

SURFACE TRANSPORTATION BOARD

DECISION

Docket Nos. MC-F-20904, MC-F-20908, and MC-F-20912

PETER PAN BUS LINES, INC.—POOLING—GREYHOUND LINES, INC.

Digest:¹ The Board earlier granted permission for 2 bus companies to share their operations and earnings through a “pooling” arrangement when providing service between New York City and 3 other cities. In this decision, the Board declines the request of another bus company to require a formal application prior to permitting the 2 bus companies to continue to share their curb-to-curb bus service between the same cities. The Board also declines an alternative request to limit the hours in which the 2 companies may provide curb-to-curb service.

Decided: April 19, 2011

BACKGROUND

The Pooling Arrangements. Peter Pan Bus Lines, Inc. of Springfield, Mass. (Peter Pan) and Greyhound Lines, Inc. of Dallas, Tex. (Greyhound) (collectively, Applicants) filed 3 applications in 1997 for authority under 49 U.S.C. § 14302 to “pool” (share or divide) their operations and revenues for bus service in several transportation corridors. Applicants sought pooling authority for service: (1) in Docket No. MC-F-20904, between New York City (NYC) and Philadelphia, Pa.; (2) in Docket No. MC-F-20908, between NYC and Washington, D.C.; and (3) in Docket No. MC-F-20912, between NYC and (a) Boston, Mass., and (b) Springfield, Mass.

Applicants acknowledged that they were competitors and claimed that their overlapping services caused low passenger loads on buses and drained their resources. Applicants argued that, if pooling were approved, they could reduce excess capacity on buses, eliminate unnecessary duplication of facilities and staff, better manage their pricing, and make capital improvements to provide better service.

After reviewing the relevant pooling agreements in these proceedings, the Board approved each application. The Board found that Applicants’ pooling arrangements would likely improve bus service by permitting the 2 companies to load buses more fully, reduce excess capacity, provide better customer service, and achieve better financial stability. The Board

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).

concluded that, for each application, the sharing arrangements would foster improved service to the public and economy of operation, and would not unreasonably restrain competition.² In the case concerning the pooling of bus service between NYC and Washington, in which other parties had filed comments, the Board required Applicants to submit, for 3 years, periodic reports on the fares charged in that corridor.³

Since the Board authorizations, Applicants have made certain changes to the pooling agreements. As relevant here, in 2008, Applicants submitted a letter informing the Board that they had agreed to a Fourth Amendment by which they would provide an “enhanced” curb-to-curb service on 3 of the same routes for which sharing of services and revenues already was authorized between NYC and (1) Washington, (2) Philadelphia, and (3) Boston.⁴ In the letter, Applicants sought confirmation that the curbside service was encompassed within their already approved pooling authorizations and did not require a new application. Applicants stated in a follow-up letter that they had designed the enhanced service to compete with “Chinatown” buses, which provided curbside service in these transportation corridors and operated at peak times.⁵ The then-Acting Secretary of the Board stated in a responsive letter that the curb-to-curb service came within the scope of the Board’s prior pooling authorizations, and consequently no formal Board action was needed.⁶ Applicants named their shared curbside service “BoltBus.”⁷

Request to Reopen. A competitor bus company has objected to this BoltBus arrangement. Motor carrier Megabus Northeast, LLC (Megabus) and its noncarrier parent corporation, Coach USA, Inc. (collectively, Coach), ask us to reopen this proceeding and to find that Applicants’ BoltBus service was not encompassed in the agency’s earlier authorizations of pooling in the 3 corridors and instead requires a new application. Megabus competes with BoltBus in providing curbside bus service between NYC and Washington, Philadelphia, and Boston.⁸ In the alternative, Coach seeks a ruling that BoltBus’s curbside service must be

² MC-F-20904, slip op. at 2 (STB served June 30, 1997); MC-F-20912 slip op. at 3 (STB served Feb. 12, 1998); MC-F-20908, slip op. at 5 (STB served Apr. 29, 1998).

