

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D. C.

ORDER NO. 1912

IN THE MATTER OF:

Served November 6, 1978

Application of ATWOOD'S TRANSPORT )  
LINES, INC., to Purchase Certifi- )  
cate No. 12 of THE GRAY LINE, INC. )

Case No. AP-78-30

By application filed August 28, 1978, Atwood's Transport Lines, Inc. (Atwood's), seeks authority pursuant to Title II, Article XII, Section 12(b) of the Compact, to purchase the operating rights of The Gray Line, Inc. (Gray Line), as well as 15 of its buses and other operating property and assets including a van, four automobiles, shop and garage equipment, two-way radios, office furniture and supplies, bus parts and membership in The Gray Line Sight-Seeing Association, Inc. The total purchase price to be paid by Atwood's to Gray Line for these assets is \$547,500 due upon consummation of the transaction. Atwood's filed a related application with the Interstate Commerce Commission (ICC) to acquire certain operating rights issued by that agency. This Commission has no jurisdiction over ICC operating rights and expressly excludes them from our consideration herein. 1/

The Commission held a public hearing on this matter on September 29, 1978. Protests to the application were filed by Local Union 1138 of the Amalgamated Transit Union, AFL-CIO, and jointly by Drivers' Tours, Inc., and certain employees of Gray Line. In addition, a notice of interest was filed by Mr. Robert C. Reuter.

One preliminary matter requires disposition. At the hearing the Administrative Law Judge excluded the entire testimony of Mr. John Killeen on behalf of protestant Drivers' Tours, Inc. We believe that this testimony, while entitled to little weight for the reasons set forth below, is admissible and, therefore, overrule the exclusion.

Atwood's, a wholly-owned subsidiary of Frank Martz Coach Company, Inc., is a Maryland corporation with offices located in Tuxedo, Md. It holds Certificate of Public Convenience and Necessity No. 14 authorizing regular-route service, charter operations pursuant to contract with the

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1/ On October 26, 1978, the ICC, Review Board No. 5, granted Atwood's application, subject to certain filing conditions. No additional conditions were imposed with respect to employee protection or the other substantive issues discussed below. No. MC-F-13715F.

National Geographic Society, and specified charter operations including service between points in that part of the Metropolitan District located within the Capital Beltway on the one hand, and, on the other, points in the Metropolitan District. The authority sought to be purchased, Certificate of Public Convenience and Necessity No. 12 of Gray Line, authorizes the following service:

- (A) Regular-route operations transporting passengers and their baggage, during the officially scheduled racing season only, between Washington, D. C., on the one hand, and, on the other, race tracks in Upper Marlboro and Bowie, Md., and Rosecroft Raceway, near Oxon Hill, Md., each over a specified route serving no intermediate points;
- (B) Irregular-route operations
  - (1) Charter operations
    - (a) round-trip or one-way: from points in the Metropolitan District, not including Alexandria, Va., to points in the Metropolitan District.
    - (b) one-way: from Alexandria, Va., to points in the District of Columbia.
  - (2) Special Operations
    - (a) round-trip, sightseeing or pleasure tours, from points in the Metropolitan District, except Dulles International Airport, and Alexandria, Va., to points in the Metropolitan District; and from Alexandria, Va., to the District of Columbia, points in that part of the State of Maryland located in the Metropolitan District, and points in that part of the Commonwealth of Virginia in the Metropolitan District, via the District of Columbia, and return.
    - (b) one-way, sightseeing or pleasure tours, from points in the Metropolitan District, except Dulles International Airport and Alexandria, Va., to points in the District of Columbia.

To approve the purchase the Commission must find that the proposed transaction is consistent with the public interest pursuant to Title II, Article XII, Section 12(b) of the Compact. The Commission may condition approval of the proposed acquisition with such terms, conditions, and modifications as it finds to be necessary.

At the public hearing Atwood's presented evidence concerning its operations, equipment, repair facilities and financial position. It also testified that it intends to continue Gray Line's present operations including race track, charter and charter contract service, as well as the individually-ticketed sightseeing tours, and Atwood's has applied for membership in the Gray Line Sight-Seeing Association. Atwood's indicated that it would pay the purchase price from internal cash including an advance from Frank Martz Coach Company, Inc.

