



U.S. Department
of Transportation
**Federal Transit
Administration**

REGION I
Connecticut, Maine,
Massachusetts,
New Hampshire,
Rhode Island, Vermont

Transporation System Center.
Kendall Square,
55 Broadway
Suite 904
Cambridge, Massachusetts 02142

Read file

April, 27, 1995

*TRO-1
Charter*

Melvin B. Neisner, Jr., Esq.
Killington Road, P.O. Box 186
Killington, VT 05751

Dear Mr. Neisner:

This responds to your letters dated February 1 and March 3, 1995, written on behalf of Ark Transportation, Inc. (Ark) alleging that the Bus Company, Inc., a/k/a Marble Valley Regional Transit District (MVRTD) is providing charter service in violation of the Federal Transit Administration's (FTA) charter regulation, 49 CFR Part 604. Specifically, Ark alleges that MVRTD executed a "Grant Agreement" to provide charter service for the Mountain Green Condominium Owners Association (Mountain Green) located in Sherburne, Vermont.

In its response dated February 16, 1995, MVRTD argues that the service in question is mass transportation and notes that the purpose of the Grant Agreement is to provide funds for public mass transit service in the Mendon-Sherburne area. According to MVRTD, the funds provided under the Grant Agreement were used to expand Sherburne's present public transportation system by adding a bus to the fleet being operated on the Sherburne-Mendon routes. Furthermore, MVRTD points out that prior to the execution date of the Grant Agreement, MVRTD was providing what has already been found by FTA to be mass transit service^{1/} to Mountain Green and actually had a scheduled stop at Mountain Green. Moreover, MVRTD states that it could not ignore Mountain Green on its bus route because it is the largest condominium complex in Sherburne with 214 units and a commercial center. Finally, MVRTD asserts that the stop at Mountain Green connects with its other routes and does have an open door policy.

^{1/} See Ark Transportation, Inc. v. Marble Valley Regional Transit District, TRO-1/VT-12/94-01 (December 16, 1994), *aff'd* by Gordon J. Linton, Administrator, on April 4, 1995.

The essential issue in this case is whether the service in question is impermissible charter service or mass transportation. The Federal Transit Laws define "mass transportation" as service provided to the public and operating on a regular and continuing basis. 49 U.S.C. § 5302(a)(7). The FTA has articulated other features which logically follow from this definition:

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 not closed door. Thus, anyone who wishes to ride on the service must be permitted to do so.

52 Fed. Reg. 11919-20 (April 13, 1987).

First, Ark makes several allegations concerning the control criterion. Ark argues that the service is under the control of Killington, through its original underlying contract, and Mountain Green. As noted above, the FTA has already determined that the service being provided by MVRTD pursuant to the Subsidy Agreement with Killington is mass transportation. Next, Ark argues that there has not really been an increase in service on the evening shuttle route because MVRTD has added only one additional stop since executing the Grant Agreement, and contends that there is actually less frequency of service because the 10:00 p.m. run has been dropped from the evening schedule. Moreover, Ark claims that MVRTD does not stop at each of the locations listed on the Killington Road Rapid Transit Schedule. In FTA's view, the decision to increase or decrease service and setting routes and schedules is a proper exercise of MVRTD's control within the meaning of mass transportation and is a critical element in distinguishing it from charter service. Moreover, section IV of the Grant Agreement between MVRTD and Mountain Green states that "delivery of service, scheduling, and type and number of vehicles will be totally under the control of the [MVRTD]." Ark presents no evidence that this provision has been violated.

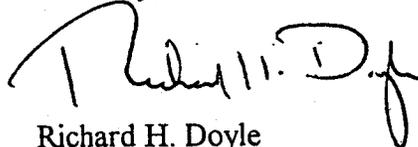
With reference to the second element of mass transportation, the FTA has determined that service is designed to benefit the public at large when it serves the needs of the general public and not some "special organization such as a private club." 52 Fed. Reg. 11920 (April 13, 1987). Ark maintains that the service is not designed to benefit the public at large, only skiers staying at Mountain Green's condominium hotel during the ski season. Moreover, Ark claims that the Upper Basin Service only transports skiers traveling through the condominium developments and not persons making connections to other routes. In the April 4, 1995, decision on appeal, FTA found that "persons renting condominiums and their guests are not a sufficiently defined group to be considered a private club. Moreover, while the service accommodates them primarily, it is not restricted to their exclusive use." Accordingly, it is being provided to benefit the public at large and is consistent with the second criterion of mass transportation.

Turning now to the third characteristic of mass transportation, the FTA notes that deciding whether service is open door, involves a two-part test. FTA looks both at the level of ridership by the general public as opposed to a defined group and at the intent of the recipient in offering the service. The intent to make service open door can be ascertained from the attempts to make the service known and available to the public. While FTA considers that this marketing effort is best evidenced by publishing the service in the recipient's preprinted schedules, other examples include displaying destination signs on buses, a substantial public ridership and/or attempts to widely market the service, and posting bus stop signs and connections to other transportation routes.

In its decisions of December 16, 1994, and April 4, 1995, the FTA determined that MVRTD made adequate efforts to demonstrate its intent to make the service in question open door. In this case, Ark alleges that MVRTD failed to advertise the schedule which included the Mountain Green stop in certain local newspapers during the weeks of December 15 and 22, 1994. The FTA notes, however, that the Grant Agreement between MVRTD and Green Mountain did not go into effect until December 23, 1994. Moreover, based upon the February 16, 1995, edition of "The Mountain Times" it is apparent that MVRTD has been publishing the updated schedule. FTA has previously found that a recipient is not required to exhaust all efforts to make the service known and available to the public, only enough effort to indicate an intent that the service is open door. That level of effort has been reached in this case.

In conclusion, the service provided by MVRTD to the Mountain Green Condominium Association meets FTA's criteria for mass transportation. If you have any questions, please contact Margaret E. Foley, Regional Counsel, at (617) 494-2409.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard H. Doyle". The signature is fluid and cursive, with a large initial "R" and a distinct "D" at the end.

Richard H. Doyle
Regional Administrator

cc: John A. Facey, III, Esq.
Reiber, Kenlan, Schwiebert,
Hall & Facey, P.C.
P. O. Box 578
Rutland, VT 05702-0578

Ark Transportation, Inc.
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Larry Dreier, Administrator
Marble Valley Regional Transit District
158 Spruce Street
Rutland, VT 05701

Ms. Judy Douglas
Vermont Agency of Transportation
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Montpelier, VT 05633-5001

Mr. Schulyer Jackson
Vermont Transportation Board
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Montpelier, VT 05633

Frank P. Urso, Esq.
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Rutland, VT 05701

Representative Betty Ferraro
111 State Street
Montpelier, VT 05633

Mr. Fred Bever
The Rutland Herald
27 Wales Street
Rutland, VT 05701

Mr. Tim Crossman
The Rutland Tribune
98 Allen Street
Rutland, VT 05701

Senator Patrick J. Leahy
P. O. Box 933
Montpelier, VT 05601-0933

Representative John Kasick
United States Congress
Washington, D.C. 20510

Federal Highway Office
133 State Street
Montpelier, VT 05633



U.S. Department
of Transportation
**Federal Transit
Administration**

REGION I
Connecticut, Maine,
Massachusetts,
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Rhode Island, Vermont

Transportation System Center
Kendall Square,
55 Broadway
Suite 904
Cambridge, Massachusetts 02142

June 8, 1995

Mr. Joe R. Follansbee
Executive Director
Cooperative Alliance for Seacoast Transportation
213 Main Street
Durham, NH 03824

Dear Mr. Follansbee:

This responds to your request of May 30, 1995, concerning COAST's plans to provide transportation for three upcoming events which are being run by independent non-profit organizations. Specifically, the events are Market Square Day (Portsmouth, 80,000 people, 2-3 buses), First Night (Portsmouth, 60,000 people, 2 buses), and the International Children's Festival (Somersworth, 10,000 people). You state that you will perform the service, at the request of the communities and organizations holding the events, solely to ease traffic congestion through creation of park-and-ride type shuttle service. According to your letter, the directors of these events have told you that without donated transportation services they would be unable to fund traffic mitigating shuttles of any type. The service will be completely open to the public, with publicly announced or advertised stops and schedules, at a 25-cent fare.

The essential issue in this matter is whether the service in question is mass transportation or impermissible charter service. Based upon the information contained in your letter, the service in question does not meet the charter criteria of being provided under a single contract for the exclusive use of a defined group of people who have authority to decide the itinerary. Instead, the service falls more closely within the definition of mass transportation which is defined under the Federal Transit Laws as service provided to the public and operating on a regular and continuing basis. 49 U.S.C. § 5302(a)(7). The FTA has articulated other features which logically follow from this definition:

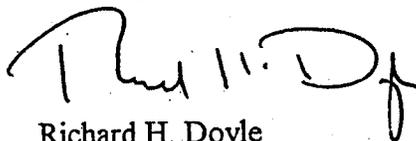
First, mass transportation is under the control of the recipient. Generally, the recipient is responsible for setting the route, rate, and schedule, and deciding what equipment is used. Second, the service is designed to benefit the public at large and not some special organization such as a private 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 (Apr. 13, 1987).

During a June 8, 1995, conversation with Margaret Foley, Regional Counsel, you stated that COAST would set the route, rate and schedule and decide what equipment is used in providing the service. Therefore, the FTA finds that COAST will exercise sufficient control over the service within the meaning of mass transportation. Next, you state in your letter that the service will be provided "completely open to the public." Accordingly the FTA has determined that the service is being provided to benefit the public at large and is consistent with the second criterion of mass transportation. Turning now to the third characteristic of mass transportation, the FTA notes that deciding whether service is open door, involves a two-part test. FTA looks both at the level of ridership by the general public as opposed to a defined group and at the intent of the recipient in offering the service. The intent to make service open door can be ascertained from the attempts to make the service known and available to the public. While FTA considers that this marketing effort is best evidenced by publishing the service in the recipient's preprinted schedules, other examples include displaying destination signs on buses, a substantial public ridership and/or attempts to widely market the service, and posting bus stop signs and connections to other transportation routes. According to your letter, the stops and schedules will be publicly announced or advertised. The FTA has previously found that a recipient is not required to exhaust all efforts to make the service known and available to the public, only enough effort to indicate an intent that the service is open door. That level of effort has been reached in this case.

In conclusion, the service in question meets FTA's criteria for mass transportation. If you have any questions, please contact Margaret Foley at (617) 494-2409.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard H. Doyle". The signature is fluid and cursive, with a large initial "R" and a long, sweeping tail.

Richard H. Doyle
Regional Administrator



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REGION I
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Transportation System Center
Kendall Square,
55 Broadway
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Cambridge, Massachusetts 02142

JUN 8 1995

Ms. Rosemary Doyle
President
Cape Ann Travel Company, Inc.
d/b/a Cape Ann Tours
5 Whistlestop Mall
Rockport, MA 01966

Dear Ms. Doyle:

This responds to your recent undated letters of complaint addressed to President Clinton alleging that a subrecipient of the Cape Ann Transportation Authority (CATA) performed impermissible trolley service during 1994 and intends to resume the service during the summer of 1995. Specifically, you claim that the Cape Ann Transportation Operating Company (CATOC), a private nonprofit organization which receives federal funds through CATA, conducted narrated trolley tours last year outside CATA's fixed-route service and that CATOC plans to apply for a State license to conduct sightseeing and charter service this year.

