

a preliminary determination as to whether probable cause exists to believe that a violation has taken place. See 49 CFR §604.40.

Closely related to this is your request for a hearing to determine the urban area of AC Transit cited in both your September and March letters. The UMIA charter bus regulation provides two different possible opportunities to you for participation in a hearing.

Section 604.17 of the charter regulation provides an opportunity for private operators to comment in a hearing on a grant applicant's charter operations at the time a grant application is made to UMIA. However, those comments must be submitted to the applicant, not to UMIA. 49 CFR 604.17. Also, the charter regulation provides that the Administrator of UMIA may hold, if he deems it necessary, an evidentiary hearing pursuant to a charter bus complaint investigation. Such a hearing is not a right to the parties but is discretionary for the Administrator, to enable him to gather the necessary evidence to make a decision on a complaint. 49 CFR 604.42. Since there is no complaint involved at this time a hearing is not appropriate under this provision. Further, even if a complaint were involved, a hearing may not be held if it were deemed by UMIA as unnecessary, 49 CFR 604.42.

Thank you for your patience in this matter. If you have any questions you may continue to direct them to UMIA's Region IX office. If you wish to file a complaint you may send it to me and after docketing in this office we will transmit it to the Region IX office for investigation.

Sincerely,

Margaret M. Ayres
Margaret M. Ayres
Chief Counsel

AUG 18 1980

Paul Nagle, Esq.
United Bus Owners of America
Suite 201
500 Water Street
Washington, DC 20024

Dear Mr. Nagle:

This is in response to UBOA's question asking whether it is proper for the Des Moines Metropolitan Transit Authority (MTA) to use UMTA assistance for express commuter service between Altoona, Iowa, a town that is outside of MTA's urban area, and downtown Des Moines.

The fact that the service goes outside the MTA urban area is significant if the Altoona express may be characterized as a "charter bus operation," as defined in UMTA's charter bus regulations, 49 C.F.R. Part 604. This is crucial since charter bus operations that go outside of a grantee's urban area trigger the provisions of Section 3(f) of the Urban Mass Transportation Act of 1964 (UMT Act), as amended, 49 USC 1601 et seq., and the UMTA charter regulations, 49 C.F.R. Part 604. These statutory and regulatory provisions impose certain restrictions on UMTA grantee intercity charter operations. Charter operations are defined as:

...(T)ransportation by bus of a group of person who, pursuant to a common purpose, and under a single contract, at a fixed charge for the vehicles or service, in accordance with the carrier's tariff have acquired the exclusive use of a bus to travel together under an itinerary, either agreed on in advance, or modified after having left the place of origin. (This includes the incidental use of buses for the exclusive transportation of school students, personnel and equipment.)

49 C.F.R. 604.3(b).

Information obtained from the MTA indicates that the Altoona express does not meet that definition. It is a fixed route service that runs at prescribed times during the weekdays, charging passengers on a fare per person basis. The service is open to all members of the general public, with no restriction based any group membership.

Since the Altoona express does not meet that definition, the statutory and regulatory provisions relating to charter bus operations do not apply.

Also, comparison of the service to the definition of "mass transportation" found in the UMT Act leads us to believe that the service is mass transportation and thus the proper subject of UMTA assistance. Section 12(c)(6) of the UMT Act provides:

The term mass transportation means transportation by bus ... either publicly or privately owned, which provides to the public either general or special service (but not including school buses or charter or sightseeing service) on a regular and continuing basis.

Since, as shown above, the Altoona express provides service to the general public on a regular and continuing basis and does not meet the definition of charter bus operations, it appears that it is not improper to support the service with UMTA financial assistance.

It may be, however, that the service is in conflict with Section 3(e) of the UMT Act, 49 USC 1602(e). That section provides:

No Financial assistance shall be provided under this Act to any state or local public body or agency thereof for the purpose, directly or indirectly, ... of providing by contract or otherwise for the operation of mass transportation facilities or equipment in competition with, or supplementary to, the service provided by an existing mass transportation company, unless the Secretary finds that such program to the maximum extent feasible, provides for the participation of private mass transportation companies

The information provided to us by the MTA indicates that establishment of the service was made after public notice was given of MTA's intention to initiate the Altoona express. No objection to or request for participation in provision of the service was filed by a private transportation company. As a consequence it does not appear that any private operator has been harmed by this MTA operation, and thus the service does not appear to conflict with Section 3(e). However, if UBOA has additional information relating to compliance with this provision, it should be submitted to this office so that we can thoroughly consider the matter.

I hope this answers UBOA's question. If any other questions
come to mind please feel free to call me.

Sincerely,

Ernesto V. Fuentes

cc: Reg. Counsel

D. Charter Bus



U.S. Department of Transportation
Urban Mass Transportation Administration

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JAN 16 1981

Anthony R. Ameruso, P.E.
Commissioner
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Transportation
40 Worth Street
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Charter Bus

Dear Commissioner Ameruso:

This is in response to your letter of November 3, 1980, which requested guidance on several issues relating to the charter bus provisions of the Urban Mass Transportation Act of 1964, as amended ("the UMT Act"), 49 U.S.C. 1602(f) and 1608(c)(6), and the UMTA charter bus regulation, 49 CFR Part 604. I am providing specific answers to your enumerated questions, below. However, it is important to first explain the basis for UMTA's requirements and summarize what the requirements actually are.

UMTA's charter bus regulation is designed to implement two provisions of the UMT Act. The first provision, section 12(c)(6), states that "mass transportation" service, which is eligible for UMTA funding, does not include " . . . charter or sightseeing service". 49 U.S.C. 1608(c)(6). The Comptroller General of the United States has interpreted this provision to disallow the use of financial assistance provided under the UMT Act for the purchase of buses intended for use in charter service, but to allow, even encourage, the "incidental" use of such buses for charter service so long as such service "does not detract from or interfere with urban mass transportation service for which the equipment is needed." Opinion of the Comp. Gen., B-160204 (December 7, 1966). This "incidental use" restriction applies to all UMTA grantees, and is set forth in the charter regulation at 49 CFR 604.11.

The second provision of the UMT Act on which the regulation is based is section 3(f), which is a special provision enacted to protect private operators in the intercity charter bus industry from being foreclosed from intercity charter bus business by competition from federally assisted public bodies and those private carriers who operate urban mass transportation services on their behalf. 49 U.S.C. 1602(f). Under this provision, all grantees who receive funds under the UMT Act or the Federal-Aid Highway Act for "the purchase or operation of buses," must enter into a charter bus agreement with the Secretary of Transportation to protect private intercity charter bus operators. The terms of this "agreement" are set forth in 49 CFR 604.13, and become operative if a recipient of capital or operating assistance, or an operator on its behalf, engages in charter bus operations outside its urban area, and derives \$15,000 or more annually from such operations.

In the event that a grantee or an operator on its behalf engages in incidental charter bus operations outside its urban area, and derives \$15,000 or more annually from such operations, the regulation requires that the grantee submit to UMTA the following: (1) a statement with respect to notice to private charter bus operators regarding the proposed or existing incidental charter operations (49 CFR 604.15); (2) a certification of costs (49 CFR 604.3, 604.15(a)(3)); and (3) a cost allocation plan (49 CFR 604.3, 604.15(a)(4)).

The answers to your enumerated questions are as follows:

1. What is the definition of "mass transportation service?"

The term "mass transportation" is defined in section 12(c)(6) of the UMT Act as follows:

" . . . transportation by bus, or rail, or other conveyance, either publicly or privately owned, which provides to the public general or special service (but not including school buses or charter or sightseeing service) on a regular and continuing basis." 49 U.S.C. 1608(c)(6).

While the statutory definition of "mass transportation" is silent on the matter, it is important to note that UMTA is authorized to assist mass transportation services only within urban areas, and not between cities. This is evident from the congressional statement of Findings and Purposes contained in section 2 of the UMT Act (49 U.S.C. 1601) and from the inclusion in the Act of a separate program of assistance for intercity bus service in section 22 (49 U.S.C. 1618).

2. What is the definition of "incidental charter use?"

The UMTA charter bus regulation defines "incidental" as charter bus operations which do not interfere with regularly scheduled service (49 CFR 604.3), and lists three charter uses that are presumed not to be incidental:

- (1) Weekday charters which occur during peak morning and evening rush hours;
- (2) Weekday charters which require buses to travel more than fifty miles beyond the grantee's urban area; and
- (3) Weekday charters which require the use of a particular bus for more than a total of six hours in any one day. 49 CFR 604.11(b).

Any other charter use would be considered an "incidental use," and is allowed, so long as the other requirements of the regulation are met.

3. What geographical entity comprises the "urban area" for purposes of operators assisted by the New York City Department of Transportation?

The definition of "urban area" for purposes of the UMT Act is left to UMTA's discretion, 49 U.S.C. 1608(c)(10). The charter bus regulation defines "urban area" as follows:

" . . . the entire area in which a local public body is authorized by appropriate local, State and Federal law to provide regularly scheduled mass transportation service. This includes all areas which are either (a) within an 'urbanized area' as defined and fixed in accordance with 23 CFR Part 470, subpart B; or (b) within an 'urban area' or other built-up place as determined by the Secretary under (section 12 of the UMT Act)." 49 CFR 604.3.

Section 12(c)(10) of the UMT Act defines "urban area" as follows:

". . . any area . . . which is appropriate, in the judgment of the Secretary, for a public transportation system to serve commuters or others in the locality taking into consideration the local patterns and trends of urban growth." 49 U.S.C. 1608(c)(10).

In considering the applicability of these definitions to the New York City area, we have determined that for purposes of the charter regulation and the "incidental use" presumption, the urban area for New York City Department of Transportation should coincide with the Tri-State New York-Northeast New Jersey-Connecticut urbanized area. This is conditioned, however, on the operators' authority to provide service within the entire area. However, our definition of "urban area" also includes those areas where an operator actually provides mass transportation services, even though it has no explicit authority to do so, so long as it is not prohibited from doing so.

4. What are the UMTA regulations on the scheduled use of UMTA-funded buses as opposed to charter use? While there are no regulations that bear on this specific question, the definition of "mass transportation" service provides guidance on the allowed uses of UMTA-funded buses. That is, UMTA-funded buses can only be used for scheduled services that fall within our definition of "mass transportation." By analogy with the "incidental use" restrictions, however, such buses may be used for other purposes when not needed for mass transportation. That is, an operator who is authorized to provide regularly scheduled intercity service on weekends, for example, could do so with UMTA-assisted buses. However, it would have to be demonstrated that no UMTA operating assistance is attributed to the provision of such non-mass transportation service. In addition, where such service competes with or supplements

the services provided by other private, non-subsidized mass transportation companies, the requirements of section 3(e) of the UMT Act apply (49 U.S.C. 1602(e)). UMTA will shortly issue a Notice of Proposed Rule-making implementing section 3(e), and we anticipate that the proposed regulation will provide guidance in this area.

5. What restrictions apply under the following circumstances:

(a) Private company receives operating assistance but does not have UMTA-funded buses: The charter bus restrictions apply to any bus company that receives either capital or operating assistance. Likewise, operating assistance is available only for eligible "mass transportation" services.

(b) Private company has UMTA-funded buses and non-UMTA funded buses, and (1) does not receive operating assistance: The charter bus restrictions and mass transportation use requirements apply only to UMTA-funded operations. Thus, a private company which owns its own buses and receives no operating assistance is free to operate those buses without restriction. The company's UMTA-funded buses, however, are subject to all applicable UMTA requirements.

