

BEFORE THE FEDERAL TRANSIT ADMINISTRATION

Desert Resorts Transportation :
Complainant :
v. : Charter Complaint #2002-07
: 49 U.S.C. Section 5323(d)
SunLine Transit Agency, :
Respondent :

DECISION

Introduction

Desert Resorts Transportation (Desert Resorts) filed this complaint with the Federal Transit Administration (FTA) on April 26, 2002, alleging that the SunLine Transit Agency (SunLine) provided charter service in violation of the FTA charter regulation, 49 CFR Part 604. The service complained of pertains to SunLine's bus service to an annual film festival. Based upon a review of the allegations in the complaint and the subsequent filings of the parties, FTA concludes that the service in question is charter service as defined by 49 CFR 604.5(e) because it was performed under a single contract at a fixed charge for the vehicles. FTA orders SunLine to cease and desist from providing the service as it is currently configured.

Complaint

Desert Resorts filed this complaint with the FTA by letter dated April 26, 2002. The complaint alleges that SunLine provided charter service in violation of FTA's charter rules on two separate occasions; specifically, under contract with the Nortel Networks Palm Springs International Film Festival (PSIFF) from January 11-20, 2002, and at the Desert Resorts Regional Airport on April 8, 2002.

In a letter dated June 28, 2002, FTA directed the parties to attempt local conciliation for thirty days under 49 CFR 604.15. In correspondence dated July 25 and August 12, 2002, SunLine acknowledges that the service performed at the airport was impermissible charter service and states that it paid Desert Resorts \$560.00 in full settlement and release of all claims. SunLine maintains, however, that the service provided for the PSIFF is mass transportation and reports that the parties are unable to resolve this dispute. By letter of August 27, 2002, FTA advised Desert Resorts and SunLine that it would proceed with a formal investigation concerning the PSIFF service.

In its complaint, Desert Resorts claims that SunLine provided bus service under contract to the PSIFF at a fixed charge of \$50.00 per hour per vehicle without notifying local charter operators or national bus associations as required by 49 CFR 604.11. Desert Resorts included with its complaint three "SunLine News" press releases which state the free SunBus PSIFF shuttle is conveniently timed to connect with the SunLink schedule to

allow for a full day to enjoy viewing world class films, shopping or dining. The press releases emphasize the positive effect the SunLink/SunBus¹ partnership will have on reducing traffic congestion and harmful emissions.

Response

SunLine's response is dated September 10, 2002. SunLine states that from January 11-20, 2002, it provided additional fixed-route service with two buses that operated open door. SunLine claims that the service is an enhancement to its regular fixed-route service and operates without any negative impact on its regular service.

SunLine included with its response a December 17, 2001 Agreement (Exhibit C) signed by SunLine's Transit Marketing Coordinator and the Chairman of the PSIFF. The Agreement stipulates that SunLine will operate two PSIFF-wrapped buses free to the public between four theater venues every 10 minutes from January 10-21, 2002² between the approximate hours of 8:00 a.m. and 11:00 p.m. It identifies the four theater venues and provides that the stop at the Palm Springs High School Auditorium is pending School District and SunLine approval. The Agreement further provides that the cost to the PSIFF to operate this special service is \$50.00 per hour per bus. In addition, the Agreement provides that SunLine will operate two wrapped buses on various SunBus routes from December 2001 through May 2002, for a monthly advertising fee of \$1,000 per bus.

According to SunLine, the \$50.00 charge indicates the subsidy that PSIFF agreed to pay so that the fare would be free for all riders and to assist with the marketing efforts which were extensive. SunLine maintains that its arrangement with the PSIFF is a marketing agreement, not a transit service agreement. As part of the marketing agreement, SunLine notes that it provided SunBus passes to members of an association called the Elderhostel; the SunBus passes allowed riders access to all fixed-route service during January 2002.

SunLine also submitted a flyer (Exhibit A) and a placard (Exhibit B). The flyer and placard offer free shuttle service, list the bus schedule, and direct festivalgoers to look for PSIFF signs at select SunBus stops. The flyer contains a map outlining the PSIFF route to four theater venues: #1 Festival of Arts Cinemas, #2 PS High School Auditorium, #3 Courtyard 10, and #4 Annenberg Theater (Palm Springs Museum). SunLine maintains that it placed the flyer and placard on its regular fixed route buses to advertise the service and that the flyer was placed at all PSIFF locations as well. Moreover, SunLine states that every newspaper ad and every TV spot for the festival included news of the service.

Rebuttal

Desert Resorts' rebuttal is dated September 27, 2002. Desert Resorts claims that the December 17, 2001, Agreement contains terms and conditions typically used in any

¹ SunLine's preprinted schedule states that SunBus is a "Valley-wide fixed route bus service" and SunLink is an "express service to the Inland Empire."

