

BEFORE THE FEDERAL TRANSIT ADMINISTRATION

California Bus Association,
On behalf of Amador Bus Lines,

Complainant

Charter Complaint #2003-01
49 U.S.C. Sections 5303, 5304,
5306, 5307, and 5323

v.

Sacramento Regional Transit District,

Respondent.

DECISION

INTRODUCTION

On March 6, 2003, the California Bus Association (CBA) filed this complaint with the Federal Transit Administration (FTA) alleging that the Sacramento Regional Transit District (RT) has violated the conditions placed on the receipt of Federal assistance by the Federal transit laws (49 U.S.C. Chapter 53) by instituting the Downtown Circulator service, which among other things, replaced a service operated by a private operator, Amador Bus Lines, under contract to the State of California Department of General Services (DGS). After reviewing the allegations and the filings of the parties, FTA concludes as follows:

- that RT's Downtown Circulator is not impermissible charter service under FTA's charter service regulation at 49 CFR Part 604; that RT's Downtown Circulator is "mass transportation" within the meaning of the Federal transit laws; and, accordingly, that the requirements of 49 U.S.C. 5323(d)(1) regarding a public authority's provision of charter service in competition with a private operator of charter bus service do not apply to RT's service; and
- that since Amador's shuttle service contract with DGS was for charter service, not mass transportation service, the requirements of 49 U.S.C. 5323(a)(1) regarding a public authority's provision of mass transportation service in competition with a private operator of mass transportation service do not apply; that with regard to participation by the private sector, RT has met the minimum statutory requirements for public notice and comment in section 5307; and that while it appears that RT could have done more to explore the use of private sector providers in this situation, RT has met the minimum requirements of section 5306.

CBA's complaint

Under its contract with DGS, Amador provided shuttle service for the exclusive benefit of state employees parking in state lots. Sometime in 2002, the State contacted RT to determine whether RT could add new routes to its downtown service area that would meet the needs of its employees who travel between State parking lots and State office buildings. As a result of these discussions, RT developed the Downtown Circulator service (also referred to as the Capital Shuttle), which now consists of three fixed routes numbered 141, 142, and 143 within the Central City of Sacramento. As a part of this plan, RT also changed the frequency of its previously existing Route 140.

This expansion of RT's service is provided by FTA-funded CNG-powered buses. DGS and RT entered into an agreement whereby DGS compensates RT for the additional costs of increasing downtown service in consideration of RT's acceptance of the State employee ID card as proof of fare payment along these new routes. Passengers who do not possess a State ID card pay the applicable fare. DGS purchases Central City Passes for its employees at a discounted rate.

On January 28, 2003, DGS notified Amador that its contract would not be renewed when it expired on April 7, 2003. In its March complaint, CBA requested that FTA investigate, alleging that RT violated private sector participation requirements under 49 U.S.C. 5303 (f)(4), 5304(d), 5306(a) and 5307(c)(2) and (6) by failing to inform or involve the private sector in its plan to use Federal assistance to purchase expansion buses for the purpose of displacing the private operator.

CBA also cites 49 U.S.C. 5323(a)(1)(A) and (B) in arguing that RT's federally assisted expansion buses are being used, unlawfully, to prevent an existing private transportation operator from fairly competing to provide this service.

CBA also asserts RT's Downtown Circulator service violates FTA's charter regulations, arguing that the Downtown Circulator is not mass transportation service as defined by 49 U.S.C. 5302(a)(7) and 49 CFR Part 604. CBA cites the agreement with DGS for RT to provide shuttle service for DGS employees and the RT planning documents describing DGS' approaching RT to operate the service needed to replace the shuttle service performed by Amador.

