

BEFORE THE URBAN MASS TRANSPORTATION ADMINISTRATION

In the matter of

BLUE GRASS TOURS AND CHARTER  
Complainant

versus

LEXINGTON TRANSIT AUTHORITY  
Respondent

:  
CHARTER COMPLAINT

:  
(49 U.S.C. 1602(f))

:  
URO-III - 1987

MEMORANDUM OF DECISION

Question Presented

Whether the transportation provided to the University of Kentucky principally for its faculty, staff and students by the Lexington Transit Authority, Lexington, Kentucky (hereinafter referred to as "LexTran") constitutes impermissible charter service in violation of 49 CFR Part 604, which implements Section 3(f) of the Urban Mass Transportation Act of 1964 as amended, 49 U.S.C. 1602(f) (the "UMT Act")?

Facts

The facts as presented by complainant, Blue Grass Tours and Charter, a privately-owned transportation company located in Lexington, Kentucky, and by respondent, LexTran, are as follows:

The University asked the complainant to bid on a contract (referred to as "annual subsidy" by LexTran) to provide a certain number of hours in the course of the year according to a set route and schedule. The University asked complainant to give a rate per hour based on that information. Then, before complainant had replied, it was told by the University that LexTran had lowered its price and that the University would continue to have the needed transportation provided by LexTran.

The service at issue is apparently around the University campus, from building to building. It is open and free to anyone going on the route. The service is only provided when the University is open. It is in addition to the regularly scheduled LexTran routes that exist in Lexington, some of which travel to and through the campus.

Neither complainant nor respondent has provided for the record a copy of a written agreement setting forth the terms of the service in question. The schedule for the service is apparently set by an oral or informal agreement between the University and LexTran and runs when the University needs it. (There may have been in the past a written contract establishing the terms of the agreement but apparently the agreement is currently not in writing.)

Instead of collecting fares from each passenger, as LexTran does with its regular routes, LexTran receives an annual subsidy from the University for the service. The agreement to provide the service appears to be renewed annually in July.

#### Complainant's Position

It is the complainant's contention that the service in question is actually a form of prohibited charter service. The definition of charter found in Urban Mass Transportation Administration (UMTA) regulations at 49 CFR Subsection 604.5(e) is as follows:

transportation using buses or vans, or facilities funded under the Acts [49 U.S.C. 1601 et seq. and 23 U.S.C. 103(e)(4) and 142] of a group of persons who pursuant to a common purpose, under a single contract, at a fixed charge (in accordance with the carrier's tariff) for the vehicle or service, have acquired the exclusive use of the vehicle or service to travel together under an itinerary either specified in advance or modified after having left the place of origin. This definition includes the incidental use of UMTA funded equipment for the exclusive transportation of school students, personnel, and equipment.

The service complained of runs at the behest of the University which dictates locations and schedules. According to the complainant, LexTran has input in developing the routes from a logistical point of view as any operator would but the University determines the starting points and destinations and which areas of campus and specific buildings are to be included in the service.

The service fluctuates according to when school is in session. It is reduced during the summer and it does not exist when school is out of session and during holidays such as Christmas.

The complainant contends that the service may be open to the public but it is not advertised or promoted to make the public aware of its availability (except on the campus). Anyone wishing to use LexTran's regular service to points off campus must take LexTran's regular (published) routes and pay a fare.

Respondent's Position

LexTran's position is that its campus service fits the definition of "mass transportation" found in Section 12(c)(6) of the UMT Act of 1964, as amended. According to that definition, mass transportation means:

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.

To support that contention, LexTran states that the service operates on a regular and continuing basis throughout the year, Monday through Friday, between the hours of 7:10 a.m. and 6:20 p.m., but that service levels naturally vary during the year, based upon demand.

Furthermore, the service is open to the general public and the vehicles are not for the use of any particular group. The riders have no control of the route or destination of the vehicle.

LexTran sets the routes and schedules based on LexTran's knowledge of transit operations and the area's geography with input from the University on class schedules, working hours, and peak hours of the hospital.

There is no fare charged for the service. The University pays LexTran an annual subsidy, established by mutual agreement. There is no subsidy contract in effect.

The service is promoted in conjunction with all of LexTran's services.

LexTran has signed an agreement with UMTA pursuant to 49 CFR Subsection 604.7 in which LexTran has agreed not to provide charter service with UMTA funded facilities and equipment unless there is no able and willing private operator or unless one of the exceptions in 49 CFR Section 604.9 applies.

Conclusion

The issue is not a simple one. Frequently, transportation service around a university complex is considered "mass transportation." (Please see in this regard Question number 27.d. of the Charter Questions and Answers published on November 3, 1987, 52 Fed. Reg. 442252.) In this case, however, even though LexTran has argued that this service fits the definition of mass transportation, the facts would indicate that the service more closely resembles charter service.

Discussion

The service in question more closely fits the definition of "charter" found in the UMTA regulations than the definition of "mass transportation" found in the UMT Act. However, there is no contention that LexTran is providing permissible charter service as an exception under UMTA charter regulations, 49 C.F.R. Section 604.9.

Notwithstanding the fact, as LexTran contends, that the service on the campus is "regular and continuing," it appears that that service has been set up "under a single contract" to regularly benefit a group of persons who have specified where and when they want the service to exist and who annually pay a special price to have it available only when they are there to use it.

Notwithstanding the fact, as LexTran contends, that there may be no written contract in effect, the service is provided for the University only at the times and locations specified by the University and agreed to by LexTran. (Although not clearly stated by either complainant or respondent, I infer from their letters that the annual subsidy only covers service required by the University except as altered for operational reasons by LexTran.)

Notwithstanding the fact, as Lextran contends, that none of the individual riders has the ability to direct the vehicle to take a different course, the University, on behalf of those individuals, does have the prerogative of altering routes and schedules.

Indeed, the campus service is, in some respects, quite dissimilar to LexTran's other routes. For example, it is free to individual riders (while on Lextran's other routes individual riders pay a fare) and there are no published schedules (while published schedules exist for LexTran's other routes). Moreover, while those two characteristics of the service are not in themselves determinative of whether it is either charter or mass transportation - See in this connection Question 27.a. of the Questions and Answers Published November 3, 1987. 52 Fed. Reg. 42252. - the conclusion one would have to draw is that the service to the University is a special type of service which is set up, advertised and operated differently than LexTran's regular service. and notwithstanding the absence of a written contract, one that appears to be operating pursuant to a special agreement to accommodate the special needs of the University.

This conclusion is reinforced by application of part of the discussion in the preamble to the charter regulation published on April 13, 1987 to the present situation. In the preamble UMTA explained that three characteristics of mass transportation differentiate it from charter service.

First, mass transportation is under the control of the recipient. Generally the recipient is responsible for setting the route, rate, and schedule, and deciding what equipment is used. Second, the service is designed to benefit the public at large and not some special organization such as a private club. Third, mass transportation is open to the public and is not closed door. Thus, anyone who wishes to ride on the service must be permitted to do so. [49 CFR Part 604, 52 Fed. Reg. 11916, at 11920]

Although LexTran would argue that it is in control of the service with respect to setting routes, rate, schedule and equipment, it appears that the University has requested service generally - if not specifically - according to certain routes and schedules. LexTran has proposed to charge a certain rate and has decided what equipment to use in order to meet the needs of the University.

Secondly, although LexTran would argue that the service provided to the University benefits the public at large, and is not exclusive as for a private club, it appears that it is designed to fulfill the transportation needs of the University students and personnel. It is not set up to benefit the general public except as the general public might coincidentally need to travel around the campus.

Thirdly, although the service is "open door" in the sense that anyone wanting to ride on it is not excluded from doing so, UMTA has interpreted "open door" to mean involving a substantial public ridership and/or an attempt by the transit authority to widely market the service. That does not appear to be the situation here. Moreover, the service does not operate in the general urban area of Lexington, but only on campus.

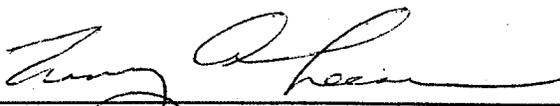
Finally, although the definition of "mass transportation" in the UMT Act does include the concept of "special" service, the type of service complained of in this case is not one of the two types of "special" service that legally fit the definition of "mass transportation." They are: service exclusively for elderly and handicapped and service provided for the workers who live in the innercity, but work in a factory in the suburbs. These historically are the only two "special" types of service still considered to be mass transportation. [52 Fed. Reg. 11916 at 11920]

Decision

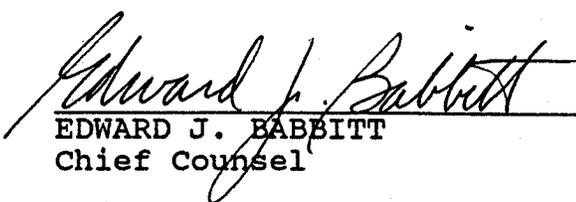
Because the service provided by LexTran to the University of Kentucky is in reality charter service rather than mass transportation, unless LexTran has gone through the public process described in the charter regulations at 49 C.F.R. 604.11 and found there to be no legally "able and willing" private charter operator in its service area (and thus is operating the service pursuant to a legitimate exception to the regulation pursuant to 49 C.F.R. section 604.9,) I conclude that it is an impermissible use of UMTA funded facilities and equipment to continue to provide the transportation which has been the subject of this discussion.

Accordingly, unless LexTran can show that it has gone through the abovementioned public process and found there to be no legally "able and willing" private charter operator, LexTran is ordered to cease and desist immediately this special service to the University.

5/9/88  
DATE

  
NANCY A. GREENE  
Regional Counsel

5/17/88  
DATE

  
EDWARD J. BABBITT  
Chief Counsel

BEFORE THE URBAN MASS TRANSPORTATION ADMINISTRATION  
OFFICE OF CHIEF COUNSEL

In the matter of:

SEYMOUR CHARTER BUS LINES,	)	
Complainant	)	
	)	
v.	)	TN-09/88-01
	)	
KNOXVILLE TRANSIT AUTHORITY,	)	
Respondent	)	

DECISION

SUMMARY

Seymour Charter Bus Lines (Seymour) filed this complaint with the Urban Mass Transportation Administration (UMTA), alleging that the Knoxville Transit Authority (K-TRANS) was providing charter service in violation of the Urban Mass Transportation Administration's (UMTA) charter regulation, 49 CFR Part 604. The complaint specifically alleged that Seymour had contracted to provide charter service for the University of Tennessee (the University). Applying a balancing test to the service in question, UMTA concludes that it is charter service as defined by 49 CFR 604.5(e). UMTA orders K-TRANS to cease and desist from providing the service as it is currently configured. K-TRANS must report to UMTA within 90 days on the measures it has taken to comply with the terms of this order.

