BEFORE THE FEDERAL TRANSIT ADMINISTRATION

In the matter of:	)	
United Motorcoach Association	)	CHARTER COMPLAINT
Complainant	)	49 U.S.C. 5323(d)
v.		
City of Rome Transit Department	)	CHARTER SERVICE DOCKET
		No. 2007-02
Respondent	)	

DECISION

SUMMARY

The United Motorcoach Association, hereinafter referred to as "complainant", filed this complaint with the Federal Transit Administration (FTA), alleging that the City of Rome Transit Department (RTD), hereinafter referred to as "respondent", has provided charter service in violation of the FTA charter regulation, 49 C.F.R Part 604. The complainant specifically alleges that respondent provided impermissible charter service by leasing a "trolley type vehicle" to a private local passenger provider, Shuttle Tran, some 49 times during 2006; that Shuttle Tran receives a $50.00 "commission" for providing the service but only collects the monies and remits to RTD as only RTD buses and drivers are utilized in these operations; and that rather than ceasing charter operations, RTD chose to "subcontract" all charter work through the local private provider, Shuttle Tran.

FTA accepted the complaint after determining that the complaint was not without obvious merit and on February 15, 2007, advised both parties to attempt to conciliate the dispute in accordance with 49 C.F.R. §604.15. By letter dated March 5, 2007, complainant advised that the conciliation efforts had failed and provided documentation in support. By letter dated March 12, 2007, FTA directed both parties to proceed with the formal complaint process.

THE COMPLAINT

The United Motorcoach Association is an association representing private, for-profit charter operators engaged in the business of providing charter and other transportation services. By letter dated February 5, 2007, complainant filed this complaint with the FTA alleging that the services in question are a form of prohibited charter service. Specifically, complainant alleges that the respondent provided impermissible charter services by leasing a trolley type vehicle to a private local passenger provider, thus providing prohibited charter service indirectly through the private provider which it was not legally able to provide directly. In essence, complainant alleges that the private provider was merely a "broker" for the respondent's illegal charter service; that the service provided was provided with respondent's equipment and drivers; and that the lease of said equipment to the private provider failed to qualify as a valid exception under the charter rule because the private provider did not lack capacity. Finally, complainant offered as an example a call it allegedly placed to the respondent in November of 2006 in which it requested that a trolley bus be made available for a wedding requesting terms and availability. Complainant stated that an RTD employee taking the call encouraged it to "go ahead and contract for the charter service as the dates fill up". Complainant states that it was not referred to a willing and able private provider and that RTD noted that it was happy to have its business.

THE RESPONSE

Complainant's complaint was forwarded to the respondent for response by letter dated March 12, 2007. On April 13, 2007, RTD filed its response. The respondent alleges that the service complained of did not constitute a violation of 49 U.S.C. §5323(d) or the charter regulation as set forth at 49 C.F.R Part 604.

Respondent represents that it does not charter any category of revenue vehicle or offer contracted services through direct contact with the public. The respondent asserts that it completed a public participation process to document the availability of "willing and able" private charter operators and that when contacted by an individual or individuals interested in charter services, the individual or individuals are informed that the RTD does not provide charter services and are then referred to a local private carrier. When contacted by a private charter provider requesting support for charter service, the RTD admits that it will enter into a subcontract agreement with the private carrier to provide the vehicle needed but that such agreements are entered into in accordance with 49 C.F.R Part 604.9(b)(2). RTD further asserts that "subcontracted" services it provides are incidental to the provision of mass transportation services and that such services never interfere with the provision of mass transit services or detract from the provision of those services. Finally, the RTD maintains that it only knowingly leases its equipment to private providers which lack accessible equipment or which lack capacity. In order to ensure that private carriers are in fact eligible to lease equipment in accordance with the charter rule, the RTD advised that it has adopted policy which requires written confirmation from all private providers wishing to lease equipment that the provisions of the exception to the charter rule under 49 C.F.R 604.9(b)(2) are, in fact, met. RTD

concludes by stating that it is committed to the principal behind the charter rule that federally funded equipment and facilities be used to promote the provision of mass transit services to the public and not compete unfairly with private charter operators.

THE REBUTTAL

On April 25, 2007, complainant was advised by FTA that respondent's response to the complaint had been received and in accordance with 49 C.F.R. §604.15(d), was provided 30 days from receipt of this notice to provide a rebuttal. On May 24, 2007, complainant provided its rebuttal to FTA. In its rebuttal, complainant reasserted its previous allegations and urged FTA to interview witnesses, obtain sworn testimony, and inspect documents. Complainant concluded its rebuttal by maintaining that FTA is "...compelled to refer this matter to the U.S. Department of Justice...as the disregard for Federal statutes is nearly incomprehensible".