(b)(2) Same as (b)(1), but company does receive operating assistance: Operating assistance is available only for eligible "mass transportation" service. Therefore, in order for the company to use its own buses without restriction, all operating assistance must be attributable to the mass transportation portion of its operations. That is, the company may use its own buses in non-incidentual charter service only if its cost allocation plan demonstrates that charter revenues from these buses exceed charter expenses. The company's UMTA-funded buses are restricted to incidentual charter use only.

(c) and (d) Private company has an equity interest in UMTA-funded buses: UMTA agreed to allow the private bus companies in New York City to receive an undivided proportional share of the ownership of buses for which they put up the local share on the condition that the buses would be subject to all the terms and conditions of the grant agreement between UMTA and NYCDOT. Thus, the fact that a company has an equity interest in UMTA-funded buses does not limit any otherwise applicable UMTA requirements or restrictions.

(e) If a company does charter or scheduled work within and/or outside the urban area, must it use separate buses for this service with separate financial accounts or may it use the same buses with separate financial accounts: This question is too broad for a specific response. As noted above, the charter restrictions apply to companies receiving operating or capital assistance. UMTA-funded buses, whether they receive operating assistance or not, can be used for charter service only on an incidentual basis. By analogy, UMTA-funded buses may be used for other non-mass transportation uses (i.e., regularly scheduled intercity service) only on an incidentual basis. Under no circumstances may operating assistance be used to offset non-mass transportation operating expenses. Inasmuch as operating expenses will involve such activities as maintenance and storage, which apply to an entire fleet, the company will

have to be able to separately allocate its mass transportation expenses and non-mass transportation expenses. Thus, if a company has its own buses, and wishes to use them in non-incidenta1 charter or other non-mass transportation operations, it may either physically segregate these buses from its UMTA-assisted buses, or demonstrate, in its cost allocation plan, that UMTA operating assistance is not used to subsidize the non-mass transportation services.

(f) Do UMTA regulations apply only during the period of an operating assistance grant: Assuming that a company has no buses that were purchased with UMTA funds, the charter and mass transportation use restrictions would apply only for the period of an operating assistance grant. UMTA requirements apply to UMTA-funded buses for as long as they are used in mass transportation. In the event a bus is withdrawn from mass transportation service, section 4 of the grant agreement and OMB Circular A-102, Attachment N, govern the disposition of the equipment.

I have attempted to provide you with workable interpretations of the applicable rules, in response to your questions. Enclosed are copies of pertinent documents. In preparing project applications and budgets, you should work closely with the UMTA regional Transit Assistance office to ensure that UMTA assistance is being used for eligible expenses. I hope that this letter has clarified UMTA's requirements. If you have any further questions, please feel free to contact me again.

Sincerely,


Glenn F. Wasserman
Regional Counsel

Enclosures



U.S. Department
of Transportation
**Urban Mass
Transportation
Administration**

Region 2
Connecticut,
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TALMAGE TOURS, INC.)
)
vs.)
)
NEW JERSEY TRANSIT CORPORATION)

MEMORANDUM OF DECISION

I. Summary of Decision

This decision is the result of an investigation into the charter bus operations of the New Jersey Transit Corporation ("NJTC"). On the basis of this investigation, we have determined that NJTC's temporary operation of charter bus tours pending the implementation of a plan to restructure its mass transportation routes and service levels does not constitute a violation of the applicable statutory and regulatory requirements pertaining to charter bus operations and therefore does not require any remedial action beyond NJTC's own present plans to discontinue its charter bus operations by November 25, 1981.

II. The Complaint and NJTC's Response

The complaint, dated July 15, 1981, alleges that NJTC is "selling motorcoach tours under the auspices of the State of New Jersey, Brendan Byrne, Gov." (Letter from George C. Guenther to Honorable Andrew L. Lewis, Secretary, July 15, 1981). Enclosed with the complaint is a copy of an advertisement which appeared in the Philadelphia Inquirer on June 14, 1981, promoting NJTC bus tours to various locations beyond NJTC's service area which range from three to fourteen days in duration.

We forwarded the complaint to NJTC on August 12, 1981, and afforded the respondent an opportunity to demonstrate that it is not in violation of Section 3(f) of the Urban Mass Transportation Act of 1964, as amended, ("the UMT Act"), 49 U.S.C. 1602(f), and why the Urban Mass Transportation Administration ("UMTA") should not issue an appropriate order under that section or take other appropriate action. (Letter from Glenn F. Wasserman to Jerome C. Premo, August 12, 1981). NJTC responded by letter dated September 16, 1981.

The NJTC's response, (letter from Kenneth S. Levy to Glenn F. Wasserman, September 16, 1981), which includes several exhibits, does not dispute the allegation that NJTC is operating charter bus tours but contends that those operations do not constitute a violation of applicable UMTA rules. The NJTC response states that NJTC had acquired the private bus company Transport of New Jersey ("TNJ") with UMTA grant assistance, and that UMTA had concurred in the interim continuation of TNJ charter operations until NJTC develops and implements a plan for restructuring routes and service levels subsequent to the acquisition of TNJ, and that NJTC has developed a plan to totally segregate its mass transportation and non-incidentual charter operations by November 25, 1981. NJTC further asserts that the interim continuation of TNJ charter operations does not constitute a violation of law in that (1) its charter operations are based on fair and equitable arrangements to assure that UMTA financial assistance does not allow NJTC to foreclose private operators from the intercity charter market, and (2) the use of UMTA-funded buses by NJTC in charter service is "incidentual" to and will not interfere with NJTC's ability to provide regular mass transportation service. By letter dated October 15, 1981, the law firm Fry, Hirschman, Golden, Welz & Yatron, on behalf of the complainant, replied to NJTC's response. (Letter from Howard M. Fry to Glenn F. Wasserman, October 15, 1981). The reply contends that while UMTA instructed NJTC to adopt a plan to restructure routes and service levels on November 25, 1981, NJTC has only recently begin to do so. Moreover, the reply questions NJTC's statement that its charter operations are incidentual to its mass transportation service and that such operations are being run on a fair and equitable basis with respect to other private charter operators. The reply further contends that some of the financial data supplied by NJTC in its response are "suspect" and that TNJ's continued charter operations preclude effective competition by non-subsidized carriers.

III. Findings of Fact

The following facts are undisputed:

1. On November 25, 1980, UMTA approved a capital grant in the amount of \$32,111,000 to assist NJTC in the purchase of stock representing the tangible assets of TNJ and its wholly-owned subsidiary, the Maplewood Equipment Company.

2. The UMTA grant was made with the express understanding that TNJ was operating extensive charter bus services and on the condition that if buses which were then being used by TNJ primarily or exclusively for charter service were not assimilated mass transportation service, NJTC would sell those buses and offset the UMTA grant with the proceeds of such sale. UMTA instructed NJTC that "(T)he retention or disposition of the acquired equipment will depend on the adoption by NJTC of a final plan for the restructuring of routes and service levels." (Letter from Hiram J. Walker to Louis J. Gambaccini, November 25, 1980).

3. On July 17, 1981, NJTC informed UMTA that the NJTC Board of Directors on July 14, 1981 approved a plan to restructure TNJ's charter operations, including assimilating into mass transportation service all vehicles previously purchased with federal funds. NJTC anticipated that "all buses acquired under the UMTA grant will be placed in regular service no later than November 25, 1981 (the first anniversary of the grant approval)." (Letter from Jerome C. Premo to Hiram J. Walker, July 17, 1981).

4. At the time the complaint was filed and at the present time, NJTC offers to operate or operates charter bus tours with UMTA-funded buses, substantially as described in the June 14, 1981 newspaper advertisement submitted with the complaint.

IV. The Legal Framework

At issue is whether or not the continued charter operations by NJTC violate UMTA's regulation on Charter Bus Operations, 49 C.F.R. Part 604.

UMTA's charter bus regulation is designed to implement two provisions of the UMT Act. The first provision, section 12(c)(6), states that "mass transportation" service, which is eligible for UMTA funding, does not include "... charter or sightseeing service". 49 U.S.C. 1608(c)(6). The Comptroller General of the United States has interpreted this provision to disallow the use of financial assistance provided under the UMT Act for the purchase of buses intended for use in charter service, but to allow, even encourage, the "incidental" use of such buses for charter service so long as such service "does not detract from or interfere with urban mass transportation service for which the equipment is needed." Opinion of the Comp. Gen., B-160204 (December 7, 1966). This "incidental use" restriction applies to all UMTA grantees, and is set forth in the charter regulation at 49 CFR 604.11. The regulation lists three charter uses that are presumed not to be incidental:

- (1) Weekday charters which occur during peak morning and evening rush hours;
- (2) Weekday charters which require buses to travel more than fifty miles beyond the grantee's urban area; and
- (3) Weekday charters which require the use of a particular bus for more than a total of six hours in any one day. 49 CFR 604.11(b).

The second provision of the UMT Act on which the regulation is based is section 3(f), which is a special provision enacted to protect private operators in the intercity charter bus industry from being foreclosed from intercity charter bus business by competition from federally assisted public bodies and those private carriers who operate urban mass transportation services on their behalf, 49 U.S.C. 1602(f). Under this provision, all grantees who receive funds under the UMT Act or the Federal-Aid Highway Act for "the purchase or operation of

buses," must enter into a charter bus agreement with the Secretary of Transportation to protect private intercity charter bus operators. The terms of this "agreement" are set forth in 49 CFR 604.13, and become operative if a recipient of capital or operating assistance, or an operator on its behalf, engages in charter bus operations outside its urban area, and derives \$15,000 or more annually from such operations.

In the event that a grantee or an operator on its behalf engages in incidental charter bus operations outside its urban area, and derives \$15,000 or more annually from such operations, the regulation requires that the grantee submit to UMTA the following: (1) a statement with respect to notice to private charter bus operators regarding the proposed or existing incidental charter operations (49 CFR 604.15); (2) a certification of costs (49 CFR 604.3, 604.15(a)(3)); and (3) a cost allocation plan (49 CFR 604.3, 604.15(a)(4)).

V. Analysis

The first issue which must be resolved is whether the interim continuation of TNJ's charter operations, following that company's acquisition by NJTC with UMTA assistance, may be considered to be incidental to NJTC's regular mass transportation operations. This is because the procedures set forth in UMTA's regulation presuppose that a grantee's charter operations will only be incidental to and not interfere with the grantee's regular mass transportation services.

The UMTA regulation codifies the incidental charter restriction which the Comptroller General set forth in his 1966 opinion. See Appendix A, 49 C.F.R. Part 604, and 49 C.F.R. 604.11(b). To rebut the three presumptions stated in the Comptroller General's opinion, a grantee must establish to UMTA's satisfaction that a proposed use of a bus in charter service during weekday peak hours, or during weekdays more than fifty miles outside of the grantee's service area, or during weekdays for more than six hours in a single day, will not interfere with its ability to provide regular mass transportation service. It is undisputed that NJTC operates charter service requiring the use of federally assisted buses during weekdays in one or more of the above circumstances. In its response, NJTC states that it uses 80 of its 1,510 buses for charter operations. At the present time, peak hour demand requires that TNJ have 1,219 buses in regular mass transportation service. See letter from Kenneth S. Levy to Glenn F. Wasserman, October 27, 1981. Thus, the use of 80 buses in charter service would not interfere with NJTC's ability to provide regular mass transportation service. That the TNJ fleet contains a number of buses far in excess of its peak hour needs is a matter of some concern to UMTA. Consequently, the grant to NJTC for the acquisition of TNJ was conditioned upon NJTC's developing a plan to restructure TNJ's route and service levels and to dispose of buses not needed for regular mass transportation service. As previously noted, NJTC

intends to implement such a plan by November 25, 1981. During the interim, the use of excess buses in charter service is consistent with the Comptroller General's opinion:

"Such service contributes to the success of urban mass transportation operations by bringing in additional revenues and providing full employment to drivers and other employees. It may in some cases even reduce the need for Federal capital assistance." (Appendix A, 49 C.F.R. Part 604).

