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VIA FEDERAL EXPRESS

The Honorable Anne K. Bingaman
Assistant Attorney General
Antitrust Division
Department of Justice
Washington, D.C. 20530

Request For Business Review of ATFA Joint Venture

Dear Assistant Attorney General Bingaman:

Pursuant to 28 C.F.R. Section 50.6, we are writing on behalf of our client, LWN Consulting, to request a business review determination regarding a proposed joint venture involving regional automobile truck transport firms. This request is made pursuant to the Department's recently adopted pilot program of resolving business review requests within 60 to 90 days. See Trade Reg. Reports (CCH) at ¶ 50,095 (1992). We also enclose copies of non-privileged documents responsive to the categories set forth in the pilot program requirements. Because our client is anxious to proceed with its venture as soon as possible, we would greatly appreciate the Department's prompt response to this request.

OVERVIEW

Our client proposes to form a joint venture composed of approximately 7 regional automobile truck transporters from different regions around the United States (the "members"). The joint venture would be known as the Automobile Transport Fleet Affiliation ("ATFA"). The members who would be invited to participate in the joint venture are small to medium-sized carriers (with fleets ranging from 20 to 250 tractor/trailers) whose business is currently confined principally to the region within which each is located. Because of their small size, these carriers currently cannot compete for business in the highly concentrated market for nationwide new car hauling, and also cannot efficiently provide service in the market for large scale used car moves. The primary purpose of ATFA would be to allow members to compete effectively in these markets.

The activities of the venture would include: (a) joint bidding by ATFA for new car transportation business which none of its members individually could obtain; (b) sharing information about used car transportation opportunities too large for any of the members individually to handle, and communication of bid information with respect to those opportunities between ATFA and vehicle manufacturers; and (c) joint purchasing by the members of certain items (e.g., trucks, tires, software, insurance) to take advantage of volume discounts.

As detailed below, the effects of such activities would increase competition and benefit consumers in both the relevant new and used car transportation markets.[1] In addition, the structure of the venture would not restrict competition in any market.

MARKET CHARACTERISTICS

The New Vehicle Transportation Market:

The new car transportation market is highly concentrated. In 1991, when 12.3 million new cars and light trucks were sold in the United States,[2] the largest single firm, Ryder Automotive Carrier Group, hauled over 5.6 million new vehicles, or 46% of the total.[3] Ryder is the only new vehicle carrier with terminals located in every region of the country. It has contracts with all of the Big Three domestic manufacturers as well as major importers such as Toyota, Honda, Nissan, Mazda, Mitsubishi, Volkswagen, and Mercedes-Benz.

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[1] The vehicle transportation market discussed in this letter is confined to transportation by truck. Many new and used cars also move by rail, and used cars sometimes are driven to new locations.

[2] *See* Automotive News, 1992 Market Data Book, p. 17 (May 27, 1992).

[3] 1991 Ryder System Annual Report at p. 18.

Total 1991 annual revenues in the U.S. new car transportation market amounted to between $1.4 and $1.7 billion.[4] Based on annual revenues, Ryder has a 41.6% share in the new car transportation market, and the largest four firms have a collective market share in excess of 75%.

The following summarizes some relevant data[5] for the largest four carriers in the new car market:

Carrier	Annual Sales	Terminals	Tractors	Market Share
Ryder	$645MM	89	4,326	41.6%
Leaseway	263MM	27	3,079	16.9%
Allied Systems	177MM	32	1,327	11.4%
Jack Cooper	137MM	14	1,067	8.8%

The dominant new car haulers have long-term contracts with manufacturers and importers of vehicles at prenegotiated rates for delivery. The contracts typically call for moves of large numbers of vehicles per year (e.g., from 10,000 to well over 100,000 per contract) in regions and localities across the country.

There are numerous substantial barriers to entry into the multi-regional new vehicle transportation market. First and foremost, the capital investment required to compete in the market is enormous. The dominant new vehicle haulers have extremely large fleets of tractor/trailers (each of which costs approximately $150,000) and networks of numerous terminals.

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[4] Figures obtained from the American Trucking Association Financial and Operating Statistics, 1991 Annual Report, the National Automobile Transporters Association, and the Interstate Commerce Commission.

[5] The data is based on figures obtained from the Interstate Commerce Commission as well as information provided by the carriers (e.g., in annual reports).

The cost of purchasing a new fleet the size of Jack Cooper Transport Company (1,067 trucks) would be in excess of $150 million, and Ryder's fleet (4,326) would cost over $600 million.

The new vehicle carriers' large fleets are necessary to meet their customers' requirements for hauling large quantities of vehicles. New vehicle carriers must also have substantial backup capacity to be able to ensure their customers of reliable and safe deliveries to the point of sale.