In its response dated April 6, 1995, CATA argues that the service in question is mass transportation and not sightseeing or charter service. CATA maintains that its drivers did not give narrated tours on the trolley system last year and claims that the service was open to the public at an established fare with a fixed schedule. In response to your contention that CATA intends to perform sightseeing and/or charter service this year, CATA submitted a March 14, 1995, letter addressed to you from the Massachusetts Department of Public Utilities (DPU) advising you that CATA has not petitioned for authority to operate either trolley sightseeing service or charter service. Further, CATA notes that, as a private nonprofit company, CATOC may petition the DPU for a license to provide sightseeing or charter service as long as CATOC does not use publicly funded equipment or receive public funds to operate the service. According to CATA there will be no route deviation because the trolley will travel along its regular fixed-route system. Moreover, CATA points out that its route system has been in effect since the early 1970's and states that Cape Ann Tours operates as a private for-profit sightseeing/charter business over existing previously approved CATA routes.

Before reaching the main issue of this complaint, it is appropriate to address several subsidiary questions you raised. First, in regard to your concerns that CATA has selected CATOC to operate its transportation service, please be advised that FTA's private enterprise participation policy (copy enclosed) emphasizes local decision-making. Thus, the public/private operator choice is to be made at the local level. Furthermore, although Cape Ann Travel was not selected to provide the service, CATA did contract with a private nonprofit organization to operate its system. Next, you complain that it is difficult for you to compete with CATA's fare structure. Under 49 U.S.C. § 5307(d)(1)(I), FTA's jurisdiction over fares is limited to assuring that its recipients have a locally developed process to solicit and consider public comment before raising a fare. Therefore, CATA's fare structure is strictly a local matter and as long as CATA follows its public participation process to ensure consideration of public comment in final plans for fare increases, it will be in compliance with FTA regulations concerning fare structure. Having dispensed with these questions, we will proceed to an examination of the main concerns of your complaint.

The essential issue in this case is whether the service in question is mass transportation or impermissible charter or sightseeing service. The Federal Transit Laws define "mass transportation" as service provided to the public and operating on a regular and continuing basis. 49 U.S.C. § 5302(a)(7). The FTA has articulated other features which logically follow from this definition:

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, Apr. 13, 1987 (copy enclosed).

You allege that CATA performed impermissible charter service, sightseeing service and school bus service as described below.

Charter Service. Under Section 5323(d) of the Federal Transit Laws, as codified, 49 U.S.C. § 5301, *et seq.*, and the FTA's implementing regulation, 49 CFR Part 604, a recipient of FTA financial assistance may not provide charter service if a private operator in its geographic area is willing and able to do so unless one or more of the exceptions listed at 49 CFR 604.9 apply.

First, you claim that CATA ran buses during the Travel Writers Weekend for the Cape Ann Chamber of Commerce (COC). In its supplemental response dated May 16, 1995, CATA maintains that it advised the COC to "always contact private-for-profit companies" to provide these services. CATA acknowledges that on one occasion it did provide transportation for the COC during the Travel Writers Weekend but only after you gave CATA permission to do so after

withdrawing your offer to provide the service at the last moment which left the COC with no other transportation provider.^{1/} Second, you claim that CATA provided charter service during St. Peter's Festival and submitted a copy of the "1994 Fiesta schedule" which states that the Fiesta shuttle would run directly between State Fort Park and St. Peter's Square from 6:00 p.m. to 10 p.m. on Friday and from 7:30 p.m. to 10 p.m. on Saturday and Sunday. In answer to this allegation, CATA points out that this schedule was advertised in a newspaper as open to the public. Moreover, it is apparent from the schedule that this service was designed to benefit the public at large and not some special group or organization. Third, you allege that CATA violated the charter regulation because they used a vehicle for a parade in Salem, Massachusetts. CATA responded that the vehicle was used for advertising only, with no ridership. The FTA has previously determined that the incidental use of buses for advertising purposes is not in violation of FTA's charter regulation so long as the vehicles are used for demonstraton purposes only. However, if the advertisers use the vehicles to transport passengers, the services will be considered charter. Fourth, you ask why CATA has an office in Peabody. In its response CATA properly notes that this is not a matter of concern to the FTA and explains that the Peabody office represents CATA's Medicaid Dispatch Office for the Department of Public Welfare for the cities of Salem and Lynn. Indeed, CATA notes that your company, Cape Ann Tours, is a transportation provider for CATA's Medicaid Program. Fifth, you complain that CATA ran buses to the Peabody Shopping Mall. According to CATA, this service was instituted pursuant to a request made by citizens of Gloucester to the Mayor, is open to the public and is outlined in its fare schedule. Accordingly, based on the facts stated above, the FTA concludes that the services provided by CATA do not constitute impermissible charter service.

Sightseeing Service. Under the Federal Transit Laws, as codified, 49 U.S.C. § 5302(a)(7), a recipient of FTA funding may not provide sightseeing service. However, as noted in Question and Answer No. 39 contained in : "Charter Service Questions and Answers," 52 Fed. Reg. 42254, Nov. 3, 1987 (copy enclosed), sightseeing service is not subject to the restrictions placed on charter service, and may be provided by a recipient if it is incidental to the provision of mass transportation.

In support of your contention that CATA performed impermissible sightseeing service, you submitted a video cassette which was taped during a trolley ride in which the driver pointed out places of interest and stated that he was given information to memorize about the area. In

^{1/} The May 16 letter states that CATA provided this service in the Spring of 1994; however, on May 18, Mr. Wallace called Margaret Foley, Regional Counsel, to clarify this information. Mr. Wallace stated that while CATA had performed the service once in the past, last year the COC hired a school bus operator to provide the service. Mr. Wallace further stated that he believes that this year Cape Ann Tours will be providing these transportation services.

addition, you claim that you saw books describing the Cape Ann area on the desk of Kay Nordstrom, CATA's operator, and contend that is further evidence that CATA performed sightseeing service. In deciding whether service is mass transportation or sightseeing, the FTA reviews the characteristics of the service to determine to which category it most properly belongs. As indicated in copies of CATA's schedules for its fixed-route and trolley system, the provision of trolley service will not result in a deviation of CATA's regular fixed-route service. CATA points out that years ago it attempted to run fixed-route service through Essex but due to low ridership the service was terminated. Although CATA's regular fixed-route service only goes as far as the Essex line while the trolley service runs through Essex, under FTA guidelines, recipients have discretion to reopen or extend a route and are required to conduct a public participation process only in those cases involving major service reductions. See 49 U.S.C. § 5307(d)(I). Accordingly, the FTA finds that CATA's trolley service is mass transportation and not in violation of federal law.

School Bus Service. Section 5323(f) of the Federal Transit Laws, as codified, 49 U.S.C. § 5301, *et seq.*, prohibits the use of FTA-funded equipment or operations to provide service exclusively for the transportation of students and school personnel in competition with private schoolbus operators. However, under FTA's implementing regulation, 49 CFR Part 605, grantees may provide "tripper service," which is regularly scheduled mass transportation service which is open to the public and which is designed to accommodate school students and personnel, using various fare collections or subsidy systems. Section 605.3 of the regulation states that buses used in tripper service must be clearly marked as open to the public and may not carry designations such as "school bus." These buses may stop only at a grantee's regular service stop and must travel within a grantee's regular route service as indicated in the published route schedules.

In your letters of complaint, you allege that CATA is performing school bus service for Gloucester High School. In support of this allegation, you state that normally CATA buses can be waved down, but not the buses coming from the high school. In addition, you claim that your son had to travel 1/4 of a mile from the high school in order to board a CATA bus.

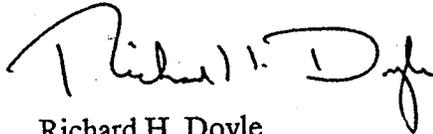
In Lamers Bus Lines, Inc. v. Green Bay Transit System, dated May 10, 1982, the FTA found that loading and unloading passengers in a school yard was not a regular service stop because it was uncertain whether the public would be allowed to use the stop on school property or whether the stop would be visible and known to the public. In Lamers, the FTA stated that both of these criteria must be met in order to find that a stop on school property is a regular stop. With regard to the first criterion, CATA maintains that the service stop located at the high school is open to the public. Moreover, the FTA notes that the bus stop was relocated at the high school after William J. Leary, Superintendent of the Gloucester Public Schools, wrote to Mr. Wallace on September 30, 1992, asking that CATA use the circle at the main school entrance in front of the high school as its bus stop because that area offers the maximum safety for the students who, at that time, were required to cross a heavily trafficked street when entering and exiting the CATA

buses (copy of letter enclosed). Mr. Leary stated that "for safety reasons, CATA has our permission to enter school property and to use the circle as its bus stop." Based on these facts, the FTA finds that CATA's bus stop located at Gloucester High School is publicly accessible. Turning now to the second characteristic of a regular bus stop, the FTA is unable to find that the high school stop is known and visible to the general public. Although Gloucester High School is listed on CATA's published bus schedule, it is unclear whether the public has been sufficiently notified of its location and use as a regular service stop. FTA, therefore, orders CATA to submit documentation that appropriate signs have been placed on the street, indicating to the public where on the school premises the bus stop may be found.

In conclusion, the FTA finds that CATA is not performing charter service or sightseeing service in violation of federal law. With regard to the provision of school bus service, CATA is ordered to report to the FTA within thirty days on the measures it has taken to comply with the terms of this order.

In accordance with 49 CFR 604.19 (copy enclosed), you may appeal this decision within ten days to Gordon J. Linton, Administrator, Federal Transit Administration, 400 Seventh Street, S.W., Room 9328, Washington, DC 20590.

Sincerely yours,



Richard H. Doyle
Regional Administrator

Enclosures: Private Enterprise Participation Notice, 59 Fed. Reg. 21890 (Apr. 26, 1994)
Charter Service, Final Rule, 52 Fed. Reg. 11916 (Apr. 13, 1987)
Charter Service Questions and Answers, 52 Fed. Reg. 42248 (Nov. 3, 1987)
Letter from William J. Leary to CATA, dated 9/30/92
FTA's Charter Regulation, 49 CFR Part 604

cc: Eugene Wallace, CATA



U.S. Department
of Transportation
**Federal Transit
Administration**

REGION VIII
Arizona, Colorado, Montana,
Nevada, North Dakota,
South Dakota, Utah, Wyoming

Columbine Place
216 Sixteenth Street
Suite 650
Denver, Colorado 80202-5120
303-844-3242
303-844-4217 (FAX)

June 12, 1995

Richard C. Thomas, Public Transit Director
City of Phoenix
302 N. First Avenue, Suite 700
Phoenix, AZ 85003

Subject: Charter Service for Super Bowl XXX

Dear Mr. Thomas:

The City of Phoenix has requested an exception under 49 CFR Section 604.9(b)(4) to allow the City to participate directly in charter service for Super Bowl XXX to be held in Phoenix on January 28, 1996. The City has been asked by the Super Bowl XXX Host Committee to provide buses, which will complement the 500 to 700 buses coming from out of State.

