

1330 Connecticut Avenue, NW
Washington, DC 20036-1795
202 429 3000 main
www.steptoec.com

233811

February 19, 2013

VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

ENTERED
Office of Proceedings
February 19, 2013
Part of Public
Record

Re: MC-F-21047, Frank Sherman, FSCS Corporation, TMS West Coast, Inc., Evergreen Trails, Inc. and Cabana Coaches, LLC – Acquisition and Consolidation of Assets – American Charters, Ltd., American Coach Lines of Jacksonville, Inc., American Coach Lines of Miami, Inc., American Coach Lines of Orlando, Inc., CUSA ASL, LLC, CUSA BCCA, LLC, CUSA CC, LLC, CUSA FL, LLC, CUSA GCBS, LLC, CUSA GCT, LLC, CUSA K-TCS, LLC, and Midnight Sun Tours, Inc.

Dear Ms. Brown:

On November 30, 2012, the Livery Operators Association of Las Vegas (“LOA”) filed a Petition to Reopen in this proceeding. On December 18, 2012, Evergreen Trails, Inc. (“Evergreen”) and Cabana Coaches, LLC, as well as related non-carrier applicants (collectively “Applicants”), filed a reply to that Petition. On February 1, 2013, LOA filed a letter replying to Applicants’ reply to the Petition (LOA’s Surreply). Consistent with 49 CFR 1104.13(c) and for the reasons discussed below, the Board should reject LOA’s Surreply. However, should the Board decide to waive 49 CFR 1104.13(c) and accept LOA’s Surreply, Applicants request that Board accept this response to LOA’s Surreply so that Applicants have the final word, consistent with STB rules.

I. The Board Should Reject LOA’s Surreply

LOA’s filing of its February 1, 2013 Surreply is a violation of 49 CFR 1104.13(c), which prohibits the filing of replies to replies. Although the Board does occasionally waive section 1104.13(c), it does so only when the party seeking to file a reply to a reply shows good cause. The Board has indicated that good cause exists where a reply to a reply will add newly discovered evidence to the record, point to new precedent that has emerged since the initial petition, or where the initial reply raises new allegations. *See CSX Corp.—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc. (Arbitration)*, Docket No. 28905 (Sub-No.

28), 2 STB 554, 556 (served Sept. 3, 1997) (“Under 49 CFR 1104.13(c), replies to replies are not permitted. While we may allow additional pleading for good cause shown, CSXT has not shown good cause. CSXT did not submit newly discovered evidence or precedent arising after the submission of its appeal.”).¹ In contrast, the Board has denied requests to waive section 1104.13(c) where a petitioner merely seeks to rebut the respondent’s arguments. *See Waterloo Railway Company—Adverse Abandonment—Lines of Bangor and Aroostook Railroad Company and Van Buren Bridge Company in Aroostook County, Maine*, Docket Nos. AB-124 (Sub-No. 2), AB-279 (Sub-No. 3), slip op. at 3 (served May 6, 2003) (“The Trustee argues that we should accept its pleading because CN’s reply ‘blatantly mischaracterizes case law pertaining to the availability of discovery in abandonment cases’ and ‘grossly overstates the alleged burden of complying with the Discovery Requests.’ This, however, is merely an argument that CN’s interpretation of case law and view of its compliance burden is incorrect.”).

In the present case, LOA has not shown that good cause exists for waiving 49 CFR 1104.13(c). LOA’s reply does not introduce newly discovered evidence and it does not point to new precedent. Rather, LOA’s Surreply consists solely of further rebuttals to Evergreen’s arguments and should therefore not be accepted.

LOA claims that the Surreply was submitted to clarify misstatements in Applicants’ reply. However, the STB has found that the clarification of alleged misstatements is not sufficient justification for waiving 49 CFR 1104.13(c). *See East West Resort Transp., LLC—Pet. for Declaratory Order—Motor Carrier Transp. of Passengers in Colo.*, MC-F 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) (“*East West Resort*”). In support of its Surreply, LOA cites an example in which counsel for Applicants, in another, unrelated proceeding, asked the STB to accept a reply to a reply based on alleged misrepresentations. However, in that proceeding, as in *East West Resort*, the STB rejected the request. The STB stated: “The alleged misstatements do not, however, constitute good cause for accepting a reply to a reply...In addition, the letter-reply repeats many of the same arguments in Coach’s petition.” *Peter Pan Bus Lines, Inc.—Pooling—Greyhound Lines, Inc.*, STB Docket Nos. MC-F-20904, MC-F-20908, and MC-F-20912, slip op. at 3 (served April 20, 2011). Similarly, in the present case, LOA’s allegations of misstatements are an insufficient basis for accepting LOA’s Surreply, particularly when the Surreply essentially just repeats the same arguments made in the Petition to Reopen.

