

David H. Coburn  
202 429 8063  
dcoburn@steptoe.com



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

234344  
ENTERED  
Office of Proceedings  
May 31, 2013  
Part of  
Public Record  
  
May 31, 2013

**VIA ELECTRONIC FILING**

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

**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 May 15, 2013, Evergreen Trails, Inc. (“Evergreen”) and related applicants filed a letter with the Surface Transportation Board (“Board”) informing the Board that the Nevada Transportation Authority (“NTA”) had voted to recognize the transfer of intrastate operating authorities from CUSA K-TCS, LLC to Evergreen that resulted from the Board’s September 6, 2012 decision in this proceeding. This letter is to inform the Board that on May 21, 2013, the NTA issued an order reflecting this vote. A copy of that order is attached hereto.

Evergreen urges the Board to proceed to act on, and deny, the pending November 30, 2012 Petition to Reopen which the Livery Operators Association of Las Vegas (“LOA”), a nonparty to this proceeding, has filed and to which Evergreen responded on December 18, 2012.

Pursuant to the Board’s September 6, 2012 Decision in this proceeding, Evergreen has been operating in Nevada for the past several months, utilizing the intrastate operating authority it acquired with Board approval. Denial of the LOA Petition will remove any question concerning Evergreen’s continued right to operate. It will also facilitate expansion of

Ms. Cynthia T. Brown  
May 31, 2013  
Page 2



Evergreen's operations to better serve the public's interest in safe and competitive motor passenger carrier operations.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David H. Coburn".

David H. Coburn  
Christopher G. Falcone

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

cc: Kimberly Maxson-Rushton, Esq.  
Cooper Levenson  
6060 Elton Avenue, Suite A  
Las Vegas, Nevada 89107  
Counsel for Livery Operators Association of Las Vegas

BEFORE THE NEVADA TRANSPORTATION AUTHORITY

In Re: the United States Surface Transportation )  
Board's approval of the sale and transfer of CPCN ) Docket No. 12-09019  
2016, Sub 2 from CUSA K-TCS, LLC d/b/a )  
CoachAmerica and CPCN 2115 from CUSA K-TCS, )  
LLC d/b/a Gray Line Airport Shuttle to Evergreen )  
Trails, Inc. d/b/a Horizon Coach Lines. )  
\_\_\_\_\_ )

At a general session of the Nevada Transportation  
Authority held on April 25, 2013.

PRESENT: Chairman Andrew J. MacKay  
Commissioner George Assad  
Deputy Commissioner Marilyn Skibinski

**ORDER**

The Nevada Transportation Authority ("Authority") makes the following findings of fact and conclusions of law:

- 1) In a September 5, 2012 Decision (service date September 6, 2012), the United States Surface Transportation Board ("STB") approved, *inter alia*, the above-captioned transfers of Nevada Certificates of Public Convenience and Necessity.
- 2) In a letter dated September 12, 2013 legal counsel for Evergreen Trails, Inc. notified the Nevada Transportation Authority ("Authority") of the STB Decision.
- 3) The matter was placed on the agenda for the Authority's September 23, 2012 general session as follows:

**ADOPTION OF FEDERAL APPROVAL OF TRANSFER OF  
CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY  
TO PROVIDE CHARTER BUS SERVICE**

**50. Docket No. 12-09019** The Authority will consider whether to adopt the United States Surface Transportation Board's approval of the sale and transfer of Certificate of Public Convenience and Necessity

(hereinafter “CPCN”) 2016, Sub 2 from CUSA K-TCS, LLC d/b/a CoachAmerica and CPCN 2115 from CUSA K-TCS, LLC d/b/a Gray Line Airport Shuttle to Evergreen Trails, Inc. d/b/a Horizon Coach Lines. Staff investigation concluded.

