

BEFORE THE FEDERAL TRANSIT ADMINISTRATION

September Winds Motor Coach, Inc., and
Tecumseh Trolley & Limousine Service,
Complainants

v.

Charter Service Docket No. 2004-02
49 U.S.C. Section 5323(d)

Toledo Area Regional Transit Authority,
Respondent.

DECISION

Summary

On March 18, 2004, Tecumseh Trolley & Limousine Service ("Tecumseh Trolley") 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, also on March 18, 2004, September Winds Motor Coach, Inc. ("September Winds") filed a complaint with the FTA also alleging that TARTA was providing charter service in violation of FTA's charter regulation, 49 C.F.R. Part 604.

FTA had previously issued a number of cease and desist orders against TARTA for charter violations. Due to the new complaints and FTA existing concerns related to the referral of business by TARTA to Greenhorse Charters, on April 5, 2004, FTA halted all drawdowns on existing TARTA grants. FTA informed TARTA that it would need to develop a remediation plan to address charter violations and ensure that TARTA was complying with the charter regulations prior to allowing it to resume drawdowns on existing grants. As a condition of the remediation plan, FTA required TARTA to seek FTA approval in advance of all TARTA direct charters, as well as the leasing of TARTA vehicles and drivers. TARTA agreed to the remediation plan and on May 6, 2004, FTA released the drawdown restrictions.

Regarding the complaints, the Respondent filed a reply to the Tecumseh Trolley complaint on April 7, 2004. The Respondent filed a reply to the September Winds complaint on April 30, 2004. In a response dated June 17, 2004 (received by FTA on June 29, 2004), Tecumseh Trolley replied to Respondent's replies. On June 15, 2004, September Winds replied to Respondent's replies. At FTA's request, TARTA responded to additional issues that had not previously been addressed on August 12, 2004.

FTA consolidated the two charter complaints based on the similarity of the allegations. Upon reviewing the allegations in the complaints and the subsequent filings of both the Complainants and the Respondent, FTA has concluded that with regard to the complaints, TARTA is not currently violating the charter regulations. The majority of Complainants allegations have been

addressed through TARTA's remediation plan. However, on TARTA's website it advertises under its downtown lunch trolleys a service called "Trolley Direct Trip for Six." This service does constitute impermissible charter operations. TARTA should immediately cease and desist providing this service. Additionally, given TARTA's past history of charter violations, FTA will continue to closely monitor TARTA's activities. Pursuant to the remediation plan, TARTA needs FTA concurrence prior to providing charters or leasing vehicles and equipment.

Complaint History

Tecumseh Trolley filed its complaint with the FTA on March 18, 2004. The complaint alleges the following:

1. Eight weddings that had previously hired Tecumseh Trolley cancelled, stating they were going to use TARTA through Green Horse Charter Services.
2. Jim Tichy of Toledo Blade cancelled with Tecumseh Trolley and hired TARTA.
3. Tecumseh Trolley received notice that TARTA will be doing the Jamie Farr Golf Classic.
4. Hylant Group event cancelled with Tecumseh Trolley and chartered with TARTA.

Attached to Tecumseh Trolley's complaint was a letter dated February 12, 2004, from Respondent referring business to Green Horse Charter Services.

September Winds filed its complaint with the FTA also on March 18, 2004. The complaint alleges the following:

1. TARTA sent out a letter dated Feb. 12, 2004, referring charter business to Green Horse Charters ("Green Horse").
2. TARTA is participating in the Jamie Farr Golf Classic.
3. TARTA conducted a local charter for the Valentine Theater and the Art Museum for private groups.
4. TARTA is providing charter service for Toledo Mud Hens Games.
5. TARTA has financial improprieties related to providing charter service.

On April 5, 2004, as a result of TARTA's extensive prior problems relating to charter violations, as well as the letter TARTA sent to customers referring business to Green Horse, FTA halted all drawdowns on existing TARTA grants pending TARTA complying with the charter regulations. FTA informed TARTA that it would need to develop a remediation plan to address charter violations and ensure that TARTA was complying with the charter regulations prior to allowing it to resume drawdowns on existing grants. As a condition of the remediation plan, FTA required TARTA to seek FTA approval in advance of all TARTA direct charters, as well as the leasing of TARTA vehicles and drivers.