COMPLAINT

Seymour filed this complaint with UMTA on August 19, 1988. The complaint alleged that K-TRANS was providing charter service in violation of UMTA's charter regulation, 49 CFR Part 604. The complaint specifically alleged three violations. According to the first two allegations, set forth in paragraphs 5 and 6 of the complaint, K-TRANS had established brokering arrangements with Loy Bus Lines and Mays Bus Lines. In paragraph 7 of the complaint, Seymour alleged that K-TRANS had successfully bid on a contract for charter service to the University, at a charge that was less than its fully allocated cost of providing the service.

By letter of September 23, 1988, UMTA advised Seymour that its allegations stated a complaint under 49 CFR 605.15. The letter directed Seymour to attempt local conciliation for thirty days. If no resolution were reached at the end of this period, the

letter stated, either party could write to UMTA to request a formal investigation.

On October 27, 1988, Seymour wrote to UMTA to state that it had met with K-TRANS on the previous day. As a result of discussions which took place, Seymour stated, it was withdrawing its allegations that K-TRANS had established brokering arrangements with Loy Bus Lines and May Bus Lines. Seymour stated, however, that the parties had been unable to reach an agreement on the nature of K-TRANS' service to the University. Seymour maintained that the service was charter service, and therefore prohibited by UMTA's charter regulation.

#### RESPONSE

By letter of November 21, 1988, UMTA advised Seymour and K-TRANS that it would proceed with a formal investigation of the remaining allegations concerning K-TRANS charter service for the University. UMTA gave K-TRANS 30 days to respond to the complaint.

K-TRANS' response was dated December 21, 1988. K-TRANS noted that it was making no response to the allegations of paragraphs 5 and 6 of the complaint concerning K-TRANS' brokering arrangements with Loy Bus Lines and Mays Bus Lines, since those allegations had been withdrawn by Seymour.

Responding to the allegations in paragraph 7, K-TRANS stated that it has been providing service to the University of Tennessee campus and to certain student apartments operated by the University. K-TRANS explained that it had been operating, as part of the mass transit system of the city for many years, service to and from the campus and to and from 5 off-campus apartments occupied by married and graduate students.

In June 1988, stated K-TRANS, the University issued a request for quotations. K-TRANS indicated that it was providing service to the University not under a separate contract, but "pursuant to the request for quotations issued by the University and the response of K-TRANS." K-TRANS denied that the service was charter service, or that service was being provided in violation of the UMTA charter regulation.

K-TRANS stated that the schedule for the Route 22 service, a copy of which was attached to its response, showed that the service provided for the University community was divided into two parts. The first part, explained K-TRANS, was known as the Campus Route, and connected the main campus with the University Agricultural Campus along Weyland Drive, a main thoroughfare of the City. K-TRANS stated that no fare was charged for this intercampus service.

The second part of the service, according to K-TRANS, was provided to five (5) separate apartment complexes which housed married and graduate students. K-TRANS explained that the service to the

married student apartments ran along a principal thoroughfare, through residential and commercial areas. K-TRANS maintained that the buses stopped and picked up at any K-TRANS stop along the way. Each rider, stated K-TRANS, paid a fare for this service.

K-TRANS stated that in its request for quotations, the University requested the use of 45-passenger buses, set the departure times from the campus and the apartments and the times during which the service would operate, and set the fare to be charged for students. Otherwise, K-TRANS maintained, the service was totally under the control of K-TRANS.

K-TRANS explained, notably, that it set the number of vehicles used to provide the service, handled all operational details, and determined the routes to be followed. K-TRANS stated that for the most part, the buses operated along publicly dedicated and maintained streets, were open to the public at regular fares, and stopped at all of K-TRANS' regular stops. Moreover, stated K-TRANS, the service appeared in K-TRANS' regularly published schedules, which were distributed to the general public. K-TRANS acknowledged that the service was geared to meet the needs of the University community, but stated that it was not tied exclusively to University class schedules, and had operated on a modified schedule during vacation periods. These factors, K-TRANS maintained, confirmed that the service was "mass transportation" as defined on page 11920 of the preamble to UMTA's charter regulation (52 Fed. Reg. 11916 et seq., April 13, 1987).<sup>1</sup>

K-TRANS further contended that the service was for the benefit of the public-at-large, since University students were members of the public as was any group which lives in a particular sub-division or series of apartment complexes. College students were not, maintained K-TRANS, a restricted, nurtured group as would be secondary students served by a school bus, but were members of the local community.

On the other hand, K-TRANS submitted, the service was not "charter service," because, among other things, the patrons did not have a common purpose or constitute a defined group, they had not acquired exclusive use of the bus, they did not travel under an itinerary specified in advance or have authority to set the destination, and each rider paid an individual fare.

Responding to the allegation of paragraph 9 of the complaint concerning K-TRANS' failure to bid fully allocated costs for the University contract, K-TRANS acknowledged that the successful bid price was \$22.75 per hour, but stated that determination as to

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1) "Mass transportation" is herein defined as having the following three basic characteristics: 1) it is under the control of the grantee (i.e., the grantee sets the rate, route, fares and schedules); 2) it is designed to meet the needs of the general public as opposed to those of a particular group; 3) it is open to the public.

whether the charge was compensatory was not appropriate. If it were determined that the service was charter service and should not be provided, argued K-TRANS, the amount of the charge would become a moot question. If, stated K-TRANS, the ultimate decision were that the service is mass transportation, then the matter complained of in paragraph 9 should not be an issue.

Further responding to the complaint generally, K-TRANS asserted that the regulations promulgated at 49 CFR Part 604 were not within the legal authority granted to UMTA under the Urban Mass Transportation Act of 1964, as amended (UMT Act), since the service complained of was not being operated outside the urban area in which K-TRANS provided regularly scheduled mass transportation service.<sup>2</sup>

For the above reasons, K-TRANS concluded that the complaint should be dismissed.

#### REBUTTAL

By letter of December 29, 1988, UMTA wrote to Seymour to state that it had received the response of K-TRANS on December 21, 1988, and that K-TRANS had indicated that it had forwarded a copy of its response to Seymour. UMTA stated that Seymour would have 30 days to file a rebuttal.

Seymour's rebuttal is dated January 17, 1989. Seymour therein stated that the issue presented in this proceeding was whether transportation provided to the University exclusively, or on a substantially exclusive basis, for its faculty, staff and students by K-TRANS, constituted impermissible charter service in violation of 49 CFR Part 604.

Seymour pointed out that in consideration of the payment of \$22.75 per hour per bus, K-TRANS agreed to provide service to the University campus, operating in an area and at times specified by the University. Seymour noted that in meeting this general transportation requirement, the University had imposed specific requirements on K-TRANS, including the number and seating capacity of buses used, detailed insurance specifications, maintenance of a cash collection system acceptable to the University, and frequency of service and points of origin and destination.

Seymour asserted that the service provided by K-TRANS to the University was not mass transit. Seymour pointed out that mass transit is described in the preamble to UMTA's charter regulation

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2) UMTA will not discuss this issue, since it has already dealt with it extensively in two previous decisions, Washington Motor Coach Association v. Municipality of Metropolitan Seattle, WA-09/87-01, March 21, 1988, and B&T Fuller Double Decker Bus Company v. VIA Metropolitan Transit, TX-02/88-01, November 14, 1988.

as being: 1) under the control of the grantee; 2) designed to benefit the public at large; 3) open door. 49 Fed. Reg. 11920, (April 13, 1987). Seymour maintained that K-TRANS' service had none of those characteristics of mass transit.

First, stated Seymour, K-TRANS' service to the University was not under its control, but operated according to routes, minimum rates, and schedules set by the University, which also specified what equipment is used.

Second, Seymour argued, K-TRANS maintained that the service was designed to benefit "members of the public," since students were part of the public at large. That argument, Seymour pointed out, was rejected by the UMTA Chief Counsel in Blue Grass Tours and Charter v. Lexington Transit Authority (Memorandum of Decision dated May 17, 1988). In that decision, Seymour noted, the Chief Counsel ruled that the service was not set up to benefit the general public, except as the general public might coincidentally need to travel around the campus.<sup>3</sup>

Third, Seymour acknowledged that K-TRANS' service could be described as "open door" in the sense that no one wanting to use it was prevented from doing so, but denied that it was true "open door" mass transit. Seymour quoted the finding in an opinion letter of UMTA's Chief Counsel dated December 28, 1988, that certain service provided by the Ithaca Transit Authority was impermissible charter service since it was apparent that the purpose of the trip was to provide service for a particular group of senior citizens and not for the public-at-large. Seymour cited K-TRANS' failure to furnish the University with documentation of fares collected or passengers carried as evidence that there was no significant public ridership or routes serving the married students' apartments.

Seymour maintained that K-TRANS' campus service conformed to the following seven criteria for charter service set forth in 49 CFR 604.5(e):

1) The patrons had a common purpose, namely to travel to or from points on the University campus.

2) The service was provided exclusively for University students and personnel. Moreover, Seymour stated, no transportation was provided when school was not in session.

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3) The Lexington Transit Authority, the respondent in the proceeding cited, eventually modified this element of the service by publishing schedules for its campus service, advertising them to the public, and marking campus stops with its logo, thereby evidencing an attempt to invite public ridership. By letter of December 27, 1988, to the Lexington Transit Authority, UMTA recognized that these and other changes had converted what it believed was charter service to mass transit.

3) While the passengers did not board as a group at a common place, it was not uncommon for motor carriers to pick up at various locations (ex., pick-ups at various hotels in the case of convention charters).

4) The University had acquired exclusive use of the bus for its students and personnel.

5) The passengers travelled together under an itinerary specified in advance by the chartering party, the University.

6) The University, the chartering party, set the destinations.

7) The buses were chartered for the purpose of providing transportation on an individual basis; hence, each person paid an individual fare.

Seymour argued that like the service in Blue Grass, the service provided by K-TRANS to the University was set up, advertised, and operated differently than K-TRANS' regular service and was geared to accomodate the special needs of the University when school was in session.

Seymour responded to K-TRANS' argument that UMTA lacked legal authority to promulgate the charter regulation by stating that 12(c)(6) of the UMT Act, by restricting UMTA funds to use for mass transit purposes, invested UMTA with the necessary authority to prohibit use of funds for other purposes. Section 12(c)(6), maintained Seymour, was a fairly typical example of a delegation of authority to frame major governmental policy without significant statutory guidance.

Seymour asked that for the reasons set forth above, K-TRANS should be barred from receipt of further financial assistance for mass transit facilities and equipment.

#### REQUEST FOR ADDITIONAL INFORMATION

By letter of January 26, 1989, UMTA requested additional information from K-TRANS. The information requested, and K-TRANS' response of March 10, 1989, are summarized as follows:

QUESTION: Why, after providing service to the University of Tennessee for many years as part of its mass transit system, is K-TRANS now providing it pursuant to the request for quotation from the University?

