

SERVICE DATE – JUNE 6, 2013

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. MCF 21047

FRANK SHERMAN, FSCS CORPORATION, TMS WEST COAST, INC., EVERGREEN TRAILS, INC. AND CABANA COACHES, LLC - ACQUISITION AND CONSOLIDATION OF ASSETS - AMERICA CHARTERS, LTD., AMERICAN COACH LINES OF JACKSONVILLE, INC., AMERICAN COACH LINES OF MIAMI, INC., AMERICAN COACH LINES OF ORLANDO, INC., CUSA ASL, LLC, CUSA BCCAE, LLC, CUSA CC, LLC, CUSA FL, LLC, CUSA GCBS, LLC, CUSA GCT, LLC, CUSA K-TCS, LLC, AND MIDNIGHT SUN TOURS, INC.

Digest:¹ This decision denies the request filed by the Livery Operators Association of Las Vegas to reopen a decision that allowed Frank Sherman and various motor carrier and noncarrier entities controlled by him (collectively, Applicants) to acquire the assets of motor carrier subsidiaries controlled by Coach America Holdings, Inc. The decision also directs Applicants to seek the Board's authority for a change within its corporate family or to tell the Board why such authority is unnecessary.

Decided: June 4, 2013

On June 4, 2012, Frank Sherman (Sherman) together with FSCS Corporation (FSCS), TMS West Coast, Inc., Evergreen Trails, Inc. d/b/a Horizon Coach Lines (Evergreen), and Cabana Coaches, LLC (Cabana) (collectively, Applicants) filed an application under 49 U.S.C. § 14303 and the Board's regulations at 49 C.F.R. pt. 1182 to acquire the assets of 12 separate interstate motor passenger common carrier subsidiaries of noncarrier Coach America Holdings, Inc. (Coach America), including, as relevant here, CUSA K-TCS, LLC (K-TCS), American Coach Lines of Miami, Inc. (Coach-Miami), and Midnight Sun Tours, Inc. (Midnight Sun).²

¹ 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).

² At the time, the Coach America subsidiaries were in Chapter 11 bankruptcy proceedings. In re Coach Am. Group Holdings Corp., Case No. 12-10010 (KG) (petition filed Jan. 3, 2012). The proposed acquisition was approved by the U.S. Bankruptcy Court for the District of Delaware on May 22, 2012.

In their application, Applicants indicated that K-TCS, an interstate motor carrier that operated charter, sightseeing, and airport shuttle operations in Nevada, had discontinued its operations and that K-TCS's assets, including its Nevada intrastate operating authority, would be consolidated into Evergreen through the proposed acquisition.³ Applicants further stated that, "Evergreen does not plan to resume the services previously offered by [K-TCS]".⁴

Also in their application, Applicants indicated that, under the terms of the Asset Purchase Agreement, Transportation Management Services, Inc., another company controlled by Sherman, would have the right to purchase the Coach America subsidiaries and would then assign its right to purchase to either FSCS or to Evergreen and Cabana. If the right to purchase were assigned to Evergreen and Cabana, Cabana would receive the right to purchase and consolidate the assets of Coach-Miami and Midnight Sun into Cabana; Evergreen would receive the right to purchase and consolidate the assets of all of the other Coach America Subsidiaries into Evergreen. The Board granted the application by decision served on September 6, 2012.

In a letter filed on October 9, 2012, Applicants informed the Board that, while they initially did not have definitive plans regarding operations in Nevada, Evergreen would now conduct certain operations in Nevada with the assets and permits it acquired through the Board-authorized transaction, specifically the motorcoach assets and intrastate operating authority of K-TCS. Applicants further stated that, for purposes of efficiency and cost effectiveness, the assets acquired from Coach-Miami and Midnight Sun would be consolidated into Evergreen rather than Cabana, as had been contemplated at the time the application was filed.

On November 30, 2012, the Livery Operators Association of Las Vegas (LOA) filed a petition seeking to reopen the proceeding based on new evidence and material error. LOA asserts that Applicants misled the Board by stating in their application that they would not resume operations in Nevada, despite current plans to do so.⁵ Accordingly, LOA requests that the Board clarify that any newly proposed Nevada operations by Evergreen are excluded from the Board's approval decision. LOA further argues that Evergreen's "purely intrastate operations" in Nevada do not fall under the Board's jurisdiction and should be regulated by the Nevada Transportation Authority (NTA).⁶

³ Application at 16 n.8.

