

BEFORE THE FEDERAL TRANSIT ADMINISTRATION

Thompson Motor Coach,
Complainant,

v.

Indianapolis Public Transportation Corporation,
Respondent.

Charter Complaint
49 U.S.C. Section 5323(d)
Docket No. 2005-12

DECISION

Summary

On August 18, 2005, Thompson Motor Coach (“TMC” or “Complainant”) filed a complaint with the Federal Transit Administration (“FTA”) alleging that Indianapolis Public Transportation Corporation (“Respondent” or “IndyGo”)¹ was providing service in violation of FTA’s charter regulation, 49 Code of Federal Regulations (C.F.R.) Part 604. The allegations related to IndyGo providing park and ride service for the Brickyard 400 NASCAR Race (the “BY400”). On August 24, 2005, FTA issued a letter providing the parties an opportunity to informally conciliate the matter. On September 28, 2005, the Respondent indicated the parties were unable to conciliate the charter issue.

On October 13, 2005, the Complainant submitted a formal complaint detailing further allegations regarding illegal charter operations. The complaint included allegations relating the provision of service for Indianapolis Colts football games and the Indiana State Fair. IndyGo filed its response to the allegations on December 2, 2005. IndyGo stated that the routes are special routes which are open to the public. FTA forwarded the response to TMC and provided TMC with thirty days to respond. TMC subsequently asked for two extensions in order to file its rebuttal. On May 31, 2006, TMC filed its rebuttal. On June 2, 2006, the American Bus Association (“ABA”) assisted with the filing of a second rebuttal for TMC. The second rebuttal included additional allegations.

On July 11, 2006, additional information was sent to IndyGo to provide a supplemental response. The second rebuttal had not been previously provided to IndyGo. IndyGo requested an extension and filed its second rebuttal on September 13, 2006.

Upon reviewing the allegations in the complaint and the subsequent filings of all the parties (the Complainant, the ABA and IndyGo), FTA has concluded that the service in question does not meet the definition of “charter.”

¹ IndyGo is a recipient of Section 5309 funds; therefore, it is required to comply with the charter regulations.

Complaint History

Complainant contacted the FTA on August 18, 2005, via email to complain that on August 7, 2005, TMC had attempted to provide transportation for the BY400 to park and ride riders at the Indianapolis Zoo (the "Zoo"). Complainant alleged that IndyGo was providing illegal charter service at that time and contacted local authorities who escorted TMC off the Zoo property.

FTA on August 24, 2005, provided IndyGo and TMC with an opportunity to conciliate its charter dispute. On September 26, 2005, IndyGo indicated the parties were unable to reach a resolution of the dispute.

On October 13, 2005, FTA received a formal complaint from TMC alleging that IndyGo provides illegal charter service for three events at the Indianapolis Speedway. The three events are the Indianapolis 500, the Formula One Race and the BY400. The charge for these events is \$15 roundtrip per rider. Additionally, the complaint alleged that IndyGo provides illegal charter service for Indianapolis Colts home games and the Indiana State Fair. IndyGo lists these routes as "special routes." Complainant indicated that IndyGo does not provide charter service for certain events like the Black Expo and the Circle City Classic which are handled by private charter operators. The Complainant requested compensation for lost revenues and attorney's fees.

On December 2, 2005, IndyGo filed its response. In its reply, IndyGo characterized the service provided for the three races as "special route/ shuttle service." Respondent states that the service runs from a number of park and ride lots around Indianapolis and that tickets are \$15 per person for a roundtrip.

One of the locations for pick-up was the Indianapolis Zoo (the "Zoo") which is private property. IndyGo made special arrangements with the Zoo to use its parking lot for one of the races. Both parties acknowledge that when TMC attempted to use the Zoo lot for pick-ups on August 7, 2005, one of the race days, TMC was escorted off the Zoo property by state police.

