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of Transportation
Federal Transit
Administration

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February 8, 2005

VIA CERTIFIED MAIL

Richard P. Schweitzer, P.L.L.C.
1776 K Street, NW
Suite 800
Washington, DC 20006

William Volk
General Manager
Champaign-Urbana Mass Transit District
801 E. University Avenue
Urbana, IL 61801

Edward Gill
Thompson Coburn LLP
Suite 600
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Washington, DC 20006

RE: Charter Service Docket No. 2004-10

Dear Mr. Schweitzer, Mr. Volk, and Mr. Gill:

In accordance with 49 CFR Part 604, the Federal Transit Administration (FTA) has concluded its review of the charter complaint submitted by Allerton Charter Coach, Inc. and is enclosing a copy of our decision on this matter.

As always, if you have any questions regarding the FTA procedures, please contact Nancy-Ellen Zusman, Regional Counsel, at (312) 353-2789.

Sincerely,

Joel P. Ettinger
Regional Administrator

Enclosure

BEFORE THE FEDERAL TRANSIT ADMINISTRATION

Allerton Charter Coach, Inc.,
Complainant

v.

Charter Service Docket No. 2004-10
49 U.S.C. Section 5323(d)

Champaign-Urbana Mass Transit District,
Respondent.

DECISION

Summary

On May 26, 2004, Allerton Charter Coach, Inc. ("Allerton") filed a complaint with the Federal Transit Administration ("FTA") alleging that Champaign-Urbana Mass Transit District ("CUMTD" or "Respondent") was providing charter service in violation of FTA's charter regulation, 49 Code of Federal Regulations ("C.F.R.") Part 604. On June 10, 2004, FTA transmitted the complaint to CUMTD and notified them that they had thirty days to conciliate the dispute. On August 31, 2004, Allerton notified FTA that the parties had been unable to informally resolve the charter complaint; Allerton also amended its complaint. On September 3, 2004, CUMTD was provided with thirty days to respond to the complaint and amended complaint. When CUMTD failed to respond, FTA contacted the Respondent. CUMTD acknowledged that it was in fact providing illegal charter service. Subsequently, on October 20, 2004, FTA issued a cease and desist order to CUMTD.

On November 2, 2004, CUMTD requested an extension of time to allow it to answer the complaint. FTA granted the extension request.

On November 4, 2004, Allerton amended its complaint a second time. CUMTD filed an initial response to the second amended complaint on November 8, 2004, via email. On November 8, 2004, CUMTD requested a further extension to respond to the original complaint and the first amended complaint. Due to Allerton's refusal to agree to another extension, FTA denied the request on November 9, 2004, but allowed CUMTD an extra week to respond to the second amended complaint.

On November 11, 2004, CUMTD responded to all the complaints. On December 1, 2004, FTA provided Allerton with thirty days to respond to CUMTD's response. When Allerton had failed to respond, FTA contacted Allerton who requested a brief extension. Allerton filed its response on January 6, 2005.

Upon reviewing the allegations in the complaints and the subsequent filings of both the Complainant and the Respondent, FTA has concluded that CUMTD¹ has been consistently

¹ CUMTD is a recipient of both Section 5307 and 5309 funds; therefore, it is required to comply with the charter regulations.

violating the charter regulations and must immediately cease and desist from providing illegal charter service. Failure by CUMTD to immediately cease and desist from providing illegal charter service could result in loss of federal funds, as well as suspension of draw down privileges.

Complaint History

Allerton's first complaint against CUMTD was filed on May 26, 2004. It alleged the following:

1. CUMTD's willing and able notice was flawed;
2. CUMTD had never made a determination to Complainant's willing and able response;
3. After Allerton provided its willing and able response, CUMTD continued to provide illegal charters for previously booked charters;
4. CUMTD provided no charge service for Urbana Middle School to a local radio station, because CUMTD indicated that Illini Swallow could not provide the service; and
5. CUMTD provided illegal charter for the InterVarsity Christian Fellowship.