ANSWER: Prior to 1988, the basis for subsidy by the University to K-TRANS had been by negotiated agreement. Last year, however, following an informal proposal from a private operator, the University determined that it should be satisfied as to the appropriate payment, and decided to solicit proposals.

QUESTION: Please submit a copy of Requirements Contract UC #0505-990.

ANSWER: Document requested, dated June 23 1988, is attached.

QUESTION: Has there been a change in fares, routes or schedules since the K-TRANS began operating the service pursuant to the University's request for quotation?

ANSWER: No change has been made in fares, routes or schedules, though it has been determined to operate the service when the University is not in session.

In a supplemental response, K-TRANS commented on two matters contained in complainant's rebuttal, and provided other additional information.

First, K-TRANS stated, with regard to the assertion that all patrons had the common purpose to travel to and from points on the University campus, it should be pointed out that students may transfer to another K-TRANS route with the purchase of a transfer at the regular charge.

Second, K-TRANS noted that complainant's rebuttal contained a footnote to the effect that no transportation was provided when the University was not in session. K-TRANS referred to Exhibit "C" of its response showing the schedule for the Christmas Holiday period between December 15, 1988, and January 10, 1989.

K-TRANS further stated that bus stops signs were, and historically had been, posted and maintained on the regular campus. K-TRANS moreover maintained that while the University's request for proposals contained a schedule of desired departure times, this schedule had originally been developed by K-TRANS in consultation with the University. Finally, K-TRANS stated that in order to further illustrate the urban nature of the service in question, it was attaching a city street map showing the routes followed over the campus area.

#### COMMENT ON SUPPLEMENTAL RESPONSE

On March 20, 1989, Seymour provided the following comments on the supplemental information furnished by the complainant.

First, argued Seymour, the students' alleged ability to transfer to other routes did not make the campus routes part of an integrated mass transit system.

Second, stated Seymour, the operation of the service during the Christmas season did not negate the fact that the service was not mass transportation, but was dedicated exclusively to the needs of University students and personnel.

Third, Seymour contended that the posting of stop signs was irrelevant if the general public did not use the service in question.

Fourth, Seymour stated that it would be reasonable to assume that service for the University, whether mass transit or charter, would be discussed by officials of K-TRANS and the University to determine the most convenient departure times.

Fifth, Seymour conceded that the service provided by K-TRANS under contract to the University was over routes depicted on the city map supplied by K-TRANS. Finally, Seymour maintained that K-TRANS had failed to establish that it had transported even one member of the general public.

K-TRANS was required under the terms of its contract with the University, stated Seymour, to furnish documentation of fares collected and passengers carried, but had thus far failed to do so.

#### DISCUSSION

The essential issue in this case is whether the service provided by K-TRANS to the University is impermissible charter service or permissible mass transportation.

The complainant's argument that the service provided by K-TRANS to the University is charter service is based in large part on the definition of charter service set out at 49 CFR 604.5(e), and on the Chief Counsel's determination in Blue Grass (supra) concerning similar university campus service.

In Blue Grass, the Chief Counsel determined that the service provided by the Lexington Transit Authority (Lextran) essentially corresponded to the criteria of section 604.5(e). First, the Chief Counsel found, the service was charter service, since it was provided "under a single contract." The Chief Counsel's investigation revealed that although no written contract had been concluded between the parties, the service was operated by the grantee on terms set by the University, and the grantee was compensated on the basis of hours of service.

Second, the Chief Counsel found that the service was operated and managed differently from the grantee's other routes, since there were no published schedules for the campus routes, and it was provided for free.

Third, the Chief Counsel found that the service had been designed to meet the transportation needs of university students and personnel, and that that though it was operated open door, only coincidentally served the needs of the needs of the general public. Balancing these factors, the Chief Counsel determined that the service was charter service.

The same type of balancing test must be applied in determining the nature of service involved in any complaint filed with UMTA, since, as the preamble to the charter regulation points out at page 11926, there is no fixed definition of charter service, and the characteristics cited by UMTA are given as examples only.

While the service provided by K-TRANS is similar to that provided by Lextran at the time of the complaint cited in Blue Grass, it has other characteristics which more easily fit the definition of mass transportation.

In contrast to Lextran, K-TRANS does publish the campus routes in its regular schedules. Moreover, K-TRANS' service to and from the married student apartments is not provided for free, but each passenger pays an individual fare. In these respects, the service conforms to the criteria for mass transportation.

At the same time, K-TRANS' service and Lextran's service as it was reconfigured following the Chief Counsel's decision in Blue Grass, share similarities which also meet UMTA's mass transit criteria. While in both cases the routes serve mainly university students and personnel, both offer at least a significant opportunity for public ridership. In Lextran's case, following the issuance of the Chief Counsel's decision, the campus service was modified to invite public ridership through the publication of regular schedules and the marking of campus stops with the Lextran logo.

The K-TRANS service affords an opportunity for public ridership through the publication of regular schedules and the posting of bus stop signs throughout the campus. Moreover, as K-TRANS points out, since the University campus is located in a central part of the urban area, some of the campus route buses follow major thoroughfares and passengers using them may connect with other K-TRANS routes. Further, contrary to Seymour's assertion that the campus service does not operate during school vacation periods, K-TRANS has demonstrated that the service does operate on a modified schedule at least during the Christmas holiday season. Thus, the service does appear to be open and available to the general public.

Seymour, while not denying that the service is open door, cites K-TRANS' failure to furnish the University with documentation of fares collected or passengers carried as evidence that there is no significant public ridership on the campus routes. Although K-TRANS has not made this information available to UMTA, UMTA disagrees with Seymour that this is conclusive evidence that no member of the general public has been transported by the campus service. The agreement between K-TRANS and the University does not require that K-TRANS provide separate data on student and nonstudent riders. Thus, even though K-TRANS may be able to provide information on fares collected and passengers using this service, it does not appear that this information would be in any way helpful in determining the number of student riders versus the

number of members of the general public being transported on the campus routes.

On the other hand, both the university service originally operated by Lextran and K-TRANS' campus service meet UMTA's criteria for charter service in that they are provided under an agreement which links the cost of the service to the number of hours operated. This agreement, by allowing the University to set fares and schedules, places control of the service with a party other than the grantee. Although K-TRANS maintains that it handles other aspects of the service, such as the number of vehicles used and the routes to be followed, UMTA notes that these are merely operational details and not determinative of actual control of the service. As UMTA has stated in its "Charter Service Questions and Answers," 52 Fed. Reg. 42248, 42252 (November 3, 1987), such control of fares and schedules is the critical element in distinguishing charter service from mass transportation in the case of service to a university complex. Question 27(d) indeed states:

"If the service is for the exclusive use of students and the university sets the fares and schedules, the service would be charter. However, such service operated by a recipient which sets fares and schedules and is open door, though it serves mainly university students, would be mass transportation."

Thus, by operating under an agreement which allows the University to control the service, K-TRANS fails to meet the criterion set in the most important part of the balancing test which UMTA uses to distinguish charter service from mass transportation in the case of campus route service.

It should be noted that following the Chief Counsel's decision in Blue Grass, Lextran modified this aspect of its service by ceasing to provide it under an agreement linking payment to hours of service, instead receiving an annual grant from the University. In a letter to Lextran dated December 27, 1988, UMTA recognized that by thereby assuming control of the campus service and by making it open to the general public, Lextran had successfully converted the service to mass transportation. UMTA noted that in so transforming the service, Lextran had provided an example for similarly situated grantees.

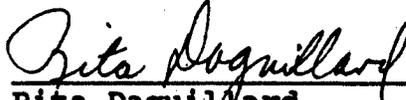
Should K-TRANS wish to continue providing service to the University, it must reconfigure the service to conform to UMTA's mass transportation guidelines. It should be pointed out, however, that even if K-TRANS were to operate the campus service as mass transportation it should, in accordance with UMTA's private sector policy, examine the interest and capability of the private sector in providing this service. This is especially the case since, according to the information furnished by K-TRANS, this service has been operated for several years. Under the guidelines set forth in Circular 7005.1, "Documentation of Private

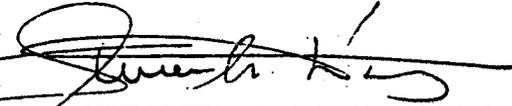
Enterprise Participation Required for Sections 3 and 9 Programs" (December 5, 1986), UMTA grantees should examine each route at least every three years to determine if it could be more efficiently operated by private enterprise.

**CONCLUSION AND ORDER**

UMTA finds that the service provided by K-TRANS to the University service is charter service, since it is provided under an agreement with the University, which controls rates and schedules. In order to come into compliance with UMTA requirements, K-TRANS must either cease and desist from providing the service, or it must provide it in conformance with UMTA's mass transportation guidelines. K-TRANS must report to UMTA within 90 calendar days of receipt of this decision on the measures that it has taken to comply with this order.

Dated: November 29, 1989

  
 Rita Daquillard  
 Attorney-Advisor

APPROVED: 

Steven A. Diaz  
 Chief Counsel

LaFayette + Greenville Bus  
Owners Association  
Complainant

v.

New Jersey Transit Corporation  
Respondent

NJ-07/86-01

#### SUMMARY

The LaFayette + Greenville Bus Owners Association (L + G) filed this complaint with the Urban Mass Transportation Administration (UMTA) alleging that the New Jersey Transit Corporation (NJT) was unfairly treating small private bus operators in violation of Section 3(e) of the Urban Mass Transportation Act of 1964, as amended (UMT Act), with regard to the provision of mass transportation service for the Liberty Weekend Celebration. After a thorough review, UMTA finds that NJT did violate UMTA's policies concerning the involvement of the private sector in the provision of this service and we order NJT to comply with these policies in the future when similar special service is planned and provided.

#### COMPLAINT

On June 17, 1986, L + G wrote to UMTA complaining about the service that NJT was planning to provide for the Liberty Weekend Celebration to be held from July 3 -7, 1986. L + G complained that NJT'S treatment of small private operators in relation to their participation in the transit service for this celebration was unfair. L + G included a copy of a newspaper article that described the additional services that NJT planned to provide for the celebration.

L + G sent another letter to UMTA dated July 1, 1986, on this same issue. The letters included several pieces of correspondence between L + G and NJT. In a June 16, 1986, letter to NJT, L + G complained about the service that NJT would provide from Journal Square, the Grove Street PATH Station, and the Exchange Place PATH Station to Liberty Park. L + G states that it provides this service 365 days each year and that any such service NJT would provide will be an infringement on its rights and "unjustly deprive us of windfall profits." L + G claimed that NJT never took its capabilities into consideration and that it wants to resolve the issue before the celebration begins.

L + G included a copy of NJT's response which stated that it understands that L + G does not have the operating authority needed to provide regular route service between Journal Square and Liberty Park. Furthermore, NJT stated that it had contacted the Central Avenue IBOA which does have the needed authority, but that it was awaiting a response.

