



U.S. Department
of Transportation
Federal Transit
Administration

REGION IX
Arizona, California,
Hawaii, Nevada, Guam
American Samoa,
Northern Mariana Islands

201 Mission Street
Suite 2210
San Francisco, CA 94105-1839
415-744-3133
415-744-2728 (fax)

APR 28 2003

Bill Miller
Desert Resorts Transportation
PO Box 2084
Rancho Mirage, CA 92270

Richard Cromwell III
General Manager, CEO
SunLine Transit Agency
32-505 Harry Oliver Trail
Thousand Palms, CA 92276

Re: Charter Complaint 2002-11, Desert Resorts
Transportation v. SunLine Transit Agency

Dear Mr. Miller and Mr. Cromwell:

In accordance with the Federal Transit Administration (FTA) Charter Service regulations, Title 49 Code of Federal Regulations (CFR) Part 604, the Federal Transit Administration (FTA) has reviewed the above captioned Complaint along with related materials submitted by both parties. For administrative convenience FTA has consolidated 106 individual complaints filed by Desert Resorts Transportation (Desert) against the SunLine Transit Agency (SunLine) for purposes of this decision as all complaints arise out of the same set of circumstances.

In earlier decisions (California Bus Association (CBA) v. SunLine) rendered on February 10, 1997 and January 15, 2002, FTA determined that group trips performed by SunLine, including those, which are the subject of the instant complaint, constitute charter service subject to the procedural requirements and limitations contained in the FTA Charter Service regulations. FTA also determined that SunLine failed to comply with the Charter Service regulations in agreeing to provide such services. Accordingly, the only issue to be decided at this time is what, if any, remedies authorized under the regulations (49 CFR §604.17) should be imposed.

Background

On February 10, 1997, the FTA issued a decision finding that SunLine's fixed-route group trip service was charter service in violation of 49 CFR Part 604. SunLine was ordered to discontinue operating the service and advised that if it wished to reinstitute group trip operations, it must reconfigure the service to conform to FTA's mass transportation guidelines. Shortly thereafter, FTA granted a temporary stay of its decision based on SunLine's assertions that the information it had provided prior to the February 10 decision was outdated; the parties had resolved their

differences during an October 1996 meeting; and the charter service infractions had been corrected. Based on supplemental information obtained following the February 10, 1997 decision, on January 15, 2002, FTA found that SunLine had not made the changes necessary to bring the group trip service within the definition of mass transportation. SunLine's reconfigured group trip service was found to be charter service rather than mass transportation and therefore, an impermissible use of FTA funded facilities and equipment. FTA suggested several ways in which SunLine could reconfigure the service in order to bring it into compliance with Federal requirements; however, SunLine failed for a variety of reasons to adopt those suggestions.

As of the January 15, 2002 letter of decision, SunLine had obligated itself and scheduled to perform approximately 146 group trips according to information provided by both parties. Following the January 15 decision, SunLine hosted a meeting of private charter operators to explain the situation and to see if any of them could carry out the group trip contracts. Thirty-Nine or forty of those trips were cancelled by SunLine. The remaining 106 were not cancelled and form the basis of Desert's 106 Complaints. In a letter dated May 3, 2002, addressed to Pacific Coast Bus Service, Inc. SunLine admits carrying out the balance of the group trips and states that the last trip was performed on April 23, 2002.

Discussion

Desert is seeking remedies under 49 CFR §604.17 which says that: "(a) If the Regional Administrator determines that a violation of this part has occurred, the Regional Administrator may order such remedies as the Regional Administrator determines are appropriate. (b) If the Regional Administrator determines that there has been a continuing pattern of violation of this part, the Regional Administrator may bar the respondent from the receipt of further financial assistance for mass transportation facilities and equipment."

To remedy SunLine's admitted violations, Desert asks FTA not only to withhold further Federal funding from SunLine, but to also require SunLine to pay Desert monetary damages in an amount equal to that which would have been received had Desert provided the service. In support of its requests Desert relies on the preamble to the charter regulation found at 52 Federal Register (FR) 11916, April 13, 1987, page 11929. In the discussion of Section 604.17 Remedies, the preamble says, "this section of the final rule sets forth the remedies, or penalties, that UMTA may impose on a recipient if we find that there has been a violation of the regulation."

In response, SunLine argues that it booked the 106 group trips before the January 15, 2002 decision letter was issued in reliance on the temporary stay granted earlier by FTA and in good faith believing that it was properly reconfiguring the service based on advice from FTA. The record reflects that the trips were booked before the FTA decision and completed in approximately three months following the decision.

In determining whether to impose the remedies requested, SunLine's intent in providing the group trips following the FTA decision of January 15 must be balanced with the likely effects of such remedies. Nothing in the record suggests that SunLine was acting in defiance of the FTA decision. To the contrary, the meeting held with private operators to see if they could perform any

of the contracted group trips suggests that SunLine made a concerted effort to carry out the intent of the decision. Nothing in the record suggests that SunLine was knowingly attempting to harm Deserts or any other private operator. Rather, SunLine appears to have acted in the mistaken belief that its group trips were a permissible form of mass transportation.

