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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. MC-F-21035

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

Digest:[1] Two competing motor carriers that provide sightseeing bus services primarily in New York City seek STB approval of their joint business arrangement. Concluding that the transaction is not in the public interest because it will create an entity with excessive market power, the Board denies the request for authority.

Decided: February 8, 2011

SUMMARY

This case involves the request of the corporate families of 2 bus carriers that operate the overwhelming majority of double-decker, hop-on, hop-off buses in New York City (NYC) for STB authorization of their joint business arrangement. Under the governing statute, STB approval would shield the transaction from scrutiny by the New York State Attorney General (NYSAG), which began an investigation into the combination. One of the carriers, International Business Services (IBS), is an established interstate carrier that has operated its local service and its interstate charter and tourism services under the Gray Line New York (Gray Line) trade name. The other carrier, City Sights Twin, is a new entity that took over the operations of City Sights, LLC (collectively, City Sights),[2] which was primarily a local carrier operating in NYC. The transaction contemplated that IBS and City Sights would join forces through a joint venture and operate their NYC double-decker, hop-on, hop-off services together through a new company, Twin America, LLC (Twin America).

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[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, Ex Parte No. 696 (STB served Sept. 2, 2010).

[2] City Sights, LLC, was formed in 2004 to operate a tour bus service in NYC. Applicants state that City Sights, LLC, was not named as an applicant because it was not a party to the transaction, having transferred its assets to City Sights Twin prior to the transaction forming Twin America. Even though we recognize that these are separate entities, we will refer to both of them as City Sights, regardless of timeframe, unless otherwise specified.

The parties did not seek STB authority when Twin America was created in March 2009. NYSAG, however, issued subpoenas raising questions regarding the competitive issues surrounding the operation. Immediately thereafter, Twin America sought (and subsequently received) a license from the Federal Motor Carrier Safety Administration (FMCSA) to operate interstate services; it then sought STB authority for the joint venture, claiming that, because its operations were interstate in nature and subject to STB oversight, they were beyond the reach of NYSAG.

As discussed below, we find that the transaction is within the Board's jurisdiction, but we are denying the authority sought. It is apparent that the transaction has been modified since March 2009 after NYSAG expressed concerns about the transaction and that these modifications have an impact on jurisdiction. We are concerned that the Board's processes may have been manipulated to avoid the inquiry by NYSAG. Nevertheless, we find jurisdiction here. IBS/Gray Line has long been an interstate carrier. And there is unrefuted testimony that City Sights held itself out to provide, and did in fact provide, interstate operations in the past (albeit without authority); that the owner of City Sights controlled an interstate motor carrier at the time of the modified transaction for which authorization has been sought; and that Twin America conducts some interstate services.

Having reviewed the merits of the transaction, we have concerns about its competitive impacts. The transaction creates a combined entity that possesses excessive market power and has the ability to raise rates without competitive restraint and otherwise conduct its operations to the detriment of consumers. While the potential for harm to the public arising from the concentrated market power achieved by the transaction could – standing alone – persuade the Board to reject this transaction, the possibility of unchecked rate increases and other competitive harm in this docket is not just theoretical. Shortly after the transaction took effect, Twin America did indeed raise its rates significantly, and it has maintained this rate increase during the nearly 2 years in which the combination has been in effect. Accordingly, we find that the approval of this transaction is not consistent with the public interest.

BACKGROUND

This proceeding was initiated on August 19, 2009. At that time, the corporate families of IBS/Gray Line[3] and of City Sights Twin[4] (collectively, Applicants) filed an application under

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[3] The corporate family of IBS/Gray Line includes Stagecoach Group PLC (Stagecoach), its noncarrier intermediate subsidiaries (Stagecoach Transport Holdings plc, SCUSI Ltd., and Coach USA Administration, Inc.), and Coach USA, Inc. (Coach USA). The Stagecoach/Coach USA group controls numerous passenger carriers throughout the United States. Its umbrella organization, Coach Group, is based in the United Kingdom and operates bus, coach, tram, and train operations throughout the UK as well as the United States.

49 U.S.C. § 14303 to acquire control of Twin America, once Twin America's FMCSA license to operate as an interstate carrier was granted.[5] The parties seeking to acquire control of Twin America are 2 direct competitors in the NYC tour bus industry. The first co-applicant is IBS,[6] a subsidiary under the Coach USA family of motor carriers controlled by Stagecoach that has operated its local service and its interstate charter and tourism services under the Gray Line trade name. The second co-applicant is City Sights Twin, which was formed for the purpose of effectuating the joint venture between IBS and City Sights, LLC, a company that, since 2004, had operated almost exclusively in the NYC tour business.

Often, bus merger transactions subject to Board authority are routine transactions with little or no competitive impact. They are typically processed through tentative grants of authority that become effective automatically, unless the Board affirmatively acts to deny the authority. As discussed below, however, the facts that this case presents are not routine.

