

Before the Federal Transit Administration

American Bus Association
Complainant

v.

Charter Docket # 2007-15

Rochester-Genesee Transportation Authority
Respondent

Decision

Summary

By letter dated October 11, 2007, the American Bus Association (“Complainant” or “ABA”) filed a complaint (“Complaint”) with the Federal Transit Administration (“FTA”) alleging that the Rochester Genesee Transportation Authority (“Respondent” or “RGRTA”) is providing service in violation of FTA’s charter regulations, 49 Code of Federal Regulations (C.F.R.) Part 604. The service in question pertains to the Wegmans LPGA golf tournament service from June 18-24, 2007 and shuttles for the 2007 Buffalo Bills Training Camp from July 26 to about August 22, 2007. ABA also raises questions about RGRTA’s proper fleet size for public transportation.

By FTA’s letter dated October 18, 2007, FTA acknowledged receipt of the Complaint and directed the parties to follow an expedited complaint process pursuant to 49 C.F.R. Section 604.15. Having received no response from RGRTA, FTA by letter dated January 9, 2008, inquired of the status of RGRTA’s response. On January 14, 2008, FTA received a copy of a response from Respondent dated November 16, 2007 (“Response”). By letter dated January 18, 2008, Complainant submitted their rebuttal to FTA (“Rebuttal”). Although beyond the prescribed process, RGRTA also submitted a sur-rebuttal dated January 28, 2008 (“Sur-rebuttal”), in response to the ABA Rebuttal addressing the validity of this service under FTA’s new charter regulations.

Based upon our review of the allegations in the preceding documents and our own research, FTA finds that the service in question does not violate FTA’s current charter regulations. We point out, however, that FTA is making no statement regarding whether this service conforms to the requirements of FTA’s new charter regulations which become effective on April 30, 2008, nor have we considered the submissions of the parties as they relate to compliance with such prospective regulations. Similarly, Complainants’ allegations regarding the size of the RGRTA bus fleet do not fall within the purview of the charter regulations and will not be addressed herein.

History of the Proceedings

Complaint

Complainant filed its Complaint alleging that the Respondent would provide illegal charter service to the Wegmans 2007 LPGA golf tournament and the Buffalo Bills 2007 training camp. Complainant specifically alleges that Respondent is not operating public transportation service to these special events because the service does not meet FTA's three factors for determining public transportation.

A. Golf tournament

With respect to the golf tournament, the ABA asserts that the golf tournament controls the service because the subsidy agreement sets the term for the service and stops when the tournament ends, sets the route and the amount to be paid by the subsidy provider, thereby taking control out of the hands of RGRTA.

ABA's Exhibit 2 also purports to show photos of buses bypassing patrons at regular bus stops which ABA states is additional evidence that RGRTA was contractually obligated to operate a closed route from designated parking lots.

Complainant challenges that the current tournament service is not public transportation because it does not benefit the public and is not open door. Complainant states that the buses left from parking lots, went past regular bus stops to a private country club, and the LPGA website says the service leaves every 20 minutes and runs for one hour after the completion of play. Further, the ABA states that RGRTA's Schedule Book for Routes 99 and Above, as shown in Exhibit 4, has a schedule for dates that have already passed and that riders cannot connect with any other line. Complainant points out that Exhibit 5, the Early Summer Seasonal Routes 2007 brochure, shows that the service is a shuttle that runs in a loop with no intermediate stops and that no member of the public would conclude the service was for their use. Lastly, ABA explains that on their Exhibit 6, RGRTA's webpage, the specific golf route, 104, does not appear.

B. Buffalo Bills Training service

Complainant alleges that the Buffalo Bills services also fails to meet the three factor charter test for public transportation because the subsidy provider again controls the service, the service operates from within parking lots to inside the college campus and the service received less advertising than the golf tournament service.

Specifically, Complainant states that the Buffalo Bills service did not appear on Respondents' website under "schedules" and the service did not appear in the Respondent's Early Summer Seasonal Routes 2007 brochure.

