



U.S. Department
of Transportation

**Federal Transit
Administration**

Administrator

400 Seventh St., S.W.
Washington, D.C. 20590

January 2, 2003

Paul J. Yesawich, III, Esq.
Harris Beach
99 Garnsey Road
Pittsford, New York 14534

Re: Charter Service Complaint Docket No. 2002-02
Appeal from Regional Administrator's Decision

Dear Mr. Yesawich:

The Rochester-Genesee Regional Transportation Authority (RGRTA) sent its Appeal from the September 18, 2002, charter service decision of Federal Transit Administration (FTA) Regional Administrator Thompson to me on September 30, 2002. On October 4, 2002, FTA accepted the Appeal of RGRTA as timely filed. On October 8, 2002, Kemps Bus Service, Inc. (Kemps), filed its Response to RGRTA's Appeal. RGRTA received Kemps' response on October 14, 2002, and submitted its Rebuttal on October 24, 2002.

Procedural Finding

FTA's Charter Service appeal procedure states that:

The Administrator will only take action on an appeal if the appellant presents evidence that there are new matters of fact or points of law that were not available or not known during the investigation of the complaint.

49 CFR § 604.19(b).

On October 4, 2002, FTA accepted RGRTA's Appeal. Having thoroughly examined the evidence presented by RGRTA of new matters of fact or points of law, it is apparent that there are no *new* matters of fact or points of law that were not available during the time the original investigation was pending. I, therefore, will not take action on this Appeal. Accordingly, the September 18, 2002, decision of Regional Administrator Thompson is administratively final.

New Matters of Fact

RGRTA stated that it did not receive a copy of all the documents and other evidence submitted by the complainant in this matter. RGRTA stated that if it had received such

evidence, it would have been able to respond to that evidence and the outcome of the proceeding may have been different. Specifically, RGRTA stated that as of September 30, 2002, it had not received a copy of Kemps' second rebuttal dated May 21, 2002. The agency file indicates that Kemps' letter dated May 21, 2002, was sent to Don Riley, CEO, RGRTA. Also, Kemps' October 8, 2002, Response to the Appeal, Tab C, contradicts RGRTA's claim by providing a copy of the letter itself, the certified mail receipt, and the return receipt signed by a RGRTA representative. RGRTA did not dispute this in its October 24, 2002, Rebuttal.

In addition, RGRTA presented "new" evidence in the form of an affidavit from RGRTA Chief Financial Officer Robert Frye concerning numbers of paid riders on routes located entirely within and partially within the Rochester Institute of Technology (RIT) campus during the period September 1, 2001, until August 31, 2002. Mr. Frye's affidavit relies on data that was within the control of RGRTA at all times during the investigation of this complaint by Regional Administrator Thompson, but RGRTA did not present it until its Appeal. Therefore, RGRTA has not presented any "new matter of fact" within the meaning of 49 CFR § 604.19(b) that would constitute grounds for me to act on this Appeal.

New Points of Law

In its Appeal, RGRTA argues that FTA committed various "errors of law" in its decision. Asserting an "error of law," however, is not a proper ground for appeal. Section 604.19(b) states that the Administrator will take action on an appeal only if the appellant presents evidence that there are "new . . . points of law that were not available or not known during the investigation of the complaint." RGRTA has failed to meet this standard. While RGRTA disputes FTA's reasoning, RGRTA does not allege a specific "point of law" that was not available or known to RGRTA during the investigation. RGRTA, therefore, has not presented any new points of law that would constitute grounds for me to act on this Appeal.

Advisory Opinion

For advisory purposes only, I address here RGRTA's specific arguments alleging "errors of law" in the Regional Administrator's decision. Recipients of Federal financial assistance are prohibited from providing charter service, except in very limited circumstances, 49 CFR § 604.9(a). FTA Regional Administrator Thompson investigated the charter service complaint brought by Kemps, a local private carrier, against RGRTA, on March 18, 2002. Regional Administrator Thompson's September 18, 2002, decision found that RGRTA provided impermissible charter service and ordered it to cease and desist any such further service as soon as practicable, in accordance with its existing contracts.