³ See MC-F-20908, slip op. at 6 (STB served Apr. 29, 1998) (Board would reopen and reconsider its approval if, as a result of the pooling, competition for passengers were diminished to such an extent that Peter Pan and Greyhound were able to raise fares to an unreasonable level).

⁴ Pet. Ex. 1, page 1 & Fourth Amendment. The agreement encompassing the Fourth Amendment provides that Applicants also intend to continue their shared bus services from bus stations and terminals. Id., Fourth Amendment 2.

⁵ Pet. Ex. 1, final page.

⁶ Pet. Ex. 2.

⁷ Pet. 2.

⁸ Pet. 10.

restricted to morning and evening peak hours. Applicants replied in opposition to Coach's petition.

PRELIMINARY ISSUES

May 2010 Letter-Reply. On May 28, 2010, Coach submitted a letter-reply to Applicants' reply to Coach's reopening petition. Citing the Board's rule precluding the filing of a reply to a reply, at 49 C.F.R. § 1104.13(c), Applicants ask us to reject Coach's letter-reply. Coach argues that its letter-reply is necessary to correct misstatements in Applicants' reply. The alleged misstatements do not, however, constitute good cause for accepting a reply to a reply. See E.-W. Resort Transp., LLC—Pet. for Declaratory Order—Motor Carrier Transp. of Passengers in Colo., MCF 21008, slip op. at 2 (STB served Apr. 8, 2005) (rejecting a reply to a reply submitted on the ground that the record was incomplete due to representations made in the other party's reply). In addition, the letter-reply repeats many of the same arguments in Coach's petition. For these reasons, we will grant the request to reject Coach's letter-reply.

December 2010 Letter. On December 16, 2010, Coach filed another letter informing the Board about a new "Greyhound Express" intercity bus service in the Midwest, which, according to Coach, competes directly with another of Coach's carriers, Megabus USA, LLC. In the letter, Coach argues that Greyhound's new service between cities in the Midwest demonstrates that Greyhound can provide bus services similar to those covered by the Fourth Amendment without Board-authorized pooling authority. Applicants respond that the new service in the Midwest is not relevant and ask the Board to disregard Coach's letter.

We agree with Applicants that the new pleading is not relevant to the issues raised by Coach's challenge to Applicants' pooled service in a different region, the Northeast. For that reason, we will not consider the letter in reaching our decision.

DISCUSSION AND CONCLUSIONS

The major issue in this case is whether a minor amendment that does not expand the scope of an existing approved pooling agreement may be put into place only after it is approved in a proceeding before the Board. We find that formal approval is not necessary here, because the amendment at issue does not expand the scope of the existing authorization; nor does the improved competitive environment undermine the earlier authorization. We also find that the operations actually provided are not beyond the scope of the amendment.

Original Authorizations of These Pooling Arrangements. Motor carriers providing transportation subject to the Board's jurisdiction may not agree to pool or divide traffic, services, or revenue, absent Board approval. 49 U.S.C. § 14302(a). The Board may authorize pooling agreements between bus companies if it finds that the pooling: (1) will be in the interest of better

service to the public or of economy of operation; and (2) will not unreasonably restrain competition. 49 U.S.C. § 14302(b).

In each of these cases, the Board authorized the pooling arrangements after finding that they met the statutory standards. As with all approvals of pooling agreements, the Board's authorization conferred on the parties an exemption from the antitrust laws and all other law, as necessary to carry out the arrangement. 49 U.S.C. § 14302(f).

A New Application Is Not Required for This Amendment, Which Does Not Expand the Pooling into a New Geographic Territory. Coach argues that the Fourth Amendment—concerning curbside service on the same northeastern routes on which Applicants already shared operations and revenues—required a new application and a Board finding whether the amendment was of “major transportation importance.”⁹ In essence, Coach contends that, under 49 U.S.C. § 14302, a new application was required for the curbside service.