A petition for a special events exception must describe the event, explain how it is special and explain the amount of charter service which private charter operators are not capable of providing (49 CFR Section 604.9(d)(2)). The service to be provided must be incidental charter service in accordance with 49 CFR Sections 604.5(i) and 604.9(e), that is, it must not interfere with or detract from mass transit operations.

The City of Phoenix has described the extraordinary size of the Super Bowl and the number of buses that will be needed to serve the event. Further, Phoenix has stated that a combination of public and private contractors will be needed to provide the service. Phoenix has assured FTA that any charter service provided by the City will not interfere with scheduled, fixed-route service. Therefore, Phoenix has met the criteria for a special events exception.

Accordingly, FTA hereby grants an exception to provide charter service during Super Bowl XXX to the extent that private operators are not capable of providing the service (49 CFR Section 604.9(b)(4)). The City shall assure that private operators are notified of their opportunity to participate in the service and are permitted to participate to the maximum extent feasible.

Thank you for submitting the request for an exception in such a timely fashion. Best wishes to the Host Committee and the City for a successful Super Bowl XXX.

Sincerely yours,



Louis F. Mraz, Jr.
Regional Administrator

OPTIONAL FORM 99 (7-90)

FAX TRANSMITTAL # of pages ▶

To <i>Al Villaverde</i>	From <i>Fta - Region 8</i>
Dept./Agency	Phone # <i>Denver</i>
Fax #	Fax #

NSN 7540-01-317-7368 5099-101 GENERAL SERVICES ADMINISTRATION



U.S. Department
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**Federal Transit
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REGION I
Connecticut, Maine,
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Rhode Island, Vermont

Transportation System Center
Kendall Square,
55 Broadway
Suite 904
Cambridge, Massachusetts 02142

June 13, 1995

Robert B. Kennedy, Administrator
Lowell Regional Transit Authority
145 Thorndike Street
Lowell, MA 01852

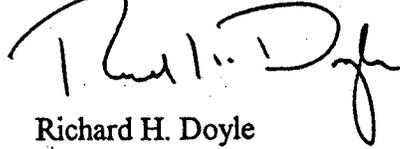
Dear Mr. Kennedy:

Reference is made to your May 19, 1995, response to the complaint filed by Rosemary Doyle of Cape Ann Travel Company, Inc., d/b/a Cape Ann Tours, alleging that Lowell Regional Transit Authority (LRTA) was "doing airport service." You acknowledge that, during the first week of May 1995, LRTA provided airport service to the Lowell Sun Charities for the National Golden Gloves Boxing Tournament, but contend that the service was within the "incidental basis exception of 49 CFR 604.9(b)." According to your letter, the Lowell Sun Charities was unable to make a satisfactory arrangement with a private carrier to transport tournament participants to and from Logan Airport. You further state that LRTA does not anticipate providing this service to any group in the future.

Based upon the information contained in your letter, the service provided did not fall within one or more of the exceptions set forth in the Federal Transit Administration's (FTA) charter service regulation, 49 CFR Part 604. Moreover, there is no "incidental basis exception," instead, the regulation states that any charter service that a recipient provides under any of the exceptions must be incidental charter service. Furthermore, it appears that LRTA did not complete the public participation process as required by 49 CFR 604.11 when FTA-funded equipment is used to provide charter service. Accordingly, the FTA has determined that LRTA was in violation of the charter regulation in May 1995. The LRTA must cease this practice in the future or jeopardize its federal transportation assistance.

I hope this information is helpful. If you have any questions, please contact Margaret Foley, Regional Counsel, at 494-2409.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard H. Doyle". The signature is fluid and cursive, with the first name "Richard" and last name "Doyle" clearly distinguishable.

Richard H. Doyle
Regional Administrator

cc: Ms. Rosemary Doyle
(w/copy of LRTA's 5/19/95 letter)



U.S. Department
of Transportation

**Federal Transit
Administration**

Administrator

400 Seventh St. S.W.
Washington, D.C. 20590

JUL 27 1995

Mr. Richard J. Simonetta
General Manager
Metropolitan Atlanta Rapid Transit Authority
2424 Piedmont Road
Atlanta, Georgia 30324-3330

Dear Mr. Simonetta:

In response to your letter dated July 14, 1995, I grant your request for an exception to the Federal Transit Administration's (FTA) charter service regulation, 49 CFR Part 604, for charter bus service in support of the 1996 Olympic Games in the Atlanta area from June 1, to August 10, 1996. I understand that this service will require a maximum of six hundred (600) transit buses, as circumstances dictate, for the sole purpose of transporting certain members of the Olympic Family, consisting of athletes and accompanying officials, and media personnel (Rightsholding Broadcasters and Accredited Press) to and from security-restricted competition and non-competition venues. The number of buses required for the Olympic Family System may rise to a maximum of eight hundred (800) for extraordinary situations, such as on July 17, 1996, for Opening Ceremonies when all athletes and accompanying officials and media personnel need to be transported to the Olympic Stadium during a limited time period. This increase will be utilized only when the needs of the Olympic Spectator System are sufficiently diminished. This charter service will operate solely to support the transportation of approximately 50,000 of the members of the Olympic Family as defined above on a fixed, predetermined schedule. Transit buses used in both the Olympic Family System and the Olympic Spectator System will come from transit providers from around the country.

I grant this exception under the special event provision of the regulation, which permits such service where private charter operators are not capable of providing the needed service. 49 CFR 604.9(b)(4). As you indicate, over the last year and a half, the Atlanta Committee for the Olympic Games (ACOG), the coordinating entity for the Olympics, has met with private operators in the Atlanta area regarding service requirements, equipment inventories and estimated market demand for charter service during the 1996 Olympic Games. ACOG has also met with senior officials from national and State organizations that represent private operators in the Atlanta area including the Georgia Motor Coach Association (GMCA), the American Bus Association (ABA), and United Bus Owners of America (UBOA). As a result of these discussions, ACOG determined that private operators in the Atlanta area do not have enough transit buses to meet its needs.

ACOG has determined that only transit buses can satisfy its needs for a variety of reasons. Of special note, the unique security concerns presented by the Olympic Games make imperative the use of transit buses because they (1) afford ease of surveillance and inspection, (2) do not include

July 14, 1995

Page 2

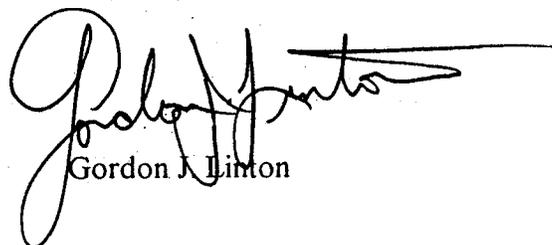
restrooms, underbelly storage, or overhead storage that pose additional security risks and impose additional inspection requirements, (3) have seating that is smooth and easy to inspect, (4) have large windows that provide good lighting, and (5) have large wheel wells that are easy to inspect. I believe that this security factor alone justifies your requirement to use transit buses.

As you note, other factors support the use of transit buses. Transit buses provide wide aisles for transportation of equipment, two-doors for access/egress, and interior system information displays that will make an important contribution to accommodating the multilingual Olympic Family. In addition, I certainly support your desire to use new or nearly new buses for the Olympics. This desire, however, is not a factor I have considered in granting the exception.

In a similar context, Congress has clearly signaled its intent that exceptions from our charter regulation be granted when extraordinary circumstances are present, noting the 1987 Pan American Games as an example of a situation that supported the use of "the services of the Indianapolis Public Transportation Corporation in meeting the extraordinary transit needs of the international competition." S. Rep. No. 423, 99th Cong., 2d Sess. 66 (1986). Of course, the 1996 Centennial Olympic Games is an extraordinary event for which transit needs will far exceed those of the 1987 Pan American Games. The Olympic Games in Atlanta will be the largest Olympic Games in history; twice as large as the 1984 Olympic Games in Los Angeles. Moreover, Congress has recognized the extraordinary transit needs of the 1996 Olympic Games and the Paralympics by specially appropriating \$16 million dollars for the costs of planning, delivery and temporary use of transit vehicles. Department of Transportation and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-331, 108 Stat. 2471 (1994).

I note also that private operators will provide service during the Olympic Games for transportation demand commensurate with their service capabilities. On June 5, 1995, AGOG issued a Request For Quotations from private providers to provide transportation service to Olympic sponsors and to ACOG itself. ACOG estimates that approximately 750 over-the-road coaches will be used by Olympic sponsors and that a smaller number will be used by ACOG to provide Olympic Family services not requiring the special transportation requirements of the Olympic Family System fleet. In addition, of course, the Olympics will generate very substantial independent demand for transit services on the part of spectators, vendors, and local residents. Please advise Susan E. Schrueth, Regional Administrator in Atlanta, on a monthly basis, of your efforts to coordinate the use of private operators for these charter opportunities.

Sincerely,



Gordon J. Linton

JUL 31 1995

The Honorable Jon Kyl
United States Senate
Washington, D.C. 20510-0304

Dear Senator Kyl:

This responds to your letter enclosing correspondence from your constituent, Mr. R.K. Vollmer, President of Nava-Hopi Tours, Inc. Mr. Vollmer expresses concern that the use of subsidized transit buses during the 1996 Olympic Games in Atlanta will preclude private operators from providing service for that event. You request an explanation and pertinent written information concerning this matter.

The 1996 Olympic Games in Atlanta are expected to be the largest in history - according to projections, attendance will be twice that of the 1984 Olympic Games in Los Angeles. Recognizing this extraordinary need, Congress provided that in Fiscal Year 1995 "\$16,000,000 shall be available for grants for the costs of planning, delivery, and temporary use of transit vehicles for the special transit needs of the XXVIth Summer Olympics and the Xth Paralympiad." Public Law 103-33 (September 30, 1994).

The transit buses to be used for the members of the Olympic Family, defined as athletes, accompanying officials, and media personnel, will also operate on a fixed, predetermined schedule. These transit vehicles will not be open to the general public, and will therefore be providing charter service as defined in FTA's charter service regulation, 49 CFR Part 604. Since the regulation prohibits FTA recipients from providing charter service if there is a willing and able private operator, the Metropolitan Atlanta Rapid Transit Authority (MARTA), on behalf of the other transit agencies lending vehicles for this event, requested an exception under 49 CFR 604.9(b)(4) to provide service for the Olympic Family (see enclosed copy of letter from Richard J. Simonetta, General Manager of MARTA).

Under that provision, recipients may petition FTA to provide charter service for an event of an extraordinary or singular nature. One of the factors FTA considers in reviewing such requests is the recipient's attempts to determine whether private operators are able to provide the service. Attached to MARTA's request is a chronology of contacts that ACOG has had with private operators during the past year and a half. According to MARTA, these discussions indicate that local private operators do not have a sufficient quantity of transit buses to meet the needs of the Olympics. MARTA states that for various security reasons, transit buses, rather than over-the-road coaches are needed to provide this service.

ACOG will nonetheless use private operators to support other transportation needs for official Olympic sponsors and the Olympic Family that are appropriate to their service capabilities. Please

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find enclosed a copy of ACOG's request for quotations for charter service for the Olympic sponsors.

FTA granted MARTA's request after considering all of the factors outlined above.