DISCUSSION

The purpose of the complaint process set forth at 49 C.F.R. §604.15 is to allow interested parties, who believe that a recipient is in violation of the requirements of the charter rule, to submit a written complaint to the FTA Regional Administrator outlining their complaint. Should the complaint be accepted, the complainant and respondent are required to provide written evidence in support of their positions. Upon a review of the written evidence, the Regional Administrator may decide to issue a decision on the evidence received, request additional information if he or she determines additional information is necessary, and/or hold an informal evidentiary hearing.

In this instance, written evidence was provided by both parties in the form of the complaint itself, letters and memorandums detailing the failed conciliation process, respondent's response to the complaint, and rebuttals filed by complainant. Upon conclusion of the complaint process, FTA asked respondent to provide additional information which had not previously been provided to FTA's satisfaction. Finally, in order to confirm the circumstances surrounding the complaint, the FTA Regional Counsel met separately with respondent's representatives and Mr. Isaac Rudeseal of Shuttle Tran in Rome, Georgia on June 28, 2007. FTA believes that sufficient time has been provided over the past five months for both parties to submit documentation in support of their positions and that the investigation conducted by FTA was both comprehensive and complete. As such, we believe that additional time necessitated by conducting an informal evidentiary hearing would be unwarranted as ample opportunity has already been provided to present substantive evidence. An informal evidentiary hearing will therefore not be held as this decision is the prerogative of the Regional Administrator within his or her discretion pursuant to 49 C.F.R. §604.15(g).

Complainant has also requested that this matter be referred to the Department of Justice. FTA is compelled to adhere to the charter complaint process as set forth in regulation at 49 C.F.R. §604.15. That process mandates that the Regional Administrator, upon receipt of a complaint, review the evidence received and prepare and issue a written decision

upon completion of the investigation. Should the Regional Administrator determine that a violation of the rule has occurred, such remedies as the Regional Administrator may find appropriate shall be ordered. FTA will not abrogate its responsibilities to comply with its regulatory mandates. Because the complainant has filed its complaint with the FTA, FTA will not withhold issuing a ruling in this matter nor refrain from affording the respondent any direction/and or advise in this or any related matter. As previously stated, FTA believes its investigation into the facts and circumstances of this matter was comprehensive and complete and that it is compelled to issue a decision on the complaint as filed. Complainant's request that this matter be referred to the Department of Justice is accordingly denied.

A review of the complaint and an analysis of the facts and circumstances pertinent to the complaint follows.

EXCEPTIONS TO THE CHARTER RULE

The foundation of this complaint is whether the trolley vehicle leased by the respondent to a private, local passenger provider, Shuttle Tran, constituted a "brokerage" agreement whereby the RTD provided prohibited charter service indirectly through the private provider which it was not legally able to provide directly. The charter rule set forth at 49 C.F.R. 604.9(b)(2) permits a recipient to enter into a contract with a willing and able private charter operator to provide charter equipment to or service for the private charter operator if (1) the private charter operator is requested to provide charter service that exceeds its capacity; or (2) the private charter operator is unable to provide equipment accessible to elderly and handicapped persons itself. Willing and able means having the desire, having the physical capability of providing the categories of revenue vehicles requested, and possessing the legal authority, including the necessary safety certifications, licenses and other legal prerequisites, to provide charter service in the area in which it is proposed to be provided. See 49 C.F.R. 604.5(p). In the instant case, Shuttle Tran appears to meet the definition of a willing and able private provider. In fact, the complainant acknowledges Shuttle Tran's status as a willing and able private provider in its letter of March 5, 2007 to FTA wherein it states that Shuttle Tran "...is primarily an airport shuttle operation...and that it operates three 15 passenger vans and one 1979 MCI...." On the other hand, FTA has defined a broker as someone who has only an office and a telephone and arranges for another party to provide charter, having no transportation equipment of its own. 52 Fed. Reg. 11922 (1987). Clearly, Shuttle Tran, by definition, is not a broker but is a willing and able private provider falling within the exception set for at 49 C.F.R. 604.9(b)(2). Furthermore, FTA finds that the RTD reasonably determined that Shuttle Tran lacked capacity to provide the service in question. The Q's and A's published at 52 Fed. Reg. 42242 provides that grantees will be allowed to use their reasonable, good faith judgment as to whether the requirements of 49 C.F.R. 604.9(b)(2) have been met and, in the absence of apparent fraud or falsified statement, will not be required to look behind a request for the use of buses by a private provider. As a demonstration of its good faith, the RTD notes that it has now adopted a policy to require that the private provider confirm in writing its compliance with the requirements of this exception.

