

**BEFORE THE FEDERAL TRANSIT ADMINISTRATION  
REGION VIII**

**Forell Limousine & Bus Service,  
Complainant**

v.

**Charter Service Docket No. 2007-18**

**River Cities Transit,  
Respondent**

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**DECISION**

Forell Limousine & Bus Service (Forell) filed a complaint with the Federal Transit Administration (FTA) by letter dated December 6, 2007, alleging that River Cities Transit (RCT) violated FTA's charter service regulations at 49 C.F.R. Part 604. For the reasons set forth below, I find that RCT did not violate FTA's charter service regulations at 49 C.F.R. Part 604.

**I. BACKGROUND**

RCT, a public transit agency located in South Dakota, is a recipient of FTA financial assistance. As a recipient of FTA financial assistance, RCT is subject to FTA's charter service regulations at 49 C.F.R. Part 604.

Forell, a private transportation operator located in South Dakota, filed a complaint with FTA by letter dated December 6, 2007, alleging that RCT violated FTA's charter service regulations at 49 C.F.R. Part 604.<sup>1</sup> Forell filed its complaint with FTA in the context of a general inquiry into the status of a then pending charter service matter which FTA subsequently adjudicated on April 14, 2008.<sup>2</sup>

RCT timely filed with FTA a response to Forell's complaint by letter dated May 27, 2008.<sup>3</sup> In sum, RCT asserted that it did not violate FTA's charter service regulations at 49 C.F.R. Part 604.<sup>4</sup>

Forell timely filed with FTA a reply to RCT's response by letter dated June 25, 2008.<sup>5</sup> In its reply, Forell further alleged that RCT violated FTA's charter service regulations at 49 C.F.R. Part 604.<sup>6</sup>

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<sup>1</sup> Letter from Forell Limousine Bus Service (Forell) to the Federal Transit Administration (FTA), December 6, 2007.

<sup>2</sup> See Forell Limousine & Bus Service v. River Cities Transit, Charter Service Docket Number 2006-02 (Fed. Transit Admin. Region VIII Apr. 14, 2008).

<sup>3</sup> Letter from River Cities Transit (RCT) to FTA, May 27, 2008

<sup>4</sup> *Id.*

<sup>5</sup> Letter from Forell to FTA, June 25, 2008

<sup>6</sup> *Id.*

## II. STATUTORY AND REGULATORY FRAMEWORK

### A. Applicable Regulation

During the course of this proceeding, FTA promulgated new charter service regulations at 49 C.F.R. Part 604.<sup>7</sup> The new charter service regulations took effect on April 30, 2008.<sup>8</sup> In this Decision, FTA applies the charter service regulations as they existed at the time that the service at issue occurred. Because the service at issue occurred in 2007, FTA applies the charter service regulation that was in effect prior to April 30, 2008.

### B. Statutory and Regulatory Framework

#### 1. Charter Service

In 1975, Congress amended the Urban Mass Transportation Act of 1964 to allow the Urban Mass Transportation Administration (UMTA), now FTA, to provide Federal financial assistance to a grantee if the grantee agreed not to provide charter service in a manner that forecloses private operators from providing charter service.<sup>9</sup> Those provisions are now codified as amended at 49 U.S.C. § 5323(d)(1), and they state:

Financial assistance under this chapter may be used to buy or operate a bus only if the applicant, governmental authority, or publicly owned operator that receives the assistance agrees that, except as provided in the agreement, the governmental authority or an operator of mass transportation for the governmental authority will not provide charter bus transportation service outside the urban area in which it provides regularly scheduled mass transportation service. An agreement shall provide for a fair arrangement the Secretary of Transportation considers appropriate to ensure that the assistance will not enable a governmental authority or an operator for a governmental authority to foreclose a private operator from providing intercity charter bus service if the private operator can provide the service.<sup>10</sup>

In 1976, UMTA promulgated regulations implementing the above statutory provision. UMTA codified those regulations at 49 C.F.R. Part 604. Under 49 C.F.R. § 604.5(e), FTA defines "charter service" as:

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<sup>7</sup> See Charter Service Final Rule, 73 Fed. Reg. 2,326-61 (Jan. 14, 2008).

<sup>8</sup> 73 Fed. Reg. 2,326

<sup>9</sup> Amendments to the Urban Mass Transportation Act of 1964, Pub. L. No. 93-650, § (a), 88 Stat. 2-1 (1975) (codified as amended at 49 U.S.C. § 5323(d) (2006)).