Mr. Vollmer states that the use of publicly subsidized buses during the Olympics will not affect his company, but that it may be affected by the granting of waivers for events such as the Phoenix Super Bowl. Please note that upon receipt of such requests, FTA applies the criteria of 49 CFR 604.9(b)(4) on a case-by-case basis.

I trust that you find this information helpful. Please do not hesitate to contact me if you need further information concerning this matter.

Sincerely,

/s/ original signed by

Gordon J. Linton

Enclosures

BEFORE THE FEDERAL TRANSIT ADMINISTRATION

In the matter of:)	
Great American Trolley Co., Inc.)	
)	Complainant
)	CHARTER COMPLAINT
)	49 U.S.C. § 5323(d)
Coastal Rapid Public Transit Authority)	
)	Respondent
)	TRO-IV/SC-9/95-01

DECISIONSUMMARY

Great American Trolley Co., Inc. (GAT), filed this complaint with the Federal Transit Administration (FTA), alleging that Coastal Rapid Transit Authority (CRPTA) is providing charter service in violation of the FTA charter regulation, 49 CFR Part 604. The complaint specifically alleged that CRPTA had entered into an agreement to provide charter service for Myrtle Beach Farms Co., Inc., d/b/a Broadway at the Beach (BATB), a commercial resort development. Applying a balancing test to the service in question, FTA finds that the service is in fact mass transportation, and therefore, not in violation of the charter service regulations. However, CRPTA has failed to modify existing schedules or publish supplementary or amendatory schedules reflecting the availability of the BATB service including routing, scheduling or fare information. In order to correct this deficiency, such action must be taken to properly advertise this service. CRPTA must report to FTA within thirty days on the measures it has taken to comply with the terms of this order.

CRPTA and BATB entered into a "Trolley Operations Contract" on May 12, 1995 with transportation services commencing May 25, 1995, and terminating January 3, 1996; BATB having the option to extend the contract until May 1, 1996.

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COMPLAINT

GAT is a private transit company operating trackless trolleys (buses) in South Carolina. By letters dated April 27, 1995, May 1, 1995, and May 21, 1995, GAT filed this complaint with the FTA alleging that the service in question is actually a form of prohibited charter service. A copy of the "Trolley Operations Contract" was forwarded by the respondent with its response. The definition of charter service found in FTA's regulations at 49 CFR § 604.5(e) is 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....

Specifically, GAT complains that CRPTA contracted with BATB to provide charter services within BATB, a commercial resort development consisting of restaurants, retail shops, entertainment and other business establishments along the 21st through 29th Avenue North area in Myrtle Beach, South Carolina. According to the complaint, GAT has several trackless trolleys which it operates in and around Myrtle Beach; was ready, willing and able to contract with BATB to provide the desired service; but was underbid by CRPTA resulting in the contract being awarded to CRPTA by BATB. GAT bases its complaint upon nine allegations.

Allegation #1: The project in question is a privately owned amusement park called BATB located in the City of Myrtle Beach, South Carolina. BATB is located at 21st & Bypass #17.

Allegation #2: GAT has the only approved service to BATB.

Allegation #3: CRPTA has equipment which is totally funded by the Federal government. CRPTA has no approved route to BATB.

Allegation #4: BATB went out for bids to provide transportation for its employees and customers. This transportation requested would be confined totally to within the amusement park.

Allegation #5: CRPTA submitted a bid to the request for proposal using a trolley funded by FTA. CRPTA was awarded the contract.

Allegation #5A: GAT asserts that it is a gross abuse of the public trust to use Federally funded equipment to provide service to a private amusement park and take business from a private provider (GAT).

-3-

Allegation #6: GAT has several trackless trolleys which it operates in and around Myrtle Beach. GAT was ready, willing and able to provide the service. GAT bid on the contract but was underbid by CRPTA.

Allegation #7: The contracting entity in this case, BATB, has contracts with the tenants in the amusement park wherein BATB is committed to providing transportation service to the employees of the tenants albeit totally within the park. That is, the employees will park their cars within the park and take contracted for transportation to the tenant properties.

Allegation #8: The fare, the route, the hours of service and the frequency of service will all be set by BATB. Moreover, BATB has required that the vehicle to be used will be a trackless trolley. BATB will pay the transportation provider an hourly contract rate and the fare to passengers in the park will be free.

Allegation #9: The service constitutes charter service and not mass transit. GAT has the only approved service to the park. CRPTA will not be setting rates, schedules, or selecting equipment to be used. Moreover, this service is for the benefit of a private organization, namely BATB. Only employees and patrons of BATB can use this service.

RESPONSE

GAT's complaint was forwarded to CRPTA for response and by letter dated June 27, 1995, its response was provided. CRPTA asserts that it is a private, non-profit corporation which provides mass-transportation services in Horry and Georgetown Counties, South Carolina. CRPTA admits that it utilizes Federal as well as state and local funds in the provision of these services. Moreover, CRPTA asserts that services it provides at BATB, which is located in Horry County, constitute mass transportation allowable under the decisions of the FTA and Federal law and regulation.

In response to allegation #1, CRPTA asserts that GAT's characterization of BATB as a "privately owned amusement park" is misleading. CRPTA describes the project as a development consisting of commercial retail space, theaters, restaurants and retail shops which are leased to individuals and are open to the public. It maintains that BATB is a major development open to and frequented by the public through the use, in part, of connecting mass transit service provided by CRPTA.

CRPTA denies GAT's second allegation that GAT has the only approved service to BATB. CRPTA asserts that it has continuously operated routes in the area of BATB for years and will have the capacity to provide connecting service to the area. CRPTA states that it has been designated by the City of Myrtle Beach as the designated recipient of funds and that no further authorization is needed for transporting passengers within the limits of a municipality.

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In response to allegation #3, CRPTA admits to purchasing certain equipment (including trolleys which it anticipates using at Broadway at the Beach) but asserts that it has continuously serviced the surrounding area.

CRPTA contends that with regard to allegation #4, it submitted a proposal to BATB to provide public transportation for employees and members of the public which frequent the theaters, restaurants, and retail shops. CRPTA asserts that although the service which it has contracted for will take place within the BATB area, CRPTA will be able to provide connecting service outside the area.

With regard to allegation #5, CRPTA asserts that it submitted a proposal using Federally funded equipment which was accepted by BATB.

CRPTA asserts in response to allegation #5A that its proposal to provide service is a lawful use allowed by Federal law and regulation. Furthermore, CRPTA contends that BATB is a major commercial facility open to the public and not a private amusement park.

With regard to allegation #6, CRPTA states that it is without knowledge as to GAT's ability to provide service to BATB and therefore denies same. It also states that it lacks sufficient information to form an opinion as to whether GAT provided a bid to perform the service in question but admits that GAT provides very limited service within the Myrtle Beach area.

In response to allegation #7, CRPTA asserts that it will have an open-door policy making its services available not only to employees but to the public as well.

CRPTA asserts that with regard to allegation #8, CRPTA will establish fares, routes, hours of service and frequency of service; not BATB. CRPTA also maintains that it retains control over the service to be provided.

Finally, with regard to allegation #9, CRPTA denies that its agreement with BATB constitutes charter service since CRPTA sets its own rates and schedules and maintains control over the equipment it will use. CRPTA maintains the service is designed to benefit the public at large and that it is open door.

REBUTTAL

By letter dated June 27, 1995, FTA forwarded a copy of CRPTA's response and notified GAT that it would be provided 30 days from receipt to rebut that response. FTA advised GAT that upon review of the rebuttal, a review of the evidence would be conducted and a decision rendered. GAT submitted its rebuttal to FTA by letter dated August 21, 1995.

In its rebuttal, GAT asserts that at the time CRPTA submitted its bid for the service, CRPTA had no connecting service to BATB nor does it provide connecting service at the present time. GAT

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alleges that CRPTA has applied to the South Carolina Service Commission for authority to operate connecting service but that it has not yet received approval.

GAT alleges that only it has been authorized by the City of Myrtle Beach to service BATB and included a letter from the City Manager modifying GAT's route to include service to BATB. GAT maintains that the vehicle in question was funded by FTA to service specific routes but that the vehicle is used instead as an amusement park trolley, not in mass transportation as intended. GAT encloses pictures which depict a trolley with BATB signage. GAT argues that the vehicle is only used at the amusement park and because of the signage, can only be used at the park. GAT furthermore argues that BATB controls the usage of the vehicle and points to requirements BATB imposes upon said use such as the location of the route or routes and the times that such service must be provided. GAT acknowledges that CRPTA's contract with BATB contains provisions which reserves to CRPTA the sole responsibility and authority for reducing, setting, and modifying routes, schedules and services but alleges that BATB in fact controls said operations since it is given the right to terminate should CRPTA materially change its rates, routes, and schedules.

Finally, GAT alleges that it is a willing and able private provider and, that under FTA's charter regulations, CRPTA should be prohibited from providing the service in question.

DISCUSSION

The essential issue in this matter is whether the service provided by CRPTA is charter or permissible mass transportation.

The FTA has rendered several decisions regarding what constitutes charter service. Those decisions include Seymour Charter Bus Lines v. Knoxville Transit Authority, TN-09/88/01; Blue Grass Tours and Charter v. Lexington Transit Authority, URO-III-1987; and most recently, Ark Transportation, Inc. v. Marble Valley Regional Transit District, TRO-1/VT-12/94-01. Although GAT does not cite prior FTA decisions in support of its claims, it raises issues similar to those raised in the above cited decisions. Seymour and Bluegrass were cases involving service in and around university campuses which the FTA determined was charter and not mass transportation. Ark involved service in Killington, Vermont which parallels in numerous respects the service CRPTA intends to provide to Broadway at the Beach.

The Federal transit laws, as codified at 49 U.S.C. §5302(a)(7) define mass transportation as service provided to the public and operating on a regular and continuing basis. The FTA has further distinguished charter service from mass transportation by characterizing it as: 1) being under control of the grantee, who generally is responsible for setting the route, rate, and schedule and deciding what equipment is used, 2) being designed to benefit the public at large and not some special organization such as a private club, and 3) being open to the public and not closed door so that anyone who wishes to ride on the service must be permitted to do so. (52 Fed. Reg. 11920, April 13, 1987) On the other hand, FTA has defined the main features of charter as: 1)

the service is by bus or van; 2) the service is to a defined group of people; 3) there is a single contract between the recipient and the riders, not individual contracts between the recipient and each rider; 4) the patrons have the exclusive use of the bus; 5) the charge for the bus is a set rate; and 6) the riders have the sole authority to set the destination. (52 Fed. Reg. 11919, April 13, 1987) GAT argues that because the service provided by CRPTA does not contain the elements characteristic of mass transportation, that it is therefore charter service. GAT claims that because of a cancellation clause included in CRPTA's contract with BATB, BATB has control over the service rendered thus effectively placing it in the position of establishing the route, rates, schedule, and decision of what equipment is to be used. GAT further argues that permanent advertising by BATB upon the trolley dictates that there can be no discretion as to which vehicle can be used, thus placing the operation of the vehicle in the control of BATB.

The Issue of Control

The operative clauses in question invoked by GAT in asserting that BATB controls the operation of the service are found in paragraphs 2 and 8 of CRPTA's Operations Contract. Paragraph 2 reads in part:

"...Notwithstanding any provision to the contrary, CRPTA reserves the sole responsibility and authority for reducing, setting, and modification of routes, schedules and services provided under this agreement, provided, however, that any material change by CRPTA in the rates, routes and schedules provided under this agreement shall give BATB the right to terminate this agreement...."