In 1998, Coach USA acquired control of Gray Line and IBS, as well as other related carriers, in a Board-approved transaction.[7] At that time, Gray Line was providing both interstate and local NYC services; as a result of the transaction, IBS came into possession of a number of double-decker buses, which were used to provide transportation service in the form of hop-on, hop-off bus tours of NYC.[8] As part of the joint venture, Gray Line contributed 59 double-decker buses to Twin America's operations in NYC.[9]

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[4] The corporate owner of City Sights is Mr. Zev Marmurstein. It is uncontested that, in addition to Twin America (of which he was named president and chief executive officer), Mr. Marmurstein has (since 2003) controlled a motor carrier called R.W. Express, LLC. See Mr. Zev Marmurstein–Continuance in Control–R.W. Express, LLC, MC-F-21036 (STB served Oct. 16, 2009).

[5] On November 17, 2009, Twin America became a registered motor passenger carrier (MC-688284).

[6] IBS is a registered motor passenger carrier (MC-155937).

[7] Coach USA, Inc.–Control–Chenango Valley Bus Lines, Inc., et al., MC-F-20927 (STB served Aug. 28, 1997).

[8] Hop-on, hop-off bus tours allow customers to leave a bus at multiple locations, tour specific sites, and then hop on another bus run by the same company at the same or another location. These bus stops are specifically designated and marked and are authorized to be used as such through permission obtained from the New York City Department of Transportation.

[9] Verified Statement of Ross Kinnear (V.S. Kinnear) 3, Nov. 17, 2009.

City Sights entered the NYC bus tour industry in 2005, in competition with Gray Line, with 8 double-decker buses.[10] By 2009, City Sights' fleet had grown to 70 buses[11] and City Sights was competing directly with Gray Line in the double-decker bus tour market. The record indicates that one other company, Big Taxi Tours, was also operating double-decker tours. Big Taxi Tours, however, serves a smaller geographical area with just 4 buses in NYC,[12] in stark contrast to City Sights and Gray Line tours, which enjoy the lion's share of the territory and market.[13]

In early 2009, the principals of Gray Line and City Sights began to discuss uniting their double-decker, hop-on, hop-off NYC tour bus business. On March 17, 2009, Gray Line/IBS and City Sights entered into a transaction described as a "joint venture," forming Twin America. The joint venture became effective on March 31, 2009.[14] Applicants assert that the business purpose of the joint venture was to increase efficiency and reduce costs using fewer tour buses, as well as to achieve cost savings through the consolidation of duplicative "back office personnel" and other administrative functions.[15] From the terms of the agreement forming Twin America, it appears that Twin America's essential transportation purpose is to operate the double-decker tour bus market within NYC.

Applicants operated Twin America pursuant to the joint venture – without apparent regulatory concerns – from March 31, 2009 until July 31, 2009. On that day, and again on August 3, 2009, Applicants were subpoenaed by NYSAG, whose office was investigating antitrust issues associated with Twin America's formation and operation.[16] Although the parties to the joint venture had sought no federal authorization from any agency either immediately before or after commencing operations under the joint venture, on August 10, 2009, shortly after receiving subpoenas from NYSAG, Twin America filed with the FMCSA for operating authority to become a regulated interstate carrier. Because of federal preemption, interstate bus carriers

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[10] Applicants' Reply 47, Verified Statement of Zev Marmurstein (V.S. Marmurstein) 2, Nov.17, 2009.

[11] The 70 buses in 2009 are made up of 62 buses in use by City Sights and 8 double-decker buses under construction at the time the joint venture was formed. Id.

[12] Comments of Transport Workers Union (Comments of TWU) 18, Feb. 1, 2010.

[13] Comments of NYSAG 3-4, Nov. 3, 2009. Although NYSAG had limited access to financial information, its initial analysis in the fall of 2009 indicated that Big Taxi covered only one out of the four tour loops collectively covered by Twin America, and that the separate preexisting market shares of City Lights and Gray Line were approximately 45 % each, with Big Taxi representing only 11 %.

[14] Applicants' Reply 9, V.S. Kinnear 4, Nov. 17, 2009.

[15] Application 11, Aug. 19, 2009.

[16] Comments of NYSAG 1, Nov. 3, 2009.

are not subject to state or local economic regulation. Twin America then met with NYSAG and informed it that Applicants had filed an application with the STB on August 19, 2009, seeking approval for their transaction under 49 U.S.C.§ 14303 (along with the antitrust exemption that goes with it). Subsequently, Twin America received its interstate operating registration from FMCSA on November 17, 2009 – 7 months after Twin America had begun operating its NYC double-decker tour business.

Applicants state that at the time of the joint venture, neither party was aware that the transaction required Board authorization, or that Twin America required federal operating authority.[17] In their August 19 application, Applicants did advise the Board of NYSAG's interest in the matter.

The timing and complexity of the transactions presented to the Board, as well as the competitive concerns expressed by NYSAG, raised substantial jurisdictional and legal issues warranting close consideration. Consequently, in a notice served and published in the Federal Register on September 18, 2009 (74 Fed. Reg. 47,985-86), the Board declined to grant temporary authority under 49 C.F.R. § 1182.4(b). Instead, we requested further comments on the transaction. On November 2, 2009, NYSAG filed comments that, among other things, contended that City Sights was not an interstate carrier at the time of the transaction. On November 17, 2009, Applicants replied to the comments of NYSAG. 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.

