BEFORE THE FEDERAL TRANSIT ADMINISTRATION

September Winds Motor Coach, Inc.,
And
Tecumseh Trolley & Limousine Service,
Complainants

Charter Service Complaint
No. 2004-09

v.

Toledo Area Regional Transit Authority
("TARTA"),
Respondent

Complaint.

TARTA provided improper charter service both to the parade and shuttle service from park-n-ride locations to the Mud Hens Stadium also known as Fifth-Third Field for the purpose of the National World War II Memorial Dedication on Saturday, May 29, 2004. Not all willing and able private charter providers agreed to such service and the private provider to whom TARTA leased buses still had capacity and any contract was at less than actual costs or alternatively not at the same cost offered to Tecumseh Trolley & Limousine Service.

Complaint History/Background/Facts

FTA conducted a triennial review of TARTA in July 2003, and found TARTA to be in violation of the charter rule, 49 CFR Part 604. FTA found that TARTA's willing and able determination notice was improperly worded, and TARTA was informed to cease and desist providing charter service until TARTA had properly gone through the willing and able determination process as required by 49 C.F.R. Section 604.11. TARTA ignored FTA's cease and desist order for three months and was ordered to cease and desist three times more before it finally obeyed the order.

Following the triennial review, FTA received additional complaints against TARTA. FTA required TARTA to develop a remediation plan to address charter violations and to ensure that TARTA was complying with the charter regulations. One of the conditions of the remediation plan was that TARTA seek FTA approval in advance of all TARTA direct charters and for leasing of TARTA vehicles and drivers.

TARTA's contact for advance approval was Regional Counsel, Nancy Ellen Zusman. This explains what complainant Tecumseh Trolley & Limousine Service ("Tecumseh Trolley") described in its letter of May 27, 2004: "I am really questioning how the FTA really fits into the mix. Seems you always know the moves ahead of time!" Indeed, FTA required TARTA to apprise FTA of its actions ahead of time so that FTA could enforce compliance with the charter regulation.

On May 18, Jim Gee of TARTA contacted Ms. Zusman by e-mail and asked to be allowed to use his excess vehicles on Saturday, May 29 to provide transportation of veterans in the parade for those unable to walk the entire route.

On May 19, Ms. Zusman responded by e-mail advising Mr. Gee that the request was charter service, which did not qualify for the special event exception to the charter rule, and that TARTA could not provide the service unless it reached agreement with all willing and able providers.

On May 25, 2004, Michael Schmuhl, Manager of Lakefront Lines, Inc, wrote to James Gee of TARTA indicating that Lakefront did not have any handicap accessible buses available for May 29, 2004 and that it would like to contract with TARTA in order to respond to Robert Schmitt, Chairman of the World War II Dedication Day Committee, who wanted to transport about 500 veterans on that date.

On May 25, 2004 Mr. Gee again e-mailed Ms. Zusman, requesting that TARTA be allowed to contract with Lakefront Lines for the instant event. Ms. Zusman replied by e-mail the same day advising that TARTA could supply accessible vehicles and drivers under the charter exceptions.

By separate letters dated May 27, 2004, complainants each wrote to Ms. Zusman asserting charter violations by TARTA.

September Winds Motor Coach, Inc. ("September Winds") indicated that it had not entered into an agreement to allow TARTA to provide transportation services for the instant event. September Winds complained that a lease between TARTA and Lakefront Lines was inappropriate because: (a) TARTA was not supplying only accessible vehicles; (b) TARTA was not charging its fully allocated costs because Robert Schmitt advised that "TARTA would do it for free."

Tecumseh Trolley indicated that it had not entered into an agreement to allow TARTA to provide transportation services for the instant event. Tecumseh Trolley complained that a lease between TARTA and Lakefront was inappropriate because: (a) Lakefront still had capacity as evidenced by Lakefront's response to a telephone inquiry from Mr. Pixley for 2-56 passenger buses at a price of $400 per day for May 29, 2004. (See Page 1 of the May 27 letter from Pixley to Zusman.) And, (b) TARTA deliberately referred Robert Schmitt, to a private provider that had only one bus so that it would have an opportunity to provide its busses to fill the lack of capacity of that private provider, Lakefront Lines, thus denying work to willing and able private providers, including Tecumseh Trolley.

On May 27, 2004, Ms. Zusman made inquiry by e-mail of Mr. Gee indicating that she was receiving complaints that TARTA was supplying park and ride service related to the instant event.

