

BEFORE THE FEDERAL TRANSIT ADMINISTRATION

Cardinal Buses, Inc.,
Complainant

v.

Charter Complaint #2002-08
49 U.S.C. Section 5323(d)

Interurban Transit Partnership,
Respondent.

DECISION

Summary

On June 20, 2002, Cardinal Buses, Inc. ("Complainant") filed a complaint with the Federal Transit Administration ("FTA") alleging that Interurban Transit Partnership ("Respondent") was going to provide a service in violation of FTA's charter regulation, 49 Code of Federal Regulations (C.F.R.) Part 604. The service specifically complained of pertains to Respondent's providing bus service for a radio station's birthday on June 22, 2002. Respondent filed an answer dated July 12, 2002. Complainant filed a response dated July 23, 2002. Upon reviewing the allegations in the complaint and the subsequent filings of both the Complainant and the Respondent, FTA has concluded that the service in question does violate FTA's regulations regarding charter service. Respondent is hereby ordered to cease and desist in providing such illegal service.

Complaint History

Complainant filed its complaint with the FTA on June 20, 2002. The complaint alleges that the Respondent was going to provide charter service¹ for a radio station promotional event on June 22, 2002. Specifically, Complainant alleges that the Respondent was intending to provide charter service for the event and as a private charter provider he had never been contacted by the Respondent. The Complainant also alleges that in the past he has received a "willing and able" questionnaire from the Respondent or its predecessor organization, Grand Rapids Transit Authority, but he has not received one in the past couple of years.

Respondent filed its answer on July 12, 2002. In it, Respondent denied that the service it provided for the radio "Birthday Bash" was charter service. Respondent indicated the service was open to the public, no fee was charged and there was no contract. The service, Respondent also indicated, did not interfere with its regularly scheduled service. Respondent states that it no longer provides charter service, which is why it no longer sends out a "willing and able" questionnaire.

¹ Respondent receives Section 5307 and 5309 funds from FTA; therefore, they must comply with the charter regulations.

Complainant responded on July 23, 2002. In its reply Complainant stated that although there may not have been financial reimbursement, the Respondent benefited from the positive publicity it received in the radio announcements. This reply reiterated the assertion that Respondent's service was an illegal charter operation and that Complainant was not provided an opportunity to offer its own charter service. Complainant requested a cease and desist order.

Discussion

As Complainant has accurately stated, recipients of federal financial assistance can provide charter service in very limited circumstances. In the absence of one of the limited exceptions, the recipients are prohibited from providing the service. 49 C.F.R. Section 604.9(a). Complainant is not asserting that any of the charter exceptions apply, but rather that the service they are providing is not charter service.

The regulations define charter service as the following:

[T]ransportation using buses or vans, funded under the Acts of a group of persons who pursuant to a common purpose, under a single contract, for a fixed charge for the vehicle or service, who have acquired the exclusive use of the vehicle or service in order to travel together under an itinerary either specified in advance or modified after leaving the place of origin. Includes incidental use of FTA funded equipment for the exclusive transportation of school students, personnel, and equipment. 49 C.F.R. § 605.5(e).

Thus, a determination needs to be made as to whether Respondent's service meets the definition of charter by examining the elements required for charter service. In order to qualify as charter service, the following questions need to be answered:

- a) Is this transportation service using buses funded with FTA money?
- b) Is the service for a common purpose?
- c) Is it under a single contract?
- d) Is it for a fixed charge for the vehicle or service?
- e) Is the exclusive use of the vehicles to travel together under an itinerary either specified in advance or modified after leaving the place of origin?

Each of these elements is discussed below. If Respondent's service includes each of these elements, then it is charter service. If it is charter service, a determination needs to be made as to whether it is permissible charter service.

A. Is this transportation service using buses funded with FTA money?

The Respondent receives federal money for its buses and its capital maintenance expenses. It is a publicly funded transportation service. Its primary source of funding is dollars it receives from the FTA. Respondent's purpose is to provide public transportation through a bus system. The buses it uses are purchased with federal money.

B. Is the service for a common purpose?

Although there was not a formal agreement, Respondent acknowledges that the radio announcements stated service was provided from park and ride lots to the event. The event, according to Complainant, was held at the Allegan County Fair Grounds.

C. Is it under a single contract?

The arrangement although not under a written contract does evidence a single oral contract. It appears that in exchange for the radio providing publicity for the Respondent, the Respondent provided free shuttle service for the "Birthday Bash" event.

D. Is it for a fixed charge for the vehicle or service?

Although the service was provided for free, FTA has indicated that charter service does not necessarily require there to be monetary payment. In its 1987 Charter Service Questions and Answers, 52 Federal Register 42248, FTA stated the following:

27. Question: Do the following types of service fall within the definition of "charter service" for the purposes of the regulation:

a. Service that is provided for free but otherwise meets the criteria in the definition of charter?

Answer: Cost is irrelevant in determining whether service is mass transportation or charter service. Thus, service which meets the criteria set by UMTA [FTA's precursor agency the Urban Mass Transportation Administration], i.e., service controlled by the user, not designed to benefit the public at large, and which is provided under a single contract, will be charter regardless of the fact that it is provided for free.

As a general rule, free charter service would be "non-incidenta1" since it does not recover its fully allocated cost, and could not be performed by an UMTA recipient, even under one of the exceptions to the charter regulations. However, UMTA will consider certain types of free charter service to be "incidenta1." An example of this would be free service to an economically disadvantaged group when there is no private operator willing and able to perform the service. Since UMTA is concerned about the diversion of mass transit revenues and the reduction in mass transportation life resulting from service provided below cost, it will, when presented with a complaint, consider such service "incidenta1" charter only in a very limited number of cases.