We have therefore concluded that the interim use of 80 buses by NJTC for charter service pending the implementation of a plan for TNJ's routes and service levels is an incidental use that does not violate the Comptroller General's opinion or the UMTA regulation.

The next issue is whether NJTC has complied with the procedures set forth in the UMTA regulation. The three requirements that apply to a grantee who engages in incidental charter bus operations outside its urban area and derives \$15,000 or more annually from such operations are as follows: (1) the grantee must submit documentation regarding notice to private charter operators; (2) the grantee must provide a certification of costs; and (3) the grantee must prepare and submit a cost allocation plan. 49 C.F.R. 604.3, 604.15.

For purposes of investigating the complaint, we reviewed NJTC's most recently approved operating assistance grant. On December 15, 1980, NJTC submitted the required information in support of its application for an operating assistance grant for the year ending June 30, 1981 (UMTA project No. NJ-05-4032). A notice of public hearing was advertised in 11 newspapers throughout the State and was also sent to 157 bus carriers in New Jersey and all charter bus carriers in the Bronx and Manhattan, New York (33 carriers). The notice clearly states that TNJ "engages in and intends to continue to engage in" charter operations in accordance with its tariffs filed with the State DOT and the Interstate Commerce Commission, and that "the required documentation relating to the charter bus operations of the (subsidized) carriers will be available for inspection" prior to and at the time of the scheduled public hearing. Our review of the verbatim transcript of the September 25, 1980 hearing shows that not one charter operator, including the complainant, appeared at the hearing to oppose the application or otherwise comment on it.

In addition to the information concerning the public hearing and notice to charter operators, NJTC submitted comprehensive financial information from TNJ including a statement of revenues and expenses showing that charter revenues are equal to or greater than charter-related expenses, a certification by NJTC's Comptroller concerning the financial statement, and copies of all applicable tariffs. Following a review of this material, the UMTA Regional Administrator accepted the certification of costs and otherwise approved NJTC's charter operations by approving the grant. See 49 C.F.R. 604.18(b).

This approval was based on UMTA's determination that the figures set forth in the certified statement of revenues and expenses appeared reasonable, and that no private charter bus operator had testified at the hearing or otherwise challenged those figures.

Now, however, the complainant challenges the estimated revenues and costs certified by TNJ's Comptroller for the year which will end June 30, 1982, which is attached to NJTC's response. In its reply to the NJTC response, counsel for the complainant suggest an inconsistency between this certification and a staff review of TNJ's estimated charter and tour business, which is also attached to the response. The certification apparently does not take into account any charges for equipment leases, while the staff review does. This apparent inconsistency does not indicate a violation of the applicable rules. Indeed, the staff review of TNJ's charter operations is premised upon a total separation of charter operations from TNJ's mass transportation service, which would resolve any question of compliance with the UMT Act and charter regulations. Moreover, the certification of actual revenues and costs for the year ending June 30, 1980, which was the subject of the September 25, 1980 public hearing, has not been challenged by the complainant or any other private charter bus operator.

The complainant further questions the reasonableness of TNJ's charter rates, based on the assumption that TNJ's recent 30 percent rate increase in a period of less than seven months shows that the rate prior to the rate increase was "extremely low and that it can be assumed that such a low rate would preclude effective competition from non-subsidized carriers." We cannot, on the basis of complainant's speculation, determine that TNJ's charter rates are "designed to foreclose competition by private charter bus operators," as prohibited by the regulation. 49 C.F.R. 604.13(3). Furthermore, complainant and all other private charter bus operators have had the opportunity to comment on previous charter rates at the public hearings held by NJTC for its operating assistance grant applications. As noted above, no private charter bus operator testified at the September 25, 1980 hearing. We will not, therefore, review TNJ's past charter rates, especially in light of the recent increases in those rates which are not being challenged by the complainant as violative of the applicable rules.

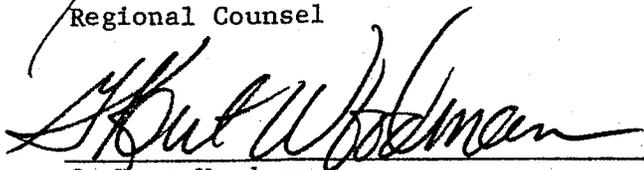
VI. Conclusion

Based on the foregoing, we do not find that NJTC has violated the applicable statutory and regulatory requirements by continuing to operate TNJ's charter and tour services pending the implementation of a reorganization plan. This decision is founded upon the reasonableness of UMTA's condition in the November 25, 1980 grant approval that NJTC will either assimilate its charter buses into mass transportation service or sell its charter buses and offset the grant with the proceeds of such sale, depending upon "the adoption by NJTC of a final plan

for the restructuring of routes and service levels." NJTC has stated that it will implement such a plan by November 25, 1981, and we have determined that implementation by that date will be reasonable. We therefore conclude that the charter operations complained of do not constitute a violation of the UMT Act or UMTA's charter bus regulations, 49 C.F.R. Part 604.



Glenn F. Wasserman
Regional Counsel



G. Kent Woodman
Chief Counsel

NOV 24 1981

DECISION

Greyhound Lines, Inc. and Hopkins Limousine Service, Inc.

Complainants

v.

Greater Cleveland Regional Transit Authority

Respondent

I. Summary

This decision is the result of an investigation into the charter bus operations of the Greater Cleveland Regional Transit Authority (GCRTA). The investigation disclosed that while GCRTA, in good faith, believed that it has substantially complied with restrictions imposed on charter activities of UMTA grantees by the Urban Mass Transportation Act of 1964, as amended (49 U.S.C. 1601 et seq.), and the Act's implementing regulations (49 CFR Part 604), that, in fact, certain remedial actions are required to bring GCRTA into full compliance with the regulations. No pattern or practice of violations was disclosed by the investigation into the Respondent's operations.

II. Background

UMTA received a complaint from Hopkins Limousine Service Inc. (Hopkins) on April 12, 1981, through Senator Glenn's office, charging that GCRTA was conducting illegal charter activities. A similar but more detailed complaint was received from Greyhound Lines, Inc. on April 13, 1981. Given the similarity of the complaints, they have been combined for purposes of this decision. Reference is primarily to Greyhound's complaint since that was more detailed.

Specifically, the Complainants alleged that: GCRTA operated charter service during prohibited times and in prohibited areas at costs which foreclosed private operators from the intercity charter bus industry; that GCRTA's charter agreement with UMTA is in violation of the statute and implementing regulations; and that if such charter service is incidental it is only because GCRTA maintains an excessive spare ratio which allows them to violate the intent of the regulations with impunity.

The Complainants request that UMTA order the Respondent to cease and desist from engaging in the practices complained of and to withhold all future funding until it does cease such practices.

Supporting the complaint are various exhibits, including a typical Greyhound statement at public hearings, typical notice of application by GCRTA, Greyhound internal memo from a meeting with GCRTA on February 20, 1981, GCRTA's letter on peak requirements and charter fleet, and UMTA's 1979 response to Greyhound concerning GCRTA's charter activities. Greyhound filed additional information on June 17 and August 6, 1981, including a statement of "Agreed Facts".

It should be noted that five to seven private operators have complained about GCRTA's charter operations at every public hearing held over the last several years and that Greyhound filed a similar complaint with UMTA, which was decided in favor of GCRTA in May of 1979. Nonetheless Greyhound continues to assert that UMTA's charter regulations are being violated. UMTA docketed the complaint for review having determined that Complainants had provided sufficient evidence to justify a preliminary determination of probable cause with regard to the alleged violations.

III. Response to the Complaint

GCRTA responded to the complaints on May 1, May 20, June 3, and September 4, 1981, and denied any wrongdoing. In support of its defense, GCRTA provided the following information: a copy of its charter agreement with UMTA; a certification of costs for the year ending December 31, 1979; a listing of its fleet requirements; a listing of its charter operations from April 1, 1980 through March 31, 1981; a copy of its advertisement in the Yellow Pages; a copy of a state court decision, Schwenk v. Miami Valley Regional Transit Authority, 4 003d 145 (1975), to support its position that the RTA can operate charters outside its urban area; and Daily Vehicle Reports and Vehicle Control Charts for the days on which charters were operated more than 50 miles outside their urban area to substantiate that they were able to meet their peak hour requirements, scheduled maintenance and road calls.

Respondent asserts that all charter operations are incidental to regularly scheduled mass transportation, that they are operating all charter service in compliance with their agreement with UMTA, that their revenues exceed their costs and that the alleged excess spare ratio is unfounded and irrelevant to the issue at hand.

IV. Findings and Determinations

The complaint raises several distinct issues which, although interrelated, are addressed separately:

1. Does GCRTA have a valid charter agreement with UMTA and has it been adhering to the terms of that agreement?
2. Do GCRTA's charter operations qualify as incidental service?
3. Has GCRTA foreclosed private operators from intercity charter bus activity where such private operators are willing and able to provide such service?

1. Does GCRTA have a valid charter agreement with UMTA?

Every grantee who conducts charter service outside its urban area must first enter into a written agreement with UMTA (49 CFR 604.12). GCRTA has provided a copy of an undated charter agreement signed by Mr. Leonard Ronis, then General Manager of GCRTA, which it purports is its charter agreement with UMTA. This agreement contains terms and conditions other than the standard terms and conditions in 49 CFR 604.13 and therefore, constitutes a special agreement under 49 CFR 604.14. Specifically, it provides that GCRTA may conduct charter service during peak morning and evening rush hours, weekday charters which require the use of a coach for more than a total of six hours in any one day, and charter service outside of its urban area provided that its equipment requirements permit it to operate such charters without interfering with regularly scheduled service.

GCRTA did not provide, and our records did not contain, any indisputable evidence that UMTA concurred in this specific charter agreement. Our files do contain, however, a letter dated September 19, 1977 from Richard S. Page, then UMTA Administrator, to Mr. B. L. Peyton, Regional Vice President of Greyhound Lines, Inc., stating that the presumptions of incidental service in 49 CFR 604.11 can be overcome in an agreement between UMTA and a grantee. The letter further states that GCRTA has obtained such an agreement from UMTA and that this agreement expressly provides that GCRTA may engage in incidental charter service which does not interfere with regularly scheduled mass transit service. Thus, we conclude that the charter agreement provided by GCRTA was approved by UMTA.

However, whether this constitutes a valid agreement is another question. A letter dated April 7, 1978, from the previous Chief Counsel, Margaret M. Ayres, to Mr. Peyton, identified the criteria to be used by UMTA in determining if there is a legally sufficient basis to limit or deny a proposed charter agreement. These "include, but are not limited to the following determinations: (1) that a grantee is not allowed to carry out proposed charters under State law under section 604.15(4)(b)(1); (2) that a grantee has failed to follow the procedures prescribed by the regulations with respect to certification of costs, the preparation of a cost allocation plan or notice to private carriers; or, (3) that a proposed agreement violates the incidental requirement of section 604.11 of the regulations." Using these same criteria, there is an adequate basis for reconsidering our acceptance of the agreement. Furthermore, given the lapse of time since our concurrence in the agreement, and the issues raised in the complaint, there is ample legal basis for requiring UMTA and GCRTA to either enter into a standard agreement as provided in 49 CFR 604.13 or another special agreement under 49 CFR 604.14, if justified per I.C. of this decision.

