BEFORE THE FEDERAL TRANSIT ADMINISTRATION

In the matter of:	)	
Motorcoach Association of South Carolina	)	CHARTER COMPLAINT
Complainant	)	49 U.S.C. 5323(d)
v.		
Charleston Area Regional Transportation Authority	)	CHARTER SERVICE DOCKET No. 2006-03
Respondent	)	

DECISION

SUMMARY

Motorcoach Association of South Carolina, hereinafter referred to as "complainant", filed this complaint with the Federal Transit Administration (FTA), alleging that the Charleston Area Regional Transportation Authority (CARTA), hereinafter referred to as "respondent", has provided charter service in violation of the FTA charter regulation, 49 CFR Part 604. The complainant specifically alleges that CARTA provided impermissible charter service during a period of three days from February 17th through the 19th to the Southeastern Wildlife Exhibition (SEWE) held in Charleston, South Carolina. The complainant alleges that the service was available only to attendees of the Exhibition; that CARTA charter buses failed to stop at regular stops where the general public would ordinarily board the buses; that the general public was denied service on buses used to provide charter service; that special routes were operated to provide charter service that were different from regularly scheduled routes; and that the service provided was not regularly scheduled, open door, and available to the public in general.

FTA accepted the complaint after determining that the complaint was not without obvious merit and on April 13, 2006, advised both parties to attempt to conciliate the dispute in accordance with 49 C.F.R. §604.15. By letter dated June 21, 2006, complainant advised that the conciliation efforts had failed and provided documentation in support. By letter dated June 26, 2006, FTA directed both parties to proceed with the formal complaint process.

THE COMPLAINT

The Motorcoach Association of South Carolina is an association representing private, for-profit charter operators engaged in the business of providing charter and other transportation services in and about the State of South Carolina. By letter dated April 7, 2006, complainant filed this complaint with the FTA alleging that the services in question are a form of prohibited charter service. Specifically, complainant alleges that the respondent provided impermissible charter services by providing transportation services for SEWE attendees for a period of three days beginning on February 17th and ending February 19th in the City of Charleston, South Carolina. According to the complaint, the respondent failed to determine the willing and able status of area private operators prior to providing the services in question; that there were willing and able private operators available to provide the services; and that respondent engaged in violations of 49 CFR Part 604 by utilizing Federally funded equipment in illegal competition with the complainant. Complainant bases its complaint upon the allegation that the services provided by respondent were not open to the general public; that the buses in question did not stop at regular stops; that members of the general public could not board the buses, pay a fare, and ride the buses; and that the buses were for the exclusive use of SEWE attendees.

Complainant offered the following observations:

> Despite four attempts to board buses and pay a fare, the drivers would not accept fares and insisted the buses were for Southeastern Wildlife Exhibition attendees only.
>
> The Southeastern Wildlife Exhibition buses did not stop at regular stops ("our observers flagged them down in the middle of the road"). It was later discovered CARTA/Southeastern Wildlife Association had portable signs around town to identify pick-up/drop off points.
>
> "Our observers experienced great difficulty in finding a regular route bus".
>
> CARTA/Southeastern Wildlife Exhibition furnished a special brochure for the three day event. The brochure offered a telephone number to call for assistance. When the number was called to advise of difficulty in getting on a scheduled bus, the caller was informed that the buses in question were charter buses available only to Southeastern Wildlife Exhibition attendees.

Observers were advised by "regular route bus drivers" that although the Southeastern Wildlife Exhibition buses were running on roads generally designated as "routes", they were running in the opposite direction of the "regular route buses".

THE RESPONSE

Complainant's complaint was forwarded to the respondent for response by letter dated June 26, 2006. On July 25, 2006, CARTA filed its response. The respondent alleges that the service complained of did not constitute an exception to 49 U.S.C. §5323(d) or the charter regulation as set forth at 49 CFR Part 604 and that the service provided was, in fact, mass transportation service in that (1) it was under CARTA's control, (2) that it was designed to benefit the public at large, and (3) that it was open to the public and not closed door.