L + G responded and complained that NJT's response was sent too late to permit a resolution of the problem. L + G also reiterated its basic complaint.

#### RESPONSE

UMTA reviewed the materials that L + G sent and concluded that it could be viewed as a complaint that NJT had not complied with Section 3(e), 8(e) or (f) of the UMT Act and the implementing policies in the planning and prospective provision of the special service for the celebration. Since it appeared that L + G had attempted to resolve this problem at the local level and failed, UMTA sent NJT a copy of the materials submitted by L + G on July 31, 1986, for a response due no later than 30 days from receipt.

NJT's response dated August 26, 1986, states that it did not violate the UMT Act or any other federal law, regulation or policy in its planning or provision of this service. NJT enclosed several attachments with its response that include descriptions of the planning of the service, press releases about the service and schedules of the service. NJT states that it decided to provide the service in conjunction with the New Jersey Liberty Weekend Executive Committee since the current services would be unable to meet the anticipated unprecedented level of service that would be needed.

NJT admits that L + G provides service to within 1.25 miles of Liberty Park and that the Central Avenue IBOA provides regular service directly to the Park. NJT states that it offered a portion of the special service to Central if it could provide guaranteed operable air conditioned buses. Since Central could not make this guarantee, NJT did not use Central in the provision of the service. Furthermore, NJT states that while it discussed the option of hiring private operators to provide the service that due to concerns about the quantity and quality of equipment, the decision was made not to use them.

NJT states that the planning process for this service is not part of the regular planning process in Section 8(e) or 9(f) of the UMT Act and that L + G lacks standing to file this complaint since it does not have authority to operate to the Park.

NJT states that it did use UMTA funded buses to provide the service, but that the operating costs were borne by the farebox revenues and that the workers volunteered their time. Thus, NJT views this service as a local operation except for the buses.

NJT concludes that L + G's only complaint is that NJT did not lease or hire it. NJT states that the decision which private operators should or should not be included in the provision of special service such as here should be left up to the sound discretion of the local officials. As a result, NJT finds L + G's complaint frivolous.

#### REBUTTAL

UMTA sent a copy of NJT's response to L + G on September 11, 1986, and provided it with 30 days from receipt to rebut the response. L + G's rebuttal is dated October 6, 1986.

In its rebuttal, L + G states that NJT's actions in regard to this service are just another example of how it bullies the private, independent carriers in Hudson County, New Jersey. L + G states that as late as July 1, 1986, it was told by an NJT employee that L + G was to be included in the provision of this service.

L + G provides a description of the service it provides and states that it serves Liberty Park, passing within 2 blocks on one route and 3 blocks on another, of the entrances. L + G states that NJT provides hardly any service during the year to the park.

The rest of L + G's rebuttal reiterates problems that it has had with NJT over the years. These issues are not relevant to the complaint at hand.

## DISCUSSION

A central issue in this complaint is whether the special service that NJT planned and provided for Liberty Weekend is the type of service for which a recipient needs to follow UMTA's policies on the involvement of the private sector. NJT claims that it is not and, as a result, the complaint is frivolous.

In UMTA's October 22, 1984, "Private Enterprise Participation in the Urban Mass Transportation Program" we state that recipients should consult with the private sector by affording them the opportunity as early as possible to participate in the development of new and restructured mass transit service. In the January 24, 1986, "Guidance on Documentation of Private Enterprise Participation in Urban Mass Transportation Programs," UMTA stated that "new or restructured services" may include any or all of the following,

establishment of a new mass transportation service; addition of a new route or routes to an applicant's or grantee's mass transportation system; a significant increase in service on an existing route in an applicant's or grantee's mass transportation system; or a change in the type or mode of service provided on a specific, regularly scheduled route in an applicant's or grantee's mass transportation system.  
51 Fed. Reg. 3307

It is arguable that the special service that NJT provided for Liberty Weekend does not fit with in this definition. It was service for a limited time, designed to serve one event, and would not continue beyond the scheduled activities. Since the definition that UMTA provided appears to contemplate service of a permanent nature, the service in question would not be subject to the guidance in the policy statements.

UMTA disagrees. The service here involved the establishment of new routes and services. Although the services were offered for a limited time and for a limited purpose, the service was provided to meet an unprecedented level of need. Such service requires

advance planning and it is clear that planning did occur at least two months prior to provision based on the documents that NJT provided. NJT included a copy of the "Transportation/Traffic Control Plan Liberty Week Celebration 3 - 6 July, 1986" with its response. This report is dated May 21, 1986, and the date on some of the pages is May 12, 1986. Thus, the service was not designed in response to an immediate emergency or an unanticipated need that would have made the involvement of the private sector impossible. Therefore, UMTA concludes that this was "new or restructured service" and that NJT should have followed UMTA's policy guidance before instituting the service.

This is not to say that all service of a limited duration or purpose will automatically be "new or restructured service." UMTA will make such decisions on a case-by-case basis. In situations like this one, however, where there was time to involve the private sector, the recipient should treat the limited service as "new or restructured service."

In the October 22, 1984, policy guidance, UMTA states that a recipient should have a process in place to provide for the participation of the private sector to the maximum extent feasible. UMTA limits its review of complaints to only those that allege a procedural violation that there is no such process, that the process was not followed, or that the process does not provide for the fair resolution of complaints.

NJT has not submitted a formal private sector participation process to UMTA. UMTA has, however, accepted NJT's Private Carrier Advisory Committee (PCAC) as NJT's good faith efforts to comply with UMTA's private sector policies. The PCAC includes a process for resolving disputes between NJT and private operators.

NJT has presented no evidence that it used the PCAC in the planning or provision of the special service for Liberty Weekend or for resolving the complaint which L + G filed with NJT. While UMTA admits that NJT did consider the use of Central in the provision of this service, that consideration appears to have been done on an ad hoc basis and not the formal process that UMTA's policies envision.

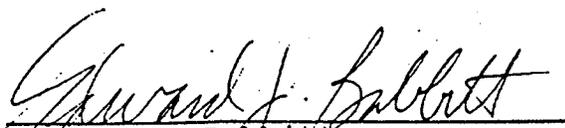
UMTA acknowledges that NJT claims that L + G has no standing to complain under Section 3(e) since it does not have authority to provide service into Liberty Park. At this point, UMTA does not find that this is an important issue. That fact may be a valid reason for deciding not to include a private operator in the provision of service, but it does not absolve a recipient from the basic and preliminary steps of following its private sector process before a conclusion as to the capability of a particular provider is made.

## CONCLUSION

After a thorough review of the materials submitted by the parties, UMTA concludes that NJT did not comply with UMTA's policy guidance provision of service for Liberty Weekend. Therefore, UMTA orders NJT to comply with these policies in the future and to follow its own locally developed policies and procedures whenever similar special service is planned and provided. Failure to do so may result in finding a pattern of violations that jeopardizes continued Federal funding.

  
Rita Daguillara  
Attorney-Advisor

5/26/88

  
Edward J. Babbitt  
Chief Counsel

5/27/88

LAFAYETTE + GREENVILLE BUS OWNERS ASSOCIATION  
Complainant  
v.  
NEW JERSEY TRANSIT CORPORATION  
Respondent

NJ-11/85-01

SUMMARY

In this complaint, the LaFayette + Greenville Bus Owners Association (complainant) alleges that the New Jersey Transit Corporation (respondent) is in violation of the private sector provisions in the Urban Mass Transportation Act of 1964, as amended (UMT Act), and the implementing policies. After a thorough investigation, the Urban Mass Transportation Administration (UMTA) finds that the allegations are not substantiated.

COMPLAINT

On November 13, 1985, Mr. J. Kevin Moran, complainant's president, wrote to UMTA to complain about the competition that it faces from the respondent. Complainant makes the following specific allegations. First, complainant alleges that respondent competes unfairly against it because respondent receives monies, operating subsidies, and equipment from the Federal Government, the State of New Jersey and the New York-New Jersey Port Authority.

Second, complainant alleges that there is a conflict of interest since respondent's Chairman is also the Director of the New Jersey Department of Transportation (NJDOT). As a result, complainant alleges that respondent in reality regulates the bus fare structure in New Jersey.

Third, complainant alleges that respondent has not provided it with equipment for its bus operations under the 1983 and 1984 bus allocation plans. Complainant alleges that it is due \$125,000 for 1983 and \$300,000 for 1984.

Fourth, complainant alleges that respondent unfairly competes with it on its bus service in the Jersey City - Bayonne corridor because respondent uses advance design buses (ADB) on this route. These are relatively new buses and complainant states that it must use buses that are at least 10 years old. Complainant argues that out of fairness respondent ought to use the same type of equipment. Complainant states that it has written to respondent on this matter. Complainant states that respondent has replied that it may use the ADB's and that complainant cannot dictate the type of buses it uses. Complainant states that it does not object to respondent's use of the ADB's elsewhere.

Fifth, complainant alleges that when it complains or makes an inquiry of respondent, NJDOT conducts an inspection of its equipment. Complainant alleges that these inspections cause a hardship. Complainant states that taking buses out of service for minor repairs inconveniences the customer because it has no spares and, thus, there are fewer buses on the line.

Sixth, complainant concludes by stating that it has asked respondent to buy it out because it can no longer compete with it. To date complainant states that no answer has been forthcoming.

#### RESPONSE

UMTA reviewed complainant's letter and decided to treat it as a private sector complaint. Pursuant to UMTA's complaint procedures, we forwarded a copy of complainant's letter to respondent on February 28, 1986, and provided it with 30 days from receipt to respond to the allegations. Due to administrative oversight, UMTA neglected to enclose a copy of complainant's letter and corrected the error on March 24, 1986. UMTA extended respondent's time for response to 30 days from receipt of the second letter.

Respondent replied on April 25, 1986. In general, respondent states that it has reviewed the applicable provisions in the UMT Act and the implementing policy statements and finds that it has violated no Federal law or regulation. Respondent concludes that there is no reason for UMTA to take further action on the matter.

Respondent also responds to the specific allegations that complainant makes. In response to complainant's second allegations, respondent states that its Chairman is also the Commissioner of Transportation in New Jersey because of New Jersey State Law. Respondent states that the office that sets intrastate fares for private bus carriers is the Office of Regulatory Affairs. Respondent states that while the Director of this office does report to the Commissioner, the Director is completely independent of respondent.

In response to complainant's third allegation respondent provides a summary of the equipment that complainant was told that it would receive under the allocation plans. Respondent states that complainant informed respondent on August 4, 1985, that it no longer wished that equipment. Respondent states that it is waiting for a request from complainant for replacement items.

In response to the fourth allegation, respondent provides copies of the correspondence between the parties on this issue. Respondent notes that it had offered ADBs to complainant in 1981, but that complainant refused them since it would not be able to maintain such complicated buses.

