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SERVICE DATE – SEPTEMBER 6, 2012

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 grants the request filed by Frank Sherman and various carrier and noncarrier entities controlled by him for approval to acquire the assets of 12 separate interstate motor passenger common carrier subsidiaries currently controlled by Coach America Holdings, Inc.

Decided: September 5, 2012

On June 4, 2012, Frank Sherman (Sherman) together with FSCS Corporation (FSCS), TMS West Coast, Inc. (TMS West), 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)—American Charters, Ltd. (Charters); American Coach Lines of Jacksonville, Inc. (Coach-Jacksonville); American Coach Lines of Miami, Inc. (Coach-Miami); American Coach Lines of Orlando, Inc. (Coach-Orlando); 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. (Midnight Sun) (collectively, Coach America Subsidiaries)—and to consolidate certain of those assets into Evergreen and others into Cabana.

Notice of the finance application was served and published in the Federal Register on July 3, 2012 (77 Fed. Reg. 39,571). A copy of the notice was also served on the U.S. Department of Transportation, Federal Motor Carrier Safety Administration (FMCSA); the U.S. Department of Justice, Antitrust Division; the U.S. Department of Transportation, Office of the

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).

General Counsel; the Federal Trade Commission, Bureau of Competition, Premerger Notification Office; and two parties that had filed comments in opposition to the proposed transaction: Michael Yusim, an individual, and the Ventura County Transportation Commission (VCTC).² Based on our review of the record, we are granting the application.

BACKGROUND

Sherman, an individual who controls motor passenger carriers, owns and controls over 95% of the stock of FSCS. FSCS, a noncarrier holding company incorporated in the State of Maryland, owns TMS West, a noncarrier holding company incorporated in the State of Washington; TMS Canada Holdings Ltd. (TMS Canada), a Canadian holding company; and Cabana, an interstate motor passenger carrier incorporated in the State of Maryland and headquartered in the State of Florida. TMS Canada owns Horizon Coach Lines, Ltd. (Horizon), a motor passenger carrier registered and based in British Columbia, Can. that operates in Canada and the United States. TMS West owns Evergreen, an interstate motor passenger carrier incorporated and headquartered in the State of Washington.

The transaction contemplates that: (1) the assets of Charters; Coach-Jacksonville; Coach-Orlando; CUSA ASL, LLC; CUSA BCCAE, LLC; CUSA CC, LLC; CUSA FL, LLC; CUSA GCBS, LLC; CUSA GCT, LLC; and CUSA K-TCS, LLC, would be purchased by either FSCS or Evergreen to be operated under the Horizon Coach Lines name; and (2) the assets of Coach-Miami and Midnight Sun would be purchased by either FSCS or Cabana and consolidated into Cabana. Cabana would also adopt the d/b/a name “Horizon Coach Lines,” and the assets consolidated into Cabana would be operated under that name. Under an asset purchase agreement, see infra, another company controlled by Sherman, Transportation Management Services, Inc. (TMS), obtained the right to purchase the Coach America Subsidiaries. TMS is to assign its right to purchase to either FSCS or to Evergreen and Cabana. If TMS assigns its right to purchase to Evergreen and Cabana, Cabana will receive the right to purchase the assets of Coach-Miami and Midnight Sun, and Evergreen will receive the right to purchase the assets of all of the other Coach America Subsidiaries identified above.³ Evergreen, Cabana, and each of

² On June 19, 2012, VCTC, a California public agency that operates a regional bus system, filed a Request for Delay. VCTC withdrew the request on June 29, 2012.

³ A request for interim approval to acquire management and operational control of the assets under 49 U.S.C. § 14303(i) was included in this filing (Docket No. MCF 21047 TA). In a decision served on June 29, 2012, interim approval was granted, effective on the service date of the decision. In that decision, the Board specified that “to the extent valid leases and other contracts are associated with the assets being acquired, Applicants are reminded that these leases and other contracts must be honored consistent with the language in § 14303(i) concerning the provision ‘of adequate and continuous service to the public.’

the 12 Coach America Subsidiaries currently hold charter and/or regular route interstate operating authority issued by FMCSA.⁴

The Coach America Subsidiaries are currently involved in proceedings instituted under Chapter 11 of the Bankruptcy Code, having filed a voluntary petition for relief with the U.S. Bankruptcy Court for the District of Delaware on January 3, 2012. On January 13, 2012, the Coach America Subsidiaries also filed a motion to sell substantially all of their assets and effectively to liquidate. According to Applicants, the proposed acquisition is evidenced by an Asset Purchase Agreement that was entered into by the parties on May 18, 2012, and was approved by the U.S. Bankruptcy Court for the District of Delaware at a hearing on May 22, 2012.