The service specifically complained of is RGRTA's bus service to a Rochester firefighter's funeral service near Syracuse, New York on March 12, 2002; a school field trip service provided by Livingston Area Transportation Service (LATS), a subsidiary of

RGRTA, on March 15, 2002; transportation service provided by RGRTA to Siena Catholic Academy on March 27, 2002; service from a senior living complex to a local supermarket, service between parking lots and a country club for the Ladies Professional Golf Association (LPGA) Tournament in June 2001 and June 2002; and service provided to the Rochester Institute of Technology (RIT) for commencement on May 25-26, 2002 and for intercampus shuttle service that is not part of RGRTA's regular route service. In addition, on May 6, 2002, Kemps complained about the direct agreement RGRTA has with the Town of Chile to provide charter service.

Definition of Charter Service

FTA's charter service regulation provides that recipients of FTA funding must enter into an agreement with FTA that the recipient will provide charter service that uses equipment or facilities provided under the Federal transit laws only to the extent that there are no private charter service operators willing and able to provide the charter service that the recipient desires to provide, unless one or more of the exceptions in 49 CFR 604.9 applies, 49 CFR § 604.7. Charter service is defined as "transportation using buses or vans, or facilities under the Acts 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." 49 CFR § 604.5(d).

Wegmans Grocery Shuttle

Kemps complained that local supermarkets work directly with RGRTA to provide transportation. RGRTA provides what it refers to as "regular lease service" from various senior citizen complexes to Wegmans grocery store. RGRTA acknowledged that this service is paid for by Wegmans and that no fare is required of any passenger. RGRTA did not provide a copy of a written contract between itself and Wegmans. RGRTA argues that these are public routes with publicly advertised schedules and fares that any member of the public may use. RGRTA argued it has operated this service for more than twenty years and that FTA has not questioned this service in its triennial reviews.

In its April 23, 2002, correspondence, RGRTA provided a newly revised "grocery shuttle outline" showing layovers at the store of from 40 to 100 minutes from arrival to leaving. According to the "grocery shuttle outline," the buses do not proceed to any other destination once they arrive at the store; the buses idle and wait for the grocery store customers to complete their shopping before leaving the store. In addition, the "grocery shuttle outline" does not look anything like the schedules and maps contained in RGRTA's regular service schedules.

In response to FTA's request to provide previous existing schedules of its Wegmans service, on July 15, 2002, RGRTA provided maps and schedules that are partially hand-drawn and hand-written, do not include details like location of bus stops or bus stop arrival and departure times, and that do not appear anything like RGRTA's other maps

and schedules. The only documents that include definite arrival and departure times at specific stops also include specific details to the bus driver about where and when to take a service road and what direction to take at a stop-sign along with directions to "pick up group" and "drop off group." The schedule also states, "Please stop at First Federal Bank for any passengers requesting to get off at that location."

RGRTA stated that schedules for this service are available at its Customer Service Center, Midtown Sales Center and Reception Desk; however, these measures do not indicate widespread availability of the information to the general public. The schedules are not published in the same format as the regular service RGRTA provides. The schedules indicate extended layovers so that Wegmans customers can conduct their business. It is clear from reviewing the schedules that the service RGRTA is providing to Wegmans is prohibited contract charter service for the benefit of Wegmans customers rather than regular mass transportation for the public at large. RGRTA provides the service for a group of persons (persons living in senior citizen complexes) who pursuant to a common purpose (grocery shopping at Wegmans) at a fixed charge (paid by Wegmans) have acquired the exclusive use of the vehicle or service (the buses layover at Wegmans for the senior citizens to return) to travel together under an itinerary either specified in advance or modified after having left the place of origin (riders are taken to Wegmans, may alight at First Federal Bank, and return to their point of origin).

Ladies Professional Golf Association Wegmans Rochester International Golf Tournament

In response to Kemps' complaint, RGRTA acknowledged that it has provided shuttle service to and from the Locust Hill Country Club in Pittsford, New York, for the Ladies Professional Golf Association (LPGA) Tournament. This is a special five-day annual event and RGRTA produced evidence that it provided this service for the past two years and contemplates providing it again in 2003. Based on the "Public Schedule" RGRTA submitted, it provided either five-minute or ten-minute service from various parking lots in Rochester to the Locust Hill Country Club in Pittsford, New York, from June 4 through June 10, 2001.