Paragraph 8 provides in part:

"...In the event a CRPTA trolley is out of service for one (1) hour, CRPTA shall provide a replacement trolley....Replacement trolley will carry no advertising. If a CRPTA mini-bus (Goshen) is substituted at the discretion of CRPTA for trolley during extended service hours, additional BATB signage identification will be applied."

CRPTA maintains that it alone establishes the fares, routes, hours of service and frequency of service based on its proposal to BATB. FTA finds CRPTA's argument persuasive. The terms of the Operations Contract clearly reserve the sole responsibility and authority to CRPTA for reducing, setting, and modification of routes, schedules and services. It clearly authorizes CRPTA to substitute at its discretion a mini-bus for the trolley during extended hours of service. It allows CRPTA the discretion of picking up and dropping off passengers anywhere along the route as determined by CRPTA. It provides that CRPTA shall furnish the operators, fuel, and supplies at its own expense and that the operators and other persons employed by CRPTA in or about the performance of this service shall be and remain the employees of CRPTA and not BATB. And finally, it reserves to CRPTA the authority to approve any requested advertising or vehicle markings in advance. FTA believes these facts outweigh any influence BATB could bring

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to bear due to its right to terminate since clearly the contract must be mutually beneficial to each party with each having demands, necessities, and legal obligations which dictate the nature and manner of service to be provided.

Many of these same factors existed in Ark wherein FTA determined that the provider in question, Marble Valley Regional Transit District (MVRTD), developed the routes and schedules identified in its Operating Agreement and that it had the final say in setting schedules and increasing or decreasing routes and scheduling based on demand and volume. In addition, MVRTD had final approval authority over all advertising placed on the bus, even though BATB's counterpart in Ark, Killington, had exclusive advertising rights on the buses. FTA determined that this provision did not diminish MVRTD's control or operation of the service. Ark and the instant case are distinguishable from Seymour and Blue Grass, cases involving service to university campuses wherein the universities were found to have set the schedules and fares rather than the transit operator and had the prerogative to alter routes and schedules. Such is not the case in the matter before us here.

The Issue of Whether Service is Designed to Benefit the Public at Large

GAT maintains that the service provided by CRPTA is confined to the employees and customers of a private amusement park and therefore not designed to benefit the public at large. It furthermore asserts that CRPTA has no connecting service to BATB and that GAT has the only approved service to the park.

In this regard, it should be noted that in the preamble to the charter regulation, FTA states that service is designed to benefit the public at large when it serves the needs of the general public and not some special organization such as a private club. (52 Fed. Reg. 11920, April 13, 1987) CRPTA argues that BATB is a development of commercial retail space frequented by the public and that members of the public as well as employees will be provided transportation. CRPTA furthermore adds that it anticipates providing connecting service to the park at some point in the future although none is currently provided.

It is clear that service is not intended for an exclusive group of riders, as appeared to be the case in Bluegrass and Seymour, i.e. college students, but that it is available to anyone wishing to board it. In addition, although FTA recognizes connecting service would enhance the availability of the service to the public, it is not essential that it be provided in order to cause the service in question to be determined to be mass transportation; that is, under the control of the grantee, of benefit to the public at large, and open door. Finally, for purposes of the Federal government, CRPTA has submitted a legal opinion stating that it has the legal authority and capacity to provide mass transit service and to receive and disburse Federal funds for that purpose. It has entered into contractual agreements with FTA agreeing to provide mass transit services in accordance with applicable Federal rules and regulations. In this regard, no further authorization is needed for purposes of complying with FTA mandates. Should additional local

authorization be deemed necessary by the State of South Carolina, that is an issue of purely local concern.

The Issue of Whether Service is Open Door

GAT maintains that the service provided by CRPTA is for the benefit of a private organization, i.e. BATB, and that only employees and patrons of BATB can use this service. Once again, CRPTA argues that its service is open to all employees and members of the public seeking transportation in the area.

In determining whether service is open door, FTA looks not only to the level of ridership by the general public as opposed to a defined group, but also to the intent of the recipient who provides the service. The intent to provide service that is open door can be discerned by the efforts that a recipient has made to make the service known and available to the public. FTA thus takes into consideration the efforts a recipient has made to market the service. Generally, FTA considers that this marketing effort is best accomplished by publishing the service in the recipient's pre-printed schedules.

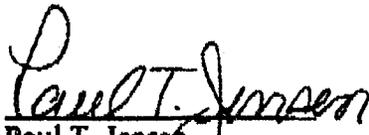
CRPTA states that schedules will be posted not only on the CRPTA vehicles but also throughout the restaurants, retail shops and theaters of the development as well as throughout Horry and Georgetown Counties. CRPTA provided no schedules as evidence of this assertion however, and, in fact, the only schedule provided was provided by GAT as exhibit 5 to its rebuttal. That schedule is entitled, "System-Wide Route Map/Year Round Schedule/CRPTA/Effective February 1995." It lists various route information, maps, and fares for services provided by CRPTA. Nowhere does it list service or route information relative to the BATB service. Since the Operating Agreement is dated May 12, 1995, the schedule obviously would not reference the BATB service. No evidence was presented, however, which indicates that the schedule was updated or that other commonly distributed schedules to the general public are now in existence which advise the public of the availability of service at BATB. It therefore is not apparent that CRPTA has taken efforts to market the service and make the service known and available to the public, the second test in determining whether the service is, in fact, open door. In consideration of the forgoing, FTA has determined that although the service does not appear to be provided to an exclusively defined group, and is thus, "open door", CRPTA has failed to adequately make the availability of the service known to the general public. Assuming, however, that CRPTA reprints its existing schedules or provides supplementary schedules which depict and describe availability of the BATB service, FTA finds that the service meets the third mass transportation criterion of "open door".

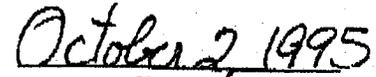
CONCLUSION

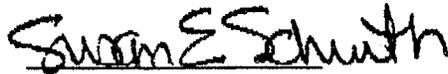
After a thorough investigation, FTA concludes that the service provided by CRPTA is mass transportation because it substantially conforms to the following criteria: 1) it is under the control

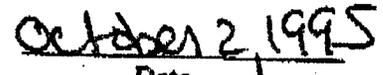
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of the grantee; 2) it is designed to benefit the public at large; and 3) it is open door. With regard to the third element, however, FTA finds that CRPTA has failed to adequately inform the public of availability of service at BATB. FTA accordingly orders CRPTA to reprint existing schedules or publish amendatory schedules which clearly notify the public of the availability of service at BATB including routing, scheduling, and fare information. CRPTA must report to FTA within thirty days on the measures it has taken to comply with the terms of this order.


Paul T. Jensen
Regional Counsel


Date


Susan E. Schruth
Regional Administrator


Date



U.S. Department
of Transportation
Federal Transit
Administration

REGION I
Connecticut, Maine,
Massachusetts,
New Hampshire,
Rhode Island, Vermont

Transportation System Center
Kendall Square,
55 Broadway
Suite 904
Cambridge, Massachusetts 02142

OCT 23 1995

Ms. Rosemary Doyle
President
Cape Ann Travel Company, Inc.
d/b/a Cape Ann Tours
5 Whistlestop Mall
Rockport, MA 01966

Dear Ms. Doyle:

This responds to your letters of complaint dated September 6 and 16, 1995, alleging that the Cape Ann Transportation Authority (CATA) performed impermissible charter service during Schooner Festival weekend on September 2, 1995. In addition, your September 6 letter suggests that CATA is violating charter regulations by transporting students to after-school events.

Before addressing the essential issue of your complaint, it is appropriate to address a subsidiary question you raised. You complain that it is difficult for you to compete with CATA's fare structure. Under 49 U.S.C. § 5307(d)(1)(I), the FTA's jurisdiction over fares is limited to assuring that its recipients have a locally developed process to solicit and consider public comment before raising a fare. Therefore, CATA's fare structure is strictly a local matter and as long as CATA follows its public participation process to ensure consideration of public comments in final plans for fare increases, it will be in compliance with FTA regulations concerning fare structure. Having dispensed with this question, we will proceed to the main concern of your complaint.

Based upon the information contained in CATA's September 18, 1995, response, the service in question does not meet the charter criteria of being provided under a single contract for the exclusive use of a defined group of people who have authority to decide the itinerary. 49 CFR § 604.5(e). Instead, the service falls more closely within the definition of mass transportation which

is defined under the Federal Transit Laws as service provided to the public and operating on a regular and continuing basis. 49 U.S.C. § 5302(a)(7). From this provision, the FTA has identified several salient characteristics of mass transportation: service that is under the control of the provider, designed to benefit the public at large, and open to the public and not closed door. 52 Fed. Reg. 11919-20 (April 13, 1987).

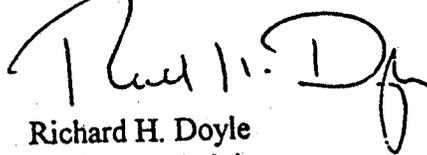
In his September 18 response, Eugene Wallace, Administrator of CATA, maintained that the service in question operates over CATA's regular fixed-route system. Moreover, during an October 19, 1995, conversation with Margaret Foley, FTA Regional Counsel, Mr. Wallace stated that CATA sets the route, rate and schedule and decides what equipment is used in providing the service. Therefore, the FTA finds that CATA exercises sufficient control over the service within the meaning of mass transportation.

Next, CATA claims that the service is not for the exclusive use of any group or organization. Accordingly, the FTA has determined that the service is being provided to benefit the public at large and is consistent with the second criterion of mass transportation. This second element of mass transportation overlaps with FTA's third requirement for mass transportation, namely that the service be "open door." In determining whether service is open door, FTA looks not only to the level of ridership by the general public as opposed to a defined group, but also to the intent of the recipient who provides the service. The intent to provide service that is open door can be discerned by the attempts that a recipient has made to make the service known and available to the public. FTA thus takes into consideration the efforts a recipient has made to market the service. Generally, FTA considers that this marketing effort is best evidenced by publishing the service in the recipient's preprinted schedules, however, other examples include displaying destination signs on buses, a substantial public ridership, public advertisements, and posting bus stop signs and connections to other transportation routes. A recipient is not required to exhaust all these efforts to make the service known and available to the public, only enough effort to indicate an intent that the service is open door. In this regard, FTA notes that CATA's transportation schedule for Schooner Festival weekend was advertised in a local newspaper which stated that the service was being provided to ease traffic congestion. Moreover, CATA submitted a copy of its regular route schedule which lists service to and from Gloucester High School as well as several other schools. Mr. Wallace maintains that the buses that stop at the schools are open to the public and do not carry school bus designations. Thus, it appears that the transportation CATA provides to students for after-school events is "tripper service" which is defined at 49 CFR § 605.3 as regularly scheduled mass transportation service which is open to the public and designed to accommodate school students. Accordingly, the FTA finds that the service in question conforms to the third criterion of mass transportation in that it is open to the public and not closed door.

In conclusion, the FTA finds that CATA is not performing charter service in violation of federal regulations. In accordance with 49 CFR § 604.19, you may appeal this decision within ten days to Gordon J. Linton, Administrator, Federal Transit Administration 400 Seventh Street, S.W., Room 9328, Washington, D.C. 20590.