On February 1, 2010, NYSAG filed a sur-reply to the November 17 reply of Applicants. On February 1, 2010, the Transport Workers Union, AFL-CIO, Local 225 (TWU) also filed comments.[18] Applicants filed their response to NYSAG's sur-reply and to TWU's comments on March 10, 2010. Continental Guest Services Corporation (CGSC), a Manhattan-based sightseeing and hospitality company, also filed several rounds of comments.[19] The Board held an oral argument on April 27, 2010, in which Applicants, NYSAG, and CGSC participated.

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[17] V.S. Kinnear 2, Nov. 17, 2009. As noted above, Twin America is now a registered motor passenger carrier.

[18] On January 12, 2011, Applicants filed a copy of a letter from TWU to the Board withdrawing its objections to the approval of the application. The letter states that TWU and Gray Line executed an amendment to its collective bargaining agreement and that TWU is satisfied that work will not be transferred away from the bargaining unit and that members will be protected from potentially concerning aspects of the Twin America transaction.

[19] CGSC's business involved providing double-decker tour bus tickets through hotels in NYC. Its claims against Applicants, however, while stemming from the transaction at issue here, are not directly relevant to the application, because they were not related to the transportation aspects of the joint venture. CGSC was also the plaintiff in a New York State court proceeding

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PRELIMINARY MATTER

By decision served January 29, 2010, the Board issued a protective order upon the request of Applicants, which was clarified by decision served March 4, 2009. The order concerned a NYSAG pleading containing certain information in a declaration by NYSAG's witness Dr. Kitty Kay Chan, which Applicants deem confidential. Ultimately, NYSAG submitted a public version of the document redacting most of the allegedly confidential material, with one exception: Exhibit 1 to Dr. Chan's declaration.[20] Applicants complain that the remainder of the exhibit should be deemed confidential because it contains non-public internal business information relating to the formation of Twin America. In response, NYSAG argues that Applicants have waived any confidentiality that may have attached to the document by submitting their own non-confidential filing on November 17, 2009, quoting from a statement in the allegedly confidential document.[21]

The Board typically allows companies to protect from public disclosure certain proprietary and commercially sensitive information because of the risk that release of such information could have commercial and competitive consequences. Cent. Or. & Pac. R.R. – Aban. & Discontinuance of Service – Coos, Douglas, and Lane Counties, Or., AB 515 (Sub-No. 2), slip op. at 3 (STB served Aug. 1, 2008). To obtain confidential status, however, a party must do more than simply assert a desire to keep a document confidential. Here, while Applicants state that the exhibit contains non-public internal business information, they do not assert any commercial disadvantage if Exhibit 1 to Dr. Chan's declaration were made available to the public.[22] For that reason, and because the same document was already made public in the

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that sought to enjoin Twin America and the parties that formed it from ceasing to sell double-decker tour bus tickets to CGSC and from changing terms and conditions of ticket sales. On September 14, 2010, the New York court dismissed CGSC's claims against IBS, City Sights Twin, and Twin America. Continental Guest Services Corp. v. International Bus Services, Inc., et al., No. 600643/10 (Sup. Ct. N.Y. Co. Sept. 14, 2010).

[20] Applicants also claim as confidential quotes from Exhibit 1 contained in Dr. Chan's declaration.

[21] See Verified Statement of Professor Robert D. Willig (V.S. Willig) 2 n.1, Nov. 17, 2009.

[22] The March 4 Decision states that, 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 they believe should remain confidential. Applicants did not provide such information. Accordingly, Applicants' request to have NYSAG's March 11 public version removed from the website is denied.

New York state court proceeding,[23] we conclude that the document is not confidential and does not disclose sensitive business information.

DISCUSSION AND CONCLUSIONS

As noted, Applicants brought this matter to us after their transaction had been consummated and become the subject of an inquiry by state antitrust authorities. The circumstances under which Applicants brought the matter to the Board and Applicants' post hoc arguments that the Board possesses exclusive authority to examine the transaction may be seen at least partially as an effort to deflect the State's scrutiny of the arrangement. At this juncture, however, the Applicants have structured a transaction that is covered by 49 U.S.C. § 14303(a) and the Board must rule on the application. Under the approval standard of 49 U.S.C. § 14303(b), we find that this transaction is not in the public interest. The transaction produces an unacceptably high market concentration that can lead to, and has in fact led to, unchecked rate increases, and that holds the potential for other harmful effects of excessive market power.

Jurisdiction

Under 49 U.S.C. § 14303(a), transactions effecting control of passenger bus operations require STB approval where they involve multiple regulated bus carriers, or where they involve acquisition of control of a regulated bus carrier by a noncarrier that controls at least one other regulated carrier.[24] Subsections (a)(1) – (a)(3) apply when, on each side of the transaction, there

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[23] Cont'l Guest Services Corp. v. Int'l Bus Services, Inc., et al., No. 600643/10 (Sup. Ct. N.Y. Co. Sept. 14, 2010).

[24] The provisions of 49 U.S.C. § 14303(a) state as follows:

(a) Approval Required. - The following transactions involving motor carriers of passengers subject to jurisdiction under subchapter I of chapter 135 may be carried out only with the approval of the Board:

(1) Consolidation or merger of the properties or franchises of at least 2 carriers into one operation for the ownership, management, and operation of the previously separately owned properties.

(2) A purchase, lease, or contract to operate property of another carrier by any number of carriers.

(3) Acquisition of control of a carrier by any number of carriers.

(4) Acquisition of control of at least 2 carriers by a person that is not a carrier.