<sup>10</sup> 49 U.S.C. § 5323(d)(1) (2006)

[T]ransportation using buses or vans, or facilities funded under the Acts of a group of persons who pursuant to a common purpose, under a single contract, at a fixed charge (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.<sup>11</sup>

Thus, the definition of charter service includes the following elements: (1) transportation using FTA-funded vehicles or facilities, (2) a group of people with a common purpose, (3) a single contract, (4) a fixed rate, (5) exclusive use, and (6) an itinerary either specified in advance or modified after having left the place of origin.

Under 49 C.F.R. § 604.7(b), an applicant for Federal financial assistance must agree that it will provide "charter service . . . only to the extent that there are no private charter service operators willing and able to provide the charter service . . ." <sup>12</sup> Under 49 C.F.R. § 604.9(a), if a recipient provides charter service using FTA-funded equipment or facilities, the recipient must first determine if there are private operators willing and able to provide the service.<sup>13</sup> If a private operator is willing and able to provide the service, then the recipient cannot provide the service unless an exception applies under 49 C.F.R. § 604.9(b).<sup>14</sup>

Under 49 C.F.R. § 604.17(a), if FTA determines that a recipient violated FTA's charter service regulations under 49 C.F.R. Part 604, FTA may order such remedies as FTA determines are appropriate.<sup>15</sup>

## 2. Public Transportation

When deciding a charter service case under 49 C.F.R. Part 604, FTA analyzes the grantee's service against the definition of "public transportation" at 49 U.S.C. § 5302(a)(10).<sup>16</sup> As opposed to FTA's definition of "charter service" which describes the type of service that FTA does not allow under 49 C.F.R. Part 604, Congress's definition of "public transportation" describes the type of service that FTA allows under 49 C.F.R. Part 604. Congress defines "public transportation" as "transportation by a conveyance that provides regular and continuing general or special transportation to the public, but does not include . . . charter . . . transportation."<sup>17</sup>

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<sup>11</sup> 49 C.F.R. § 604.5(e) (2007).

<sup>12</sup> 49 C.F.R. § 604.7(b).

<sup>13</sup> 49 C.F.R. § 604.9(a).

<sup>14</sup> *Id.*

<sup>15</sup> 49 C.F.R. § 604.17(a).

<sup>16</sup> See, e.g., *Motorcoach Marketing International, Inc v Metropolitan Transit Authority of Harris County*, 1, 2 (Oct. 28, 2003).

<sup>17</sup> 49 U.S.C. § 5302(a)(10) (2006).

FTA has interpreted “public transportation” to include several key characteristics.<sup>18</sup> First, public transportation is transportation that is under the control of the recipient, meaning, the recipient is generally responsible for setting the route, rate, and schedule, and deciding what equipment is used. Compensation on the basis of hours or service is evidence of charter service, whereas individual fares paid by individual riders indicates that the service is public transportation.<sup>19</sup>

Second, public transportation is transportation that is designed to benefit the public at large and not some special organization, such as a private club. Riders outside a target group of customers must be eligible to use the service.<sup>20</sup>

Third, public transportation is transportation that is open to the public and is not closed door—anyone who wishes to ride on the service must be permitted to do so. In determining whether service is “open door,” FTA looks at the level of ridership by the general public, as opposed to a particular group, and at the intent of the recipient offering the service.<sup>21</sup> The intent to make service “open door” can be discerned in the attempts to make the service known and available to the public.<sup>22</sup> FTA takes into account the efforts a recipient has made to market the service.<sup>23</sup> Generally, this marketing effort is best evidenced by publication of the service in the grantee’s preprinted schedules.<sup>24</sup> FTA also has interpreted “open door” to mean a substantial public ridership and/or an attempt by the transit authority to widely market the service.<sup>25</sup>

### **C. Burden of Persuasion and Standard of Proof in a Charter Service Case**

When a statute is silent regarding a party’s burden of persuasion, that is, which party loses if the evidence is closely balanced, the default rule is that the plaintiff or claimant bears the burden of persuasion.<sup>26</sup> Congress was silent regarding which party bears the burden of persuasion in a charter service case, therefore, the complainant bears the burden of persuasion with respect to each element of the complainant’s case.

