

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. MCF 21046

PROFESSIONAL TRANSPORTATION, INC.
—ASSET ACQUISITION—CUSA ES, LLC AND CUSA CSS, LLC

Digest:¹ This decision grants the request filed by Professional Transportation, Inc., for approval to acquire the assets of two interstate motor passenger common carrier subsidiaries currently controlled by Coach America Holdings, Inc.

Decided: August 17, 2012

On May 31, 2012, Professional Transportation, Inc. (PTI or Applicant) 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 two interstate motor passenger common carrier subsidiaries of noncarrier Coach America Holdings, Inc. (Coach America)—CUSA ES, LLC (CUSA ES) and CUSA CSS, LLC (CUSA CSS) (collectively, Coach America Subsidiaries).

Notice of the application was served and published in the Federal Register on June 29, 2012 (77 Fed. Reg. 38,884).² 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 General Counsel; the Federal Trade Commission, Bureau of Competition, Premerger Notification Office; and Michael Yusim, an individual who had filed a comment on June 5, 2012, in opposition to the proposed transaction.³

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 A Notice of Correction was served on July 17, 2012, and published in the Federal Register on July 20, 2012 (77 Fed. Reg. 42,831), correcting the identification of the parties' representatives.

³ Applicant responded to Mr. Yusim's comment on June 26, 2012, and Mr. Yusim replied to that filing on June 28, 2012. While 49 C.F.R. § 1104.13(c) prohibits the filing of a reply to a reply, we will accept Mr. Yusim's June 28, 2012, filing in the interest of compiling a complete record. Acceptance of Mr. Yusim's additional filing will neither prejudice any party nor prolong our reaching a decision.

On July 17, 2012, BNSF Railway Company (BNSF) filed a comment asking the Board to approve PTI's application as expeditiously as possible, as the Coach America Subsidiaries provide rail crew transportation services critical to BNSF's operations. Mr. Yusim filed a response to BNSF's comment on July 18, 2012. On July 24, 2012, Union Pacific Railroad Company (UP) filed a comment also requesting that the Board approve PTI's application as soon as possible, in order to protect its business operations. Mr. Yusim filed a response to UP's comment on July 26, 2012. On August 9, 2012, William Sharpe filed a comment objecting to the approval of PTI's application, to which Applicant responded on August 13, 2012. Based on our review of the record, we are granting the application.

BACKGROUND

PTI, an interstate passenger motor carrier with authority subject to the jurisdiction of the FMCSA in Docket No. MC-217444, primarily provides regulated passenger transportation services transporting rail crews for its railroad-related customers. CUSA ES and CUSA CSS hold interstate passenger motor carrier authority under FMCSA Docket Nos. MC-463168 and MC-522544, respectively. In addition to interstate authority, CUSA ES holds intrastate authority in Indiana, Nebraska, and Pennsylvania, as well as taxi licenses issued by the Cities of Bismarck and Minot, N.D.; CUSA CSS holds intrastate authority in Colorado, Kansas, and Washington. Both Coach America Subsidiaries primarily provide regulated passenger transportation services transporting rail crews, and CUSA ES also provides limited transit, paratransit, and taxi services.

Under the proposed transaction, Applicant would acquire the various assets of the Coach America Subsidiaries, including the vast majority of their equipment, various customer contracts, certain leased real property, various equipment leases, and good will. Following the acquisition, the Coach America Subsidiaries would wind down their business affairs and ultimately cease all operations. Applicant states that it will use these assets, including the acquired intrastate authorities and permits, to continue much of the rail crew transportation business performed by the Coach America Subsidiaries.

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 filed a motion to sell substantially all of their assets and effectively to liquidate. According to Applicant, the Bankruptcy Court entered an order on May 25, 2012, authorizing and approving the sale of the assets of CUSA ES and CUSA CSS.

DISCUSSION AND CONCLUSIONS

Jurisdiction

Under 49 U.S.C. §§ 14303(a)⁴ 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 any other 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, Applicant seeks to acquire the assets of two 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.

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 many factors—including whether the transaction would have any anticompetitive effects.

Adequacy of transportation to the public. Applicant asserts that the transaction will benefit the traveling public. Specifically, Applicant contends that the transaction, which will consolidate the assets and operations of the Coach America Subsidiaries into Applicant's own financially healthy operations, will result in the continuation of the specialized rail crew transportation services provided by the Coach America Subsidiaries. Additionally, Applicant

⁴ 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.

claims that it has the potential to improve upon existing service levels due to its financial wherewithal, allowing it to expand services, invest in additional equipment, and gain economies of scale based upon its sizeable operations.

Applicant also asserts that the transaction will have no adverse impact on competition. Applicant contends that even though rail crew passenger transportation is a specialized service, there will still be substantial competition following the proposed transaction. Applicant cites to current competitors, low entry barriers into the market, and the ability for railroads to implement private carriage operations as precluding the potential for monopolistic pricing following the proposed transaction.

Fixed charges. Applicant asserts that there are no fixed charges associated with the proposed acquisition of control.

Affected carrier employees. Applicant states that, in accordance with federal law, the Coach America Subsidiaries have provided notice to their applicable employees of the proposed termination of their employment as a result of the proposed transaction. Additionally, through that notice, PTI requested that any employees of the Coach America Subsidiaries that wished to work for PTI promptly apply to PTI for employment. PTI further states, however, that it does not anticipate a significant reduction in force or changes in compensation levels and/or benefits, as Applicant intends to continue the Coach America Subsidiaries' existing operations. Applicant notes that staffing redundancies could result in limited downsizing of back-office and/or managerial level personnel.

