



US Department
of Transportation
Federal Transit
Administration

Deputy Administrator

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

DEC 21 2005

Mr. Edward J. Gill, Jr. Esq.
Thompson Coburn L.L.P.
1909 K Street, N.W., Suite 600
Washington, D.C. 20006-6900

Re: Charter Service Complaints Nos. 2004-16 and 2004-18

Dear Mr. Gill:

On February 25, 2005, Joel Ettinger, then the Regional Administrator for Region V of the Federal Transit Administration (FTA), issued a charter service decision in response to complaints filed by September Winds Motor Coach, Inc. (September Winds) and Tecumseh Trolley & Limousine Service, Inc. (Tecumseh Trolley). Both complaints alleged that the Toledo Area Regional Transit Authority (TARTA) provided charter service for the Applebutter Festival in Grand Rapids, Ohio.

As you know, in several previous instances FTA had found TARTA in violation of the FTA's charter service regulation. In order to avoid further sanctions, TARTA agreed to a remediation plan by which it would seek FTA prior approval of any charter service it proposed to provide. In accordance with that mediation plan, FTA approved TARTA's lease of buses to Lakefront Lines, Inc. (Lakefront) for the Applebutter Festival since Lakeland did not have sufficient capacity to provide the service itself. The decision found that TARTA's provision of buses to Lakefront for the Applebutter Festival's shuttle service constituted a violation of TARTA's remediation plan and illegal charter service within the meaning of FTA's charter service regulations in 49 CFR 604. FTA's decision also recommended voluntary disgorgement of TARTA's \$6,880 fee to the complaining parties.

TARTA requested an extension of time until March 21, 2005 to file its appeal because it did not receive two attachments to the decision until March 9, 2005, the date an appeal would have been due. On March 10, 2005, TARTA requested an extension of ten days until March 21, 2005, for TARTA to file its appeal. FTA granted TARTA's request for an extension of time for TARTA to file its appeal until March 21, 2005. TARTA appealed FTA's decision on March 21, 2005. I apologize for the delay in responding to TARTA's appeal and any inconvenience that this may have caused.

FTA's Charter Service regulation states that:

The Administrator will only take action on an appeal if the appellant presents evidence that there are new matters of fact or points of law that were not available or not known during the investigation of the complaint.

49 CFR 604.19(b).

New Matters of Fact

A. Remediation Plan

In its appeal TARTA states that on September 8, 2004 it was contacted by Lakefront. Lakefront informed TARTA that Lakefront was obliged to provide eight buses on October 10, 2004 to the Historical Society of Grand Rapids; however, it lacked the capability to do so and was, therefore, requesting to lease TARTA buses at \$75.00 per hour. On September 13, 2004 TARTA sent a copy of this letter to FTA Regional Counsel Nancy-Ellen Zusman. TARTA was under a remediation plan requiring TARTA to obtain FTA approval before leasing buses to private operators. The remediation plan did not require TARTA to send a letter to the private provider seeking verification and supporting documentation of the request.

At the time of the investigation Regional Administrator Ettinger was aware of the fact that TARTA was under a remediation plan, and that TARTA had submitted Lakefront's request to lease buses to Regional Counsel Zusman. In addition, all information that TARTA provided in rebuttal to the complaints was and is part of the record and was considered at the time of the investigation. Therefore, this information does not constitute a new matter of fact within the meaning of Section 604.19(b).

B. TARTA's Contact with Applebutterfest

In response to the complaints filed by September Winds and Tecumseh Trolley, on December 7, 2004, TARTA's General Manager stated that TARTA had not held negotiations with representatives of the Grand Rapids Applebutterfest and that TARTA only had contact with Lakefront. The Regional Administrator's decision stated that it was disingenuous to aver that there was no contact between TARTA and representatives of the Applebutterfest. TARTA argues that this statement is not supported by the record. On January 13, 2005, however, Carol Erdody, Transportation Coordinator of the Applebutterfest, informed FTA that she knew that there was a complaint against TARTA, so she could not use TARTA to provide charter buses for the festival. FTA did not inquire as to how Ms. Erdody knew of the complaint against TARTA. TARTA argues that she could have obtained this information from the TARTA website or from an article in *The Blade* published on December 30, 2003; she did not necessarily have to be in

contact with TARTA in order to know about the complaints against TARTA and its inability to provide charter service. These assertions do not constitute new matters of fact that were not available or not known during the investigation of the complaint, per Section 604.19(b).

