BEFORE THE FEDERAL TRANSIT ADMINISTRATION

United Limo, Inc.,
Complainant

v.

Charter Complaint
49 U.S.C. Section 5323(d)

South Bend Public Transportation Corporation,
Respondent.

DECISION

Summary

On September 13, 1999, United Limo, Inc. ("Complainant") filed a complaint dated August 31, 1999, with the Federal Transit Administration ("FTA") alleging that South Bend Public Transportation Corporation ("Respondent") is providing a service in violation of FTA's charter regulation, 49 Code of Federal Regulations (C.F.R.) Part 604. The service specifically complained of pertains to Respondent's bus service to the Notre Dame/St. Mary's Complex located in South Bend, Indiana. Respondent filed an answer dated December 22, 1999. Complainant filed a response on February 4, 2000. Respondent filed additional information on March 13, 2000, and Complainant responded on April 18, 2000. Upon reviewing the allegations in the complaint and the subsequent filings of both the Complainant 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.

Complaint History

Complainant filed its complaint with the FTA on September 13, 1999.[1] The complaint alleges that the Respondent is providing illegal charter service[2] by providing private charter service for the University of Notre Dame Du Lac and St. Mary's (collectively referred to as the "schools")[3] beginning on August 23, 1999. Specifically, Complainant alleges that this service is not open to the public because: (1) the service is to provide shuttle service among the schools; (2) the service is pursuant to a contract between the schools and the Respondent; (3) the service is on private property that is gated and secured; (4) the schools are billed for the service on a monthly basis; (5) hours of operation are prescribed by the schools; (5) the schedule for the service is to be

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[1] Complainant filed its original complaint on August 31, 1999, with the Michiana Area Council of Governments ("MACOG"). On September 29, 1999, MACOG filed a Motion to Dismiss with the FTA. MACOG contends they should not be a party to this action because they do not handle federal funds for the Respondent as the Complainant alleges in their complaint. MACOG in their Motion to Dismiss correctly points out that Respondent is a direct recipient of federal funds from the FTA; the funds do not pass through MACOG. FTA agrees with this factual assertion and dismisses MACOG as a party to this complaint.

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

[3] The Respondent is also providing service to Holy Cross College, but it is not a signatory to the agreement.

distributed by the schools (and the drivers); (6) collection of fares is at the discretion of the schools; and (7) Respondent agrees not to allow any advertising on the buses inconsistent with the missions of the schools. Complainant also asserts that Respondent entered into its agreement for charter service with the schools without giving the Complainant proper notice and an opportunity to offer its service. Complainant requested a cease and desist order or in the alternative a loss of federal funds.[4]

Respondent filed its answer on December 22, 1999. In it, Respondent denied that it was providing illegal charter service, and attached as an exhibit a copy of the agreement between itself and the schools dated November 22, 1999. Respondent asserts that its service is not illegal because it is offered to the general public. Respondent also claims their legal notice was posted prior to their entering negotiations with the schools. Respondent alleges that it consulted with FTA staff before providing the service.

Complainant responded on February 4, 2000. This reply reiterated the assertion that Respondent's service is an illegal charter operation and that Complainant was not provided proper notice for an opportunity to offer its own charter service. Complainant again requested a cease and desist order.

Respondent requested leave to file a further response on February 23, 2000, and subsequently filed a response on March 13, 2000. Respondent again claimed that the service is open to the public and attached a map of the service as an exhibit.

Complainant filed an additional reply on April 18, 2000. Complainant reasserted its prior position in its reply. It also addresses the references the Respondent makes to conversations with FTA employees as to the legality of the service being provided. Complainant asserts any opinions offered by FTA would be advisory not controlling.[5]

Discussion

As Complainant has accurately stated, recipients of federal financial assistance can provide charter service in very limited circumstances. 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). Complainant is not asserting that any of the charter exceptions apply, but rather that the service they are providing is not charter service.

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

[4] The Complainant has requested that MACOG withhold federal funds, but as previously indicated the Respondent is a direct recipient of federal funds from the FTA.