Respondent represents that in November of 2005, it was contacted by the SEWE to request charter service for some 40,000 SEWE participants attending a three day event in downtown Charleston. CARTA advised SEWE that it could not provide the requested charter service. At a later date, SEWE again contacted CARTA and inquired about transportation services that CARTA could provide. On December 1, 2005, CARTA responded that it could provide open door service to SEWE attendees as well as to the public in general and that in providing such service, it would allow any member of the public to board its vehicles when in service for a regular fare.

CARTA subsequently agreed to supplement its existing downtown route system to accommodate the SEWE event in return for a one-time payment by SEWE to CARTA for $23,775. Special SEWE badges were then issued to SEWE participants (apparently through SEWE) who were allowed to board CARTA buses utilizing the badge as a "pass" valid for all service provided by CARTA in its service area as well as the downtown supplemental service.

CARTA prepared pamphlets addressing this supplemental service making them available to the public through various public outlets. The service was advertised in local newspapers and other media services including approximately 72 hotels, CARTA ticket sales outlets, and CARTA buses.

In addition to these public announcements, CARTA instructed Veolia Transportation Services, Inc. ("Veolia"), its fixed route service provider, to inform all drivers that the supplemental service was open to all regular fare-paying passengers as well as the SEWE badge holders. CARTA requested that Veolia's dispatchers make frequent "all call" reminders to drivers throughout the three-day event. CARTA maintains that Veolia posted notices to this effect and distributed memos to each driver of the supplemental service on each day of the event and made frequent radio announcements to drivers.

CARTA concludes that the service complained of was indeed mass transportation in that it was under the control of the recipient, that the service was designed to benefit the public at large and not some special organization, and that the service was open to the public and not closed door. CARTA notes that it refused to provide exclusive charter service when contacted by SEWE; that it controlled the service by establishing the route, rate and schedule and decided what equipment would be used; that the service was open to all members of the public including the influx of visitors to the Charleston Center, Charleston's downtown convention center and the primary site of the SEWE event; and that the service was not "closed door" but rather open to anyone who wished to avail themselves of the service.

THE REBUTTAL

On July 27, 2006, complainant was advised by FTA that respondent's response to the complaint had been received and in accordance with 49 C.F.R. §604.15(d), was provided 30 days from receipt of this notice to provide a rebuttal. On August 10, 2006, complainant provided its rebuttal to FTA. In its rebuttal, complainant reasserted its previous allegations and maintained that CARTA simply "dressed-up" charter work to appear as mass transportation.

Complainant further maintained that the service provided was not "open-door", that the respondent never intended it to be, and that federally funded equipment and facilities should not be used to compete unfairly with private charter operators. Furthermore, the complainant argued that previous rulings issued by FTA and cited by the respondent fail to recognize the "actual implementation" of the service a federal recipient may have under consideration. In summation, the complainant requested a ruling from FTA finding the respondent in violation of the charter rule and requested that an evidentiary hearing be held if necessary.

On August 17, 2006, FTA acknowledged receipt of the complainant's rebuttal but requested additional information in accordance with 49 C.F.R. §604.15(f). In that letter, FTA noted that the issue, as presented by the complainant, was not whether the respondent could supplement existing fixed route service to accommodate the need for additional service within the confines of the charter rule, but rather whether the actual implementation of that service resulted in transportation services reserved for an exclusive group. FTA noted that the respondent provided documentation in its response, as outlined previously, which might lead one to find that the implementation and operation of the service was open door and not exclusive to a specific group of riders. The complainant was requested to provide similar documentation supporting its assertion that the actual implementation and operation of the service was limited to an exclusive group of riders.

Because FTA had not received a response to its letter of August 17, 2006 within the 30 day response time provided, FTA contacted the complainant on September 20, 2006 to determine if a response was forthcoming. Complainant responded by e-mail that FTA's letter had been delayed in delivery but maintained its previous position that the

respondent had provided impermissible charter service and that the service was not open to the general public. Due to the delay in receiving FTA's letter of August 17, 2006, an additional week was offered to the complainant for response.

A final rebuttal was received from complainant by letter dated September 27, 2006. Although complainant failed to provide additional evidence in support of its allegations, an informal evidentiary hearing was again requested. Complainant furthermore requested that should FTA deny this request, that it withhold any rulings to avoid prejudicing "inevitable court proceedings" and that FTA refrain from affording CARTA any directions and/or advise in this or any related matters.