Neither the statutory provision nor the implementing regulation, however, addresses the situation when the pooling parties merely wish to alter or amend their arrangement in the same territory for which the effects on competition already have been assessed and pooling already has been approved. We interpret § 14302 as not requiring a new application when an amendment would not permit the pooling participants to serve a new or additional route or territory, because the requisite statutory inquiry into the public interest and effects on competition has already been performed for the routes at issue. In this regard, the Board has made clear that a full application is needed when the opposite is true—a proposed amendment to a pooling agreement would involve a new route or geographic territory. See, e.g., Peter Pan Bus Lines, Inc.—Pooling—Greyhound Lines, Inc., Docket No. MC-F-20908 (STB served Mar. 24, 2010) (rejecting an amendment and requiring a new application to serve a new city (Philadelphia) on the existing pooled route between NYC and Washington; the amendment would have allowed the first pooled service between Washington and Philadelphia).¹⁰

We acknowledge that, when Applicants earlier filed a full application in these proceedings seeking approval of certain amendments that did not extend their authorized, shared territory or routes, the Board processed the application as requested. See, e.g., Peter Pan Bus Lines, Inc.—Pooling—Greyhound Lines, Inc., Docket Nos. MC-F-20904, et al. (STB served Dec. 18, 1998) (giving notice of Board's tentative approval of “certain minor and conforming

⁹ Pet. 2-3. See 49 C.F.R. § 1184.3.

¹⁰ On March 22, 2011, Coach and Megabus filed in Docket MC-F-20908 a request for an order requiring Applicants to show cause why they should not be required to terminate their newly announced pooled service between Newark, N.J. and Washington, D.C. via Baltimore, Md, arguing that this service is not authorized under the authorized agreement for pooling between NYC and Washington. This request will be the subject of a separate decision.

amendments” to the previously approved applications in these cases). But the fact that the agency entertained a new application seeking approval for conforming amendments does not mean that an application actually was required under the statute, nor did the Board specifically consider that issue as it was not raised by any party. In light of the statutory silence on amendments and modifications to approved pooling agreements, we now interpret the statute as logically not requiring a new amendment here, because there was no expansion of routes or territories at issue.

Reopening Is Not Warranted Because the Improved Competition for Bus Services Does Not Undermine the Earlier Authorizations of Pooling. Under the governing statute, 49 U.S.C. § 722(c), and regulations, 49 C.F.R. § 1115.4, a petition to reopen will be granted only upon a showing that the prior Board action involved material error or would be affected materially because of new evidence or changed circumstances. DesertXpress Enters., LLC—Pet. for Declaratory Order, FD 34914, slip op. at 6 (STB served May 7, 2010); Town of Springfield, N.J. v. STB, 412 F.3d 187, 189 (D.C. Cir. 2005) (party seeking reopening must show how changed circumstances would materially affect the Board’s disposition).

Here, Coach bases its reopening request on changed circumstances. Coach states that intercity bus service on the pooled routes served by BoltBus has become “significantly more competitive” because of new entrants into curbside bus service and there has been “dramatic growth in demand and ridership.”¹¹ We agree with Coach that there has been a dramatic increase in competition for bus services on these routes. Indeed, one of the new entrants is petitioner Coach’s Megabus service.¹² According to Coach, the market for bus service in these northeastern corridors now is “economically robust,”¹³ as demonstrated in several academic studies and other evidence provided by Coach, attesting to today’s strong competition for bus services in the Northeast. As Coach further explains, there are so many competitors on these routes that a website has been established to display the services of the competing bus operators.¹⁴

According to Coach, the Board should reopen these proceedings because there no longer is a need to assist financially unstable carriers, which was one of the reasons that the Board

¹¹ Pet. 3.

¹² Coach states that, in 2008, Megabus began providing service on the same routes as BoltBus. Pet. 10. According to Coach, other recent entrants and expanded services in these corridors include Vamoose, Washington Deluxe, Limoliner, DC2NY, Hola Bus, and Tripper Bus. Pet. 11-12 & n.25.

¹³ Pet. 4.

¹⁴ Pet. 12. Coach cites: <http://busjunction.com>; see also Pet. Ex. 9 (printout from the website).

approved Applicants' pooling agreements in the late 1990s.¹⁵ However, if, as Coach posits, a positive change in underlying conditions were deemed to require that a pooling application must be reopened and reconsidered, Applicants would have to expend time and resources to defend their success in improving their bus services and their financial conditions, even though, as Coach ably demonstrates here, there has been an increase in competition. That would not, in our view, be a productive way for us to exercise our licensing authority.