RT's response

On March 20, 2003, RT responded to the complaint. RT related the history of its development of the Downtown Circulator service, including its public hearing in June 1999 for the program of projects that included expansion of its CNG fleet. At that time, RT did not have a specific plan for deploying these new buses, other than to meet growing demand for service in the region. In addition, RT anticipated that it might need more buses to accommodate the service changes that would be required with the opening of the South Sacramento and the Amtrak-Folsom Light Rail Corridor Light Rail Extension projects. Last year, RT developed the service plan to determine where to

deploy these new buses, which are only now being delivered to RT. RT argued it met the private enterprise consultation obligations regarding procurement of these buses with its published notices.

RT argued that it complies with the FTA public participation requirement by publishing a notice annually that solicits private enterprise participation in RT's development of its program of projects to be funded under FTA grants. RT also publishes a notice of its program of projects inviting comments before the program is adopted, combining this notice with its budget public hearing notice. It provided a copy of the notices for the last three years. The notice in June of 1999 included expansion of RT's bus fleet. In addition, RT published a public hearing notice in August 2002 for the new Downtown Circulator service. RT states that its public notice process was reviewed as part of FTA's 1997 and 2000 triennial reviews and that no deficiencies in the public participation process were noted.

RT states that although the new routes are designed to serve State employees, the Downtown Circulator service is part of RT's fixed route system of mass transportation and is not charter service as defined by the three factors cited by FTA: (1) open to the public and not closed door, (2) designed to benefit the public at large, and (3) under the control of the recipient.

In response to CBA's argument that section 5323 applies to this situation, RT argues that FTA funds are not used to operate the competing service and that the shuttle service operated by Amador was charter service, not "mass transportation service" protected by the statute.

Finally, RT argues that CBA's protest is untimely because Amador knew on January 27, 2003 that RT would be operating this service because it testified at RT's public hearing on that day but waited until March 8th to submit its protest.

RT believes the MPO for the Sacramento metropolitan urban area has properly provided the notice required by sections 5303(f)(4), 5304(d), and 5307(c)(2) and (6).

CBA's response to RT

On April 7, 2003, CBA responded to RT's March 20 and 25 responses, stating as follows:

1. RT is not in compliance with private sector participation requirements because it did not disclose that its 1999 program of projects bus expansion plan would include the Downtown Circulator service. Further, CBA states that RT's August 26, 2002 public hearings did not include the private sector in consultation regarding this new service.
2. RT is not excused from FTA private sector participation requirements because it does not receive FTA operating assistance.

3. Amador has standing to be protected under section 5323 because of its likelihood to be financially injured.
4. RT's Downtown Circulator is not mass transportation, but charter under contract to DGS. RT's 1992 Sacramento Downtown Shuttle Feasibility Study Draft Final Report does not support the new service in question. CBA maintains there is no demonstrable demand for the Downtown Shuttle other than to serve State employees. Further, all of RT's public notices in 2002 identify this service as "New Downtown State Shuttles." CBA argues that while the service agreement with DGS was converted into a purchase of Central City passes, the subsidy from DGS remains substantially the same.
5. CBA's complaint is not untimely because while RT approved the Downtown Shuttle Service on September 30, 2002, it was not until a February 14, 2003 meeting with DGS that CBA was told that DGS was not interested in pursuing discussions with CBA.

RT's second response

On June 3, 2003, RT provided additional information regarding its compliance with 49 U.S.C. sections 5306 and 5307 regarding private enterprise participation. RT responded that the requirement in section 5306(a) applies to plans and programs developed by the metropolitan planning organization, in this case the Sacramento Area Council of Governments. RT states it complied with section 5307(c) requirements for participation of interested parties, including private transportation providers.

DISCUSSION

1. Charter Service.

The threshold issue is whether the service provided by RT is impermissible charter service or permissible mass transportation. The definition of charter service found in FTA's regulations at 49 CFR 604.5(e) is as follows:

[T]ransportation 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 a one-time provision of service over which the passenger, not the service provider, exercises control. 52 Fed. Reg. 11916, 11919 (April 13, 1987). In contrast, the Federal transit laws define "mass transportation" as transportation that provides regular and continuing general or special transportation to the public. 49 U.S.C. § 5302(a)(7). In the preamble to its charter service regulation, FTA has articulated other features that flow logically from this definition:

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.