[5] Although Respondent makes assertions that it consulted with FTA staff regarding the legality of the service, Respondent provided no written documentation that it sought a formal legal opinion from the FTA. Any conversations with FTA staff would have been of a general nature, since it would be difficult to determine the type of service being provided without viewing the contract between the Respondent and the schools. Respondent did not provide a copy of the contract for FTA legal review until after the complaint had been filed.

> 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?

Each of these elements is discussed below. If Respondent's service includes each of these elements, then it is charter service. If it is charter service, a determination needs to be made as to whether it is permissible charter service.

A. Is this transportation service using buses funded with FTA money?

The Respondent receives federal money for its buses and its capital maintenance expenses. It is a publicly funded transportation service. Its primary source of funding is dollars it receives from the FTA. Respondent's purpose is to provide public transportation through a bus system. The buses it uses are purchased with federal money.

B. Is the service for a common purpose?

The Agreement dated November 22, 1999 (the "Agreement"), between Respondent and the schools[6] includes several relevant provisions, which relate to the question as to whether the service provided is charter service. The Agreement discusses that its purpose is to provide a public shuttle bus service between the University of Notre Dame campus, the Saint Mary's College campus, and the Holy Cross College campus. The service runs between the schools on private property owned by the schools, since the Agreement states that the schools grant Respondent the right to use their roads and highways for the shuttle service. The Agreement also states that the University of Notre Dame du Lac agrees to keep its key card controlled gate operational during the shuttle service. Since the campus is gated and the service runs on private property, the shuttle service is not open to the public.

C. Is it under a single contract?

The Agreement serves as the single contract for the shuttle service.

[6] The Agreement as previously indicated is between the Respondent and the University of Notre Dame du Lac and the Corporation of Saint Mary's College Notre Dame.

D. Is it for a fixed charge for the vehicle or service?

The Agreement states that Respondent will provide at least two buses on a daily basis to run the shuttle service between the schools during the hours of operation prescribed by the schools. The schools will determine the actual number of buses used and the days and hours of service. The schools will pay $32 per hour per vehicle during the hours the shuttle operates. The hours will include fifteen minutes in each direction for deadheading each bus between the Respondent's garage and the school campuses. Therefore, there is a fixed charge for the vehicle for which the schools will be charged.

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?

Under the Agreement, the Respondent shall set the schedule for the shuttle service during the hours set by the schools. The Respondent shall also set the routing. The schools and the drivers will distribute the schedule. The schools can decide to levy a fare at a later date, and then their billing for the shuttle service will be reduced accordingly.

Other provisions of the Agreement include the restriction on advertising on the shuttle buses. In the Agreement it states that the Respondent agrees to no advertising inconsistent with the schools' mission. The Agreement does state that the Respondent assumes responsibility and liability for the service. It also states that the Respondent is not an agent of schools, but it is a public carrier.

Examining all the indicators of the service, it is clear that the service being provided by the Respondent is a charter service. Respondent's own reply dated December 22, 1999, states, "We were informed that the cost of the service for a year must be provide...so that comparisons could be made with other providers who might also be interested in the service." Respondent must have known at the time this was charter service or why would other providers be interested. In fact, Respondent indicates in their reply dated March 13, 2000, that they provided their annual notice to provide charter service and received no responses from private providers, so they clearly knew this service was a charter service.

Respondent fails to provide evidence to back up its assertion that it is providing a public shuttle service. In its reply dates March 13, 2000, it states, "We [Respondent] carry the public on the shuttle trips, including students, non-students, parents of students, visitors to our area, sports fans, and other persons from the community." However, the Agreement indicates that the route starts and ends at the gates to the Schools and payment for service is hourly by the schools. Included in the hourly calculations is the time spent deadheading the vehicles.

The two cases Complainant cites, Greyhound Lines, Inc. v. City of New Orleans, 29 F. Supp. 2d 339 (E.D. LA. 1998) and Blue Bird Coach Lines, Inc. v. Linton, 48 F. Supp. 2d 47 (D.D.C. 1999), expand on the interpretation of charter service. The Greyhound case involved Greyhound buses being used for transporting passengers from their hotels to the Convention Center. The Court in making its determination that this was charter service stated that the service Greyhound provided was only available to clients of The Convention Store, not to the general public.