A change in the industry's condition could, in some cases, be material enough to warrant the Board's reopening a decision. But here, Coach demonstrates that there is improved service to the public and increased competition for bus services in these corridors. The Board initially authorized these pooling applications because it found that the sharing arrangement would lead to improved service and would not restrain competition unduly. While Coach has demonstrated that this finding has proved true, it has not met the statutory standard for reopening a Board decision, because a detailed examination of the current conditions of bus service in the Northeast would not materially affect the Board's earlier findings.

Coach also posits that the increased demand for bus service undermines the Board's findings when it initially approved the pooling agreements. In 1998, when we authorized these pooling agreements, Peter Pan and Greyhound separately operated so many buses on these routes that neither company was able to fill the buses to capacity. But, at that time, each company wished to protect its market share by making buses available frequently. Now, according to Coach, there is so much demand for bus service in these corridors that there is no need to continue to approve pooling of the 2 companies' services.

The increased demand has been met by the many new entrants into curbside service, including Megabus. Coach has provided no cogent reason why these entrants (and additional companies) cannot continue to grow to meet the increased demand. In our view, the fact that rider demand and the number of buses plying these corridors continues to grow does not require us to revisit our earlier finding that service to the public would improve through approval of the original pooling applications.

Finally, Coach complains that the authorized pooling gives Applicants a competitive advantage by permitting them to share expenses and risks, free of concerns about antitrust enforcement.¹⁶ In this regard, Coach claims that its related corporation, Megabus, and other competitors on these routes do not have a similar ability to share expenses and risks. We note, however, that the many other new and expanded companies providing curbside service in these corridors appear to be able to compete successfully with Applicants.

¹⁵ Pet. 9-14.

¹⁶ Pet. 14.

The purpose of the antitrust laws is “the protection of competition, not competitors.” Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 906 (2007), quoting Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 338 (1990). Similarly, when approving a pooling arrangement, we are concerned primarily with its effect on consumers. In view of the demonstrated benefits of Applicants’ pooling on consumers, we will not reopen to reconsider our earlier approval.

The Fourth Amendment Does Not Restrict the Hours of BoltBus’s Operations. Coach also argues that, because the BoltBus curbside service is offered throughout the day, Applicants have exceeded their authority under the Fourth Amendment.¹⁷ In support of this argument, Coach cites a sentence in a letter from the Board’s Acting Secretary: “[Applicants’] new service will operate from curbside locations rather than from terminals and will be offered only during the morning and evening peak travel times.”¹⁸ The terms of the Fourth Amendment itself do not limit the times when the service will be offered, however.

The Acting Secretary understandably misstated the hours of service because Applicants had informed her that curb-to-curb service would permit them to compete more effectively with “the so-called Chinatown bus operators,” which offer service “only at morning and evening peak travel times.”¹⁹ Applicants added that their BoltBus service would operate similarly.²⁰

As Applicants explain, however, they did not mean “identically” when they said “similarly.”²¹ Coach has not provided evidence that Applicants are operating outside the terms of the Fourth Amendment, and we will not restrict the hours when Applicants may provide shared service under their pooling agreement and authorization. As Coach’s own evidence shows, several of the competitors on these routes, including Megabus, operate throughout the day and evening, like Applicants’ shared service.²²

It is ordered:

1. The petition to reopen and to deny approval of the Fourth Amendment to the pooling agreements or, in the alternative, to limit the hours in which Applicants may provide shared curb-to-curb bus service under those agreements is denied.

¹⁷ Pet. 18.

¹⁸ Pet. Ex. 2.

¹⁹ Pet. Ex. 1, final page.

²⁰ Id.

²¹ Reply 12.

²² Pet. Ex. 9.

2. Applicants' request to reject Coach's May 28, 2010 letter-reply is granted.
3. This decision is effective on its service date.

By the Board, Chairman Elliott and Commissioner Mulvey.