As evidence of its control over the LPGA service, RGRTA provided a copy of the contract between itself and Disabled Children of Monroe County Golf Tournament, Inc., dated May 8, 2002. RGRTA did not charge any fare to passengers because New York State subsidized \$60,000 in transportation costs. Disabled Children of Monroe County Golf Tournament, Inc., did not provide a cash subsidy, but in-kind advertising services valued at \$10,000. The contract indicated that RGRTA was to provide buses from June 17 through June 23, 2002, and through June 24, 2002, should a weather delay extend the event. Exhibit A of the contract indicated specific days of service, shuttle times, number of buses and lots to be used. Exhibit A specifically noted that on June 17 through June 19, 2002, RGRTA would hold buses until the course was clear. A general note to the schedule stated that, "Closing times are approximate. The gauge is one-half hour after the last group comes off from the 18th hole. Twenty-nine (29) foot small buses will be used." RGRTA asserted that the LPGA schedule was disseminated to the public

in a variety of ways including by news release, on RGRTA's automated telephone system, at RGRTA's Midtown Sales Center, and at its Reception Desk.

RGRTA stated that the LPGA service is not charter service since it falls squarely within example 27(c) contained in "Charter Service Questions and Answers," 52 Fed. Reg. 42248, November 3, 1987. This example described "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 [emphasis added] and with fares collected from individuals, whether or not the individual fares are subsidized by a donor." Charter Service Question and Answer 27(c), however, is merely an illustration of how the criteria for charter service apply to regularly scheduled but relatively infrequent events such as sporting events and annual festivals.

Based on the facts presented, the service RGRTA provided to the LPGA does not fit within any of the exceptions established in section 604.9 of the charter service regulation. The evidence presented establishes that LPGA controlled the service by requiring an indefinite schedule based on whether the golf course was clear, and that twenty-nine (29) foot small buses were to be used. In addition, the service was provided under a single contract or series of annual contracts. Finally, the service was for the benefit of people attending the golf tournament rather than the public at large.

FTA looks not only at who rides the bus in determining if it is open door, but also at the intent of the recipient in offering the service. To determine the intent, FTA considers what attempts the recipient has made to make the service known. For instance, FTA has found that publishing the service in the grantee's pre-printed schedules is the best marketing effort. *Washington Motor Coach Association v. Municipality of Metropolitan Seattle*, WA-09/87-01 (March 21, 1988). In its Appeal, RGRTA argued that it widely advertised the LPGA routes to the general public. But according to its July 15, 2002, response to FTA, RGRTA only issued a news release, placed the information on its automated telephone system for passengers, and made it available at its Midtown Sales Center and Reception Desk. There was no evidence of advertising on inside and outside bus cards, radio, or television. These limited publicity efforts evidence that the service was designed to benefit the LPGA rather than the public at large.

Finally, RGRTA argued that the Regional Administrator's decision is contrary to the decision of the United States District Court in *Blue Bird Coach Lines, Inc. v. Linton*, 48 F. Supp. 2d 47 (D.C.D.Ct. 1999).¹ The facts presented here are distinguishable from the facts in the *Blue Bird* decision. In *Blue Bird*, RGRTA was providing service to carry passengers from the Rochester area to football and basketball games in Buffalo and Syracuse, respectively. In *Blue Bird*, RGRTA published brochures regarding the service, and fares were paid as customers boarded. FTA concluded in that instance that the shuttle service was not charter service because "there was no single contract with a fixed charge, no exclusive use, nor an itinerary controlled by other than the transit operator."

¹ Kemps was one of the Complainants, and RGRTA the Respondent, in FTA's charter service complaint decision that was upheld in *Blue Bird*.

Blue Bird, at 51. In contrast, RGRTA provided service to LPGA pursuant to a single contract; schedules and equipment used were the subject of contract rather than solely within RGRTA's control; and the LPGA service was not designed to benefit the public at large.

Rochester Institute of Technology Campus Service

Kemps made clear in its May 21, 2002, response to FTA that its issue was specific to RGRTA service (provided through its subsidiary, Regional Transit Service, Inc. (RTS)) provided for inter-campus shuttling and graduation commencement. Kemps acknowledged that although RGRTA provides RIT students with "links to off-campus life, most of their shuttles are within the campus and do not link to the community at all."

RGRTA responded to Kemps on July 15, 2002, and provided copies of four agreements between RGRTA/RTS and RIT for (1) Additional Campus Shuttle Service; (2) Public Shuttle Route-RIT Inn and Conference Center; (3) February 24-28 and March 9-10, 2002, Midtown, Amtrak and Airport Shuttle Service; and (4) May 23-26, 2002, Midtown, Amtrak and Airport Service.

