

BEFORE THE FEDERAL TRANSIT ADMINISTRATION

September Winds Motor Coach, Inc., and
Great Lakes Limousine Association,
Complainants

v.

Charter Service Docket Nos. 2003-08
and 2003-24
49 U.S.C. Section 5323(d)

Toledo Area Regional Transit Authority,
Respondent.

DECISION

Summary

On July 10, 2003, September Winds Motor Coach, Inc. ("September Winds") filed a complaint with the Federal Transit Administration ("FTA") alleging that Toledo Area Regional Transit Authority ("TARTA" or "Respondent") was providing charter service in violation of FTA's charter regulation, 49 Code of Federal Regulations (C.F.R.) Part 604. Subsequently, during TARTA's Triennial Review, also in July 2003, the Respondent was found to be out of compliance with the charter regulations, specifically 49 C.F.R. Section 604.9(b) and was told to immediately cease and desist from providing charter service. The final report of the Triennial Review was conveyed to TARTA on August 14, 2003.

The Respondent filed a reply to the September Winds complaint dated September 17, 2003. On October 2, 2003, September Winds provided additional information indicating that TARTA was still offering charter service, and on October 7, 2003, FTA issued a second letter ordering TARTA to immediately cease and desist providing charter service. September Winds responded to TARTA's reply on October 22, 2003.

On November 13, 2003, the Respondent was involved in an incident with the Ohio Department of Public Safety ("ODPS"). ODPS discovered underage drinking of alcohol on TARTA buses that were running between the University of Toledo and Headliner's Bar. FTA was notified via telephone of the incident on November 18, 2003. Also, on November 18, 2003, Great Lakes Limousine Association ("Great Lakes") filed a complaint against the Respondent for charter violations.

After contacting TARTA via telephone on November 18, 2003, FTA followed up with a letter on November 24, 2003, reiterating for the third time that TARTA must immediately cease and desist operating charters until it had properly completed the willing and able charter determination process. TARTA indicated that it would cancel all existing charters.

One of the cancelled charters was a charter with Paula Chasteen for her wedding. Ms. Chasteen contacted FTA via telephone on November 26, 2003, to complain about the cancellation of her wedding charter. Ms. Chasteen provided a copy to FTA of TARTA's charter confirmation on December 17, 2003.

TARTA met with FTA on December 1, 2003, to discuss outstanding charter issues. TARTA was asked to respond to all additional allegations in writing, specifically the Great Lakes complaint and the ODPS incident. TARTA indicated that it had issued a notice for willing and able private providers on November 28, 2003. TARTA provided its response to the additional allegations on December 29, 2003.

FTA consolidated the two charter complaints and the ODPS incident based on the similarity of the allegations and the incident circumstances. Upon reviewing the allegations in the complaints and the subsequent filings of both the Complainants and the Respondent, FTA has concluded that the service in question does violate FTA's regulations regarding charter service. Respondent is hereby ordered to cease and desist providing such illegal service.

Complaint History

September Winds filed its complaint with the FTA on July 10, 2003. The complaint alleges the following:

1. TARTA provided unauthorized charter for the following events:
 - a. Crosby Garden Festival of Arts;
 - b. Parade of Homes;
 - c. Senior Open;
 - d. School Runs;
 - e. Employment Services;
 - f. Christmas Shuttle Service; and
 - g. Wedding Trolleys.
2. September Winds replied to TARTA's annual notification to willing and able charter providers and never received a response;
3. TARTA underbid September Winds on the A-Plus Employment Services contract;
4. TARTA's phone book listing included bus and trolley charters; and
5. TARTA advertised group tours, weddings and parties under the heading "Buses- Charters & Rentals" in the phone book.

During the Triennial Review in July, TARTA was found to be out of compliance with the charter requirements. It was told verbally to cease and desist from providing charter service. On August 14, 2003, the final report of the Triennial Review was conveyed to TARTA, and it was told in writing to stop operating charters.

On October 2, 2003, September Winds supplemented its complaint with an ad showing TARTA service for Mud Hens games and pages from TARTA's website listing a variety of services that TARTA offered, specifically the availability of its trolleys for lunchtime service and rental, including for weddings and parties.

On October 7, 2003, FTA wrote TARTA again reiterating that it was under a cease and desist order to cease charter operations. FTA also indicated that it had never received a response to the September Winds complaint.

