BEFORE THE FEDERAL TRANSIT ADMINISTRATION

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

Charter Service Complaints
No. 2004-16 and 2004-18

v.

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

Complaint.

TARTA provided improper charter service to the Historical Society of Grand Rapids Ohio on October 10, 2004 for a festival event known as the Applebutter Festival, an annual event. Specifically, TARTA provided shuttle service from park-n-ride locations to the festival location. TARTA violated the accessibility and capacity exemption because Lakefront Lines, Inc. ("Lakefront") had vehicles available to provide service on this date, including some accessible buses.

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. Ms. Zusman verbally approved the use of vehicles under a charter exception for this

service based on verbal representations from Mr. Jim Gee that Lakefront lacked adequate vehicles to provide the service and based on receipt of a facsimile from Mr. Jim Gee of TARTA, dated 9-3-04, and including as an attachment a letter from Lakefront, dated September 3, 2004, addressed to Mr. Gee stating: "Lakefront does not have the capability to handle this request, as we do not have the equipment available to do this job and agree to pay TARTA's charter rate of $75.00 per hour."

On September 10, 2004, Lakefront entered into a one-page contract with the Historical Society of Grand Rapids, Ohio, to supply a total of eight buses to perform shuttle service on October 10, 2004 with the route to be provided by the Historical Society. The contract did not specify accessible buses or otherwise describe the vehicles to be supplied. Caroline Erdody was listed as the contact person for the Historical Society although the Treasurer of the Society (Bachman) signed the contract.

By separate letters, each undated and marked "Sent Via Fax", complainants each wrote to Ms. Zusman asserting charter violations by TARTA. From other correspondence referencing these complaints, it is clear the complaints were received sometime between October 10 and October 20, 2004.

September Winds Motor Coach, Inc. ("September Winds") indicated that the lease between TARTA and Lakefront Lines was inappropriate because Lakefront had vehicles available on this date. Lakefront amended its complaint to ask for financial compensation from FTA or from TARTA. It is unclear if what is being requested is disgorgement of the fees from this particular violation or from the history of violations. The contract amount with Lakefront for the Applebutter Festival was $6880.

Tecumseh Trolley complained that a lease between TARTA and Lakefront was inappropriate because Lakefront still had capacity; it only created "an illusion about capacity." Tecumseh Trolley also complained that TARTA dealt directly with the Applebutter committee and not with Lakefront, which only signed the contract. Tecumseh complains that door configuration is not a basis for a capacity exception. Finally, Tecumseh Trolley complains that FTA's approval resulted in denying work to willing and able private providers, including Tecumseh Trolley.

On October 20, 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 November 18, 2004, Mr. Gee responded for TARTA on Complaint No. 2004-18 from Tecumseh Trolley. Mr. Gee indicated that: Lakefront Lines contacted TARTA and indicated that Lakefront did not have enough vehicles to provide the service. He indicated that the local Lakefront office had only 21 vehicles. TARTA provided service after FTA approved its lease of vehicles and drivers to Lakefront Lines.

By letter, dated December 7, 2004, Mr. Gee responded for TARTA on Complaint No. 2004-16 from September Winds with essentially the same defense. He also asserted that

TARTA dealt only with Lakefront and did not negotiate directly with representatives of the Grand Rapids Applebutter Festival. He also indicated that he did not have any discussions with any party regarding the provision of dual door capacity vehicles for the festival. He asserted that TARTA had no knowledge of the basis for this complaint.

In mid-December, 2004, the file related to this Charter Complaint was assigned to Regional Counsel Paula L. Schwach who would advise Regional Administrator Ettinger.

TARTA's response was provided to the Complainants by letter dated January 13, 2005.

On January 13, 2005, Ms. Schwach had a telephone conference with Ms. Caroline Erdody, the contact person listed on the Lakefront contract. Ms Schwach confirmed the statements made by Ms. Erdody in the telephone conference by e-mailing a summary of the same to Ms. Erdody on January 13, 2004. On January 14, Ms. Erdody e-mailed a confirmation of the content. The e-mails are attached hereto. Ms. Erdody confirmed that TARTA performed its shuttle services prior to the October 2004 festival. Because of complaints against TARTA, Ms. Erdody knew that TARTA could not provide the service for the 2004 festival. Ms. Erdody called some charter providers from the Toledo phonebook. In these calls, Ms. Erdody indicated that she required a bus that had both a rear and a front door for speed of access and egress and did not want an over-the-road bus. Ms. Erdody acknowledged a telephone inquiry from a charter provider and later recalled that this provider was Casino Tours (also known as September Winds Motor Coach).

On February 1 FTA received September Winds' rebuttal of TARTA's response. See letter dated January 28, 2005 from Steve Tobis to Regional Counsel Schwach. Mr. Tobis alleges in his rebuttal that TARTA suggested the use of Lakefront to Ms. Erdody.