A. Authority to Operate Charters Under State Law

There is incomplete documentation to support a conclusion that GCRTA has authority to conduct charters on a statewide basis. The documentation supplied by GCRTA provides two contradictory arguments as to why it has authority to conduct charters on a statewide basis.

The first is that GCRTA has authority to operate transit service anywhere in the state. It bases this conclusion on both statutory and case law. Section 306.35(g) of Ohio Revised Code states that an RTA may ". . . acquire, construct, improve, extend, repair, lease, operate, maintain or manage transit facilities within or without its territorial boundaries deemed necessary to accomplish the purpose of its organization. . ." In Schwartz v. MVRTA, supra, the Ohio Court held that an RTA is not subject to the jurisdiction of the Public Utility Commission and may extend its transit services to non-contiguous areas outside the territorial boundaries of the RTA.

While these sources may provide conclusive evidence that GCRTA has the authority to provide transit service on a statewide basis, neither source specifically provides that charter service is transit service. In fact, section 306.30(A) of Ohio Revised Code defines a transit facility as one ". . . having as its primary purpose the regularly scheduled mass movement of passengers between locations within the territorial boundaries of a regional transit authority. . ."

If GCRTA believed that this were a proper legal basis for GCRTA to provide transit service, including charter service, on a statewide basis, no charter agreement would have been necessary, as section 3(f) of the Act only requires an agreement for charter bus operations outside the urban area within which the operator provides regularly scheduled mass transportation service. Under 49 CFR 604.3(b), the urban area is defined as the entire area in which a local public body is authorized by law to provide regularly scheduled mass transportation service. This is further defined to include all areas which are either within an "urbanized area" as fixed in accordance with 23 CFR Part 470, or within an "urban area" as determined by the Secretary under 49 USC 1608(c)(4)).

GCRTA also argues that it has authority to conduct statewide charters because its predecessor, the Cleveland Transit System, provided charter service throughout Ohio for over thirty years under Article XVIII, Section 6 of the Ohio Constitution which allows a municipality to sell and deliver to others any transportation service in an amount not exceeding fifty percent of the total service. However, GCRTA has not established that it is a municipality which would be covered by this section of the constitution. Conversely, it has not established that it is entitled to this constitutional protection as a successor of Cleveland Transit System.

While Ohio law may provide a basis for finding that GCRTA has the authority to conduct charters on a statewide basis, neither source relied upon by GCRTA to date is sufficient to justify that conclusion. Therefore, prior to UMTA approving a new charter agreement with GCRTA it must provide sufficient documentation to establish that it has authority to conduct charters under State law.

As part of this process, GCRTA must specifically document the urban area within which it is authorized to operate mass transit service. In developing this documentation, GCRTA is hereby notified that UMTA will not recognize a grantee's authority to provide mass transportation service which extends beyond an area within which the grantee can reasonably provide mass transportation service, in morning and evening peak periods, to and from a central city. The fact that state law may authorize a grantee to provide service on a statewide basis, does not preclude UMTA from limiting its definition of the urban area for Federal purposes to the area in which it is reasonable for the grantee to provide regularly scheduled mass transportation service. In determining reasonableness, the fact that a grantee actually provides service to such an area will be considered conclusive. Thus, until GCRTA establishes a broader urban area, consistent with the above guidelines, UMTA will only recognize as GCRTA's urban area the territorial limits of the four counties to which GCRTA presently provides service. This includes Cuyahoga County which is a member of the RTA, and Lake, Lorain, and Medina Counties, since GCRTA has four routes which serve suburban commuters in these counties.

B. Compliance with the Procedures in 49 CFR Part 604

The regulation establishes certain procedures which must be followed by grantees. Certain of these procedures deal with "certification of costs" (49 CFR 604.15, 30 and 51). GCRTA has failed to follow these procedures prescribed by the regulations with respect to certification of costs in that the most recent certification of cost provided by the GCRTA during this investigation was for the year ending December 31, 1979. It should be noted that on February 17, 1982 we received a certification of cost for the year ending December 30, 1980 as part of GCRTA's 1982 operating grant application (OH-05-4131). However, 49 CFR 604.3(b) provides that the period covered by the grantee's certification of costs shall not be less than two or greater than four of its most recently completed fiscal quarters. Also, 49 CFR 604.15 requires that a certification of costs be included in each application. All future applications must include a current certification of costs. This will allow private operators a chance to comment in a timely manner, at the public hearing, on this data.

C. Compliance with the Incidental Requirements of 49 CFR 604.11

Three examples of activities which will be presumed not to be incidental are provided in 49 CFR 604.11. While UMTA has previously voiced the opinion that the presumptions of incidental service can be overcome in an agreement, it is now time to restate that position.

It is UMTA's intention that the presumptions of non-incidental service apply in all instances. However, these are not conclusive presumptions and can be rebutted after the fact, on a case by case basis, if the grantee presents evidence or documentation, which in UMTA's determination sufficiently shows that the questioned charter service indeed did not interfere with regularly scheduled service, including regularly scheduled

maintenance and road calls, on the day and time in question. In other words, the grantee must have sufficient daily records to show that all service requirements were met. In exceptional cases, UMTA will also consider allowing the grantee to overcome the regulatory presumptions in the negotiation of an agreement, but such a rebuttal must be fully documented, must rely on unique situations, such as topography, unusual peak hours or special events, and must clearly show that regularly scheduled mass transportation service will not be interfered with under any circumstances. The grantee, of course, would still be subject to challenge if it used the UMTA equipment in non-incidentual service which had not been approved by UMTA as part of a special agreement.

In summary, while GCRTA did have a charter agreement and may have been performing in conformance with that agreement, the issues raised by this complaint suggest that the agreement must be renegotiated along the guidelines listed above. Until a new agreement is entered into, in conformance with the procedures in 49 CFR Part 604, GCRTA will not be permitted to perform charter service outside the urban area in which it provides regularly scheduled mass transportation service. Furthermore, GCRTA must comply with the incidental restrictions (not during peak hour or more than 6 hours in one day) contained in 49 CFR 604.11.

2. Do GCRTA's charter operations qualify as incidental service?

As discussed above, the regulation contains three examples of bus uses which are considered non-incidentual yet the GCRTA agreement allows them to use the buses in these ways as long as their equipment requirements so permit. With respect to one of these examples, GCRTA provided evidence that between April 1, 1980 and March 31, 1981, it conducted 65 charters more than 50 miles outside its urban area. It also provided evidence in the form of Daily Vehicle Reports and Vehicle Control Charts that, on the days in question, it was able to meet all peak hour requirements, scheduled maintenance and road calls. However, a key element of Greyhound's complaint is that GCRTA has been able to conduct these types of charters without interfering with regularly scheduled mass transportation service because it has an inordinately high spare ratio. The documentation supplied by GCRTA, taking into account both the number of buses scheduled for routine maintenance (94) and the number of buses inactive and held as spares (80), shows that as of April 1981 this ratio was around 21%. This is higher than UMTA's general rule of thumb of 10%-15% but is justified on the basis that 41% of GCRTA's fleet is over 12 years old and the high breakdown rate of its newer buses. However, there is documentation, in terms of recent press clippings, that GCRTA has had to lease 50 buses from MARTA in order to meet its regularly scheduled service because of the poor condition of its buses. (These extra 50 buses are not included in GCRTA's figures and would increase the spare ratio.) Furthermore, GCRTA admitted in a October 21, 1981 letter requesting our concurrence in a grant to rehabilitate 100 buses (OH-05-0058) that they have been experiencing severe equipment shortages and "it has not been possible to make schedule since January 1981." In light of these facts, GCRTA will not be allowed to use its high spare ratio to conduct, or to justify conducting, charter operations in excess of those allowed in the regulation. This means that the number of buses used for charter and peak hour service, including scheduled maintenance and road calls, shall not exceed 110% of GCRTA's peak hour requirements.

In this regard, continued use of the excess spare ratio to justify charter operations may constitute engaging in a practice which is a means of avoiding the requirements of the charter agreement. If so, such action will clearly be prohibited by the terms of any agreement under 49 CFR 604.13.

As a corollary matter, Hopkins has objected to the size and content of the GCRTA ad in the "Yellow Pages" under "Charter and Rental Buses". This ad states "pick the bus that meets your need from the largest charter bus fleet in Ohio." GCRTA has countered that this ad only refers to their two "Charter Chiefs" which were bought without UMTA assistance. However, it seems unlikely that two buses give GCRTA the largest charter bus fleet in Ohio. While such an advertisement itself would not result in a violation of the incidental provision, since GCRTA would presumably turn down any charter requests that interfered with regularly scheduled service, the tone does imply that GCRTA is ready and able to provide charters at any time. Therefore, in the future, GCRTA may not advertise service which is impermissible under the charter regulation.

In summary, while GCRTA may have been able to conduct non-incidental charters without in fact interfering with regularly scheduled service, such operations were partially possible only as a result of its high spare ratio. In the future, GCRTA may not conduct non-incidental charters, without finding itself subject to a complaint and having to justify such charters after the fact, and may not use its spares as a means of justifying its charter operations.

3. Has GCRTA foreclosed private operators from intercity charter bus activity where such private operators are willing and able to provide such service?

GCRTA's existing agreement, like the standard agreement, provides that a grantee will generate enough revenue from its charter operations to equal or exceed the costs of providing such service consistent with a cost allocation plan required by the regulation which includes dummy charges for taxes and depreciation. While GCRTA has not provided a recent certification of costs, its certification for the year ending 1980 shows that it was able to meet this criteria. Without evidence to the contrary, we will assume that GCRTA is charging overall a high enough rate to cover all of its costs.

However, the agreement also provides that a grantee will not establish a charter rate which is designed to foreclose competition by private bus operators. Greyhound has provided an analysis, using GCRTA's own figures, which shows that on certain trips GCRTA's bus revenue for that trip would be less than the fully allocated cost for that charter trip. GCRTA has stated that its cost of charter operations is \$4.12 per mile, yet for an overnight trip from Cleveland to Kings Island Amusement Park, 480 round trip miles, it would only charge \$965.00 or \$2.01 per mile. Furthermore, this charge is \$155.00 less than Greyhound would charge for a similar trip.

The issue raised by this analysis is whether a grantee can undercharge on certain routes as long as its overall revenue exceeds its costs. The regulation itself is silent on this issue and only requires that revenues generated by operations are equal to or greater than the cost of providing such charter operations.

However, in the interest of fairness, UMTA will establish the following guidelines for determining whether rates exceed costs and whether a private operator is being foreclosed: (i) the general cost test is whether overall charter revenues equal or exceed overall costs; (ii) even if a grantee meets this test, the grantee can still be found to be in violation of the regulation if it engages in predatory pricing on a single route, that is pricing which is designed to foreclose competition.

In summary, while GCRTA has shown that at least through 1980, it was able to cover its costs on an overall basis, it must continue to provide this certification of cost information with each application and cannot establish predatory pricing on individual routes.

V. Conclusion

Based on the foregoing, we find that GCRTA has violated the applicable statutory and regulatory requirements by operating certain non-incidentals charters and by not filing a current certification of costs. However, these findings are based, in part, upon an interpretation of the regulation which has not previously been communicated to GCRTA. As a consequence, we conclude that although a violation occurred, it was not part of a continuing pattern that indicated disregard of the restrictions imposed on grantees under 49 CFR Part 604. Thus, we are recommending that the following corrective actions be taken:

1. Within sixty (60) days of receipt of this order, GCRTA will cease and desist all charter operations outside its urban area until all of the requirements of this order have been complied with. For purposes of this order, urban area will be defined as the territorial limits of those counties actually served by GCRTA. Charter service conducted in the urban area must be incidental. For any charter contracts in existence on the date of this order, for service to occur after the 60-day period, GCRTA will immediately contact UMTA Region V for instructions on how to handle these contracts.

