

BEFORE THE FEDERAL TRANSIT ADMINISTRATION

American Bus Association,
Complainant

v.

Charter Service Docket No. 2005-06
49 U.S.C. Section 5323(d)

The Greater Cleveland Regional Transit Authority,
Respondent.

DECISION

Summary

On April 29, 2005, the Federal Transit Administration (FTA) was notified that the American Bus Association (the "ABA" or the "Complainant") believed The Greater Cleveland Regional Transit Authority ("GCRTA" or the "Respondent") intended to violate the charter regulations.

On May 10, 2005, the parties were provided a thirty day conciliation period in order to resolve the dispute. The ABA notified the FTA on June 14, 2005, that the parties were unable to resolve the dispute and it wished to initiate the formal charter complaint process. GCRTA was provided an opportunity to respond to the allegations in the complaint concerning proposed service for the Rock and Roll Hall of Fame's CMJ/Rock Hall Music Fest scheduled for June 9-11, 2005 (the "Music Fest"). On July 29, 2005, GCRTA provided a response, and on September 2, 2005, the ABA provided its response to the GCRTA's reply. GCRTA filed a second response dated September 23, 2005, and the ABA responded on September 28, 2005.

Upon reviewing the allegations in the complaints and the subsequent filings of both the Complainant and the Respondent, FTA has concluded that the service in question constitutes "mass transportation" and is not a violation of the charter regulations.¹

Complaint History

The ABA initially notified the FTA, GCRTA and the Rock and Roll Hall of Fame and Museum (the "Hall of Fame") that GCRTA would be violating the charter regulations if it provided service for the Music Fest. In its letter dated April 28, 2005, the ABA indicated that one of its members, Great Day Tours and Charter Bus Service (Great Day) was willing and able to provide the service for the Music Fest. Complainant indicated that Great Day had been told by the Hall of Fame that it had contracted with GCRTA to provide the service and the Hall of Fame was paying for the service. Riders would need to either donate \$1 or an Ohio Lottery Ticket to offset the charge or attendees could ride free with an event badge. The Music Fest is an annual event and the service would only be running during the three day event. The ABA asserted that the service is only for attendees at the Music Fest, it will only operate between the Hall of Fame and the Flats Event Center and for evening activities related to the Music Fest, there will be no fee charged and the

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

service only runs the three days of the event. Attached to the letter were a number of FTA charter decisions. The ABA and GCRTA were provided with thirty days to conciliate the complaint.

On June 14, 2005, the ABA notified the FTA that the parties were unable to resolve the dispute and FTA initiated the formal charter complaint process. GCRTA filed its response dated July 29, 2005. In its response, GCRTA asserted that the Music Fest service was "mass transportation" and a permissible special event service. GCRTA indicated that it received a subsidy from the Hall of Fame, but that the service was controlled by GCRTA, open to the public and would benefit the public at large. GCRTA indicated the service was advertised in its monthly newsletter (60,000 copies were distributed), on its website and by targeted e-mails sent to almost 5,000 GCRTA riders. It was also advertised on GCRTA's electronic message boards in all twenty of its rail stations for two weeks prior to the event. Attached to its response, GCRTA included a letter addressed to the Hall of Fame indicating that the service would be controlled by GCRTA, but subsidized by the Hall of Fame, copies of its monthly newsletter and website, and copies of FTA charter decisions.

On September 2, 2005, the ABA responded to GCRTA's response. Complainant stated that the service provided was in fact charter service, not "mass transportation. It was for a one-time event under a single contract, the service was not really controlled by GCRTA and it was not for the benefit of the public at large. In its response the ABA asserts that the service was only "nominally open door." The ABA relies on *Kemps Bus Service, Inc. v. Rochester-Genesee Regional Transportation Authority*, Charter Complaint Docket No. 2002-02 for the proposition that even if a service has some elements of "mass transportation," other facts indicate the service is charter in nature.

GCRTA requested and was granted leave to file a further response. On September 23, 2005, it issued a further response. In its response, GCRTA indicated that 23% of the riders of the service paid a regular fare. It also stated that "input" from the Hall of Fame is not the same as control of the service. GCRTA also indicated that the marketing campaign was to ensure that riders in the area were aware of the service.

On September 28, 2005, the Complainant filed another response. Complainant states that almost all the users of the service were patrons of the Music Fest. It further states that all the marketing was targeted to Music Fest patrons. Finally, it states that the service was not regular and continuing, but took place over the course of three days for Music Fest patrons.

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). Respondent is not asserting that any of the charter exceptions apply, but rather that the service they provided was 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, 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. Additionally, "mass transportation" is defined in 49 U.S.C. Section 5302(a)(7) 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 sightseeing transportation.