- 4) Prior to consideration by the Authority at the September 2012 general session, legal counsel for the Livery Operators Association of Las Vegas (“LOA”) notified Authority Staff of its intent to protest the matter. Chairman MacKay granted the request for Protestant status at the general session. In light of the protest, Administrative Attorney Day recommended that the matter be tabled to allow time for the parties to file written argument. By a vote of 3-0, the Authority adopted Mr. Day’s recommendation and assigned Commissioner Monica B Metz as Presiding Officer in the matter.
- 5) As a Protestant, the LOA is not a party of record in this matter, as party status can be conferred only through a Petition for Leave to Intervene (NAC 706.397). The LOA has not filed such a Petition in this matter.
- 6) The LOA filed its written Protest on September 26, 2012. The Applicants filed a Response on October 9, 2012. The LOA filed a Reply on October 16, 2012.
- 7) In a letter dated October 17, 2012, the LOA notified the STB of alleged infirmities pertaining to the STB’s Decision.
- 8) On October 29, 2012, the Applicants filed a Rebuttal to the LOA’s Reply.
- 9) On December 3, 2012, the Authority received a copy of the LOA’s Petition to Reopen filed with the STB on November 30, 2012.
- 10) On December 18, 2012, the Applicants filed with the STB—and the Authority received a copy of—the Applicants’ Reply to the Petition to Reopen.
- 11) On January 28, 2013, the LOA submitted to the Authority a letter requesting clarification of the status of this matter.

- 12) In a letter dated February 1, 2013, the LOA submitted additional argument to the STB.
- 13) In a letter dated February 12, 2013, the Applicants responded to the LOA's above-referenced January 28, 2013 letter to the Authority.
- 14) To date, the Authority has received no indication that the STB Order has been reopened, reconsidered, stayed, withdrawn or otherwise impaired in any way.
- 15) In the most recent prior instance of the STB ordering the transfer of Nevada intrastate authority, the matter appeared on the Agenda for the Authority's April 17, 2008 General Session. The following minutes detail the Authority's handling of the matter:

**12. \*\*Consent Items:**

a) Notice (No action required)

**Docket No. 06-02013** The Surface Standard Board's approval of Brown's Crew Car of Wyoming, Inc. dba Armadillo Express application to sell and transfer and of Rail Crew Express, LLC for authority to purchase and acquire 100% of the stock of Brown's Crew Car of Wyoming, Inc. dba Armadillo Express (operating as a contract carrier under Permit MV 6107, Sub 3 in the State of Nevada). Staff investigation concluded. Mr. Day provided a brief summation of this matter. The Authority's consideration of this particular item is guided by operation of law rather than the more typical analysis of an Application. On 1/30/06, Rail Crew Express, LLC filed an application with the United States Surface Transportation Board for approval of its purchase of Brown's Crew Car of Wyoming dba Armadillo Express. On 2/3/06, Rail Crew Express filed a copy of its STB application with our Authority. On 2/27/06, the STB issued a decision approving that transaction. Pursuant to Federal law [49 USC 14303(f)], when the STB approves transactions such as this one, that approval serves to pre-empt most other state consideration of that transaction. Therefore, this matter has been listed as Notice Only. The Applicant will still report to us (such as for verification of insurance, etc.) since the federal preemption extends only to the transfer of the company, not ongoing operations. Commissioner Metz stated that the information with reference to who is running the operation, who owns the operation, etc. should still be obtained to update our records. Chairman MacKay asked Senior Deputy Attorney General David Newton if he had reviewed the matter. Mr. Newton stated that he had reviewed Mr. Day's legal research and analysis and concurred with Mr. Day's conclusions.

**Discussion**

While the history of this matter summarized above may be long and convoluted, the applicable law is unmistakably clear. 49 U.S.C. 14303(f) states in relevant part that “A carrier or corporation participating in or resulting from a transaction approved by the (Surface Transportation) Board...may carry out the transaction, own and operate property, and exercise control of franchises acquired through the transaction *without the approval of a State Authority.*” Thus, transactions ordered by the United States Surface Transportation Board require only *notice* to the Authority so that the Authority can perform its very limited role of taking appropriate “ministerial” steps to implement the transfer.<sup>1</sup> Such steps include updating of records, inspection of vehicles, and related compliance items.

