

BEFORE THE FEDERAL TRANSIT ADMINISTRATION

Indian Trails, Inc., Classic Caddy Limousine, and
The Tecumseh Trolley & Limousine,
Complainants,

Capital Area Transportation Authority,
Respondent.

Charter Complaints
49 U.S.C. Section 5323(d)
Docket Nos. 2002-01, 2002-04,
and 2002-10

DECISION

Summary

On March 7, 2002, Classic Caddy Limousine ("Classic Caddy") filed a complaint with the Federal Transit Administration ("FTA") alleging that Capital Area Transportation Authority ("Respondent") is providing service in violation of FTA's charter regulation, 49 Code of Federal Regulations (C.F.R.) Part 604, as well as improperly leasing its vehicles. Classic Caddy followed up with some additional information on March 27, 2002. The service specifically complained of pertains to Respondent's use and leasing of its trolleys for charter service. Respondent filed an answer dated May 1, 2002. Complainant filed a reply on June 13, 2002.

On April 1, 2002, The Tecumseh Trolley & Limousine ("Tecumseh Trolley") filed a complaint with the FTA alleging that Respondent is providing service in violation of FTA's charter regulation, 49 C.F.R. Part 604, as well as improperly leasing its vehicles. On July 9, 2002, Tecumseh Trolley filed additional information with the FTA.

On June 20, 2002, Indian Trails Incorporated ("Indian Trails") submitted a letter to the American Bus Association complaining about the Respondent providing unauthorized charter service. FTA was also provided with a copy of the information. On July 16, 2002, FTA consolidated the three complaints and asked that the Respondent answer a number of questions related to its trolleys. On August 14, 2002, the Respondent requested a thirty (30) day conciliation period and an extension for filing its response to the consolidated complaints. On August 15, 2002, FTA granted the request for the conciliation period, but denied the request for an extension. On August 16, 2002, Respondent filed its response to the three consolidated complaints. The thirty (30) day conciliation period, which ended on September 14, 2002, did not result in a settlement.

Upon reviewing the allegations in the three complaints and the subsequent filings of all three of the Complainants (Classic Caddy, Tecumseh Trolley, and Indian Trails, hereinafter are referred to collectively as the "Complainants") 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. Respondent is also ordered to disallow improper charter mileage for the vehicles to be used for the purposes of calculating useful life.

Complaint History

Complainant Classic Caddy filed its complaint with the FTA on March 7, 2002, and provided follow up information on March 27, 2002. The complaint alleges that the Respondent is providing illegal charter service¹ by providing private charter service using its trolleys, as well as improperly leasing the trolleys. Specifically, Complainant alleges the following: (1) the annual notice was improper; (2) the notice was only sent to two bus services in the area when there are many more willing and able charter providers in the area; (3) the Respondent improperly found Classic Caddy not to qualify as a willing and able charter provider; (4) the Respondent has vehicles in its fleet that are only used for charter service, specifically trolleys; (5) Respondent is improperly leasing vehicles in its fleet when there is not a legitimate capacity constraint; (6) Classic Caddy alleges that Dean Transportation and Indian Trails are improperly leasing Respondent's vehicles without a legitimate capacity constraint; and (7) Respondent is allowing alcohol to be consumed on charter trips. Classic Caddy provided additional documentation on March 27, 2002.

Respondent filed its answer on May 1, 2002. In it, Respondent stated that it provided charter service briefly in fiscal year 2001 after following the annual notice procedures. Respondent alleges that no willing and able charter providers responded to the annual notice. Respondent states that it received seven responses to its annual notice dated August 28, 2001. It attempted to negotiate with the private operators, and subsequently issued an Indication of Interest form for private providers to complete if they were interested in leasing Respondent's vehicles based on capacity constraints. Three private providers returned the forms, Indian Trails, Dean Transportation, and Tecumseh Trolley. The Respondent states it ceased to provide charter service because it could not reach agreement with the private willing and able charter operators. Respondent alleges that requests for charter are referred to private operators. The Respondent states that the charter regulations relate to intercity charter service and that it does not provide any intercity charter service.

On June 13, 2002, Classic Caddy filed its reply to Respondent's answer. In its reply, Classic Caddy reiterated its allegations and added that the Respondent provided charter service for the International Art Festival in East Lansing, MI.

On April 1, 2002, Tecumseh Trolley filed a complaint alleging the same violations as Classic Caddy. Additionally, on July 9, 2002, it provided documentation supporting its allegations.

On June 20, 2002, Indian Trails submitted a letter to the American Bus Association complaining about the Respondent providing unauthorized charter service. FTA was also provided with a copy of the information. Indian Trails included with its materials copies of the Respondent's charter terms.