Attached to Allerton's complaint were emails between CUMTD and Allerton concerning some of the alleged charter service; CUMTD's annual notice for 2003; a letter dated July 9, 2003, from Respondent indicating it qualified as a willing and able private provider; approximately 75 CUMTD charter contracts (between January 7, 2003, and April 25, 2004); and an unsigned contract between CUMTD and the InterVarsity Christian Fellowship to provide service between December 26, 2003, and January 30, 2004. On June 10, 2004, FTA provided the parties with thirty days to conciliate the complaint.

On August 31, 2004, Allerton informed FTA that the parties were unable to reach an agreement. It also filed its first amendment to the complaint, alleging that CUMTD had provided an "Orientation Special" service for the University of Illinois (U of I) during June and July 2004. Allerton alleged that this service violated the charter regulations. On September 3, 2004, FTA provided CUMTD with thirty days to respond to the allegations in the complaint and the amendment to the complaint.

When CUMTD had failed to respond within thirty days, FTA contacted the respondent on October 20, 2004, about the allegations. During a telephone conversation on that date, Mr. Volk, General Manager of CUMTD, acknowledged that CUMTD for a significant number of years had an arrangement with Illini Swallow to operate charters on its behalf for a 10% fee. CUMTD paid Illini Swallow a 10% fee and then operated the charter service itself. He also indicated that in the past Illini Swallow had been the only private willing and able provider in CUMTD's area. Additionally, he acknowledged that CUMTD had finished providing service on all outstanding charters after receiving the Allerton complaint. Mr. Volk also acknowledged that CUMTD had never responded to Allerton's willing and able response in July 2003. Mr. Volk stated that at the present time CUMTD was only providing charters for 501(c)(3) organizations. FTA memorialized this telephone conversation in a letter dated October 20, 2004, and ordered CUMTD to immediately cease and desist providing illegal charter service. FTA also reminded CUMTD that it had yet to respond to the Allerton complaint and amendment.

On November 2, 2004, CUMTD requested and was granted an extension until November 12, 2004, to respond to the complaint and amendment. Two days later, on November 4, 2004,

Allerton filed a second amendment to its complaint. It alleged that CUMTD was still providing illegal charter service for the U of I as special service. FTA forwarded the second amended complaint to CUMTD. Tom Costello of CUMTD indicated in an email dated November 8, 2004, that the service provided was wheelchair accessible buses for the vendors for the football games. CUMTD indicated that it believed that this service was permissible under the charter regulations. Subsequently, CUMTD's counsel requested a further extension to respond to the complaint and amendments. On November 9, 2004, when Allerton would not agree to a further extension, FTA denied the extension request, but allowed CUMTD to have an extra week to respond only to the second amendment.

On November 11, 2004, CUMTD filed its response. In its response, CUMTD stated it did not believe it needed to respond to each of the complaints nor acknowledge any of the violations. CUMTD stated that after receiving FTA's letter dated October 20, 2004, it had ceased providing "any and all charter service which it understands to be in violation of FTA's regulations." CUMTD went on to state that it believed it could provide service under the limited exceptions under the regulations and that it believed the only charter service it currently provided was allowed under Section 604.9(b)(5). CUMTD provided no supporting documentation. FTA transmitted CUMTD's response to Allerton on December 1, 2004, and provided it with thirty days to reply.

On January 3, 2005, when FTA had not received a response from Allerton, it contacted Allerton who requested a short extension to file a response. Allerton filed a response on January 6, 2005. In its response, Allerton stated that CUMTD's reply was non-responsive. Allerton pointed out that CUMTD had failed to provide any documentation to support its position, that CUMTD had implied it would be continuing to provide charter service, it was out of time for filing evidence, and that the illegal service had continued even after FTA issued its cease and desist letter. Allerton requested that FTA withhold funds from CUMTD.