In order to trigger the generation of an itemized list of such required compliance items, it has been the practice of the Authority to place such federally ordered transfers on the agenda of a general session. Upon recognition at the general session, an Order is generated detailing the compliance items. In past instances, such items have been properly identified as “Notice Only” on the agenda, thereby clearly indicating that the Authority has no ability to “grant” or “deny” the transfer, but merely the obligation to implement it (see paragraph 14 above).

In this case the “notice only” language was inadvertently omitted from the agenda item, with the unintended consequence of creating the appearance that the Authority was actually empowered to grant or deny the transfer at the September 2012 general session. *Neither the Authority nor any Presiding Officer was so empowered then, now, or at any time in the interim.*

After the Protestant raised concerns about the STB Order, and the matter was “tabled” by the Authority at its September 2012 General Session, the Authority Staff delayed undertaking its

---

<sup>1</sup> 49 CFR 1182.8(f) requires the transferor and transferee to comply with ministerial requirements to allow the NTA to implement an STB-directed transfer.

ministerial obligations to implement the STB-ordered transfers. By operation of the STB Order and 49 U.S.C. 14303(f), the Applicant could have operated under the transferred CPCNs without awaiting Authority approval.

Here, the Applicant forestalled operations under the CPCNs at issue for approximately four months, despite the Protestant's failure to have the STB Order stayed, re-opened, set aside, or otherwise reconsidered—the only means by which the Authority could avoid simply ministerially implementing the final STB Order. When in January 2013 the Transferee carrier's attorneys notified the NTA that the Transferee would be going forward with operations without awaiting further order of the Authority, the Authority remained compelled to comply with the STB Order and Authority Staff remained obligated to perform the limited ministerial actions of implementing the STB-ordered transfer, as had been the respective obligations since first receiving notice of the STB Order.

While the Authority finds the above legal analysis conclusive, the Protestant in its written submissions referenced above (and during the Authority's April 25, 2013 General Session) raised several issues that require response.

First, the Protestant argued that absent substantive consideration by the Authority of whether to grant or deny the transfers at issue, the Protestant would be denied due process—an opportunity to be heard. Most significantly, the Authority is expressly preempted from substantive consideration of the transfers, pursuant to federal statute and the Supremacy Clause of the United States Constitution. Further, the STB process itself provides ample opportunity to be heard, including noticing and hearings. Here, the Protestant apparently failed to avail itself of the opportunity for participation in the STB proceedings. Now that those proceedings are closed, the Protestant asks the NTA to unlawfully thwart a valid, final federal order, which the NTA is

compelled—without discretion or further contemplation—to ministerially implement. The Protestant’s alleged infirmities in the STB Application and STB Order can only properly be addressed before that body, and the Authority cannot provide a “backdoor” appeal process by impeding its Staff’s obligatory ministerial implementation of the still-final STB Order.

The Protestant has claimed that the ministerial functions compelled by operation of the STB Order, federal statute, and the Supremacy Clause of the United States Constitution require separate approval of the Authority. These ministerial functions include updating the carrier’s tariff and insurance records, and conducting vehicle inspections to assure updated markings on vehicles. None of these actions require an Order of the Authority, and all are routinely conducted without Order of the Authority. For example, the tariffs stamped “accepted” by Authority Staff as part of the compulsory ministerial implementation of the STB-ordered transfers here are among approximately 138 such tariffs administratively accepted by Staff since January 1, 2012 with neither consideration by—nor order from—the Authority. Carriers operating under such tariffs unsupported by Authority Order since January 1, 2012 include notable Las Vegas Livery Operators Association members Bell Trans, Presidential Limousine, and Las Vegas Limousines. Further, all these same ministerial functions—including Staff acceptance of updated tariffs—are performed in every sale and transfer of authority, as part and parcel of the implementation of such transfer and without separate application or approval under the sections governing Authority review and approval of tariffs (NAC 706.1384, NRS 706.321).