FTA subsequently received a response from TARTA dated September 17, 2003. In its response, TARTA indicated the following as to September Winds allegations:

1. Crosby Garden Festival of the Arts- service provided through a contract with Toledo Aero Charters;
2. Parade of Homes- service provided through a contract with Toledo Aero Charters;
3. Senior Open- no additional TARTA service was provided;
4. School Runs- it is permissible tripper service;
5. Employment Services- TARTA does not provide such service;
6. Christmas Shuttle Service- TARTA utilizes its trolleys on regular published routes;
7. Wedding Trolley- TARTA provides direct charter service after reaching agreements with all willing and able private providers; TARTA has never received a response from September Winds; and
8. TARTA acknowledged it had been cited during the recent Triennial Review for improper wording on its willing and able notice, but that the notice was in the process of being revised.

On October 22, 2003, September Winds responded to TARTA's reply. It stated the following:

1. TARTA's reply was untimely;
2. TARTA never contacted September Winds regarding a willing and able notice, but in June 2000, the American Bus Association contacted them about TARTA's notice, September Winds responded as a willing and able provider, but it never heard back from TARTA;
3. There is no address or listing for Toledo Aero Charters and the only phone number for them is listed as Wisniewski Funeral Home or Toledo Limousine Service;
4. Another private operator has photos of TARTA buses at various events (Cedar Point Amusement Park, Crosby Gardens Festival, etc.); and
5. Christmas Shuttle and Wedding Shuttles are part of a complaint from another operator.¹

On November 18, 2003, FTA was notified via telephone by a private charter operator that TARTA had been involved in an incident involving charter service and that there was a news story about the incident. The news article from a Toledo news station stated that on November 13, 2003, undercover agents from the ODPS arrested students on a TARTA bus for underage drinking. TARTA had been running a shuttle service from the University of Toledo to Headliner's Bar on Thursday nights. The shuttle was advertised as a "party bus."

FTA immediately contacted TARTA by telephone on November 18, 2003, regarding the ODPS incident. FTA followed up with TARTA in an email on November 19, 2003. FTA requested that TARTA explain the circumstances of the incident and provide supporting documentation. TARTA indicated that it had provided a shuttle service from the University of Toledo to Headliner's Bar through Toledo Aero Charter. FTA stated it wanted information on Toledo Aero

¹ September Winds refers to a complaint filed by Tecumseh Trolley and Limousine Service ("Tecumsch Trolley") against TARTA. FTA never received a complaint from Tecumseh Trolley.

Charter since FTA had been unable to find a listing for Toledo Aero Charter, and its only phone number was listed to Wisniewski Funeral Home.

On November 21, 2003, FTA obtained from ODPS a copy of the contract between TARTA and Verso Group, which represented Headliner's Bar. ODPS also supplied a copy of the "party bus" advertisement.

FTA issued a third letter to TARTA on November 24, 2003, asking TARTA to explain in writing the ODPS incident and the Verso contract. Again, FTA reiterated that TARTA should not be providing direct charter service nor leasing its vehicles until the ODPS incident was fully explained.

Subsequently, FTA received a complaint from Great Lakes dated November 18, 2003. In its complaint, Great Lakes alleged that its members consistently complain about TARTA providing illegal charters. TARTA was seen providing a charter from the COBO Hall to a Red Wings Hockey game on September 25, 2003, with a marquee marked "charter"; other charters included: Comerica Park for Detroit Tigers games, Cedar Pointe Ohio for the amusement park, etc. Great Lakes alleges that TARTA despite a cease and desist order from FTA is still advertising and providing wedding charters with its trolley. Great Lakes alleges that TARTA admits it does approximately 300 weddings a year. Because Great Lakes allegations were the same general allegations as the prior complaints, FTA consolidated the complaint with the September Winds complaint.

On November 25, 2003, TARTA admitted that it had stopped booking new charters, but it was continuing to provide charter service because it disagreed with FTA's cease and desist order. FTA informed TARTA that cease and desist meant stop all charters immediately. TARTA indicated it would cancel all its outstanding booked charters.

On November 26, 2003, Paula Chasteen contacted FTA to complain that her wedding charter with TARTA scheduled for November 28, 2003, had been cancelled. Ms. Chasteen subsequently provided a copy to FTA of her contract with TARTA and her confirmation dated October 29, 2003. The confirmation states that alcohol is permitted on the trolleys.