DISCUSSION

The purpose of the complaint process set forth at 49 C.F.R. §604.15 is to allow interested parties, who believe that a recipient is in violation of the requirements of the charter rule, to submit a written complaint to the FTA Regional Administrator outlining their complaint. Should the complaint be accepted, the complainant and respondent are required to provide written evidence in support of their positions. Upon a review of the written evidence, the Regional Administrator may decide to issue a decision on the evidence received, request additional information if he or she determines additional information is necessary, and/or hold an informal evidentiary hearing.

In this instance, written evidence was provided by both parties in the form of the complaint itself, letters and memorandums detailing the failed conciliation process, respondent's response to the complaint, and rebuttals filed by complainant. Complainant was provided additional opportunities to supplement its rebuttal and over 30 days of time extensions were authorized for complainant to provide additional evidence. This evidence may have included sworn written testimony, affidavits detailing events, times, names, etc., or any other documentation complainant may have believed would support its assertions. We believe that sufficient time has been provided over the past six months for both parties to submit documentation in support of their positions and that the record speaks for itself. As such, we believe that the additional time necessitated by such a hearing would be unwarranted as ample opportunity has already been provided to present substantive evidence. An informal evidentiary hearing is accordingly denied. This decision is the prerogative of the Regional Administrator and within his or her discretion pursuant to 49 C.F.R. §604.15(g).

Complainant has also requested that should an evidentiary hearing be denied, that FTA withhold issuing a decision on this complaint and that it refrain from affording the respondent any directions and/or advise in this or any related matters.

FTA is compelled to adhere to the charter complaint process as set forth in regulation at 49 C.F.R. §604.15. That process mandates that the Regional Administrator, upon receipt of a complaint, review the evidence received and prepare and issue a written decision upon completion of the investigation. Should the Regional Administrator determine that a violation of the rule has occurred, such remedies as the Regional Administrator may

find appropriate shall be ordered. FTA will not abrogate its responsibilities to comply with its regulatory mandates. Because the complainant has not withdrawn its complaint, complainant's request that FTA withhold issuing a ruling in this matter and refrain from affording the respondent any direction/and or advise in this or any related matter is denied.

A review of the complaint and an analysis of its application to the charter rule is now provided.

DEFINITIONS

The foundation of this complaint is whether the service provided by the respondent during the three-day SEWE event constituted "mass transportation". The complainant argues that the service provided was charter service in violation of 49 C.F.R. Part 604. The respondent asserts that it merely modified existing mass transportation routes to accommodate the influx of riders generated by the SEWE event and that the service provided constituted mass transportation.

The Federal transit laws define mass transportation as transportation that provides regular and continuing general or special transportation to the public. 49 U.S.C. §5302(a)(7). The FTA has articulated several standards which assist in further defining mass transportation.

> First, mass transportation is under the control of the recipient. Generally, the recipient is responsible for setting the route, rate, and schedule, and deciding what equipment is used. Second, the service is designed to benefit the public at large and not some special organization such as a private club. Third, mass transportation is open to the public and is not closed door. Thus, anyone who wishes to ride on the service must be permitted to do so.

52 Fed. Reg. 11920

In contrast, the definition of charter service as set forth at 49 C.F.R. §604.5(e) provides as follows:

> ...transportation using buses or vans, or facilities funded under the Acts of a group of persons who pursuant to a common purpose, under a single contract, at a fixed charge...for the vehicle or service, have acquired the exclusive use of the vehicle or service to travel together under an itinerary either specified in advance or modified after having left the place of origin.

Charter service is usually thought of as a one-time provision of service and the user, not the recipient, has the control of the service. 52 Fed. Reg. 11916, 11919 (April 13, 1987).

CHARTER SERVICE OR MASS TRANSPORTATION

FTA has previously stated that a balancing test must be applied to determine the nature of the service involved in any complaint filed with FTA since, as the preamble to the charter regulation points out at pages 11919-20, there is no fixed definition of charter service, and the characteristics cited by FTA are not exhaustive, but merely illustrative. Seymour Charter Bus Lines v. Knoxville Transit Authority, TN-09/88-01 (November 29, 1989); California Bus Association v. Sacramento Regional Transit District, (Charter Complaint #2003-01, August 5, 2003). As a result, FTA will consider the following elements of the service provided to determine whether the service constituted charter service or mass transportation.