With this being said, FTA is concerned that the spirit and intent of the regulation may be breached should the present relationship between the respondent and Shuttle Tran be allowed to stand. And while, by definition, Shuttle Tran is not a broker and the RTD is legally permitted to lease equipment to a private provider of transportation which lacks capacity, it is clear that the object of the leases in question is the trolley bus owned by RTD. The trolley is frequently requested by individuals for charter service as represented by 50 of some 82 lease contracts with Shuttle Tran in 2006. The record indicates that no other private provider requested the lease of the trolley. Clearly, because a willing and able private provider exists, the respondent is prohibited from providing charter services directly. But because the willing and able private provider frequently lacks capacity, it is almost always able to lease the trolley and provide the charter service. As a result, the respondent benefits from the lease of the equipment (the record indicates that RTD leases the trolley for $150.00 for the first two hours of any trip, plus $55.00 for each additional hour, or fraction thereof, for any trip) and provides a service through Shuttle Tran that it could not otherwise provide directly. As a result, even though Shuttle Tran is not, by definition, a broker, the application of the facts in the instant case would be no different than if Shuttle Tran had no equipment. Fortunately, FTA need not address this apparent inconsistency between the letter of the law and the application of the facts as FTA finds that the current use of Federal funding in support of the trolley is impermissible on other grounds.

MASS TRANSPORTATION

The Federal transit laws define mass transportation as transportation that provides regular and continuing general or special transportation to the public but does not include ...charter service. 49 U.S.C. §5302(a)(7). The FTA has articulated several standards which assist in further defining mass transportation.

> 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. 11920

In contrast, the definition of charter service as set forth at 49 C.F.R. §604.5(e) provides as follows:

> ...transportation 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.

Charter service is usually thought of as a one-time provision of service and the user, not the recipient, has the control of the service. 52 Fed. Reg. 11916, 11919 (April 13, 1987).

Finally, "incidental charter service" is defined at 49 C.F.R. 604.5(i) as service which does not interfere with or detract from the provision of the mass transportation service for which the equipment or facility were funded under the Acts or does not shorten the mass transportation life of the equipment or facilities.

Upon receipt of complainant's rebuttal, FTA posed several questions to the RTD including a request to describe how the trolley is used in the provision of mass transportation operations, how it was funded, and whether or not it is maintained in a federally funded facility. In a letter dated June 8, 2007, respondent replied that the trolley was purchased with non-federal funds but is operated and maintained in a federally funded facility. It further explained that although the trolley was originally incorporated into the mainline route services in the downtown area, the trolley bus commitment to mainline route service was later eliminated, but remained available for charter service through subcontract/lease to private service providers. The respondent concluded with a comment that the trolley is not used on a daily basis.

Clearly the trolley is not used to provide mass transportation even though it is, in the words of the respondent, operated and maintained in a federally funded facility. Such use of the facility is strictly prohibited since the use of the federally funded facility to house and maintain the trolley is not for an eligible or appropriate project purpose; i.e. the support of mass transportation activities. The support and maintenance of the trolley in the federally funded facility clearly constitutes a use substantially different from that represented by the respondent in its application or the project description for the grant agreement under which the facility was funded and is prohibited by the terms and conditions of the "Master Agreement" pursuant to which the grant was awarded.

CONCLUSION

As previously stated, FTA believes that the spirit and intent of the charter regulation has been breached due to the respondent's business relationship with Shuttle Tran. Shuttle Tran will, on any given day, almost always lack capacity and will always be able to lease the trolley bus from the respondent. RTD is accordingly always able to provide charter service indirectly through Shuttle Tran which it would be prohibited from doing directly. By definition, however, Shuttle Tran is not a "broker" as defined by FTA and the respondent is legally entitled to lease equipment to Shuttle Tran pursuant to 49 C.F.R. §604.9(b)(2). As a result, FTA finds that the respondent is not in technical violation of 49 U.S.C. §5323(d) or 49 C.F.R Part 604.

FTA does find, however, that the operation and maintenance of the trolley bus in question in a federally funded facility constitutes an ineligible use of that facility as the use of the trolley is strictly for non-mass transportation service. Such use interferes with and detracts from the provision of mass transportation service for which the facility was

funded. As such, respondent shall immediately cease and desist from any use of the facility to house, maintain, and or operate the trolley. Because the trolley was not funded with federal assistance, FTA cannot direct the future use of the vehicle other than to require that so long as it is used for non-mass transportation purposes, its maintenance and operation must remain completely separate and apart from future federal financial assistance. Any remittance and reimbursement for the improper use of the facility for storage and maintenance of the vehicle will be addressed through separate correspondence.

Paul T. Jensen
Regional Counsel

7/5/07
Date

Yvette G. Taylor
Regional Administrator, Ph.D.

7-5-07
Date