On May 28, 2004, Mr. Gee responded to Ms. Zusman by e-mail that TARTA made a decision to provide Mud Hens service (i.e. service from downtown where the field is located to certain park-n-ride locations) after a telephone conversation with Kim Danes of Rep. Kaptur's office. Mr. Gee indicates that he proposed the idea because "it was identical as our Mud Hens Park-N-Ride service. I didn't view it as charter as it is open to the public with the same fare structure serving the same location with no compensation outside of the fare revenue. Unlike a shuttle service we are transporting from our 13 established [stops at--sic] Park-N-Ride lots."

On June 10, 2004, FTA's Regional Office in Chicago notified Mr. Gee by letter of the charter complaints filed by September Winds and Tecumseh Trolley and requested that TARTA respond to the complaints.

By letter, dated July 6, 2004, Mr. Gee responded for TARTA. Mr. Gee indicated that: TARTA provided contact information for all seven willing and able providers to Mr. Schmitt and to Ms. Danes to see if these private providers would enter into an agreement to allow TARTA to provide service to the World War II Memorial Dedication Parade. Mr. Schmitt indicated to Mr. Gee on May 24 in a telephone conference that the private providers rejected such an agreement. Mike Schmuhl of Lakefront Lines contacted TARTA and indicated that Lakefront had 21 coach buses and none were accessible. TARTA provided service after FTA approved its lease of vehicles and drivers to Lakefront Lines. Regarding the Fifth-Third Field Park-N-Ride Service, Mr. Gee's letter indicated that: the Fifth-Third Field was the location of the simulcast of the dedication ceremony for the National World War II memorial. He repeated the argument from the May 28, 2004 e-mail. He further stated that there was no special pricing, routing, or preferential treatment given to any veterans group. He attached a copy of the May 25 press release announcing the service, the fare structure, and the park-n-ride locations.

[Note: the July 6, 2004 letter from TARTA also addresses the Jamie Farr Golf Classic. Since at the time of the May 27 complaint and even at the date of the July 6 letter, no service had been provided by TARTA to the Jamie Farr Golf Classic, the matter was not ripe for an administrative ruling. The complainants are free to file a subsequent complaint, if and when TARTA provides some service or enters a binding contract to provide such service.]

TARTA's response was provided to the Complainants.

Based on a memorandum to the file from Renee Wheeler, paralegal to Ms. Zusman, Ms. Wheeler called Mr. Tobis of September Winds regarding his rebuttal of the evidence submitted by TARTA. Mr. Tobis indicated that he was not submitting a rebuttal because FTA would not do anything about TARTA's violation of the charter rules.

Ms. Wheeler likewise had telephone contact with Mr. Pixley of Tecumseh Trolley and invited his rebuttal. On September 9, 2004, Tecumseh Trolley wrote that capacity was not an issue for Lakefront on May 29, 2004 and that Lakefront freely admitted the same. He further states that Lakefront does not normally do short local work according to Tom Goble, one of the owners of Lakefront. Lakefront normally does long hauls. Lakefront responded to Mr. Gee because by using TARTA's buses, Lakefront could lower its costs and make some money. Further, Mr. Pixley for Tecumseh states that TARTA gave Lakefront a different price than it gave to Tecumseh.

[Note: Mr. Pixley's letters contains possible other allegations not related to this particular complaint. Either Mr. Pixley for Tecumseh Trolley should repeat these allegations in a separate complaint, or the Regional Office should address the issues raised with TARTA, including: operation of trolley vehicles and a water taxi. These issues may be relevant to TARTA's overall compliance with its plan of remediation; however, they are not relevant to the instant complaint.]

On November 3, 2004, Ms. Zusman had a telephone conference with Ms. Kim Danes of Rep. Kaptur's office. She indicated that Lakefront agreed to do the event using TARTA vehicles because Lakefront did not have accessible vehicles. She explained that she was responsible for doing the event and had been very concerned about how they would be able to provide transportation for the veterans all of whom were elderly and many of whom were disabled.

By letter, dated November 22, 2004, the parties to this matter were advised that the file had been assigned to Regional Counsel Paula L. Schwach who would advise Regional Administrator Ettinger.

On November 23, 2004, Ms. Schwach had a brief telephone conference with Mr. Gee requesting a copy of the agreement between Lakefront Lines and TARTA and of the fully allocated costs for a bus. TARTA provided by e-mail an explanation of why it did not charge fully allocated costs to Lakefront Lines after admitting the same in a second brief telephone conference.