Acceptable Charter Service

If a recipient of federal funds, like the Respondent, wishes to provide charter service, then it must comply with the charter regulations. Charter service is defined as the following:

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 in order to travel together under an itinerary either specified in advance or modified after leaving the place of origin. This definition includes the incidental use of FTA funded equipment for the exclusive transportation of school students, personnel, and equipment. 49 C.F.R. § 604.5(e).

The regulation goes on to discuss under what circumstances a Recipient may provide charter service. It states the following:

If a recipient desires to provide any charter service using FTA equipment or facilities the recipient must first determine if there are any private charter operators willing and able to

provide the charter service . . . To the extent that there is at least one such operator, the recipient is prohibited from providing charter service with FTA funded equipment or facilities unless one or more of the exceptions in Section 04.9(b) applies, 49 C.F.R. Section 604.9(a).

There are a number of exceptions listed for providing charter service. The two principal exceptions involve leasing vehicles and equipment based on capacity and accessibility restraints of private providers. Section 604.9(b)(2). Additionally, there are exceptions for "special events" (Section 604.9(b)(4)) and for providing service for non-profits (Section 604.9(b)(5)). However, the threshold question to be addressed before a recipient provides any charter service is whether there are any willing and able private providers.

The Complainant's allegations relate to all these requirements. They allege that CUMTD has been providing service when there are "willing and able" private providers and that CUMTD is providing charter service when the exceptions do not apply.

Discussion

Federal funds are provided to transit agencies to allow them to provide mass transportation. The charter regulations were meant to carve out limited exceptions that allow recipients of federal funds to provide charter service under very limited circumstances. The intent of the regulations was to prevent transit agencies from competing with private charter operators.

A. Willing and Able Notice

Allerton first contacted CUMTD on March 3, 2003, via email indicating that it was a private provider in the area. CUMTD responded that it issued its annual "willing and able" notice every June and that in the past the only response had come from Illini Swallow. (Complainant's Exhibit A) CUMTD indicated it had entered into an agreement with Illini Swallow to provide charter service since Illini Swallow had capacity constraints. CUMTD further stated that if Allerton provided an address, CUMTD would make sure Allerton received a copy of the notice and if they were interested, CUMTD could enter into an arrangement similar to the one it had with Illini Swallow. This response was appropriate given the fact that Allerton had not responded to the annual notice the prior June.

When CUMTD issued its annual notice in June 2003, however, it ceased following the charter regulations. The regulations state the following:

If a recipient desires to provide any charter service using FTA equipment or facilities the recipient must first determine if there are any private charter operators willing and able to provide the charter service . . . To the extent that there is at least one such private operator, the recipient is prohibited from providing charter service with FTA funded equipment or facilities unless one or more of the exceptions in Section 604.9(b) applies, 49 C.F.R. Section 604.9(a).

The regulations clearly state that before a recipient provides charter service it must determine if there is any willing and able charter operator. 49 C.F.R. § 604.9(a). In order to determine if there is at least one private charter operator willing and able to provide the service, the recipient must complete a public participation process. 49 C.F.R. § 604.11(a). The regulations under 49 C.F.R. § 604.11(a) require that the recipient complete the following:

- (1) At least 60 days before it desires to begin to provide charter service . . .
 - (b) The public participation process must at a minimum include:
 - (1) Placing a notice in a newspaper, or newspapers, of general circulation within the proposed geographic charter service area;
 - (2) Sending a copy of the notice to all private charter service operators in the proposed geographic service and to any private charter service operator that requests notice;
 - (3) Sending a copy of the notice to the United Bus Owners of America, 1300 L Street, NW., Suite 1050, Washington, DC 20005 and the American Bus Association, 1100 New York Avenue, SW, Suite 1050, Washington, DC 20005-3934.
 - (c) The notice must:
 - (1) State the recipient's name;
 - (2) Describe the charter service that the recipient proposes to provide limited to the days, times of day, geographic area, and categories of revenue vehicle, but not the capacity or the duration of the charter service;
 - (3) Include a statement providing any private charter operator...at least 30 days... to submit written evidence...
 - (4) State the address to which the evidence must be sent;
 - (5) Include a statement that the evidence necessary for the recipient to determine if a private charter operator is willing and able includes only the following:
 - (i) A statement that the private operator has the desire and the physical capacity to actually provide the categories of revenue vehicle specified, and
 - (ii) A copy of the documents to show that the private charter operator has the requisite legal authority to provide the proposed charter service and that it meets all necessary safety certification, licensing and other legal requirements to provide the proposed charter service.
 - (6) Include a statement that the recipient shall review only that evidence submitted by the deadline, shall complete its review within 30 days of the deadline, and within 60 days of the deadline shall inform each private operator that submitted evidence what the results of the review are.
 - (7) Include a statement that the recipient shall not provide any charter service using equipment or facilities funded under the Acts to the extent that there is at least one willing and able private charter operator unless the recipient qualifies for one or more of the exceptions in 49 C.F.R. Section 604.9(b).

The annual notice issued by CUMTD did not include the categories of revenue vehicle. Additionally, there was a typo regarding the date submissions were due; it should have read July 23, 2003, not 2002. The real flaw in the process, however, was the failure by CUMTD to make a determination with regard to Allerton's submission dated July 9, 2003, that it wished to be

considered "willing and able."² CUMTD was aware of Allerton's interest as early as March 2003, yet they did nothing to curtail their operating charter service. CUMTD provided approximately 73 charters between June 21, 2003³, and April 25, 2004. To the extent there was at least one "willing and able" private provider, CUMTD should not have been providing charter service. Also, if CUMTD intended to enter into contracts with private providers to allow it to do certain types of charter service, then that should have been included in the notice.

B. Exceptions

In an email dated January 7, 2004, when Allerton asked CUMTD about its continuing to provide unauthorized charter service, specifically charter for the Crop Protection Movement, CUMTD responded that they had

not accepted any new charter orders since mid-November... The only exception to that is if they qualify for an exception based on disability and they certify to that. We continue to 'run out' charter orders we committed to and where contracts were in place prior to mid-November... the Crop Protection movement... falls into that category.
(Complainant's Exhibit E)

Once CUMTD had issued its annual notice, which under the regulations is required to be issued 60 days prior to providing charter service, they should have halted providing charter service until they had determined that there were no "willing and able" private providers unless one of the exceptions applied. FTA does not know why CUMTD used the mid-November date, but to the extent there was at least one "willing and able" private provider, direct charter service should have stopped. The fact that it was already booked is irrelevant; CUMTD should have canceled all prior bookings.

As to some of the other exceptions that CUMTD relied on, it stated that it provided the "special service" for the football vendors based on the "disability exception." Although there is an exception based on disability, Section 604.9(5)(i), the exception requires a number of prerequisites for the exception to apply. It is highly unlikely that vendors for a football game would qualify as organization exempt from taxation, which is one of the prerequisites for qualifying under that exception.

CUMTD acknowledged to FTA on October 20, 2004, that for a significant number of years it had had an arrangement with Illini Swallow to operate charters on its behalf for a 10% fee. For a 10% fee paid to Illini Swallow, CUMTD operated the charter service. The 10% fee was essentially a finder's fee. This arrangement is a violation of the charter regulations. A transit agency can enter into a contract with a private provider to provide equipment or service if the private provider does not have enough accessible vehicles or does not have enough capacity. Section 604.9(b)(2) However, this exception is not for providing direct charter service, but for leasing vehicles or

² CUMTD acknowledged in a telephone call with FTA on Oct. 20, 2004, that they never responded to Allerton's request for a "willing and able" determination.