Was the service provided by CARTA under its control or a third-party? Who determined and established the routes, rates, schedules, and equipment to be used?

A review of the evidence submitted reveals that in November of 2005, SEWE contacted the respondent to determine if charter service could be provided for attendees at the SEWE Exhibition to be held in Charleston in February of 2006. The respondent advised that it could not provide the requested charter service. When contacted later that same month by SEWE to determine what other forms of transportation might be provided, respondent advised that it could provide supplemental open door service available to the public in general. (Affidavit of Christine Wilkinson, Tab 7 to respondent's response dated July 25, 2006). On December 1, 2005, the respondent submitted a proposal to SEWE outlining the numbers of vehicles and hours of service it felt necessary to meet SEWE's needs for a fixed price of $23,775. (Exhibit C, Tab 7 to respondent's response dated July 25, 2006). It also stated that while the respondent felt the proposed service would meet the needs as requested by SEWE, the service proposed would continue to be open to any member of the general public who wished to ride for the regular fare. Individuals holding a SEWE badge would be allowed to use the supplemental service, as well as all other service operated by respondent, by showing their SEWE attendance badge.

These facts are uncontested. Clearly SEWE did not control the modification of the existing service, mandate the fares to be charged, select the equipment to be utilized in providing the service, or determine who was eligible to utilize the service. Nor did the acceptance by the respondent of "SEWE passes" signify or constitute charter service. See California Bus Association, supra at 5 and Gray Line Seattle v. King County Metro: Seattle Home Show, WA, Decision, February 11, 2005 where FTA relied upon the Q&A No. 27(a) to 52 Fed. Reg. 42248 and found that whether fares are collected from individuals or the cost of service is subsidized by a donor does not determine whether bus service is charter.

We note in addition that the agreement between the respondent and SEWE is not a "single contract" as that term is used in the definition of charter service because the respondent's control of the transportation was not significantly diminished by the terms of the agreement. In fact, the record supports that the respondent, not SEWE, determined

the level of service required, what number of buses that would be used, what type of buses would be used, what schedules would be operated, and who was allowed to use the service. Moreover, with respect to the fee charged to SEWE for the transportation, the record reflects that the respondent, not SEWE, established and determined those costs based upon its estimation of hours of use, numbers of buses, and ridership.

The evidence submitted supports respondent's contention that it controlled the service in question.

Did CARTA design the service to benefit the public at large or was it designed specifically to benefit attendees of the Southeastern Wildlife Exhibition?

FTA has previously stated that service is designed to benefit the public at large when it serves the needs of the general public, instead of those of "some special organization such as a private club." 52 Fed. Reg. 11920 (April 13, 1987). The charter regulation requires that for service to be considered as mass transportation, riders outside a target group of customers must be eligible to use the service. Annett Bus Lines v. City of Tallahassee, FL-TALTRAN/90-02-01 (April 28, 1992). In Desert Resorts Transportation v. SunLine Transit Agency, CA, Decision, 2002-07, January 3, 2003, FTA found that a film festival route was designed to interconnect with SunLine's (the grantee's) regular fixed-route and that all four theater venues could be accessed on SunLine's regular service. SunLine press releases indicated the film festival shuttle was conveniently timed to connect with SunLine's regular service to allow for a full day to enjoy viewing world class films, shopping or dining. FTA found that the festival-goers were not a sufficiently defined enough group to be considered a "private club" and although the service may have accommodated them primarily, it was not restricted to their exclusive use but was available to anyone wishing to board it.

In Gray Line Seattle, supra at 8, FTA found that the Metro Home Show bus service was designed to be open to the general public. No reservations were required to ride the service. Moreover, FTA determined that the service provided over 6,900 trips assisting in alleviating traffic and parking congestion to and around the Home Show site, and therefore benefited the public in general. FTA also relied on Blue Bird Coach Lines, Inc. v. Linton, 48 F.Supp. 2d 47 (DC Dist. Co. 1999) in addressing whether the service was designed to benefit the public at large. In Blue Bird Coach Lines, it was alleged that a recipient's bus shuttle service to carry passengers from the Rochester area to football and basketball games in Buffalo (150 miles round trip) and Syracuse (190 miles round trip) from designated departure areas to the stadium parking lot for the games and departed after the games ended or when all passengers were accounted for, was charter service. In rejecting this claim the Court stated:

> Granted that sports fans are not the general public but a "subset of the general public," A.R., "the service is designed so that anyone can board the bus, no reservations are required and, according to the brochure, fares are paid as you board." There is no evidence in the record that the shuttle service customers formed a "well-defined and cohesive enough group to be considered a 'special

organization"" 48 F.Supp. 2d at 51.