FTA needs to determine whether the service meets the definition of "charter" as the Complainant argues or "mass transportation" as the Respondent argues. In additions to the definitions referenced above, FTA describes three elements distinguishing "mass transportation" from "charter service."

First, mass transportation is under the control of the recipient. Generally, the recipient is responsible for setting the route, rate, and schedule and deciding what equipment is used. Second, the service is designed to benefit the public at large and not some special organization such as a private club. Third, mass transportation is open to the public and is not closed door. Thus anyone who wishes to ride on the service must be permitted to do so.

Blue Bird Coach Lines, Inc. v. Linton, 48 F.Supp. 2d 47 (DC Dist. Co. 1999), citing 52 Federal Register 11916, 11920 (April 13, 1987).

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 is not charter service. (See FTA Questions and Answers, Number 27(c), 52 Federal Register 42248, November 3, 1987.)

In applying the definition of "charter service" and the three- prong test, both referenced above, to the Music Fest service, while some criteria of the definition of "charter service" applies, not all criteria are met and all of the criteria in the three prong test determining mass transportation are met.

The Music Fest service includes the use of buses funded in part by FTA; it is under a single contract; and is under an itinerary specified in advance. However, the Music Fest service is not for the "exclusive use" of a single group of persons. As to the first prong of the test for mass transportation – under the control of the recipient – GCRTA controlled the route, schedule, and equipment used. GCRTA set up temporary bus signs for the special event pick-up points and the other stops were regular stops at GCRTA stations. GCRTA stated that fares would either be \$1, a non-winning Ohio Lottery ticket or a Music Fest badge. The first prong of the test has been met, the service was under the control of GCRTA.

As to the second prong of the test – designed to benefit the public at large – the Music Fest service was open to the public. While it is clearly evident that the Music Fest service was intended to serve individuals attending the Music Fest, that, in and of itself is not determinative of this factor. In *Blue Bird Coach Lines*, it was alleged that a recipient's bus shuttle service to carry passengers from the Rochester area to football and basketball games in Buffalo (150 miles round trip) and Syracuse (190 miles round trip) from designated departure areas to the stadium parking lot for the games and departed after the games ended or when all passengers were accounted for, was charter service. In rejecting this claim, and specifically as to prong two, the Court stated:

Granted that sports fans are not the general public but a "subset of the general public," A.R. 37, "the service is designed so that anyone can board the bus, no reservations are required and, according to the brochure, fares are paid as you board." There is no evidence in the record that the shuttle service customers formed a "well-defined and cohesive enough group to be considered a 'special organization'"

48 F.Supp. 2d at 51.

Here, the same can be said for the Music Fest. The Music Fest service was designed to be open to anyone. No reservations were required. Non-Music Fest patrons could either pay \$1 or present a non-winning Ohio Lottery ticket. Similar to the *Blue Bird* case, it is irrelevant whether fares are collected from individuals or the cost of service is partially subsidized by a donor. The fare structure does not determine whether bus service is charter. (See, FTA Questions and Answers, Number 27(a).) Finally, GCRTA indicated that 23% of the fares were collected from fare-paying passengers.

The third prong is that the transportation service is open to the public. As previously noted, the service is open door. And, the availability of the service was well publicized. The notification of the service was available on the GCRTA website, targeted emails, in GCRTA's *Rider's Digest*, and on electronic message displays at all GCRTA train stations.

This case is distinguished from the charter decision of *Charter Service Complaint Docket No. 2002-02, Appeal from Regional Administrator's Decision (Appeal Case No. 2002-02)* cited by the Complainant. The case involved bus service provided by Rochester-Genesee Regional Transportation Authority (RGRTA) from various senior citizens' complexes to Wegman's grocery store. There, among the references made, FTA stated:

RGRTA provided a newly revised "grocery shuttle outline" showing layovers at the store of from 40 to 100 minutes from arrival to leaving. According to the "grocery shuttle outline," the buses do not proceed to any other destination once they arrive at the store; the buses idle and wait for the grocery store customers to complete their shopping before leaving the store.

(See, also the discussion relating to the service for the *Ladies Professional Golf Association Wegmans Rochester International Golf Tournament (LPGA)* in the same case, wherein FTA stated that in the case of the *LPGA*, "RGRTA would hold buses until the course was clear. A general note to the schedule stated that, 'Closing times are approximate. The gauge is one-half hour after the last group comes off from the 18th

hole.' ... The evidence presented establishes that LPGA controlled the service by requiring an indefinite schedule based on whether the golf course was clear..."