³ The copy of the annual notice FTA received is undated; however, since CUMTD indicated that they published their notice in June every year, and the notice allowed private providers to respond up until July 23, 200[3], FTA used that date as a June 23, 2003, as the beginning date.

service to a private provider, so the private provider can provide the service. CUMTD could have leased vehicles or service to Illini Swallow if they met one of the exceptions (accessibility or capacity constraints), but it could not provide service on Illini Swallow's behalf. All the service that CUMTD provided for Illini Swallow constituted impermissible charter service. Whether the service was free or not, it was impermissible service, since CUMTD could not provide service as a subcontractor for Illini Swallow.⁴

C. Possible Additional Charter Service

Charter service is defined 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, 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. This definition includes the incidental use of FTA funded equipment for the exclusive transportation of school students, personnel, and equipment. 49 C.F.R. Section 604.5(e).

The 75 CUMTD contracts each set forth an explanation of whom the trip is for, the cost of the trip, the number of buses, the date, and the scheduled pick-up and drop-off time. (Complainant's Exhibit D) Each contract shows that the Respondent was providing transportation using its buses to a group under a single contract for a fixed charge under a specific itinerary. Because Respondent has failed to explain or refute any of these allegations, FTA finds that each of the 73 trips, which took place after it issued its 2003 annual notice, qualified as impermissible charter service.

In its two amendments to the complaint, Allerton alleged three more specific trips constituted impermissible charter service. The trips were for the InterVarsity Christian Fellowship, orientation for the U of I, and special service for vendors at U of I football games.

FTA does not have enough information to determine whether or not the service provided for the InterVarsity Christian Fellowship constituted charter service or not. It appears that it was not, since it was on CUMTD's regular fixed route, CUMTD was to set the times of operation of the routes, the routes were to be publicized and open to the general public. (Complainant's Exhibit G) The service as presented seems more like mass transportation than charter service.

The two trips that were provided for the U of I in all likelihood constituted impermissible charter service. Based on the information that FTA was provided⁵ the orientation service seems like the U of I was directing the service, as it would have been for the vendors at the football games. However, since FTA doesn't have the contract or other documentation relating to the orientation service other than Allerton's allegations, FTA cannot definitively state that this service was

⁴ CUMTD acknowledged in a letter dated May 18, 2004, that the service for Urbana Middle School was a no-cost trip it provided because Illini Swallow had no available equipment. (Complainant's Exhibit F)

⁵ Allerton alleged that CUMTD provided orientation service for the U of I students during June and July 2004. The Respondent did not rebut this allegation, so FTA is left to conclude that the allegation is true.

charter. In both U of I cases, the buses had "special" service advertised as their destinations (according to Allerton and not rebutted by CUMTD), implying that it was not regular fixed route service. Based on CUMTD's initial response via email when questioned about the vendor service, it constituted impermissible service since it was for transporting vendors to the U of I football games, presumably under a fixed contract. Although CUMTD stated the service was provided pursuant to the charter disability exception, it did not provide any documentation to support that assertion. Therefore, the two U of I services, as described by Allerton, qualify as impermissible charter service.⁶

D. Incidental Requirement

Any charter service that a recipient provides must be incidental (49 CFR Section 604.9(e)) The definition of "incidental charter service" is charter service that does not "interfere with or detract from the provision of the mass transportation service for which the equipment or facilities were funded under the Acts; or does not shorten the mass transportation life of the equipment or facilities." 49 CFR Section 604.5(i).

In order to be incidental, a recipient must recover at least its fully allocated costs. On May 7, 2004, the Complainant inquired about "special service" provided by CUMTD for Urbana Middle School. (Complainant's Exhibit F) In a letter in response, CUMTD stated that the service in question was provided for Illini Swallow since it had no available equipment. CUMTD acknowledged that the service was for Urbana Middle School to travel to a local radio station⁷ at no cost.