FTA subsequently received a response from TARTA dated April 7, 2004. In its response, TARTA indicated the following as to the Tecumseh Trolley allegations:

1. TARTA is informing brides that it can no longer offer direct charter service and that all charter work would need to be through a private provider;
2. TARTA has certified seven companies as "willing and able";
3. TARTA informed the Jamie Farr Golf Classic that it could not do direct charter work, but could only supply vehicles through a private provider if the private provider had either a capacity or accessibility constraint;

4. TARTA was approached by Lakefront Lines about leasing buses to them for the Jamie Farr Golf Classic;
5. TARTA has not provided vehicles either directly or through a lease to the Hylant Group;
6. TARTA is not leasing vehicles through Green Horse Charters because they have not met the requirements to be a willing and able private provider;
7. TARTA's charter service is all accounted for and is only incidental service;
8. TARTA operates two regular published routes using its trolleys, a weekday lunch route and holiday service;
9. TARTA proposes to send a letter to the seven private providers listing under what exceptions it can lease vehicles;
10. TARTA will develop a form letter and telephone script for all inquiries with contact information; and
11. TARTA will include information on its website explaining the charter regulations.

On April 30, 2004, TARTA responded to September Wind's complaint dated March 18, 2004. It stated the following:

1. TARTA has changed its internal policies;
2. TARTA refers charter business to the seven private providers who have been determined to be willing and able, including September Winds;
3. Charter customers are told that TARTA can no longer conduct direct charter work and can only lease vehicles to private providers under one of the limited exceptions;
4. TARTA indicated to Jamie Farr that it could not provide direct service, if Jamie Farr wanted to use TARTA vehicles through a private provider, TARTA could only lease the vehicles under one of the limited exceptions, TARTA quoted rates to Lakefront Lines and September Winds for an hourly rate (it would not quote a daily rate), and it will not lease vehicles to Lakefront Lines without FTA prior approval;
5. TARTA will not lease vehicles to Green Horse until it qualifies as a willing and able provider;
6. No charter revenues are being used inappropriately, all revenues are being recorded and mileage on vehicles is also being recorded pursuant to FTA requirements; and
7. TARTA is now complying with the FTA charter regulations; it is no longer leasing its trolleys for charter work.

As a result of FTA halting drawdowns of existing TARTA grants on April 5, 2004, TARTA entered into a remediation plan with FTA in May 2004. The plan included the following:

1. TARTA would develop a telephone script explaining that it could not conduct direct charter and referring potential customers to private providers;
2. TARTA would explain the regulations on its website;
3. TARTA will not lease any vehicles to private providers who have not qualified as "willing and able";
4. TARTA will not lease trolleys based on capacity constraints;
5. TARTA would request FTA concurrence prior to leasing any vehicles to private providers or conducting any direct charters.

Based on the proposed remediation plan, on May 6, 2004, FTA released the drawdown restrictions.

On June 15, 2004, September Winds responded to TARTA's reply, stating the following:

1. TARTA has failed to address the relationship between Green Horse and TARTA;
2. TARTA has failed to address the letter it sent to potential customers referring business to Green Horse for wedding trolley service;
3. TARTA has failed to address the charter work they performed to the Valentine Theatre for a private group.
4. TARTA has not explained how the winning bid amount for Jamie Farr could be \$55/hour when TARTA's rate is \$75/hour.
5. TARTA has failed to explain why they disregarded FTA's cease and desist order on three occasions.