And finally, in California Bus Association, supra at 6, FTA found that:

> While the service is designed to accommodate the State employees primarily, it is not restricted to their exclusive use, but is available to anyone wishing to board; moreover, this service has been integrated into RT's larger route structure, providing greater transportation connectivity in the downtown area for riders of the fixed route system.

The supplemental service provided by respondent was clearly designed to accommodate SEWE attendees primarily but was it restricted to their exclusive use? The service, as described by respondent, was intended to be available to anyone wishing to board the service as evidenced by the respondent's e-mail to SEWE on December 1, 2005 which advised that in providing the requested service, it would allow any member of the public to board its vehicles when in service for a regular fare. But to determine whether the service provided was actually restricted to an exclusive group, we must now ask the following question:

Did the actual implementation and operation of the service by CARTA result in transportation services reserved for an exclusive group?

In determining whether service is truly "open door", FTA looks both at the level of ridership by the general public, as opposed to a particular group, and at the intent of the recipient in offering service. The intent to make service open door can be discerned in the attempts to make the service known and available to the public. FTA thus takes into account the efforts a recipient has made to market the service. Generally, this effort is best evidenced by publication of the service in the recipient's preprinted schedules. Washington Motor Coach Association v. Municipality of Metropolitan Seattle, WA-09/87-01 (March 21, 1988). FTA has also interpreted "open door" to mean a substantial public ridership and/or an attempt by the transit authority to widely market the service. Blue Grass Tours and Charter v. Lexington Transit Authority, KY, Decision, May 17, 1988. The posting of bus stop signs and connections to other transportation routes are also considered indicators of "opportunity for public ridership." Seymour, supra at 9. The recipient is not required to make all of these efforts in order to have manifested the intent to make service open door.

Respondent has stated that it designed and modified its regularly scheduled service in order to provide open door, and thus mass transportation service, to the public at large as well as the SEWE attendees. When asked by SEWE if it would provide charter service during the event, CARTA replied that it could not but offered to provide the modified service so long as it was open to the general public at the regular fare. (Affidavit of Christine Wilkinson, Tab 7 and e-mail dated December 1, 2005, Tab 8 of respondent's response). The respondent marketed the modified service by preparing pamphlets describing the supplemental service and distributed the pamphlets at various public outlets including approximately 72 hotels and CARTA ticket sales outlets. It also

published the pamphlet in local newspapers and other media services and distributed the pamphlets on buses. (Affidavit of Christine Wilkinson, supra). Finally, respondent gave specific instructions to its service provider, Veolia, that the supplemental service was to be open to all persons and that regular fare-paying passengers were to be accepted as well as the SEWE badge holders on the supplemental service. (E-mail dated February 16, 2006, Tab 10 of respondent's response). Veolia informed its bus drivers that the supplemental service was open door and available to the public, posted notices to this effect, distributed memos to each driver of the supplemental service on each day of the event, and made frequent radio announcements to drivers. (Affidavit of Virginia Stevens, Tab 11 of respondent's response).

A review of the evidence submitted reveals however that the actual implementation and operation of the service resulted in service that was reserved for an exclusive group. A review of respondent's Exhibits D and E, Tab 7 of respondent's response, attached hereto, is instructive. Exhibit D is the pamphlet described above which was distributed at various public outlets including hotels and grocery stores as well as on the buses themselves. Exhibit E is a copy of the "notice" published in local newspapers. Both publications are directed specifically at SEWE attendees. Exhibit D portrays the SEWE logo on it front page and lists the dates of the exhibition. Shuttle schedules are listed in the pamphlet by day, hour, and location. The pamphlet welcomes attendees to Charleston and encourages them to ..."take advantage of CARTA" and advises them that ..."CARTA buses are available and free for all SEWE ticket and badge holders". A map and legend depicting the routes and points of interest is also provided. Exhibit E, which was published in local newspapers, again depicts the SEWE logo and provides a list of SEWE activities available to attendees at the SEWE event. The notice states that by showing the Southeastern Wildlife Expo badge/pass during the exhibition that participants could ride CARTA's entire system for free.