Response

RGRTA's response, once received, was dated November 16, 2007. In their Response, RGRTA states that the ABA appears to be appealing FTA's October 5, 2006 Decision,

Docket No.:2006-12 pertaining to LPGA service pursuant to 49 CFR §604.19. The subject matter of this Complaint is the 2007 service to two different events; therefore, it could not be an appeal of an October 5, 2006 Decision. Each set of facts must be evaluated separately and the October 5, 2006 Decision has no bearing on the 2007 events.

Respondent submitted copies of its 2007 Subsidy Agreements in Exhibits C-2 and C-3. Under these agreements, the subsidy provider agreed to provide a subsidy amount in addition to the per-rider subsidy amount in order to induce RGRTA to continue providing the service.

Respondent also submitted as Exhibit D-1, a copy of the "Early Summer Seasonal Routes 2007" brochure and as Exhibit D-2, a copy of the "Late Summer Seasonal Route Schedule" for 2007. These brochures contain information regarding Routes 104 and 112.

RGRTA also alleged that these schedules were on their website through September 3, 2007. According to RGRTA's Exhibit E, these routes are back up on their website currently under the "Routes 99 and Above" schedules. Similarly, RGRTA's Exhibit 6 came from their website "Trip Planner" which RGRTA admits that as of October 9, 2007 would not have shown the routes since they were not operating at that time.

In response to Complainant's allegations that only golf patrons were allowed to board, Respondent points to the terms of their subsidy agreement which allows any passengers to board and have their fare subsidized, regardless of attendance at the golf event. Respondent did not address the photos submitted with the Complaint addressing the open door issue.

Respondent acknowledged that some of these routes are express but maintained that express service can still be open door and public transportation.

Rebuttal

By letter dated January 18, 2007, ABA filed its Rebuttal with FTA. ABA reiterated that the service provided is not open door or for the public at large as only golf patrons would ride the bus and it is only designed for golf patrons or Buffalo Bills patrons. Complainant argued that the designated route and the manner of operation show that the service is charter. Lastly, ABA believed the service was not intended to be open door because it ran from parking lots to privately-owned facilities.

Complainant also alleged that all of the seasonal service would be charter under FTA's new regulations and raised again its argument on the use of surplus buses.

Sur-Rebuttal

Respondent entered a Sur-rebuttal dated January 28, 2007, to argue how the new charter rules will apply to RGRTA once effective. RGRTA acknowledges that they will not be able to enter into these types of subsidy agreements with subsidy providers but dispute the other allegations regarding how this service might be reconstituted.

Discussion

FTA notes, at the outset, that the Complaint was not an appeal of Docket No. 2006-12, as the Compliant herein relates to 2007 service and, therefore, FTA will not consider this argument as the facts are specific to this 2007 decision. We also reiterate that the FTA is making no evaluation of whether this service is or whether and how it might be conformed to comply with the requirements of FTA's new charter regulations, effective April 30, 2008. We are only considering the submissions of the parties under the current regulations, as that is when the service in question occurred.

In reviewing this Complaint, it must be determined whether the service in question is charter or public transportation.

FTA's regulations define charter as:

transportation using buses or vans, funded under the Acts of a group of persons who pursuant to a common purpose, under a single contract, at a fixed charge for the vehicle or service, have acquired the exclusive use of the vehicle or service to travel together under an itinerary either specified in advance or modified after leaving the place of origin. 49 C.F.R. 605.5(e).

Public transportation is defined as follows:

Transportation by a conveyance that provides regular and continuing general or special transportation to the public, but does not include schoolbus, charter, or sightseeing transportation.

In considering whether service is public transportation or illegal charter service, FTA looks at three elements to distinguish the two types of service. First, public transportation is under the control of the recipient; the recipient sets the route, rate and the schedule; second, the service is designed to benefit the public at large and not some special organization and, third, mass transportation is open to the public and is not closed door. 52 Fed. Reg. 11920, April 13, 1987.

As to the first prong of the test, it appears that RGRTA controls the routes, schedules and equipment used. RGRTA has a published route and route number with stops on the route to the golf tournament, depending upon the day of service; similarly, RGRTA has a published route to the Buffalo Bills training camp and it is express service. While there are subsidy agreements for the routes with the golf tournament and Buffalo Bills subsidy providers, they do not specify that RGRTA should use any particular type of equipment, nor does it suggest that the provider will have the right to control the route, the equipment or the frequency of service.