Witnesses for Gray Line stated that The First Gray Line Corporation, its parent corporation, wants to terminate operations in the Washington metropolitan area and intends to discontinue Gray Line's operations and liquidate its assets if the sale to Atwood's is not consummated by November 30, 1978. A need to upgrade its equipment and maintenance facility and the ability to earn a greater return on capital in its West Coast operations are primary reasons why The First Gray Line Corporation seeks to withdraw from the Washington market.

Gray Line has operated as many as 53 buses during the Washington tourist season, but is selling only 15 buses to Atwood's. Atwood's proposes to purchase 18 additional vehicles to further supplement its existing fleet of 62 buses. Atwood's believes that it will be able to provide all service now offered by Gray Line with this quantum of equipment. Additional vehicles will be acquired if necessary. Atwood's expects to hire all Gray Line office employees and will have need for additional drivers and maintenance employees. It states that preference will be given to Gray Line drivers who have qualifications equal to (or greater than) other job applicants.

Joint protestants Drivers Tours, Inc., and certain Gray Line employees contend that they are ready and willing to purchase the operating rights and specified assets of the company and that Gray Line did not negotiate with them in good faith. Drivers Tours, Inc., was incorporated just before the hearing to pursue the purchase of Gray Line assets including the operating rights. Despite testimony that Drivers Tours was prepared to offer \$600,000 in cash for the assets, no proof of any actual ability to produce the money was given. In fact, it was shown on cross-examination that this company has no assets or firm commitments for financing. Pursuant to the terms of its articles of incorporation, Drivers Tours may not transact business until \$1,000 worth of stock has been sold. Allegations regarding lack of good faith in negotiating on the part of Gray Line's management were similarly not supported by competent proof.

Testimony by Mr. Robert C. Reuter manifested an interest in the proposed transaction's affect on disabled passengers. He stated that Gray Line presently employs a licensed guide who is also a sign language interpreter, and urges that Atwood's be required to do so also. Mr. Reuter requested that the Commission take notice of proposed federal regulations regarding accessibility of carrier equipment for disabled people and consider these elements in reaching a decision in this case.

Local Union 1138 of the Amalgamated Transit Union offered testimony regarding the effect of the transaction on Gray Line employees as discussed below. Essentially, the union seeks liberal severance pay for the Gray Line drivers and guaranteed offers of employment by Atwood's with retention of all seniority benefits. 2/

In determining the consistency of this purchase with the public interest the Commission considers, among other factors, the fitness of the acquiring carrier, the benefits and costs of the transaction to the riding public, the fairness of the purchase price, the resulting competitive balance of the industry, and the interests of the carrier employees affected. These two carriers generate the largest share of operating revenues from sightseeing and general charter work among the regulated carriers in the Metropolitan District. Although no other carrier engaged in local operations has protested the proposed transaction, it is incumbent upon the Commission to consider the effect on competitors and the general competitive situation in the industry.

Atwood's is financially sound and is known for operating what may well be the best-maintained equipment in the local area. The buses are modern and there is a frequent updating of Atwood's fleet and maintenance facilities to help ensure safe operations. In fact, Atwood's is in the process of expanding its garage and is in a position to continue proper repair of all additional equipment needed to provide service. Testimony at the public hearing indicates that Atwood's plans to continue Gray Line operations substantially as offered now, and would, therefore, not change the existing service offered. No complaints have been received from any carriers potentially affected by the transaction. The purchase may well improve present Gray Line service to the public because of more efficient use of combined resources, upgrading of operating equipment, and the availability of improved maintenance facilities.

The proposed purchase price principally involves the sale of appraised tangible assets with only \$34,000 allocated to the cost of operating authorities, membership in the Gray Line Sight-Seeing Association, Inc., and goodwill. This amount certainly does not appear to be excessive and is fair and equitable when viewed with the resulting continued public service. The fact that Atwood's would enter into competition with other sightseeing carriers, absent a showing by those carriers of harmful effect on their traffic or revenue, does not warrant disapproval of the proposed purchase. To the extent that competition for charter business would be lessened, there remain other regulated carriers capable of rendering charter service to the public although their operations are less broad in scope because of territorial or equipment restrictions. Additionally,

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2/ Local Union 1098 which represents certain employees of Atwood's (drivers and mechanics) did not enter an appearance and took no position on the issues herein.

the largest local charter and sightseeing carriers, Metrobus and Landmark Services, Inc., respectively, are functioning as strong competition for Atwood's and the other certificated charter and sightseeing carriers. We still have some concern with the dominant position that Atwood's would achieve in the regulated market by purchasing Gray Line's operating right and assets, but we believe that our jurisdiction over market entry and tariff approval can correct any competitive imbalance that might appear in the future.