RGRTA/RTS's letter contracts confirm RIT's requests for additional services and the stops, schedules and fees for providing the services. The letter contracts note that RIT may elect to add additional operating days and fold the service into the existing service agreement. RIT decides when it wants to add another bus to the schedule and the time of day the bus will operate. RIT decides whether the service will continue to operate or not. RGRTA/RTS charges RIT \$62.00 per hour for its service. RGRTA/RTS's letter contract for Public Shuttle Route-RIT Inn and Conference Center stated that "RTS will also track the actual service hours provided each month and will make an adjustment to the final monthly installment, if necessary, to reflect the actual hours of service provided during the nine-month period." Periodically, RIT requests special service, for example, the services from campus to Midtown, Amtrak and the Airport as evidenced by the above referenced letter contracts.

RGRTA contends that the service is open door and therefore is not charter service as explained by FTA in "Charter Service Questions and Answers," question 27(d). RGRTA's reference is to FTA's interpretation of whether service within a university complex constituted prohibited charter service: "If the service is for the exclusive use of students and the university sets fares and schedules, the service would be charter. However, such service operated by a recipient which sets fares and schedules and is open door, though it services mainly university students, would be mass transportation." 52 Fed. Reg. 42252, November 3, 1987.

In its September 30, 2002, Appeal RGRTA included an affidavit from Robert Frye, Chief Financial Officer for RGRTA, stating that during the period from September 1, 2001, until August 31, 2002, approximately 2,400 individuals paid the regular RTS fare to ride on routes located entirely within the RIT campus. Mr. Frye further stated "during this same period approximately 339,282 individuals rode on routes subsidized, at least in part,

by RIT. Approximately 154,000 of these passengers did not have RIT identification and paid the regular RTS fare.” Mr. Frye’s affidavit shows that only a very small number of people from outside the RIT community used the routes located entirely within the RIT campus. It is not clear which routes Mr. Frye is referring to (except that they are subsidized *only in part* by RIT) when he stated that a large number (approximately 45%) of the passengers paid the regular fare and were not subsidized by RIT.² In any event, open door service does not of itself mean that the service is not prohibited charter service. Question 27(d) also requires that the recipient (RGRTA/RTS) set the fares and schedules. In this case, however, the evidence shows that it is RIT, not RTS, that sets the stops, schedules and fares (free to RIT students, faculty, and employees who show an RIT identification card).

RGRTA’s response to Kemps’ complaint regarding graduation commencement service is that it is an expansion of its existing route structure that services the RIT campus. RGRTA did not, however, provide a copy of any contract for this particular service. If, as RGRTA argues, the graduation commencement service was an expansion of its existing route structure, I find that it is also prohibited charter service for the reasons stated in the preceding paragraph regarding RIT’s control of the service.

Finally, RGRTA argued that the four letter agreements for intra-campus service have all expired. RGRTA then concluded that it is already in compliance with FTA’s Order since the services are no longer being performed. The expiration of the four letter agreements does not absolve RGRTA of responsibility for providing prohibited charter service. RGRTA stated that it would renegotiate its contract with RIT to clarify that RGRTA has complete control over the fares and schedules and is open door.

Rochester Firefighter’s Funeral Service, Livonia School District Field Trip, Siena Catholic Academy Service, and Town of Chile Service Contract

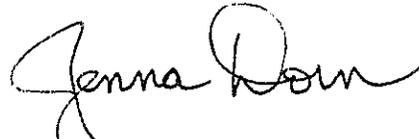
RGRTA does not appeal from the Regional Administrator’s decision with respect to these services.

² Mr. Frye states that these routes are subsidized *only in part*, by RIT. These would be the routes that travel between the campus and the Mall, the so-called “Movie Mall Shuttle.” Kemps did not complain about routes that travel outside the RIT campus.

Conclusion

RGRTA has not shown new matters of fact or points of law that were not available during the investigation. Accordingly, RGRTA's Appeal is denied. This decision is administratively final.

Sincerely,

A handwritten signature in cursive script that reads "Jennifer L. Dorn". The signature is written in black ink and is positioned above the printed name.

Jennifer L Dorn

cc: John H. Kemp, President
Kemps Bus Service, Inc.
2926 Lakesville Road
Avon, NY 14414