FTA forwarded IndyGo's response to counsel for TMC on December 28, 2005. TMC's counsel requested a number of extensions to provide its rebuttal through May 2006. On May 31, 2006, TMC provided a rebuttal reiterating its original allegations. On June 2, 2006, TMC provided a second rebuttal with assistance from the American Bus Association. In the rebuttal, TMC points out that the service provided by IndyGo does not meet the definition of "mass transportation." It is neither regular nor continuous and the fare charged is substantially more than the regular \$2 fare charged on its other routes.

On July 11, 2006, IndyGo was provided with additional information from TMC that had not been included in FTA's prior transmittal requesting a response. IndyGo requested an extension before providing its response and provided a response on September 13, 2006. In its response, IndyGo states that the Indianapolis Colts shuttles were an experimental service that was provided in 2003 and 2004, but has since been discontinued. IndyGo provides park-and-ride service on weekends during the State Fair. A private provider provides the service during the week. It also acknowledges providing a special route from four shopping malls to the Indianapolis Convention

Center on the opening day of the Black and Minority Health Fair. Three sponsors (a municipally owned utility, a radio station and the State Health Department) underwrite the cost of the service.

Discussion

As Complainant and Respondent have accurately stated, recipients of Federal financial assistance cannot provide charter service using federally funded equipment or facilities, unless one of the limited exceptions applies. 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). Respondent is asserting that it is not providing charter service under the definition of charter under 49 C.F.R. Section 604.5, but rather is providing service which meets the definition of "public transportation."²

A. Regulations

Under 49 C.F.R. Section 604.9(a), if a recipient desires to provide charter service, it must first determine whether there are any willing and able private charter providers. If there is at least one willing and able provider, the recipient is prohibited from providing charter service unless one of the exceptions applies. *Id.* The recipient must follow all the procedures for determining willing and able private operators under 49 C.F.R. § 604.11. The public participation process requires at a minimum that a notice be placed in a newspaper of general circulation and a notice is required to be sent to all private charter service operators in the proposed geographic charter service area. 49 C.F.R. § 604.11(b)(1) and (2).

"Public transportation" is defined in 49 U.S.C. Section 5302(a)(10) as:

transportation by a conveyance that provides regular and continuing general or special transportation to the public, but does not include school bus, charter, or intercity bus transportation or intercity passenger rail transportation provided by the entity described in chapter 243 (or a successor to such entity) [Amtrak].³

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, for a fixed charge for the vehicle or service, who have acquired the exclusive use of the vehicle or service in order to travel together under an itinerary either specified in advance or modified after leaving the place of origin. Includes incidental use of FTA funded equipment for the exclusive transportation of school students, personnel, and equipment. 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 required for charter service. In order to qualify as charter service, the following questions need to be answered:

² As part of Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), the definition of "mass transportation" was changed to "public transportation." Section 3004(d)(7)

³ Since SAFETEA-LU changed the definition of "mass transportation" to mean "public" transportation, FTA will hereinafter refer to "public transportation" rather than "mass" transportation.

- 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?

B. Indianapolis Motor Speedway Events

- a) Is this transportation service using buses funded with FTA money?

IndyGo has acknowledged that the service was run using buses funded with FTA funds. (*See*, IndyGo Response dated Dec. 2, 2005 at pg. 6) Additionally, the buses are stored in FTA funded facilities.

- b) Is the service for a common purpose?

The service that was provided was clearly for a common purpose. Although IndyGo contends otherwise, the service was only for race attendees. IndyGo acknowledges that the service consisted of "special routes" or "shuttle services" for the Indianapolis 500, the Grand Prix race and the NASCAR Brickyard 400. (*See, Id.* pg. 2) The morning service started at 7 am and the afternoon service continued until approximately three hours after the race. *Id.* at pg. 3. The service was designed around meeting the needs of the race attendees, not for the purposes of providing public transportation to the public at large. Although the routes may have been heavily advertised via brochures, radio advertising and public service announcements, the advertisements were directed at race attendees, not the general public. IndyGo contends anyone who wanted to go to the Indianapolis Speedway could use the service, but other than race attendees, why would anyone want to go to the Speedway on the day of the races?

- c) Is it under a single contract?