The Law.

49 USC 5323(d)(1) places restrictions on the provision of charter service by FTA grantees. Those restrictions are explained more fully in the implementing regulations, commonly referred to as the charter rule and found at 49 CFR Part 604. More specifically, 49 CFR 604.9(b)(2) allows an FTA grantee like TARTA to provide charter service if it:

"enters into a contract with a private charter operator to provide charter equipment to or service for the private charter operator if:

(i)The private charter operator is requested to provide charter service that exceeds its capacity; or

(ii) The private charter operator is unable to provide equipment accessible to elderly and handicapped persons itself."

In addition to meeting the requirements of an exception such as the one at Section 604.9(b)(2), all charter service must be incidental. Incidental is defined at Section 604.5(i) to mean service, which does not interfere with or detract from the provision of mass transportation service; or does not shorten the mass transportation life of the equipment or facilities.

Application of the Law to This Case.

The Parade. TARTA provided service to the parade under the exception found at 49 CFR 604.9 (b)(2). TARTA argued that it provided the service both because the need for service exceeded Lakefront Lines capacity and because Lakefront Lines was unable to provide accessible equipment needed by aged and disabled veterans. Because the regulation is disjunctive, it was only necessary for TARTA to meet one of these two requirements.

It is not clear that Lakefront Lines lacked the capacity. If Lakefront Lines had 21 coach-sized buses as TARTA claims, and each held 56 persons as the complainants aver, then Lakefront could have provided service for more than 500 persons—the number to be served. Neither party refutes this possibility in its responses to FTA.

It is clear from Lakefront's letter that it did not have enough accessible vehicles. It is not clear that TARTA supplied vehicles in fact that were accessible for the parade.

The service was provided on Saturday and did not interfere with regularly scheduled service. Assuming for purposes of argument that TARTA did provide accessible buses for the parade, then the question is whether the service shortened the mass transportation life of the buses provided. If TARTA recouped its fully allocated costs for hourly operation of a bus and the mileage related to the service were deducted from the mileage constituting the useful life mileage of the bus, then the service did not shorten the mass transportation life of the buses and, given the other facts, met the definition of incidental charter service.

In response to Ms. Schwach's request for the contract and fully allocated costs of November 23, TARTA admitted that it did not charge fully allocated costs to Lakefront Lines. TARTA indicates that it believed it had to recover fully allocated costs annually instead of trip by trip. TARTA claims that it discovered its error in July when Ms. Zusman, unrelated to this particular instance, e-mailed TARTA advising TARTA of the law. (See e-mail attached hereto.) Given this admission, it is clear that the charter service to the parade was not incidental and therefore was improperly provided in violation of the charter rule.

The Park-N-Ride Service. The bus service provided by TARTA from downtown at the Fifth-Third Field to the designated park-n-ride lots extended the Mud Hens (minor league baseball) service by one day. This service was advertised by press releases and event public relations. The service was open to the general public and each person paid the regular bus fare for such service. TARTA was fully in control of the routes and the method of operation. While the event is one that occurs irregularly, the service was routinely provided to these particular locations. This service meets the definition of mass transportation and is not illegal charter service.

Decision

TARTA's provision of buses to Lakefront Lines for the parade, which was part of the National World War II Memorial Dedication on Saturday, May 29, 2004, constituted a violation of TARTA's remediation plan and illegal charter service.

TARTA's provision of the park-n-ride service was mass transportation and allowable.

Remedy

Because of TARTA's past history of failure to comply with the Part 604, FTA finds it necessary to require TARTA to submit each future request under the remediation plan in writing. To the extent that service is predicated on 49 CFR 604.9(b)(2), this writing should include: the request from the private provider for lease of equipment and/or drivers, the written contract with the private provider, and the recitation of fully allocated costs. Further, with the first such submission, TARTA shall supply is calculation of fully allocated costs. This cost may be based on operational costs average for the current year (whether that be a fiscal year or a calendar year). Should the remediation plan be in place and the year ends, then TARTA shall again submit its calculation of fully allocated costs. Using such an annual average should not be confused with charging a fully allocated cost for each individual charter trip.

Submitted: November 24, 2004

By: Paula L. Schwach

Paula L. Schwach, Regional Counsel, TRO-07

Approved: Donald Simmonds (for)

Joel P. Ettinger, Regional Administrator, TRO-05