We hope this information is helpful. If you have any questions, please contact Margaret Foley at (617) 494-2409.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard H. Doyle". The signature is fluid and cursive, with a large initial "R" and a distinct "D".

Richard H. Doyle
Regional Administrator

Enclosures: 49 CFR Part 604 - Charter Services

cc: Mr. Eugene Wallace, CATA



U.S. Department
of Transportation
**Federal Transit
Administration**

REGION I
Connecticut, Maine,
Massachusetts,
New Hampshire,
Rhode Island, Vermont

Transportation System Center
Kendall Square,
55 Broadway
Suite 904
Cambridge, Massachusetts 02142

October 10, 1996

Rosemary Doyle, President
Cape Ann Travel Company, Inc.
d/b/a Cape Ann Tours
5 Whistlestop Mall
Rockport, MA 01966

Dear Ms. Doyle:

This responds to your letters of complaint alleging that the Cape Ann Transportation Authority (CATA) is performing impermissible charter service. Specifically, in your undated letter received in this office July 3, 1996, you claim that CATA is performing charter service for the joint Chambers of Commerce (COC) and is providing trolley service along the same route that Cape Ann Tours has operated over for the past eight years. In your letter of July 5, 1996, you contend that CATA violated charter regulations in connection with transportation service for the Boston Consulting Group (BCG); and you also complain because CATA selected the Cape Ann Transportation Operating Company (CATOC) as their operator instead of your company. CATA submitted responses to your complaint on July 11 and 12, 1996; however, you did not submit a rebuttal.

With regard to your allegation that CATA is providing impermissible charter service for the COC, CATA maintains that Federal funds and Federally funded equipment are not used to provide the "Rockport Shuttle" service. Furthermore, in support of its statement that the service is open to the public and operates as regularly scheduled service on a fixed-route system, CATA submitted a copy of the printed route schedule for the "Rockport Shuttle." Moreover, CATA claims that it does not provide transportation service solely for the use of any organization or group. In response to your claim that CATA operates trolley service over the same route you have used for the past eight years, CATA points out that its operations predate those of Cape Ann Tours; and while your company operates as a private for-profit charter and sightseeing business, CATA operates as a public transit provider.

Pursuant to FTA's charter service regulation, 49 CFR Part 604, a recipient of FTA funding may not provide charter service using FTA-funded equipment or facilities if there is a private operator in its geographic area willing and able to provide that charter service, unless one or more of the exceptions listed at 49 CFR 604.9(b) apply. Recipients are subject to the charter regulation but only to the extent that they use FTA-funded equipment or facilities to provide charter service. If

a recipient sets up a separate company that uses only locally funded equipment and facilities and operates the service solely with local funds, or the recipient is able to maintain separate accounts for its charter operators to show that the charter service is truly a separate division that receives no benefits from the mass transportation division, then FTA's charter rule does not apply. 52 *Federal Register* 42248 (November 3, 1987) According to CATA, no Federal funds or Federally funded equipment are being used to provide the "Rockport Shuttle" service. However, even if Federally funded equipment and facilities were used to provide the service in question, based upon CATA's July 11 response and the "Rockport Shuttle" route schedule submitted therewith, the service in question does not meet the charter criteria of being provided under a single contract for the exclusive use of a defined group of people who have authority to decide the itinerary. 49 CFR § 604.5(e). Rather, the service falls more closely within the definition of permissible mass transportation which is defined under the Federal Transit Laws as service provided to the public and operating on a regular and continuing basis. 49 U.S.C. § 5307(a)(7).

Next, you assert that CATA "compounded" the alleged charter violations by notifying you of an opportunity to perform charter service for the BCG. To substantiate your claim, you submitted a copy of CATA's April 25, 1996, letter to you which states that, "[i]f you are interested and are able to provide transportation for the enclosed [BCG] schedules, please call...with a price quote as soon as possible." In his July 12, response Mr. Wallace explains that CATA only assisted the BCG in locating private operators to perform charter service, but did not supply any vehicles or equipment, Federally funded or otherwise, and did not contract with any operators to provide the service in question. In addition, you complain that CATA selected CATOC, a private nonprofit organization, as its operator instead of Cape Ann Tours. In this regard, FTA's jurisdiction is limited to requiring its grantees to follow the procurement standards set forth at 49 CFR § 18.36 and FTA Circular 4220.1D, "Third Party Contracting Requirements" in order to assure full and open competition. Otherwise, the choice of operator is to be made at the local level.

In conclusion, the FTA finds that CATA did not perform charter service in violation of Federal regulations. In accordance with 49 CFR § 604.19, you may appeal this decision within ten days of receipt to Gordon J. Linton, Administrator, Federal Transit Administration, 400 Seventh Street, S.W., Room 9328, Washington, D.C. 20590. You must include in your appeal the basis for the appeal and evidence to support your position and provide a copy of the appeal to CATA. I hope this information is helpful. If you have any questions, please contact me at (617) 494-2409.

Sincerely,


Margaret E. Foley
Regional Counsel

cc: CATA



U.S. Department
of Transportation
**Federal Transit
Administration**

REGION I
Connecticut, Maine,
Massachusetts,
New Hampshire,
Rhode Island, Vermont

Transportation System Center
Kendall Square,
55 Broadway
Suite 904
Cambridge, Massachusetts 02142

November 7, 1996

Rosemary Doyle, President
Cape Ann Tours and Trolley
P. O. Box 278
Rockport, MA 01966-0378

Dear Ms. Doyle:

This is to advise you that we are not considering your letter of October 24, 1996, an appeal of the Federal Transit Administration's (FTA) October 10, 1996, decision because your letter does not meet the standard set forth at 49 CFR § 604.19 (copy enclosed) which requires that an appeal present evidence that there are new matters of fact or points of law that were not available or not known during the investigation of the complaint. The October 10 ruling held that the service being provided by the Cape Ann Transportation Authority (CATA) is not impermissible charter service. In the preamble to the charter regulations, FTA states that the main features of charter are: 1) the service is by bus or van; 2) the service is to a defined group of people; 3) there is a single contract between the recipient and the riders, not individual contracts between the recipient and each rider; 4) the patrons have the exclusive use of the bus; 5) the charge for the bus is a set rate; and 6) the riders have the sole authority to set the destination. (52 Fed. Reg. 11919, April 13, 1987) (copy enclosed). 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. *Id.*

In contrast, the Federal transit laws define "mass transportation" as service provided to the public and operating on a regular and continuing basis. 49 U.S.C. § 5302(a)(7) (copy enclosed). From this provision, FTA has identified three salient characteristics of 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.

52 Fed. Reg. 11919-20.

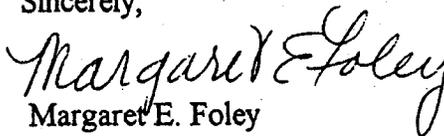
As stated in FTA's October 10 decision, even if Federally funded equipment and facilities were used to provide the transportation in question, based upon CATA's July 11, 1996, response and the Rockport Shuttle route schedule submitted therewith, the service in question does not meet

the charter criteria of being provided under a single contract for the exclusive use of a defined group of people who have authority to decide the itinerary. 49 CFR § 604.5(e). Rather, the service falls more closely within the definition of permissible mass transportation because it is open to the public and operates on a regular and continuing basis.

Furthermore, the FTA found that CATA did not violate the charter regulations by notifying you of an opportunity to perform charter service for the Boston Consulting Group (BCG). You note in your October 24 letter that you were asked to submit a bid directly to CATA instead of to the BCG and although this request may have given the appearance that CATA was involved in providing the service, CATA explained in its July 12 response that it only assisted the BCG in locating private operators to perform charter service, but did not provide any vehicles or equipment and did not contract with any operators to provide the service. While FTA does not require grantees to give members of the public who request it the name of a "willing and able" private provider, we recognize that this information may be beneficial to the public and encourage grantees to provide it. 52 *Fed. Reg.* 42250 (November 3, 1987) (copy enclosed). Grantees who have a roster of several private providers may use their discretion in determining which names to give to a member of the public who calls. *Id.* In this case CATA went further and notified you of the opportunity to provide charter service and asked you to submit a price quote. The FTA recommends that in the future, if a member of the public calls CATA for charter services, CATA should only provide the names of willing and able private providers so as not to create the appearance that the charter regulations are being circumvented.

In your October 24 letter, you state that you have not been at the Whistlestop Mall address since July 1995. You complain because FTA forwarded CATA's responses to your complaint to that address, but also state that you did not see any sense in submitting a rebuttal thereto. Unfortunately, you do not usually put a return address on your correspondence, and it was not until the Post Office returned the October 10 decision that FTA first realized mail is no longer delivered to the old address. Please be assured that we will keep a record of your new address in our files. In order that our records remain accurate, we ask that you include your address on future correspondence so we will know whether you are still at the same location.

Sincerely,


Margaret E. Foley
Regional Counsel

cc: Joseph Randazza, Acting Administrator, CATA

Enclosures: 49 CFR Part 604
49 U.S.C. 5301, et seq.
52 *Fed. Reg.* 11916 (April 13, 1987)
52 *Fed. Reg.* 42250 (November 3, 1987)



U.S. Department
of Transportation
**Federal Transit
Administration**

Administrator

400 Seventh St. S.W.
Washington, D.C. 20590

Chen *Chron*

DEC 3 1996

Mr. Richard A. White
General Manager
Washington Metropolitan Area Transit Authority
500 Fifth Street, N.W.
Washington, D.C. 20001

Dear Mr. White:

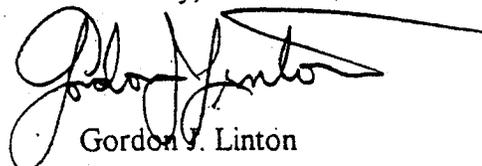
This responds to your request for an exception under 49 CFR 604.9(b)(4) that would permit the Washington Metropolitan Area Transit Authority (WMATA) to provide charter service to any governmental or political agency affiliated with the inaugural of the President and Vice President of the United States, from January 15, 1997, through January 22, 1997.

The Federal Transit Administration's (FTA) charter regulation, 49 CFR Part 604, prohibits recipients from providing charter service if there is a willing and able private operator. Under section 604.9(b)(4), a recipient may petition FTA to provide charter service for special events of national importance to the extent that private charter operators are not capable of providing the service. The key determinant in this exception is the extent to which private charter operators are not capable of providing service for the event. See, *52 Federal Register* 11925, April 13, 1987.

FTA has consulted organizations representing local private operators in connection with your request. These organizations have indicated that they have no objection to FTA's granting of this exception, on the condition that all charter trips provided thereunder originate and terminate within WMATA's service area, and that WMATA provide only those services that private operators are unable to provide.

Accordingly, I hereby grant an exemption under 49 CFR 604.9(b)(4) permitting WMATA to provide charter service during the inaugural of the President and Vice President of the United States, from January 15, 1997, through January 22, 1997. This exception allows WMATA to provide only charter trips originating and terminating within its service area, and only those services that private operators are unable to provide.