In addition to the publication of the pamphlet and notice, buses providing the supplemental SEWE service carried destination signs that read "SPECIAL". Black and white placards placed on the bus window read "Southeastern Wildlife Expo". Route numbers and destinations were not listed on the destination signs or sign boards. Sandwich boards (signs) were placed at several CARTA bus stops, in addition to a few locations that were not regular CARTA bus stops, near Marion Square, and read "Southeastern Wildlife Exposition Bus Stop".

Finally, FTA reviewed respondent's "Daily Route Summary Report" for each day the supplemental service was provided, i.e. Friday, February 17 – Sunday, February 19, 2006. The supplemental service or "SEWE" route was designated "Route 306" for purposes of the report. On Friday, February 17, 3,252 riders used route 306. Of those, 3,207 were SEWE riders. On Saturday, February 18, 5,310 of 5,358 riders using route 306 were SEWE riders. And on Sunday, February 19, 1,669 riders used route 306, 1,651 of which were SEWE riders. (See attached Daily Route Summary Reports). On average, members of the general public which used the supplemental service constituted approximately 1.11% of all riders to use the service during the SEWE exposition.

As stated previously, in determining whether service is truly "open door", FTA looks at several factors including attempts made by the recipient to make the service known and available to the public. As previously noted, this effort is best evidenced by publication of the service in the recipient's preprinted schedules. Washington Motor Coach Association, supra at 10. Although respondent published a pamphlet and distributed it at various locations throughout the city in addition to publishing a notice in local newspapers, respondent failed to amend its preprinted schedules to include the supplemental service. This failure may not, in and of itself, have led us to conclude that the service was reserved for an exclusive group. However the context of the pamphlet and notice clearly targeted attendees of the SEWE exhibition. Nowhere was it stated that the service was open to the general public. The service was marketed separately from the regularly scheduled service and appeared to provide special or different service for SEWE attendees offering free rides "with your Southeastern Wildlife Expo Badge/pass." The printed pamphlet and notice was not printed as a supplement to the regularly preprinted schedule. It is not unreasonable for one to conclude that the service was to be provided only to SEWE attendees.

In addition, the posting of bus stop signs and connections to other transportation routes are also considered indicators of "opportunity for public ridership." Seymour, supra at 9. Respondent admits that destination signs and sign boards carried by the buses providing the supplemental service read "Special" and "Southeastern Wildlife Expo" and that separate bus stop signs which read "Southeastern Wildlife Exposition Bus Stop" were placed along the routes providing the supplemental service. Once again, one might reasonably conclude that the service provided by these buses was designated for SEWE attendees to the exclusion of the general public. FTA addressed a similar issue in California Bus Association v. SunLine Transit Agency, CA, Decision, February 10, 1997, wherein we determined that signage displayed on buses such as "Supplemental Service" and "Supplemental, Limited Service" was contrary to the notion that the service was open to the general public. FTA found that such signage was impermissible pursuant to 49 U.S.C. §5325(d) and that in order for the service to be considered open to the public, head-signs must display route numbers and destinations. California Bus Association, supra at 7.

Finally, ridership numbers provided by the respondent during the SEWE exposition suggest that regular riding members of the general public did not use the supplemental service, or at least to any extent. And while actual ridership by the general public does not necessarily indicate that the service was reserved to an exclusive group to the exclusion of the general public, we do believe it is a factor to be considered, along with all other factors, in determining whether the service was open door.

CONCLUSION

A review of the evidence has led us to conclude that the service was marketed, operated and provided in such a manner that might have caused one to believe that the service was not open door and available to the general riding public. We believe the ridership numbers support this conclusion. We therefore find that the actual implementation of the

service, whether intended or not, resulted in prohibited charter service. Prior to providing such service in the future, respondent will be required to submit documentation which establishes the manner by which the proposed service will be provided and marketed, and how signage on buses and bus stops will be displayed.

Paul T. Jensen
Regional Counsel

October 5, 2006
Date

Yvette G. Taylor
Regional Administrator

10-5-06
Date