As far as FTA is aware, the service was not under a single contract. However, IndyGo acknowledged that the routes were based on historic traffic patterns and in consultation with law enforcement. *Id.* at pg. 2. Also, the schedule for the service is dependent on the race schedule. The service will run until three hours after the last race. IndyGo acknowledges that it has been providing this service for decades. Although there may not be a formal contract between the Speedway and the Respondent, the two parties have clearly made some arrangement regarding the provision of service for the Speedway events. The Speedway website has a link under transportation to the IndyGo website.

- d) Is it for a fixed charge for the vehicle or service?

Fares were set at \$15 per person. According to IndyGo's website, currently, a single ride fare is \$1.50 and a day pass is \$3.50.⁴ The roundtrip fare for race day service was \$15. One can

⁴ The Race Day Shuttle brochure indicated that Day Passes were \$3 at the time of the 2005 races.

conclude that this service was not designed for anyone not attending the race based on the fare structure alone. The charge of \$15 per rider qualifies as a fixed charge for the service since it was not the regular fare and in fact was five times a regular fare roundtrip. *See*, attached brochure exhibit.

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?

The vehicles were used to pick-up race attendees from specific park and ride lots and drop attendees at the Speedway. Even IndyGo acknowledges that it expected that most passengers would be race attendees, but anyone could ride the bus. Buses left when they were fully loaded or IndyGo employees determined departure was appropriate. The last morning bus departed for the track 15 minutes before the official race start time. (*See*, Race Brochure) One of the pick-up locations was the Indianapolis Zoo (the "Zoo") parking lot, which was private property. Neither party disputes that on August 7, 2005, when the Complainant attempted to load passengers on Zoo property, he was escorted off the property by law enforcement personnel. The vehicles were used exclusively to transport race attendees via an itinerary specified in advance.

This particular service although not under a single contract was designed solely to benefit attendees of the race. The service ended three hours after the races ended. The service was tied to the race, it was not operating on a regular schedule the way all other IndyGo routes do. The charge for the service was \$15 per person.

If the service is analyzed as potentially public transportation, then it does not meet the definition of public transportation. It was not regular and continuing general or special transportation. The service only occurred on race days which happen three times a year. IndyGo calls the service "special service"; however, FTA does not recognize "special service." The routes were not designed as public transportation. Additionally, one of the pick-up locations was on private property, namely the Zoo parking lot. Again this service was not designed as public transportation.

There was a common purpose, specifically for the races. It was not regularly scheduled service. The exclusive use of the vehicles was to transport individuals to the races, although IndyGo contends that the service was open to the public, it was not public transportation. No one besides race attendees would be interested in riding the buses. This service did not involve additional buses on a regularly scheduled route. If it had, it would have met the definition of public transportation.

This service does not fall under any of the recognized charter exceptions either. IndyGo characterizes the service as a "special route."⁵ FTA does not recognize "special routes" as a category of service.

The IndyGo service does not meet the definition of either charter service or public transportation. It does look very similar to a service that FTA has previously stated was not charter service.⁶

⁵ *See*, Declaration of Donna White dated Dec. 1, 2005.

Clearly this service would be the type of service that private providers should be provided with an opportunity to participate in. FTA strongly recommends that IndyGo advertise the service in advance and allow local private providers the opportunity to work in conjunction with IndyGo to provide the service. Region VI issued a decision dated October 28, 2003, which involved a complaint against Houston METRO regarding the annual Houston Livestock Show and Rodeo. The facts of the Houston METRO case are very similar to the facts here; however, in the Houston case, Houston METRO advertised for participation by private providers in the event. Clearly, the Complainant was interested in participating. IndyGo could easily follow Houston METRO's example and invite private provider participation.

C. Indianapolis Colts Games

IndyGo indicates that the Indianapolis Colts shuttles have been discontinued.