In response to the fifth allegation, respondent states that the safety inspection of buses in New Jersey is a responsibility of the Office of Regulatory Affairs within NJDOT and that its buses are subject to the same inspection as complainant's buses. Respondent provides the name of the director of this office and suggests that complainant contact him.

#### REBUTTAL

UMTA sent a copy of respondent's letter to complainant on May 7, 1986, and provided it with 15 days from receipt to rebut the evidence. Complainant's rebuttal is dated June 16, 1986. Since this is dated after the expiration of the 15-day rebuttal period, UMTA does not regard the letter as part of the administrative record for this complaint and has not considered the material in rendering this decision.

#### DISCUSSION

In "Private Enterprise Participation in the Urban Mass Transportation Program," 49 Fed. Reg. 41310, October 22, 1984, UMTA describes its private sector complaint process. This notice states that UMTA will entertain complaints,

Only upon procedural grounds that the local planning and programming process has not established procedures for the maximum feasible participation of private providers consistent with section 8(e) and the spirit of this policy; or that local procedures were not followed; or that the local process does not provide for fair resolution of disputes.

In addition, UMTA states that we will not entertain any complaints until the complainant has attempted to resolve its problems at the local level. Therefore, UMTA has created a narrow range of issues that we will entertain as formal private sector complaints. Although there maybe many other problems that a private operator may have with an UMTA recipient, such problems will not form the basis of a complaint that UMTA will adjudicate.

In this complaint, several allegations do not fall within the three categories listed in the policy statement. These are the first, second, and sixth allegations. The first allegation is a complaint about the structure of Federal, State and local funding mechanisms for mass transportation. The second is a complaint about the structure of State law. The sixth is a complaint that respondent appears to show no interest in purchasing complainant. Since none of these are allegations that fall with the three categories listed above, UMTA will not address them in this decision. The allegations that UMTA will discuss further are, therefore, the third, fourth, and fifth.

In the third allegation, complainant alleges that it has not received equipment under respondent's bus allocation plan. Read in a light most favorable to the complainant, the third allegation can be viewed as an allegation that respondent's planning and programming process does not provide for the maximum feasible participation of the private sector because the program does not provide the equipment promised under it.

Respondent does not deny that complainant has not received the equipment that was to be provided in 1983 and 1984. Respondent, however, explains that complainant has not received any equipment because it wrote to say that it did not want the equipment originally sought and has not indicated any substitute equipment. It appears that there is not a problem with respondent's program, but rather that complainant has not followed the process involved with obtaining equipment under it. It appears that all complainant must do is contact the respondent to resolve this matter.

In the fourth allegation complainant alleges that respondent unfairly competes with it because it uses ADBs on a route they both serve. Complainant does not allege that it is unfair competition that respondent serves this route. The complaint is limited to the use of newer buses on the route. Complainant alleges that it has written respondent numerous times in an attempt to resolve this problem, but that it has had no success.

In the fifth allegation, complainant alleges that the respondent initiates retaliatory inspections of complainant's equipment whenever it complains to respondent. Read in a light most favorable to complainant, these two allegations appear to be that respondent's local process does not provide for the fair resolution of disputes.

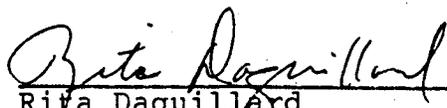
It is important to note that the dispute that a party complains of must be something that the UMT Act or the implementing policies require or address. UMTA cannot reach beyond the limits of our authorizing legislation or implementing documents in order to control the relationships of our recipients and private enterprise. In the case of the fourth allegation, UMTA recognizes that complainant is not satisfied with the fact that respondent uses newer buses and that it must use older buses to serve basically the same pool of riders.

The use of newer equipment may attract more riders and result in higher revenues. This, however, is not a practice that the UMT Act or the implementing policies prohibit or even address. Thus, UMTA will not reach beyond these limits to address the merits of the disagreement. UMTA does note, however, that complainant did have the opportunity to obtain the same buses that respondent uses, but declined. That is a decision complainant made several years ago and with which it must live.

Complainant states that the respondent initiates retaliatory inspections of its equipment whenever it complains to respondent. The evidence presented by respondent shows, however, that respondent has no part in deciding if and when bus inspections are done. Rather, this duty lies within NJDOT's Office of Regulatory Affairs which is completely independent from respondent. Furthermore, this office inspects respondent's buses as well as complainant's buses. Therefore, UMTA finds that respondent cannot be guilty of violating the private sector protection provisions in the UMT Act or the policy statements with regard to any inspections since it has no responsibility for instituting or conducting them.

CONCLUSION

After a thorough review of the materials submitted, UMTA finds that complainant has not substantiated any violations by respondent of the private sector provisions in the UMT Act or the implementing policies. Therefore, the complaint is dismissed.

  
\_\_\_\_\_  
Rita Daguillard  
Attorney-Advisor

4/21/88  
\_\_\_\_\_  
Date

  
\_\_\_\_\_  
Edward J. Babbitt  
Chief Counsel

4/6/88  
\_\_\_\_\_  
Date



U.S. Department  
of Transportation  
  
Urban Mass  
Transportation  
Administration

Headquarters

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

*File check*

JUN 23 1988

Mr. Troy L. Nelson  
Charter Department  
Mass Transportation Authority  
1401-03 South Dort Highway  
Flint, Michigan 48503

Dear Mr. Nelson:

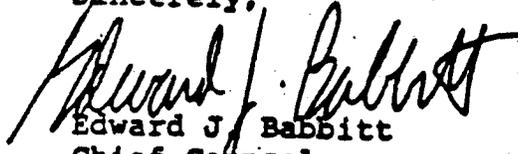
Enclosed is a letter to me from Mr. Charles A. Webb, General Counsel of the American Bus Association, accompanied by a letter to you from Mr. Thomas W. Fisher, President of Tower Bus.

The Urban Mass Transportation Administration (UMTA) is aware that, for a variety of reasons, a private operator might be unwilling or unable to perform certain charter trips. While UMTA has taken the position that an UMTA recipient, such as the Mass Transportation Authority (MTA), may perform a particular charter trip, even though the recipient has determined that there are "willing and able" private operators in its service area, there first must be an agreement to this effect between the recipient and all the private operators in the recipient's geographical area and any service provided must conform to the limitations of that agreement. In addition, the recipient's annual charter notice must have provided for this type of agreement. If it did not, the recipient must, before undertaking the charter trip in question, amend its notice to specifically refer to such an agreement. Moreover, recipients are encouraged to engage private operators in a dialogue through other means as well, such as written communications, conferences, or informal meetings.

From my review of Mr. Fisher's letter to you, it appears that there is a misunderstanding between you and Mr. Fisher about the conditions under which MTA may provide charter service. Indeed, unless the other private operators have concurred in the "agreement" MTA believes it has made with Tower Bus, MTA may not operate any charter service in its geographical area, since there is apparently at least one willing and able operator (Tower Bus) has been identified.

In summary, UMTA requests that MTA honor all the requirements of the charter service regulations, 49 C.F.R. Part 604.

Sincerely,



Edward J. Babbitt  
Chief Counsel

Enclosures

cc: Charles Webb

In the matter of:

BEFORE THE URBAN MASS  
TRANSPORTATION ADMINISTRATION

Yellow Cab Co. )  
Complainant )  
 )  
 )  
v. )  
 )  
JAUNT, Inc. )  
Respondent )  
 )

VA-03/86-01

SUMMARY

DECISION

Yellow Cab, Co. (Yellow) filed this complaint with the Urban Mass Transportation Administration (UMTA) alleging that JAUNT, Inc. (JAUNT) had not complied with the provisions in the Urban Mass Transportation Act of 1964, as amended (UMT Act) and the implementing guidance concerning the participation of private enterprise in the provision of UMTA assisted mass transportation. After a thorough review of the administrative record, UMTA finds that the local decision-maker erred in its interpretation and application of UMTA's guidance. Therefore, UMTA remands this matter to the local level for further action consistent with this decision.

COMPLAINT

Yellow's private sector complaint with JAUNT came to UMTA's attention in 1985.<sup>1</sup> By letter dated August 9, 1985, UMTA informed Yellow that it needed to attempt to resolve its problems with JAUNT at the local level before UMTA would become involved. Yellow's formal complaint dated March 21, 1986, acknowledges that local attempts were made but that the local process did not provide for the fair resolution of its dispute with JAUNT.

In the first part of its complaint, Yellow sets forth the chronology of events. On June 18, 1985, the University of

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<sup>1</sup> Yellow states in various exhibits attached to its complaint that the service which is the subject of this complaint could be charter service. UMTA, however, has treated this as a complaint of non-compliance with UMTA's requirements for the participation of the private sector in the provision of mass transportation since that is how Yellow characterized its problems in the actual complaint letter. UMTA believes that the service is mass transportation since while it is provided under contract, JAUNT appears to control the service and it is not exclusive to the employees of the University. The contract, Exhibit 14 to the complaint, makes this clear.

Virginia (University) issued a request to bid on bus service to shuttle its employees between two branches of its hospitals. JAUNT had been providing this service since 1977, but at Yellow's request, the University agreed to put it out to bid.

Both Yellow and JAUNT responded. Yellow alleges that it bid \$18.25/hour and that JAUNT bid \$10.50/hour. The University selected JAUNT and Yellow appealed the decision to the Charlottesville-Albemarle Metropolitan Planning Organization (MPO) alleging non-compliance with UMTA's guidelines on the participation of the private sector in the provision of mass transportation service.

The MPO did not have a process for resolving private sector disputes, but Yellow states that it agreed with JAUNT to a three member arbitration panel that would issue a non-binding decision. The panel met and issued a decision on December 2, 1985, finding that JAUNT had not violated UMTA's guidelines. The MPO adopted a resolution approving this decision on December 12, 1985. Yellow states that there was no appeals process for this decision, but it requested the MPO to reconsider the decision on January 17, 1986. Yellow states that on January 30, 1986, it appeared before the MPO's technical committee requesting that it recommend to the MPO that the MPO should reconsider approval of the decision. The request was denied. Yellow asked the MPO to reconsider the decision on March 19, 1986, and this request was also denied.

Yellow states that it must now seek UMTA involvement. Yellow states that it understands that UMTA will not review the substance of the local decision, but that it needs UMTA's assistance to establish a local procedure that protects private operators when disputes arise as a result of the application of UMTA's guidance.

Yellow states that there are several bases for its appeal to UMTA. First, Yellow states that an appeals process is necessary due to various factors including the fact that the arbitration was non-binding, that the panel took a narrow approach in its analysis of whether it is appropriate for JAUNT to provide the shuttle service, and the panel's failure to address several issues raised by Yellow.

Second, Yellow states that regardless of whether it is appropriate for JAUNT to provide the service, the panel erred in its failure to adequately consider the issue of true comparison of costs. Yellow raised this issue in the documents it presented to the panel arguing that JAUNT's bid of \$10.50/hour does not represent its true cost for providing the service.