Counsel provided Mr. Gee of TARTA with a copy of the January 28 rebuttal letter and Mr. Gee promptly faxed a reply to the rebuttal claiming that he had no contact with Ms. Erdody regarding the 2004 Applebutter Festival and that all contacts were through Lakefront.

On February 22, Counsel Schwach received a voice mail message from Mr. Steve Pixley of Tecumseh Trolley making inquiry as to whether he had timely provided a rebuttal; he had not.

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 Applebutter Festival Charter Service. TARTA provided service to the festival under the exception found at 49 CFR 604.9 (b)(2). TARTA argued that it provided the service because the need for service exceeded Lakefront Lines capacity. It is not clear that Lakefront Lines lacked the capacity. TARTA never asked for verification of or looked behind the assertion that Lakefront lacked the equipment to do this job on this day. TARTA never asked the question "Why does Lakefront lack capacity?" Neither Complainants nor TARTA in their responses or rebuttals to FTA provides clear proof of Lakefront's capacity or lack thereof. Ms. Erdody and Mr. Tobis of September Winds Motor Coach have different recollections of their conversation, and Counsel is unable to determine if steering to Lakefront clearly occurred. This is not however, a necessary fact.

It is clear from Lakefront's letter that it asserted that it lacked the equipment to do this job. However, it is also clear from Regional Counsel Schwach's telephone conference with Caroline Erdody that the equipment sought from private charter providers was expressly dual-door buses. Ms. Erdody claims that Lakefront was the first private charter provider who she contacted by telephone that indicated it could provide a dual-door bus so she contracted with Lakefront and looked no further.

49 CFR 604.9(b)(i)—the exception relied upon in this case—does not allow for a distinction between buses based on door configuration. The fact that the Historical Society preferred a dual-door bus for speed of access and egress so that it could reduce the number of buses needed to promptly serve the anticipated shuttle users is not relevant to whether Lakefront in fact lacked capacity. The demand for dual-door buses, however, did chill the outreach/results of the telephoning done by Ms. Erdody.

Given the nature of the relationship between the Historical Society/Arts Council and TARTA, i.e., the Applebutter festival had always used TARTA to provide the shuttle service until 2004, it is disingenuous that there was no contact between anyone at TARTA and anyone related to the event. Ms. Erdody would not have known that there

were charter complaints against TARTA and that this was the reason TARTA could not provide the 2004 service absent some contact between parties engaged in the production of the Applebutter Festival and TARTA representatives. It is also disingenuous that TARTA did not know that Lakefront wanted TARTA buses because of the Historical Society's preference for dual door buses. However, even assuming that TARTA did not know, TARTA had a clear responsibility to perform some reasonable amount of due diligence to determine why Lakefront lacked capacity, i.e., were all its buses were engaged and/or did it need accessible equipment and all its accessible units were already under contract? But TARTA raised no questions despite its responsibility to determine if the request from Lakefront met the criteria of the instant charter exception.

Even the contract itself appears to assume that a party knowledgeable about the Applebutter Festival is providing the real service. It contains no description of the route and has no map of the park-n-ride locations from which the shuttle service would operate. Such a description would be unnecessary, if the service were provided by TARTA drivers who had provided this service annually for years.

The service was provided on Saturday, and no party claims that the service interfered with TARTA's regularly scheduled service. TARTA recouped its fully allocated costs for hourly operation of a bus--$75.00 per hour. And, assuming that 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.

Decision

TARTA's provision of buses to Lakefront Lines for the Applebutter Festival's shuttle service constituted a violation of TARTA's remediation plan and illegal charter service.

Remedy

TARTA's past history of failure to comply with the Part 604 is blatant. Most recently in Charter Decision 2004-09, FTA found it necessary to require TARTA to submit each future request under the remediation plan in writing and to specify certain terms to be contained in the writing. FTA now further elaborates on those terms and also requires a specific statement from the lessee of TARTA equipment and/or drivers explaining the reason for their lack of capacity on a particular date. FTA however feels that this is not a sufficient remedy because of the continuing pattern of violation on the part of TARTA. FTA recommends that TARTA consider paying each aggrieved party half the fee earned or $3,440. Therefore, FTA reserves a decision on further remedy for 30 days while TARTA considers voluntary disgorgement of the $6880 fee earned for the leasing of FTA funded equipment to Lakefront in this instance. FTA requests that TARTA advise

the Regional Administrator no later than March 30, 2005 by a writing as to its decision. FTA will consider additional imposition of remedies available to it on or about March 30, 2005. FTA will advise TARTA in writing if it decides to impose additional remedies at that time.

Submitted: February 24, 2004

By: Paula L. Schwach

Paula L. Schwach, Regional Counsel, TRO-07

Approved: Joel P. Ettinger

Joel P. Ettinger, Regional Administrator, TRO-05