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Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

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EL EXPRESO GROUP, LLC--ASSET ACQUISITION--CUSA EE, LLC D/B/A EL EXPRESO

Surface Transportation Board,

I am writing this letter in opposition to
VERIFIED REQUEST FOR INTERIM APPROVAL (232615)

As I have repeatedly argued, as long as 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, with respect to any of the Coach America bus companies, then none of the Coach America bus companies should be allowed to be sold.

49 USC § 31105. EMPLOYEE PROTECTIONS

(a) Prohibitions.—(1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because—(C) the employee accurately reports hours on duty pursuant to chapter 315;

49 USC § 31105. EMPLOYEE PROTECTIONS

(b) Filing Complaints and Procedures—(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.

Although the discrimination cases in regard to accurately reporting hours on duty are directed at one of the Coach America bus companies, Midnight Sun Tours, all of the Coach America bus companies, including CUSA EE, LLC, are bound by the same Coach America log policies as Midnight Sun Tours.

The Coach America logging off-duty policy was not followed at Midnight Sun Tours; and it is a virtual certainty that the Coach America logging off-duty policy was not followed at any of the other Coach America bus companies, including CUSA EE, LLC.

Midnight Sun Tours accepted logs from drivers in which the drivers logged 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. By so doing, Midnight Sun Tours violated the FMCSA hours of service regulations.

Furthermore, by firing drivers who would not 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, Midnight Sun Tours discriminated against drivers who accurately reported their hours on duty, in violation of 49 USC 31105.

The significance of Provision 3 in Question 2 of the Guidance to FMCSR 395.2 must be understood. 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.

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.*

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.

Any record of duty status, in which a driver logs off-duty during a tour of duty without the written instructions mandated by Provision 3 in Question 2 of the Guidance to FMCSR 395.2, is a false record of duty status. By accepting such records of duty status, Midnight Sun Tours, as well as the other Coach America bus companies, including CUSA EE, LLC, are accepting false records of duty status. It is a violation of the FMCSA hours of service regulations for bus companies to accept false records of duty status.

The fundamental issue in the discrimination cases against Midnight Sun Tours in regard to accurately reporting hours on duty, aside from changing the logs, shredding the logs, and dispatching drivers into illegal tours of duty, is the meaning of 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

What does Provision 3 in Question 2 of the Guidance to FMCSR 395.2 actually mean; and what obligation does Provision 3 in Question 2 of the Guidance to FMCSR 395.2 actually place on the Coach America bus companies, in order that the Coach America bus company drivers be able to log off-duty during their tours of duty?

Coach America established the meaning of Provision 3 in Question 2 of the Guidance to FMCSR 395.2 in a log policy, dated August 1, 2007, entitled "FMCSR 395-Hours of Service Guidance Logging Off Duty during a Tour of Duty". The following is taken from the Coach America logging off-duty policy:

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 on board 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.

There were no written instructions at Midnight Sun Tours, specific to the exact trips, and specific to the breaks within the trips, authorizing drivers to log off-duty during their tours of duty, as required by the Coach America logging off-duty policy; and yet, drivers at Midnight Sun Tours logged off-duty during their tours of duty, and Midnight Sun Tours accepted those logs.

Actually, on scheduled shuttle runs, the shuttle schedules, which were the written instructions mandated by Provision 3 in Question 2 of the Guidance to FMCSR 395.2, made it known to the Midnight Sun Tours drivers that they were to log off-duty for only half an hour. However, Midnight Sun Tours made the drivers log off-duty for four hours on the scheduled shuttle runs. Midnight Sun Tours made drivers log off-duty while they were scheduled to be driving the bus.

Midnight Sun Tours' disregard of Provision 3 in Question 2 of the Guidance to FMCSR 395.2 as being a necessary condition for logging off-duty during a tour of duty was codified in a memo, dated September 10, 2009, and entitled "STANDING AUTHORIZATION AND INSTRUCTION TO LOG OFF DUTY FOR RELIEF". The following is taken from that Midnight Sun Tours memo:

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.

With the knowledge and consent of Coach America, and by means of a simple memo, Midnight Sun Tours 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. Provision 3 in Question 2 of the Guidance to FMCSR 395.2, which governs how drivers log off-duty during a tour of duty for the entire motor carrier industry, no longer applied at Midnight Sun Tours.

Drivers at Midnight Sun Tours now had to choose between logging off-duty during a tour of duty in accordance with an FMCSA hours of service guidance that demanded 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, or logging off-duty during a tour of duty in accordance with a Midnight Sun Tours company memo that prohibited 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.

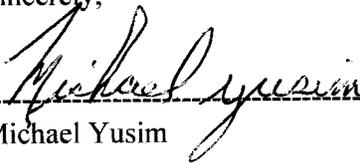
By allowing the sale of CUSA EE, LLC, as well as the other Coach America bus companies, the Surface Transportation Board will be affirming Midnight Sun Tours' belief that Provision 3 in Question 2 of the Guidance to FMCSR 395.2 really does not matter as a necessary condition for logging off-duty during a tour of duty.

Counsel for Vazquez Holdings and Mr. Vazquez now comes before the Surface Transportation Board, asking that the Surface Transportation Board grant Vazquez Holdings and Mr. Vazquez the interim authority to operate CUSA EE, LLC.

I contend that as part of the decision making process in regard to whether the Surface Transportation Board should grant Vazquez Holdings and Mr. Vazquez the interim authority to operate CUSA EE, LLC, it is essential that the Surface Transportation Board require Vazquez Holdings and Mr. Vazquez to produce the written instructions mandated by Provision 3 in Question 2 of the Guidance to FMCSR 395.2 that will be used by Vazquez Holdings and Mr. Vazquez to authorize the CUSA EE, LLC drivers to log off-duty during their tours of duty.

If Vazquez Holdings and Mr. Vazquez cannot produce the written instructions mandated by Provision 3 in Question 2 of the Guidance to FMCSR 395.2, then by granting Vazquez Holdings and Mr. Vazquez the interim authority to operate CUSA EE, LLC, the Surface Transportation Board is also granting Vazquez Holdings and Mr. Vazquez the interim authority to violate the FMCSA hours of service regulations by accepting false records of duty status, in which drivers are logging 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; and that is not in the public interest.

Sincerely,

 7-29-12

Michael Yusim

cc:

David H. Coburn
Timothy M. Walsh
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036



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.



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.