BEFORE THE FEDERAL TRANSIT ADMINISTRATION

Indian Trails, Inc.,
Complainant

v.

Charter Complaint
49 U.S.C. § 5323(d)

City of Kalamazoo Public Transportation Division (Kalamazoo Metro Transit),
Respondent

DECISION

Summary

Indian Tribes, Inc. ("Complainant") filed a complaint dated November 16, 1998, with the Federal Transit Administration ("FTA") alleging, in sum, that the City of Kalamazoo Public Transportation Division ("Respondent") is providing service in violation of FTA's charter regulation, 49 CFR Part 604. The service specifically complained of pertains to respondent's bus transportation service between Western Michigan University ("WMU") home football and basketball games and parking facilities located approximately one and a half miles from the site of the games.[1] Respondent answered on December 28, 1998, complainants replied on February 2, 1999, and respondents responded on March 5, 1999. The complaint process is now complete and, upon reviewing the allegations of the complaint, FTA has concluded that the service in question is mass transportation, not charter service. Therefore, respondent has not operated services in violation of the charter regulations.

Complaint History

Complainant filed its complaint on November 16, 1998 along with exhibits A through C, a purchase order from WMU to complainant for bus service, invoices from complainant to WMU for that service, and a yellow pages advertisement published by the respondent. The complaint alleges that the respondent is providing illegal shuttle service from parking points on the WMU campus to WMU football and basketball games played approximately one and a half miles away. Specifically, complainants allege that the service falls within the definition of charter service because it is provided for the common purpose of going to the sporting event, under a contract by which WMU pays the cost, to

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[1] Complainants also asserted that respondent's transportation service provided exclusively for members and coaches of the WMU football team violated FTA's charter regulations. By a letter dated January 19, 1999, counsel for respondent alerted both FTA and complainant that this particular service was being discontinued. Had FTA determined that this service was violating its charter regulations, which it appears that it was, FTA's action would have been to issue a cease and desist order. So long as this service has been discontinued, FTA considers the issue moot.

a group of passengers exclusive of the general public since no one other than game attendees would use the service.

Respondent filed its answer to the complaint on December 28, 1998. In it, respondent denied that it was providing illegal charter service and attached as exhibits one through four its contract with WMU, a copy of the schedule for the service in question, yellow pages advertisements from 1980 through 1996, and a letter from complainants authorizing respondent to assist in providing service for the Kalamazoo Public Schools during specific dates. Respondent asserted that its service was not illegal charter service because it was open door, the respondent set its routes, and that the subsidy provided by WMU did not transform the service into charter.

FTA then notified complainant that it had 30 days to respond to respondent's answer. Before that response was received, respondent forwarded a letter to both complainant and FTA stating that it would be discontinuing its service to the WMU football team[2], but reasserting its contention that the public shuttle was not charter service. Complainant then filed their reply on February 2, 1999, attaching this letter as Exhibit A. This reply characterized respondent's answers and reiterated its own arguments from the complaint.

Respondent filed a final rebuttal on March 5, 1999 in which they disputed the complainant's characterization of the answer and outlined again why its service did not fall within the FTA's definition of charter service. It stated that the complainant mischaracterized several sections of the answer and overlooked the FTA's own publications regarding charter service.

Discussion

The central issue to be decided in this matter is whether the service being provided by respondent is impermissible charter service or permissible mass transportation. Complainant correctly cites the definition of charter service, found at 49 CFR section 604.5(e), as follows:

> . . . transportation using buses or vans . . . of a group of persons who pursuant to a common purpose, under a single contract, at a fixed charge . . . for the vehicle or service to travel together under an itinerary either specified in advance or modified after having left the place of origin.

In order to decide this matter, these elements of charter service must be compared to those of mass transportation. Mass transportation is defined as transportation "by a conveyance that provides regular and continuing general or special transportation to the public." 49 USC § 5302(a)(7). The characteristics of mass transportation which distinguish such a service from charter have been set forth as follows:

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[2] Complainant had included this service in their charge that respondent was providing illegal charter service. As stated in footnote 1, because the respondent as ceased in providing this service, FTA considers the question of whether or not it was impermissible as moot.

> 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.

52 Fed. Reg. 11916, 11920 (April 13m 1987).

FTA has found that using a balancing test derived from these three factors best ascertains whether any given service is mass transportation or charter. Seymour Charter Bus Lines v. Knoxville Transit Authority, TN-09/88-01 (November 29, 1989). As such, analyzation of three basic questions will reveal the nature of the service: (1) is the service under the control of the recipient; (2) is it designed to benefit the public at large; and (3) is it open to the public at large and not closed door?