² According to subsequent correspondence, the dates were changed to January 11-20, 2002.

contract for charter service, such as the hourly rate per bus, hours of service, and location of stops. In addition, Desert Resorts argues that the service is controlled by the user and is not designed to benefit the public at large because the buses stop only at the four PSIFF theater venues stipulated in the Agreement. Moreover, Desert Resorts asserts that SunLine has not provided any evidence that the PSIFF service was regularly scheduled or route deviation service.

Desert Resorts contends that SunLine has engaged in a continuing pattern of violation, including the service performed at Desert Resorts Regional Airport as well as alleged violations which are the subject of a separate charter complaint filed by Desert Resorts and currently pending before FTA. Desert Resorts asks FTA to order SunLine to reimburse to complainant the sum of \$23,400.00 plus penalties.

Second Response

By letter of October 8, 2002, FTA requested additional information from SunLine including its preprinted schedule and any supplemental documentation pertaining to the Agreement of December 17, 2001.

By letter dated October 18, 2002, SunLine submitted its supplemental response and enclosed its regular published schedule along with a November 26, 2001, letter it had sent to the PSIFF formalizing discussions that took place between the parties on September 19, 2001. The letter states SunLine will create and operate the bus route; one bus will allow for service every 20 minutes; and two buses will provide service every 10 minutes. SunLine's letter further stipulates that additional stops along the designated route are at the discretion of the SunBus driver and only when it is safe and legal to do so. In addition, the letter provides that it is the parties' intent to produce a successful special event that nurtures the use of public transit. SunLine maintains that the November 26, 2001, correspondence confirms SunLine's creation of the route and control of the service.

SunLine further argues that it designed the PSIFF service to overlay its regular fixed route in an effort to encourage riders to transfer and utilize the additional free service.³ According to SunLine, it added two stops to the PSIFF service that did not previously exist on its regular fixed route: #2 Ramon [PS High School Auditorium] and #4 Annenberg Theatre [Palm Springs Desert Museum]. SunLine claims that all of the film festival venues, with the exception of #4 Annenberg Theatre can be accessed by the regular fixed-route service.⁴ SunLine claims that the service does not inconvenience any

³ A comparison of the film festival flyer with the published schedule at pages 10 and 17 indicates that the PSIFF service follows segments of SunLine's regular fixed-route service on Lines 14, 24, 30 and 111 as well as on Line 23 along Ramon between Farrell and Sunrise. The flyer shows the PSIFF route detours approximately one block from SunLine's regular fixed-route at Palm Canyon where it continues along Amado, turns left on Museum Drive and turns left again at Tahquitz to return to Palm Canyon.

⁴ The preprinted schedule contains a section entitled "Places to Go on Sunbus" on page 13 and lists theater venues #1, #3 and #4 as accessible on the regular fixed-route service. As to venue #2, pages 9 and 10 of the schedule indicate that PS High School Auditorium is adjacent to SunLine's fixed route service on Lines 14 and 23, respectively.

riders by deviating from regular fixed route service and is designed to integrate with the regular route to maximize availability of the service to the general public.

SunLine states that it performed the PSIFF service for the first time in January 2001 and intends to provide the same type of service annually, subject to FTA's finding that the service is mass transit and not charter service.

Second Rebuttal

By letter dated October 28, 2002, Desert Resorts provided its second rebuttal. Desert Resorts points out that the service was provided under a single contract for \$50.00 per hour per vehicle and operated during peak hours. Further, Desert Resorts argues that SunLine does not have the final say for setting and modifying the route, rate, schedule and equipment. Rather, Desert Resorts reiterates that SunLine's arrangements with the PSIFF are identical to private charter operations where the client requests transportation and dictates the location and frequency of service while the charter operator sets a schedule based on driving time and client desires. Moreover, Desert Resorts maintains that the service does not benefit the public at large because it is designed to serve only attendees of the PSIFF; none of the four film venue stops coincide with SunLine's regular fixed route service; and the PSIFF service overlaps existing routes only in terms of the streets travelled over. Desert Resorts emphasizes that the theater venues are located at least 300-500 feet from the closest regular SunBus stops.

Third Response

On October 30, 2002, SunLine provided additional information pertaining to the PSIFF service. Thereafter, Desert Resorts indicated it intended to rebut the October 30 submission. In a November 25, 2002, conference call among FTA, Desert Resorts and SunLine, it was agreed that the FTA would not consider the October 30 information as part of the administrative record and Desert Resorts would not file an additional rebuttal.

Discussion

Before reaching the main issue of this complaint, two subsidiary questions raised by complainant will be addressed. First, in settling the dispute involving the service at the Desert Resorts Regional Airport, SunLine made a decision at the local level to pay \$560.00 in damages to Desert Resorts. Desert Resorts now requests that FTA order SunLine to pay \$23,400.00 plus penalties for providing the PSIFF service. The FTA is a grant-making agency, not a regulatory or enforcement agency. As such, the FTA does not award damages or assess fines and therefore, will not entertain Desert Resort's request. Next, Desert Resorts refers to various allegations it raised in another complaint involving SunLine which is currently pending before this agency. FTA will issue a separate decision in that matter. We turn now to the main concerns of Desert Resorts' complaint.