Carriers with smaller operations simply cannot compete for new vehicle business on this scale. First, their fleets are too small to handle reliably and quickly the large loads of new vehicles that the customers need to move. Second, their geographic reach is limited because they do not have terminals outside their localities, and they therefore have difficulty arranging backhauls. Thus, their trucks would be forced to return empty, driving their costs (and prices) up.

In contrast, the dominant carriers all have sophisticated computerized tracing capabilities to monitor vehicle movements nationwide, as well as the ability to arrange backhauls to maximize efficiency and avoid the problem of empty or idle trucks. Also, because of their substantial size and buying power, the new car carriers also enjoy substantial cost advantages in areas such as the purchase of equipment and insurance. Indeed, Ryder is so large that it is able to manufacture its <u>own</u> trailers.

Their large size gives the largest new car carriers a further advantage over smaller would-be competitors, in terms of convenience to the customer. Large carrier customers can conveniently deal with a single point of contact in a single negotiation and take care of a large proportion of their new car transportation needs for an extended period. In contrast, dealing with numerous smaller carriers requires customers to engage in multiple negotiations and suffer increased transactions costs and inconvenience.

<u>Used Vehicle Transportation Market</u>:

The used car transportation market is highly fragmented. It is made up of hundreds of small to medium-sized carriers who operate within their regions and localities. Used car moves most often involve less than 300 units at a time, and the bulk of them are much smaller (8-10 units per move).

Used car transportation needs are not very steady or predictable, so long-term contracts are almost unheard of. Instead, the used car transportation market operates like a "spot" market, and the customer often has to expend significant effort to locate a qualified carrier with trucks available to do the job. Typically when the need for a used car move arises, customers have to contact multiple carriers in the relevant area to try to find the trucks they need, and then to negotiate rates once a suitable carrier is found.

When large scale used car moves arise, the transactions costs for the customer are even higher. Because used car carriers in the market are too small to handle the largest jobs, the customer in those situations cases has to assemble a patchwork of different carriers to accomplish the move. This requires not only multiple calls to find trucks, but also multiple negotiations with the carriers under consideration. With large scale moves, there is currently no way to arrange the move via a single point of contact.

HOW ATFA WILL OPERATE

The purpose of ATFA will be to engage in three categories of activity: (1) joint bidding on new car hauling business too large for any member individually to handle; (2) communication to members of used car transportation opportunities, and joint bidding on used car moves too large for any member of ATFA to handle on its own; and (3) joint purchasing in bulk of products necessary in the conduct of the vehicle transportation business.

Outside of the activities outlined above, the members of ATFA will continue to do business independently of each other and of ATFA. The members will always remain free to bid independently on any business they wish. In addition, the members will not be restricted in any way from bidding against ATFA.

Structure of ATFA:

ATFA will be an association of approximately seven independent automobile transport companies located in different, non-overlapping regions throughout the country. Membership in ATFA will be confined to dependable carriers with excellent business reputations and safety records. Some of the carriers who would participate as members of ATFA currently participate only in the used car hauling market, and others participate in both the used and new car markets. The largest carrier under consideration for inclusion in ATFA has fewer than 250 tractor/trailers, and the others have less than half of that number.

The estimated combined annual revenue of the ATFA members will be less than $70 million, and their combined market share is currently less than 2.2% of the new car transportation market. There is no precise data available to calculate the members' combined market share in the used car market. However, the volume of annual U.S. auction sales of used cars and light trucks is slightly larger than numbers of new vehicles sold (14 million used versus 12.3 million new).[6] Therefore, the combined market share of the venture participants in the used vehicle market should be no greater than the figure for the new vehicle market.

It is currently anticipated that ATFA will be organized as a corporation. It will be governed by a board of directors consisting of one representative from each of its members, plus any ATFA officers or employees selected for service on the board. The venture will be managed on a day-to-day basis by one or more ATFA officers or employees who will not be employees of or own stock in any member.

Membership in ATFA will be documented by means of separate contracts between each member and ATFA, and will involve no direct contractual arrangements between any ATFA carriers.

ATFA's Activities:

Used Car Bidding. ATFA intends to establish relationships with potential customers likely to have the need for hauling large volumes of used vehicles (e.g., car rental companies, manufacturers with accumulated trade-ins). ATFA will solicit customers by offering them a single point of contact to arrange used car moves anywhere in the continental United States. Once a customer approaches ATFA with a used car transportation opportunity, ATFA will promptly contact all of its members to inform them of the potential business. In addition, if any ATFA member learns of an opportunity which the

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[6] Automotive News, "The Auction Industry Comes of Age," Supplement at p. 3 (October 23, 1991).

individual member cannot handle independently, ATFA will (at the request of the member) contact other members to solicit their interest.