DISCUSSION AND CONCLUSIONS

Jurisdiction

Under 49 U.S.C. §§ 14303(a)⁵ and (g), transactions effecting the acquisition of motor passenger carrier assets require Board approval where they involve a purchase, lease, or contract to operate property of another carrier by any number of carriers whose aggregate gross operating revenues exceed \$2 million during a period of 12 consecutive months ending not more than six months before the date of agreement of the parties. Here Applicants seek to acquire the assets of a number of motor passenger carriers whose aggregate gross operating revenues exceeded \$2 million during the 12-month period preceding the filing date of the application. Accordingly, Board approval of the proposed transaction is required.

⁴ CUSA GCBS, LLC, and CUSA K-TCS, LLC, discontinued operations in April 2012. The assets of these companies will be consolidated into Evergreen, but Evergreen does not plan to resume the services previously offered by these companies.

⁵ The provisions of 49 U.S.C. § 14303(a) state as follows:

(a) Approval Required.—The following transactions involving motor carriers of passengers subject to jurisdiction under subchapter I of chapter 135 may be carried out only with the approval of the Board:

(1) Consolidation or merger of the properties or franchises of at least 2 carriers into one operation for the ownership, management, and operation of the previously separately owned properties.

(2) A purchase, lease, or contract to operate property of another carrier by any number of carriers.

(3) Acquisition of control of a carrier by any number of carriers.

(4) Acquisition of control of at least 2 carriers by a person that is not a carrier.

(5) Acquisition of control of a carrier by a person that is not a carrier but that controls any number of carriers.

Statutory Standard for Approval

Under 49 U.S.C. § 14303(b), we must approve and authorize a transaction that we find consistent with the public interest, taking into consideration at least: (1) the effect of the transaction on the adequacy of transportation to the public; (2) the total fixed charges that result; and (3) the interest of the affected carrier employees. 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.

Adequacy of transportation to the public. Applicants assert that the proposed transaction will benefit the traveling public. Specifically, they contend that the transaction will consolidate the assets and operations of the Coach America Subsidiaries into Applicants' financially healthy group of carriers. This, they claim, will give the Coach America Subsidiaries greater access to working capital, better credit ratings, and reduced borrowing costs, which in turn will facilitate any borrowing needed for fleet modernization and other improvements that will benefit the traveling public. The traveling public, according to Applicants, will benefit from the Coach America Subsidiaries having greater access to capital resources, favorable debt restructuring, significant interest cost savings, and reduced operating costs resulting from enhanced volume purchasing. In addition, Applicants contend that the services provided by the Coach America Subsidiaries will benefit from more centralized management, which will facilitate savings in such administrative areas as accounting, coordinated purchasing services, coordinated driver training services, and vehicle sharing to ensure maximum utilization and operational efficiency of equipment.

Applicants also assert that the proposed transaction will have no adverse impact on competition. They state that the competition between the Coach America Subsidiaries on the one hand and Evergreen or Cabana on the other hand is very limited. In the Houston, Tex. area, Applicants note that CUSA GCT, LLC, provides charter and commuter contract services, whereas Evergreen primarily focuses on contract operations for cruise lines and large events such as conventions and trade shows. In the Miami, Fla. area, Applicants note that charter operations account for almost two thirds of Coach-Miami's business and that contract business with cruise lines accounts for about 14% of its revenues, whereas charter operations account for about 10% of Cabana's business and contract business with cruise lines accounts for about 90% of its revenues. Applicants assert that many other motor passenger carriers in the Miami area compete for this business and that Evergreen and Cabana will continue to face competition from private vehicles and other transportation modes with respect to the services at issue.

Fixed charges. Applicants assert that the transaction will not have a material adverse impact on fixed charges associated with the services currently provided by the Coach America Subsidiaries, Evergreen, and Cabana. They note that interest charges associated with the operations currently provided by the Coach America Subsidiaries should decline as a result of the proposed transaction.

Affected carrier employees. Applicants state that under the terms of the purchase agreement, they will make “at will” employment offers to at least 75% of the employees primarily related to the businesses to be acquired at the time of the transaction closing.

In addition, Applicants state that a number of the Coach America Subsidiaries—Charters; CUSA BCCAIE, LLC; CUSA CC, LLC; CUSA FL, LLC; CUSA GCBS, LLC; CUSA GCT, LLC; and CUSA K-TCS, LLC— hold intrastate operating authorities that will be transferred to Evergreen as a result of the transaction. They assert that under 49 U.S.C. § 14303(f), Board approval of the proposed transaction would allow the acquisition of the assets of the Coach America Subsidiaries to be accomplished without the need for potentially prolonged formal action by any state regulatory authorities, relieving Applicants from burdensome regulatory requirements.

