

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE MOTOR CARRIER ACT

- and -

IN THE MATTER OF AN APPLICATION by **PENGBO FU o/a PENGBO'S SHUTTLE** to amend Motor Carrier License No. P03318

BEFORE: David J. Almon, LL.B., Member

APPLICANT: **PENGBO FU o/a PENGBO'S SHUTTLE**
Pengbo (Rick) Fu, Owner/Operator

INTERVENORS: **TRANSOVERLAND LIMITED**
Jamie Callaghan

ABSOLUTE CHARTERS INC.
o/a COACH ATLANTIC HALIFAX
Mary Dempster

COACH ATLANTIC TRANSPORTATION GROUP LIMITED
Ryan Cassidy

MARKIE BUS TOURS
WARD L. MARKIE o/a MARKIE BUS TOURS
Ward L. Markie

HEARING DATE: April 15, 2021

DECISION DATE: **May 13, 2021**

DECISION: **Application is denied.**

I INTRODUCTION

[1] Pengbo (Rick) Fu holds a Motor Carrier License and is the owner/operator of Pengbo's Shuttle. He filed an application with the Nova Scotia Utility and Review Board on February 1, 2021, for an amendment to Motor Carrier License No. P03318. The request to amend was to add a new authority to transport any individuals or groups from J.A. Douglas McCurdy Sydney Airport to Halifax Stanfield International Airport, one way, return or the reverse thereof, along with the addition of corresponding rates.

[2] The Notice of Application was advertised in *The Royal Gazette* on February 10, 2021; industry distribution by email, fax and regular mail was completed on February 8, 2021. Four objections were received from the following: Transoverland Limited, Absolute Charters Inc. o/a Coach Atlantic Halifax, Ward L. Markie o/a Markie Bus Tours, and, Coach Atlantic Transportation Group Limited.

[3] Mr. Markie advised the Board that he would be unable to attend the hearing as he was required to drive that day, which conflicted with the hearing.

[4] A Notice of Public Hearing was issued on March 19, 2021. The Board held a hearing by GoToWebinar videoconference on April 15, 2021. Mr. Fu testified on behalf of the applicant. Jamie Callaghan testified on behalf of Transoverland. Mary Dempster gave evidence on behalf of Absolute Charters Inc. Ryan Cassidy testified on behalf of Coach Atlantic.

[5] In this application, Mr. Fu gave the following reasons for the application for an amendment to his license:

Given the situation that both Air Canada and Westjet have indefinitely suspended all service in Cape Breton, all the workers (still plenty of) in Cape Breton who need to work western and northern Canada and other people for other reasons are forced to drive four hours to Halifax.

[Exhibit P-1]

[6] All intervenors objected to Mr. Fu's application and pointed to the COVID-19 pandemic which has significantly affected all the intervenors. They oppose Mr. Fu's application arguing that their respective companies can service all the needs. Granting the amendment to Mr. Fu's license would undermine the survival of existing ones.

[7] The Board finds there would be an excess of equipment if the proposed authority were granted to the applicant, which would impair the sustainability of existing license carriers such as the intervenors. As a result, the application is denied.

II ISSUE

[8] Taking into consideration the provisions of the *Motor Carrier Act*, should the Board exercise its discretion to amend Mr. Fu's license to add a new authority to transport any individual or group from J. A. Douglas McCurdy Sydney Airport to Halifax Stanfield International Airport one way, return or the reverse thereof along with the additional corresponding rates?

III REGULATORY FRAMEWORK

[9] The Board regulates motor carriers in Nova Scotia under the *Motor Carrier Act*, RSNS 1989, Chapter 292, to ensure there is a quality, safe, and sustainable motor carrier industry in the Province. Under the legislation, no one can operate a public passenger vehicle without a license issued by the Board. There is no right to a license; it is a privilege and gives the holder no perpetual or exclusive rights.

[10] In any application for a license, or an amendment to a license, the applicant must satisfy the Board, on a balance of probabilities, that it should grant the application.