2. GCRTA will provide evidence that it has authority under state law to conduct charters and will document the urban area within which it is authorized to operate mass transportation service.

3. If GCRTA is able to establish that it has authority to provide charters outside its urban area, GCRTA and UMTA will enter into a new agreement using the standard provisions contained in 49 CFR 604.13. GCRTA will follow all of the applicable steps for obtaining a modified charter agreement contained in 49 CFR 604.20(b)-(d).

4. If GCRTA and UMTA enter into an agreement allowing GCRTA to conduct charters outside its urban area, GCRTA will keep its certification of costs current as required by the regulation in all of its future grant applications.

5. GCRTA will not use its high spare ratio to justify providing non-
incidental charter service.

6. Rates charged for individual charter operations must not be predatory.

Failure of GCRTA to comply with the terms of this order may result
in a finding of a continuing pattern of violations and the discontinuance
of Federal funds for mass transit until compliance is assured.

Brigid Hynes-Cherín
Brigid Hynes-Cherín, Regional Counsel, UMTA Region V

8/23/82
Date

CONCUR:

J. Muntz, acting for
G. Kent Woodman, Chief Counsel

8/20/82
Date

*Filey Charter
Reps*



U.S. Department
of Transportation

Headquarters

400 7th Street S.W.
Washington, D.C. 20590

**Urban Mass
Transportation
Administration**

JAN 14 1983

Michael L. Ritz, Esquire
Assistant Chief Counsel
The Greater Cleveland Regional
Transportation Authority (GCRTA)
615 Superior Avenue, N.W.
Cleveland, Ohio 44113

Dear Mr. Ritz:

By letter dated November 4, 1982, you requested that GCRTA be permitted to extend charter operations to include service to the Cleveland Coliseum located approximately 1 1/2 miles across the Cuyahoga County border in Richfield, Ohio, and that the two "Charter Chiefs" owned by GCRTA be permitted to operate exempt from UMTA regulations (49 CFR Part 604).

As noted in your letter, these requests were prompted by restrictions having been placed on RTA charter operations by UMTA in its decision of August 26, 1982, (hereafter referred to as the "Decision") resulting from an UMTA investigation of complaints by Greyhound Lines, Inc., and Hopkins Limousine Service Inc., into the charter operations of the GCRTA. Because your requests stem directly from our Decision, we have chosen to treat your letter as a formal request for reconsideration of that Decision as it effects the issues raised in your letter.

Service to the Coliseum

The evidentiary material accumulated during the UMTA investigation (in accordance with §604.42) did not support GCRTA's claim of legal authority to provide regularly scheduled mass transportation service on a statewide basis. Therefore, in the Decision UMTA exercised its authority to redefine RTA's "urban area" according to §12(c)(10) of the UMT Act and §604.3(b) of the regulation as that area actually served by GCRTA's mass transit operations, namely the territorial boundaries of the four county area containing Cuyahoga, Lake, Lorain and Medina counties. §12(c)(10) states:

[T]he term 'urban area' means any area that includes a municipality or other built-up place which is appropriate, in the judgment of the Secretary, for a public transportation system to serve commuters or others in the locality taking into consideration the local patterns and trends of urban growth;

The information you provide in support of this request that RTA be permitted to operate charter service to the Cleveland Coliseum does evidence local patterns and trends of urban growth as would permit UMTA to include the Coliseum within the defined GCRTA urban area. Specifically we are informed by your staff that:

1. Prior to 1975, the Cleveland Transit System (CTS) provided both regular transit and charter service to the Cleveland Arena located in downtown Cleveland.
2. In 1975, GCRTA took over the CTS operations in Cleveland.
3. In 1978, the Cleveland Coliseum was built in its current location as a replacement for the Cleveland Arena.
4. The Coliseum is the home of the Cleveland Cavaliers basketball team and RTA is requested to provide charter service for basketball games and special performances.
5. There is insufficient traffic to warrant establishment of regular transit service to the Coliseum and therefore only charter service is provided.
6. For approximately nine months of the year (March through November) there is insufficient private capacity willing and able to meet identified needs.
7. That the provision of charter service would primarily aid persons in the urban area as defined in the Decision.

Taking into consideration the facts as we understand them, it would appear that the relocation of the Cleveland Cavaliers from the Arena to a new Coliseum sports complex is a natural development of urban growth in the Cleveland metropolitan area. Further, we find that charter service to the Coliseum by GCRTA from the areas presently served by the GCRTA (namely the counties of Cuyahoga, Medina, Lake and Lorain) is appropriate for a public transportation system to serve commuters and others within the locality. Lastly, we take specific note of GCRTA's recent efforts to enter into a new Charter Agreement with UMTA as required by the Decision, which we anticipate will be completed within the next 120 days.

Therefore, in conformance with §12(c)(10) of the UMT Act, the "urban area" of the GCRTA is hereby defined as including the territorial boundaries of the four above named counties, and that area of approximately 1 and 1/2 miles from the Cuyahoga county border to the Cleveland Coliseum in Richfield, Ohio.

The Cleveland Coliseum is located in Summit County. We take specific note of the fact that the city of Akron, Ohio operates its own mass transit system within that county. Nothing in this decision is to be regarded as evidencing the existence of any right of GCRTA to operate within the boundaries of Summit County which did not previously exist under Ohio law.

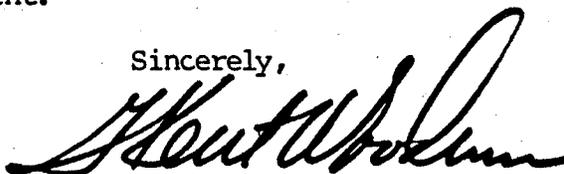
Operation of GCRTA's Charter Chiefs

In considering GCRTA's request that the two "Charter Chiefs" be permitted to operate exempt from the UMTA regulations, consideration has been given to balancing the need for vigorous enforcement of the charter regulations for the protection of private enterprise on the one hand, and the degree of harm which GCRTA may be expected to suffer if the requested relief were not granted from the Decision. On that basis, UMTA finds no justification for exemption of the GCRTA Charter Chiefs from operation subject to the regulations. First, expansion of the GCRTA urban area as to include the Coliseum would permit GCRTA to provide charter service to that location even without a charter agreement in force between GCRTA and UMTA, subject only to the incidental use provisions and cost certification provisions of the UMTA regulations as they relate to vehicles, equipment and facilities funded under Urban Mass Transportation Act of 1964, as amended. As the "Charter Chiefs" were purchased without UMTA participation, those vehicles are already exempt from the incidental use provisions and thus can be used within the defined GCRTA urban area for charter service subject only to the cost certification provisions. Second, a review of the list of GCRTA charter contracts requiring operation beyond the defined "urban area" which were in existence prior to the Decision, which list was included along with your request, reflects only three contracts which are affected. On balance, it would appear that any damage to GCRTA which might be occasioned by a potential breach of contract can be avoided through a waiver of the regulation with respect to operation outside the urban area for those contracts without a blanket exemption. Therefore, your request that the "Charter Chiefs" be permitted to operate exempt from the UMTA regulations is hereby denied. A waiver is hereby granted, however, permitting GCRTA to provide contract charter service beyond its urban area for the three outstanding contracts existing as of the August 26, 1982, Decision on the dates specified in your submission.

Finally, contrary to the statement in your letter, the Decision did not cancel the charter agreement under which RTA has been operating. Rather, the UMTA Administrator is permitted by §604.14 of the charter regulations to authorize the use of provisions other than the standard ones contained in §604.13 where the Administrator determines that the requirements of §3(f) of the UMT Act and §164b of the Highway Act can be met by such provisions. As discussed on pages three through five of the decision (copy enclosed), RTA did not provide, and UMTA records did not contain any indisputable evidence that UMTA had originally or thereafter concurred in the specific charter agreement under which RTA has been operating. While it was found that RTA may have a charter

agreement and may have been performing in conformance with that agreement, the issues raised by the complaint suggest that the agreement must be renegotiated. Thus, under authority of §604.14, the Agreement under which GCRTA had been operating, as limited by the Decision and this Decision on Request for Reconsideration is hereby approved and shall continue in effect until a new agreement is consummated. This agreement continues to be approved subject to examination or audit of charter bus manifests, and other accounts by UMTA representatives in the event of a complaint by an interested party alleging that the charter rates charged by GCRTA are not in compliance with the terms of this agreement.

Sincerely,



G. Kent Woodman
Chief Counsel

Enclosure

Urban Mass Transportation Administration
UCC-31:DURKEE:dd::x61936
Retyped:DURKEE:kly:12-1-82:61936
cc: UCC-Chron/UCC-31/UCC-30/UCC-1/URO-5



U.S. Department
of Transportation

Urban Mass
Transportation
Administration

Headquarters

400 7th Street S.W.
Washington, D.C. 20590

Charles Peppas

JAN 27 1984

Mr. Charles A. Webb
Attorney at Law
606 London House
1001 Wilson Boulevard
Arlington, Virginia 22209

Dear Mr. Webb:

This responds to your recent letter informing the Urban Mass Transportation Administration (UMTA) of the American Bus Association's (ABA) continuing interest in a charter bus complaint filed against the Greater Cleveland Regional Transit Authority (GCRTA). You specifically request information concerning any proposed agreements between UMTA and the GCRTA which would allow the GCRTA to conduct charter service outside its urban area.

As you know, UMTA issued a decision on August 26, 1982, that found the GCRTA in violation of UMTA's regulation on Charter Bus Operations (49 CFR Part 604). As a result, UMTA ordered the GCRTA to cease and desist all charter operations outside its urban area. The order permitted the GCRTA to enter into a new charter bus agreement with UMTA to provide service outside its urban area if it could establish that it had the legal authority under State law to do so. Under the terms of the decision, "urban area" is defined as "the territorial limits of those counties served by GCRTA."

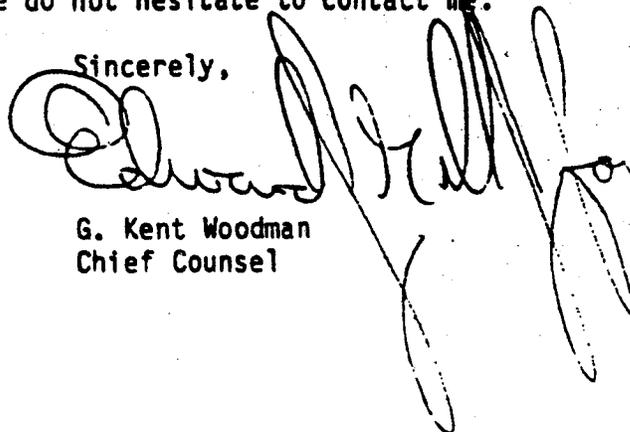
By letter dated November 4, 1982, the GCRTA requested that it be permitted to extend charter operations to include service to the Cleveland Coliseum located approximately one and one-half miles across the boundary of its "urban area" as defined by the decision. UMTA concurred in this request on January 14, 1983.

On October 3, 1983, UMTA entered into a charter agreement with the GCRTA. A copy is enclosed. Under the terms of this agreement, the GCRTA is not permitted to engage in charter operations with UMTA funded equipment and facilities outside its urban area. The agreement defines "urban area" as

"the area within the territorial boundaries of counties in which GCRTA provides regularly scheduled mass transportation service." The agreement does permit the GCRTA to use its Charter Chiefs to provide charter service anywhere in the State of Ohio since these vehicles were not federally funded. The GCRTA, however, may not use any Federal operating assistance to subsidize the charter services provided with these buses.