On the other hand, suspension of SunLine's eligibility for further Federal financial assistance would likely result in a noticeable reduction in the quality of mass transportation service to transit riders in the SunLine service area. That result would be contrary to FTA goals for increasing transit ridership and making public transportation the mode of choice for the traveling public. Accordingly, FTA will not impose that penalty in the absence of evidence that less drastic remedies will not suffice.

In the preamble to the issuance of the Charter Service regulations FTA purposely declined to specify any particular penalties that might be imposed upon finding a violation, beyond the possibility of withdrawing future financial assistance. "In this final rule, UMTA [now FTA] has decided not to specify any penalties. We agree with several of the commenters that this approach provides UMTA with the flexibility needed to fashion a remedy that fits the situation. While this may permit the possibility of arbitrary penalties and remedies, UMTA's close reliance on and following of precedents should prevent this."

In the fifteen years the regulations have been in effect, FTA has neither withheld future financial assistance, nor awarded monetary penalties in response to a violation, so there is no such precedent to apply in this case. With respect to Desert's request that FTA require SunLine to pay Desert the amount Desert would have earned had Desert provided the group trips, Desert has not shown that it would necessarily have been hired over other private charter operators. Even if it could be shown that Desert would have been awarded the contracts, it is purely speculative to suggest that Desert would have earned a particular sum on such business.

The preamble does provide some guidance regarding one appropriate remedy to be applied where charter service is impermissibly performed. At 52 FR 11926 discussion of spare ratios and useful life rely on Section 9 [now 5307] Formula Grant Application Instructions, to wit, "a transit bus has a mass transit useful life of 12 years. UMTA will not permit a recipient to count charter service toward meeting this 12-year mark. As a result, UMTA will, absent extenuating circumstances, only permit a bus to be replaced after the bus is used in 12 mass transportation years, not just 12 calendar years."

Further guidance with regard to remedies is found in the Questions and Answers promulgated by UMTA at 52 FR 42248, November 3, 1987. Question 28 asks, "How should grantees calculate 'mass transit useful life' less 'charter life' of vehicles?" The Answer is as follows: "Any reasonable method of calculation is sufficient (e.g. average hours per week, month, or year subtracted from total hours; average miles per week, etc., subtracted from total miles). The calculation does not necessarily have to be done for each particular bus, and averages can be applied to an entire fleet. For instance, a grantee that provides 3 days of charter service per year per bus, would subtract 36 days from the 12-year useful life of each individual bus...." Other expenses for which grant money may not be used when charter is performed include depreciation, fuel, maintenance and labor.

Conclusion

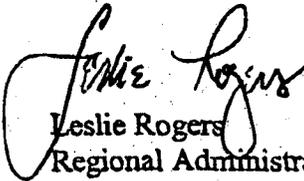
Because the charter services performed by SunLine between January 15, 2002 and April 23, 2002, had been contracted for and scheduled prior to the date of FTA's January 15 decision letter, and

there is no evidence in the record to suggest that SunLine acted in bad faith or in defiance of the FTA decision, FTA will neither withhold future financial assistance to SunLine, nor impose monetary penalties payable to Desert pursuant to 49 CFR §604.17, consistent with prior precedent. Desert's requests that FTA deny further financial assistance to SunLine and that SunLine be directed to pay monetary damages to Desert are hereby denied.

However, in light of the continuing nature of the violations and the apparent inability of SunLine to conform its behavior to the regulatory requirements with respect to its so called "group trips", SunLine is hereby ordered to cease and desist from offering to perform any type of group service, except for services designed to meet the special needs of elderly or handicapped patrons otherwise permitted under the Charter Service regulations.¹ In determining the in-service useful life of FTA funded vehicles, equipment, and facilities used in support of "group trips" since January 1, 1997, SunLine must calculate and deduct all associated use (mileage, time, or depreciation) from the inventory records required to be maintained in accordance with 49 CFR Part 18 and related terms and conditions of FTA Assistance Agreements. No reference to group trips is to be published in the SunLine Rider's Guide as was done in July 2001. SunLine must take all necessary steps to conform its service in all respects to the requirements of FTA's regulations and guidelines for mass transit.

In accordance with 49 CFR §604.19 appeals of this decision must be made within ten days of receipt of this decision. The appeal should be sent to Jennifer Dorn, Administrator, FTA, 400 Seventh Street, S.W., Room 9328, Washington, D.C. 20590.

Sincerely,


Leslie Rogers
Regional Administrator

¹ This order encompasses all group service as described in SunLine's July 2001 Rider's Guide. A separate complaint has been filed by Desert regarding SunLine services designed to meet the special needs of elderly and handicapped patrons as advertised on SunLine's internet web page. Those services are not covered by this decision and will be addressed in a response to the recent complaint.