Payment came through a contract not individual paying passengers. Both these criteria were used to define charter service. In the Blue Bird case, the Court determined the service being provided by the Rochester-Genessee Regional Transit Authority of roundtrip transportation from Rochester to Buffalo and Syracuse for football and basketball games was not charter service. The service was widely advertised and open to the public. Individuals paid their own fare; it was not under a fixed contract. A finding that the service provided by the Respondent is charter service is consistent with both these cases.

In addition to the facts listed above, in the questions and answers section of the implementing charter regulations in the federal register, an on-point question was posed. The question asked whether service within a university complex according to routes and schedules requested by the university would constitute charter service. The answer indicated that "if the service is for the exclusive use of students and the university sets fares and schedules, the service would be charter. However, such service operated by a recipient which sets fares and schedules and is open door, though it serves mainly university students, would be mass transportation [Question 27(d)]." 52 FR 42248 (November 3, 1987) (DOT Charter Service Questions and Answers) The description of the service as set forth in the answer indicates that factually the Respondent's service is more like the former rather than the latter type of service.

Finally, it is interesting to note that from 1996 through 1999, the Complainant provided charter service to the schools. The description of the service in Complainant's complaint is identical to the service at issue here. Complainant states, "On July 26, 1996, [Complainant] United entered into a written charter service agreement with the University of Notre Dame Du Lac and Saint Mary's College, to provide specified charter motor carrier transportation services on a scheduled per vehicle per hour basis, invoiced monthly, with payment due within thirty (30) days." The service being provided by the Respondent is the same service and the terms of the Agreement are the same.

The Respondent has entered into a contract with two universities to provide shuttle service among three schools. The buses, which were purchased with federal dollars, are for the exclusive use of the shuttle service. The two schools are being billed for the use of the buses. The schools and the drivers are providing the schedules; the schedules are not available to the public with the other regular route information. The shuttle service is conducted on private roads and on a gated campus. The schools monitor the advertisements on the shuttles and they decide the hours of operation. The Respondent is clearly providing a private charter service.

Acceptable Charter Service

If a recipient of federal funds, like the Respondent wishes to provide charter service, then it must comply with the procedural requirements. The regulation states the following:

> If a recipient desires to provide any charter service using FTA equipment or facilities the recipient must first determine if there are any private charter operators willing and able to provide the charter service ... To the extent that there is at least one such operator, the recipient is prohibited from providing charter service with FTA funded equipment or facilities unless one or more of the exceptions applies, 49 C.F.R. Section 604.9(a).

There are a number of exceptions listed for providing charter service. However, the Respondent has not contended that one of the exceptions to the charter regulations applies in this case. Instead, the Respondent claims that even if this is a charter service, the Complainant failed to respond as a willing and able charter service to the solicitation for service. Respondent alleges they were not provided the opportunity to respond.

The regulations clearly state that before a recipient provides charter service it must determine if there is any willing and able charter operator. 49 C.F.R. § 604.9(a). In order to determine if there is at least one private charter operator willing and able to provide the service, the recipient must complete a public participation process. 49 C.F.R. § 604.11(a). The regulations under 49 C.F.R. § 604.11(a) require that the recipient complete the following:

(1) At least 60 days before it desires to begin to provide charter service...

(b) The public participation process must at a minimum include:
(1) Placing a notice in a newspaper, or newspapers, of general circulation within the proposed geographic charter service area;
(2) Send a copy of the notice to all private charter service operators in the proposed geographic service and to any private charter service operator that requests notice;
(3) Send a copy of the notice to the United Bus Owners of America, 1300 L Street, NW., Suite 1050, Washington, DC 2005 and the American Bus Association, 1100 New York Avenue, SW, Suite 1050, Washington, DC 20005-3934.

