

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. MC-F-21034

CLEAN TRUCK COALITION, LLC—POOLING APPLICATION

Decided: November 19, 2009

By application filed on June 3, 2009, the Clean Truck Coalition, LLC (CTC), requests approval of a pooling agreement under 49 U.S.C. 14302 and 49 CFR Part 1184, to pool and/or divide specialized clean truck equipment¹ and corresponding traffic, as necessary, and to use collective purchasing options through a central buying mechanism for fuel, equipment, and materials to manage operation costs. Notice of the pooling application was published in the Federal Register on June 25, 2009 (74 FR 30356-57), inviting comments to be filed on or before July 27, 2009. Comments were filed by the International Brotherhood of Teamsters (IBT) and Ernesto Jesus Nevarez. This decision approves and authorizes CTC's pooling agreement.

BACKGROUND

CTC is a California limited liability company, comprised of motor carriers (members) that conduct regional interstate transportation operations and serve the Ports of Los Angeles and Long Beach (the Ports).² The members of CTC are regarded as small- to mid-sized companies that use either employee drivers or independent contractors to operate their own vehicles, including clean trucks. CTC states that its members have individually invested in clean trucks, having purchased 626 clean trucks in total. CTC also states that its members collectively represent less than 10 percent of the overall monthly clean truck activity (as measured by container moves) within the Ports' harbor facilities. Further, CTC states that its members satisfy the stringent clean truck requirements of the Ports and are duly licensed to serve both Ports as

¹ CTC defines "clean truck" as a motor vehicle tractor that is equipped with a 2007 or newer diesel engine or an engine powered by alternative fuel, such as liquefied natural gas, compressed natural gas, or a hybrid electric/diesel system, and compatible with the protocols of the Clean Truck Program described herein.

² The motor carrier parties to the pooling arrangement are: Green Fleet Systems, LLC, a Delaware limited liability company; California Intermodal Associates, Inc., a California corporation; Fox Transportation, Inc., a California corporation; Golden State Express, Incorporated, a California corporation; Harbor Division, Inc., a California corporation; Overseas Freight Inc., a California corporation; Pacific 9 Transportation, Inc., a California corporation; Progressive Transportation Services, Inc., a California corporation; Southern Counties Express, Inc., a California corporation; and Total Transportation Services, Inc., a California corporation.

part of the Clean Truck Program (Program), an environmental initiative that seeks to reduce air pollution caused by trucks used to transport cargo to and from the Ports.³ The Program, as described by CTC, aims to phase out all “dirty” diesel trucks from the Ports within 5 years through a rolling ban on all trucks that do not meet the Environmental Protection Agency 2007 Truck Emission Standards. To take part in the Program, carriers must apply to each Port for a concession agreement. These “concessionaires” are held accountable for maintaining their trucks to ensure lower emissions output over the life of the truck. The Program also provides grants and financial incentives that allow selected trucking companies to replace older, high-polluting trucks with newer, cleaner trucks.

CTC operates as a joint venture, through which members seek to establish a network of carriers that would pool and/or divide specialized clean truck equipment on a shared basis as part of the Program. In effect, the pooling agreement would create a “clean truck clearinghouse,” whereby each member would have continuous access to an inventory of clean trucks and would be able to monitor the availability of clean trucks.

CTC states that this clearinghouse system would require the coordination and combination of members’ information technology, operations, leased equipment, vendor contacts and resources, maintenance facilities, vehicles, and related administration. The structure would also require the development of an internal and external communication and joint management plan; the training of representatives; and the implementation of ways to cross-sell and promote each other’s services as concessionaires with access to the Ports.

On July 24, 2009, Mr. Nevarez submitted comments, arguing that Federal Motor Carrier Safety Administration regulations governing the leasing of vehicles do not allow for the pooling or dividing of motor vehicles. Mr. Nevarez also states that leases, finance agreements, and regulations, both Federal and state, prohibit the subleasing or rental of vehicles used in the pooling agreement. Finally, Mr. Nevarez argues that, with its 626 clean trucks shared among 10 members, CTC members will restrain competition within the Program, which Mr. Nevarez states has over 6,000 registered clean trucks.