TARTA met with FTA on December 1, 2003. In that meeting, TARTA was asked to provide a written response to all the outstanding allegations against it. FTA again reiterated that until TARTA went through the willing and able determination process, it should not be providing direct or indirect charter.

TARTA sent in its response dated December 29, 2003, stating the following:

1. Past booking of charters- TARTA had been leasing vehicles for charter use to Aero Charters/ Toledo Limousine (Aero Charters) since 1995 based on its capacity constraints. TARTA only learned this year that Aero Charters had no vehicles. TARTA will stop doing business with Aero Charters. TARTA was also providing direct charter service with its trolleys, because it alleged it had agreements with the private willing and able providers. TARTA has ceased doing that and is currently going through the willing and able determination process. It received seven responses and will attempt to obtain

agreements with all seven private providers. It will not provide direct charter with its trolleys if it cannot reach agreements.

2. Service in Great Lakes complaint- The trips referenced by Great Lakes were "No Crumb" trips. Trips were organized and driven by TARTA drivers at minimal cost to outside organizations. The driver or group is assessed a charge of \$50 or \$100 to cover fuel costs and wear and tear on the vehicle. TARTA has stopped providing "No Crumb" trips.
3. Headliner's Incident- TARTA entered into an agreement with the Verso Group through Aero Charters to provide a shuttle from University of Toledo to Headliners and a coffee house. TARTA states it has a policy of no alcohol on its vehicles and the driver did not know underage drinking was going on. TARTA will no longer take work that potentially may involve underage drinking.
4. School Tripper service- TARTA provides permissible tripper service for school children.
5. Holiday Trolley Sleigh Service- TARTA provides holiday service utilizing its trolleys between two malls. The service is open to the public and listed on TARTA's regular schedules.

Acceptable Charter Service

If a recipient of federal funds, like the Respondent, wishes to provide charter service, then it must comply with the procedural requirements. The regulation 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 applies, 49 C.F.R. Section 604.9(a).

There are a number of exceptions listed for providing charter service. However, the Respondent has not complied with the procedural prerequisites for the exceptions and in some instances has provided service that does not even fall within an exception.

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) Send 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) Send a copy of the notice to the United Bus Owners of America, 1300 L Street,

NW., Suite 1050, Washington, DC 2005 and the American Bus Association, 1100 New York Avenue, SW, Suite 1050, Washington, DC 20005-3934.

(c) The notice must:

- (1) State the recipients name;
- (2) Describe the charter service that the recipient proposes to provide limited to 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 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. § 604.9(b).

Discussion

Recipients of federal financial assistance can provide charter service under these very limited circumstances. In the absence of one of the limited exceptions, the recipients are prohibited from providing the service. 49 C.F.R. Section 604.9(a). Complainants allege that the Respondent is providing charter service utilizing both its buses and its trolleys. Complainants also allege that Respondent is utilizing a non-existent company to provide direct charter service and improperly leasing its vehicles for direct charter service. Additionally, Complainants are asserting that none of the charter exceptions apply. Respondent receives Section 5307 so it is required to comply with the charter regulations.

Respondent was found to be out of compliance with the charter regulations during its recent triennial review. TARTA's willing and able determination notice was improperly worded, and TARTA was informed to cease and desist providing charter service until it had properly gone through the willing and able determination process as required by 49 C.F.R. Section 604.11. TARTA ignored FTA's cease and desist order for three months and was ordered to cease and desist three times before it finally obeyed the order.

A. Aero Charters Service

Respondent acknowledged in its response dated September 17, 2003, that the trips for the Crosby Garden Festival of the Arts and the Parade of Homes were leasing TARTA vehicles through Aero Charters. TARTA also acknowledged in its letter dated December 29, 2003, that the Headliner's shuttle service also involved the leasing of TARTA vehicles to Aero Charters. Respondent admits that Aero Charters has no vehicles and a search on the internet reveals that its phone number is listed to a funeral home, as September Winds properly states. Under the charter regulations, vehicles can only be leased for capacity or accessibility reasons to private providers (Section 604.9(b)(2)). Aero Charters does not qualify as a private provider so all of these incidents constitute improper charter.

