

UNITED STEELWORKERS OF AMERICA,	}	
LOCAL 8751,	}	
Complainant,	}	
	}	
vs.	}	MA-01/87-01
	}	
MASSACHUSETTS BAY TRANSPORTATION	}	
AUTHORITY,	}	
Grantee/Respondent	}	

I. SUMMARY OF DECISION

This decision is in response to a complaint filed with the Urban Mass Transportation Administration (UMTA), on January 7, 1987, by the United Steelworkers of America, Local 8751 (Steelworkers), which alleged that a school transportation plan to be put into effect on January 12, 1987, by the Massachusetts Bay Transportation Authority (MBTA), failed to comply with various provisions in the Urban Mass Transportation Act of 1964, as amended (UMT Act), and its implementing regulations and policies.

The complaint specifically alleged that the MBTA plan violated Section 3(g), which prohibits grantees from providing exclusive school service; Section 5(i)¹, by failing to hold public hearings prior to the inception of the new service; and Sections 3(e) and 8(e), which require grantees to involve the private sector to the maximum extent feasible in the planning and provision of mass transportation. Under the new plan, school bus service for approximately 2,500 students at several Boston public schools, which had formerly been provided by a private operator, was to be performed by MBTA starting on January 12, 1987. The Steelworkers represent some 35 bus drivers to be laid off by the private operator as a result of the plan's implementation.

UMTA's examination of the materials submitted by the parties leads it to conclude that because the service provided by MBTA does not conform to the requirements of 49 CFR 605.3, it is exclusive school service, in derogation of Section 3(g) of the UMT Act. UMTA will not, however, make a determination on the private sector issue raised in the complaint, since it appears that no member of Steelworkers is a private operator of mass transportation services, as required by Section 3(e). Finally, UMTA finds that since MBTA has submitted a certification under Section 9(e)(3)(H), it is not required to comply with the public notice requirements in Section 5(i).

¹This section was erroneously cited in the complaint as Section 3(i).

II. COMPLAINT

On January 7, 1987, Steelworkers filed a complaint with UMTA, alleging that a school transportation plan to be put into effect by MBTA on January 12, 1987, at the request of the Boston School Committee, failed to comply with various provisions of the UMT Act. The complaint claimed that MBTA planned to begin service on approximately 40 new bus routes, created solely for the purpose of transporting students to and from Boston public schools. Service on these routes had formerly been provided, the complaint pointed out, by National School Bus Company, a private operator, and the employer of 35 of the complainant's members.

The complaint alleged that the new MBTA service would constitute exclusive school service, in violation of Section 3(g), since it failed to make provision for regular MBTA stops or published schedules, as required by 49 CFR 605.3.

The complaint moreover alleged that the new service violated Section 5(i), by providing for no public hearing and opportunity to comment on the new service.

Finally, the complaint claimed that MBTA had failed to solicit private enterprise participation, as required by Section 8(e) and 9(f) and UMTA's implementing guidelines and policies.

Several supporting documents were attached to the complaint. These included an affidavit by Margaret A. Geddes, a law clerk for Steelworkers' attorneys, who stated therein that her inquiries to MBTA headquarters had revealed that no published schedules or route information were available for the new service. Ms. Geddes further stated that when she called the MBTA route information telephone line, she was told that although the new bus routes would be open to the public, no scheduling information on them would be made available to the public. When she expressed interest in using one of the new bus routes, Ms. Geddes said, she was discouraged by MBTA personnel from doing so. The affidavit also stated that when Ms. Geddes asked MBTA personnel whether provision had been made for public hearing or notice on the new service, she learned that it had not been. She was also told, Ms. Geddes said, that MBTA's Board of Directors had discussed the new service on one occasion during the previous five months, namely during its meeting of September 10, 1986. She attached to her affidavit a copy of the minutes of this meeting, as well as copies of documents pertaining to items discussed at the meeting.