In addition, with respect to the transfer of the Coach America Subsidiaries' intrastate authorities and CUSA ES's taxi licenses, PTI states 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 formal action by any state regulatory authorities, thereby relieving Applicant from burdensome regulatory requirements.

Applicant certifies that: (1) Applicant has not been assigned a safety rating and each of the Coach America Subsidiaries holds a satisfactory safety rating issued by the U.S. Department of Transportation; (2) Applicant and each of the Coach America Subsidiaries has the requisite insurance coverage under 49 U.S.C. § 13906; and (3) neither Applicant nor either of the Coach America Subsidiaries is domiciled in Mexico or owned or controlled by persons of that country. Applicant further asserts that approval of the application will not have a significant effect on the quality of the human environment or the conservation of energy resources.

In his comment, Mr. Yusim contends that a subsidiary of Coach America that is not at issue in this proceeding—Midnight Sun Tours, Inc. (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, in the public interest, the Board disallow the sale of any subsidiaries of Coach

America until the Secretary is allowed to hear and decide the two cases, and that Applicant be required to produce certain documents relating to hours of service reporting.

In response, Applicant asserts that the assets of Midnight Sun are not among those it seeks to acquire in this proceeding, and that Mr. Yusim's protest has no obvious bearing on its application or the Board's consideration thereof. Moreover, Applicant asserts 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. Applicant claims that the Bankruptcy Court has denied Mr. Yusim's requests and has refused to permit his individual claims against Midnight Sun to move forward at this time. According to PTI, the Bankruptcy Court will consider Mr. Yusim's claims in due course, consistent with customary practice, and if his claims are determined to be valid he may receive distributions in accordance with the priorities of the Bankruptcy Code. Finally, Applicant asserts that the Board should deny Mr. Yusim's document production request, because the sought documents are of no relevance to this transaction.

Mr. Yusim's claims are not relevant to this proceeding. The proposed transaction in this proceeding would transfer the assets of CUSA ES and CUSA CSS to Applicant—entities that are not the subjects of Mr. Yusim's claims pending before the Secretary and the Bankruptcy Court. Mr. Yusim's claims relate to Midnight Sun and its parent entities. While those claims may go forward in the appropriate forums, we need not delay an unrelated transaction that is consistent with the public interest while that process continues. Thus, we will not delay our consideration of the proposed transaction, nor will we require Applicant 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 that will be addressed by them in due course.

In his comment, Mr. Sharpe alleges that PTI, his former employer, has discriminated against, harassed, and retaliated against its employees (citing five specific cases involving alleged wrongdoing), repeatedly acted to prevent the implementation of higher safety standards, and operated without proper intrastate authority. Mr. Sharpe states that he is opposed to any Board action that would allow PTI to obtain new operating authorities until such time as the charges in Matthews and Hickenbottom v. Professional Transportation, Inc. and Romain (Matthews), a Fair Labor Standards Act case currently pending in the U.S. District Court for the Southern District of Indiana, can be addressed and settled in court. Mr. Sharpe also questions the actions of the FMCSA, alleging that the FMCSA has not investigated any of PTI's "serious" accidents.

In response, Applicant states that the information provided by Mr. Sharpe is unfounded, misleading, and bears no relevance to the matters which are the subject of the Application. As for the specific cases of unfair employment practices, Applicant asserts that such employee actions have been infrequent given the size of its operations, that three of the actions cited by Mr. Sharpe have been resolved, that Matthews is in mediation, and that a fifth is pending but strongly defended by PTI. Applicant adds that a dispute with West Virginia over intrastate authority was resolved in the 1990s and that it currently operates in certain counties of West Virginia with such

authority. Finally, Applicant states that it goes beyond mere regulatory and legal compliance in its adherence to stringent safety policies and procedures.

The proposed transaction involves the transfer of the assets of the Coach America Subsidiaries to PTI according to the statutes and regulations administered by the Board. The specific concerns raised by Mr. Sharpe fall under the jurisdiction of other regulatory bodies or state and federal courts. As in the case of the concerns raised by Mr. Yusim, Mr. Sharpe's concerns may be addressed in the appropriate forums without delaying the transaction before the Board. Although the Board does consider the effect of a proposed transaction on employees, Mr. Sharpe's claims do not flow from the proposed transaction.

Applicant has submitted the information required by 49 C.F.R. § 1182.2(a)(7). Specifically, Applicant has 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 or material changes in employment.⁵ 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. Applicant is granted authority to acquire the assets of the Coach America Subsidiaries, as discussed above.
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; (6) BNSF Railway Company, c/o Richard E. Weicher, 547 W. Jackson Boulevard, Suite

⁵ Although Mr. Yusim makes broad allegations that the proposed transaction is not in the public interest, he provides no specific evidence challenging Applicant's representations under the three-part criteria of § 14303(b). Mr. Sharpe also does not specifically address the criteria of § 14303(b).

1509, Chicago, IL 60661; (7) Union Pacific Railroad Company, c/o Stephen A. Kessler, 1400 Douglas Street, Omaha, NE 68179; and (8) William W. Sharpe, 3736 Union Ave., Apt. #5, Steger, IL 60475.

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