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232510

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Surface Transportation Board
395 E Street, S.W.
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DOCKET NO: MCF_20146_0

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

Surface Transportation Board,

I am writing this letter in response to:

REPLY OF APPLICANTS TO PROTEST OF MICHAEL YUSIM (232500)

In accordance with 49 USC 14303(b), in order for the Coach America bankruptcy sales to be approved, the Surface Transportation Board must find that the Coach America bankruptcy sales are “consistent with the public interest”.

49 USC § 14303 - CONSOLIDATION, MERGER, AND ACQUISITION OF CONTROL OF MOTOR CARRIERS OF PASSENGERS

(b) Standard for Approval.— The Board shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest. The Board shall consider at least the following:

- (1) The effect of the proposed transaction on the adequacy of transportation to the public.*
- (2) The total fixed charges that result from the proposed transaction.*
- (3) The interest of carrier employees affected by the proposed transaction.*

The Board may impose conditions governing the transaction.

As I have already argued, a Coach America bankruptcy sale under a condition in which the Secretary of Labor is prohibited from hearing and deciding discrimination cases in regard to accurately reporting hours on duty, in accordance with 49 USC 31105(a)(3)(A), is not in the public interest.

§ 31105. EMPLOYEE PROTECTIONS

(a) Prohibitions.—(3)(A) If the Secretary of Labor decides, on the basis of a complaint, a person violated subsection (a) of this section, the Secretary of Labor shall order the person to—

(i) take affirmative action to abate the violation;

(ii) reinstate the complainant to the former position with the same pay and terms and privileges of employment; and

(iii) pay compensatory damages, including backpay with interest and compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

The purpose of the FMCSA hours of service regulations is ensure that fatigued drivers are not operating motor vehicles on the public highways. Prohibiting the Secretary of Labor from hearing and deciding discrimination cases in regard to accurately reporting hours on duty, in accordance with 49 USC 31105(a)(3)(A), defeats the purpose of the FMCSA hours of service regulations.

Please allow me to address the specific points raised by Counsels in their letter.

Midnight Sun is not a party to the Contemplated Transaction and the assets of Midnight Sun are not among those of the Contemplated Transaction. Thus, the protest, which is directed at the alleged actions of Midnight Sun, has no bearing whatsoever on the Application under consideration in this proceeding. For that reason alone, the Protest should be denied without delay to the approval of the Contemplated Transaction.

The Midnight Sun Tours bankruptcy is being jointly administered with all of the other Coach America bus company bankruptcies; IN RE COACH AM GROUP HOLDINGS CORP., CASE NO. 12-10010(KG), in the Bankruptcy Court in the District of Delaware.

Coach America, as the parent company of Midnight Sun Tours, is ultimately responsible for the logging abuses that were committed at Midnight Sun Tours, and the discrimination in regard to accurately reporting hours on duty, that resulted from those logging abuses. Midnight Sun Tours did not act without the knowledge and consent of Coach America.

There is no distinction between Coach America, and the bus companies that Coach America owns. There is no significance as to which of the Coach America bus companies are being sold. They are all Coach America bus companies. It is Coach America that is being protected in the bankruptcy court from having to account for the logging abuses, and the discrimination in regard to accurately reporting hours on duty that resulted from those logging abuses, that Coach America allowed to occur under its ownership.

Which of the Coach America bus companies committed those logging abuses and discrimination in regard to accurately reporting hours on duty really does not matter. It is ultimately Coach America, as the parent company of Midnight Sun Tours, that bears the responsibility.

None of the Coach America bus companies should be allowed to be sold under a bankruptcy condition in which the Secretary of Labor is prohibited from hearing and deciding discrimination cases in regard to accurately reporting hours on duty, in accordance with 49 USC 31105(a)(3)(A).