Steelworkers also enclosed an affidavit by Susan M. Moir, a bus driver employed by National Bus Company. Ms. Moir therein stated that she had received route sheets for the new school transportation service from the office of Boston's Superintendent of Schools. She traced these routes, Ms. Moir stated, on the MBTA's present public route map, for the purpose of establishing their correlation with regular MBTA routes. Ms. Moir said that

she followed by car four of the proposed routes, and that these routes, at least in part, did not correspond with regular MBTA service. On three of the routes, Ms. Moir said, she saw only nine marked MBTA stops of a total of thirty-nine pickups designated on the route sheets. On the fourth route, she stated, only ten of the fourteen designated stops were regular MBTA stops. Copies of the route sheets and the MBTA map in question were attached to the affidavit.

III. RESPONSE

UMTA forwarded a copy of Steelworkers' complaint to MBTA on January 8, 1987. The accompanying letter stated that a review of the evidence presented enabled UMTA to determine that a violation of 49 CFR 605 would take place if MBTA's new school transportation plan were put into effect. Should the new service begin, UMTA stated, MBTA would have 30 days from its receipt of the letter to show why no violation had occurred.

The letter further stated that Steelworkers' complaint alleged that MBTA had not complied with the private sector participation requirements in Sections 3(e), 8(e), and 9(f) of the UMT Act and the implementing policies. Since the proposed school transportation plan would involve new or restructured service, the letter noted, the private sector should be considered prior to its inception. UMTA pointed out that its policy is to encourage parties to resolve their differences at the local level before becoming involved in the complaint. It was therefore directing the one member of Steelworkers understood to be the owner of a private mass transportation company, UMTA said, to contact MBTA in order to resolve any differences. UMTA stated that this party would be allowed to file a formal complaint with UMTA if there was no resolution of these differences within 30 days of his contacting MBTA.

UMTA moreover stated that Steelworkers' complaint had also alleged that MBTA had violated the public notice requirements set forth in Section 5(i)(3) of the UMT Act. UMTA said, however, that it held the position, set out in the Federal Register notice of October 10, 1986, that Section 5(i)(3) had been superseded by the requirements of Section 9(e)(3)(H), which require private sector participation only if there is a fare increase or a service reduction, and not for service increases. The letter indicated that MBTA would not be bound by the requirements of 5(i)(3) if it had submitted a certification under 9(e)(3)(H).

MBTA responded by letter dated February 5, 1987. The letter first of all claimed that Steelworkers lacked standing to bring this complaint, since none of its members appeared to be a private bus operator. MBTA cited Bradford School Bus Transit, Inc. v. Chicago Transit Authority, 537 F.2d 943 (7th Cir. 1976), in support of its contention that only such private operators fall under the protection of the UMT Act.

MBTA denied that its new service constituted exclusive school service in violation of Section 3(g) of the UMT Act and 49 CFR 605. MBTA instead stated that its new school transportation plan involved supplemental service which met the definition of "tripper service" contained in 49 CFR 605.3. Its new service, MBTA stated, was regularly scheduled, open to the public, and modified to meet the needs of school students and personnel. MBTA also affirmed that the buses used stop only at regular MBTA service stops, and their routes appear on MBTA's published schedules. MBTA claimed that the instances cited in affidavits submitted by Steelworkers, in which supplemental buses admitted only students or passed by regular stops, were rare and exceptional cases, which the MBTA Operations Directorate had sought to remedy by issuing special orders to bus drivers. These orders, MBTA said, are sent out whenever supplemental service is initiated or resumed, or whenever deviations are brought to the attention of MBTA. MBTA attached a copy of these special orders to its response.

MBTA moreover claimed that since June 1984, it had continuously complied with the tripper service requirements. MBTA attached copies of a letter dated June 22, 1984, which it had sent to UMTA and which outlined action it had taken to remedy any deviations from tripper requirements. Also attached was a copy of a letter dated July 25, 1984, from UMTA and which stated that MBTA had satisfactorily resolved any problems with regard to its tripper service.