RGRTA published the route for the golf tournament and the Buffalo Bills training camp along with its other routes and issued schedules on its website. The routes are subject to

the same fare structure as the rest of RGRTA's public transportation service. The subsidy providers subsidize RGRTA depending upon the number of the passengers according to RGRTA's regular fare structure. Again, under the current regulations under which this service is analyzed, FTA has clearly stated that the existence of a subsidy does not alone transform mass transportation into charter service. See FTA Questions and Answers, number 27a, 52 Federal Register 42248, November 3, 1987 ("Questions & Answers"). According to the terms of the subsidy agreements, there is no subsidy for those individuals traveling with one of RGRTA's unlimited "Freedom Passes" or for individuals traveling one-way. This indicates that all members of the public are permitted to use the service. Further, there is no language in the subsidy agreement that gives the subsidy provider the right to require any specific frequency of service.

With respect to the second prong of the test, whether the service is designed to benefit the public at large, it is clear that the service is designed primarily to benefit that portion of the public interested in going to the annual golf tournament or Buffalo Bills training camp. However, the service is designed so that any member of the public wanting to travel along that route is able to board. In the charter realm, prior FTA decisions have found that a subset of the general public is still considered to be the public at large for public (mass) transportation purposes. Gray Line Seattle v. King County Metro (FTA Decision February 2005) ("Gray Line") citing Bluebird Coach Lines v. Linton, 48 F. Supp 2d 47 (DC Dist. Ct., 1999). In this instance, Buffalo Bills patrons and golf fans are a part of the general public who would like to be able to use public transportation to go to their events. The services were advertised on the RGRTA website and through the seasonal flyers for both types of service as well as on the LPGA website. Apparently, the ABA did not have a copy of the Late Summer Seasonal Route Schedule which showed Route 112 and, there is no specific date on this brochure indicating when it was made available to the public.¹ Similarly, it appears that the Late Summer Seasonal Route Schedule did appear on their website although it was removed once the service was no longer in operation.² Therefore, golf patrons or Buffalo Bills patrons as well as any member of the general public could benefit from this service.³

The third prong of the test is whether the service is open to the public and not closed door. FTA looks at the intent of the recipient in offering the charter service to determine whether the service is open door. FTA considers what attempts the recipient has made to make the service known and has found that publishing the service is the best marketing effort. Washington Motor Coach Association v. Municipality of Metropolitan Seattle, WA-09/87-01 (March 21, 1988). As stated above, the service appeared on RGRTA's website along with its other routes and schedules with the same fare structure. In addition, RGRTA published a pre-printed brochure which advertised this service.

¹ In the future, RGRTA should always date their brochures so it is possible to discern when it was made available.

² It is not entirely clear why it has reappeared under the Routes Above 99 Schedule on their website; we encourage the publication of route information; however, RGRTA should clarify how their schedules operate.

³ FTA was unable to determine from the photos submitted by Complainant that patrons had been turned away along the designated routes.

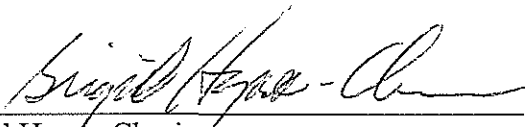
Therefore, there was a broad outreach effort and it can be concluded that the service is open to the public and benefited the public at large.

Conclusion

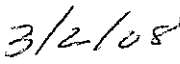
RGRTA used the current fare structure, various website pages and the Early and Late Summer Seasonal Brochure, the subsidy agreement and the regular and continuing nature of the annual service to an infrequent event to demonstrate that the service was public transportation. FTA finds that the service to the LPGA golf tournament and Buffalo Bills service was public transportation and not charter service.

Appeal

The losing party may appeal this decision to the Administrator within 10 days of the receipt of this decision pursuant to 49 CFR Section 604.19. The appellant shall include in its appeal the basis for the appeal and evidence to support the position. The appellant shall send a copy of the appeal to the prevailing party. The appeal should be sent to: FTA Administrator, Federal Transit Administration, 1200 New Jersey S.E., Washington, D.C. 20590 and be marked Charter Appeal.



Brigid Hynes-Cherin
Regional Administrator



Date