

BEFORE THE FEDERAL TRANSIT ADMINISTRATION

Kemps Bus Service, Inc.
Complainant

v.

Charter Complaint
49 U.S.C. Section 5323(d)

Rochester-Genesee Transportation Authority,
Respondent.

DECISION

Summary

By letter dated March 18, 2002, Kemps Bus Service, Inc. ("Complainant") filed a complaint with the Federal Transit Administration ("FTA") alleging that Rochester-Genesee Transportation Authority ("Respondent") is providing service in violation of FTA's charter regulation, 49 Code of Federal Regulations (C.F.R.) Part 604. The service specifically complained of pertains to Respondent's bus service to a funeral in Syracuse, a school field trip, local supermarket service, a golf tournament and college campus service. Respondent filed a Response dated April 3, 2002. Respondent filed a second Response dated April 23, 2002. Complainant filed a Rebuttal dated May 6, 2002. Complainant filed a Second Rebuttal on May 21, 2002. Respondent filed a 3rd Response by letter dated July 15, 2002. Complainant filed a 3rd Rebuttal by letter dated July 17th, 2002. Upon reviewing the allegations in the complaint and the subsequent filings of both the Complainant and the Respondent, FTA has concluded that the service in question does violate FTA's regulations regarding charter service. Respondent has admitted that Respondent's charter procedures were in violation of FTA's regulations and is hereby ordered to cease and desist in providing such illegal charter service.

Complaint History

Complainant filed its complaint with the FTA by letter dated March 18, 2002. The complaint alleges that the Respondent is providing illegal charter service¹ by providing private charter service for (1) the Rochester Firefighters attending a funeral, (2) a field trip for the Livonia School District, (3) local supermarket chains, (4) a local LPGA golf tournament and (5) inter-campus shuttling and commencement around a private college. Specifically, Complainant alleges that this service is charter because Respondent did not follow the required public participation process and did not receive a waiver from FTA to provide these services

Respondent filed its Response by letter dated April 3, 2002. In it, Respondent denied that it was providing illegal charter service, and attached as an exhibit a copy of a letter from an unidentified signatory stating that the service was requested for "March 2002" because it exceeded Golden

Memories By letter dated April 15, 2002, FTA requested Respondent to flesh out more fully its Response to the Complaint.

Respondent filed a Second Response dated April 23, 2002. This response reiterated that the funeral service and school trip were done because such service exceeded the capacity of a private charter operator. It also stated that the LPGA event and the supermarket service are of a public nature and any member of the public may board according to their timetable. Respondent attached as exhibits a copy of a "Grocery Shuttle Outline" dated 4/23/02 and various college campus shuttles timetables, which purport to be public schedules

Complainant sent their Rebuttal on May 6, 2002. This Rebuttal reiterated the assertion that Respondent's service is an illegal charter operation and also noted that Complainant was not provided proper notice for an opportunity to offer its own charter service. Respondent reasserted its allegations regarding the Livonia School District field trip and provided a copy of an invoice from Respondent to such school. Complainant states that contracts should not be between a recipient of Federal funds such as the Respondent and a charter customer. In addition, Complainant raises several other alleged charter trips that were referenced in Respondent's Response such as the service on behalf of the Town of Chili and the Siena Catholic Academy. With respect to the commencement service and the LPGA event, Complainant states that it contacted these organizations to try and provide the service and was informed that these services were under contract with Respondent. Complainant alleges that this service would not fit within one of the "special event" exceptions to the FTA regulations

Complainant submitted a Second Rebuttal dated May 21, 2002, in response to Respondent's Second Response. Complainant submits that the LPGA event is not public service because it is performed pursuant to a contract and that an opportunity was not first given to the private operators. Complainant points out that it is a special 5 day event for which passengers do not pay a fare. With respect to the supermarket service, Complainant alleges that this is also performed pursuant to a contract between Respondent and the supermarkets and that the passengers pay no fare. Complainant alleges that the service was taken over by Respondent after a private operator went out of business ten years ago and that there was no public participation process. Lastly, Complainant explains that the college service, which they are complaining of, is service for inter-campus shuttling and graduation commencement, not the other shuttles with links to off-campus life. Complainant states that the commencement service was not addressed by Respondent's responses and that this service is solely within the campus and is not regular route service. Also, Complainant again alleges that the college service is pursuant to a direct contract with the college.