Yellow quotes from the decision to support its position. The decision states that the concept of true comparison of costs is difficult to analyze and such a comparison would be difficult to do particularly since it did not know how Yellow calculated its costs. Yellow states that the panel never asked for this information and that Yellow did not furnish this information

itself since the UMTA guidance is directed to determining the true cost of recipients' service. Moreover, Yellow states that it believes that it introduced enough evidence to show that its cost was lower than JAUNT's subsidized cost and therefore established that it could provide the service more efficiently than JAUNT.

Third, Yellow argues that the panel erred by stating that in fact the issue of true comparison of costs is "somewhat moot" since Yellow failed to establish that the shuttle service is not "new or significantly restructured." Yellow argues that the service does meet this threshold test under UMTA guidance since the service described in the request for bids completely changed the route and doubled the distance.

Yellow states that regardless of whether the service is new or restructured, the UMTA guidance makes clear that true comparison of costs must be calculated when the private sector maintains that it can provide service more efficiently. Yellow refers to 49 Fed. Reg. 41312 to support this position and to 51 Fed. Reg. 3306 - 3308 to confirm this contention.

Yellow states that JAUNT admitted to the panel that its bid of \$10.50/hour had nothing to do with the cost of the service. It is alleged that JAUNT maintains that this figure represents the fare. Yellow quotes from the testimony by Linda Wilson, JAUNT's Executive Director, to the panel to support this argument.

Yellow also quotes from JAUNT's pamphlet, Advantages to Human Service Agencies of Using the Consolidated JAUNT System For Transportation Needs (May 1985). This document states that one of the cost savings that social service agencies realize by contracting with JAUNT is that the "Users pay only half of the cost of transportation" since half of JAUNT's operating costs are subsidized by State, local and Federal assistance. Yellow infers from this that JAUNT's real costs are approximately \$20.00/hour. Yellow states that this inference is supported by JAUNT's statement of monthly performance indicators for the first 10 months of fiscal year 84-85 which shows JAUNT's total costs to be \$19.31/hour.

Yellow states that JAUNT disputed this \$19.31 figure and stated to the panel that JAUNT had never figured what its indirect costs would be. Yellow refers to Ms. Wilson's testimony when she states that she would guess that the adding of the indirect costs of operating its shuttle service would bring the cost to \$15.00 or \$16.00/hour.

Yellow states that it was distressed to learn this since on April 18, 1984, JAUNT had prepared a cost analysis of the shuttle for the University and included indirect costs for this service. Yellow states that when the indirect costs listed in this analysis are added to the FY 84-85 direct costs the total cost would be \$26.08/hour which is higher than Yellow's bid of \$18.25/hour. Yellow states that JAUNT's failure to disclose this information to

the panel and its misrepresentation that no analysis had been made, prevented the panel from reaching a decision on the true facts.

Yellow also states that the \$26.08/hour figure is significant since the service described in the request for bids was twice as long as that operated in FY 84-85. Yellow presumes that if JAUNT's bid had remotely reflected its true costs that it would have to have been increased from this figure. Instead, JAUNT bid the same price for FY 85-86 as it had in FY 84-85.

Yellow describes in detail what it considers to be irregularities in the bidding process. Yellow states that there were discussions between JAUNT and the University during the bidding process and that the service which JAUNT provides under the resulting contract does not reflect the service that was described in the request for bids.

Yellow concludes by stating that part of the problem involved with this action is the MPO's uncertainty in how to implement UMTA's guidance. In addition, Yellow states that the MPO is predisposed to favor JAUNT due to its length in providing service in the Charlottesville area. Yellow states that this position makes it difficult for private carriers to become involved.

#### RESPONSE

UMTA reviewed Yellow's letter and determined that the service appears to be mass transportation, but that there was no evidence of how JAUNT attempted to provide for the participation of the private sector to the maximum extent feasible. Since there appeared to have been an attempt to resolve the matter at the local level, UMTA stated that it was now the appropriate time for us to investigate the complaint. On April 23, 1986, UMTA sent JAUNT a copy of the materials that Yellow submitted and provided JAUNT with 30 days from recipient to respond.

JAUNT's response is dated May 2, 1986. JAUNT argues that there is a local process for resolving disputes and the process used in this complaint was in fact suggested by Yellow's attorney. JAUNT states that the MPO formally adopted this process to handle all future disputes on April 3, 1986. JAUNT questions whether Yellow accepts this process only when it decides in favor of the private operator.

JAUNT states that it has been providing the hospital shuttle service since 1977 and that it is part of a consolidated human service/public specialized transportation system. JAUNT states that the fee charged for this service is based on recovering all direct operating costs and that indirect costs are funded by local, State and UMTA funds.

JAUNT states that none of the participants in the coordinated system bid for services. They are, instead, public agencies being served by another public agency. JAUNT states that if private operators wished to participate they would have difficulties. As an example, JAUNT states that since it only receives subsidies to operate and administer its service, that these are the only funds it could pass along to a private operator through a subcontract. JAUNT states, however, that it would need to retain these monies since it would still have administrative costs with the subcontract.

JAUNT describes the series of events that have led up to this controversy. First, JAUNT states that in FY 85 no private operator expressed any desire to provide the shuttle service even though one of Yellow's employees was serving on JAUNT's board and on the MPO's technical committee.

Second, JAUNT states that Yellow went to the University and told it that it had to bid out the shuttle service. The University complied, but that the bid requests only the fee charged for the service. JAUNT states that as part of its transportation improvement process (TIP), it determined that the University qualified for JAUNT's subsidized fee. JAUNT states that if the University had not qualified for this rate, it would not have bid on the service since JAUNT only serves approved agencies.

Third, JAUNT states that it would investigate subcontracting to Yellow, but that it understands that Yellow is not interested in subcontracting for the shuttle.

Fourth, JAUNT is unclear what remedy Yellow seeks. JAUNT states that a remedy could include the opportunity to subcontract or require JAUNT to bid its full costs for the shuttle service.

Finally, JAUNT describes the activities it is doing to involve the private sector. First, JAUNT has developed an agreement to begin subcontracting demand-responsive urban public transportation to taxicabs. There are problems with insurance coverage in this effort that it is attempting to resolve. These same problems inhibit JAUNT's ability to subcontract out the shuttle service. Second, JAUNT has private sector representation on its board. Third, JAUNT will engage a consultant to design a complete cost allocation plan prior to the approval of the 1988 TIP. Fourth, JAUNT had private sector participation in its recent revision of its policies, procedures and long range plans .

#### REBUTTAL

UMTA sent a copy of JAUNT's response to Yellow on May 7, 1986, and provided it with 30 days from receipt to rebut JAUNT's response. On June 4, 1986, Yellow wrote to UMTA to request a copy of UMTA's decision in Raleigh Transportation Services v. City of Raleigh.

North Carolina and Capital Area Transit System, and an extension until June 23, 1986.<sup>2</sup> UMTA sent the requested materials and granted the extension by letter dated June 10, 1986. Yellow's rebuttal is dated June 19, 1986.

Yellow states that it had expressed an interest in and questioned JAUNT's role in providing the shuttle service since 1982. Yellow states that it never had the opportunity to become involved in this service until the University put the service out to bid in June 1985. Before Yellow responded to this request, it sent a copy of UMTA's guidelines to JAUNT so that it could bid its fully allocated costs for the service.

Yellow reiterates its allegations concerning the panel's failure to adequately address the issue of true comparison of costs. Yellow also reiterates JAUNT's failure to inform the panel of the analysis of indirect costs that it had done in 1984.

Yellow states that this failure to disclose information and other actions taken by JAUNT evidence its lack of good faith in this controversy. Yellow states that this attitude is evident in a newspaper article written by Ms. Wilson.

Yellow closes by requesting that UMTA impose all available sanctions against JAUNT including the withholding of future funding until JAUNT complies with UMTA's private sector guidance and redresses the loss sustained by Yellow as a consequence of JAUNT's failure to comply with those guidelines in this matter.

## DISCUSSION

In its complaint, Yellow raises several issues, some of which are peripheral to the central issue. We will dispose of the peripheral issues first.

First, Yellow describes irregularities with the bidding process. Yellow points to discussions between JAUNT and the University and differences between the service as described in the request for bids and the actual service. While UMTA is concerned with possible problems in the bidding procedures, our concerns are limited to situations where an UMTA recipient is conducting the procurement, and not where the recipient is bidding on service sought by a third party. It is UMTA's position that the third party, in this case the University, is in the best position to determine compliance with the procurement procedures that it must follow and that any disputes arising from procurement procedures should be resolved in a local forum. Therefore, UMTA is

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<sup>2</sup> UMTA's letter of April 23, 1986, to JAUNT cited this decision as the basis for initially determining that the shuttle service is mass transportation.

dismissing the allegations with respect to JAUNT's bidding irregularities.

Second, Yellow states that its main concern with the local resolution process that was involved in this matter is that it did not provide for an appeals process. Since Yellow finds that the panel took a narrow approach in its analysis of whether it is appropriate for JAUNT to provide the shuttle service and did not properly apply the guidance on fully allocated costs that an appeals process is critical.

UMTA disagrees. The guidance which UMTA has issued on private sector participation has never required a local appeals process to be part of the local dispute resolution process. Indeed, the most recent guidance provided in UMTA Circular 7005.1, "Documentation of Private Enterprise Participation Required for Sections 3 and 9 Programs" (December 5, 1986), states, "Once a Complainant has exhausted his local dispute resolution process, he should send his complaint to: [the UMTA] Chief Counsel."

The implication of this language is that a local appeals process is not required since UMTA sees its role as the party to whom appeals of that local process are made. While a local dispute resolution process many provide for local avenues of appeal, UMTA does not require one. See, e.g. Durango Transportation, Inc. v. City of Durango, CO-09/85-01, February 24, 1987 (the local process provided for several levels of appeal). As result, the absence of such a component does not invalidate the local process nor is it the basis for UMTA to entertain a complaint.

UMTA now turns to the central issue in this complaint. Yellow correctly states UMTA's position that we will not review the substance of local decisions regarding service or the appropriate service provider. UMTA articulated this position in the October 22, 1984, guidance on "Private Enterprise Participation in the Urban Mass Transportation Program," [49 Fed. Reg. 41310] and restated it in Circular 7005.1. This statement should not be interpreted to mean that UMTA will never review the substance of a local decision. Rather, UMTA's position is that we will not review the substance of a local decision when the decision is reasonable and correctly applies our guidance. If UMTA were to accept every local decision simply because a local process was followed, but not ensure that our guidance were correctly articulated and applied, we would license arbitrary, unreasonable, and capricious decisions.

In this case, UMTA finds that the decision which the panel issued and which the MPO adopted does not correctly reflect UMTA's guidance and is, therefore, not acceptable to UMTA. There are several reasons for this, but before these are stated, UMTA will summarize the decision.