On July 2, 2004, FTA received a response dated June 17, 2004, from Tecumseh Trolley, stating the following:

1. TARTA admits it was giving brides rates after the cease and desist order;
2. TARTA is leasing vehicles to Lakefront Lines ("Lakefront") when they have not exceeded their capacity;
3. TARTA is leasing to September Winds when they have not exceeded capacity, but because a customer has requested a TARTA vehicle and TARTA charges less to lease a vehicle than Tecumseh Trolley charges;
4. TARTA is leasing vehicles to September Winds when it is not legally authorized to conduct business in the Toledo area;
5. TARTA did not charter the Hylant Group event because Tecumseh Trolley intervened;
6. 350 weddings in a year and \$1.9 million dollars in charter business should not be considered incidental charter work;
7. TARTA is only using one of its six trolleys for the lunchtime and holiday service, the other five trolleys are sitting idle;
8. TARTA should not be telling customers over the phone or on their web page what the charter rules are; and
9. TARTA has failed to send a letter to five of the seven private willing and able providers under what conditions it will lease vehicles.

FTA requested that TARTA respond to the additional issues raised in Tecumseh Trolley's response. On August 12, 2004, TARTA responded as follows:

1. There is no relationship between TARTA and Green Horse. TARTA did not lease any vehicles to Green Horse since it was unable to meet the minimum requirements to be considered "willing and able";
2. TARTA sent letters to customers who had pending reservations referring business to Green Horse to "highlight" that it could no longer do direct charter work. No charter work has been conducted since Nov. 2003;
3. TARTA has not provided any charter work to the Valentine Theater since Nov. 2003;
4. In all its requests to lease TARTA vehicles, Lakefront has stated that it needed vehicles either because of a capacity or accessibility restraint;
5. TARTA leased one vehicle to September Winds on April 17, 2004, because it stated it had a capacity constraint;
6. TARTA determined that September Winds meets the definition of "willing and able" provider. It is unaware that September Winds is unable to conduct business in Ohio;

7. TARTA uses five of its six trolleys for its lunchtime service and two of the trolleys during the holiday season. The other trolleys are used as emergency spare vehicles; and
8. TARTA sent the same letter to all seven of the “willing and able” private providers notifying them under what terms it would lease vehicles.

Acceptable Charter Service

If a recipient of federal funds, like the Respondent, wishes to provide charter service, then it must comply with the charter regulations. Charter service is defined as the following:

transportation using buses or vans, funded under the Acts of a group of persons who pursuant to a common purpose, under a single contract, for a fixed charge for the vehicle or service, who have acquired the exclusive use of the vehicle or service in order to travel together under an itinerary either specified in advance or modified after leaving the place of origin. Includes incidental use of FTA funded equipment for the exclusive transportation of school students, personnel, and equipment. 49 C.F.R. § 605.5(e).

The regulation goes on to discuss under what circumstances a Recipient may provide charter service. It 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. The two principal exceptions involve leasing vehicles and equipment based on capacity and accessibility restraints of private providers. Section 604.9(b)(2).

The Complainants allegations relate to both requirements. They allege that TARTA has been providing service when there are “willing and able” private providers and that TARTA is leasing vehicles when the exceptions do not apply.

Discussion

TARTA in the past has been found to have violated the charter regulations. In February 2004, FTA issued a decision finding TARTA out of compliance with the charter regulations.¹ Less than six weeks later, FTA received these two new charter complaints. On the basis of those complaints and an attached letter showing that TARTA was referring business to a specific private provider, FTA halted all drawdowns of TARTA’s existing grants. If TARTA wanted to access its grant funds or obtain new grants, it was told it must enter into a remediation plan that would ensure compliance with the charter regulations. TARTA and FTA agreed on a remediation plan in May and TARTA’s drawdown restrictions were released. One of the conditions in the plan is that TARTA must obtain FTA concurrence prior to providing charter service or leasing

¹ Consolidated charter decision for complaint nos. 2003-08 and 2003-24.

equipment or vehicles.

A. Green Horse Referrals

Respondent has acknowledged in its response dated August 12, 2004, that it was referring previously booked charters to Green Horse. Clearly, TARTA is not permitted to refer business to any one particular private provider. Additionally, TARTA has acknowledged in its replies that Green Horse did not qualify as a “willing and able” private provider. TARTA stated in its responses that it has not leased any vehicles to Green Horse. FTA is not aware that TARTA actually leased any vehicles to Green Horse despite the Feb. 12, 2004, referral letter to customers.

TARTA has determined that there are seven “willing and able” private providers. TARTA states that it is referring business only to the seven qualified providers. September Winds and Tecumseh Trolley are both on the “willing and able” list; Green Horse is not.