On July 16, 2002, FTA consolidated the three complaints and asked that the Respondent answer a number of questions related to its trolleys. On August 16, 2002, Respondent replied to the three

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

consolidated complaints, as well as responded to FTA's additional questions. Respondent stated that it has two trolleys, which were state funded. Respondent states that the trolleys are in its active fleet; however, the trolleys are not currently being used for a scheduled route², but rather for special occasions. The trolleys are also being leased for charter service. Respondent states that it is not providing any direct charter service and that it is leasing the trolleys to private providers based on capacity constraints. Respondent states that the service provided for the International Art Festival was not charter service, but scheduled service.

Respondent states that as of August 8, 2002, it ceased accepting any bookings of its trolleys for private operators. It alleges this was done in an attempt to resolve the outstanding complaints. Respondent requested a thirty (30) day conciliation period, which was granted on August 15, 2002. The conciliation period ran on September 14, 2002, but the parties did not reach a settlement.

Discussion

As Complainants have accurately stated, recipients of Federal financial assistance cannot provide charter service using Federally funded equipment or facilities, unless one of the limited exceptions applies. 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). Respondent is asserting that it is not providing direct charter service and that it is leasing its trolleys pursuant to the exception under 49 C.F.R. Section 604.9(b)(2).

A. Regulations

Under 49 C.F.R. Section 604.9(a), if a recipient desires to provide charter service, it must first determine whether there are any willing and able private charter providers. If there is at least one willing and able provider, the recipient is prohibited from providing charter service unless one of the exceptions applies. *Id.* The recipient must follow all the procedures for determining willing and able private operators under 49 C.F.R. § 604.11. The public participation process requires at a minimum that a notice be placed in a newspaper of general circulation and a notice is required to be sent to all private charter service operators in the proposed geographic charter service area. 49 C.F.R. § 604.11(b)(1) and (2). The notice needs to include among other items, the categories of revenue vehicle. *Id.* at (c)(2). There are only two categories of revenue vehicle, buses and vans. 49 C.F.R. § 604.5(d).

B. Prior Triennial Finding

On October 3, 2000, the Respondent had a deficient finding with regard to charter bus. At that time, FTA stated that the Respondent was providing trolleys to private charter operators under Exception 2, when it should be utilizing Exception 7. The FTA required the Respondent to publish its annual notice to determine whether there were any willing and able private charter operators.

² Respondent sent a clarifying letter dated September 23, 2002.

C. Annual Notice

On September 5, 2000, and August 31, 2001, the Recipient published annual notices in the *Lansing State Journal*. The notices proposed that the Respondent intended to provide charter service using Chance Trolley vehicles. The notice was misleading, since it did not properly state what type of revenue service the Respondent intended to provide, namely bus or van service. The notice implied that if a private provider could not provide trolley service it could not qualify as a willing and able charter provider. Additionally, the Respondent was required to provide notices to all private charter operators in the area. Respondent in its answer dated May 1, 2002, states only that it published the notice. It does not indicate that notices were sent directly to all private charter operators in the geographic area as required under 49 C.F.R. § 604.11(b)(2).

D. Leasing Trolleys

The Respondent has been leasing the trolleys to private operators pursuant to its Indication of Interest forms. Although the form states that the Respondent's equipment will only be used "when the charter operator lacks capacity to provide charters or is unable to provide equipment accessible to elderly and handicapped persons for charters," private operators have been using the trolleys when there is not a capacity constraint. Capacity should relate to the private operator's overall vehicle capacity. The private operator does not have a capacity constraint, simply because it does not have a trolley. It would only have a capacity constraint if it did not have enough buses or vans to handle its private charter business. This misinterpretation was cited in FTA's triennial findings dated October 3, 2000, when the Respondent was informed that it should not be leasing trolleys under Exception 2 of the regulations, but rather Exception 7. Tecumseh Trolley has admitted that it filled out the Indication of Interest form when it did not lack capacity, regarding buses and vans.

Although Respondent indicated in a letter dated August 9, 2002, that as of August 8, 2002, it "ceased accepting bookings for use of its equipment by charter operators, including the trolleys which had been used for weddings," it still is working out commitments for bookings made prior to August 8, 2002. It appears that even now, CATA is still improperly leasing its vehicles for charters. The trolleys are not being used for regular service and are only being used for charter service either directly by the Respondent or improperly leased to private operators for charter service. Finally, the regulations state that "[a]ny charter service that a recipient provides under any of the exceptions in this part must be incidental charter service." 49 C.F.R. § 604.9(e). Incidental service is defined as "charter service which does not: (1) interfere or detract from the provision of the mass transportation service for which the equipment or facilities were funded under the Act; or (2) does not shorten the mass transportation life of the equipment or facility." 49 C.F.R. § 604.5(i). The trolleys were solely being used for charter service and were not being used for mass transportation at all.