[11] The *Motor Carrier Act* provides the following guidance to the Board on matters it may consider:

Factors considered

13 Upon an application for a license for the operation of a public passenger vehicle or for approval of the sale, assignment, lease, or transfer of such a license, the Board may take into consideration:

(a) any objection to the application made by any person already providing transport facilities whether by highway, water, air or rail, on the routes or between the places which the applicant intends to serve, on the ground that suitable facilities are, or, if the license were issued, would be in excess of requirements, or on the ground that any of the conditions of any other license held by the applicant have not been complied with;

(b) the general effect on other transport service, and any public interest that may be affected by the issue of the license or the granting of the approval;

(c) the quality and permanence of the service to be offered by the applicant and the fitness, willingness, and ability of the applicant to provide proper service;

(ca) the impact the issue of the license or the granting of the approval would have on regular route public passenger service;

(d) any other matter that, in the opinion of the Board, is relevant or material to the application. R.S., c. 292, s. 13; 1990, c. 35, s. 4; 1992, c. 23, s. 10.

[12] Thus, in assessing an application, the Board considers, among other things, the public interest, the quality and permanence of service to be offered, the general effect on other transportation service, and the sustainability of the industry including whether there is need for additional equipment in the area. Factors considered by the Board, and the weight that should be given them, will vary with the circumstances of each case.

IV EVIDENCE

1. Applicant

[13] Mr. Fu testified that because airline services were (temporarily) suspended as a result of COVID-19, it caused problems to the local community and, in particular, this presented challenges to residents of Cape Breton who work out of province, as they have to drive themselves to the airport in Halifax. This is the reason for his application: to provide shuttle service between the two airports, in Sydney and Halifax. He plans to charge \$60/person. His evidence was that he could run the service for \$.60/km “just for the short term” adding that “if I still cannot make any penny from that, probably I will shut down.” Even when the services are resumed, Mr. Fu speculated that there is a doubt that the services won’t be cancelled again. Despite this, Mr. Fu testified that he is trying to serve the community better, to offer other choices to local customers.

2. Objectors

[14] Mr. Callaghan, representing Transoverland, based in Cape Breton, testified that this company has only two to three busses on the road right now, based on a lack of business in the area. He said there is not enough demand to justify additional vehicles. Their revenues are down. Over 95% to 97% of his fleet is sitting idle. His company does not offer a shuttle service; however, they do make trips to the Halifax airport with larger groups. Consistent with the evidence of the other objecting carriers, he expressed concerns about the industry, caused by the pandemic. As far as he is concerned, the needs of the public are being met. Adding another vehicle would result in excess of equipment.

[15] Mary Dempster, representing Atlantic Charters Inc., testified that Maritime Bus business is down 64%. Before the pandemic, the Sydney to Halifax run represented 16% of its business volume; currently, it represents 35%.

[16] Ms. Dempster objects to Mr. Fu's pricing structure. Taking groups from Sydney to Halifax, then deadheading back to Sydney suggests that their sustainability is in question.

[17] Ms. Dempster submitted that carriers in the area have sufficient gear in place to perform the services Mr. Fu is seeking. Adding other vehicles at this time would constitute excess equipment. She testified that it would negatively affect existing carriers who have sufficient manpower and equipment currently and do not need any additional forces to cause these two components to "sit idle." She said that "trading dollars" with other licensees does not help the industry to grow. Finally, her evidence was that Maritime Bus, the inter-city line run for the Maritimes, services Sydney, and Halifax as part of its scheduled routes. Such additional authority to move people from Sydney and Halifax could negatively affect the ridership of Maritime Bus.

[18] Ryan Cassidy, Operation Analyst, with Coach Atlantic Transportation, charter division of Maritime Bus, echoed the comments of Mary Dempster. The pandemic has had a great negative impact on ridership. He testified that his company wants to ensure that they hold onto the current ridership and that they maintain their net worth within the three Maritime Provinces. Mr. Cassidy also expressed concern about Transoverland's sustainability within the Cape Breton region and ensured they always have partners who can look after the charter business when normal business resumes.

[19] He added that the new equipment which Mr. Fu is offering exacerbates the issue. Maritime Bus currently has vehicles deployed to meet the service. Finally, Mr. Cassidy noted that Transoverland, a strategic partner, had 90% to 95% of equipment sitting idle and there is no need for these services sought at this time.