The decision, dated November 25, 1985, first thanks the parties for their participation and the opportunity to consider the

issues. The decision then turns to the specific two questions that Yellow raised in the materials that it submitted to the panel. First, the decision finds that JAUNT may provide service like the hospital shuttle service since there is nothing in the record to show that it is inappropriate for JAUNT to provide the service.

Second, the decision addresses the issue of the full allocation of costs as stated in UMTA's 1984 guidance. The decision states that JAUNT's bid does not take into consideration all of its costs since it does not include indirect costs. The decision, however, states that the concept of true allocation of costs is a difficult concept to deal with for several reasons including the absence of a profit factor for the UMTA recipient and the lack of knowledge of how Yellow arrived at its bid of \$18.25/hour.

The decision addresses this quandary and finds that JAUNT's true cost is higher than the \$10.50 it bid, but that the panel could not provide a definitive answer to Yellow's question "since the manner in which the Yellow Cab bid was calculated was unknown to the panel." p. 3.

The decision, however, states that the matter of comparing costs was "somewhat moot" since the panel did not conclude that the service was "new or significantly restructured." The decision states that this is the threshold that service must meet, under UMTA's guidance, to require a comparison of the full allocation of costs. While the decision states that the panel reached this conclusion because the service as provided by JAUNT under the contract is the same as it was providing previously for the University, it states that the panel would have reached the same conclusion if the route had been changed in accordance with the request for bids.

Next, the decision states that the UMTA guidance and policies involved in this matter apply to UMTA recipients and not to third parties like the University. The panel did not permit "such technicalities" to prevent it from responding to Yellow's question.

The panel concludes by stating that the MPO should give serious consideration to the involvement of the private sector in the provision of mass transportation in the area, but that the lack of clarity and nebulous concepts in UMTA's guidance do not provide a useful service. The decision closes with the request that the parties bring these views to UMTA's attention.

UMTA finds that this decision is unacceptable for several reasons. First, the panel finds that the service is not new or significantly restructured so as to trigger the comparison of fully allocated costs between the various proposers. The decision states that the panel reached this conclusion because the service JAUNT provides under the contract is the same as it provided before. In addition, the panel finds that even if the service

were provided as described in the request for bids that it would not be new or significantly restructured.

UMTA disagrees. First, it is the service as described in the request for bids that must be compared with existing service in order to make a decision whether it is new or restructured. The panel erred in using the service as provided by JAUNT under the contract as the benchmark. The service described in the request for bids would follow a different route than that which JAUNT was providing and would have doubled the length of the route. This change is clearly a significant restructuring of an existing route and requires the comparison of fully allocated costs when making decisions between competing service providers.

UMTA would have reached this same conclusion even if the service described in the request for bids had been the same as JAUNT was providing. In a contract situation, as here, UMTA believes that any rebidding for existing service is new or restructured service.

The second error that UMTA finds the panel made is to not compare the fully allocated costs of JAUNT with the bid made by Yellow. While UMTA does not dispute the panel's conclusion that the UMTA guidance is directed at the recipients and not third parties, UMTA holds that when a recipient bids on service requested by third parties, the recipient must bid its fully allocated costs if the provision of that service will involve the use of UMTA assistance.

In this case, JAUNT only bid its fare excluding any allocation of the indirect administrative costs associated with performing under the contract. The panel recognized that it could make a guess, based on JAUNT's testimony, that adding the indirect costs would increase the cost to more than the \$10.50/hour which JAUNT had bid. The panel concludes that despite this, it could not provide a definitive answer since it did not have Yellow's calculations.

UMTA's guidance does not require that all parties to a bid submit their fully allocated costs. It is only the public agencies and non-profit agencies whose bids must reflect their fully allocated costs. UMTA's guidance states that in such circumstances, "Subsidies provided to public carriers, including operating subsidies, capital grants and the use of public facilities should be reflected in the cost comparisons." 49 Fed. Reg. at 41312. Thus, UMTA does not intend that a private operator fully allocate its costs or bid this figure in a procurement. UMTA intends that the price bid by the private operator is the figure against which a recipient's or a non-profit agency's fully allocated cost is compared. In this case, the panel did not follow this approach and UMTA cannot permit this error to stand.

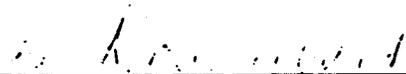
It is important to note that UMTA does not require that the service be performed by the low bidder. UMTA has always maintained that cost is one of the factors that a decision maker should consider, but we have never stated nor do we support the

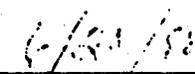
position that it is the only factor to consider. UMTA Circular 7005.1 makes this clear when it states in Paragraph 5.d. that the local process for the consideration of the private sector must include, "The use of costs [defined in the circular as fully allocated costs] as a factor in the private/public decision." [Emphasis added.] Thus, price is one of many factors that should be considered before any decision is made on the appropriate service provider.

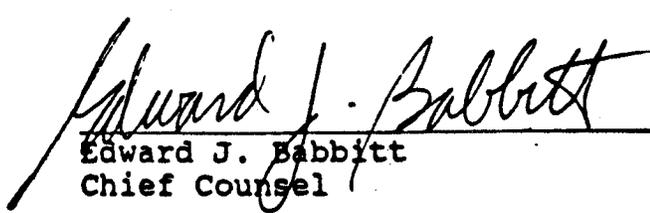
#### CONCLUSION

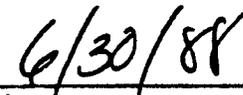
After a thorough investigation of the record, UMTA finds that the decision recommended by the arbitration panel and adopted by the MPO is not consistent with UMTA's guidance and cannot be accepted by UMTA as the end product of a local resolution process. Therefore, UMTA remands this matter to the MPO for further action consistent with its process adopted April 3, 1986, this decision, and UMTA's guidance. UMTA expects that the parties will act as expeditiously as possible to comply with this order.

UMTA reminds the parties that if the local decision is that JAUNT should not provide the service, but the University decides that it wants JAUNT as the provider and JAUNT actually provides the service, then the service will not be eligible for any UMTA assistance and must be provided using only locally funded equipment, facilities and operating assistance. Any further UMTA action in this complaint will be based on appeals, if any, of the decision on remand.

  
 Rita Daguillard  
 Attorney-Advisor

  
 Date

  
 Edward J. Babbitt  
 Chief Counsel

  
 Date



U.S. Department  
of Transportation

Urban Mass  
Transportation  
Administration

The Administrator

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

JUL 6 1988

Dear Colleague:

The anniversary of the effective date of the Urban Mass Transportation Administration's (UMTA) charter service regulation, 49 C.F.R. Part 604, has recently passed. UMTA has been pleased with the cooperation of the many UMTA recipients that have implemented this regulation appropriately, and that have responded in a positive manner with the private charter bus industry.

Because the time is near when many recipients that wish to provide charter service to accommodate community needs must publish new annual notices, UMTA would like to direct your attention to the following matters:

#### Defective Notices

Problems with notices have frequently arisen when recipients have described the types of equipment they intend to use, and suggested that a private provider must offer similar equipment to be considered willing and able. A recipient's notice must not require anything beyond: (1) a statement that the private operator has the desire to provide the service described and the physical capability, by virtue of the possession of at least one bus or van, to do so, and (2) submission of documents showing that the private operator possesses the requisite legal authority. Regardless of how the recipient describes its own service, the recipient must make it clear in the notice that private operators are not required to respond in similar detail.

UMTA is aware that for a variety of reasons a private operator might be unwilling or unable to perform certain charter trips. UMTA believes that a recipient may make the "willing and able" process more effective by expanding the content of its charter notice to include information which would be helpful to the private operator in deciding whether to respond. Thus, in addition to the information required by 49 C.F.R. § 604.11(c), i.e., days, times of day, geographic area, and category of revenue vehicle to be used, a recipient may include in its notice descriptions of destination, trip purpose, or clientele to be served. As long as the notice does not discourage a response from a person who meets the minimum criteria for a "willing and able" operator, a recipient has flexibility in using descriptions which allow private operators to decide whether they desire to perform a particular trip.

In addition, if the recipient's annual charter notice has provided for such an agreement, an UMTA recipient may perform a particular charter trip, even though it has been determined that there are "willing and able" private operators in its service area, when there is an agreement to this effect between the recipient and the private operators.

In addition to this formal notice process, recipients are encouraged to engage private operators in a dialogue through other means as well, such as written communications, conferences, or informal meetings. A recipient may also provide in its notice a telephone number which a private operator may call to obtain further information on the proposed service.

For further information pertaining to requirements for charter notices, your attention is directed to Questions and Answers Numbers 2 through 18 of UMTA's Charter Service Questions and Answers, 52 Fed. Reg. 42242 et seq., November 3, 1987.

### Special Service

UMTA considers "special service" to be a type of "mass transportation," rather than "charter service." Among the types of service that qualify as "special service" are service exclusively for elderly and handicapped persons and service provided for workers who live in the inner city, but work in the suburbs. However, these types of special service should not be confused with charter service for non-profit or other similar groups. See preamble to the Charter Service Regulation, 52 Fed. Reg. 11920, April 13, 1987, and Question and Answer Number 44 of UMTA's Charter Service Questions and Answers, 52 Fed. Reg. 42242 et seq., November 3, 1987, for further discussion. If you have any questions about whether the special service you intend to offer qualifies as mass transportation, please contact the appropriate UMTA Regional Manager.

### Special Events

A recipient need not announce in the notice its intention to seek a special events exception; nevertheless, it may be useful for recipients to use the notice as a means to determine to what extent private operators are able to provide service to accommodate a particular special event. See Question and Answer Number 23 of UMTA's Charter Service Questions and Answers, 52 Fed. Reg. 42242 et seq., November 3, 1987, for further discussion.

Proposed Amendment To The Regulation

I also call your attention to UMTA's recent issuance of a notice of proposed rulemaking (NPRM) containing proposed amendments to the charter service regulation, 53 Fed. Reg. 18964 et seq., May 25, 1988. In response to congressional guidance, UMTA is undertaking a rulemaking to consider an amendment to its charter regulation that would allow nonprofit social service agencies with a need for affordable or handicapped-accessible equipment to seek bids from public transit authorities. The NPRM also addresses whether an exemption to those public transit authorities which purchased charter rights entirely with non-Federal funds prior to enactment of the Urban Mass Transportation Act of 1964, as amended, should be permitted. UMTA held a hearing on this proposed amendment on June 20, 1988, in Washington, D.C., and will hold further hearings on June 29, 1988, in Kansas City, Missouri; on July 15, 1988, in Cincinnati, Ohio; and on July 20, 1988, in San Francisco, California. Please see the UMTA notice at 53 Fed. Reg. 20660 et seq., June 6, 1988, for more information on these hearings. UMTA welcomes your participation in this rulemaking.