By letter dated June 26, 2002, FTA requested further information of Respondent in order to clarify Complainant's allegations.. Generally, the FTA inquired into the existence of the alleged contracts, the basis of the fares, whether the campus is open to the general public, whether there is commencement service provided and how the charters were obtained.

Respondent filed a 3rd Response by letter dated July 12, 2002. Respondent again claimed that the supermarket service, LPGA service and college service are public routes with publicly advertised schedules and fares, open to the public. Respondent states that the supermarket service is "underwritten" by the grocery stores, although no contract is attached and no fare is charged.

Respondent states again, with respect to the LPGA service, that it is a public route, open to the public and advertised, pursuant to a contract with the golf tournament. A copy of the schedule and contract is attached. Similarly, the Respondent states that the college service for the Rochester Institute of Technology is a public route, no fare is collected; it is open to the general public and it is performed pursuant to a contract with the college. FTA's question regarding access to the campus by the public was not addressed. A copy of the contract with RIT was attached as an exhibit. Respondent asserts that the commencement service is an expansion of the existing route structure. Lastly, Respondent states that with respect to the Funeral service, Livonia School District and Siena Catholic Academy service that, Respondent acknowledges "procedural irregularities" for these charter requests and states that they have taken corrective measures to avoid any further "misapplications" of FTA's charter policies.

Discussion

As Complainant has accurately stated, recipients of federal financial assistance can provide charter service in very limited circumstances. In the absence of one of the limited exceptions, the recipients are prohibited from providing the service. 49 C.F.R. Section 604.9(a). Complainant is no longer asserting that any of the charter exceptions apply, but rather that the service they are providing is not charter service.

The regulations define charter service as the following:

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).

Thus, a determination needs to be made as to whether Respondent's service meets the definition of charter by examining the elements of charter service. In order to determine whether service is charter, FTA looks at the following questions:

- a) Is this transportation service using buses funded with FTA money?
- b) Is the service for a common purpose?
- c) Is it under a single contract?
- d) Is it for a fixed charge for the vehicle or service?
- e) Is the exclusive use of the vehicles to travel together under an itinerary either specified in advance or modified after leaving the place of origin?

See United Limo, Inc. v. South Bend Public Transportation Corporation

With respect to Complainant's allegations, it must be determined whether the service is "charter" service as described above or whether it more closely fits the definition of "mass transportation" Mass transportation is defined as service provided to the public and operating on a regular and continuing basis. 49 U.S.C. Section 5302 (a)(7). Mass transportation can be recognized by the following features: it is under the control of the recipient; the recipient sets the route, rate and

schedule and decides on the equipment; the service benefits the public at large and not some special organization and it is open to the public. 52 Fed. Reg. 11920, April 13, 1987.

A). The RIT campus service

Beginning with Respondent's service provided in and around the RIT campus, in the questions and answers section of the implementing charter regulations in the federal register, a relevant question was posed. The question asked whether service within a university complex according to routes and schedules requested by the university would constitute charter service. The answer indicated that "if the service is for the exclusive use of students and the university sets 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 [Question 27(d)]." 52 FR 42248 (November 3, 1987) (DOT Charter Service Questions and Answers.

A review of the various exhibits to Respondent's July 15, 2002 Response indicates that factually the Respondent's service is more similar to the former, than the latter type of service. The university decides when it wants to add another bus to the schedule and the time of day the bus will operate. It is the university that decides whether the service will continue to operate or not. The contract between Respondent and the university sets forth (as best as can be determined) the numbers of hours a day a route will operate. Overall, there is a per hour rate charged the university for the bus service. The Respondent keeps track of the actual hours operated and adjusts the university's invoice accordingly. Periodically, the university requests special service from the campus to Amtrak and the Airport for special days of the year. As the letter contract says, "RIT may elect to add additional operating days", if the service proves worthwhile. Despite Respondent's contention that the service is open to the public and regular route service, it appears that the service is established pursuant to a single contract or series of contracts, that there is a fixed charge, the itinerary is specified in advance and that it is specifically designed to meet the needs of the university students. Moreover, the service is designed and under the control of the university, although operated by the Respondent. As the letter contracts demonstrate, although anyone boarding the bus travels for free, the service is not set up to benefit the general public except as the public might coincidentally need to travel around the campus area. While there are published schedules, one factor alone is not determinative of whether a service is mass transportation or charter. See Blue Grass Tours v. Lexington Transit Authority. The Respondent's inter-campus service more closely fits the definition of charter described above.