As concerns Steelworkers' allegations that MBTA has failed to comply with UMTA's private sector participation policy, MBTA stated that the policy was not applicable in this case. The privatization requirements, MBTA affirmed, are triggered only when a grantee contemplates the establishment of new service or a significant increase in service on an existing route. MBTA cited UMTA's definition of "new or restructured services", contained in the Federal Register of January 24, 1986, at 3307, and which reads as follows:

establishment of a new mass transportation service; addition of a new route or routes...; a significant increase in service on an existing route...; or a change in the type or mode of service provided on a specific, regularly scheduled route... ²

²The guidelines set forth in this Federal Register Notice were effective only for FY 1986. Guidelines for 1987 and beyond are contained in UMTA Circular C 7005.1, which broadens the definition of "new or restructured service" to include "a significant realignment of an existing route in a grantee's mass transportation system". UMTA C 7005.1, at page 3.

Since the new school service consisted merely of placing extra buses on existing routes, MBTA stated, there was "no significant increase in service" as envisaged by the notice. This being the case, MBTA said, the notice and consultation requirements of the privatization policy had not been triggered.

Finally, MBTA stated that it had not been contacted by any member of Steelworkers who is the owner of a mass transportation company, as stated in UMTA's letter of January 8, 1987.

IV. REBUTTAL

On February 13, 1987, UMTA forwarded to Steelworkers a copy of MBTA's response. Steelworkers was given 30 days from its receipt to furnish a rebuttal.

Steelworkers submitted its rebuttal by letter dated March 11, 1987. Steelworkers first of all denied MBTA's claim that Steelworkers lacked standing to bring a complaint for violation of the regulations concerning school bus operations. Steelworkers cited 49 CFR 605.30, which states that "any interested party" may file a complaint with UMTA alleging violation of the school bus regulations.

Second, Steelworkers rebutted MBTA's claim that the new school transportation plan conformed to the tripper service requirements set out in 49 CFR 605.3. The new service is not open to the public, Steelworkers stated, since the supplemental buses do not stop for riders waiting at regular stops, and operate either unsigned or with confusing signs. Steelworkers also stated that the buses stop at places without marked MBTA stops to discharge student riders. Steelworkers attached affidavits and photos in support of these affirmations.³ Moreover, Steelworkers said, route cards had not yet, to the best of its information, been published for the supplemental runs which, Steelworkers said, were hybridized MBTA routes, that for the most part track the former yellow school bus routes.

Third, Steelworkers stated that MBTA had ignored the private enterprise guidelines triggered by its new school service. Steelworkers maintained that MBTA's supplemental service is exactly the type of service envisioned in the Act and the regulations as requiring the grantee's consideration of private sector participation. Since MBTA had not undertaken any private enterprise participation prior to its inception of this new and

³ Steelworkers submitted with its rebuttal eight affidavits by National bus drivers and MBTA users who stated that, while waiting at regular MBTA bus stops, they or other persons were bypassed by supplemental buses, and that these buses discharged or picked up students at places other than regular MBTA stops. Also enclosed were photos of supplemental buses carrying "No Stops", "Out of Service", or "Limited" destination signs.

restructured service, it was in violation of UMTA's privatization policy guidelines.

V. DISCUSSION

Before reaching the main issues in this case, it is necessary to make a preliminary determination on a threshold question raised in MBTA's response, namely that of whether Steelworkers has standing to bring a complaint under the UMTA school bus regulations. MBTA cites Bradford School Bus Transit, Inc. v. Chicago Transit Authority, 537 F.2d 943 (7th Cir. 1976) in support of its contention that only private bus operators are entitled to bring a complaint under the said regulations. MBTA states that in that case, the court defined those interests Congress intended to protect in enacting the UMT Act, and found that only private bus operators fall clearly within the statute's zone of protection. Since none of the complainants appears to be a private bus operator, MBTA claims, they are outside the zone of interest created and protected by the statute, and thus lack standing to file a complaint with UMTA.

