



U.S. Department
of Transportation
Federal Transit
Administration

REGION VI
Arkansas, Louisiana,
New Mexico, Oklahoma,
Texas

819 Taylor St. Suite 8A36
Fort Worth, TX 76102
817-978-0550
817-978-0575 (fax)

October 28, 2003

Robert J. Dostal, Jr.
Motorcoach Marketing International, Inc.
6920 N.E. 4th Lane
Ocala, Florida 34470

Re: Charter Complaint

Dear Mr. Dostal:

The Federal Transit Administration (FTA) has completed its review and investigation of the complaints filed by Motorcoach Marketing International, Inc., Fame Tours, Inc., and the United Motorcoach Association that principally allege certain bus service provided by the Metropolitan Transit Authority of Harris County, Texas, (Houston METRO) in connection with the annual Houston Livestock Show and Rodeo (Rodeo) was in violation of the FTA's Charter Service regulation, 49 CFR Part 604. As each of the three complaints sets forth essentially the same allegations, this letter will serve as the FTA's response to all three of the complaints.

Specifically, it has first of all been alleged that the City of Houston, Texas, for many years has awarded a contract to Houston METRO for the provision of bus service in connection with the Rodeo and, consequently, Houston METRO is providing charter service for the Rodeo with federally funded equipment in violation of the FTA's Charter Service regulation. Secondly, it is alleged that Houston METRO, as a public transportation provider, has engaged in a monopoly with its special event bus service in Houston, Texas. Finally, it is alleged that Houston METRO improperly uses federally funded buses to exclude many private operators from competing for charter service for the Rodeo and other special events.

With respect to the first allegation in the complaint concerning impermissible charter service being provided by Houston METRO in connection with the Rodeo, the FTA has conducted a thorough review of the role and manner in which Houston METRO has provided the bus service in this case. As a part of the analysis to determine whether the Rodeo service provided by Houston METRO in this case is impermissible charter service or permissible mass transportation, it will be helpful to review the definitions of the terms "charter service" and "mass transportation" as they are defined in the FTA's Charter Service regulation and in the Federal Transit Act, respectively.

The term "charter service" is defined in 49 CFR Section 604.5(e) as follows:

[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 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.

The term "mass transportation" is defined in the Federal Transit Act at 49 U.S.C. Section 5302 (a) (7) as follows:

Mass transportation means transportation by a conveyance that provides regular and continuing general or special transportation to the public, but does not include school bus, charter, or sightseeing transportation.

Although perhaps not readily apparent from the above definitions, based on the language in the preamble to the FTA's Charter Service regulation, 52 Fed. Reg. 11916 (April 13, 1987), and many FTA administrative decisions that have since interpreted these definitions, there are three important characteristics that distinguish "mass transportation" from "charter service".

The first characteristic of mass transportation is that the service provider must exercise a significant degree of control over the transportation. By contrast, an operator that provides charter service typically does not possess any control in establishing, for example, the schedule or trip destination. Therefore, to determine the degree of control in this case, the FTA must ascertain the extent of Houston METRO's role in establishing the schedules, fares, and the routes of the service. A second characteristic of mass transportation is that the service must be designed to benefit the public at large and not some special organization or group of persons. Charter service, on the other hand, will involve a single contract for transportation between the service provider and an organization or a group of persons. Thus, the FTA will examine how the service was structured in this case and whether the service in this case was intended to benefit an organization rather than the general public. Finally, the third characteristic of mass transportation is that the service must be open to the public and not be closed-door service. As charter service is service exclusively for an organization or a group of persons, the FTA will review whether the public was notified of the availability of open-door service in this case or whether the service provided to the Rodeo was closed-door service to the patrons of the event. Therefore, in view of the foregoing characteristics, the FTA conducted the following analysis of pertinent aspects of the service provided by Houston METRO in this case to determine whether Houston METRO engaged in impermissible charter service or permissible mass transportation.

A.

Did Houston METRO exercise a sufficient degree of control over the schedules, fares, routes, and the equipment that would be used to provide the service?