C. Dual-Door Buses

On December 7, 2004, TARTA's General Manager also stated that TARTA did not have any communication with Lakefront regarding the provision of dual-door buses for the Applebutterfest. The Regional Administrator's decision stated that it was disingenuous to aver that TARTA did not know Lakefront wanted TARTA buses because of Applebutterfest's desire for dual-door buses. TARTA argues that this statement is not supported by the record, and that it had no communications regarding the provision of dual-door buses. The record reflects, however, that Carol Erdody also informed Lakefront and other charter bus companies that she preferred buses with both a rear and a front door so that more passengers could enter and exit with greater speed. She requested city-type buses because they work better for access and egress. FTA's decision was a factual determination based on all the evidence before it. TARTA's denial of any contact with representatives of the Applebutterfest and any knowledge of the need for dual door buses is already documented in the record. Therefore, TARTA has not provided any new matters of fact within the meaning of 49 CFR 604.19(b) to constitute grounds for an appeal.

TARTA argued that the statement in the decision about the chilling effect of Carol Erdody's telephone search for dual-door buses is irrelevant. This argument, however, does not constitute grounds for an appeal. TARTA provided no new facts that were not already available at the time of the investigation.

D. Lakefront's Capacity

The Regional Administrator's decision stated that TARTA violated the accessibility and capacity exception because Lakefront "had vehicles available to provide service." TARTA argues that this is a subjective finding and not supported by the record. TARTA disputes FTA's factual finding that Lakefront had the capacity to service the festival. The record reflects that the complainants were witnesses to the fact that Lakefront's own vehicles were available on October 10, 2004 during the Applebutterfest. TARTA did not provide any new information to contradict evidence that Lakefront had vehicles available to provide service. Disagreement with FTA's factual findings in the decision does not constitute a new matter of fact.

Therefore, TARTA has not provided any new matters of fact within the meaning of 49 CFR 604.19(b) to constitute grounds for an appeal.

New Points of Law

In the appeal letter TARTA refers to a FTA charter decision issued on August 25, 2004, Charter Service Docket No. 2004-02, and a Federal Register Notice issued on November 3, 1987, 52 FR 42248, in support of its position. The decision and the Federal Register notice state that FTA does not expect grantees to inquire into evidence provided by private providers unless there is some indication of fraud or falsified statement. TARTA argues that pursuant to these two sources of precedent TARTA was not under any obligation to inquire into Lakefront's lack of capacity.

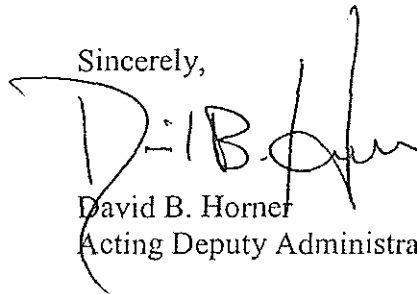
Nonetheless, the Charter Service appeal procedure requires "new points of law that were not available or not known during the investigation of the complaint." 49 CFR 604.19(b). The information that TARTA presents in its appeal request does not constitute a new point of law. Indeed at the time of the investigation Regional Administrator Ettinger was well aware of the decision at Charter Service Docket No. 2004-02 and the Federal Register Notice at 52 FR 42248 (Nov. 3, 1987).

Therefore, TARTA has not provided any new points of law within the meaning of 49 CFR 604.19(b) to constitute grounds for an appeal.

Conclusion

I have considered the evidence submitted by TARTA in support of its appeal. TARTA has not presented any new matters of fact or points of law that were not available or known during the time of the original investigation. Therefore I will not take any action on this appeal. Accordingly, the February 25, 2005 decision by the FTA Regional Administrator Ettinger is the final FTA decision in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "D. B. Horner". The signature is stylized and written over the typed name and title.

David B. Horner
Acting Deputy Administrator

cc: James K. Gee, General Manager
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