When a statute is silent regarding the standard of proof that should apply in a case, “the preponderance of the evidence is the proper standard, as it is the default standard in

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<sup>18</sup> 52 Fed Reg. 11,916, 11,920 (Apr. 13, 1987)

<sup>19</sup> *Seymour Charter Bus Lines v. Knoxville Transit Authority*, Charter Service Case No. TN-09/88-01, 1, 9-10 (Nov. 29, 1989)

<sup>20</sup> *Annett Bus Lines v. City of Tallahassee*, Charter Service Case No. FL-TALTRAN/90-02-01, 1, 3 (Apr. 28, 1992)

<sup>21</sup> *Washington Motor Coach Association v. Municipality of Metropolitan Seattle*, Charter Service Case No. WA-09/87-01 1, 10 (Mar. 21, 1988)

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Blue Grass Tours and Charter v. Lexington Transit Authority*, Charter Service Case No. URO-III-1987, 1, 5 (May 17, 1988).

<sup>26</sup> *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56 (2005); *Forell Limousine & Bus Service*, Charter Service Docket Number 2006-02 at 6-7.

civil and administrative proceedings.”<sup>27</sup> Congress was silent regarding the standard of proof in a charter service case, therefore, FTA utilizes a preponderance of the evidence standard. To hold something by a preponderance of the evidence means that something is more likely so than not so.<sup>28</sup>

### III. DISCUSSION

#### A. Broken Arrow Hunting Lodge

In its complaint, Forell alleged that RCT provided an impermissible charter service trip from the Pierre Regional Airport to the Broken Arrow Hunting Lodge on November 8, 2007. In its reply, Forell alleged that RCT provided the trip with a van financed by FTA, and that eight hunters utilized the service to the Broken Arrow Hunting Lodge. Forell alleged that these eight hunters had exclusive use of the vehicle. Additionally, Forell alleged that RCT and Broken Arrow Hunting Lodge entered into a single contract for the service whereby Broken Arrow Hunting Lodge paid RCT a fixed rate of \$1.55 per passenger and \$1.50 per mile in exchange for the service.

In its response, RCT claimed that the trip to the Broken Arrow Hunting Lodge was demand response service, meaning the service was part of RCT’s non-fixed route public transportation requiring an arrangement for the service in advance. RCT provided FTA with the log sheet corresponding to the trip, and argued that the trip to Broken Arrow Hunting Lodge was part of a local non-fixed route—“Local Route 23.” Additionally, RCT indicated that, after it dropped off passengers at the Broken Arrow Hunting Lodge, it used the vehicle to drop off at least one passenger at a local hotel. RCT did not dispute that it provided the transportation in a vehicle funded by FTA.

FTA finds that RCT’s November 8, 2007 trip from Pierre Regional Airport to the Broken Arrow Hunting Lodge was not an impermissible charter service trip. Indeed, there are some elements of an impermissible charter service trip here. RCT provided the trip in an FTA-funded vehicle to a group of people traveling to a hunting lodge.

However, RCT picked up at least one additional passenger at the airport and dropped off that passenger at a local hotel—RCT did not drop off this passenger at the hunting lodge. This fact tends to show that the service is public transportation which RCT designed to benefit the public at large, and not some special organization. The trip was not for a single group that had exclusive use of the bus. The service was open to the general public.

Moreover, Forell did not produce any evidence that RCT entered into a single contract with the Broken Arrow Hunting Lodge to exclusively transport the passengers at a fixed

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<sup>27</sup> *Yzaguirre v. Barnhart*, 58 F App’x 460, 462 (10th Cir. 2003) (quoting *Jones ex rel. Jones v. Chater*, 101 F.3d 509, 512 (7th Cir. 1996)); *Forell Limousine & Bus Service*, Charter Service Docket Number 2006-02 at 7.

<sup>28</sup> See, e.g., *Williams v. Eau Claire Pub. Sch.*, 397 F.3d 441, 444 (6th Cir. 2005); *Forell Limousine & Bus Service*, Charter Service Docket Number 2006-02 at 7.

rate. Forell merely alleged that such a contract exists. Forell did not prove the existence of such a contract by a preponderance of the evidence.

There are some elements of impermissible charter service here, but not all. Therefore, FTA finds that RCT did not violate FTA's charter service regulations under 49 C.F.R. Part 604 with respect to its November 8, 2007 trip from the Pierre Regional Airport to the Broken Arrow Hunting Lodge.