In this administrative complaint, the language of the school bus regulations is clear and controlling. 49 CFR 605.30 provides that "any interested party" may file a complaint with the Administrator alleging a violation of the grant agreement not to engage in school bus operations. 49 CFR 605.3 defines an "interested party" as

an individual, partnership, corporation, association or public or private organization that has a financial interest which is adversely affected by the act or acts of a grantee with respect to school bus operations.

Complainants, as a group of individuals whose financial interests have been adversely affected by loss of their jobs because of the school bus operations undertaken by MBTA, clearly fall within the category of persons entitled under these provisions to bring a complaint.

Since Steelworkers' standing to bring this administrative complaint has thus been established, a determination can be made on the three main issues presented therein, and which are as follows.

1. Whether MBTA's supplemental bus service constitutes exclusive school service

Under Section 3(g) of the UMT Act, no Federal financial assistance may be granted to providers of mass transportation unless the applicant and the UMTA Administrator enter into an agreement that the applicant will not engage in school bus operations exclusively for the transportation of students. This section, and its

implementing regulations in 49 CFR 605, are aimed at protecting private school bus operators from unfair competition with UMTA grantees.

Under the terms of 49 CFR 605.3, however, a grantee may modify its regularly scheduled service to accommodate the needs of school students and personnel. This specially modified service, termed "tripper service", must meet the following criteria:

- Buses used must be clearly marked as open to the public and may not carry designations as "school bus or "school special";
- Buses must stop at a grantee's regular stops;
- Routes must be indicated in the grantee's published schedules.

In its complaint, Steelworkers alleges that the supplemental bus service to be begun by MBTA on January 12, 1987, would be exclusive school service, since it fails to meet the above criteria. The complaint claims that the buses used follow private school bus routes, are filled to capacity with students to the virtual exclusion of other riders, do not stop at regular MBTA bus stops, and their routes are not included in MBTA's published route schedules.

While the regulations do not prohibit supplemental buses from using existing routes or from loading up with students, they do require that, in order to qualify as "tripper" buses, these vehicles stop only at the grantee's regular stops and appear in the grantee's published schedules. Steelworkers' allegations on these points, then, if true, indicate a violation of the school bus regulations on the part of MBTA.

MBTA, in its response, denies these allegations, and states instead that its supplemental buses are clearly marked with regular route numbers and destinations, and are open to the public. All supplemental buses, MBTA asserts, stop only at regular MBTA stops, and their routes appear in MBTA's published schedules. MBTA states that it is aware that Steelworkers has submitted affidavits describing instances in which the supplemental buses have failed to display route numbers and destination signs, have admitted only students, and have stopped at locations other than regular stops. These are, however, MBTA affirms, "rare instances, which the MBTA Operations Directorate continues to remedy through diligent reminders to drivers, in the form of special orders to all surface line operators." In support of its claims, MBTA has submitted copies of these special orders, drafted in May 1984, and which it states are re-issued each time supplemental service is resumed.

While UMTA does not question the good faith or intent behind the issuance of these orders by MBTA, it does question their effectiveness. Seven of the affidavits, submitted by Steelworkers nearly a month after the date of MBTA's letter to UMTA, detail several examples of continued non-compliance by the supplemental buses with tripper service requirements. The affidavits cite instances in which supplemental buses bearing "No Stops" or "Limited" destination signs and carrying only school children, bypassed persons standing at regular MBTA stops.⁴ Photos of some of the buses in question accompany the affidavits. The affidavits also contain accounts of buses passing by persons attempting to flag them down, while stopping at non posted stops solely to discharge school children.⁵ One MBTA user states that when he attempted to board one of the supplemental buses, he was told that it was a school bus, and was instructed by the driver to take another bus to his destination.⁶