Sincerely,



Gordon J. Linton



U.S. Department
of Transportation
**Federal Transit
Administration**

Chiron

400 Seventh St., S.W.
Washington, D.C. 20590

DEC 16 1996

Mr. William J. Evans
Director of Evaluation and Development
Rochester-Genesee Regional
Transportation Authority
1372 East Main Street
P.O. Box 90629
Rochester, New York 14609

Dear Mr. Evans:

This responds to your letter to our Region II Office requesting an extension of a waiver allowing the Rochester-Genesee Regional Transportation Authority (RGRTA) to provide specific charter services using vehicles funded by the Federal Transit Administration (FTA).

Under FTA's charter regulation, 49 CFR Part 604, recipients may not provide charter service using FTA-funded equipment if there is a willing and able private operator. I understand that FTA's Region II Office granted RGRTA a 12-month waiver on October 11, 1995, since no private operators responding to RGRTA's 1995 annual charter notice could provide "transit-type lift and front-end and kneeling-equipped" vehicles. You indicate that in response to its 1996 charter notice, RGRTA again received no responses from operators having the specified type of vehicles. You therefore seek an extension of the waiver to provide charter service.

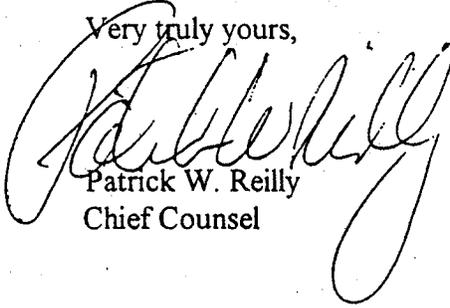
The granting of such a waiver is contrary to 49 CFR 604.3(p), which provides that a private operator is willing and able if it has the required category of vehicles and the legal authority to provide charter service. In implementing guidance, FTA has explained that there are only two categories of revenue vehicle, namely buses and vans. Under the charter regulation, a bus is a bus whether it is an intercity bus, a transit bus, a school bus, or a trolley bus. A private operator does not have to demonstrate that it has any particular type of bus in order to be considered "able." 52 *Federal Register* 42248, November 3, 1987.

Consequently, any private operator responding to RGRTA's annual charter notice and having at least one bus or one van that it is licensed to use in charter service, must be determined willing and able. RGRTA may therefore provide charter service using FTA-funded equipment only under one of the exceptions to the regulation. One of these exceptions, at section 604.9(b)(2)(ii), allows a recipient to provide charter equipment to or service for a private operator that lacks accessible vehicles. Further, under section 604.9(b)(5)(ii), a recipient may provide direct charter service to certain tax-exempt entities requesting service for persons with disabilities. Also, under section 604.9(b)(7), a recipient may provide specific types of charter service under a formal agreement with all the willing and able private operators in its service area. Before concluding a formal agreement under this section, recipients must complete the review process to ensure that all willing

and able private operators are valid parties to the agreement. Recipients are not required to seek approval or concurrence from FTA in order to provide service under these exceptions.

I regret any confusion caused by FTA's erroneous decision to grant RGRTA's 1995 waiver request, and trust that this provides you with the necessary clarification and guidance concerning FTA's charter requirements.

Very truly yours,

A handwritten signature in black ink, appearing to read "Patrick W. Reilly". The signature is fluid and cursive, with a large loop at the end.

Patrick W. Reilly
Chief Counsel

cc: L. Penner, TRO-2
Scott Biehl, TCC-30

BEFORE THE FEDERAL TRANSIT ADMINISTRATION

California Bus Association,
Complainant

Charter Complaint

v.

49 U.S.C. § 5323(d)

SunLine Transit Agency,
Respondent :

DECISION

Introduction

The California Bus Association (CBA) filed this complaint with the Federal Transit Administration (FTA) alleging that the SunLine Transit Agency (SunLine) is providing service in violation of FTA's charter regulation, 49 CFR Part 604. Specifically, CBA claims that SunLine's group trip policy and procedures are designed to promote charter service for school groups and that this practice excludes fixed-route riders. Applying a balancing test to the service in question, FTA finds that SunLine's group trip service is charter service in violation of 49 CFR Part 604 which implements Section 5323(d) of the Federal Transit Laws, as codified, 49 U.S.C. § 5301, *et seq.* Therefore, SunLine is ordered by this decision to correct the practices that do not comply with FTA's requirements.

Complaint

CBA filed this complaint with the FTA on June 24, 1996, and also provided photographic, video and documentary evidence. Specifically, CBA alleges that SunLine buses (aka "SunBuses") fail to stop for passengers waiting at designated bus stops, display unclear and misleading head-signs, and make off-route stops including loading and unloading passengers on school property. CBA's complaint and rebuttal describe incidents occurring on nine separate days between May 1993 and September 1996 all of which involved service to school groups.

Response to Complaint

CBA's complaint was forwarded to SunLine and by letters dated August 23 and September 3, 1996, SunLine provided its response. SunLine submitted additional documentation including its preprinted schedule, "SunBus Group Trip Policy Summary," and "Planning Group Trips" brochure. The brochure describes the service in question as trips made by a group of ten or more people from one mutual origin to one mutual destination. In addition, the brochure advertises that groups can go on field trips within a one-mile radius of the fixed route. To qualify for the group fare discount of fifty cents per rider, trips must be requested at least five working days prior to but no more than three months in advance of the trip. The brochure goes on to state that SunLine is

not a charter service; all SunBus services are open to the general public and operate on published fixed routes; all buses will make any stop on the route where passengers need to board or alight; additional buses may be placed in service for groups of forty or more at SunLine's discretion; and SunLine may limit the number of buses accommodating group trips, particularly during peak hours. According to the policy summary, SunLine reserves the right to cancel confirmed group trips because its first commitment is to meet regular fixed-route needs. The summary also contains procedures for groups to follow when cancelling trips.

In a July 12, 1996, memorandum, SunLine's Senior Trainer explains that new coach operators are advised that after picking up group trip riders, SunBuses must proceed along the regular fixed route, street by street, picking up regular passengers along the way until they reach their destination. At no time are SunBuses allowed to enter school grounds or private property. After the group has alighted the coach, the operators must remain in service until the end of the line unless a "follower" has caught up to them at which time they may transfer the remaining passengers. In addition, all "moneys" for the trips go through the farebox and the operators must log in the number of passengers in the group.

SunLine states that it sends the group trip brochure to schools annually and submitted a mailing list containing names and addresses of more than ninety schools and organizations. According to SunLine, the brochure is also included with a letter confirming group trip arrangements scheduled by a group leader using the service for the first time. Furthermore, SunLine acknowledged that it has performed over 4,000 group trips including most of the trips documented in CBA's complaint, for example, group service for Della Lindley Elementary School, Vista Del Monte Elementary School, Cahuilla Elementary School, Desert Springs Middle School, and Bubbling Wells Elementary School. SunLine maintains that it has instructed its operators not to enter school property to load and unload riders, and to pick up passengers along fixed routes.

With regard to CBA's allegations that SunBuses display clear and misleading head-signs, SunLine claims in its September 3 response that "Going into Service" is the correct head-sign to display while a group is boarding a bus, and that once the group has finished boarding, the sign should be changed to "Supplemental Service." SunLine's Senior Trainer states, however, that new coach operators are instructed to use headsigns reading "Supplemental, Limited Service" during group trips. Finally, SunLine maintains that it is intensifying its driver training and will discuss these issues in upcoming Operator Safety Meetings.

Rebuttal

In its rebuttal dated September 17, 1996, CBA challenges the legality of the group trip policy because the policy provides that SunBuses can deviate from established routes at the charter party's request and that the policy excludes fixed-route riders. Furthermore, CBA contends that when it became aware SunLine intended to provide the group trips in question, it monitored SunLine's activities and observed that SunBuses did not just occasionally pass up passengers

but rather, "never" stopped for passengers waiting at SunLine bus stops no matter how persistent the people were to board the SunBuses.

Moreover, CBA claims that SunLine has continued to perform closed-door charter service in spite of this complaint and SunLine's subsequent response thereto. Specifically, CBA alleges that on September 13, 1996, SunLine transported the Cathedral City High School band to the College of the Desert in two SunBuses displaying "Supplemental Service" and "Going into Service" head-signs. In support of this claim, CBA provided additional photographs. According to CBA, when one of the drivers observed someone taking pictures, the head-sign was changed to "Out of Service" for the duration of the trip. In addition, CBA claims that two female passengers were refused entry into one of the buses and that the SunBuses passed up fixed-route passengers along Highway 111 and travelled off-route.

Finally, CBA submitted correspondence regarding a November 10, 1992, complaint filed with FTA alleging that SunLine was operating exclusive school bus service in violation of FTA's school bus regulation, 49 CFR Part 605. In a December 2, 1992, response to CBA, SunLine represented that the service complained of was supplemental tripper service along fixed routes and that SunBuses did not enter school grounds or make off-route stops. CBA claims that SunLine's letter is a "local agreement" under 49 CFR 604.9(b)(7) and that SunLine is in violation thereof. CBA argues that despite FTA involvement and the subsequent "local agreement," SunLine has continued to operate closed-door service and that CBA's repeated efforts to resolve the matter over the course of three years have been unsuccessful.

Discussion

Before reaching the main issue of this complaint, it is appropriate to address a subsidiary question raised. CBA characterizes SunLine's December 2, 1992, correspondence as a "local agreement" within an exception to the charter regulation, and maintains that SunLine is in violation thereof. SunLine's correspondence, however, pertains to supplemental tripper service under FTA's school bus regulations, 49 CFR 605.3 and therefore, does not constitute a "formal agreement" as defined at 49 CFR 604.9(b)(7) of the charter regulation.

The FTA points out, however, that CBA properly brought this complaint under the charter regulation, not the school bus regulation. The preamble to FTA's school bus regulation explains that "school bus operations" generally take place during peak morning and evening hours. 41 Fed. Reg. 14127, 14128 (April 1, 1976). The transportation of students and personnel exclusively during off-peak hours would be charter service governed by 49 CFR Part 604. The group trips provided by SunLine for extracurricular school activities are clearly not "school bus operations" providing peak hour transportation to and from school; however, the service does warrant scrutiny under the charter regulation. We turn now to an examination of the main concerns of CBA's complaint.

The essential issue in this matter is whether the service provided by SunLine is impermissible charter service or permissible mass transportation. The definition of charter service found in FTA's regulations at 49 CFR 604.5(e) is 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).

In contrast, 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 other features which logically flow from this definition:

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.

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 because, 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). We have established the following findings and determinations on the basis of such an analysis.

1. Under the control of the recipient.

The record establishes that SunBuses deviate up to one mile from the published fixed routes to accommodate groups of ten or more. According to SunLine, the vehicles return to and continue along the regular route and stop at any bus stop where passengers need to board or alight. In addition, SunLine has discretion to increase or decrease the number of SunBuses used for group trips based on demand and volume. Next, SunLine has set a group-rate fare of fifty cents per rider, decides whether an additional fare will be required if transfers are involved, and advertises the fare in the preprinted fixed-route schedule and group trip brochure. Finally, according to the group trip brochure, the group representative must contact SunLine to schedule the trip and

supply the following information: date of trip, time of outbound trip, time of inbound trip, origin, destination, and group size. SunLine then confirms the reservations with a follow-up letter.