(5) Acquisition of control of a carrier by a person that is not a carrier but that controls any number of carriers.

is at least one regulated carrier, while subsections (a)(4) – (a)(5) apply when a noncarrier will control multiple carriers.

To determine whether an entity is subject to § 14303, we look to the provisions of 49 U.S.C. § 13501, which, as pertinent here, give the Board general jurisdiction over passenger transportation by motor carrier between states. Because interstate motor carriers are required to obtain federal licenses,[25] the applicability determination is usually mechanical: licensed carriers need control authorization from the Board, while other entities do not. Determining Board jurisdiction can be more complicated, however, if, as sometimes occurs, entities unlawfully function as interstate motor carriers without obtaining the necessary authority.

This is one such case. There is no doubt that IBS/Gray Line was a regulated motor carrier, and that there was thus a regulated carrier on the Stagecoach/Coach side of the transaction.[26] The City Sights side of the transaction, however, is less clear. For the transaction to fall under § 14303, we need to be able to find either that City Sights was a regulated motor carrier, or that Mr. Marmurstein, the owner of City Sights, controlled at least one other regulated carrier at the time of the transaction.

In invoking our authority, Applicants state, and NYSAG does not deny, that prior to the joint venture, City Sights conducted tour bus services in interstate commerce (without a license).[27] Similarly, in Docket No. MC-F-21036, Mr. Marmurstein stated that he obtained control of the interstate motor carrier R.W. Express, LLC in 2003. We do not condone City Sights' operations without motor carrier authority. However, for jurisdictional purposes, we find that these uncontested facts render City Sights a motor carrier, and Mr. Marmurstein a noncarrier controlling a carrier, for purposes of 49 U.S.C. § 14303(a).[28] Further, Stagecoach and Coach USA are noncarriers that control other motor passenger carriers in addition to IBS, one of the entities forming Twin America. This means that, on both sides of the transaction, there are (1) carriers, and (2) noncarriers that control carriers. Applicants also present unrebutted testimony that, in addition to its tourism services within NYC, Twin America now provides interstate bus service between NYC and points in other states, including Atlantic City, N.J. and

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[25] Interstate motor carriers are subject to registration before the FMCSA, which focuses principally on safety and financial responsibility. See 49 U.S.C. § 13902.

[26] As mentioned, IBS is a registered motor passenger carrier (n. 5) and Coach received our authority to control Gray Line and IBS (n. 7).

[27] Applicants' Reply 8, Nov. 17, 2009.

[28] The Board served notice of Mr. Marmurstein's request for approval to possess control of R.W. Express in Docket No. MC-F-21036 on October 16, 2009. That decision set the docket for comment, and stated that, if no opposing comments were received, the notice would become effective on November 30, 2009. No opposing comments were filed, and the notice is now effective.

Washington, D.C., using buses provided to the joint venture by each entity.[29] Thus, the entity formed by the transaction is subject to our authority.[30] Accordingly, our approval of the joint venture is required under 49 U.S.C. § 14303(a) in order to carry out the transaction.

Statutory Standard for Approval

Under 49 U.S.C. § 14303(b), we must approve and authorize a transaction that we find consistent with the public interest, taking into consideration at least: (1) the effect of the transaction on the adequacy of transportation to the public; (2) the total fixed charges that result; and (3) the interest of the affected carrier employees. Thus, in determining whether the transaction is consistent with the public interest, the Board may evaluate many factors, including whether there are anticompetitive effects that would result from the joint venture.

Under the provision that is relevant here – 49 U.S.C. § 14303(b)(1)[31] – we examine "the effect of the transaction on the adequacy of transportation to the public." Under this statutory element, we consider both the benefits the public can be expected to gain from any efficiencies that result from the joint venture and the effects on competition in the segment of the motor carrier industry in which the venture takes place.[32] Economic analysis assists us in determining whether the transaction is likely to have anticompetitive consequences that would negatively impact the public.

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[29] Reply of Applicants to Sur-reply 6, Mar. 10, 2010; V.S. Kinnear 3, 6, Nov. 17, 2009; Oral Argument Transcript (Tr.) 56.

[30] Applicants' evidence on this issue is nevertheless troubling. The buses contributed by City Sights were double-decker buses specifically built for sightseeing in NYC. V.S. Marmurstein 1, Nov. 17, 2009. Indeed, Twin America's incorporating documents make it clear that Twin America's intended market was the NYC sightseeing market, a fact confirmed by Twin America's failure even to seek federal operating authority and merger approval until after its operations were challenged by NYSAG. This timeline and the relatively small amount of interstate operations by Twin America suggest forum-shopping on Applicants' part.

[31] Here, the statute does not require us to consider any factor other than § 14303(b)(1) because there are no fixed charges associated with the transaction (49 U.S.C. § 14303(b)(2)), and because Gray Line and City Sights are each honoring their own contracts that had been entered into prior to formation of Twin America, thereby protecting the interests of carrier employees (49 U.S.C. § 14303(b)(3)). See Applicants' July 8, 2010 filing, attached NLRB decision. We may, of course, consider additional factors not specifically listed in the statute.