The record reflects that Houston METRO entered into a one-year contract – as it had done in previous years – with Houston Livestock Show & Rodeo, Inc. (Corporation), a non-profit

corporation that sponsors the Rodeo, to coordinate and provide transportation services for this annual event. This one-year contract between Houston METRO and the Corporation, however, is not a "single contract" as that term is used in the definition of charter service because the recipient's control of the transportation is not significantly diminished by the terms of the contract. Rather than requiring Houston METRO to provide transportation under a single contract to a specific group of persons at a fixed charge using a certain number and type of vehicles, the contract in this case essentially amounts to a cost-sharing arrangement whereby the Corporation will participate in fifty percent (50%) of the fully allocated cost for transportation service provided by Houston METRO in connection with the Rodeo. Indeed, as to the issue of control, Article 1 of the contract specifically provides in relevant part that the Corporation "shall exercise no control over METRO's employees, servants, agents, subcontractors or representatives, nor the method or means employed by METRO in the performance of such work or services". Article 2 of the contract, on the other hand, provides that Houston METRO would provide transportation services on "routes specified by" the Corporation. While there is a partial conflict between Article 1 of the contract that allows Houston METRO to have complete control over the "method and means" of transportation and Article 2 that allows the Corporation to specify "routes", it is the FTA's view that the Article 2 provision does not *per se* appreciably detract from the overall degree of control exercised by Houston METRO in this case. In fact, the record further supports that Houston METRO, not the Corporation, determines what level of service will be required, what number of buses will be used, what type of buses will be used, and what schedules will be operated. Moreover, with respect to the fares that are charged for the transportation, the record reflects that Houston METRO, not the Corporation, establishes the individual fares for the transportation provided during the Rodeo based upon an estimate of the fully allocated costs and projected ridership. Clearly, therefore, based on the express terms of the contract and the facts in this case, Houston METRO, not the Corporation, exercises substantial control over the "method and means" in providing transportation in connection with the Rodeo.

In addition, it is noted that the degree of control exercised by the recipient in this case is clearly distinguishable from that exercised by a grant recipient in a recent case decided by the FTA on January 2, 2003, involving the Rochester-Genesee Regional Transportation Authority (RGRTA). Among the findings in the RGRTA case whereby it was determined that the grant recipient provided impermissible charter service in connection with an annual golf tournament, the FTA specifically found that the event sponsor, rather than the recipient, exercised control over the bus schedules, the number of buses, and the type of buses that would be used for the service. That is clearly not the case in this instance because Houston METRO possesses control over virtually all aspects of the service whereas, by contrast, in the Rochester-Genesee case the recipient in fact had very limited control of the service. Accordingly, based on the facts in this case, the record establishes that Houston METRO exercises not only a sufficient, but a substantial, degree of control over the schedule, fares, and the equipment that are used to provide service in connection with the Rodeo.

B.

Did Houston METRO design the service to benefit the public at large or the Corporation?

Reviewing the record in this case, it is apparent that Houston METRO widely advertised to the public the availability of the transportation service that would be provided in conjunction with the Rodeo. Specifically, Houston METRO published notice of this transportation service in printed materials, such as in printed bus schedules and in daily newspapers in the Houston, Texas, area,

and further made spot announcements of the availability of this service in the electronic media in the Houston, Texas, area. In addition, Houston METRO posted notice of the availability of this transportation on its internet website. There is no evidence in the record to show that Houston METRO sought to limit service in this case to the Corporation or only to patrons who would attend the Rodeo. To the contrary, the record would reflect that Houston METRO designed and advertised this transportation service to clearly benefit the public at large and not just the Corporation.

C.

Did Houston METRO provide open-door or closed-door service?

To determine whether the service provided by Houston METRO was in fact "open-door" service, the FTA often considers the intent of the recipient in offering the service. This intent can be evidenced in part by the efforts that the recipient has taken to market the service to the public. Generally, this effort is best evidenced by publication of the service in the recipient's preprinted schedules. *Washington Motor Coach Association v. Municipality of Metropolitan Seattle, WA-09/87-01* (March 21, 1988). In addition, efforts by the recipient to market the service to the public will also be taken into consideration. *Blue Grass Tours and Charter v. Lexington Transit Authority, URO-III-1987*. As discussed above, Houston METRO widely advertised the service to the public and notice of the service was further placed in printed notices and bus schedules. Moreover, in response to the FTA's direct inquiry, Houston METRO has represented that the service offered in connection with the Rodeo is open-door, and not closed-door, service to the public. As open-door service, anyone may pay the fare established by Houston METRO and be entitled to use the service. Furthermore, the FTA's review of a public advertisement that includes information regarding the service for the Rodeo supports Houston METRO's representation that service was not limited exclusively to patrons who attend the Rodeo but rather the record would reflect that the service was available to anyone who paid the fare.

