BEFORE THE FEDERAL TRANSIT ADMINISTRATION
Charter Services Docket No. 2006-02

Forell Limousine & Bus Service, Complainant-Appellant	)	
v.	)	Final Decision
River Cities Transit, Respondent-Appellee	)	

DECISION

On April 24, 2008, the Federal Transit Administration ("FTA") received an appeal by Forell Limousine & Bus Service ("Forell") from the April 14, 2008, decision by FTA Regional Administrator Terry J. Rosapep on a complaint filed by Forell. For the reasons set forth below, since Forell has failed to raise new matters of fact or points of law that were not available or not known during the investigation of the complaint, I will not take action on the appeal. Accordingly, the Regional Administrator's decision stands.

I. BACKGROUND

River Cities Transit ("RCT"), a local transit agency in South Dakota, is a recipient of FTA financial assistance and is prohibited by 49 U.S.C. § 5323(d) from providing charter bus services in violation of the provisions of FTA's charter bus regulations, codified at 49 C.F.R. Part 604.[1]

Forell, a private transit operator filed a complaint with the Regional Administrator on October 5, 2005, alleging that RCT provided numerous charter bus services directly to customers without determining whether any private operators were "willing and able" to provide those services, in violation of FTA's charter bus regulations.[2] RCT responded to the complaint by letter of November 18, 2005, claiming that it was providing permissible "public transportation."[3] Forell rebutted RCT's response by letter of December 18, 2005, further alleging that RCT was providing service that was "inherently charter."[4]

[1] This complaint arose under regulations that were amended effective April 30, 2008. *See* 73 Fed. Reg. 2,326 (Jan. 14, 2008). Thus, all references in this decision to 49 C.F.R. Part 604 refer to the pre-2008 version of FTA's charter bus regulation in effect at the time of the alleged violations.
[2] *Forell Limo Serv. v. River Cities Transit,* Charter Service Docket No. 2006-02, at 1 (FTA Region VIII, April 18, 2008).
[3] *Id.*
[4] *Id.* at 2.

Forell filed a new complaint with the Regional Administrator on March 1, 2006. Following an FTA request for additional information, Forell responded on February 9, 2007 with another list of RCT trips that were allegedly impermissible charter service. RCT responded again by letter of March 21, 2007.

After reviewing the evidence submitted by the parties, the Regional Administrator determined that three trips provided by RCT constituted impermissible charter service while six other trips were permissible public transportation.[5] However, the Regional Administrator declined to bar RCT from receiving FTA financial assistance, citing the fact that the charter service at issue was no longer provided by RCT, and because FTA had promulgated a new regulatory framework to govern charter bus service in the future.[6]

Forell timely appealed the Regional Administrator's decision. In its appeal, Forell alleges that FTA failed to investigate fully all complaints, especially the six trips deemed permissible public transportation by the Regional Administrator.[7] Forell requests that FTA further investigate the complaints, and upon any findings of charter violations, withhold FTA financial assistance from RCT.

II. REGULATORY FRAMEWORK

A. Standard of Review

Forell faces a challenging initial burden when seeking to appeal the Regional Administrator's decision. Under the applicable regulations, "[t]he Administrator will only take action on an appeal if the appellant presents evidence that there are new matters of fact or points of law that were not available or not known during the investigation of the complaint."[8]

B. Burden of Persuasion and Standard of Proof

When a statute is silent regarding a party's burden of persuasion, that is, which party loses if the evidence is closely balanced, the default rule is that the plaintiff or claimant bears the burden of persuasion.[9] Thus, in a charter service case, where Congress was silent regarding which party bears the burden of persuasion, the appellant bears the burden of persuading the Administrator that there are new matters of fact or points of law that were not available or not known during the investigation of the complaint.