Additionally, Question 27(c) of FTA's "Charter Service Questions and Answers," 52 Fed. Reg. 42248, 42252 (November 3, 1987), asked whether service to a regularly scheduled but relatively infrequent event, such as a sporting event, that is open to the public, with routes and schedules set by the grantee and with fares paid on board, would be viewed as charter. FTA answered that such service would not meet the criteria because there was no single contract with a fixed charge, no exclusive use, nor an itinerary controlled by someone other than the transit operator. Complainant's argument that the contract with WMU translates into a single contract with a fixed charge is unpersuasive. WMU has merely entered into a route guarantee and as such does not know what the final charge will be before the service is actually performed. Nor does the fact that individual fares are not charged to the passengers change the equation. FTA's interpretation in the above-cited question specifically allows individual fares to be subsidized by a donor. This interpretation places no limitation on how much of a subsidy is allowed. As such, a donor may subsidize the entire individual fare without transforming the service from mass transportation to charter.

The argument that all of the individual passengers somehow transform into a single group is also unpersuasive. As respondent stated, not all of its passengers have the same intent upon boarding the shuttle service – some arrive to the game early in order to "tailgate" while some arrive just as the game is about to begin; some have tickets already, others do not; some leave at halftime, other stay until the last play no matter what the score. Such various intents cannot be interpreted as forming a single, cohesive group.

The remainder of this discussion will address each of the three factors of mass transportation in turn.

1. Is this service under the control of the respondent?

Complainants contend that WMU sets the itinerary for the shuttle service when the service is ordered and that it obtains the exclusive use of the vehicles for the period of the service for each game. Respondents do not deny that this may have been how the shuttle service operated when complainants provided the service. Respondents argue, however, that in the current arrangement with WMU, respondent determines the amount of service to be provided. The respondent states that nothing in their contract with WMU mentions itineraries and that under a later agreement all decisions relative to bus itineraries were left exclusively to respondent. Indeed, FTA finds that the language of the contract does not give WMU control over the itinerary.

FTA finds that the service offered to the games is within the control of the respondent. The record indicates that the respondent has published a schedule that fixes the route, pick up, and drop off points. This schedule is identical in all respects to all other schedules published by the respondent. This schedule demonstrates that respondent, not WMU, chose the routing, direction, frequency, and timing of the services provided. Respondent also notes that it is free to change the route at any time. FTA considers it strong evidence that charter service is not involved when routes and schedules are set by the grantee.

2. Is the service designed to benefit the public at large?

Complainant apparently argues that the sporting game attendees are a subset of the general public and, as such, cannot be said to represent the general public and, therefore, the service is not for the benefit of the public at large and not mass transportation. Respondent states that the service is designed so that anyone can board the bus – no reservations are required.

FTA finds that the second element of mass transportation has also been met. In the preamble to FTA's charter regulation, 52 Fed. Reg. 11916, 11920 (April 13, 1987), FTA states that service is mass transportation and not charter when it benefits the public at large and "not some special organization such as a private club." There is no indication from the record that users of respondent's shuttle service are members of a private club, or even that they necessarily know one another before boarding. In fact, there is evidence that many do not know one another and actually have different intentions regarding when they shall arrive and leave the game site. Additionally, respondent stated that the shuttle routes pass along other Kalamazoo transit routes and are able to pick up and drop off passengers at any stop. All of this supports the idea that the service benefits the public at large.

FTA notes that it has previously found it questionable whether sporting event attendees "form a well-defined and cohesive enough group to be considered a 'special organization.'" Washington Motor Coach Association v. Municipality of Metropolitan Seattle, WA-09/87-01 (March 21, 1988). In this instance, the above-cited differences in the personal intentions held by individual riders

indicate that no such special organization exists. Respondent has widely advertised its service through publication and dissemination of its schedule in the same manner that it publishes and disseminates all of its schedules. Moreover FTA sees no reason why mass transportation service cannot be designed to transport those members of the general public who wish to attend sporting events.

3. Is the service open to the public and not closed door?

Complainant contends that the service is not open to the public because only sports game attendees will use it. Respondent contends that the service is open door because anyone can board the bus – no special pass or ticket is needed – and because the shuttle route covers streets served by other Kalamazoo Metro Transit bus routes, and the shuttle may pick up and drop off passengers at these stops. While complainant's assertion is likely to be true, this fact does not negate the open door quality of the service. FTA looks not only at who rides the bus in determining whether it's open door, but also at the intent of the grantee in offering the service. Washington Motor Coach Association v. Municipality of Metropolitan Seattle, WA-09/87-01 (March 21, 1988). To determine the intent, FTA considers what attempts the grantee has made to make the service known. For instance, FTA has found that publishing the service in the grantees preprinted schedules is the best marketing effort. Washington Motor Coach at 10. As noted already, respondent has published a schedule that is identical in all respects to its other route schedules and is widely available. This alone would indicate that the respondent's intent is that the shuttle be open door. It is also noted that complainant has made no allegation that persons desiring to use the shuttle service have been turned away. Thus, there is no indication that the service is not open door. FTA concludes that the service is open door, widely advertised and open to the public.

Conclusion and Orders

After balancing the elements of mass transportation to the service in question, FTA concludes that Respondent's service is permissible mass transportation and not impermissible charter service.

In accordance with 49 CFR 604.19, you may appeal this decision within ten days to Gordon J. Linton, Administrator, FTA, 400 Seventh Street, S.W., Room 9328, Washington, D.C., 20590.

Joel Ettinger
Regional Administrator

4-14-99
Date