Applicants certify that: (1) Evergreen, Cabana, and the Coach America Subsidiaries hold satisfactory safety ratings from the FMCSA; (2) Evergreen, Cabana, and the Coach America Subsidiaries have the requisite insurance coverage under 49 U.S.C. § 13906; and (3) neither Evergreen nor Cabana and none of the Coach America Subsidiaries are domiciled in Mexico or owned or controlled by persons of that country. Noting that the proposed transaction only involves the acquisition and consolidation of carrier assets that are already used to provide bus services, Applicants also assert that the proposed transaction will result in no significant operational changes or have adverse environmental impacts.

On June 6, 2012, Michael Yusim filed a letter in opposition to both the request for interim approval and this application for permanent authority. Mr. Yusim contends that Midnight Sun discriminated against him and another driver employed by Midnight Sun for accurately reporting their hours of service under the rules administered by the FMCSA. He states that the two cases are pending before the U. S. Secretary of Labor (Secretary) and have been stayed by the Bankruptcy Court. Mr. Yusim requests that the Board, in the public interest, disallow the sale of any subsidiaries of Coach America until the Secretary is allowed to hear and decide the two cases, and that Applicants be required to produce certain documents relating to hours of service reporting.⁶

⁶ Mr. Yusim reiterated these arguments in a filing on June 12, 2012, in response to Applicants’ June 11, 2012 reply to Mr. Yusim’s initial letter in opposition and again on August 22, 2012, in response to Applicants’ August 20, 2012 reply in support of the application and request for an expedited decision. While 49 C.F.R. § 1104.13(c) prohibits the filing of a reply to a reply, we will accept Applicants’ June 11, 2012 filing and Mr. Yusim’s June 12 and August 22, 2012 filings in the interest of compiling a complete record. Our acceptance of these additional filings will neither prejudice any party nor prolong our reaching a decision.

In a response filed on June 11, 2012, Applicants assert that Mr. Yusim has filed multiple motions in the Bankruptcy Court seeking relief from the automatic stay provisions of the Bankruptcy Code, 11 U.S.C. § 362, and objecting to the proposed sale of Midnight Sun. They claim that the bankruptcy court has denied Mr. Yusim's requests and has refused to permit his individual claims against Midnight Sun to move forward. According to Applicants, the bankruptcy court will consider Mr. Yusim's claims in due course, consistent with customary practice, and if his claims are valid he may receive distributions along with other unsecured creditors, in accordance with the priorities of the Bankruptcy Code. The proposed transaction is intended to transfer the assets of Midnight Sun and the other Coach America Subsidiaries to Applicants, and Applicants had nothing to do with the cases that are pending before the Secretary and the Bankruptcy Court. These cases are against Midnight Sun and its parent entities, and as such they may go forward in the appropriate forums without delaying a transaction that is in the public interest—one that is intended to ensure a continuation of the many transportation services currently provided by the Coach America Subsidiaries. Thus, we will not delay our consideration of the proposed transaction, nor will we require Applicants to produce documents relating to hours of service reporting with respect to claims that are within the purview of the Secretary and the Bankruptcy Court and are expected to be addressed by them in due course.

Applicants have submitted the information required by 49 C.F.R. § 1182.2(a)(7). Specifically, Applicants have submitted information sufficient to demonstrate that the proposed transaction is consistent with the public interest under 49 U.S.C. § 14303(b), in that it should have a positive effect on the adequacy of transportation to the public—including no adverse impact on competition—and should not result in an increase in fixed charges. Moreover, Applicants plan to offer employment to the majority of the employees primarily related to the businesses to be acquired.⁷ Accordingly, we find that the proposed transaction is consistent with the public interest under § 14303(b) and is otherwise necessary to ensure continued motor passenger service to the traveling public. Therefore, we are approving and authorizing the proposed transaction, as required when such findings are made under § 14303(b).

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

It is ordered:

1. Applicants are granted permanent authority to acquire the assets of the Coach America Subsidiaries, as discussed above.

⁷ Although Mr. Yusim makes broad allegations that this proposed transaction is not in the public interest, he provides no specific evidence challenging Applicants' representations under the three-part criteria of § 14303(b).

2. This decision is effective on its service date.

3. A copy of this decision will be served on: (1) the U.S. Department of Transportation, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue, S.E., Washington, DC 20590; (2) the U.S. Department of Justice, Antitrust Division, 950 Pennsylvania Avenue, N.W., Washington, DC 20530; (3) the U.S. Department of Transportation, Office of the General Counsel, 1200 New Jersey Avenue, S.E., Washington, DC 20590; (4) the Federal Trade Commission, Bureau of Competition, Premerger Notification Office, 600 Pennsylvania Avenue, N.W., Washington, DC 20580; (5) Michael Yusim, 7499 Eagle Point Drive, Delray Beach, FL 33446; and (6) the Ventura County Transportation Commission, represented by Mitchel B. Kahn, 300 Esplanade Dr., Suite 1170, Oxnard, CA 93036.

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