Therefore, based on the facts in this case, the fact that the service was free is irrelevant.

E. Is the exclusive use of the vehicles to travel together under an itinerary either specified in advance or modified after leaving the place of origin?

The Respondent acknowledges that the vehicles were used to shuttle individuals from the park and ride lots to the event. The event, according to Complainant, was held at the Allegan County Fair Grounds.

The Respondent entered into an oral contract with the radio station to provide free shuttle service for its "Birthday Bash." The buses, which were purchased with federal dollars, were for the exclusive use of the shuttle service and those individuals interested in attending the event, not the general public at large. The schedule for the service was not available to the public with the other regular route information. Presumably, the radio station may have even dictated when the service should be provided based on the schedule of its event. The Respondent was clearly providing a private charter service. If the Respondent wanted to provide this type of charter service, it should have determined whether there were any willing and able private charter providers interested in providing the service.

Acceptable Charter Service

If a recipient of federal funds, like the Respondent wishes to provide charter service, then it must comply with the procedural requirements. The regulation states the following:

If a recipient desires to provide any charter service using FTA equipment or facilities the recipient must first determine if there are any private charter operators willing and able to provide the charter service ... To the extent that there is at least one such operator, the recipient is prohibited from providing charter service with FTA funded equipment or facilities unless one or more of the exceptions applies, 49 C.F.R. Section 604.9(a).

There are a number of exceptions listed for providing charter service. However, the Respondent has not contended that one of the exceptions to the charter regulations applies in this case. By filing his complaint, Complainant has indicated there was at least one willing and able private provider interested in providing the service.

The regulations clearly state that before a recipient provides charter service it must determine if there is any willing and able charter operator. 49 C.F.R. § 604.9(a). In order to determine if there is at least one private charter operator willing and able to provide the service, the recipient must complete a public participation process. 49 C.F.R. § 604.11(a). The regulations under 49 C.F.R. § 604.11(a) require that the recipient complete the following:

- (1) At least 60 days before it desires to begin to provide charter service...
- (b) The public participation process must at a minimum include:
 - (1) Placing a notice in a newspaper, or newspapers, of general circulation within the proposed geographic charter service area;
 - (2) Send a copy of the notice to all private charter service operators in the proposed geographic service and to any private charter service operator that requests notice;
 - (3) Send a copy of the notice to the United Bus Owners of America, 1300 L Street, NW., Suite 1050, Washington, DC 20005 and the American Bus Association, 1100 New York Avenue, SW, Suite 1050, Washington, DC 20005-3934.
- (c) The notice must:
 - (1) State the recipients name;
 - (2) Describe the charter service that the recipient proposes to provide limited to days,

- times of day, geographic area, and categories of revenue vehicle, but not the capacity or the duration of the charter service;
- (3) Include a statement providing any private charter operator...at least 30 days... to submit written evidence...
 - (4) State the address to which the evidence must be sent;
 - (5) Include a statement that the evidence necessary for the recipient to determine if a private charter operator is willing and able includes the following:
 - (i) A statement that the private operator has the desire and the physical capacity to actually provide the categories of revenue vehicle specified, and
 - (ii) A copy of the documents to show that the private charter operator has the requisite legal authority to provide the proposed charter service and that it meets all necessary safety certification, licensing and other legal requirements to provide the proposed charter service.
 - (6) Include a statement that the recipient shall review only that evidence submitted by the deadline, shall complete its review within 30 days of the deadline, and within 60 days of the deadline shall inform each private operator that submitted evidence what the results of the review are.
 - (7) Include a statement that the recipient shall not provide any charter service using equipment or facilities funded under the Acts to the extent that there is at least one willing and able private charter operator unless the recipient qualifies for one or more of the exceptions in 49 C.F.R. § 604.9(b).

Procedural Determination Discussion

The regulation under 49 C.F.R. § 604.11 clearly sets forth the procedures for determining if any willing or able private charter operators exist. The onus is upon the recipient to provide a “public participation process.” At a minimum, the recipient is required to provide any private charter operator with at least 30 days to submit written evidence to prove that it is willing and able, and then it must inform each private operator what the results are at least 60 days before the deadline.

The Complainant has indicated that it is a “willing and able” charter service within the geographic area in question. The Respondent does not challenge this assertion. Respondent acknowledges that it no longer sends out “willing and able” questionnaires, because it no longer provides charter service. However, Respondent needs to understand what constitutes charter service in order to be able to state that it no longer provides charter service.

Respondent failed to properly determine whether there were any willing any private charter operators willing and able to provide the service to the event. Therefore, since Respondent has not raised any of the exceptions that would apply to providing charter service, it is prohibited from providing charter service with FTA funded equipment or services under 49 C.F.R. § 604.9(a).

Remedy

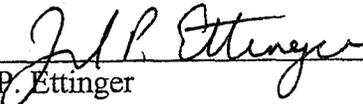
Complainant has requested that Respondent cease from providing charter operations in the future, and that it refers charter requests to private providers. FTA grants Complainant’s request for the

cease and desist order and orders Respondent to cease providing charter service in the future, and if they desire to provide charter service, then the Respondent must follow the notice and review procedures for determining if there are any willing and able private charter operators.

Conclusion and Order

FTA finds that Respondent provided impermissible charter service and orders it to cease and desist any such further service. Refusal to cease and desist in the provision of this service could lead to additional penalties on the part of FTA.

In accordance with 49 C.F.R. § 604.19, the losing party may appeal this decision within ten days of receipt of the decision. The appeal should be sent to Jennifer Dorn, Administrator, FTA, 400 Seventh Street, S.W., Room 9328, Washington, D.C. 20590.



Joel P. Ettinger
Regional Administrator

08-20-02
Date