Throughout the Protest, Mr. Yusim's complaint or issue is that the automatic stay resulting from the pending Bankruptcy Case has stayed the litigation of his discrimination case and the discrimination case of another alleged former employee of Midnight Sun, Zachary Joyner. As stated in the Application, (a) CUSA ES operates primarily as a provider of transportation services for railroad crews while also providing limited transit, paratransit and taxi services; (b) CUSA

CSS operates primarily as a provider of transportation services for railroad crews. Midnight Sun, on the other hand, operates both contract and charter services in the State of Florida and nearby states (See Application, Section II, STB Docket No. MCF-21047). Accordingly, the operations and services provided by the Sellers, CUSA ES and CUSA CSS are unrelated to the operations of and services provided by Midnight Sun. Obviously, the operations and services provided by PTI are also unrelated to the operations of and services provided by Midnight Sun.

Regardless of the operations and services provided by these bus companies, all of these bus companies must abide by the FMCSRs, and the Guidance to the FMCSRs. The discrimination cases brought by myself and Mr. Joyner before the Secretary of Labor, were done so because Coach America, as evidenced by the actions of Midnight Sun Tours, violated the FMCSRs, the Guidance to the FMCSRs, and discriminated against drivers who accurately reported their hours on duty.

The Protest fails to identify any reason that the Contemplated Transaction, which does not involve Mr. Yusim, Midnight Sun, or any services related to Midnight Sun, is not consistent with the public interest.

As I have already stated, it is not in the public interest for the Surface Transportation Board to approve a Transaction under a condition in which the Secretary of Labor is prohibited from hearing and deciding discrimination cases in regard to accurately reporting hours on duty.

Prohibiting the Secretary of Labor from hearing and deciding discrimination cases in regard to accurately reporting hours on duty defeats the purpose of the hours of service regulations; to ensure that fatigued drivers are not operating motor vehicles on the public highways.

Counsels argue that Midnight Sun Tours is not a part of the Contemplated Transaction. However, Midnight Sun Tours is a part of the Coach America family of companies, as are CUSA ES and CUSA CSS. It is ultimately Coach America, as the parent company, that bears the responsibility for allowing its bus companies to operate under policies that discriminate against drivers who accurately report their hours on duty.

None of the Coach America bus companies should be allowed to be sold until the Secretary of Labor has heard and decided all of the discrimination cases brought against the Coach America bus companies, in accordance with 49 USC 31105.

Any prohibition of the Secretary of Labor from hearing the aforementioned discrimination cases is the result of U.S. bankruptcy law, and decisions and rulings of the Bankruptcy Court, and any such prohibition has no bearing on the public interest as it is to be evaluated by the Board with respect to the Contemplated Transaction. In that regard, Applicants request that the Protest be in all things denied.

The purpose of the hours-of-service regulations is to ensure that fatigued drivers are not operating motor vehicles on the public highways. Prohibiting the Secretary of Labor from hearing and deciding discrimination cases in regard to accurately reporting hours on duty defeats the purpose of the hours-of-service regulations.

The Surface Transportation Board will have to weigh the self-interest of the Debtors in using the Bankruptcy Code to prohibit the Secretary of Labor from hearing and deciding discrimination cases in regard to accurately reporting hours on duty in order to preserve the assets of the Debtors' estate, against the public interest of ensuring that fatigued drivers are not operating motor vehicles on the public highways.

Further, to the extent that Mr. Yusim seeks a condition from the Board that would allow him to pursue his discrimination claim against Midnight Sun, the relief he seeks is more appropriately addressed to the Bankruptcy Court in the Bankruptcy Case, and not the Board.

In accordance with 49 USC 14303(b), it is within the authority of the Surface Transportation Board to "impose conditions governing the transaction".

It is in the public interest that the Surface Transportation Board impose a condition on the bankruptcy sale of the Coach America bus companies such that the Secretary of Labor is not prohibited from hearing and deciding discrimination cases in regard to accurately reporting hours on duty, in accordance with 49 USC 31105(a)(3)(A).

The condition that I seek from the Surface Transportation Board is in the public interest; not my self-interest. The Bankruptcy Court exists for the benefit of the Debtors and the Creditors; not the public interest. I cannot argue public interest in the Bankruptcy Court. I can only argue public interest before the Surface Transportation Board.