[32] See Peter Pan Bus Lines Trust – Purchase and Acquis. – Arrow Line Acquis., LLC, MC-F-20995 (STB served May 12, 2003) and GLI Acquis.Co.–Purchase–Trailways Lines, Inc., 4 I.C.C.2d 591 (1988).

Economic Analysis

Twin America's primary business is double-decker, hop-on, hop-off tour buses in NYC. Accordingly, our principal focus will be on those operations. Section 14303 requires motor carriers to seek our approval for transactions before they occur. Thus, ordinarily, information regarding any actual competitive harm that flows from a transaction is not available at the time approval is sought. In most proceedings, therefore, much of the competitive analysis is aimed at examining the *likelihood* that the transaction will increase market power and lead to competitive harm (which comes mainly in the form of price increases). Here, contrary to the statutory licensing requirement, the transaction for which approval is sought occurred prior to our approval, and as a result we have *actual* evidence of competitive harm. In the competitive analysis that follows, we examine the structure of the market in which Twin America operates to assess the current operations, the potential for competitive harm, the harm that has already occurred, and any offsetting public benefits brought about by the transaction.

1. Twin America's Price Increases

One of the hallmarks of enhanced market power is a participant's ability to increase prices unfettered by market forces. Prior to entering into the joint venture, Coach implemented price increases for Gray Line.[33] After Twin America started operations, City Sights increased fares between 10% and 17%.[34] At the oral argument, Applicants indicated that fare prices for City Sights were raised post-merger to "match" the fare increases previously set by Gray Line.[35] There is no evidence that prices have been reduced since they were put in place.

Applicants give various explanations for the increased fares, all of which are undercut by the record. Applicants assert that the price increases were driven largely by fuel price increases occurring in the last quarter of 2007.[36] While fuel prices did jump in 2007, the fares of Gray Line and City Sights rose only 1-3%[37] in the period when the companies were still independently competing. The 2009 fare increases, in contrast, which were completed after the combination, were put in place in the midst of continuing depressed passenger demand (evidently resulting from the recession) and when fuel prices were dropping.[38] Applicants also point to other tours

[33] Reply of Applicants to Sur-Reply 24, Mar. 10, 2010.

[34] V.S. Willig 10, Mar. 10, 2010.

[35] Tr. 22.

[36] V.S. Willig 9, Nov. 17, 2009.

[37] V.S. Willig 10, Mar. 10, 2010.

[38] Applicants' Reply, V.S. Willig, Ex. 2, Nov. 17, 2009.

and tourist attractions in NYC that experienced similar price increases.[39] However, their list of price changes of such tours and attractions is mixed between increases, decreases, and no change.[40] A price increase alone is not always conclusive evidence of market power. But here, the elimination of a close competitor appears to have ended the market constraints that prevented City Sights from raisings its prices without fear of a market response. After the transaction, Twin America was free to decide to raise its prices – a hallmark of unrestrained market power.

2. Market Definition

For purposes of assessing the increase in market concentration resulting from this combination, we define the relevant product and geographic markets in which the parties operate. While Applicants commit to no clear definition of the relevant market, they contend that a merger may proceed, regardless of the market definition, if barriers to entry are sufficiently low to allow the possibility of another entrant into the market.[41] We will discuss Applicants' entry barrier arguments below, but we conclude that it is important in this case to determine the parameters of the competitive environment in which Applicants' combination took place.

NYSAG proposes that the market is defined as double-decker, hop-on, hop-off guided tour buses that operate in NYC. This definition does, in fact, correspond with the description of the "purpose" and "territory" specified for Twin America in the joint venture agreement that is the foundation of the transaction for which approval is sought. This definition would include one other company that competes directly with Twin America in New York, Big Taxi Tours.[42]

Applicants, in contrast, argue that NYSAG too narrowly defines the market by failing to include other hop-on, hop-off bus options such as trolleys or coaches or other tour services such as "bicycle tours, pedi-cabs, Segway tours, and New York City's iconic horse and carriage tours," as well as helicopter tours.[43] Applicants state that Twin America competes with these various tour companies for tourists' time and money.

We conclude that that relevant market in which the Applicants compete is double-decker, hop-on, hop-off bus tours in NYC. The fact that a consumer may purchase two different types of product for a broadly defined purpose, however, does not render those two products, *per se*, substitutable. NYSAG stated at the hearing that it considers the double-decker bus market "unique" for several reasons: geographically, the sites being visited are all in NYC, and fall within a specific category of tourist sites; the double-decker buses run along specifically defined

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[39] Reply of Applicants to Sur-Reply 24-25, Mar. 10, 2010.

[40] V.S. Willig, Ex. 4, Mar. 10, 2010.

[41] Reply of Applicants to Sur-Reply 27, Mar. 10, 2010.

[42] Comments of NYSAG 3-4, Nov. 3, 2009.

[43] V.S. Willig 9-10, Nov. 17, 2009.

routes; and the service provides the option to "hop off" and "hop on" again and to board different buses within the company group, "all unique properties."[44]

Moreover, of the purported "substitutes" listed above, many possess either physical or financial limitations on the customer's participation that exclude their use as a full substitute for our analysis. Not everyone is capable of using or willing to ride a bicycle or Segway, for example, or to travel in a helicopter. Helicopter rides likewise are limited in stopping at individual sites for customers to visit, and presumably carry sufficiently higher fare costs. Bicycles, Segways, horse and carriage tours, and pedicabs likewise all possess weather, speed, and comfort constraints. Thus, they cannot be viewed as adequately substitutable for purpose of examining market concentration in the relevant double-decker, hop-on, hop-off market.