Given the many varying scenarios existing in the transportation industry, FTA has determined that a balancing test must be used to determine the nature of the service involved in any complaint filed with FTA. As the preamble to the charter regulation points out, there is no fixed definition of charter service, and the characteristics cited by FTA are illustrative, not exhaustive. *52 Fed. Reg. 11919-11920.*

Under the control of the recipient

The charter service criteria include bus transportation under a single contract at a fixed rate for the vehicle or service. FTA has previously determined that control of fares and schedules is the critical element in the balancing test FTA uses to distinguish charter service from mass transportation. *Seymour*, at 10. Compensation on the basis of hours of service is evidence of charter operations, whereas individual fares paid by each rider indicates the service is mass transportation. *Seymour*, at 9-10.

The RT and DGS arrangement, the Central City Pass Agreement, provides that RT retains control of routes and service. Such pass agreements are not features of charter service, instead constituting "group demand" service as contemplated by Q&A Number 27(e), "Charter Questions and Answers," *52 Fed. Reg. 42248, 42252* (November 3, 1987), which provides that group demand service is not charter service where groups such as employees of a common workplace contract with a transit authority for service and each individual pays his or her own fare, so long as the authority controls routes and service and the service is open door.

Designed to benefit the public at large

Service is designed to benefit the public at large when it serves the needs of the general public, instead of those of "some special organization such as a private club." *52 Fed. Reg. 11920* (April 13, 1987). *Annett Bus Lines v. City of Tallahassee*, FL-TALTRAN/90-02-01 (April 28, 1992). In this regard, CBA has provided evidence that the Downtown Circulator service was structured to meet the needs of State employees to travel from parking lots to State office buildings, that it is a service designed to substitute for the State's contract service with

Amador, and that the service since instituted carries almost exclusively State employees. The record supports these assertions; however, none of these facts, taken into consideration with the information provided by RT, results in the conclusion that the Downtown Circulator service is anything but mass transportation.

While the service is designed to accommodate the State employees primarily, it is not restricted to their exclusive use, but is available to anyone wishing to board; moreover, this service has been integrated into RT's larger route structure, providing greater transportation connectivity in the downtown area for riders of the fixed route system. FTA finds that the service benefits the public at large.

(CBA argues that RT's 1992 study supports a different downtown service configuration, not the Downtown Circulator service. FTA is not willing to substitute its judgment for the grantee's in this regard.)

Open to the public and not closed door

In determining whether service is truly "open door," FTA looks both at the level of ridership by the general public, as opposed to a particular group, and at the intent of the recipient in offering the service. The intent to make service open door can be discerned in the attempts to make the service known and available to the public. FTA thus takes into account the efforts a recipient has made to market the service. Generally, this effort is best evidenced by publication of the service in the recipient's preprinted schedules. *Washington Motor Coach Association v. Municipality of Metropolitan Seattle*, WA-09/87-01 (March 21, 1988). FTA has also interpreted "open door" to mean a substantial public ridership and/or an attempt by the transit authority to widely market the service. *Blue Grass Tours and Charter v. Lexington Transit Authority*, URO-III-1987. The posting of bus stop signs and connections to other transportation routes are also considered indicators of "opportunity for public ridership." *Seymour Charter Bus Lines v. Knoxville Transit Authority*, TN-09/88-01 (November 29, 1989).

RT advises that the Downtown Circulator routes and schedules are set out in the pocket timetables that will be supplied in each bus assigned to these routes. In addition, the new routes are included in the June 2003 edition of SRT's Bus and Lightrail Timetable Book. FTA finds that SRT has demonstrated that the service is, in fact, open door.

Accordingly, FTA concludes that RT's Downtown Circulator is permissible mass transportation, not charter service, within the meaning of the Federal transit laws. We now turn to the question of RT's compliance with the private sector participation requirements in the Federal transit laws.