Mr. Yusim has previously filed multiple motions in the Bankruptcy Court seeking relief from the automatic stay and has also objected to the sale of Midnight Sun. In each instance, the Bankruptcy Court has denied Mr. Yusim's request and refused to permit his individual claim against Midnight Sun to move forward. Because the Bankruptcy Court has refused to lift the automatic stay, Mr. Yusim's claim before the DOL cannot move forward. As it customarily does, we expect that the Bankruptcy Court will consider Mr. Yusim's claims in the due course of the Bankruptcy Case. If his claims are valid, he will receive distributions in accordance with the priority of allowed claims set forth in the Bankruptcy Code. Thus, approval of the Contemplated Transaction by this Board in no way limits or further delays Mr. Yusim's recovery of damages from Midnight Sun, if he is so entitled.

In accordance with 49 USC 14303(b), the proceedings before the Surface Transportation Board are focused on ensuring that any transactions approved by the Surface Transportation Board are "consistent with the public interest"; not the self-interest of any party appearing before the Board.

It is not in the public interest for the Surface Transportation Board to approve the bankruptcy sale of the Coach America bus companies under a condition in which the Secretary of Labor is prohibited from hearing and deciding discrimination cases in regard to accurately reporting hours on duty, in accordance with 49 USC 31105(a)(3)(A). Doing so defeats the purpose of the hours of service regulations; to ensure that fatigued drivers are not operating motor vehicles on the public highways.

Coach America permitted discrimination in regard to accurately reporting hours on duty to occur at its bus companies, as evidenced by the discrimination in regard to accurately reporting hours on duty that occurred at Midnight Sun Tours. In accordance with 49 USC 31105(a)(3)(A)(i), only the Secretary of Labor is empowered to issue an Order that will compel Coach America and Midnight Sun Tours to “take affirmative action to abate the violation”.

§ 31105. EMPLOYEE PROTECTIONS

(a) Prohibitions.—(3)(A) If the Secretary of Labor decides, on the basis of a complaint, a person violated subsection (a) of this section, the Secretary of Labor shall order the person to—
(i) take affirmative action to abate the violation;

The Coach America bus companies have to understand that they cannot eliminate Provision 3 in Question 2 of the Guidance to FMCSR 395.2 as a necessary condition for logging off-duty during a tour of duty; as was done at Midnight Sun Tours.

The Coach America bus companies have to understand that they cannot require the drivers to change their original logs, shred the original logs, and then present the changed logs as the original logs; as was done at Midnight Sun Tours.

The Coach America bus companies have to understand that they cannot have drivers log off-duty on days that the drivers worked; as was done at Midnight Sun Tours.

The Coach America bus companies have to understand that they cannot have drivers log off-duty while the drivers are driving the bus; as was done at Midnight Sun Tours.

The Coach America bus companies have to understand that they cannot dispatch drivers into tours of duty that will require the drivers to record 10/15 hours of service violations, and then write-up the drivers for actually recording the 10/15 hours of service violations; as was done at Midnight Sun Tours.

The Coach America bus companies have to understand that they cannot write-up, suspend and then fire drivers because the drivers accurately report their hours on duty; as was done at Midnight Sun Tours.

The Coach America bus companies have to understand that they cannot fire drivers, moments after the drivers refuse to change their logs; as was done at Midnight Sun Tours.

Only an Order by the Secretary of Labor, in accordance with 49 USC 31105(a)(3)(A)(i), can give the Coach America bus companies that necessary understanding. It is not in the public interest to prohibit the Secretary of Labor from hearing and deciding these abuses.

Finally, the Board should deny Mr. Yusim’s request that “the Purchasers of the Coach America bus companies” and “the Coach America bus companies currently under protection of the Bankruptcy Court in District of Delaware” produce certain documents relative to hours of service recording. Such documents are plainly of no relevance to this acquisition of control proceeding,

and concern matters relating to FMCSA rules over which this Board has no regulatory jurisdiction.

In accordance with 49 USC 14303(b)(3), the Surface Transportation Board must consider “the interest of carrier employees affected by the proposed transaction”.