B). Funeral Service and Livonia School Trip

As FTA's response and rebuttal investigation process proceeded, Respondent acknowledged that these services were impermissible charter service as Respondent contracted directly with the customer and it did not fall within an exception to the general charter prohibition. Respondent has stated that it has implemented new procedures and will have to provide a copy of these procedures in writing to FTA and Complainant within thirty (30) days of the date of this decision to ensure that these charter violations do not reoccur.

C). Supermarket service

Respondent maintains that this supermarket service is open to the public and pursuant to regular schedules, which were submitted as exhibits. Further, Respondent states that there is nothing in

the regulations, which prohibits service being underwritten by others. This is true if it were the only factor; however, the "schedules" as submitted do not appear to be like Respondent's other regular schedules. In fact, the documents submitted are entitled "View of Regular Lease Service Provided Weekly". Within the exhibit, it states that certain service is "guaranteed revenue". These are indications that the service is, in fact, charter done pursuant to a contract at a fixed rate (although such contract information was not provided). On the "Lease Trip Log", it states that there can be no standees and that they should "make an extra trip if necessary". Further, it states that they should be sure to make a record of such extra trip. On another Lease Trip Log, it states that the driver should stop at the First Federal Bank, if one of the passengers so requests. This service "underwritten" by the Grocery store appears to be operated for the benefit of a certain group of individuals, living in apartment complexes, which the grocery store wants to bring to its store to shop. One can infer that the pick-up locations were developed at the behest of the grocery store and its clients. It is not intended for the public at large and specific stops and extra trips will be operated to fit the needs of this group. Therefore, this service appears more like charter than mass transportation.

D).LPGA Golf Service

The service at issue here is advertised and open to the public. It is performed under a single contract and no fare is charged. Although it stops at different public locations and is open to the public at large, these stops are specified in the contract as are the number of buses to be operated each day. The contract also specifies the days of service, the times and the parking lots to be used. Unlike mass transportation, this service is not provided on a regular and continuing basis. It operates only a week a year when the golf tournament is in session. All decisions regarding the service are determined by the tournament association and not by the Respondent; hence, while it has some elements of mass transportation, it is more akin to charter than mass transportation.

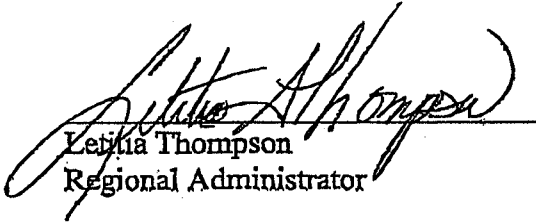
E. Town of Chile Service Contract

Respondent did not respond to the issue of the service under the Respondent's contract with the Town of Chile, raised by Complainant in its May 6, 2002 letter. This appears to be similar to the service Respondent performed for the Livonia School District in that the request did not come from a private charter operator. If the Respondent wants to perform direct charter service, the Respondent should first comply with the requirements of 49 C.F.R. Section 604.11; otherwise, service should fit within one of the exceptions to Section 604.9(b).

Conclusion and Order

FTA finds that Respondent has been providing impermissible charter service and orders it to cease and desist any such further service, as soon as practicable in accordance with the Respondent's existing contracts. Refusal to cease and desist in the provision of this service could lead to penalties on the part of FTA. Respondent shall also provide a copy of its new charter procedures to Complainant and FTA for FTA's review and shall advise FTA within thirty (30) days of the dates of contract termination

In accordance with 49 C.F.R. § 604.19, the losing party may appeal this decision within ten days of receipt of the decision. The appeal should be sent to Jennifer Dorn, Administrator, FTA, 400 Seventh Street, S.W., Room 9328, Washington, D.C. 20590.


Letitia Thompson
Regional Administrator

9-18-02
Date