In rebuttal of these complaints and allegations, MBTA offers only its affirmation that drivers have been ordered to conform to the tripper regulations, and correspondence of June 1984, with UMTA attesting that MBTA's school operations satisfied tripper requirements at that time. It is plain, from the affidavits and from MBTA's failure to furnish more concrete evidence of compliance, that the measures it has taken to ensure that its supplemental service conforms to tripper requirements, have not been sufficient. Moreover, the 1984 correspondence between MBTA and UMTA may evidence the former's conformance with the requirements at that time, but does not apply to the present situation. UMTA has in no way indicated or implied that the service begun by MBTA on January 12, 1987, meets the requirements of 49 CFR 605.3. In fact, UMTA's letter of January 8, 1987, to MBTA notes that there is cause to believe that the service constitutes exclusive school bus service, and states that "we encourage you to refrain from providing this service in order to prevent any violation of this regulation". Finally, while MBTA asserts that the supplemental bus routes appear in MBTA's published schedules, it has offered no such schedules in evidence. UMTA must therefore accept Steelworkers' allegation that no regular schedules for the supplemental buses have been published.

MBTA has, then, failed to demonstrate that it has effectively conformed the supplemental school service it initiated on January 12, 1987, to the requirements of 49 CFR 605.3. Consequently, UMTA holds that the service in question is exclusive school service, in violation of UMTA's school bus regulations. Travelways, Inc. v. Broome County Department of Transportation. (December 4, 1985).

⁴Affidavits of Susan Moir, Lilly Darling, David Darling and William McGargle.

⁵Affidavits of Susan Moir, Lilly Darling, David Darling and Garry Merchison.

⁶Affidavit of K.L. Onufry.

2. Whether the new MBTA transportation plan involves "new or restructured service" requiring the grantee to follow UMTA's privatization guidelines

Steelworkers' complaint alleges that MBTA began its new school service without consideration of private sector alternatives, in derogation of Sections 3(e), 8(e) and 9(f) of the UMT Act, and UMTA's implementing guidelines. An aim of these provisions is to protect the interests of private operators by allowing them a chance to participate in the provision of services whenever a grantee contemplates the implementation of "new or restructured service." "New or restructured service" is defined in UMTA Circular C 7005.1 as:

Establishment of a new mass transportation service; addition of a new route or routes to a grantee's mass transportation system; a significant increase or decrease in service on an existing route in a grantee's mass transportation system; a significant realignment of an existing route in a grantee's mass transportation system; or a change in the type or mode of service provided on a specific regularly scheduled route.

In its rebuttal, MBTA states that the private sector consultation guidelines do not apply in the case of its new school service, since it has not established new service or significantly increased existing service, but merely provided tripper service. MBTA claims that the new service consists solely of adding extra buses to existing routes during the hours of school opening and closing, thereby falling short of the "significant increase in service" which would trigger the notice and consultation requirements of the privatization policy.

UMTA takes exception to MBTA's characterization of its new school service as the simple "adding of extra buses to existing routes." The supplemental service involves the transportation of approximately 2,500 students to 7 Boston high schools, travelling over 18 modified bus routes. Moreover, according to documents presented by MBTA at its board of directors meeting of September 10, 1986, a detailed analysis had indicated that the new service would require 44 additional vehicles, and staffing by 48 part-time operators. In view of these projected additional costs to be incurred under the new transportation plan, the MBTA board approved a Supplementary Current Expense Budget for the period from January 5, 1987 to June 29, 1987, in the amount of \$859,193. Given the magnitude of the numbers of students, bus routes, and vehicles, as well as the importance of the expense involved, it is difficult to perceive of MBTA's supplemental plan as anything other than the "significant increase in service" envisaged in UMTA's private sector guidelines. Furthermore, materials

submitted by the parties suggest that the supplemental buses do not follow existing regular runs, but travel over routes specially altered to meet the needs of school students, and stop at locations other than regular stops. The service thus constitutes a "significant realignment of an existing route" in MBTA's mass transportation system of the type contemplated in the Circular.