I hope that this information has been helpful. If you have any additional questions, please do not hesitate to contact me.

Sincerely,

A large, stylized handwritten signature in black ink, appearing to read "G. Kent Woodman".

G. Kent Woodman
Chief Counsel

cc: Rick Bacigalupo, URO V

Enclosure

URBAN MASS TRANSPORTATION ADMINISTRATION

UCC-32:DGOLD:em:Ext. 61936: 1-19-84

Copies to: UCC-32/Gold/ UCC-Chron/ UCC-30/Munter/ UCC-1/Woodman

AGREEMENT
BETWEEN
GREATER CLEVELAND REGIONAL TRANSIT AUTHORITY
AND
THE DEPARTMENT OF TRANSPORTATION

THIS AGREEMENT, entered into this 3rd day of October, 1983, between the Greater Cleveland Regional Transit Authority, hereinafter referred to as "GCRTA" and the Secretary of Transportation of the Department of Transportation, of the United States of America.

WHEREAS, the GCRTA desires to operate charter service outside its urban area; and

WHEREAS, 49 CFR, Part 604, provides that a charter bus agreement must be entered into with the Secretary of Transportation before charter services can be operated outside GCRTA's urban area.

NOW, THEREFORE, GCRTA agrees as follows:

(1) That neither it, nor any operator of mass transportation equipment and facilities on GCRTA's behalf, will engage in charter bus operations outside the GCRTA urban area, which is defined as the area within the territorial boundaries of counties in which GCRTA provides regularly scheduled mass transportation service, except as provided for herein;

(2) That revenues generated by its charter bus operations are equal to or greater than the costs of providing charter bus operations consistent with its cost allocation plan and that GCRTA shall keep its certification of said costs current as required by regulation;

(3) That it will not establish any charter rate which is designed to foreclose competition by private bus operators;

(4) That any use of project facilities and equipment in charter service will be incidental, as described in the Opinion of the Comptroller General of the United States, B-100204, December 7, 1966, and shall not interfere with the use of such facilities and equipment in regularly scheduled mass transportation services to the public;

(5) That the two (2) buses known as the "Charter Chiefs," which were purchased by the Cleveland Transit System (predecessor of the GCRTA) with non-federal funds and which are not used in providing regularly scheduled mass transportation services, shall only be used to provide charter bus services within the State of Ohio to the extent permitted under this Agreement;

(6) That it has notified the private operators licensed by the State of Ohio to render service in its urban area of the terms and conditions of the herein Agreement.

The Secretary of Transportation of the Department of Transportation of the United States of America agrees to permit GCRTA to operate charter service pursuant to the conditions set forth in 49 CFR Part 604, which is hereby incorporated into this Agreement, including the requirement that it provide the Urban Mass Transportation Administration (hereinafter referred to as "UMTA") with its cost allocation plan;

Further, the Secretary of Transportation finds that these provisions constitute fair and equitable arrangements within the meaning of the Urban Mass Transportation Act of 1964, as amended, to assure that the financial

assistance granted by the United States Government under any mass transportation grant project will not enable GCRTA or any contracted operator of project equipment and facilities to foreclose private operators, from the intercity charter bus industry, where such private operators are willing and able to provide such service.

IN WITNESS WHEREOF the parties hereunto have set their hands and seals the day and year first written.

Witnesses:

GREATER CLEVELAND REGIONAL
TRANSIT AUTHORITY

By: *J. Terango*

Its: *Acting General Manager*

DEPARTMENT OF TRANSPORTATION

By: *Steve Wherry*

Its: *Acting Deputy Administrator*

The legal form and correctness of the within instrument are hereby approved.

Joseph A. Smith
Acting General Counsel

Tower Bus, Inc.,
Complainant

v.

Southeastern Michigan
Transportation Administration,
Respondent

I. Summary

This decision of the Urban Mass Transportation Administration (UMTA) is in response to a complaint filed by Tower Bus, Inc. (Tower) alleging that the Southeastern Michigan Transportation Administration (SEMTA) violated Federal and State statutes, Federal regulations, and an UMTA Order. UMTA's review is limited to the alleged violations of the UMTA statute, regulations and Order. UMTA has concluded that: (1) SEMTA's charter operations are in compliance with UMTA's requirements; and (2) SEMTA has not engaged in illegal anticompetitive conduct.

II. Background

Tower filed a complaint with UMTA dated September 30, 1981, alleging, inter alia, that SEMTA is engaging in illegal charter operations and anticompetitive conduct.

Specifically, Tower alleges that SEMTA violated the following:

- 49 U.S.C. § 1602
- 5 U.S.C. § 552
- 49 U.S.C. Chapter 8
- 49 C.F.R. Part 604
- 49 C.F.R. Part 605
- 49 C.F.R. Chapter 3, Subpart B
- 49 C.F.R. Chapter 10
- UMTA Order dated July 13, 1978
- State of Michigan Statutes, Act 254, P.A. 1935
- State of Michigan Statutes, Act 204, P.A. 1976, as amended
- State of Michigan Statutes, Act 442, P.A. 1976, as amended

Tower seeks: (1) an order prohibiting SEMTA from continuing its violations; (2) all funding of SEMTA by UMTA to be stopped; (3) monetary damages; and (4) an on-site investigation of SEMTA's operations.

By letter to UMTA, dated December 18, 1981, SEMTA responded to Tower's allegations. SEMTA admitted that it had violated UMTA's July 13, 1978 Order, but indicated that the violations had ceased. SEMTA denied Tower's other allegations. Tower filed a rebuttal to SEMTA's response on January 29, 1982, and SEMTA filed a surrebuttal on February 19, 1982.

The parties met with UMTA on May 10, 1982, and discussed the possibility of reaching a settlement in regard to the complaint. Negotiations took place between June and September 1982, but no settlement was agreed upon. On September 2, 1982, Tower advised UMTA that it was renewing its complaint, and alleged that SEMTA had continued to violate UMTA's charter bus regulations after Tower's September 1981 complaint was filed. Tower submitted information to support its claim on September 30, 1982. By letters dated October 15 and November 15, 1982, SEMTA denied Tower's allegation and submitted information to support its position.

III. Jurisdiction

UMTA's jurisdiction is limited to the claims made with respect to 49 U.S.C. § 1602, 49 C.F.R. Parts 604 and 605, and UMTA's Order. UMTA will not, therefore, make any determinations concerning Tower's claim that SEMTA violated the Freedom of Information Act (FOIA), 5 U.S.C. § 552, Tower's allegations of harrasment, or Tower's assertion that SEMTA violated ICC regulations, 49 C.F.R. Chapters 3 and 10, and 49 U.S.C. Chapter 8. UMTA also has no authority to award monetary damages as requested.

IV. Findings and Determinations

UMTA's findings are directed to each of the following allegations by Tower: that SEMTA (1) operates intercity charters in violation of 49 U.S.C. § 1602(f), 49 C.F.R. § 604 and UMTA's July 13, 1978 Order; (2) operates peak and extended hour charters in violation of 49 C.F.R. § 604; (3) operates school bus service in violation of 49 U.S.C. § 1602(g) and 49 C.F.R. § 605; (4) charges anticompetitive charter rates in violation of 49 U.S.C. § 1602(e) and (f) and 49 C.F.R. § 604; and (5) operates routes, schedules, and services in an anticompetitive manner in violation of 49 U.S.C. § 1602(e).

A. Charter Bus Operations

(1) Intercity Charters

By UMTA Order dated July 13, 1978, SEMTA was ordered to cease and desist for a period of three years from any charter operations outside that urban area in

which it provides regularly scheduled mass transportation services, as defined by State of Michigan Statute, Act 204, P.A. 1976, as amended. The Order was issued following a determination by UMTA that SEMTA had engaged in charter operations outside of its urban area without an agreement as required under 49 U.S.C. § 1602(f) and 49 C.F.R. § 604.12. Upon termination of the UMTA Order on July 13, 1981, SEMTA was permitted to engage in intercity charter operations according to the provisions of 49 C.F.R. § 604.13, absent a special agreement under 49 C.F.R. § 604.14. Although SEMTA has not entered into a written agreement under 49 C.F.R. § 604.12, SEMTA is bound to comply with the provisions of 49 CFR § 604.13 by the terms of Part II of the UMTA grant agreement.

Tower alleges that SEMTA conducted 317 charters outside its urban area in violation of 49 U.S.C. § 1602(f), 49 C.F.R. § 604.13 and the July 13, 1978 Order. SEMTA admits that it engaged in some charter operations outside its urban area as Tower alleges, but SEMTA also states that the number of alleged violations was exaggerated and that under current SEMTA practice, no extraterritorial charters are accepted. In addition, SEMTA states that those individuals who were primarily responsible for the violations are no longer employed by SEMTA.

In view of the unrefuted evidence that after the July 13, 1978 Order expired, SEMTA voluntarily ceased operation of all charters outside of its urban area, UMTA does not find it necessary to take any remedial action to prohibit SEMTA from engaging in such operations. Irrespective of whether there were 317 violations or fewer violations between July 13, 1978 and July 13, 1981 (when the Order was in effect), and between July 13, 1981 and December 18, 1981 (after the Order expired), we find no violations since December 18, 1981 (when SEMTA responded to Tower's complaint). SEMTA states that its voluntary extension of its three year probationary penalty will remain in effect until UMTA is satisfied that SEMTA has fully complied with all appropriate procedures. Future violations do not, therefore, appear likely. If violations do recur, UMTA will take appropriate measures at that time.

(2) Peak and Extended Hour Charters

Tower alleges that SEMTA violated 49 C.F.R. § 604.11 by operating non-incidentals charters. Under Section 604.11(b), the following uses of mass transportation buses in charter bus operations are presumed not to be incidental:

- (1) Weekday charters which occur during peak morning and evening rush hours;
- (2) Weekday charters which require buses to travel more than fifty miles beyond the grantee's urban area; or
- (3) Weekday charters which require the use of a particular bus for more than a total of six hours in any one day.

Tower charges that SEMTA operated weekday charters during peak morning and evening rush hours, and operated weekday charters which require the use of a bus for more than six hours in one day. Tower submitted data in support of its position with its initial complaint on September 30, 1981, and submitted supplemental data, indicating continued violations, on September 30, 1982. The data is presented in a computerized analysis by Tower of SEMTA's records of its charter bus operations.

SEMTA responded to Tower's allegations both by pointing out the inaccuracies in Tower's data and analysis, and by showing that those peak and extended hour charters which did occur were incidental. SEMTA submitted its own analysis of the same charter runs that were analyzed in Tower's computer printout.

Tower defines SEMTA's peak hours as 6:00 - 9:00 a.m. and 3:00 - 6:00 p.m. SEMTA submits that its operational definition of peak hours is 7:10 - 8:10 a.m. and 4:40 - 5:40 p.m. Under this definition, far fewer peak hour charters occurred. In addition, SEMTA asserts that some trips labeled by Tower as peak hour violations were cancelled and, therefore, never took place. SEMTA also states that other charters labelled by Tower as peak hour violations did not actually operate during peak hours, but were merely billed at the minimum two-hour charge.

SEMTA asserts that some of the charters designated by Tower as requiring the use of a particular bus for more than six hours actually involved the use of more than one bus for less than six hours per bus. The total time billed for each charter exceeded six hours, but each individual bus was used for less than six hours.