E. International Art Fair

The regulations define charter service as the following:

transportation 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?

The International Art Fair (the "Fair") service utilized buses that were funded with Federal funds. There was a common purpose, specifically for the Fair. It was a one-day event, not regularly scheduled service. Although the service provided was free. FTA guidance states that the cost of the service was irrelevant.³ The exclusive use of the vehicles was to transport individuals to the Fair, although the service was open to the public, it was not mass transportation. It was only for those individuals interested in attending the Fair. This service did not involve additional buses on a regularly scheduled route, which would have not been charter service, but rather involved service that was added without following the required procedures for providing a new route. This service does not fall under any of the recognized exceptions; therefore, it is illegal charter service.

F. Willing and Able Status of Classic Caddy

The Respondent determined that Classic Caddy was not a willing and able charter provider. In the Charter Questions and Answers from 52 FR 42248 (November 3, 1987), the Answer to No. 12 stated that "[i]f a private operator submits documentary evidence that it has the desire to provide

³ In an answer to the cost issue in the Charter Questions and Answers from 52 FR 42248 (November 3, 1987), Question No. 27(a), UMTA (the Urban Mass Transportation Administration a precursor to FTA) stated the following:

"Cost is irrelevant in determining whether service is mass transportation or charter service. Thus, service which meets the criteria set by UMTA, 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-incidental" 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 "incidental." 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 "incidental" charter only in a very limited number of cases."

service and the ability to supply vehicles, as well as the necessary legal authority, it must automatically be determined 'willing and able.'" The Respondent can only conduct a further investigation of a private operator's status if there is reasonable cause to believe that the information has been falsified. The Respondent should have determined that Classic Caddy was "willing and able."

G. Alcohol Use on Charter Trips

Complainants have alleged that alcohol is present during Respondent's charter trips. FTA does not regulate the use of alcohol on charter trips.

H. State Funding

CATA states that the trolleys are state funded. If the vehicles were procured without Federal funds, they could be used for charter service if they were kept completely separate from any Federally funded facility or activity. The trolleys could not be stored in a Federally funded facility.⁴ The trolleys would need to be kept completely separate from all Federally funded activities, including maintenance. CATA has not demonstrated that the trolleys are kept separate from the rest of its Federally funded fleet.

I. Intracity Service

CATA has stated that it is providing intracity service as a reason why the service they are providing is allowable. Although 49 U.S.C. Section 5323(d) only discusses that recipients of federal assistance cannot provide intercity charter service, it references the agreement that recipients must enter into with the Department of Transportation as a condition of receiving the assistance. Pursuant to FTA's Master Agreement MA(9), October 1, 2002, Section 28, a recipient cannot provide charter service unless the service is under one of the exceptions in FTA's regulations, 49 C.F.R. Part 604. FTA's charter regulations, 49 C.F.R. Part 604, prohibit any type of charter service. Intracity service is not one of the listed charter exceptions under FTA's regulations, 49 C.F.R. § 604.9(b). Therefore, CATA cannot provide the service as it currently does.

Conclusion

Based on all the information provided, FTA finds that the Respondent has been providing illegal charter with its trolleys, both direct and indirect service through improperly leasing the vehicles. The Respondent has also conducted illegal charter using its buses for functions such as the International Art Fair. The Respondent improperly determined that Classic Caddy was not a "willing and able" charter provider. If the Respondent wishes to use its trolleys for charter service, they must be segregated from all Federally funded assets.

⁴ In an answer to Question No. 26, relating to the use of locally funded buses for charter in the Charter Questions and Answers from 52 FR 42248 (November 3, 1987), UMTA stated in order to use the vehicles they need to be kept completely separate from Federally funded assets, including maintenance activities.

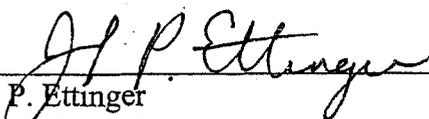
Remedy

Complainants have requested that Respondent immediately cease the charter operations at issue. FTA grants Complainants' request for the cease and desist order and orders Respondent to cease providing charter service using its trolleys and any other vehicles and cease and desist improperly leasing its vehicles. If Respondent desires to provide charter service, they must follow the notice and review procedures for determining if there are any willing and able private charter operators pursuant to 49 C.F.R. Part 604. Another alternative, if the trolleys are state funded would be to separate the trolley service from all CATA's other operations, and then FTA's charter requirements would not apply.

Order

FTA finds that Respondent has been providing 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. Additionally, the mileage for improper charter use should not accrue towards the useful life of the Federally funded vehicles.

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

10-11-02
Date