⁴ Application at 5 n.4.

⁵ As support, LOA cites a letter from Applicants' counsel, dated August 13, 2012, and addressed to the Nevada Transportation Authority, stating Evergreen's intentions "to continue operating the services currently operated by K-TCS."

⁶ On October 17, 2012, LOA submitted copies of its briefs filed before NTA opposing the transfer of K-TCS's intrastate operating authority to Evergreen. In a letter submitted May 15, 2013, Applicants state that, on April 25, 2013, NTA voted to deny LOA's protest and

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On December 18, 2012, Applicants replied to LOA's petition (December 2012 reply). Applicants assert that, while the application stated that Evergreen would not resume the discontinued operations of Nevada-based K-TCS, by explicitly requesting authority to acquire K-TCS's assets and Nevada operating authorities, nothing in the application foreclosed the possibility that Applicants might decide to operate a motorcoach business in Nevada with the purchased assets. Applicants also argue that it is the Board and not NTA that has jurisdiction over this transfer of intrastate operating authorities in a transaction involving interstate carriers.

By letter filed on January 31, 2013, Applicants informed the Board that on January 22, 2013, Evergreen initiated intrastate motor passenger service in Nevada using an intrastate operating authority acquired through the transaction. Applicants further indicated that the service was initiated pursuant to a tariff filed by Evergreen with, and approved by, NTA and following a vehicle inspection conducted by NTA.⁷

On February 1, 2013, LOA filed a surreply to Applicant's December 2012 reply, asserting that institution of operations by Evergreen is illegal, improper, and jeopardizes public safety. On February 19, 2013, Applicants requested that the Board reject LOA's surreply in accordance with 49 C.F.R. § 1104.13(c), or, alternatively, consider their attached response to the surreply.⁸

DISCUSSION AND CONCLUSIONS

Nevada Operations. Under 49 U.S.C. § 722(c) and 49 C.F.R. § 1115.4, the Board may reopen a proceeding because of "material error, new evidence, or substantially changed circumstances." The alleged grounds must be sufficient to convince the Board that they would lead it to materially alter its prior decision. If a party has presented no new evidence, changed circumstances, or material error that "would mandate a different result," then the Board will not reopen.⁹ Here, we find that LOA has failed to demonstrate a basis for reopening this proceeding.

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recognize the transfer to Evergreen of intrastate K-TCS authorities. On May 31, 2013, Applicants submitted a copy of NTA's order reflecting its vote.

⁷ Under 49 C.F.R. § 1182.8(f), parties are required to comply with any ministerial requirements of relevant State procedures in transactions involving the transfer of operating authorities.

⁸ The Board's rules at 49 C.F.R. § 1104.13(c) prohibit a "reply to a reply." However, in the interest of compiling a more complete record, we will accept the surreplies.

⁹ See Montezuma Grain v. STB, 339 F.3d 535, 541-42 (7th Cir. 2003), and DesertXpress Enters.—Petition for Declaratory Order, FD 34914, slip op. at 6-8 (STB served May 7, 2010).

The record before the Board does not support LOA's categorical assertion that Applicants "specifically disavowed any Nevada operations."¹⁰ While Applicants stated in their application that they had no plans to resume the discontinued operations of K-TCS, the Board did not interpret that statement to mean that Evergreen would never operate in Nevada, nor does it preclude Evergreen from doing so now. Rather, it is reasonable to assume that Evergreen might resume operations (as it has) in Nevada in light of the assets that it acquired, including K-TCS's Nevada intrastate operating authorities. Thus, while it would have been preferable for Applicants to have informed the Board of their apparent change of plans prior to the issuance of the September 2012 decision, we do not find Applicants' representations to be false or misleading. In any event, their change of plans would not have caused a different result from our prior decision and so it is not material.

Nor do we find the fact that Evergreen has instituted Nevada operations to constitute new evidence that would warrant reopening this proceeding. Again, even if Applicants had explicitly stated in their application that they would resume K-TCS's operations in Nevada, such a statement would not have materially altered the Board's prior decision to approve the transaction.