On July 27, 2009, IBT submitted comments, asserting that approval of the proposed pooling arrangement would have a disastrous impact on drivers operating in the Ports because CTC members would be able to coordinate and set prices both for what they charge and what they pay to drivers.⁴ IBT states this would harm competition overall and would be particularly devastating for drivers who lease their equipment. IBT challenges CTC’s market share characterization, arguing that CTC traffic accounts for more than 10 percent of clean truck

³ The Clean Truck Program is part of the San Pedro Bay Ports Clean Air Action Plan, a comprehensive strategy adopted by the Ports to reduce port-related air pollution caused by trucks, ships, locomotives, and other equipment by at least 45 percent in 5 years.

⁴ IBT comments on behalf of over 420 affiliated local unions. IBT also states that its “organizational activities include an effort to organize drivers working for Southern Counties Express, Inc.,” a CTC member. CTC states that IBT’s connection to CTC is tenuous.

movements for the Port of Los Angeles, and that CTC carriers would be in a position to capture even more market share as more clean trucks enter the business; thus, its view is that CTC is positioned to dominate the market as customers switch to clean trucks.

CTC filed a reply to these comments on August 3, 2009. On October 2, 2009, CTC sent a letter to the Board members urging timely disposition of the pooling application. On November 11, 2009, CTC sent a letter to the Board's General Counsel expressing its belief that because the Board had not acted upon the pooling application by August 1, the proposed effective date listed in the application,⁵ "by operation of law the application is now approved and effective and the member carriers may operate in accordance with the Application." CTC did not file either its October 2, 2009 letter or its November 11 letter with the Board or serve it on other parties to the proceeding. The Board has placed the letters in the public docket.⁶

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, services, or any part of their earnings without the approval of the Board. The Board shall, after a hearing, approve and authorize a motor carrier pooling agreement to the extent it finds that the pooling or division of traffic, services, or earnings: (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(c)(3). However, the Board may approve motor carrier pooling agreements without the necessity of a hearing if it first determines that the pooling agreement is not of major transportation importance and that there is not a substantial likelihood that the agreement will unduly restrain competition. 49 U.S.C. 14302(c)(2). Here, the Board concludes that approval and authorization of the proposed pooling agreement is warranted without a hearing.

The Board takes all statutory timelines seriously and regrets that a decision could not be issued sooner in this case. However, contrary to CTC's statements in its November 11 letter, a motor carrier pooling agreement is not authorized unless and until the Board issues an order making the requisite findings and determinations under section 14302. Although the statute specifies that the Board should make its determinations under section 14302(c)(2) prior to the effective date of the pooling agreement, the statute does not provide that a Board failure to act by the effective date proposed by the applicants results in automatic approval.

⁵ CTC has itself indicated two different effective dates: its application refers to a proposed effective date of August 1, 2009, while the pooling agreement states that it "shall be effective as of the date that the U.S. Surface Transportation Board approves the Agreement."

⁶ We remind parties that failure to comply with the Board's rules at 49 CFR 1102 regarding filings and ex parte communications may result in sanctions. Under 49 CFR 1104.12, every document filed with the Board should include a certificate showing simultaneous service upon all parties in a proceeding.

The Board finds that the proposed agreement is not of major transportation importance. The pooling agreement concerns only 10 carriers that collectively represent less than 10 percent of the overall monthly truck activity to and from both ports (less than 37,000 containers per month). As discussed below, should the pooling agreement be permitted, CTC's collective level of clean truck operations would be small in relation to the Ports' total number of clean truck movements. Nor would the agreement likely impact the services and routing provided by alternative services, namely standard diesel tractors (including the diesel tractor service provided by CTC members).

We also find that the proposed agreement would not unreasonably restrain competition. Rather, competition would be enhanced as the pooling agreement would give these smaller and mid-sized motor carriers greater access to clean trucks, thus enabling CTC members to compete with larger trucking operations, which CTC states make up the majority of clean truck owners. Further, CTC's clean truck market share appears relatively small. Based on figures submitted by IBT, only 5 CTC members appear in the list of "Top 20" clean truck cargo moves for the Port of Los Angeles, and these members' clean truck movements account for only 12% of the Port of Los Angeles' total clean truck moves in May 2009.⁷ Given the efforts and goals of the Program, the number of carriers seeking concession agreements is likely to increase, resulting in more clean truck movements. Moreover, CTC has also indicated that, consistent with the principles of competition, it would consider including additional qualified carriers to the agreement, as permitted by the Board and the mandates of the Program.⁸

Neither IBT nor Mr. Nevarez has demonstrated that approval of CTC's pooling agreement would restrain competition.⁹ Given that CTC's evidence indicates that CTC has only a relatively small market share of clean truck carriers serving the Ports and that evidence has not been refuted, we have no reason to conclude that CTC members would "dominate" the market