V ANALYSIS AND FINDING

[20] The main issue raised by the intervenors was why should the Board approve the amendment to Mr. Fu's license, when there are existing carriers already able to service in the area. All the objectors submitted that there is not enough business to justify the license amendment due to the global pandemic. The pandemic has affected all motor carriers in the Province.

[21] The Board has broad powers under the *Act* to regulate the public passenger carrier industry in the Province. Its powers extend to all aspects of the industry including regular commercial and irregular charter service. The main object of the *Act* is to ensure there is a quality, safe and sustainable motor carrier industry.

[22] When determining an application, as stated earlier, s. 13 of the *Motor Carrier Act* directs the Board to consider the public interest, the quality and permanence of service to be offered, the general effect on other transportation services, including the impact on regular route public passenger service, as well as assessing whether there is an excess of equipment.

[23] In *Stock Transportation Ltd.*, 2016 NSUARB 16 (CanLII), the Board commented on sustainability. While the decision dealt with motor coaches, it applies equally to mini-buses, and observed the following:

[75] Nova Scotia has a relatively small population scattered throughout the Province, with the exception of Halifax and Sydney. The costs of investing in the Industry are high, *Trius Tours Ltd.*, 2003 NSUARB 71 (CanLII), at para. 62. The charter season is short, being less than six months, from approximately mid-May to the end of October, with a peak in September/October. The capital expenditures must be paid throughout the year, whether the vehicle operates the full 12 months. In addition, a carrier has other fixed costs such as rent, insurance, fixed labour, and administration costs. Unlike some other provinces, motor carriers providing charter services in Nova Scotia receive no subsidization or tax relief...

[78] Key components to achieving the objectives of the *MC Act*, including sustainability, are the Board's regulation of the number and types/sizes of vehicles operating in the Province, the location of the carriers, the areas in which the services are provided and the rates they charge...

[79] Regulating the number of vehicles permitted to operate in the Province ensures the supply is not greater than the demand so that there is sufficient work available for licensed carriers to recover the costs of providing the transportation services, including their capital investment, and to make a profit. This is the first issue the Board is to consider under s.13(a) of the *MC Act*; that is, whether there would be an excess of equipment if the license is granted.

[24] The importance of sustainability to the motor carrier industry was discussed in the Board's Generic Public Hearing decision, reported at 2020 NSUARB 69, where the Board stated that "sustainability of this service for the public is one of the Legislation's overriding directives."

[25] In a number of recent decisions, the Board has dealt with parties who are struggling in their own ways to deal with the pandemic and its effect on transportation. The Board understands the charter and line-run segment of the industry has suffered a significant decline from the fallout of the COVID-19 pandemic, with equipment sitting idle. With scaled-back service and public health measures in place, motor carriers pushed through several months of lockdowns, attempting to adapt to new market realities. It continues.

[26] Mr. Fu, like the intervenors, has been no less affected. In his closing submissions he states:

The only reason for me to submit this application, meaning no offence, I'm trying to grab any penny from anybody in this hearing. The only thing I wanted to do is serve the community better, to offer other choices to local customers.

[Sound File 31:50-32:09]

[27] He went so far as to express some doubts as to the viability of his proposed business model in this application, which does not accord with the regulatory goal of sustainability in the industry.

[28] In any event, the Board agrees with the arguments of the objectors about the state of the industry presently. The applicant has provided no persuasive evidence of demand for services that cannot be met by existing carriers.

[29] The Board finds that there would be an excess of equipment if the amendment to Mr. Fu's license was granted, impairing the sustainability of existing licensed carriers, including the intervenors.

VI CONCLUSION

[30] After considering the evidence in accordance with the provisions of s.13 of the *Motor Carrier Act*, the Board finds that the applicant has not met the burden of proof to show, on a balance of probabilities, that the Board should grant this application; doing so, particularly in the midst of the pandemic, would give rise to sustainability concerns within the industry.

[31] As a result, the application is denied.

[32] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 13th day of May 2021.


David J. Almon