TWU in its pleadings appears to argue for an even narrower market definition than that proposed by NYSAG: double-decker, hop-on/hop-off tours provided by Twin America. TWU differentiates the other possible competitors and explains that Big Taxi Tours (the closest competitor) is a smaller company that uses tape recorded tours, rather than a live tour guide.[45] While we appreciate the distinctions that TWU draws, here, for purposes of defining the market, the Board will employ the "Small but Significant Non-Transitory Increases in Price" test utilized by the Department of Justice (DOJ) and the Federal Trade Commission (FTC) to define the relevant market.[46] This test sequentially adds the next closest substitute product or geographic area to those of the merging participants until the point where a hypothetical monopolist controlling those products or areas could profitably implement a small but significant non-transitory price increase or reduction in service. Twin America's 2009 rate hike is an example of a significant non-transitory price increase. It is significant because it is a 10%-plus price increase; in excess of the default 5% increase DOJ/FTC presume to be problematic. It is non-transitory because it has remained in effect for nearly 2 years. That Twin America is able to sustain its price increase demonstrates that it does not face sufficient competition in its relevant market to keep prices at a competitive level. Accordingly, we find that the relevant market is the double-decker, hop-on, hop-off tour bus service in NYC and that the participants in this market are Twin America (operating under its Gray Line and City Sights brands) and Big Taxi Tours.[47]

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[44] Tr. 47.

[45] Comments of TWU 19, Feb. 1, 2010.

[46] U.S. Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines (Merger Guidelines) 9, August 19, 2010.

[47] While there are differences between Twin America and Big Taxi Tours, it appears that they offer similar double-decker, hop-on, hop-off bus tours.

3. Market Share

After defining the market, the next step in this competitive analysis is to calculate market shares of the various participants, either on a revenue or physical volume basis. While acknowledging the lack of suitable data, NYSAG approximates market shares using the number of routes each company in the market serves (obtained from websites).[48] The results of NYSAG's calculations show that pre-merger Gray Line and City Sights each had 44.5% of the double-decker, hop-on, hop-off market, while Big Taxi Tours had the remaining 11%, resulting in the post-merger, joint venture controlling 89% of the market. In response, Applicants argue that this calculation is flawed, both because they disagree with NYSAG's definition of the market, and because they claim that each route should not be given equal weight in light of the wide divergence between them in terms of ridership.[49] In its pleadings, TWU notes that in NYC there are 12 licensed sightseeing companies (including services other than double-decker, hop-on/hop-off) operating a total of about 250 buses and that Twin America controls about 154 of those buses.[50]

While NYSAG's assessment of market share (89%) is not perfect because it does not consider ridership, seats, seat miles, bus miles, or sales of each of the tours, Applicants have not provided any evidence of what constitutes its market share in the market as defined by the Board. Also, if we instead employ TWU's bus data to calculate Twin America's share of the double-decker or open top buses and if we include Big Taxi as the only other participant, Twin America's share is even higher, at 97% (based on evidence that Twin America owns 120 double-decker buses, while Big Taxi owns 4). Using either approach, it is evident that Twin America has a high percentage of the market.

In sum, here we have an agreement between two direct competitors that created a single entity with a very large market share of the double-decker, hop-on, hop-off bus market in NYC. This explains the ability of the joint venture to increase prices and hold them in place since the agreement was reached. We therefore turn to Applicants' "barriers-to-entry" defense.

4. Barriers to Entry

Particularly when a combination produces a high level of concentration, the parties to the combination may rebut these claims by demonstrating that barriers to entry are not sufficiently

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[48] Comments of NYSAG 3-4, Nov. 3, 2009. The routes identified were: Downtown Loop, Uptown Town Loop, All Around Town Loop, and Brooklyn Loop.

[49] Applicants' Reply, V.S. Willig 17-18, Nov. 17, 2009. Applicants provide a percentage distribution of ridership obtained from Audience Research & Analysis, September 2008 entitled, "Gray Line Hop-on Hop-off Tours, A Ridership Study".

[50] Comments of TWU 21, Feb. 1, 2010.

high to keep other entrants out of the market. Applicants have the burden of proof on this element of the case. Here, notwithstanding the proposition that, as a general matter, entry into the bus market is not difficult, there has been no apparent new entry into this market for about 2 years and this market has unique barriers to entry. We find that Applicants have not met their burden of proof as to the barriers to entry issue.

Defined as "the set of structural, institutional and behavioral conditions that allow incumbent firms to earn economic profits for a significant length of time,"[51] barriers to entry prevent new competitors from entering the market. The Board has typically viewed barriers to entry into the *intercity* bus industry as theoretically low. Our predecessor agency, the Interstate Commerce Commission (ICC), stated in GLI Acquisition Company–Purchase–Trailways Lines, Inc., 4 I.C.C.2d 591, 601 (1988), "[w]here the barriers to entry are virtually nonexistent, potential entry, together with intermodal competition, exerts pressure on existing firms to price reasonably." This case, however, concerns a specialized form of *intracity* bus transportation that is defined not merely by the movement of passengers from an origin to destination, but by service and vehicle design components, as well, rendering the double–decker, hop-on, hop-off bus market in NYC "unique." Moreover, as noted, City Sights and Gray Line's prices have increased 10% or more, and yet no new competitors sought to enter the market.