D. Indiana State Fair

The Indiana State Fair service is also characterized by IndyGo as "special" park and ride shuttle service. (See, IndyGo Response dated September 11, 2006, at pg. 3) The only differences between the services IndyGo provides for the Indianapolis Speedway races and the State Fair is the fare structure which is \$2 per passenger, rather than \$15 per person and the number of days the service runs. The State Fair service runs Friday through Sunday during the State Fair for two weekends. During the week the same service is provided by a private operator who has made arrangements with the State Fair. The weekend service for the State Fair would also be a good candidate for private provider participation. It is interesting to note that during the week the service is operated by a private provider.

FTA does not recognize "special" service.⁷ IndyGo indicated that it has a regular route that runs by the State Fair. Running additional buses along that fixed route would be permissible since that service would qualify as public transportation.

⁶ Question No. 27(c) of the 1987 Charter Questions and Answers states the following with regard to whether this type of service falls within the definition of charter:

c. Service to regularly scheduled but relatively infrequent events (sporting events, annual festivals) that is open door, with the routes and schedules set by the grantee and with fares collected from individuals, whether or not the individual fares are subsidized by a donor?

Answer: No. Such service does not meet the charter criteria of being under a single contract, for a fixed charge, exclusive use, or with an itinerary controlled by a party other than the grantee. However, such services would appear to be excellent candidates for privatization since they may very well be self-supporting without the need for public subsidies. In accordance with UMTA's private enterprise policy, grantees should examine the interest and capability of the private sector in providing the service.

⁷ Although FTA does not recognize "special service," the definition of "public transportation" includes regular and continuous "special transportation." The term "special transportation" is meant to refer to a type of "public transportation"; namely, paratransit or other demand response service. The "special service" IndyGo refers to is not paratransit or demand response service.

E. Black Expo and Minority Health Fair

The IndyGo service provided for the Black and Minority Health Fair is a different type of service than the service provided for the State Fair and for the Indianapolis Speedway Races. IndyGo indicates that the service is designed for elderly and disabled riders. *Id.* at pg. 4. The routes were chosen near regular fixed route stops and free parking locations. The service was free and was subsidized by a utility company, a local television station, and the state health department. The service provided for the Indiana Black Expo (*See*, Exhibit B-3) appears to be free modified fixed route service. The service described for every day of the event except Thursday, July 13, 2006, was described as modified regular routes. *Id.* The routes were modified because of street closures for the event. It is unclear from the documents provided whether the Thursday service is also modified regular service or not. Since the service is being subsidized by three sponsors, presumably IndyGo is recovering its fully allocated costs. This service appears to be regular modified fixed route service, namely public transportation, and not charter service.

Conclusion

Based on all the information provided, FTA finds that the service Respondent is providing does not meet the definition of "charter." However, it also does not fully meet the definition of "public transportation." Therefore, FTA strongly encourages IndyGo to work cooperatively with private providers to jointly provide the service in the future.

Finally, the charter regulation is currently the subject of a negotiated rulemaking. It is possible that a new charter regulation will modify the definition of charter such that the Speedway service might qualify as charter service in the future.

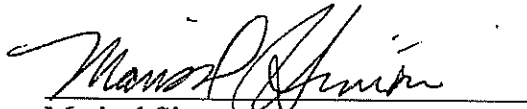
Remedy

Complainant has requested that Respondent immediately cease the charter operations at issue. FTA denies Complainants' request for the cease and desist order because Respondent is not providing charter service pursuant to 49 C.F.R. Part 604. Respondent has also requested compensation for lost revenues and attorney's fees. FTA does not have authority to grant those requests.

Order

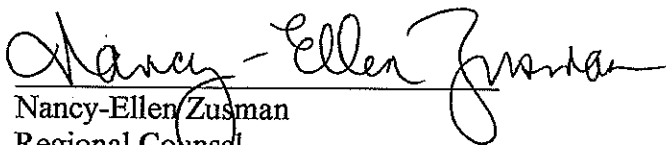
FTA finds that Respondent has not been providing impermissible charter service.

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 James Simpson, Administrator, FTA, 400 Seventh Street, S.W., Room 9328, Washington, D.C. 20590.



Marisol Simon
Regional Administrator

2-7-07
Date



Nancy-Ellen Zusman
Regional Counsel

2/07/07
Date