#### **B. Shooters Hunting Lodge Service**

In its complaint, Forell alleged that, based on an informal conversation with the manager of the Shooters Hunting Lodge, RCT provided an impermissible charter service trip to the Shooters Hunting Lodge in Kennebec, South Dakota in late October or early November of 2007. Forell did not provide FTA with facts or evidence to support its allegation.

In its response, RCT provided FTA with a list of its trips which originated at the Pierre Regional Airport in October 2007. On October 22, 2007, RCT provided service to Kennebec, South Dakota for one passenger in exchange for a regular fare of \$8.00 and \$1.50 per mile. RCT claimed that the service was essentially demand response service, meaning the service was part of RCT's non-fixed route public transportation requiring an arrangement for the service in advance.

FTA finds that Forell has not proved by a preponderance of the evidence that RCT provided an impermissible charter service trip to the Shooters Hunting Lodge. Forell did not present FTA with any facts to support its allegation. Without more than just an allegation, FTA cannot find RCT in violation of 49 C.F.R. Part 604.

Moreover, based on the evidence presented by RCT, FTA believes that the service is public transportation. RCT controlled the transportation at issue as part of its demand response service which is open to the public and designed to benefit the public at large.

#### **C. Trips to and from Car Races**

In its complaint, Forell alleged that RCT provided impermissible charter service trips on an ongoing basis from May 2007 to September 2007 for "Car Races." In its complaint, Forell did not provide FTA with any details regarding these trips. Forell did not even cite specific trips that were allegedly impermissible charter service trips. In its reply, Forell elaborated on its allegation by claiming that RCT provided impermissible charter service to passengers who had exclusive use of vehicles during the trips.

FTA finds that Forell has not presented enough facts for FTA to make a decision regarding whether any RCT trips to car races from May 2007 to September 2007 were impermissible charter service trips or public transportation. Forell has not proved by a preponderance of the evidence that RCT provided impermissible charter service with respect to any car races from May 2007 to September 2007.

**D. Trips to and from Melvin Ranch**

In its complaint, Forell alleged that RCT provided impermissible charter service trips to Melvin Ranch on July 16, 2007; July 23, 2007; July 30, 2007; August 6, 2007; August 13, 2007; and August 20, 2007. In its reply, Forell alleged that RCT provided the trips with buses financed by FTA, and that, with respect to each trip, a group of twenty-four passengers patronized the service so that it could attend a class at Melvin Ranch.

Forell alleged that children paid a flat fee to the Community & Youth Involved Center in Fort Pierre, South Dakota to participate in the Community & Youth Involved Center's summer recreation program; however, Forell did not provide FTA with any evidence to support this claim. According to Forell, the Community & Youth Involved Center, in turn, entered into a single contract with RCT for a fixed rate of \$1.55 per child and \$1.50 per mile to transport the students to and from Melvin Ranch.

Forell alleged that RCT did not market this service to the general public and that only children participating in the Community & Youth Involved Center's summer recreation program utilized the vehicles. Essentially, the Community & Youth Involved Center controlled the dates and times of service, as well as the number of passengers.

In its response, RCT claimed that the trips to Melvin Ranch constituted a portion of RCT's demand response service whereby passengers schedule rides with RCT and pay a regular individual fare in exchange for the service. RCT admitted, however, that "on occasion," the Discovery Center paid the fares on the children passengers' behalf. RCT did not dispute that it provided the service in a vehicle funded by FTA.

FTA finds that, based on the limited facts presented by the parties, Forell did not prove by a preponderance of the evidence that RCT violated FTA's charter service regulations at 49 C.F.R. Part 604.

Indeed, there are some elements of an impermissible charter service trip here. RCT provided the service at issue in an FTA-funded bus. Additionally, RCT transported a group of children to Melvin Ranch to participate in a summer recreation program. The itinerary—traveling to and from Melvin Ranch—was specified in advance.

However, it is not clear whether RCT entered into a single contract with the Community & Youth Involved Center for a fixed rate in exchange for exclusive use of the vehicles. Forell alleged that this arrangement existed, however, there is no evidence. RCT admitted that, occasionally, the Discovery Center paid fares on the children's behalf. However, the details of any such arrangements are not clear. Based on the limited facts presented by the parties, FTA cannot determine if a single contract for a fixed rate in exchange for exclusive use of FTA-funded vehicles existed between RCT and the Community & Youth Involved Center.