Any member who so desires may bid independently on this business. If there are members interested only in a portion of the haul, then they will transmit to ATFA the quantity they wish to handle, and the price per mile they would charge. ATFA would assemble the lowest price overall bid based on these responses from its members, then relay this bid to the potential customer. None of the information which ATFA receives from individual members will ever be shared with any other member, nor will the customer receive a breakdown of the bid. If the customer does not accept the bid, ATFA will inform its members, and there will be no further negotiations between ATFA and the customer.

It is presently contemplated that ATFA and its members will communicate the information discussed above primarily by means of a computer network. Such a computerized system would allow the venture internally to communicate information quickly and cost-effectively so that ATFA could provide prompt responses to customer requests. As currently envisioned, the network would be structured so that the members could communicate with ATFA, and vice versa, but the members would not be able to communicate with each other on the network.

New Car Bidding. ATFA intends to market itself to new car manufacturers and importers as a sophisticated network of high-quality vehicle transportation companies with capabilities and facilities spanning every region in the country. ATFA would offer a single point of contact for negotiations for these transportation services. Negotiation with new vehicle transportation customers would be done by ATFA officers or employees, with the assistance in some cases of a representative of one of the member carriers. Only one member representative would be involved at a time in any particular negotiation.

Prior to any such negotiations, ATFA will communicate separately with each of the member carriers to determine the prices and terms on which each is willing to deal with respect to new car business. Bids and negotiations will be based on this information collected by ATFA, but only the ATFA representative will have access to the member by member price and terms information. As with used car business, any member is free to compete independently for any new car business, and will not be restricted from competing against a ATFA bid (should it ever attain the capacity to do so).

Servicing Accounts. After it has won a contract for new or used vehicle transport business, ATFA will centrally manage the execution of the contract, and will continue to provide "single point of contact" service to its customers. Thus, all dispatching, tracing, insurance, and backhauling on this business will be handled centrally by ATFA.

This centralized control is necessary for several reasons. First, it is the only way that the venture can provide service comparable to the larger carriers whose administration and operations are centralized. Without centralized control, there would be no means for ATFA to ensure that the network is operating efficiently and meeting the needs of its customers. Moreover, centralized control will reduce administrative costs and increase operational efficiencies. The resulting savings will enable the venture to deliver its services to customers at lower cost.

Joint Purchasing. The ATFA board of directors will be responsible for identifying common items needed by all members to compete in the vehicle transportation market. This list will include many items (e.g., trucks and trailers, tires, software, insurance) which would qualify for volume discounts once members' purchases are pooled together. ATFA will negotiate and arrange discount purchases of these items on behalf of its members. Members will be free to use items purchased through this joint purchasing program in any way they choose, regardless of whether it is in their independent business or in their ATFA business.

EFFECT ON COMPETITION

ATFA will have significant pro-competitive effects. Chief among them is the creation of a new entrant in the highly concentrated market for nationwide new vehicle transportation. The new car transportation market is dominated by Ryder, with over 41% of the market, and the largest four firms in that market, who have a collective share of over 75%. Ryder is currently the only firm to offer new car transportation services on a nationwide basis.

While some of the potential members of ATFA currently participate in the new vehicle transportation market, they lack the size necessary to compete against the dominant firms for large scale transport business. ATFA will enable them to pool resources, enjoy economies of scale, and compete for business which none of them individually could hope to get. In addition, courts have recognized that the unique economies achievable by a "network" of trucking firms like ATFA have significant pro-competitive benefits. See Rothery Storage & Van Co. v. Atlas Van Lines, 792 F.2d 210, 212, 221 (D.C. Cir. 1986).

Earlier this year, the Justice Department issued a Business Review Letter stating that it would not challenge a joint venture similar to ATFA proposed in the wholesale lawn and garden products distribution industry. See Business Review Letter to Robert D. Paul, Esq. re: PRIMESOURCE joint venture (January 29, 1993).

In that situation, as here, the national market was dominated by a single firm. The benefits to competition of permitting a joint venture to form and compete with the incumbent firm were acknowledged by the Department:

> "[T]he proposed arrangement could have a significant pro-competitive effect by creating a second competitor for multi-regional and national distribution of lawn and garden products."

Id. at 3; see also Business Review Letter to Independent Drug Wholesalers Group (May 18, 1987).

ATFA will have similar pro-competitive effects in the used car market. There are currently no known firms who can consistently handle very large used car moves on their own. Thus, ATFA will create a new product to be offered to such customers: a single point of contact capable of organizing a network of trucks who can deliver the product at a single competitive price. See Broadcast Music, Inc. v. CBS, 441 U.S. 1, 20-23 (1979) (upholding horizontal venture where "resulting efficiencies created, in effect, a new product that could not otherwise exist").