In this case, the buses are not scheduled to operate based on use and direction by either the Hall of Fame or its patrons. GCRTA stated that there would be frequent bus service between 11:30 am and 6 p.m. linking the Waterfront Station with the Festival Village; frequent bus service between 6 pm and 11:30 pm linking the Waterfront Station with the Rock Hall and six music venues; and then starting at midnight and continuing until after the performances conclude, frequent bus service from the six performance venues to Public Square (GCRTA's late-night service hub), the Muni Lot and six specific hotels. Temporary bus signs were posted at all the pick-up points and patrons were directed to stand at bus stop signs in order to be picked up.

The *Appeal Case No. 2002-02* decision further states:

In addition, the "grocery shuttle outline" does not look anything like the schedules and maps contained in RGRTA's regular service schedules. ... RGRTA provided maps and schedules that are partially hand-drawn and hand-written, do not include details like location of bus stops or bus stop arrival and departure times, and that do not appear anything like RGRTA's other maps and schedules. The only documents that include definite arrival and departure times at specific stops also include specific details to the bus driver about where and when to take a service road and what direction to take at a stop-sign along with directions to "pick up group" and "drop off group." The schedule also states, "Please stop at First Federal Bank for any passengers requesting to get off at that location." ... The schedules are not published in the same format as the regular service RGRTA provides. The schedules indicate extended layovers so that Wegmans customers can conduct their business.

In this case, the Music Fest service listed pick-up locations on GCRTA's website and in its *Rider's Digest* brochure. Patrons needing pick-up were directed either to regular stations or temporary bus stops on the routes. And, unlike the RGRTA's Wegman grocery bus service, the Music Fest service provided no indication that ad hoc route departures were allowed.

Finally, the *Appeal Case No. 2002-02* decision states:

FTA looks not only at who rides the bus in determining if it is open door, but also at the intent of the recipient in offering the service. To determine the intent, FTA considers what attempts the recipient has made to make the service known. For instance, FTA has found that publishing the service in the grantee's pre-printed schedules is the best marketing effort. *Washington Motor Coach Association v. Municipality of Metropolitan Seattle*, WA-09/87-01 (March 21, 1988). In its Appeal, RGRTA argued that it widely advertised the LPGA routes to the general public. But according to its July 15, 2002, response to FTA, RGRTA only issued a news release, placed the information on its automated telephone system for passengers, and made it available at its Midtown Sales Center and Reception Desk. There was no evidence of advertising on inside and outside bus cards, radio, or

television. These limited publicity efforts evidence that the service was designed to benefit the LPGA rather than the public at large.

In the case here, the notice of Music Fest service was advertised at numerous locations. If the Music Fest service was only advertised on the Hall of Fame's website, an argument could be made that the bus service was effectively limited to Music Fest patrons since they would likely be the only ones who accessed the Hall of Fame website and learned of the GCRTA bus service. However, having the Music Fest service on GCRTA's general bus website and other public locations clearly show that the public at large had notice of the available service.

Finally, the Music Fest service is very similar to the service described in *Gray Line Seattle v. King County Metro: Seattle Home Show*, February 11, 2005. The Music Fest service as well as service provided for the Seattle Home Show were services provided for specific events, but both services met the definition of "mass transportation" rather than "charter service."² In the 1987, Charter Service Questions and Answers, Question No. 27(c) stated the following [as to whether the service would be considered 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. (Number 52 42248, November 3, 1987)

This particular service, although not meeting the definition of charter service, may be a good candidate for the private sector to provide in the future. FTA encourages the parties to explore that possibility.

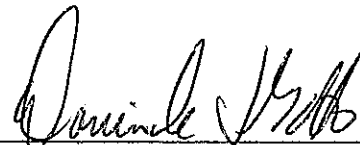
Conclusion

Because GCRTA did not violate the charter regulations, FTA denies the complaint.

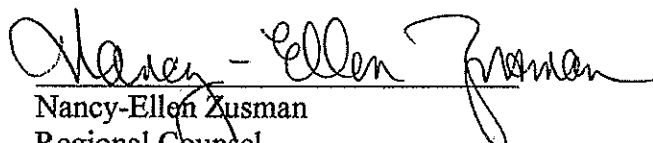
² The Complainant correctly points out that as part of Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, the definition of "mass transportation" means "public transportation." Section 3004(d)(7) However, the complaint precedes the change and therefore, it does not apply.

Appeal

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 David Horner, Acting Deputy Administrator, FTA, 400 Seventh Street, S.W., Room 9328, Washington, D.C. 20590.

for 
Donald Gismondi
Acting Regional Administrator

Dec 29, 2005
Date


Nancy-Ellen Zusman
Regional Counsel

Dec. 29, 2005
Date