Because CUMTD provided charter service free of charge, then it clearly did not recover its fully allocated costs. Therefore, the free service provided for the Urbana Middle School was not incidental. FTA has documentation that six additional trips between June and November 2003 were also no cost trips. Those six trips also constitute illegal charter service.⁸

Providing charter service approximately 73 times between June 2003 and April 2004 constitutes providing charter service on a regular basis. It also is no longer incidental service when it is that frequent. Incidental charter service is determined on a trip-by-trip basis and generally means non-peak hours and weekends. Many of the trips provided were during the week⁹ and during peak hours. 73 trips in less than a year certainly looks like a pattern of violation, and FTA has no rebuttal evidence from the Respondent. Therefore, the service as previously explained constitutes impermissible charter since it would not qualify as incidental service.

⁶ Without rebuttal information or documentation from the Respondent, FTA can only conclude the services are charter.

⁷ Attached to the original complaints are emails and a letter between the parties regarding the Urbana Middle School charter to a local radio station. (Complainant's Exhibit F)

⁸ The contracts in Complainant's Exhibit D show that the following trips were "no cost" trips: a trip for the Urbana Business Association on June 22, 2003; for the U of I, Office of International Affairs on June 23, 2003; for ISEN on Sept. 6, 2003; for the City of Champaign on Sept. 9, 2003; for the Ikenana Club on Oct. 19, 2003; and for MTD on November 2, 2003.

⁹ Of the 73 trips, at least 25 of them took place during the week and before 7 pm. (Complainant's Exhibit D)

E. Service for Non-Profits

Although there is an exception for providing service for non-profits under the regulations, Section 604.9(b)(5), CUMTD has not provided any evidence to support its assertion that that is the only charter service it is providing. Without proper documentation, FTA cannot determine whether CUMTD is complying with the requirements for that exception.

Conclusion

Because CUMTD chose not to rebut any of Allerton's allegations with evidence, FTA has no choice, but to determine that all the alleged trips except for the InterVarsity Christian Fellowship constituted impermissible charter trips. Additionally, all the service CUMTD provided on behalf of Illini Swallow also constituted impermissible charter service.

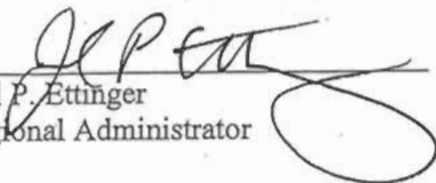
CUMTD provided illegal charter service on 73 occasions, which qualifies as a pattern of violation, since at least June 2003, when it published its annual notice to determine "willing and able" private providers and failed to make a determination with regard to Allerton. All the charter service it provided since then constitutes impermissible service because CUMTD failed to determine whether there were willing and able providers before providing the service and there is no documentation to support that any of the services qualified for the exceptions.

Remedy

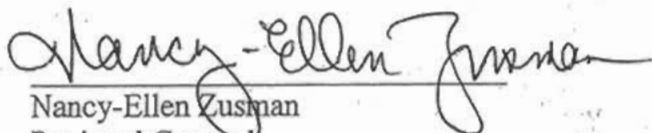
Complainant has requested that Respondent immediately cease and desist its charter operations. Until CUMTD properly completes the "willing and able" determination process, it cannot conduct any direct charter service, so FTA grants that request. Allerton has requested compensatory damages and costs, including attorney's fees. FTA does not have authority to grant compensatory damages or costs, so those requests are denied. Allerton has also requested that FTA halt federal funding for CUMTD. At this time, FTA is not granting that request.

FTA finds that Respondent has been providing impermissible charter service and orders it to immediately cease and desist any such further service. Refusal to cease and desist in the provision of this service could lead to additional penalties on the part of FTA. Additionally, the mileage for improper charter use cannot accrue towards the useful life of the Federally funded vehicles. Once Respondent has properly completed the willing and able determination process, if it wishes to resume providing direct or indirect charter service, then it must first obtain FTA concurrence from the Regional Office.

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 Jennifer Dorn, Administrator, FTA, 400 Seventh Street, S.W., Room 9328, Washington, D.C. 20590.


Joel P. Ettinger
Regional Administrator

02-08-05
Date


Nancy-Ellen Zusman
Regional Counsel

2/8/05
Date