With regard to the effect of the transaction on motor carrier employees, it is useful to look at Sections 5(2)(c) and 5(2)(f) of the Interstate Commerce Act. The former requires the ICC to give weight to the interest of the carrier employees affected, among other factors, when a carrier purchases or contracts to operate the properties of another. Section 5(2)(f) protects the interests of railroad employees affected by a similar transaction involving rail carriers, setting forth minimum specific requirements that must be met. In establishing the Compact, Congress specifically addressed the employee protection issue. See House Committee Report (Committee on the Judiciary) No. 1621, May 18, 1960, to accompany H. J. Res. 402 at 2, 19. The result was to adopt language similar to Section 5(2)(c) of the Interstate Commerce Act in the statute giving force and effect to the Compact, D. C. Code (1973 Ed.) Section 1-1412 which provides, inter alia, "[t]hat the term 'public interest' as used in Section 12(b) of Article XII, Title II of the Compact shall be deemed to include, among other things, the interest of the carrier employees affected."

The Commission believes that consideration of employee interest should be made on a case by case basis taking the relevant factual situation into account rather than by establishing a fixed rule or formula. In proceedings before the ICC regarding motor carrier employees, that Commission has imposed conditions requiring up to three months' severance pay for employees displaced as a result of a purchase, and ICC has also retained jurisdiction over certain cases with respect to protection for employees of the vendor. Cf. Midwest Buslines, Inc.-Purchase-American Buslines, Inc., 97 M.C.C. 426 (1964), Short Line, Inc.-Purchase-New England Transp. Co., 75 M.C.C. 33 (1958), and Hudson Bus Lines, Inc.-Purchase-Boston and Maine Transp. Co., 58 M.C.C. 133 (1951). The ICC and the courts have continuously held that motor carrier employees are not entitled to the same statutory protections afforded railroad employees and that, while consideration of the purchase's effect on motor carrier employees is necessary, it is only one of a number of factors to be given weight. Overnite Transp. Co.-Purchase-Rutherford Freight Lines, 97 M.C.C. 568 (1964), American Buslines, Inc. v. United States, 253 F.Supp. 481, 484 (D.D.C.) aff'd, Amalgamated Transit Union v. United States, 385 U.S. 38 87 S.Ct. 240, 17 L.Ed.2d 35 (1966).

A balance must be struck in determining what is fairest to both employees and carriers as well as the effect on the public interest taken as a whole. The general public interest, of course, is paramount to that of either the carrier or the affected employees. In Overnite, supra, at 579 the ICC found that:

The motor carriers, as a rule, do not have substantial resources, are subject to greater competition, have high operating ratios, and generally do not have the capacity to absorb any substantial or long-term compensation awards. Many motor carriers dispose of their rights and properties only because they are financially unable to continue their service to the public. Imposition of protective conditions, in such instances, often would defeat or impede the transfer and possibly result in adverse effects to service under the operating rights and to the public. In addition, it is clear that if such unifications are not authorized, the result may be the demise of the weaker carriers as well as the loss of all jobs of their employees.

While all the Overnite factors are not present in the instant case, we would ordinarily consider the impact of a severance award on the vendee and the potential effect on the public, particularly if the award would tend to necessitate a rate increase. In this case, however, the effective collective bargaining agreement between The Gray Line, Inc., and Local 1138 Amalgamated Transit Union, Article 11.5(c) specifies severance pay in the event of the sale of Gray Line according to the schedule set forth in Article 11.5(a) of the agreement ranging from no severance pay for an employee in the service of Gray Line for two years or less to five weeks pay for an employee in the service of Gray Line for 11 years or more. 3/

In the Midwest case, the ICC initially found that employee protection claims were waived by an agreement between vendor and the union representing its employees. A reviewing court disagreed with the ICC decision, holding that the cited agreement dealt with a strike settlement. Amalgamated Ass'n. of Street, Elec. Ry., Etc. v. United States, 221 F.Supp. 958,960 (1963 D.C.D.C.). The court further found that offers of employment by the purchaser including pay at the rate of beginners, status as new employees, and minimal seniority protection were inadequate. The court remanded the case suggesting that protection similar to that for rail employees be considered unless there existed reasons why such relief

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3/ Gray Line has agreed that severance pay will also be awarded to non-union employees according to this schedule in the event said employees are not hired by Atwood's. Transcript, pp. 53 and 97.

would not be applicable. The ICC subsequently imposed three months' severance pay (not the four-year protection then offered railroad employees by section 5(2)(f) of the Interstate Commerce Act) and was essentially upheld by the court, American Buslines, supra, 253 F.Supp. at 484.