2. Private Sector Involvement.

Compliance with private sector participation requirements

The relevant provisions of 49 U.S.C. 5306 focus mainly on including the private sector in participating in local transit programs, ensuring that adequate compensation is provided a private provider when its transit facilities and equipment are acquired by a state or local government authority, and protecting private providers of transit from competition with federally assisted transit providers.

Federal transit law (49 U.S.C. 5303(f)(4)) and the joint FTA/Federal Highway Administration planning regulations direct special attention to the concerns of private transit providers in planning and project development, specifically requiring that private transit providers, as well as other interested parties, be afforded an adequate opportunity to be involved in the early stages of the plan development and update process (23 CFR 450.322).

FTA does not impose prescriptive requirements for determining whether a grant applicant has made adequate efforts to integrate private enterprise in its transit program, as explained in the FTA Notice "Private Enterprise Participation," dated April 26, 1994 (59 Fed. Reg. 21890 *et seq.* (1994)); FTA Circular 9030.1C, Page V-39, Para. 24. *Private Enterprise Concerns* (October 1, 1998).

FTA grantees must comply with rigorous planning and private enterprise requirements (49 U.S.C. 5303-5307) and the joint FTA/FHWA planning regulations. To determine the adequacy of a grant applicant's efforts to incorporate private enterprise in its transit program, FTA monitors compliance with statutory and regulatory private enterprise requirements as part of the triennial reviews. Indeed, FTA's Fiscal Year 2000 Triennial Review Report noted a deficiency in RT's public participation process. On July 3, 2001, RT took corrective action through adoption of a Standard Operating Procedure establishing a new coordination and consultation process in developing the annual federal program of projects. Upon review, FTA accepted this procedure and closed the finding.

Competition with the private sector

Federal law recognizes the special concerns of private transportation providers and affords them certain safeguards from competition with public agencies. Specifically, FTA is prohibited from providing Federal assistance to a governmental body that provides service in competition with, or supplementary to, mass transportation service provided by a private transportation company, unless FTA finds that the local transportation program developed in the planning process provides for participation of private mass transportation companies to the maximum extent feasible (49 U.S.C. 5323(a)(1)(B)).

RT argues that this restriction in section 5323(a)(1) applies only if FTA funds are used to operate the competing service and the company is providing "mass

transportation" service and that neither condition is met here. RT states the Downtown Circulator service does not fall under this restriction. CBA has provided information to support its assertion that the Downtown Shuttle service was instituted to meet, at least in part, the needs of the State, as employer, to replace the service it had previously contracted for with Amador.

The term "mass transportation" is defined in 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." Emphasis added. The term "charter" is defined in the FTA regulations at 49 CFR 604.5(e) as follows:

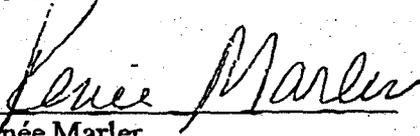
"Charter Service" means transportation using buses or vans, or facilities funded under the Act of a group of persons who pursuant to a common purpose, under a single contract, at a fixed charge (in accordance with the carrier's tariff) for the vehicle or service, have acquired the exclusive use of the vehicle or service to travel together under an itinerary either specified in advance or modified after having left the place of origin"

Under this standard, it is clear that the service Amador provided under contract with DGS was charter service; moreover, Amador is not a "private mass transportation company" to which the protections of section 5323 apply.

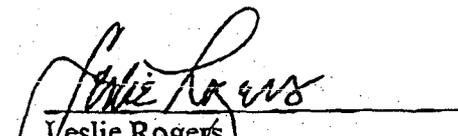
CONCLUSION

While it appears that RT could have done more to explore the use of private sector providers in this situation, RT has met the minimum requirements under the law. The service RT is providing, known as the Downtown Circulator, is not charter service, but permissible mass transportation service.

In accordance with 49 CFR 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.


 Renée Marler
 Regional Counsel

8/5/03
 Date


 Leslie Rogers
 Regional Administrator

8/5/03
 Date