¹ *See also Wyoming and Colorado Railroad Company, Inc.—Abandonment Exemption—in Carbon County, WY*, STB Docket No. AB-307 (Sub-No. 5X), slip op. at 1 (served Nov. 10, 2004) (accepting a reply to a reply because it responded to new allegations raised in the initial reply and more fully explained the factual situation); *SF&L Railway, Inc.—Acquisition and Operation Exemption—Toledo, Peoria and Western Railway, Corporation between La Harpe and Peoria, Il*, STB Docket No. FD-33995, slip op. at 2 (served Feb. 1, 2002) (accepting a reply to a reply because the initial reply “did not merely address arguments in the supplemental petition” but “made new arguments”).

II. Evergreen did not Misrepresent its Intentions to the Board

There is no need to address LOA's Surreply point by point since nearly every point in LOA's Surreply is based on a mischaracterization of Evergreen's statement regarding Nevada operations in its STB application. In the application, Evergreen stated that it did not intend to resume the operations of CUSA K-TCS, LLC ("K-TCS"). According to LOA, this statement meant that Evergreen was disavowing any possibility of operating in Nevada in any capacity. However, it is clear from the context of this statement that LOA's characterization is unreasonable.

In its application, Evergreen simply indicated that it did not intend to resume the operations of K-TCS, which was in bankruptcy, whose assets and operating authorities it sought STB approval to acquire. And it has not re-initiated K-TCS's operations, but used the assets it acquired with STB approval to initiate its own operations in its own name.

The fact that Evergreen might conduct operations in Nevada in some form was obvious – why else would Evergreen have purchased the K-TCS assets (including very explicitly its intrastate operating certificates) and requested STB approval for control of those assets? Evergreen did not intend to seamlessly resume services identical to those provided by K-TCS serving the exact same customers as K-TCS, and its STB Application also made this clear. Rather, Evergreen requested STB authority so that it would have the option to begin its own services in Nevada if it identified customers and services it believed would be profitable.

Further, as explained previously to the Board, Evergreen had no reason to "hide the ball" respecting its intentions regarding operations in Nevada. Under the relevant federal statute, the STB is interested in the impact of a transaction on the adequacy of transportation to the public and whether the proposed transaction will reduce competition. Here, Evergreen's use of the K-TCS assets provides additional and competitive service to the public, facts which support Board approval.

III. LOA Misrepresents Evergreen's Actions and Arguments

In addition to mischaracterizing Evergreen's statements, LOA's Surreply mischaracterizes some of Evergreen's actions. In particular, LOA states that Evergreen has "decided to thumb its nose at the Board and strong-arm [Nevada Transportation Authority ("NTA")] staff" and suggests that Evergreen is operating without the NTA's knowledge or consent. LOA goes on to state that Evergreen's actions are clearly illegal and place the travelling public "in jeopardy" because, according to LOA, the Nevada certificates of public convenience and necessity have lapsed and Evergreen has not undergone a safety inspection.

None of these statements is accurate, and the tone and nature of these unfounded allegations is very unfortunate. Evergreen has begun operations pursuant to a certificate transferred to it by a Board decision with the knowledge and consent of the NTA. The certificates Evergreen acquired had not lapsed at the time they were transferred. Further, as provided under NTA procedures, Evergreen informed the NTA that it intended to begin

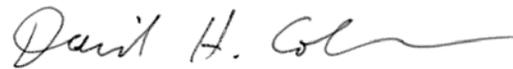
operations and the NTA staff agreed that Evergreen was entitled to operate if it complied with certain state requirements, such as providing proof of insurance, undergoing an NTA safety inspection of its vehicles and drivers, and filing a tariff with that agency. Evergreen complied with each of those requirements. See attached February 12, 2013 Evergreen reply to a January 28, 2013 letter that LOA submitted to the NTA making similar, erroneous allegations.

LOA's suggestion that Evergreen may not be a safe operator is particularly unwarranted. Evergreen not only has a satisfactory safety rating from FMCSA, but also submitted to, and passed, NTA-administered safety inspections. LOA's assumption of the mantle of the guardian of safety here, and its implied suggestion that NTA has not done its job, is fanciful. The plain reality is that LOA is simply trying to limit competition faced by its members.

CONCLUSION

For the reasons explained above, the Board should reject LOA's February 1, 2013 Surreply. If the Board chooses to accept the Surreply, it should accept Applicants' response to the Surreply set forth above.

Respectfully submitted,



David H. Coburn
Christopher G. Falcone
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue NW
Washington, DC 20036
(202) 429-8063

Attorneys for Frank Sherman, FSCS
Corporation, TMS West Coast, Inc.,
Evergreen Trails, Inc. and Cabana Coaches,
LLC

February 19, 2013

cc: All parties of record