Again, UMTA wishes to express its appreciation for the fine cooperation of many recipients in adhering to the requirements of the charter service regulation.

Sincerely,



Alfred A. DelliBovi

SYRACUSE & OSWEGO MOTOR LINES, INC. )  
 Complainant )  
 v. )  
 CENTRAL NEW YORK REGIONAL TRANSPORTATION ) NY-05/86-01  
 AUTHORITY, )  
 Respondent )

SUMMARY

Syracuse & Oswego Motor Lines, Inc. (S&O), filed this complaint with the Urban Mass Transportation Administration (UMTA), alleging that the Central New York Regional Transportation Authority (Centro) had failed to comply with the provisions of the Urban Mass Transportation Act of 1964, as amended (UMT Act), and the implementing guidance concerning private enterprise involvement in the provision of mass transportation. The complaint specifically alleged that Centro was improperly providing shuttle service between Manley Field House and Crouse-Irving Memorial Hospital (the Hospital). After a thorough investigation of the materials submitted by the parties, UMTA finds that the service in question is charter service, and is therefore not subject to UMTA's private sector guidelines. However, UMTA's charter service regulation, 49 CFR Part 604, prohibits grantees from providing charter service when there is a willing and able private operator. Centro has determined that there is at least one willing and able private operator in its service area. Therefore, assuming that the service is being operated in essentially the same manner described in the parties' original submissions, Centro should therefore cease and desist providing this service immediately.

COMPLAINT

S&O filed this complaint with UMTA on April 17, 1986. In its complaint, S&O stated that it had been negotiating with the Hospital to operate their shuttle service between Manley Field House and the Hospital. According to S&O, Centro had operated this service for the price of \$450.00 per day during the previous year. S&O claimed that Centro, upon finding that S&O was to receive this contract based on a lower price, cut its price by 25 percent to \$342.00 in order to keep the contract. S&O indicated that Centro was providing the service for a price that was below its operating cost, thereby using its Federal transportation assistance to compete unfairly with a private operator.

S&O stated that the local municipal planning organization (MPO) had no procedures for 1) judging private sector complaints or, 2) making public/private cost analyses. It therefore requested that UMTA take the necessary steps to have the local MPO conform to UMTA's private sector policy

## RESPONSE

UMTA reviewed S&O's letter and determined that it should be treated as a formal complaint under Sections 3e/8e of the UMT Act. On June 19, 1986, UMTA forwarded a copy of the complaint to Centro and provided Centro with 30 days to respond.

Centro's response is dated June 8, 1986. Centro states that the service it provides to the Hospital is not subject to UMTA's private sector guidelines. First, Centro explains, the service is described in two annual agreements between Centro and the Hospital. These agreements, states Centro, show that the service provided during the second annual term was identical to that provided during the first annual term. Consequently, Centro contends, there is no "new or restructured service" which would trigger UMTA's private sector guidelines.

Second, Centro maintains, the service was solicited by the Hospital, which accepted Centro's bid, even though it was higher than S&O's. Thus, Centro implies, when an outside party selects the service provided, the public operator has no control over the selection process, and cannot be held responsible for following the private sector guidelines.

Centro suggests that UMTA make a preliminary determination on the issue of whether service provided on an identical basis during successive terms to a private party which has solicited it, should be governed by UMTA's private sector guidelines. Centro states that it considers the guidelines inapplicable to such service, and urges UMTA to dismiss the complaint.

## REBUTTAL

UMTA forwarded a copy of Centro's response to S&O on March 22, 1988, and provided S&O with 30 days to submit a rebuttal. S&O's rebuttal, dated March 31, 1988, contests the two main points raised by Centro. First, S&O denies that Centro's shuttle service during the second annual term of the agreement was not the type of service which triggers UMTA's private sector guidelines. S&O states that under these guidelines, existing service must be periodically reviewed to determine if it can be provided more efficiently without public involvement. According to S&O, a contract renewal is the ideal time to perform such a review. S&O moreover maintains that a true comparison of costs cannot be made between service providers without the privatization guidelines. Thus, S&O indicates, the guidelines should apply whenever service is put out for bid.

Second, S&O refutes Centro's argument that because the service was solicited by a private party, it falls outside the privatization guidelines. A major policy objective of these guidelines, states S&O, is to promote greater reliance on the private sector in the provision of mass transit services. Allowing a third party to

select a service provider while not requiring the public agency involved to follow the privatization guidelines, S&O argues, permits such public agency to circumvent UMTA's private sector requirements. Accordingly, says S&O, the private sector guidelines should apply to Centro's shuttle service for the Hospital.

S&O also raises the argument that the shuttle service is charter service, since it meets all of definitional requirements of Section 604.5(e) of UMTA's charter regulation. S&O claims that the service is provided to a group of persons pursuant to a common purpose, since it is used to transport Hospital employees from the parking lot to the Hospital. These employees moreover have exclusive use of the vehicle, according to S&O, since the general public has no need for this service. S&O moreover states that the service is under a single contract, to the Hospital, at a fixed price, which changes on the basis of the level of service provided. Finally, S&O says, the itinerary for the service is specified in advance by the Hospital, which has complete policy control over this service.

The crux of Centro's counter argument, S&O states, is that the service is not charter since it is "open to the public." S&O contends that even if the service were run on a route that could be used by the general public, there are no published schedules, maps, or any other means by which the public could learn about the service. S&O consequently states that it is filing a charter complaint in reference to this service.

#### DISCUSSION

On the basis of the allegations originally made by the Complainant, UMTA decided to treat the matter as a formal complaint under Sections 3e/8e of the UMT Act, and UMTA's private sector policy. However, later allegations and the Respondent's reply to them, raise the more essential issue of whether the service in question is mass transit or charter service. 1

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1 {UMTA is aware that nearly two years have elapsed between the filing of the original complaint and the submission of the complainant's rebuttal. Therefore, UMTA bases its characterization of the Hospital shuttle service on the assumption that the service is operated in essentially the same manner described in the original complaint and response, and has undergone no significant modification in the intervening period.}

Since, as the Complainant points out, the goal of UMTA's private sector policy is to "promote greater reliance on the private sector in the provision of mass transportation services,"<sup>2</sup> above-cited provisions apply only to a grantee's mass transit services. Charter service, on the other hand, must be examined in the context of UMTA's charter regulation, 49 CFR Part 604.<sup>3</sup>

49 CFR 604.5(e) describes charter service as:

transportation using buses or vans, or facilities funded under the Acts, of a group of persons who pursuant to a common purpose, under single contract, at a fixed charge ... for the vehicle or service, have acquired use of the vehicle or service to travel together under an itinerary specified in advance or modified after having left the place of origin.

The definition of mass transit is summarized in the preamble to the regulation, as follows:

- 1 - it is under the control of the grantee;
- 2 - it is designed to benefit the public at large;
- 3 - it is open door.<sup>4</sup>

These characteristics can be measured against Centro's shuttle service to determine whether it is mass transit or charter.

First, when determining whether a particular service is under the control of the grantee, UMTA looks at whether the grantee sets the rates, fares, and schedules. In this case, it appears to be the Hospital, and not the Respondent, which is responsible for determining how the service operates. According to the Respondent's own statement, "In this case a private hospital and not the Respondent solicited service for which it, the hospital paid for." Since the hospital requested the service, and apparently sets the fare at which it operates, it presumably

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<sup>2</sup> {"Private Enterprise Participation in the Urban Mass Transportation Program," 49 Fed. Reg. 41311, October 22, 1984.}

<sup>3</sup> {The charter regulation in effect at the time of this complaint was superseded by a new regulation, which went into effect on May 13, 1987. The former regulation allowed grantees to provide charter which was "incidental" to, i.e., did not detract from or interfere with, a grantee's regular mass transit services. Under the new regulation, recipients of UMTA funds may not provide charter service if there is a private operator willing and able to provide the service.}

<sup>4</sup> {52 Federal Register 11920, April 13, 1987.}

controls the other aspects of the service as well. As such, the service cannot be said to be under the control of the grantee.

Second, the service is obviously not designed to benefit the public at large, but rather to serve the needs of a particular segment, namely employees travelling between a private parking lot and their jobs at the Hospital. It is therefore intended to meet the needs of a small, specific group, and not the general community.

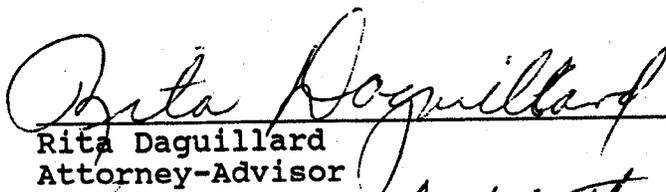
Third, while neither the Complainant nor the Respondent gives a detailed description of how the service operates, both state that it is provided under contract to the Hospital. Considering the fact that the Hospital commissioned and pays for the service, it is highly unlikely that its aim was to open it up to the general public. Since the shuttle is restricted to a particular group, then, and anyone wishing to board it is not allowed to do so, it does not qualify as open door service.

Therefore, assuming that the Hospital shuttle service is being operated in essentially the same manner described in the original complaint and response, UMTA concludes that it is not mass transit, but rather charter service. Thus, though S&O originally filed this complaint under Sections 3e/8e of the UMT Act, and the implementing guidelines, these provisions are inapplicable in this instance, since they apply only to a grantee's mass transportation services. The provision applicable to this matter is Section 604.9 of UMTA's charter regulation, which states that a recipient of UMTA funds may not provide charter service if it has determined that there is a willing and able private operator in its service area. It is UMTA's understanding that Centro has made this determination. Centro's provision of service between Manley Field House and Crouse-Irving Memorial Hospital is therefore in violation of UMTA's charter regulation.

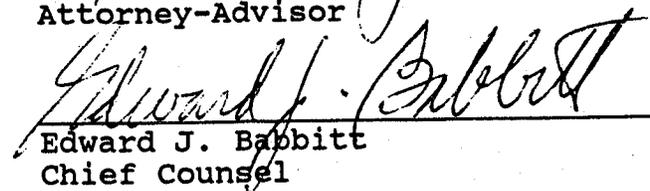
#### CONCLUSION

Assuming that the shuttle service is being operated in essentially the same manner described in the original complaint and response, UMTA concludes that it is charter service, as defined by UMTA's charter regulation, 49 CFR Part 604. Therefore, it is not subject to UMTA's private sector guidelines, which apply to a grantee's

mass transit services. Centro's provision of the service is, however, in violation of Section 604.9 of the charter regulation, which prohibits grantees from providing charter service when there is a willing and able private operator, except under one of the exceptions to the regulation. Centro should therefore cease and desist providing this service immediately.

  
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Rita Daquillard  
Attorney-Advisor

6/30/88  
\_\_\_\_\_  
Date

  
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Edward J. Babbitt  
Chief Counsel

7/6/88  
\_\_\_\_\_  
Date