presumption would apply as well.

<sup>9</sup> See, e.g., Mayflower Transit, LLC; United Van Lines, Inc.—Pooling Application, MC-F 4901, et al. (STB served Dec. 3, 2009).

2. This decision is effective on its service date.

By the Board, Chariman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.