A sustained price increase does not *per se* indicate substantial barriers to entry. Rather, the test used by other federal regulatory agencies is whether, if existing firms were to increase prices following a combination, entry by other firms would be timely, likely, and sufficient in its magnitude, character, and scope to counteract the price increase.[52] In deciding whether to commit resources to a new market, a potential new entrant will consider post-entry responses by the incumbent, and higher prices will attract new entrants only if the new entrant anticipates that it can recover its costs and earn a profit under competitive conditions. Here, it has been about 2 years since the price increase, and there has been no new entry. This suggests that barriers to entry, if not insuperable, may nonetheless be large enough to create competitive problems with the merger. Below we discuss barriers to entry that appear to be more significant in this market than in the typical interstate bus transaction, including tourist bus stops and brand.

In opposing the Applicants' position that there are low barriers to entry here, NYSAG asserts that there is a natural limit on the number of bus stops near popular NYC attractions. NYSAG states that it would be difficult for new entrants to obtain bus stops in the city, which require approval from the New York City Department of Transportation. Applicants disagree, maintaining that the City can assign additional bus stops as it sees necessary, and that bus stops are often assigned to more than one company. TWU asserts that New York City Council is

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[51] Palgrave Dictionary of Economics, 8th ed., at 383.

[52] Merger Guidelines, 28.

considering introducing “a law that would allow city council and community boards to have input into the issuance of bus stops to private companies.”[53]

Although Applicants are correct that the City has some control over the number of bus stops, there is a point at which additional tourist bus stops are impractical and potentially disruptive of city traffic. We therefore agree that the number and location of bus stops that are available could be a barrier to entry that could put potential entrants into the market at a serious disadvantage in competing against Twin America.

In discussing ease of entry, Applicants rely most heavily on City Sights’ entrance into the NYC double-decker, hop-on, hop-off bus tour services market in 2005. Applicants state that in 4 years, City Sights grew from 8 to 62 double-decker buses with plans to build 8 additional double-decker buses by the end of 2009.[54] Applicants further claim that City Sights acquired the relevant licenses from the NYC Department of Consumer Affairs for $35 per bus “with no difficulty.”[55] However, now that the market is more mature, it may be difficult for another company to enter the market and grow in the same way that City Sights was able to do.

The DOJ/FTC guidelines note that with consumer products or services, incumbents can populate the brand space, making new entry more difficult. As the DOJ/FTC Commentary on the Horizontal Merger Guidelines states: “In a market populated by well-established brands, successful entry usually requires a substantial investment in advertising and promotional activity over a long period of time to build share and achieve widespread distribution through retail channels. Moreover, making such investments by no means assures success.”[56] In this case, Twin America is still maintaining the 2 brands brought into the joint venture,[57] City Sights and Gray Line. Applicants themselves admit that Twin America uses the “well-established and valuable” Gray Line and City Sights brands. Further, Gray Line is a recognized brand in many other U.S. cities and licenses certain intellectual property to Twin America.[58]

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[53] Comments of TWU 22; Ex. 13, Feb. 1, 2010. This proposed legislation was brought up again in New York City Council in September 2010 (Int. No. 0356-2010).

[54] Applicants’ Reply 48, V.S. Marmurstein 2, 5, Nov. 17, 2009.

[55] Applicants’ Reply 47, Nov. 17, 2009.

[56] DOJ/FTC’s Commentary on the Horizontal Merger Guidelines (March 2006), at 38.

[57] TWU states that Gray Line and City Sights continue to operate their own buses; Gray Line’s red buses are parked and maintained in a separate garage from the City Sights’ blue buses. Comments of TWU 16, Feb. 1, 2010.

[58] Application 6, Aug. 19, 2009.

We explored the question of barriers to entry further in our April 27 hearing.[59] In response to questioning, counsel for NYSAG reemphasized that barriers to entry are necessarily a function of the degree of maturity of a given market – they may not be viewed in isolation outside of that context. Although City Sights was able to commence new operations in the relevant market several years ago and to expand relatively quickly, at this point, with that entrant having already absorbed a significant part of New York City demand and consumed street capacity, we find logic to NYSAG's argument that the market has become more "mature."[60] Counsel for NYSAG described several specific factors limiting additional new entrants at this juncture, including significant capital requirements; obstacles in competing against the economies of scale of the incumbent operators; special skills for the particular service; the need for licenses; arranging for ticket vendors and travel agents; and potential restrictions on further congestion.[61] Moreover, it states the obvious in any analysis of competitive impact that the one significant new entrant to this market in the past few years – and the competition that it previously presented – has now been removed as a separate competitor by the very merger transaction before us.

Based on all of these considerations, we find that Applicants have not satisfied their burden of demonstrating that barriers to entry are sufficiently low to discipline Applicants' conduct.

5. Public Benefits from the Joint Venture

Here, the most important public benefit from the joint venture is the potential for shorter waiting times for passengers as a result of cross-honoring of tickets (or cross-ticketing). Without cross-ticketing, a Gray Line passenger has to wait at one of the bus stops until the next Gray Line bus appeared. With cross-ticketing, that passenger can board a City Sights bus if it arrives first, and the reciprocal privileges apply for a City Sights passenger.