SEMTA also disputes Tower's designation of some runs as charter runs at all. These runs involve small buses operated under SEMTA's municipal credit program (discussed in Section B(1) below). Some of the runs were actually new regular transit routes that were billed as charters during a trial period to facilitate billing and review of the cost of running the routes.

In addition to presenting evidence refuting Tower's designation of runs as peak and extended hour charters, SEMTA rebutted the presumption that any peak or extended hour charters which took place were non-incidental. SEMTA submitted terminal dispatch logs, and dispatch office daily assignment sheets indicating that there was no disruption of or interference with regularly scheduled mass transportation service. Regardless of whether peak or extended hour charter operations took place, SEMTA had idle buses to operate those charters. Given that the charters did not interfere with regularly scheduled service, the charters were incidental and not in violation of 49 C.F.R. § 604.11.

(3) School Services

Tower alleges that SEMTA operated school runs in violation of 49 U.S.C. § 1602(g) and 49 C.F.R. Part 605, by assigning charter numbers to those runs as a subterfuge. According to Tower, the runs are actually regular school runs operated to the exclusion of anyone but school children. In support of its allegations, Tower designated certain charter runs, on the computer print out of SEMTA's charter operations, as school runs.

SEMTA responds that its school services include the operation of tripper service and charter service, but denies the allegation that these operations are in violation of the regulation. SEMTA contends that its tripper service is permitted under 49 C.F.R. § 605.13 and that this service has never been disguised as charter service. Furthermore, SEMTA argues that the charter service it provides for school children is not a device to avoid any of the requirements of 49 C.F.R. Part 605, and that the service is incidental charter service under 49 C.F.R. § 605.12.

After reviewing the evidence and the arguments of both parties, UMTA finds that Tower has not presented sufficient evidence to establish that SEMTA violated the requirements of 49 U.S.C. § 1602(g) or C.F.R. Part 605.

B. Competition with Tower's Services

(1) Charter Rates

Tower alleges that SEMTA's charter rates are anticompetitive in violation of 49 U.S.C. § 1602(e) and (f) and 49 C.F.R. § 604.13. Tower's major concern appears to be that under Michigan's municipal credit program, SEMTA essentially provides "free" charter trips.

It is not necessary for UMTA to decide whether, as a general matter, the municipal credit program results in anticompetitive charter service. UMTA's review is limited to considering whether SEMTA offers its charter service, including charters provided under the municipal credit program, in violation of the statutory and regulatory requirements with respect to charter rates. It is UMTA's position that no violation has occurred.

Under 49 U.S.C. § 1602(e), UMTA may not provide financial assistance for the purposes of providing for mass transportation, unless the recipient's program, to the maximum extent feasible, provides for the participation of private mass transportation companies. This provision does not apply to SEMTA's charter services, because charter services are specifically excluded from the definition of "mass transportation" under 49 U.S.C. § 1608(c)(6). SEMTA's charter rates cannot, therefore, be in violation of 49 U.S.C. § 1602(e).

According to 49 C.F.R. § 604.13, grantees are prohibited from charging anticompetitive rates for any charter operations if the grantee provides intercity charter service. As discussed in Section A(1) above, the facts in the record establish that SEMTA no longer operates any charters outside its urban area. Therefore, SEMTA's charter rates are not subject to the requirements of these sections, and no violations have occurred.

(2) Routes, Schedules, and Services

Tower presented evidence, not refuted by SEMTA, indicating that SEMTA operates some routes and schedules that overlap with Tower's services. Tower also asserts that SEMTA does not, to the maximum extent feasible, provide for the participation of private mass transportation companies as required under 49 U.S.C. § 1602(e).

In response, SEMTA contends that nearly all SEMTA and Tower routes differ by times, organization and destination, type and frequency of service. SEMTA recognizes that there are minor overlaps, but argues that the overlaps are an unavoidable result of fulfilling the public's needs for convenient and economical transportation that cannot be reasonably met by private companies alone. Moreover, SEMTA argues that the mere overlapping of routes, schedules or services does not significantly affect Tower's operations or reduce Tower's business. SEMTA also argues that, taking into account both financial and practical considerations, it has used the services of private mass transportation companies to the maximum extent feasible.

The UMT Act does not completely prohibit recipients from providing mass transportation services in competition with private companies. Section 1602(e) states that UMTA's financial assistance is not to be provided:

"for the purpose of providing ... for the operation of mass transportation facilities or equipment in competition with, or supplementary to, the service provided by an existing mass transportation company, unless (1) the Secretary finds that such assistance is essential to the program or projects required by section 8 of [the] Act, [and] (2) the Secretary finds that such program, to the maximum extent feasible, provides for the participation of private mass transportation companies..."

UMTA set forth the rules by which it determines whether a grantee has met its responsibilities to private mass transportation companies under this Section in a memorandum concerning Hudson Bus Lines, Inc.:

a. A grantee must be able to establish that it adhered to a process that assures:

(1) Private mass transportation companies have been or will be afforded an opportunity to be heard.

(2) Private mass transportation companies have been or will be given meaningful consideration as potential participants in the provision of mass transportation service.

b. A grantee may then determine whether and to what extent it is feasible to involve private mass transportation companies in the federally assisted transportation program in the area but the grantee must be able to justify its rationale for that determination.

c. Upon receiving a complaint, UMTA will review the grantee's decision and rationale therefore to assure that the grantee's decision is neither arbitrary nor capricious, nor an unwarranted abuse of discretion.

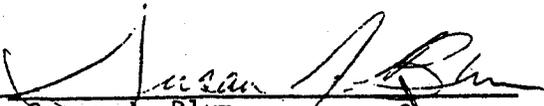
UMTA also stresses the importance of documentation by the grantee to demonstrate what opportunities to participate were actually afforded to the complainant.

SEMTA contends that it has never operated any buses, schedules or services for the purpose of competing with Tower or other private companies. Furthermore, SEMTA states that overlaps are the unavoidable result of fulfilling the public's mass transportation needs in the southeastern Michigan area. In determining the feasibility of entering into contracts with private carriers, SEMTA asserts that it takes into account both economical and practical considerations. SEMTA has submitted evidence demonstrating its willingness to accommodate and/or compensate private companies. The evidence includes documentation of agreements and proposals between SEMTA and Tower.

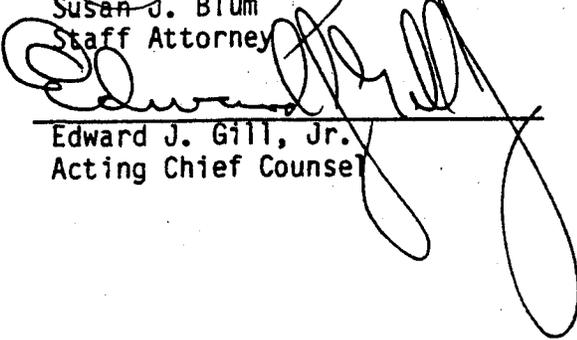
UMTA therefore finds that SEMTA's determination that it provides for participation by private mass transportation companies to the maximum extent feasible is neither arbitrary and capricious nor an abuse of discretion. Accordingly, UMTA does not find that SEMTA violated 49 U.S.C. § 1602(e) as alleged.

V. Conclusions and Order

In view of the foregoing, UMTA concludes that SEMTA's charter operations comport with UMTA's statute, regulations, and July 13, 1978 Order. UMTA also finds that SEMTA's charter rates, routes, schedules and services are also in compliance with UMTA's requirements. Therefore, no action will be taken by UMTA.



Susan J. Blum
Staff Attorney



Edward J. Gill, Jr.
Acting Chief Counsel

10/24/84
Date

November 5, 1984
Date

DECISION

Raleigh Transportation Services

Complainant

v.

City of Raleigh, North Carolina

and

Capital Area Transit System

Respondents

I. Summary

This decision is the conclusion of an investigation begun in response to a complaint received by the Urban Mass Transportation Administration (UMTA) Regional Office in Atlanta, Georgia, from Raleigh Transportation Services (RTS). In its complaint, RTS alleges that the City of Raleigh (the City) and the Capital Area Transit System (CATS) are in violation of the charter bus or school bus provisions in Sections 3(f) and 3(g) of the Urban Mass Transportation Act of 1964, as amended, (49 U.S.C. 1602(f) and (g)) (UMT Act) and the implementing regulations (49 CFR Parts 604 and 605). UMTA concludes that the City and CATS are not in violation of either Section 3(f) or 3(g) of the UMT Act or the implementing regulations.

II. Background

A. The Complaint.

RTS filed a complaint with the Regional Administrator on October 11, 1982. In this complaint RTS alleges that the City and CATS, the operator of the local public transit system which receives UMTA funds from the City, are violating the school bus provisions in Section 3(g) of the UMT Act since CATS is providing exclusive transportation for students and school personnel in competition with private operators. RTS also alleges that it had contacted the City which considers the service in question to be charter bus service, not school bus service. If true, RTS alleges that the City and CATS are

violating the charter bus provisions in Section 3(f) of the UMT Act and the implementing regulations at 49 CFR 604.11 since the service in question is provided during peak hours and the trips use a vehicle for more than 6 hours per day.

Specifically, RTS alleges that CATS is providing transportation service for students to and from North Carolina State University in Raleigh. The origin of the service is the Wakefield Apartments in Raleigh. The service is alleged to be provided by one bus in continuous circulation from 7:00 a.m. to 6:00 p.m. Monday through Friday on 30 minute headways. During peak hours, from 7:00 a.m. to 10:30 a.m. and from 2:30 p.m. to 5:00 p.m., an additional bus is alleged to provide service. The service is alleged to be paid for by the real estate management firm at the apartment complex and is for the exclusive use of the students living at the apartment complex. RTS alleges that the service operates closed door between the apartment complex and North Carolina State University. This service is alleged to be provided with the same equipment that CATS uses for its regular route service.

On October 18, 1982, UMTA responded to RTS and acknowledged the receipt of the complaint. In addition, UMTA requested that RTS provide additional information regarding the alleged charter bus violations if such information were available. No information was received and on November 11, 1982, UMTA sent a copy of the complaint to the City, UMTA's recipient, for investigation and reply.

B. Response to the Complaint.

On November 15, 1982, the City acknowledged its receipt of UMTA's October 18, 1982, letter and stated that it was preparing a response. In its response, dated December 3, 1982, the City states it understands Section 3(g) of the UMT Act and the implementing regulations to apply only to primary and secondary school bus transportation and not to the transportation of university students. Second, the City claims that it is not providing "school bus operations" as defined in 49 CFR 605.3 since it does not provide the service in question with either a Type I or Type II school vehicle as defined in the Highway Safety Program Standard No. 17 (23 CFR 1204.4). Third, the City states that the party contracting for the service is not a school or a school system, but is a businessman who operates the apartment complex. From these three premises the City concludes that the service in question is charter service.

The City further states that the intent of the Section 3(f) of the UMT Act is to protect private intercity charter bus operators. The City states that the service in question is intracity since it begins and ends within the city

limits of Raleigh. Second, the City states that it has done nothing to foreclose private operators since it changes full charter rates which cover operating expenses and which include a factor for profit.

The City states that it considers the service incidental charter service. Although the City admits that it does operate the service during peak hours and uses a bus for longer than 6 hours in any one day, it states that the service is incidental since it does not detract from or interfere with the regular service it provides.