Under 49 U.S.C. § 14303(b), the Board must approve and authorize a transaction that it finds consistent with the public interest, taking into consideration, among other things, the effect of the transaction on the adequacy of transportation to the public. In determining whether the transaction is consistent with the public interest, the Board may evaluate other factors, including whether the transaction would have any anticompetitive effects. LOA argues that Applicants' failure to indicate their intention to operate in Nevada prevented the Board from examining the adequacy of transportation to the public, particularly in the Nevada transportation market. We disagree. In analyzing the adequacy of transportation to the public, the Board considered the benefit to the traveling public of having Coach America subsidiaries operated by a financially healthy group of carriers. The Board also found that the transaction would have no adverse impact on competition. These findings would apply to Evergreen's Nevada operations as well. Acquiring and operating the assets of K-TCS, whose operations had been discontinued due to financial reasons, would not adversely affect competition; rather, it would enhance competition in the Nevada transportation market by providing an additional competitive option. Therefore, even if Evergreen's Nevada operations constitute new evidence, it would not have materially affected the Board's decision to approve the acquisition transaction.

Lastly, LOA argues that Evergreen's Nevada operations fall outside the Board's jurisdiction and would be more appropriately regulated by NTA. To the contrary, if parties to a finance transaction are motor passenger carriers subject to the Board's jurisdiction under 49 U.S.C. § 13501, then, under 49 U.S.C. § 14303(f), they are subject to the Board's exclusive and plenary jurisdiction in all matters relating to the consolidation, merger, and acquisition of

¹⁰ LOA Surreply at 4.

control, including the transfer of intrastate operating rights.¹¹ Here, the Board approved an acquisition transaction involving motor carriers subject to the Board's jurisdiction under § 13501. Accordingly, under § 14303(f), any state action that would interfere with Evergreen's ownership and operation of K-TCS's assets is preempted, regardless of the extent of the participating carriers' operations in intrastate commerce.¹² Therefore, we find that the Board did not err in asserting jurisdiction over the transaction and related matters.¹³

Florida Operations. As discussed above, under the terms of the Asset Purchase Agreement entered into by Applicants, the assets of the 12 Coach America subsidiaries, including Coach-Miami and Midnight Sun, would be purchased by either FSCS or by Evergreen and Cabana and consolidated into Evergreen and Cabana, which are both controlled by Sherman. In their application, Applicants stated that the assets of Midnight Sun and Coach Miami would be consolidated into Cabana and that Cabana would conduct the operations previously conducted by these two carriers. Applicants have now informed the Board that they are consolidating the assets of Midnight Sun and Coach-Miami into Evergreen, rather than Cabana.

It appears that Applicants have conducted a transaction within a motor carrier family requiring Board approval, but which may be exempt from the prior approval requirements of 49 U.S.C. § 14303. Applicants will therefore be directed to file with the Board a notice of exemption under 49 C.F.R. § 1182.9 or explain why such a filing is unnecessary by June 26, 2013.

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

It is ordered:

1. Applicants' request to reject LOA's surreply is denied, and both parties' surreplies are accepted for consideration.

¹¹ Colo. Mountain Express, Inc.—Consolidation & Merger—Colo. Mountain Express, 2 S.T.B. 68, 69 (1997) (Colorado Mountain Express).

¹² Id.

¹³ Moreover, the assets at issue are licenses to provide airport shuttle and scenic tour services (Csoka V.S. Exhibits A and B) that undoubtedly serve the 40,000,000 tourists who visit Las Vegas annually, according to LOA: "Unlike any other commercial market in the United States, casino gaming is indispensable to the continued viability of the state, with approximately forty (40) million tourists annually requiring safe and proper transportation in Las Vegas alone." LOA Surreply, Feb. 1, 2013 at 2. In that regard, this case is similar to Colorado Mountain Express.

2. LOA's petition to reopen is denied.
3. Applicants shall file a notice exemption under 49 C.F.R § 1182.9 pertaining to their Florida operations or explain why such a filing is unnecessary by June 26, 2013.
4. This decision is effective on its service date.

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