Another proceeding before the ICC, Central Transport, Inc.-Purchase-Norwalk Truck Lines, 116 M.C.C. 393 (1973), involved the issue of employee discharge from a carrier leasing its authority to another carrier where there was a collective bargaining agreement in effect. The ICC found that employee lay-offs occurred without any notice, that ICC precedent does not call for imposing financial responsibility on parties other than vendee, and that presence of a collective bargaining agreement does not preclude other ICC action, where the agreement did not cover lay-off notices or severance pay. The ICC awarded two weeks' severance pay, stating that ". . . the Commission is empowered to fill in such gaps in labor agreements by appropriate conditions for the protection of the affected employees." Central, supra, at 414 citing Amalgamated Ass'n., supra.

As noted above, the Gray Line union agreement here is not silent on the issue of severance pay, nor is there any indication that the severance pay agreement was not freely bargained. No cogent reason has been advanced for interfering with the terms of this agreement, except to the extent noted below, and we are of the view that the finality and reliability of collective bargaining agreements constitute a significant aspect of the public interest. The agreement purports to bind Gray Line's successor to meet the obligations of the severance pay clause, and therefore is of dubious legal value. However, the purchase agreement between Atwood's and Gray Line provides that Gray Line itself will meet the contractual severance pay obligations. As thus modified, we approve the collectively bargained severance pay provision and decline to award any additional severance compensation. Moreover, we note that a severance award such as was prescribed in the Midwest case, supra, would be prohibitively expensive and would operate to the public detriment. Based on the evidence of record, such an award would likely aggregate approximately \$200,000, nearly two-thirds of the carriers' combined net operating income for 1977. An award of this magnitude, even if acceptable to Atwood's, would likely engender a substantial rate increase to the detriment of the fare-paying public.

As was stated by the ICC in its decision in this matter (supra, note 1):

The severance pay offered by Gray Line in this proceeding is generally in line with what the Commission has imposed in the past. We agree with protestants that the Commission could impose protection different from that previously agreed to by the parties. However, we believe in this case that the offered protection

is appropriate. We do not believe that the employees' additional tour guide skills make them so specialized that their opportunities for reemployment are limited to the extent that railroad employees' chances are limited. In fact, the added skills might make Gray Line's employees more easily employable should they suffer adverse effects as a result of the proposed transaction. Moreover, the provisions of section 5(2)(f) are clearly inapplicable to the tour guides in question. We, therefore, adopt the measure of severance protection as offered and as set forth earlier in this decision. Our approval in this proceeding will be conditioned upon Gray Line's employees being afforded these protections.

This Commission generally shares the above-expressed views. However, in its brief (letter) filed October 30, 1978, Atwood's has offered certain other provisions benefiting employees. Atwood's is willing (a) to accept applications for employment from all Gray Line employees filed within 30 days of the date of consummation of this transaction, (b) to hire, on a best-qualified and position-available basis, those Gray Line employees whose qualifications are equal to or better than those of any other applicant available to Atwood's at any time within six months from the date of consummation of this transaction, and (c) to pay former Gray Line employees who subsequently may be employed by Atwood's at any time within six months after consummation of this transaction in accordance with the terms and conditions of the current collective bargaining agreement between Atwood's and Local 1098 of the Amalgamated Transit Union, with credit being given to such former Gray Line employees for all years of service previously employed with Gray Line. However, all newly hired employees will be subject to Atwood's current 45-day probation period, as provided for in its existing collective bargaining agreement referred to above.