It took over a year for Twin America to put in place cross-ticketing, and the evidence reflects that it is only available in limited circumstances. Twin America first instituted the practice with multilingual tours and then in January 2010, cross-ticketing was introduced on its Brooklyn tours.[62] Applicants state that if the Brooklyn tour proves successful, Twin America will extend cross-ticketing to the Uptown and Downtown tours, its most popular tours.[63] While

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[59] Tr. 31-45.

[60] Tr. 42-43.

[61] Tr. 41-43.

[62] Applicants' July 8, 2010 filing, attached NLRB decision 7.

[63] V.S. Marmurstein 7, Nov. 17, 2009; Reply of Applicants to Sur-Reply 20, Mar. 10, 2010.

the delay in use of cross-ticketing may be a result of union agreements with Gray Line and City Sights employees[64] or the challenges involved in standardizing services between the two brands, the delay undermines the greatest potential source of public benefits associated with the transaction. NYSAG challenges the potential for shortening waiting times, asserting that Twin America's reduction of the bus fleet has resulted in less seating capacity to accommodate passengers wanting to avail themselves of cross-ticketing.[65] Although Applicants respond that, in fact, the joint venture has improved bus services by providing adequate seating capacity,[66] the record does not demonstrate that wait times for passengers have decreased.

Applicants also assert that the joint venture results in efficiencies and estimated cost savings of $7 - $11 million.[67] However, there is no evidence that these efficiencies have been passed on to the consumer. Most noticeably, prices for the City Sights brand increased after the joint venture was formed to match those of its former competitor. Notwithstanding Applicants' explanation, we conclude, based on the record discussed above, that Twin America's sustained price increases were in fact driven not by external forces but by its market power. As further evidence that cost savings have not been passed on to consumers, NYSAG demonstrates that Twin America's fares for many sightseeing services other than double-decker, hop-on, hop-off buses where Twin America did not have market power did not increase, and in fact, decreased in 2009.[68]

Thus we have, from the start, evidence of competitive harm already arising from this transaction. Further we have not seen the public benefits that Applicants argue are the result of the joint venture. If the efficiencies and synergies of the joint venture are being realized, the benefits have not been passed on to the consumers. The prices have not decreased; cross-ticketing has been only partially implemented; and there is nothing in the record to suggest that wait times for passengers have decreased. Moreover, market concentrations of the magnitude created by this transaction carry the potential for future public harm inherent in the lack of competitive options. No claims of any offsetting public benefit that could have been predicted in such a situation have actually been realized.

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[64] Comments of TWU 24, Feb. 1, 2010.

[65] Sur-Reply of NYSAG, Verified Statement of Dr. Kitty Kay Chan (V.S. Chan) 4, Mar. 11, 2010.

[66] Reply of Applicants to Sur-Reply 17, Mar. 10, 2010.

[67] V.S. Willig 4, Nov. 17, 2009.

[68] V.S. Chan 8, Mar. 11, 2010. Because Dr. Chan's table showing price decreases deals with information that has been designated as confidential, we are not citing the specific services that experienced price reductions.

Compliance

In the normal case, if the Board denies approval for a transaction that cannot be carried out without Board approval, the next step is simple: the applicant carriers are prohibited from implementing the transaction and must remain separate entities. Here, however, contrary to the statute, the Applicants sought our approval for a transaction they had already consummated. Accordingly, we must now discuss the steps that Twin America must take given our denial of approval of the joint venture.

There are at least 2 options that Applicants may pursue at this juncture. First, they may take the necessary steps to expeditiously unwind the joint venture and completely separate the businesses, management, and assets of Gray Line and City Sights. Unfortunately, we cannot undo the harm that has already resulted from these 2 close competitors' access to each other's commercial and competitive information. However, a quick and thorough dissolution of the joint venture should restore the competitive balance in this market to pre-joint venture levels over time.

Second, Twin America may discontinue or spin off the interstate services that it began after antitrust concerns were raised about its intracity operations. Should it do so, then we would consider Twin America to be an intrastate operator not subject to our jurisdiction. This option would place the transaction within the authority of NYSAG, because § 14303 would not apply.

We direct the Applicants to provide the Board with a report detailing the steps they will take to comply with this order by March 25, 2011.

Conclusion

Although we are concerned with Applicants' apparent manipulation of the Board's processes, we find that this transaction is subject to our jurisdiction and governed by 49 U.S.C. § 14303. Under the public interest standard, we find that the evidence in the record shows limited benefits to the public from the transaction, and that any such benefits are outweighed by the competitive harm resulting from the transaction.

Accordingly, we deny the application. Regardless of how Twin America proceeds, given the facts here, we find no basis for approving the transaction between IBS/Gray Line and City Sights, and no basis for permitting the merged operations conducted by Twin America to go forward with antitrust immunity.

It is ordered:

1. Applicants' proposed acquisition of control of Twin America is denied.

2. Applicants are directed to provide the Board with a report by March 25, 2011, on compliance with this decision.

3. This decision is effective on March 10, 2011.

By the Board, Chairman Elliott, Vice Chairman Nottingham, and Commissioner Mulvey.