ATFA's joint purchasing program will simply allow its members to take advantage of some of the efficiencies and economies of scale enjoyed by the larger firms in the industry. These savings will enable ATFA members, on their own and individually, to offer their services at lower costs, which will benefit competition. In addition, because the buying group collectively represents only a small fraction of potential purchasers of truck tires, parts, accessories, insurance and computer software, there is no risk here that the ATFA members will attain monopsony power. In these circumstances, ATFA's proposed joint purchasing program will be entirely pro-competitive. See Northwest Wholesale Stationers, Inc v. Pacific Stationery & Printing Co., 472 U.S. 284, 295 (1985) (joint purchasing arrangements "designed to increase economic efficiency and render markets more, rather than less, competitive").

Furthermore, ATFA's structure and method of doing business have been designed to avoid the possibility of any anti-competitive conduct by members. NAFFTA will impose almost no ancillary restraints on its members. Existing competition and potential competition between members thus will be fully preserved, since all will remain free to bid on any business (new or used) which they wish to pursue. Indeed, if they ever have the capacity to do so, they may even compete against a ATFA bid. That is far more freedom than the typical "network" allows its members. See Rothery, 792 F.2d at 221, 230 (where the court upheld a joint venture's policy of terminating participating agents who engaged in moving business for their own account); see also Wisconsin Music Network v. Muzac Limited Partnership, 1993-1 Trade Cases (CCH) ¶ 70,176 (E.D. Wis. 1992) (upholding legality of agreement restricting affiliates' rights to market individually to large "multi-territory" customers).

In addition, the bidding process for both new and used car transport business has been carefully designed to safeguard against misuse by members of price information from other members. No such information relating to a particular member's prices will ever be available to any other member. No member would communicate directly with any other member regarding prices or terms; all communications among members would be through ATFA. Nor will more than one member representative ever be involved at one time in any negotiation with a customer. These procedural safeguards are exactly the sort the Department has favored in its prior Business Review determinations regarding joint ventures.[7]

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[7] See, e.g., Business Review Letter to Robert D. Paul, Esq. re: PRIMESOURCE (Jan. 29, 1993); Business Review Letter to

(Footnote continued on following page)

Furthermore, because of the size of ATFA and the structure of the markets in which it would participate, the risks of anti-competitive effects from its activities are realistically non-existent. ATFA's collective share of the new car transportation market would be less than 2.2%, and its share of the used car transportation market should be no higher. As Judge Bork said in Rothery, 792 F.2d at 217:

> "Analysis might begin and end with the observation that Atlas and its agents command between 5.1 and 6% of the relevant market . . . . It is impossible to believe that an agreement to eliminate competition within a group of that size can produce any of the evils of monopoly."

ATFA would be sure to face stiff competition in both the new and used vehicle transportation markets. In the used market, there are literally hundreds of other haulers that customers can use, and in the new vehicle market even ATFA's collective market share is dwarfed by that of the largest

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(Footnote cont'd from previous page)

the Beverage Importers' Freight Ass'n (Aug. 24, 1989); Business Review letter to the FRA Shippers' Ass'n (June 17, 1988); Business Review Letter to the Columbian River Shippers' Ass'n (March 30, 1988); Business Review Letter to the North American Shippers' Ass'n (March 16, 1988); Business Review Letter to North Texas Regional Clearing House Ass'n (Sept. 23, 1987); Business Review Letter to American Furniture Manufacturers Ass'n (July 7, 1987); Business Review Letter to Independent Drug Wholesalers Group (May 18, 1987); Business Review Letter to Fashion Accessories Shippers' Ass'n (March 26, 1987); Business Review Letter to International Beverage Shippers Ass'n (Dec. 13, 1985); Business Review Letter to Household Goods Forwarders Ass'n (Sept. 19, 1985); Business Review Letter to New World Shippers Ass'n (Aug. 26, 1985); Business Review Letter to Wine and Spirits Shippers Ass'n (Aug. 30, 1985); Business Review Letter to American Institute for Shippers' Ass'ns (Feb. 12, 1985); Business Review Letter to Transportation Brokers Conference of America (Feb. 8, 1985).

firms. In addition, in the new car transportation market, virtually all of ATFA's potential customers would be large and powerful buyers with many other suppliers (and other methods of transportation) from which to choose. Thus, ATFA's activities in the vehicle transportation market simply could not endanger competition in any other market.

CONCLUSION

Our client is anxious to commence its venture as soon as possible. We are of course available to work with you and your staff in any way we can to assist in your evaluation of this proposal.

Thank you for your consideration of our request.

Very truly yours,

J. Thomas Rosch

J. Thomas Rosch

Enclosures

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