⁷ CTC states and provides figures that indicate that six of its members' movements comprise 10% of the Port of Los Angeles' total clean truck moves for May 2009. However, it cites a traffic summary with only 5 CTC members appearing in the list of "Top 20" clean truck cargo moves for that port (see CTC Reply, Appendix 3). According to the traffic summary, and as asserted by IBT, the 5 CTC members appearing in the "Top 20" list constitute 12% of clean truck movements for the Port of Los Angeles. Whether CTC members account for 10 or 12 percent of clean truck movements for the Port of Los Angeles would not change our analysis of the relative size of CTC's market share.

⁸ See Averitt Express, Inc., DATS Trucking, Inc., Lakeville Motor Express, Inc., Land Air Express of New England, Pitt Ohio Express, LLC, Canadian Freightways, and Epic Express—Pooling Agreement, STB Docket No. MC-F-21023, slip op. at 5 (STB served Jan. 31, 2008).

⁹ Mr. Nevarez also cites several Federal and state regulations regarding leasing and rental requirements but fails to show how approval of the pooling agreement would conflict with these regulations. As CTC states in its reply, the leasing regulations would remain fully applicable to all agreements involving the lease and exchange of clean trucks between the members.

and restrain competition.¹⁰ Over 5,000 clean trucks operate between the Ports. As clean trucks are phased in to replace older trucks, in accordance with the aims of the Program, this figure could be expected to grow, increasing competition in a market with low entry barriers.¹¹ Thus, it is highly unlikely that the pooling agreement would allow CTC members to collude and engage in price fixing, as IBT asserts. Further, CTC certifies that the agreement does not violate the restrictions on collective ratemaking.

Given our findings on the transportation importance and competition, the Board can approve this pooling agreement without a hearing. But we also note that the pooling agreement serves the interest of better service to the public and of economy of operation. By our approving this pooling agreement, CTC members will be able to allocate efficiently their specialized clean truck equipment among themselves. Approval of the pooling agreement will enable members to form a coordinated network of information to track clean trucks; coordinate internal invoicing on leases between members; and jointly purchase equipment and materials on a group basis. In doing so, CTC will be able to provide more efficient service and clean trucks to the Ports and further the goals of the Program by reducing air pollution caused by truck traffic.

For the foregoing reasons, authority for CTC's pooling agreement will be granted. However, it is important for the parties to be aware that the Board retains the authority to withdraw authorization should it be shown that CTC members are engaging in activity that would unduly restrain competition. The Board will retain jurisdiction to require the submission of additional information should the Board find it necessary in the future. If the Board determines at any time that the transaction has become of major transportation importance or is likely to restrain competition unduly, the Board retains the power to suspend operation of all or part of the pool during the pendency of a public hearing concerning the criteria set forth in 49 U.S.C. 14302 and to impose such terms and conditions, if any, as are just and reasonable. Further, should circumstances materially change, any interested party may seek reconsideration or reopening of this decision by filing a petition with the Board.

¹⁰ In the application, CTC points out that the Federal Maritime Commission (FMC), sought to enjoin parts of the Ports' program as anticompetitive, arguing that it would reduce competition in the drayage market by giving an edge to the class of carriers that qualified under the Program. But, in Federal Maritime Commission v. City of Los Angeles, 607 F.Supp 2d. 192, 200-01 (D.D.C. 2009), the District Court denied the motion for preliminary injunction, finding that the drayage market had low barriers to entry and that the Program resulted in an unconcentrated market under the Herfindahl-Hirschman Index (defined as the sum of the squares of the market shares, multiplied by 10,000, i.e., $\sum_{i=1}^n s_i^2 \times 10,000$, where s_i is the market share of firm i in the market, and n is the number of firms). FMC has not asked us to deny this pooling agreement.

¹¹ Because the barriers to entry in the trucking industry are low, we find no basis in the record for IBT's suggestion that CTC members would capture an inordinate proportion of new clean trucks entering the market.

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

It is ordered:

1. The pooling agreement proposed in this application is approved and authorized.
2. The Board reserves the right to require submission of additional information, to investigate the actual operation of this pooling agreement, and to prescribe such terms and conditions as may be necessary to ensure compliance with the terms of this decision and applicable regulations.
3. This decision is effective on its date of service.

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