Accordingly, based on the foregoing review and analysis of the facts in this case, it is the FTA's finding that the transportation service provided by Houston METRO in connection with the Rodeo does not constitute impermissible charter service. Rather, based on the facts in this case, the FTA finds that the transportation service provided by Houston METRO in connection with the Rodeo is consistent with the elements of "mass transportation" as this term is defined in the Federal Transit Act and as it has been interpreted by the FTA. Moreover, the FTA finds that the service is "regular and continuing" because Houston METRO has provided service for this event – which has been held annually in Houston for over sixty years – on an annual basis for a considerable number of years. In addition, it is the FTA's finding that the service is "general service" because it is "open-door" service that was designed by Houston METRO to benefit the public at large.

The second allegation in the complaints states that Houston METRO uses FTA-funded buses to engage in a monopoly with special event bus service in Houston, Texas. However, the record reflects that there are only thirteen (13) special events, including the Rodeo, for which Houston METRO participates in or coordinates transportation service. On the other hand, it is estimated by the Greater Houston Convention & Visitors Bureau that there is an average of 250 conventions per year in the Houston area and this figure does not include smaller conferences and other events. As Houston METRO coordinates and participates in service for only thirteen (13) special events, which represents only a very small percentage of the total number of conventions and other special events that are held annually in the Houston area, there is thus no evidence to support the allegation

that Houston METRO has established a monopoly over the provision of special event transportation service in Houston, Texas.

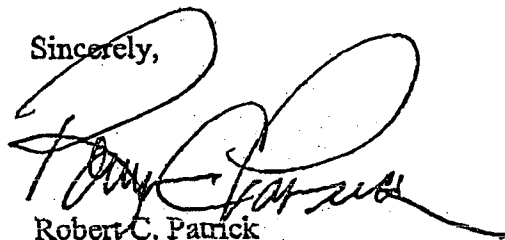
The third allegation concerns Houston METRO's role in the thirteen (13) special events for which it does participate in or coordinate service and whether it improperly excludes private operators from these events. The facts reflect that Houston METRO -- as the public transportation agency for the greater Houston metropolitan area -- issued and widely advertised an invitation for bids on September 21, 2001, to solicit private operators that would be interested in providing special event transportation services for thirteen (13) events, including the Rodeo, in the Houston area during calendar years 2002 and 2003. This invitation for bids, however, was not a federally funded solicitation and therefore it was not subject to the FTA's procurement requirements in Circular 4220.1D (now Circular 4220.1E), "Third Party Contracting Requirements", although it appears that the procedures used by Houston METRO in the selection of prospective contractors were nonetheless substantially in accordance with the principles and requirements of Circular 4220.1D.

Although not subject to the FTA's procurement requirements, Houston METRO has provided information to the FTA regarding the selection process. Assuming that the service provided by Houston METRO in connection with these other events is consistent with the manner in which service is provided for the Rodeo, the service will be deemed permissible mass transportation. As to the selection process, Houston METRO advises that the invitation for bids invited prospective contractors to provide a schedule of available vehicles and revenue-hour prices for providing transportation service for the Rodeo and twelve other special events in calendar years 2002 and 2003. Based on the data provided by the interested private operators, Houston METRO selected qualified operators to participate in providing service for the Rodeo and other special events based on need and the contractor's equipment availability and relative cost-effectiveness. In addition, with respect to service in connection with the Rodeo, although Houston METRO provides much of the service, it is the FTA's understanding that private operators, in accordance with or in addition to this selection process, in fact provide the largest number of buses for this event. Therefore, having reviewed the selection process utilized by Houston METRO for the participation of private charter operators in providing service for the thirteen (13) events, it is the FTA's view that the selection process appeared to be based primarily on valid, objective criteria and Houston METRO employed this process in a fair manner to obtain the participation by many, but not all, private operators who responded to the solicitation.

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

If you have any questions or comments regarding this decision or the appeal procedure, please feel free to call Eldridge Onco, Regional Counsel, or me at (817) 978-0550.

Sincerely,



Robert C. Patrick
Regional Administrator

cc: **United Motorcoach Association**
Fame Tours, Inc.
Shirley DeLibero