Issues that arise under Provision 3 in Question 2 of the Guidance to FMCSR 395.2 fall under the jurisdiction of the Secretary of Labor; not the Secretary of Transportation. These are economic issues. When a driver is waiting at a venue for the passengers to return to the bus, is the driver working, or is the driver not working? When a driver is waiting at an airport, or at a seaport, for passengers to arrive, is the driver working, or is the driver not working?

In accordance with FMCSR 395.8(a), these waiting times must be logged on a record of duty status; but how are these waiting times to be logged? Are these waiting times to be logged as “on-duty, not driving” (working), or are these waiting times to be logged as “off-duty” (not working)?

§395.8 Driver’s record of duty status.

(a) Except for a private motor carrier of passengers (nonbusiness), every motor carrier shall require every driver used by the motor carrier to record his/her duty status for each 24 hour period using the methods prescribed in either paragraphs (a)(1) or (2) of this section.

The answer to the question of whether a driver is working, or not working, during a non-driving segment of a tour of duty, is ultimately given by the written instructions mandated by Provision 3 in Question 2 of the Guidance to FMCSR 395.2.

the duration of the relief from duty must have been made known to the driver prior to the driver’s departure in written instructions from the employer

I am only asking for one document from each bus company; the written instructions mandated by Provision 3 in Question 2 of the Guidance to FMCSR 395.2 that permit drivers to log off-duty during their tours of duty. If the drivers of these bus companies are logging off-duty during their tours of duty, as I suspect they are, then the bus companies, as the employers, must provide the written instructions mandated by Provision 3 in Question 2 of the Guidance to FMCSR 395.2.

Question 2: What conditions must be met for a [CMV](#) driver to record meal and other routine stops made during a tour of duty as off-duty time?

Guidance:

- 1. The driver must have been relieved of all duty and responsibility for the care and custody of the vehicle, its accessories, and any cargo or passengers it may be carrying.*
- 2. The duration of the driver’s relief from duty must be a finite period of time which is of sufficient duration to ensure that the accumulated fatigue resulting from operating a [CMV](#) will be significantly reduced.*
- 3. If the driver has been relieved from duty, as noted in (1) above, the duration of the relief from duty must have been made known to the driver prior to the driver’s departure in written instructions from the employer. There are no record retention requirements for these instructions on board a vehicle or at a motor carrier’s principal place of business.*

4. During the stop, and for the duration of the stop, the driver must be at liberty to pursue activities of his/her own choosing and to leave the premises where the vehicle is situated.

In order for a driver to log off-duty during a tour of duty, all four provisions specified in Question 2 of the Guidance to FMCSR 395.2 must be met. If one of the conditions specified in Question 2 of the Guidance to FMCSR 395.2 is not met, then the driver may not log off-duty during the tour of duty.

Even though a driver may have no responsibility for the bus (Provision 1), may know the duration of the non-driving segment (Provision 2), and may be free to leave the premises where the bus is located (Provision 4), unless the employer provides the written instructions mandated by Provision 3 in Question 2 of the Guidance to FMCSR 395.2, then the driver may not log off-duty during the tour of duty.

If drivers do log off-duty during their tours of duty, without the written instructions mandated by Provision 3 in Question 2 of the Guidance to FMCSR 395.2, then those logs become false records of duty status. It is not in the public interest for bus companies to accept false records of duty status from their drivers; as was the case at Midnight Sun Tours.

At Midnight Sun Tours, there were no written instructions authorizing drivers to log off-duty during their tours of duty, in accordance with Provision 3 in Question 2 of the Guidance to FMCSR 395.2. There was only a Midnight Sun Tours memo, dated September 10, 2009, that eliminated Provision 3 in Question 2 of the Guidance to FMCSR 395.2 as a necessary condition for logging off-duty during a tour of duty. Drivers at Midnight Sun Tours were required to log off-duty during their tours of duty only on the basis of Provisions 1, 2 and 4 of Question 2 of the Guidance to FMCSR 395.2.

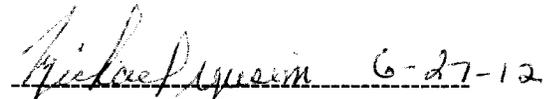
Midnight Sun Tours knew what the company had to do in regard to Provision 3 in Question 2 of the Guidance to FMCSR 395.2. It was explained to Midnight Sun Tours in the Coach America Log Policy, dated August 1, 2007. Coach America knew that Midnight Sun Tours was not following the Coach America Log Policy, and the FMCSA Guidance for logging off-duty during a tour of duty.