In sum, Forell has proved some elements of impermissible charter service with respect to the Melvin Ranch trips, but not all. Therefore, FTA finds that Forell has not proved by

a preponderance of the evidence that RCT violated FTA's charter service regulations at 49 C.F.R. Part 604.

**E. Pierre Riggs High School Class of 1977 Reunion**

In its complaint, Forell alleged that RCT provided an impermissible charter service trip for the Pierre Riggs High School Class of 1977 reunion on June 30, 2007. Forell alleged that RCT transported passengers from the Cheyenne Ridge Lodge to the Pierre Riggs High School Class of 1977 reunion and back.

In its reply, Forell alleged that RCT provided the trip with two buses financed by FTA for a group of Pierre Riggs High School alumni so that they could attend their high school reunion. Forell alleged that only alumni used the bus and it was not available to any other persons. Additionally, Forell alleged that Pierre Riggs High School entered into a single contract with RCT whereby Pierre Riggs High School agreed to pay RCT a fixed price of over \$300 for the service.

In its response, RCT claimed that the Pierre Riggs High School Class of 1977 reunion trip was demand response service, meaning the service was part of RCT's non-fixed route public transportation requiring an arrangement for the service in advance. According to RCT, fifty-two passengers individually scheduled demand response rides to the reunion. RCT claimed that after it dropped off passengers at the reunion, it provided other demand response rides for other passengers. RCT did not dispute that it provided the reunion service in vehicles funded by FTA.

FTA finds that RCT's June 30, 2007 trip for the Pierre Riggs High School Class of 1977 reunion was not an impermissible charter service trip. Indeed, there are some elements of an impermissible charter service trip here. RCT provided the service in two FTA-funded buses for a group of Pierre Riggs High School alumni who were traveling to their reunion.

However, Forell has not proved by a preponderance of the evidence that RCT entered into a single contract with Pierre Riggs High School for a fixed rate in exchange for the service. Forell alleged that the treasurer for the reunion event told a Forell employee that Pierre Riggs High School paid for the transportation related to the reunion, however, this is hearsay. Forell presented no verification of this statement and no additional evidence that such a contract existed. RCT claims that passengers individually paid fares.

Moreover, FTA finds that this service is more akin to public transportation. RCT controlled the buses. RCT set the route, rate, and schedule, and decided which buses to use. Forell did not prove that RCT excluded members of the general public from riding these buses. Indeed, after the bus drivers dropped off passengers at the reunion, the bus drivers made other demand response trips.

There are some elements of impermissible charter service here, but not all. Therefore, FTA finds that RCT did not violate FTA's charter service regulations under 49 C.F.R.



Part 604 with respect to its June 30, 2007 trip for the Pierre Riggs High School Class of 1977 reunion.

#### IV. DECISION

##### A. Decision and Order

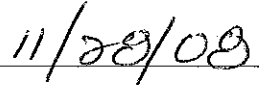
Based on the evidence of record, FTA finds that RCT did not violate FTA's charter service regulations at 49 C.F.R. Part 604 with respect to the above-referenced transportation.

I point out that, throughout this charter service proceeding, Forell failed to provide FTA with sufficient facts, verifications, and evidence to substantiate its claims. Under section 604.17(b) of the charter service regulation in effect prior to April 30, 2008, I am only required to take action on a complaint if the complaint "is not without obvious merit" and "states grounds on which relief may be granted." Under section 604.32(a) of the charter service regulation in effect after April 30, 2008, FTA only will take action on a complaint if there "appears to be a reasonable basis for investigation." Under these standards, filing a complaint without sufficient facts, verifications, and evidence may constitute a groundless and frivolous complaint upon which FTA may decide not to take action. Hereafter, if Forell continues to file complaints without sufficient facts, verifications, and evidence, then FTA may decline to entertain those complaints.

##### B. Appeal Process

In accordance with 49 C.F.R. § 604.19, a party adversely affected by this Decision may appeal this Decision to the FTA Administrator within ten days of receipt of this Decision.<sup>29</sup> The appeal should be sent to Sherry Little, Acting Administrator, Federal Transit Administration, 1200 New Jersey Avenue SE, East Building—5th Floor, Washington, DC 20590.

  
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Terry J. Rosapep  
Regional Administrator  
Region VIII

  
\_\_\_\_\_  
Date

<sup>29</sup> 49 C.F.R. § 604.19.