We believe that this arrangement, considered together with the severance pay benefits discussed above, constitutes adequate protection for Gray Line employees. For the purposes of wages, those Gray Line employees who become employed by Atwood's pursuant to the above-described condition would maintain their seniority in determining their pay scale, i.e., any Gray Line driver with two years' service will be entitled to maximum pay benefits as set forth in the collective bargaining agreement between Atwood's and Local 1098 of the Amalgamated Transit Union. Former employees of Gray Line with less than two years' service will receive wages according to their previous length of service with Gray Line, and according to the terms of the Atwood's union labor agreement. These two carriers had a combined 1977 total operating revenue of \$6,358,838 and a total net operating income of \$309,148. Atwood's testified that it expects to be able to realize operating savings on consolidated operations. The projected need for less units of equipment and concomitantly lower labor costs because of the need for less drivers and a pay scale lower than that offered currently by Gray Line are factors that tend to offset the cost of employment offers with seniority as regards wages.

We find that there would be no disadvantage to present Atwood's employees by recognizing Gray Line employees' work experience to determine salary. However, full transfer of seniority provisions would have the effect of changing bidding on runs and selection of vacation dates. The adoption of full seniority would also increase the cost of vacation benefits to Atwood's to a large degree. We are unwilling to disrupt existing seniority status at Atwood's to the detriment of its current workers. Thus, while the Commission must give consideration to the effect of the transaction on Gray Line employees, it is necessary to balance other elements of the public interest, including the effect on Atwood's and its current employees. In our view, benefits awarded to displaced Gray Line workers should not come at the expense of Atwood's employees nor should this Commission attempt to rewrite the Atwood's union collective bargaining agreement. Moreover, we decline to interfere with the normal management hiring prerogatives except to the extent conceded by Atwood's. The Commission believes that the public should be served by those carrier employees, particularly drivers, who are best qualified to care for the passengers and equipment entrusted to them. Atwood's management should be free to make its hiring selections on this basis within the framework of federal and state employment laws administered by instrumentalities other than this Commission.

One further labor matter requires consideration. The collective bargaining agreement between Gray Line and the union representing its drivers contains a successor clause in the preamble purporting to bind successors to the franchise and/or operating rights of Gray Line. The Commission does not believe that it should become involved in purely labor relations problems such as the effect of this successor clause or other similar matters that may arise from this proceeding. See Overnite, supra, 97 M.C.C. at 576-577 and cases cited therein. The proper province for settlement of this issue lies outside the scope of this Commission. Overnite Transportation Company v. N.L.R.B., 372 F.2d 765, 769 (1967). Hence, we decline comment on the successor clause other than to note its existence.

The Commission finds that Atwood's purchase of Gray Line's operating rights and assets is in the public interest. Approval will be conditioned upon the severance pay agreement in the Gray Line union collective bargaining agreement and Atwood's agreement to accept applications from, and extend offers of employment to, Gray Line employees as outlined above. Furthermore, the consolidation of operating rights, to the extent that they are duplicative, shall not be construed as conferring more than one operating right, and an appropriately revised certificate shall be issued to Atwood's upon consummation of this transaction. Rates to be charged for service arising from non-duplicative Gray Line authority (special and regular-route operations) will be the same as prevailing Gray Line rates. Any service performed pursuant to charter authority will be charged according to the present Atwood's rate structure. We have considered the needs of disabled passengers as raised by Mr. Reuter, and we concluded that no further conditions to this transaction are warranted.

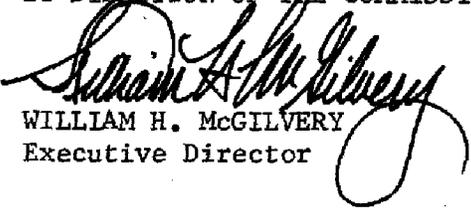
THEREFORE, IT IS ORDERED:

1. That the application of Atwood's Transport Lines, Inc., to purchase Certificate of Public Convenience and Necessity No. 12 of The Gray Line, Inc., and certain assets of The Gray Line, Inc., is hereby approved subject to the conditions set forth herein.

2. That Certificate of Public Convenience and Necessity No. 14 of Atwood's Transport Lines, Inc., shall be revised and reissued to grant a single consolidated operating right upon notice by Atwood's Transport Lines, Inc., that this transaction has been consummated in accordance with the approval granted herein.

3. That Atwood's Transport Lines, Inc., be, and it is hereby, required to give the Commission written notice of the consummation of the transaction in accordance with the approval granted herein within ten days of the date of said consummation.

BY DIRECTION OF THE COMMISSION:

  
WILLIAM H. MCGILVERY  
Executive Director