Midnight Sun Tours was accepting false records of duty status from drivers who were logging off-duty during their tours of duty, when in fact the drivers were not off-duty, because Midnight Sun Tours failed to provide the written instructions mandated by Provision 3 in Question 2 of the Guidance to FMCSR 395.2

It is in the public interest, as well as the interest of the employees of the Coach America bus companies being sold, that the Surface Transportation Board know whether the Purchasers are conducting their businesses as Midnight Sun Tours conducted its business; by accepting false records of duty status from drivers who are logging off-duty during their tours of duty, when in fact the drivers are not off-duty during their tours of duty, because the Purchasers, like Midnight Sun Tours, never provided the written instructions mandated by Provision 3 in Question 2 of the Guidance to FMCSR 395.2 that authorized the drivers to log off-duty during their tours of duty.

The only way to gauge the Purchasers' compliance with Provision 3 in Question 2 of the Guidance to FMCSR 395.2, is to examine the Purchasers' written instructions mandated by Provision 3 in Question 2 of the Guidance to FMCSR 395.2.

Sincerely,


----- 6-27-12
Michael Yusim

cc:

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MIDNIGHT SUN TOURS

Interoffice Memorandum

From: Don Redden, Safety & Operations Manager 

To: ALL MIDNIGHT SUN TOURS DRIVERS

Re: STANDING AUTHORIZATION AND INSTRUCTION TO LOG OFF DUTY FOR RELIEF

Date: September 10, 2009

All Midnight Sun Tours Drivers are hereby authorized and instructed to log Off Duty when these conditions are met: (FMCSA § 395.2 and Interpretations)

1. You have been relieved of all duty and responsibility for the care and custody of the motor coach, its accessories, and any cargo or passengers that may have been on the motor coach.
2. The duration of your relief from duty is of a set time of sufficient duration to ensure that the fatigue of operating a motor coach is significantly reduced.
3. You are at liberty to pursue activities of your own choosing and may leave the premises where the motor coach is located.
4. You are hereby instructed to log Off Duty when these conditions are met.
5. You are also authorized and instructed to record meal and other routine stops made during your tour of duty as Off Duty time.

The purpose of this Authorization and Instruction is to preserve your available hours of service while keeping you rested in between portions of your driving assignments. You are required to log Off Duty when the above conditions are met.



August 1, 2007

FMCSR 395 – Hours of Service Guidance Logging Off Duty during a Tour of Duty

The General Manager, Operations Manager, Safety Manager and Sales Manager shall be thoroughly trained and well-versed in Hours of Service rules.

A driver must have a written statement, specific to the exact trip that he or she is performing which expressly authorizes the driver to log Off Duty for specific breaks and sufficient time to relieve fatigue during a Tour of Duty, **Chartered Trip, Fixed Route or Shuttle.**

The written statement should be part of the charter order, printed onto the charter order or attached to the charter order, trip sheet or route sheet, with specifics that relate to that exact piece of work. **Distinctive software program has this capability.**

In general, a driver may log Off Duty if:

- The Driver is relieved of all duty and responsibility for the care and custody of the vehicle, its accessories, cargo and passengers. This means the bus is securely parked, there are no passengers onboard and the driver is not responsible for the bus's cargo.
- The duration of the driver's relief must be a finite time with a starting time and a return to duty time.
- The duration of the relief time Off Duty must be made known to the Driver prior to the driver's departure, in writing.

The sales department must work with the client to define break times, meal stops and enroute destination stops in order that these times can be specified on Charter Orders and Trip Sheets.

Prior to a trip's departure, the client should be instructed by the Sales or Operations department that changes to an itinerary which would affect a Driver's Hours of Service are prohibited unless approved by a manager of the company. If the client wishes to make changes to the itinerary while enroute (during a trip or charter), then the client and the driver must (together) attempt to call the Coach America office to obtain approval/denial from a Manager.