

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. MC-F-21035

STAGECOACH GROUP PLC AND COACH USA, INC., ET AL.–
ACQUISITION OF CONTROL–TWIN AMERICA, LLC

Decided: March 4, 2010

On August 19, 2009, Stagecoach Group PLC; its noncarrier intermediate subsidiaries;¹ Coach USA, Inc.; International Bus Services; City Sights Twin, LLC; and Mr. Zev Marmurstein (collectively, Applicants) filed an application under 49 U.S.C. 14303 to acquire control of Twin America, LLC (Twin America) once Twin America becomes a carrier.² In a notice served and published in the Federal Register on September 18, 2009 (74 FR 47985-86), the Board requested comments. By decision served January 12, 2010, the Board adopted a procedural schedule to allow interested persons to submit additional comments and evidence in opposition to the application. By decision served January 29, 2010 (January 29 Order), a protective order was issued, upon the request of Applicants.

On February 1, 2010, the New York State Attorney General (NYSAG) filed a sur-reply to a reply of Applicants to NYSAG's November 17, 2009 comments. On February 2, 2010, Applicants filed a letter arguing that NYSAG's sur-reply contained confidential documents and requesting that the sur-reply be removed from the Board's website. On the same day, NYSAG responded to Applicants' letter, arguing that the protective order did not apply to the documents contained in its sur-reply. NYSAG's position is that Applicants waived confidentiality by previously disclosing the documents to NYSAG in a separate investigation and that any disclosures made prior to the issuance of the protective order are beyond the scope of the protective order.

NYSAG has misconstrued the scope of the protective order and erroneously interpreted the statement in the January 29 Order providing that "disclosures that Applicants have made of commercially sensitive information to NYSAG before the issuance of this order lie beyond the scope of the order." That sentence was meant to clarify that if documents were independently obtained by NYSAG through its own investigation, the confidentiality designation here would apply, but only to the Board proceeding, and would not affect NYSAG's use of that same information in its investigation.

¹ Stagecoach Transport Holdings plc, SCUSI Ltd., Coach USA Administration, Inc.

² Twin America is in the process of applying with the Federal Motor Carrier Safety Administration (FMCSA) to be a registered motor passenger carrier. It holds USDOT number 1924173 and has been assigned docket number MC-688284 by FMCSA.

While typically information that has been voluntarily disclosed by a party in another proceeding without the benefit of a protective order would be considered by the Board to be public information, the facts here do not fit neatly within that framework. According to Applicants, after NYSAG served subpoenas requesting information concerning the formation of Twin America, Applicants agreed to provide certain documents to NYSAG in lieu of compulsory process. Applicants further state that they requested confidential treatment of the documents at the time of production. It appears, therefore, that Applicants did not intend to waive confidentiality of at least some of the documents produced to NYSAG and submitted by NYSAG in the sur-reply, although the scope of the claimed confidentiality is not clear. NYSAG's response contains only broad statements regarding waiver, and the pleadings demonstrate that the parties have not engaged in discussions to narrow the issues or documents in dispute.³

Under the circumstances, the Board will permit Applicants to designate documents in the sur-reply as confidential pursuant to the protective order.⁴ Therefore, by March 9, 2010, Applicants shall advise NYSAG which specific portions of NYSAG's filing they deem confidential. NYSAG shall then submit a public version of its filing by March 11, 2010. If, after consultation between the parties, NYSAG and Applicants continue to disagree about the confidential status of certain documents, NYSAG may challenge the designation of the documents as confidential by filing a motion with the Board pursuant to paragraph 5 of the protective order.

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

It is ordered:

1. Applicants are directed to advise NYSAG which portions of NYSAG's sur-reply Applicants deem confidential by March 9, 2010.
2. NYSAG is directed to submit a public version of its sur-reply by March 11, 2010.

³ Applicants, by their own admission, appear to have waived the confidential status of certain documents submitted to NYSAG by filing them as public documents in this proceeding. If the confidential status of certain documents continues to be challenged by NYSAG, Applicants should explain how they made the distinction between those documents disclosed and those that they believe should remain confidential.

⁴ Paragraph 2 of the protective order provides that if a party determines that a paper filed or served in this proceeding contains confidential information, that party may designate the document confidential and subject to the protective order.

3. This decision is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.