As a final argument at the Authority’s April 25, 2013 General Session, the Protestant offered an analogy. The Protestant described a situation where a probate court, in the administration of an estate, awarded a tavern business to an heir. The Protestant noted that the court-ordered award of the tavern would not alleviate the heir of the burden of applying and receiving approval of a local

liquor licensing agency for the transfer. This purported “analogy” is in fact not analogous in the most fundamental way, and thereby illustrates the Protestant’s profound misunderstanding of this matter. The analogy lacks the most critical, outcome-determinative commonality with the situation at hand. The tavern scenario would be analogous only if there were *a federal statute* that mandated “A person awarded a tavern business by order of a probate court...may carry out the transaction, own and operate the property, and exercise control of franchises acquired through the transaction *without the approval of a any local liquor licensing entity.*” Here, of course, there is such a federal statute allowing the Applicant to proceed with operations under the transferred businesses, and requiring the Authority Staff to perform the ministerial implementation of the transfer, *without Authority approval.*

### Conclusion

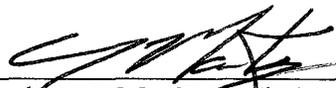
Pursuant to unambiguous federal law and consistent with Authority precedent, the Authority has been given notice of a final STB-ordered transfer and Authority Staff has performed the ministerial processes of implementing the transfer. Authority recognition of the federal STB Order and Authority Staff implementation of the transfers ordered therein are compelled by federal statute and the Supremacy Clause of the United States Constitution. Although the Protestant has raised concerns about the STB Order, the Authority is in no position to reject, modify or otherwise ignore the mandate of the still-final STB Order. If at any time the final STB Order is stayed or amended, the Authority may take appropriate action at that time.

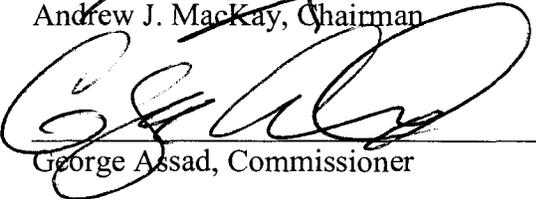
The matter should have been designated “notice only” on the Agenda for the September 2012 general session, and the Authority should not have “tabled” such a non-action item. The item could never be substantively deliberated, was not subject to “approval” or “denial,” and notice had been given by the Applicant and received by the Authority.

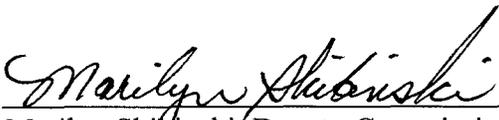
**THEREFORE, it is ordered and directed that:**

1. The Authority acknowledges that it received notice of the September 5, 2012 STB Decision (service date September 6, 2012) at its September 2012 General Session;
2. Acts of ministerial implementation of the STB-ordered transfers completed to date by Authority Staff are hereby ratified by the Authority, and the Authority Staff is hereby directed to complete any outstanding ministerial acts to implement the STB-ordered transfers; and
3. The Authority retains jurisdiction for the purpose of correcting any errors that may have occurred in the drafting or issuance of this Order.

By the Authority,

  
 \_\_\_\_\_  
 Andrew J. Mackay, Chairman

  
 \_\_\_\_\_  
 George Assad, Commissioner

Attest:   
 \_\_\_\_\_  
 Marilyn Skibinski, Deputy Commissioner

Dated: May 21, 2013  
 Reno, Nevada

NOTICE: Pursuant to NRS 233B.130, any party to this matter aggrieved by the above final decision may file a petition for rehearing or reconsideration. A petition for rehearing or reconsideration must be filed with the Authority within 15 days after the date the party received this Order.