SunLine submits that the one-mile route deviations do not violate the charter regulation because SunBuses travel along the prepublished fixed routes during part of the group trips and stop to pick up regular route passengers. On the other hand, CBA contends that the group trip policy itself is irreversibly flawed both in theory and in practice because the policy provides that SunBuses can deviate up to one mile from established routes to perform services that are not regularly scheduled.

FTA finds that SunLine's group trip service does not operate on a regular and continuing basis within SunLine's control; rather, it is provided regularly to singular events at the behest of the group participants. The groups travel pursuant to a common purpose under an itinerary specified in advance in accordance with the group's selection of pick-up and drop-off points. Although SunLine decides the number of vehicles to be used for group trips and may determine the route to follow during the deviations, FTA has previously found that these are merely operational details and not determinative of actual control of the service (Sevmour, at 10). As FTA has stated in Question 27(d) of its "Charter Service Questions and Answers," 52 Fed. Reg. 42248, 42252 (November 3, 1987), control of fares and schedules is the critical element in distinguishing charter service from mass transportation.

The FTA has previously determined that compensation on the basis of hours of service is evidence of charter operations, whereas individual fares paid by each rider indicates the service is mass transportation (Sevmour at 9). Under the group trip policy, each rider pays an individual fare set by SunLine, and the money collected goes through the fare box. In this respect, the service conforms to mass transportation. FTA finds, however, that SunLine does not set the schedules for the group trips which is supported by the fact that there are no published schedules for the service. SunLine may have input in developing the group trip service schedules as any operator would, but the group representatives specify arrival and departure times and trip origins and destinations and thus, have the prerogative of altering schedules. Blue Grass Tours and Charter v. Lexington Transit Authority, URO-III (May 17, 1988).

In applying a balancing test to the foregoing factors, FTA finds that SunLine's group trip service does not meet the first criterion of mass transportation.

2. Designed to benefit the public at large.

CBA argues that SunLine's group trip policy is designed to promote group trip charters and to exclude fixed-route riders in violation of 49 CFR Part 604. In response, SunLine submits that SunBuses make one-mile deviations from the fixed route for the convenience of the groups as

long as SunBuses make all stops along the fixed route and the deviations do not inconvenience regular passengers.

The FTA has previously noted 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 riders outside a target group of customers be eligible to use the service. See Annett Bus Lines v. City of Tallahassee, FL-TALTRAN/90-02-01 (April 28, 1992). SunLine's group trip policy targets groups of ten or more people and any members of the public who are unable or unwilling to form a group of at least ten riders are not eligible to use the service. Thus, the group trip service is not designed to benefit the public at large and in practice, is basically designed to meet the transportation needs of defined groups of students and school personnel as well as other organizations.

Indeed, the group trip service may cause inconvenience to members of the public. According to SunLine, the buses used for group trips stop at all stops along the fixed-route to pick up regular passengers. At SunLine's discretion, additional buses are added for groups of forty or more riders. These facts lead FTA to conclude that regular route passengers may be disadvantaged in either of the following ways. First, fixed-route riders, without prior notice, may be required to travel up to two miles roundtrip along route deviations made for group trips in SunBuses that do not keep within the fixed-route schedule; or second, supplementary SunBuses may be put into service solely to accommodate group trips with the result that regular passengers are excluded.

SunLine's group trip service is designed differently from SunLine's regular fixed-route service in other respects as well. For example, SunLine allows group participants to call from five days to three months in advance to schedule trips. Next, SunBuses deviate up to one mile from the fixed route to accommodate group trip passengers. Moreover, the photographic and video evidence show that there are no designated bus stop signs at the origin and destination points of the group trips. In addition, the group trip fare is fifty cents while SunLine's regular fare is seventy-five cents. Further, published schedules exist for SunLine's other routes but there are no published schedules for group trip service. Finally, group trip buses display restrictive headsigns. The reasonable conclusion adduced from these facts is that the group trip service is a special type of service which is set up, advertised and operated differently from SunLine's regular service, pursuant to a written agreement, to accommodate the special needs of the group participants (Blue Grass, at 4). Although the definition of "mass transportation" in the Federal Transit Laws, 49 U.S.C. § 5302(a)(7), does include the concept of "special" transportation, the type of service complained of in this case is not one of the two types of "special" service that legally fit the definition of "mass transportation." They are service exclusively for elderly and disabled persons and service provided for workers who live in the innercity but work in a factory in the suburbs. 52 Fed. Reg. 11920.

Thus, the group trip service is not designed to benefit the public at large and in practice, is designed to meet the transportation needs of school groups and organizations.

3. Open to the public and not closed door.

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 the 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 marketing 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, at 5). The posting of bus stop signs and the connections to other transportation routes are also considered indicators of "opportunity for public ridership" (Seymour, at 9). A recipient is not required to make all of these efforts in order to have manifested the intent to make service open door.

Although SunLine asserts that its buses are open to the general public at all times, SunLine's position is not supportable when the group trip service is examined against the complete definition and intent of the charter regulation as well as the system in actual operation. The opportunity to arrange group trips is briefly described on page 7 of the published fixed-route schedule along with a number to call for additional information. The "Planning Group Trips" brochure is printed separately and SunLine's submission indicates that it is mailed to at least ninety schools and organizations. In other respects, however, SunLine's group trip service is essentially closed door.

CBA argues that the group trip service is not available to the general public because SunBuses display unclear and misleading head-signs, and fail to stop for passengers waiting at SunLine bus stops. The photographs submitted by CBA corroborate these claims. In response, SunLine claims that "Going into Service," "Supplemental Service," and "Supplemental, Limited Service" are the correct destination signs to use on SunBuses performing group trips. These facts clearly contradict SunLine's assertion that all SunBuses are open to the public. Moreover, such practices are inconsistent with the instructions given to the general public on page 2 of the preprinted schedule which direct passengers to "[c]heck the destination sign at the front of the bus to be sure you are boarding the correct bus."

In order for service to be considered open to the public, head-signs on buses must display route numbers and destinations, and must operate according to the published schedule. Destination signs on buses such as those used by SunLine are not permitted under 49 U.S.C. 5323(d). FTA finds that SunLine has employed signing procedures of obvious impropriety. Furthermore, using a terminus where there is no bus stop sign and refusing entry to passengers render SunLine's claims that the service is open to the public unpersuasive. Therefore, FTA finds that the service in question is not "open door" and does not meet the third criterion of mass transportation.

Conclusion and Order

After applying a balancing test to the service in question, FTA concludes that SunLine's group trip operations are charter service in violation of 49 CFR Part 604. Therefore, SunLine shall immediately discontinue operating the service as it is presently configured. Should SunLine wish to reinstitute group trip operations, it must reconfigure the service to conform to FTA's mass transportation guidelines, and submit its plan to FTA for review and approval prior to implementation.

Within thirty days, SunLine must provide a written report to the FTA on the measures it has taken to ensure compliance with the terms of this order.

Margaret E. Foley
Margaret E. Foley
Regional Counsel

February 6, 1997
(Date)

Leslie Rogers
Leslie Rogers
Regional Administrator

FEB 10 1997
(Date)



U.S. Department
of Transportation
Federal Transit
Administration

REGION VII
Iowa, Kansas
Missouri, Nebraska

6301 Rockhill Road
Suite 303
Kansas City, Missouri 64131

April 25, 1997

Mr. Loren L. Jones, President
Northwest Iowa Transportation, Inc.
Northwest Iowa Tours
P. O. Box 911
Old Highway 20 E
Fort Dodge, IA 50501-0911

Re: Charter and Intercity Service Inquiry
of April 21, 1997

Dear Mr. Jones:

This letter is the response to your inquiry of April 21, 1997 regarding whether federally-funded coaches (buses) if leased by the Heart of Iowa Regional Transit Authority (HIRTA) to Five Oaks Charter, Inc. of Des Moines, Iowa, for the purpose of providing intercity bus service may be used to compete with privately funded vehicles owned by your company and other private charter providers.

The general answer to your inquiry is no: FTA regulations found at 49 C.F.R. 604.9(a) prohibit recipients of federal funds from providing charter service if there are any private charter operators willing and able to do so. Furthermore, FTA funded equipment may not be used to provide charter service unless at least one of the exceptions in 49 C.F.R. 604.9(b) applies.

Given the facts of your letter, exception (2)(ii) appears to be the only exception that could apply. This exception allows FTA funded equipment to be used when the recipient (HIRTA) enters into a contract with a private charter operator, such as Five Oaks Charter, Inc., to provide charter equipment to the operator because the operator itself is unable to provide equipment accessible to elderly and handicapped persons. However, any charter service provided under any of the exceptions must be incidental charter service as required by 49 C.F.R. 604.9(e).

Letter to Mr. Jones
April 22, 1997

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If you have additional questions or concerns, please contact Ms. Paula L. Schwach,
Regional Counsel at 816.274.5203.

Sincerely,



Lee O. Waddleton
Regional Administrator

cc: Heart of Iowa Regional Transit Authority



U.S. Department
of Transportation
Federal Transit
Administration

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Massachusetts,
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MAY 12 1997

Mr. Kenneth A. Hazeltine
Public Transportation Administrator
New Hampshire Department of Transportation
P.O. Box 483
Concord, NH 03302-0483

Dear Mr. Hazeltine:

This responds to your April 22, 1997, request for an exception under 49 CFR § 604.9(b)(4) which would allow the New Hampshire Department of Transportation (NHDOT) to operate charter service for the 13th Rural Public and Intercity Bus Transportation Conference to be held September 13-17, 1997, in North Conway.

The preamble to the charter regulation explains that the Federal Transit Administration (FTA) will grant an exception under § 604.9(b)(4) only for events of an extraordinary, special and singular nature such as the Pan American Games and the visits of foreign dignitaries. 52 Fed. Reg. 11925 (April 13, 1987) Regularly scheduled yearly or periodic events would not qualify for the exception. "Charter Service Questions and Answers," 52 Fed. Reg. 42251 (November 3, 1987) With reference to our telephone conversation last week, the FTA did grant a "special event" exception to several transit authorities in Iowa for the 1988 World Ag Expo, an international agricultural exposition which had been held in the United States only twice in twenty years and which was expected to draw between 200,000 and 300,000 visitors. However, your letter indicates that the transportation conference, which is held periodically, is not the type of activity intended by the regulation's "special event" exception.

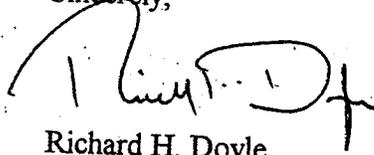
For these reasons, the FTA has determined that NHDOT must follow the public participation process set forth at § 604.11 to determine if there is a willing and able private provider of charter service. If no willing and able operator exists, NHDOT can provide charter service for the

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conference as long as it is incidental charter service which is defined at § 604.5(i) as charter service that does not interfere with or detract from providing mass transportation service or does not shorten the mass transportation life of the equipment being used. *See also 52 Fed. Reg. 42251-42252.*

We hope this information is helpful. If you have any questions, please call Margaret E. Foley, Regional Counsel, at (617) 494-2409.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard H. Doyle". The signature is stylized with a large initial "R" and a long horizontal stroke.

Richard H. Doyle
Regional Administrator

Enclosures: 49 CFR Part 604, "Charter Service"
52 Fed. Reg. 11916 (April 13, 1987)
52 Fed. Reg. 42248 (November 3, 1987)