(c) The notice must:
(1) State the recipients name;
(2) Describe the charter service that the recipient proposes to provide limited to days, times of day, geographic area, and categories of revenue vehicle, but not the capacity or the duration of the charter service;
(3) Include a statement providing any private charter operator...at least 30 days... to submit written evidence...
(4) State the address to which the evidence must be sent;
(5) Include a statement that the evidence necessary for the recipient to determine if a private charter operator is willing and able includes the following:
(i) A statement that the private operator has the desire and the physical capacity to actually provide the categories of revenue vehicle specified, and
(ii) A copy of the documents to show that the private charter operator has the requisite legal authority to provide the proposed charter service and that it meets all necessary safety certification, licensing and other legal requirements to provide the proposed charter service.
(6) Include a statement that the recipient shall review only that evidence submitted by the deadline, shall complete its review within 30 days of the deadline, and within 60 days of the deadline shall inform each private operator that submitted evidence what the results of the review are.
(7) Include a statement that the recipient shall not provide any charter service using equipment or facilities funded under the Acts to the extent that there is at least one willing and able private charter operator unless the recipient qualifies for one or more of

the exceptions in 49 C.F.R. § 604.9(b).

Procedural Determination Discussion

The regulation under 49 C.F.R. § 604.11 clearly sets forth the procedures for determining if any willing or able private charter operators exist. The onus is upon the recipient to provide a "public participation process." At a minimum, the recipient is required to provide any private charter operator with at least 30 days to submit written evidence to prove that it is willing and able, and then it must inform each private operator what the results are at least 60 days before the deadline.

The Complainant has indicated that it is a "willing and able" charter service within the geographic area in question. It provided the charter service to the schools the three prior years. The Respondent does not challenge this assertion. In a letter dated August 16, 1999, written by the Complainant to the Respondent, the Complainant clearly notifies the Respondent of its desire and willingness to provide charter service to Notre Dame University. The letter further reminds Respondent of the requirements contained in 49 C.F.R. § 604 to publish a notice in the newspaper and to send a copy of the notice to the United Bus Owners Association and the American Bus Association. However, 49 C.F.R. § 604.11(b)(2) also requires the Respondent to send a "copy of the notice to all private charter service operators in the proposed geographic charter service area and to any private charter service operator that requests notice." Respondent admits in their reply dated March 13, 2000, that they failed to send a notice to the Complainant. They state they received no responses to their annual notice. However, they do not attach a copy of their notice, so it is not clear what their "annual notice" referred to or where it was published.

Respondent seems not to understand the procedural requirements of the charter regulations. In its reply briefs, it discusses that the schools indicated that no private charter operators had replied to their request for a proposal. The Respondent indicates that this is one of the reasons it did not send a notice directly to the Complainant. However, the regulations are clear, the procedural notice requirement applies to the Respondent not the schools. 49 C.F.R. § 604.11(a). Respondent was required to send Complainant a copy of the notice, as a private charter operator in the geographic area, and because they had indicated an interest in providing the service. 49 C.F.R. § 604.11(b)(2).

Respondent appears not to have complied with additional procedural requirements regarding published notice. In Respondent's reply dated December 22, 1999, it states, "This year, our legal notice was posted shortly before the negotiations were undertaken with the University of Notre Dame for the public shuttle service about which the complaint stemmed. A copy of the notice was not mailed directly to [Complainant] United Limo, Inc. at that time, because [Respondent] TRANSPO took their owner's telephone call to us inquiring into charter provisions as an indication of their availability for charter service." The regulations require that notice be published at least 60 days before recipient desires to begin providing the service. 49 C.F.R. § 604.11(a)(1).

Respondent failed to properly determine whether there were any willing any private charter operators willing and able to provide the service to the schools. Therefore, since Respondent has not raised any of the exceptions that would apply to providing charter service, it is prohibited

from providing charter service with FTA funded equipment or services under 49 C.F.R. § 604.9(a).

Remedy

Complainant has requested that Respondent immediately cease the charter operations at issue and begin the notice and review procedures as required under 49 C.F.R. Part 604. Complainant has requested in the alternative that there be a loss of federal funds. FTA does not need to address this question since it will be granting the cease and desist order. FTA grants Complainant's request for the cease and desist order and orders Respondent to cease providing charter service to the schools, and if they desire to provide charter service, they must follow the notice and review procedures for determining if there are any willing and able private charter operators.

Conclusion and 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.

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 Nuria Fernandez, Acting Administrator, FTA, 400 Seventh Street, S.W., Room 9328, Washington, D.C. 20590.

Joel P. Ettinger
Regional Administrator

5-24-00
Date