C. Rebuttal

On January 6, 1983, UMTA sent a copy of the City's response to the RTS. The RTS rebutted the City's assertions on January 26, 1983. First, the RTS argues that the City's belief that the school bus provisions in Section 3(g) of the UMT Act apply only to primary and secondary students is difficult to understand. The RTS refers to a meeting in September 1982 attended by then UMTA Regional Administrator Carl Richardson, Ms. Collen Weule, an UMTA Attorney, and representatives of the RTS and the City. At that meeting, the RTS alleges that Mr. Richardson and Ms. Weule explained that the term "student" in Section 3(g) applies to any student including those attending colleges and universities.

Second, the RTS asserts that the City's arguments that the type of bus that CATS uses to provide the service is not a Type I or Type II schoolbus and the fact that a businessman, and not a school or school system, pays for the service are irrelevant. Third, the RTS alleges that the service is not incidental since it operates 11 hours each day, with 30 minute headways for 150 days each year.

D. UMTA Request for Additional Information.

On October 23, 1984, UMTA requested that the City provide it with additional information concerning its charter bus operations. Specifically, UMTA requested that the City provide evidence to show that the service in question does not detract from the provision of regularly scheduled mass transportation service. Although the City asserted in its December 3, 1982, response that the service is incidental even though it operates during peak hours and uses a bus for more than 6 hours a day, it provided no factual data in that letter to support its conclusion.

In addition, UMTA requested that the City provide financial data to support its claim that the costs for providing the service in question are covered by revenues. UMTA stated that the regulation's requirement that annual charter costs be covered by annual charter revenues only applies if a recipient provides intercity charter service. If a recipient provides only intracity

charter service, the regulations do not impose any requirements on the rates for this service. Since the City had never stated that it provides intercity service, UMTA advised it that it needs only provide the requested information if it provides intercity service.

E. Response.

The City responded by letter dated December 17, 1984. The City states that it has an active fleet of 46 buses, and a peak requirement of 41 buses (this is for the A.M. peak, the P.M. peak requires only 40 buses) which includes the buses used for the service in question. The City's off peak requirement is only 20 buses. In addition, the City provides an analysis of road calls during its fiscal year ending June 30, 1984. According to this analysis, the City experienced, on the average, less than one roadcall per day. From this, the City concludes that the service in question does not interfere with its mass transportation service.

In addition, the City also provides a schedule of its charter rates. According to this material, the City's charter costs per hour are \$28.62 and the rate it charges for charter service is \$29.63. The City states that this information shows that its charter revenues do cover its charter costs.

The letter, however, does not state specifically that the City provides intercity charter service. By telephone conversation on December 21, 1984, Mr. Bart Barham, the City's Transportation Services Engineer, confirmed that it does provide such service.

III. Findings and Determinations

In order to determine whether the service in question is impermissible, it is necessary to compare the current operations with both school bus service and charter bus service as these types of service are defined in the UMT Act and the implementing regulations

A. School Bus Service

Section 3(g) of the UMT Act provides that:

No Federal financial assistance shall be provided under this Act for the construction or operation of facilities and equipment for use in providing public mass transportation service to any applicant for such assistance unless such applicant and the Secretary shall have first entered into an agreement that such applicant will not engage in schoolbus operations, exclusively for the transportation of students and school personnel, in competition with private schoolbus operators.

The regulations implementing this provision define "school bus operations" as "transportation by bus exclusively for school students, personnel and equipment in Type I and Type II school vehicles as defined in Highway Safety Program Standards No. 17" 49 CFR 605.3. Thus, it is necessary to review the service provided by CATS to determine if it: 1) is by bus; 2) transports students, personnel or equipment; 3) is exclusive transportation; and 4) is provided in a Type I or Type II school vehicle.

There is no dispute that the service in question is provided by bus. In addition, the City does not deny that the service is provided exclusively for the residents of the Wakefield Apartements who attended North Carolina State University.

The City, however, does dispute that the patrons of the service are students. The City argues in its December 3, 1982, letter, that "students" only includes people attending primary and secondary schools. The RTS rebuts this argument by stating that UMTA staff have said that the term "students" does include people attending colleges and universities.

UMTA has not previously formally adressed the question of whether a college student is a "student" in terms of Section 3(g) of the UMT Act and the school bus regulations. After a thorough review of this question, UMTA concludes that the term "student" in Section 3(g) and the school bus regulation does not include college students. Neither the UMT Act nor the school bus regulations define "student". Similarly, neither the legislative history nor the regulatory history discuss who is considered to be within the class of "students". In such cases, it is a well-settled canon of statutory construction that "words used in a statute are to be given their ordinary meaning in the absence of persuasive reasons to the contrary." Burns v. Aleala, 420 U.S. 575, 580-81 (1975).

While the ordinary meaning of "students" may be broad enough to include a person of any age who studies, the meaning of this term in Section 3(g) cannot be read without looking at this provision as a whole. In addition to setting out the general prohibition against UMTA recipients providing exclusive service to students, Section 3(g) provides specific exceptions to this prohibition. The last of the three exceptions states:

this subsection shall not apply with respect to any State or local public body or agency thereof, if it (or a direct predecessor in interest from which it acquired the function of so transporting school-children and personnel along with facilities to be used therefore was so engaged in schoolbus operations any time during the twelve-month period immediately prior to the date of the enactment of this subsection. (Emphasis added.)

The word "school-children" in this exception appears to function as a synonym for "students" in the first sentence of Section 3(g). The ordinary meaning of "school-children" is, in UMTA's opinion, limited to primary, pre-primary, and secondary school students. Consequently, it is UMTA's opinion that "students" in Section 3(g), since it is a synonym for "school-children", does not include college students.

This conclusion is supported by the legislative history for Section 3(g) and a related bill passed during the same Congressional session which added Section 3(g) to the UMT Act. Congress first enacted a school bus provision in the Federal-Aid Highway Act of 1973 (Pub. L. No. 93-87). Section 164(b) of this Act requires any applicant for financial assistance to purchase buses under Sections 103(e) and 142 of 23 U.S.C. or under the UMT Act to enter into an agreement that it would not engage in exclusive school bus operations for students and school personnel in competition with private operators. Congress added the school bus provision to the UMT Act in the National Mass Transportation Assistance Act of 1974 (Pub. L. 93-503). The language added as Section 3(g) is identical to that in Section 164(b) of the 1973 Act except that it expands the agreement requirement to include applications for grants for construction or operation of any facilities and equipment.

Both of these provisions had their origins in House-passed bills. The Senate passed bills did not contain any school bus provisions and, thus, the language was included by the Conference Committees. In both House-passed bills, Section 142(h) of S. 502 and Section 9 of H.R. 6452, the word "schoolchildren" is used exclusively. The word "student" was added in conference for both bills. This evidences a clear intent on the part of Congress that the two terms are synonyms and that the persons UMTA recipients are prohibited from transporting are persons attending primary, pre-primary, and secondary schools and not those attending colleges or universities.

In addition, the same Congress which added Section 3(g) to the UMT Act also enacted the Motor Vehicle and School Bus Safety Amendment of 1974 (Pub. L. No. 93-492). This Act amends the National Traffic and Motor Vehicle Safety Act of 1966 (Pub. L. No. 89-563). In addition to authorizing appropriations for another of the Department of Transportation's operating administrations, the National Highway and Traffic Safety Administration (NHTSA) for FY 1975 and 1976, these amendments require NHTSA to issue Motor Vehicle Safety Standards for schoolbuses and defines "schoolbus" to mean,

a passenger motor vehicle which is designed to carry more than 10 passengers in addition to the driver, and which the Secretary determines is likely to be significantly used for the purpose of transporting primary, pre-primary, or secondary school students to or from such schools or events related to such schools. (15 U.S.C. §1391 (14))

Thus, for the purposes of NHTSA's safety program, Congress excluded college students from the riders of schoolbuses.

Canons of statutory construction state that statutes relating to the same subject and passed at the same legislative session are to be construed harmoniously. 82 C.J.S. § 367. Since Congress added the schoolbus provision to the UMT Act and to the Motor Vehicles Safety Act of 1966 in the same sessions, categories of person transported by a schoolbus should be interpreted consistently. Consequently, UMTA finds it necessary to exclude college students from the Section 3(g) definition of "students" since they are excluded in the Motor Vehicle and Schoolbus Safety Amendments of 1974.

Therefore, since UMTA has determined that college students are not students within the terms of Section 3(g) of the UMT Act and the implementing regulations, we conclude that the City is not in violation of the prohibitions on providing exclusive school bus service with UMTA-funded vehicles and equipment.

B. Charter bus Service.

The limitations on the charter bus service which UMTA recipients may provide with UMTA-funded vehicles and equipment are contained in two provisions in the UMT Act. Section 12(c)(6) defines "mass transportation" to specifically exclude charter service. Based on a Comptroller General's Opinion, however, UMTA recipients are permitted to provide charter bus service as long as it is incidental to the provision of mass transportation service. Section 3(f) prohibits the Secretary of Transportation from providing financial assistance under the UMT Act unless the applicant enters into an agreement that as a condition of such assistance the public body will not engage in charter bus operations outside the urban area within which it provides regularly scheduled mass transportation service so as to foreclose private operators from intercity charter service.

UMTA's regulation on Charter Bus Operations (49 CFR Part 604) define charter bus operations as:

transportation by bus of a group of persons who, pursuant to a common purpose, and under a single contract, at a fixed charge for the vehicles or service, in accordance with the carrier's tariff, have acquired the exclusive use of a bus to travel together under an itinerary, either agreed on in advance, or modified after having left the place of origin.

A comparison of the service in question with this definition indicates that it is charter service. The service is by bus and transports a group of people, for a single purpose, under a contract, at a fixed charge, under an itinerary. Although charter service is generally thought of as a one time trip, e.g., a field trip, the UMTA definition is broad enough to include the recurring type of service provided here by the City through CATS.

The regulation implements the statutory provisions referred to above in distinct ways. Section 604.11 states that charter service is presumed to be not incidental if it is during the weekday and it occurs during peak hours, requires a bus to travel more than 50 miles outside a recipient's urban area, or requires the use of a particular bus for more than a total of 6 hours in any one day. These restrictions apply to any charter service, whether intracity or intercity, which a recipient provides.

Section 604.12 implements the protections for private intercity charter bus operators by requiring a recipient that does any intercity charter service to cover total charter costs (both intercity and intracity) with total charter revenues and by prohibiting a recipient from charging a predatory rate.

The RTS alleges that the service is not incidental since it is provided during peak hours and requires the use of a particular vehicle for more than 6 hours in a day. The City responds that the service is incidental, intracity service which does not foreclose private operators since the rate charged covers all operating expenses and includes a profit factor.

After a review of the evidence submitted, UMTA concludes that the charter services is incidental. The City has an active fleet of 46 buses and has an A.M. peak requirement of 41 buses and a P.M. peak requirement of 40 bus including the buses needed for the service in question. Its off-peak requirement is 20 buses. In addition, the City's data on roadcalls, i.e. service disruptions indicating the breakdown of a bus during scheduled service, during its fiscal year 1984 show on the average less than 1 roadcall per day. Since the City has 5, 6, and 26 spare buses available during its A.M. peak period, P.M. peak period, and off peak period, respectively, it can meet roadcall needs with the available spare buses. UMTA concludes, therefore, that the City has rebutted the incidental use presumptions and that the charter service is permissible.

In addition, the City submitted a cost allocation plan showing its per hour charter costs for the twelve month period ending June 30, 1984. According to this data which accounts for the costs listed in Appendix B to the charter bus regulation, the City's per hour charter costs are \$28.62. The City's per hour charter revenues are \$29.65. The regulation only requires that the City's charter revenues equal or exceed its charter costs if it provides intercity charter service. If such service is provided, however, the recipient must ensure that its total charter revenues equal or exceed its total charter costs. Since the City does operate intercity charter service, the above