When a statute is silent regarding the standard of proof that should apply in a case, "the preponderance of the evidence is the proper standard, as it is the default standard in civil and administrative proceedings."[10] Therefore, when deciding a charter

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[5] *Forell* at 13-14.
[6] *Id* at 12.
[7] *See Forell* Appeal at 2.
[8] 49 C.F.R. § 604.19(b) (2007).
[9] *Schaffer ex rel Schaffer v. Weast*, 546 U.S. 49, 56 (2005).
[10] *Yzaguirre v. Barnhart*, 58 F.App'x 460, 462 (10th Cir. 2003) (quoting Jones *ex rel Jones v. Chater*, 101 F.3d 509, 512 (7th Cir. 1996)).

service case, FTA applies a preponderance of the evidence standard. To hold something by a preponderance of the evidence means that something is more likely so than not so.[11]

III. DISCUSSION

Under the applicable regulation, I may only take action to review the Regional Administrator's decision if Forell persuades me that there are new matters of fact or points of law that were not available or not known during the investigation of the complaint. Because Forell has failed to meet its burden in this regard, I decline to take action, and I do not address Forell's arguments that FTA neglected to conduct an investigation into the charter service allegations. Furthermore, I decline to withhold financial assistance from RCT for the reasons stated in the Regional Administrator's decision.[12]

A. No New Matters of Fact

Based on the evidence presented on appeal, Forell has failed to persuade me that there are new matters of fact that were not available or known during the Regional Administrator's investigation of Forell's complaint.[13]

Forell's additional proffered sources of fact do not indicate any new facts that were not available or known during the Regional Administrator's investigation. The following facts produced on appeal by Forell were all available to or known by the parties:

(1) a 2004 letter from RCT's Director Ron Baumgart;[14]

(2) page 4 of RCT's Response Letter regarding Ron Baumgart's opinion on what public transit can or should provider its users, November 18, 2007;[15]

(3) page 8 of RCT's Response Letter regarding RCT's service from the Pierre Airport to the passenger's final destination, November 18, 2007;[16]

(4) & (4A) a copy of the 2004 flyer that was advertised by the Discovery Center on the Pierre Area Chamber of Commerce website, August 3, 2004;[17]

(5) an October 13, 2005 DOT Audit on RCT;[18]

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[11] *See, e.g.*, *Williams v. Eau Claire Pub. Sch.*, 397 F.3d 441, 444 (6th Cir. 2005).
[12] *See* 49 C.F.R. § 604.17(b).
[13] *See* 49 C.F.R. § 604.19(b).
[14] *See Forell* Appeal at 7.
[15] *Id* at 8.
[16] *Id* at 9.
[17] *Id.* at 10.
[18] *Id.* at 11.

(6) page 8 of FTA's April 2008 Decision, specifically the section discussing roundtrip service from the Discovery Center to Melvin Ranch;[19]

(7) a September 1, 2005 maintenance and repair agreement between RCT and YMCA and schedule sheets for Buses #18 and #19;[20]

(8) schedule sheets for Buses #3, #4, and #5 dated January 4, 2006, January 11, 2006, and December 11-20, 2005, respectively;[21]

(9) page 11 of FTA's April 2008 Decision, specifically the section discussing trips to and from the YMCA;[22]

(10) a September 8, 2005 e-mail string from Connie Tveidt for the Fan Bus trips to Aberdeen, Mitchell, and Sioux Falls;[23] and

(11) a River Cities Taxi Bus advertisement for rides to Sturgis in August 2004.[24]

B. No New Points of Law

Forell alleges in its appeal that RCT violated 49 C.F.R. Part 604 by providing charter service without first determining if there was one private charter operator willing and able to provide this charter service.[25] This is not a new point of law, but rather, it is the identical point of law that Forell offered in its original complaint.[26]

Based on the evidence presented on appeal, Forell has failed to persuade me that there are any new points of law that were not available or known to the Regional Administrator during his investigation of Forell's complaint.[27] I, therefore, do not reach the merits of this claim.

IV. CONCLUSION AND FINAL ORDER

The Regional Administrator's decision stands. My decision is administratively final and is subject to judicial review pursuant to 5 U.S.C. §§ 701–706.

IT IS SO ORDERED.

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[19] *Id.* at 12.
[20] *Id.* at 13-15.
[21] *Id.* at 16-18.
[22] *Id.* at 19.
[23] *Id.* at 20.
[24] *Id.* at 21.
[25] *See Forell* Appeal at 6.
[26] *Forell* at 1.
[27] *See supra* note 5.

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November 10, 2008
Dated

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