Additionally, the contract for the Headliner's shuttle service showed TARTA's and Aero Charters's names on the contract. Therefore, it appears that TARTA itself may have been running a direct charter service under the name Aero Charters. Either way, since TARTA was providing the charter service without following the proper procedure for determining whether there were willing and able private providers, the Headliner's shuttle service constituted impermissible charter service under 49 C.F.R. Part 604.

B. "No Crumb" Service

The Respondent acknowledges in its December 29, 2003, letter that the charter service alleged in the Great Lakes complaint constituted "no crumb" service. TARTA describes this service as trips organized and driven by TARTA drivers at minimal cost to outside organizations. The driver or group was assessed a minimal charge. These trips clearly constituted charter under Section 604.5(e). The Respondent does not even allege that any of the charter exceptions applies. All the "no crumb" trips constituted impermissible charter.

C. Weddings

TARTA acknowledges that it was providing direct charters for weddings using its trolleys because it had agreements with local private providers. However, TARTA has not supplied any agreements with willing and able providers and during its recent triennial review its notice for determining willing and able providers was found to be deficient because it did not indicate what type of service TARTA intended to provide, as required by Section 604.11. Any direct charter service that TARTA supplied using its trolleys constituted impermissible charter service since it had not complied with the requirements for determining whether there were any willing and able private providers as required under Section 604.9. TARTA should also not have been advertising in the phonebook nor on the internet that it was offering direct charter service. TARTA needs to remove those advertisements.

D. Tripper Service

The evidence supports a finding that the school service TARTA is providing is permissible tripper service under 49 CFR Part 605. It is regularly scheduled mass transportation which is open to the public and it is listed on TARTA's regular scheduled published routes.

E. Holiday Shuttles

The holiday shuttles using TARTA vehicles are permissible mass transportation. They are open to the public and listed on regular published schedules.

F. Procedural Determination

The regulation under 49 C.F.R. § 604.11 clearly sets forth the procedures for determining if any willing or able private charter operators exist. The onus is upon the recipient to provide a "public participation process." At a minimum, the recipient is required to provide any private charter operator with at least 30 days to submit written evidence to prove that it is willing and able, and then it must inform each private operator what the results are at least 60 days before the deadline.

In addition to the notice, the Respondent is required to send a copy of the notice to the United Bus Owners Association (UBOA) and the American Bus Association (ABA), which it had not done. 49 C.F.R. § 604.11(b)(2) requires the Respondent to send a "copy of the notice to all private charter service operators in the proposed geographic charter service area and to any private charter service operator that requests notice." Respondent failed to send copies to the UBOA and the ABA and also failed to send notice to September Winds. September Winds alleges that they responded to the notice and never received a reply.

Until TARTA determines that there are no willing and able private providers it should not be operating any charters. Since TARTA received responses from seven private providers as a result of its recent willing and able notice, it will not be able to provide any charter service until it has reached written agreements with each of the private willing and able providers. TARTA can only lease its vehicles to private providers if one of the limited exceptions applies under 49 CFR Section 604.9(b)(2).

G. Alcohol Use on Charter Trips

Complainants have alleged that alcohol is present during some of Respondent's charter trips. FTA does not regulate the use of alcohol on charter trips. However, TARTA should be complying with Ohio law regarding the consumption of alcohol on its vehicles. The contract provided by Ms. Chasteen indicates that TARTA was allowing the consumption of alcohol on its vehicles. This fact is contrary to representations that TARTA made to FTA. TARTA should also be complying with Ohio law with regard to the consumption of alcohol by minors.

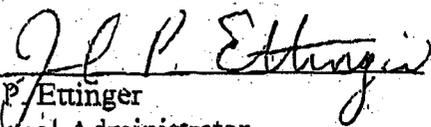
Remedy

Complainants have requested that Respondent immediately cease and desist its charter operations. TARTA has stopped providing charter service pursuant to FTA's current cease and desist order. It is currently proceeding with the willing and able determination process. Until TARTA completes the process it cannot resume charter operations. Also, it cannot provide charter service unless one of the limited exceptions applies.

Conclusion and Order

FTA finds that Respondent has been providing impermissible charter service and orders it to 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 should not accrue towards the useful life of the Federally funded vehicles

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


Joel P. Ettinger
Regional Administrator

02-07-07
Date