However, compliance with Sections 3(e) and 8(e) is triggered only when the grantee is providing mass transportation services. Since it is clear that the MBTA attempted to provide tripper service, it should have complied with UMTA's private sector guidance in the planning and provision of the service.

UMTA, however, has been clear from the beginning of its handling of the complaint that we were not including the Steelworkers' allegations of non-compliance with the UMT Act's private sector participation requirements as part of this complaint. The letter transmitting the complaint to the MBTA states:

UMTA's policy on complaints under these private sector provisions is that the parties must attempt to resolve their differences at the local level before UMTA will become involved in the complaint. Although the Steelworkers are not private providers of mass transportation service, it is our understanding that at least one of their members is the owner of a private mass transportation company. Therefore, we are directing him, through the Steelworkers, to contact you and attempt to resolve any differences. If there is no resolution of these differences within 30 days of his contacting you, he may file a formal complaint with UMTA.

Thus, while we find the service to be new or restructured, we do not here make any determination as to the MBTA's compliance with UMTA's guidance in its attempted provision of school services as tripper service, i.e., as mass transportation.

3. Whether MBTA is required to comply with the public notice requirements of Section 5(i)(3) of the UMT Act

Steelworkers' complaint alleges that MBTA has violated the notice requirements in the UMT Act which require a recipient to provide the public with an opportunity for comment on service and fare increases before they go into effect. These requirements are set forth in Section 5(i)(3) of the UMT Act and in 49 CFR Part 635.

As indicated, however, in the Federal Register notice of October 10, 1986, at page 36403, it is now UMTA's position that the requirements in 5(i)(3) have been superseded by the requirements in Section 9(e)(3)(H) of the UMT Act. These new requirements only require public notice if there is a fare increase or a service reduction, and not for service increases. Thus, the new requirements are more narrow than those in 5(i)(3).

The notice states that the recipient must still comply with the requirements in Section 5(i)(3) until it has submitted a certification under Section 9(e)(3)(H) or it is no longer an urbanized area. A review of UMTA's files shows that MBTA submitted a Section 9 certification on November 6, 1986, and is thus no longer subject to the requirements of Section 5(i)(3).

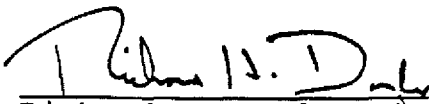
Steelworkers' complaint that MBTA has failed to provide public notice on its new service is thus not valid, since MBTA is under no statutory obligation to provide such notice.

VI. CONCLUSION

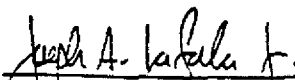
In view of the foregoing, UMTA holds that the supplemental school service begun by the MBTA on January 12, 1987, does not meet the requirements of 49 CFR 605.3, and thus constitutes exclusive school service, in derogation of Section 3(g) of the UMT Act. UMTA accordingly orders MBTA to cease and desist from providing the service as presently constituted within 10 calendar days of receipt of this decision. In the event that this service is not terminated within the prescribed time limits, UMTA will impose a suspension of the drawdown of the MBTA's Federal funds and will bar the MBTA from receiving further Federal assistance, consistent with Section 3(g) of the UMT Act.

UMTA moreover concludes that the MBTA school transportation plan meets the definition of "new or restructured service" as set forth in UMTA's private sector participation guidelines. We have however, not treated this as a private sector complaint and have made no conclusions as to the MBTA's compliance with UMTA's guidance on the subject. If, in the future, the MBTA provides service similar to that which is the subject of this complaint, UMTA reminds it that it must comply with our private sector guidance prior to instituting the service.

Finally, UMTA finds that MBTA has submitted a certification under Section 9(e)(3)(H), and is thus not subject to the requirements of Section 5(i)(3). Consequently, MBTA was under no statutory obligation to provide public notice or hearing prior to the inception of the new service.


Richard H. Doyle
Regional Administrator

MAY 15 1987
Date


Joseph A. LaSala, Jr.
Chief Counsel

MAY 13 1987
Date