The essential issue in this matter is whether the service provided by SunLine 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 thought of as a one-time provision of service and the user, not the recipient, has the control of the service. 52 Federal Register 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 the regulation, the FTA has articulated other features which locally flow 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.

While these distinctions may appear to be clear, there are many difficulties in determining in a given case which category the service fits into most appropriately. FTA has previously stated that a balancing test must be applied to determine the nature of the service involved in any complaint filed with FTA because, as the preamble to the charter regulation points out, there is no fixed definition of charter service, and the characteristics cited by FTA are not exhaustive, but merely illustrative. 52 Fed. Reg. 11919-11920. FTA has reached the findings and determinations below on the basis of such an analysis.

Designed to benefit the public at large

FTA has previously stated that 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). The charter regulation requires that riders outside a target group of customers be eligible to use the service. Annett Bus Lines v. City of Tallahassee, FL-TALTRAN/90-02-01 (April 28, 1992).

The record is persuasive that the film festival route was designed to interconnect with SunLine's regular fixed-route and that all four theater venues can be accessed on SunLine's regular service. Further, the "SunLine News" press releases indicate the film festival shuttle was conveniently timed to connect with SunLine's regular service to allow for a full day to enjoy viewing world class films, shopping or dining. In FTA's view, the festivalgoers are not a sufficiently defined enough group to be considered a "private club." Moreover, while the service may accommodate them primarily, it is not restricted to their exclusive use but is available to anyone wishing to board it. Therefore, FTA finds that the service was designed to benefit the public at large.

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 marketing 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).

FTA finds that SunLine made concerted efforts to demonstrate its intent to make the service open door. Although the film festival service is not listed in the preprinted schedule, SunLine actively marketed the service to the public through press releases, the flyer and placard, advertisements on wrapped buses, newspaper ads and TV spots, and integration with its fixed-route service. If a decision is made to reconfigure the service in accordance with FTA requirements, SunLine should publish the service in its preprinted schedules.

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 page 10. Compensation on the basis of hours of service is evidence of charter operations, whereas individual fares⁵ paid by each rider indicates the service is mass transportation. Seymour, at pages 9-10.

⁵ Cost is irrelevant in determining whether service is mass transportation or charter service. Generally, free charter service would be "non-incidentaI" since it does not recover its fully allocated cost, and FTA recipients cannot provide it, even under one of the charter exceptions. Q&A No. 27(a), 52 Fed. Reg., 42248, 42252.

The record is convincing that SunLine created and operated the PSIFF route and schedule to integrate and connect with its regular fixed-route service. Moreover, the November 26, 2001, letter from SunLine to the PSIFF provides further evidence of SunLine's control over the service by the statement "additional stops along the designated route are at the discretion of the SunBus driver." In these respects, the service is similar to mass transportation. We note, however, that the December 17, 2001, agreement between SunLine and the PSIFF specifically states that both the School District and SunLine have final approval over the new stop located at venue #2 Palm Springs High School Auditorium; and therefore, it is unclear whether SunLine had the final say over this location.

SunLine maintains the service is mass transportation and, subject to FTA approval, intends to offer the film festival service on an annual basis. In published guidance, FTA explains that "service to regularly scheduled but relatively infrequent events (sporting events, annual festivals) that is open door, with the routes and schedules set by the grantee and with fares collected from individuals, whether or not the individual fares are subsidized by a donor," does not meet the charter criteria. Q&A No. 27(c), "Charter Questions and Answers," 52 Fed. Reg. 42248, 42252 (November 3, 1987). The PSIFF service is similar in some respects to the service described in Q&A No. 27(c); however, it is provided pursuant to a single contract at a fixed charge of \$50.00 per hour per bus and fares are not collected from individuals. Therefore, SunLine failed to clear a critical hurdle in the balancing test, and the FTA concludes that the PSIFF service is charter service.

As noted in Q&A No. 27(c), FTA suggests that service such as an annual festival may be an excellent candidate for privatization. SunLine is reminded that FTA recipients are required to provide for the participation of private mass transportation companies to the maximum extent feasible. 49 U.S.C. Section 5323(a).

Conclusion

After a thorough investigation, FTA concludes that SunLine's service for the PSIFF is charter service because it meets the charter criteria of being performed under a single contract at a fixed charge for the vehicles. Therefore, SunLine shall immediately discontinue operating the service as it is presently configured.

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.

Margaret E. Foley
Margaret E. Foley
Regional Counsel

January 2, 2003
Date

Leslie Rogers
Leslie Rogers
Regional Administrator

JAN 3 2003
Date