B. Jamie Farr Golf Classic

The Respondent initially stated that it would not be providing service for the Jamie Farr Golf Classic. Subsequently, in July 2004, TARTA contacted the FTA stating that Lakefront had capacity constraints and wished to lease TARTA vehicles for the Jamie Farr Golf Classic. FTA requested documentation relating to the request.

Any charter service that a recipient provides must be incidental (49 CFR Section 604.9(e)). In order to be incidental, a recipient must recover at least its fully allocated costs. In reviewing the documentation, FTA discovered that TARTA was charging Lakefront less than its fully allocated costs. TARTA has indicated that its fully allocated costs are \$72.50/hour. It was charging Lakefront only \$40/hour. FTA informed TARTA that if it wished to lease its vehicles to Lakefront, then it must charge its fully allocated costs. TARTA increased its charge to Lakefront to \$75/hour. Based on the Lakefront’s capacity constraints, FTA allowed TARTA to lease equipment and drivers to Lakefront for the Jamie Farr Golf Classic under 49 CFR Section 604.9(b)(2)(i).

Additionally, Jamie Farr was advertising the shuttle service as “free TARTA service” on its website. TARTA was informed by FTA that if it intended to lease buses to Lakefront under the charter exception for the event, then the website needed to be corrected. Jamie Farr corrected the website.

C. Capacity Constraints

It is permissible for a recipient to lease vehicles and equipment based on capacity constraints under 49 CFR Section 604.9(b)(2)(i). Tecumseh Trolley alleges that September Winds and Lakefront are leasing vehicles from TARTA when they have failed to exceed capacity; however, it does not provide any evidence to support the allegation. FTA does not require its recipients to look behind the evidence a private provider submits unless there is “reasonable cause to believe that some or all of the evidence has been falsified.” 49 CFR Section 604.13(e) Although this standard applies to the “willing and able” determination process, it can also be applied to the

charter exception process as well. FTA did not see anything in the record to support an allegation of evidence being falsified. TARTA has provided FTA with letters from Lakefront stating it has capacity constraints when requesting FTA concurrence to lease vehicles and drivers.

D. Legal Authorization

Tecumseh Trolley alleges that September Winds is not legally authorized to provide service in the Toledo area. However, when FTA contacted the Public Utilities Commission of Ohio, Motor Carrier Registration Department, they indicated that September Winds/Casino Cruises and Dreams is registered for intrastate operations through July 15, 2004.

E. Valentine Theater Service

TARTA indicates it has not provided service to the Valentine Theater since November 2003 when it halted all direct charter work. Complainant has not supplied any information relating to when this service was provided so FTA cannot make a determination that it is impermissible charter service.

F. Mud Hens Games

If the service provided is regularly scheduled, open door, mass transportation service, then it does not meet the definition of charter service. The Mud Hens game service is regularly published service. It is listed on TARTA's website, and it is open door service provided to the public. As such, the service meets the definition of mass transportation.

G. Incidental Service

Complaint alleges that 350 trips a year does not qualify as incidental service. The definition of "incidental charter service" is charter service that does not "interfere with or detract from the provision of the mass transportation service for which the equipment or facilities were funded under the Acts; or does not shorten the mass transportation life of the equipment or facilities." 49 CFR Section 604.5(i). It is unclear what Complainant is referring to when it states 350 trips a year. TARTA was providing illegal charter service at least through Nov. 2003. It is no longer providing direct charter service. FTA is ensuring that TARTA recover its fully allocated costs. Since it stopped providing charter service in Nov. 2003, FTA is only aware of a small number of times when TARTA leased vehicles to private providers. On each of those occasions, FTA determined that the lease constituted incidental service under the FTA definition.

H. Trolley Use

TARTA states that it is using five of its six trolleys for its lunchtime service and two of the trolleys for its holiday service. As long as the trolleys are not used for impermissible charter service, FTA does not have authority to make TARTA sell its trolleys. TARTA may want to re-evaluate the use of its trolleys if they are sitting idle a large part of the year. However, if they are

used as spares in its fleet management plan and the spare ratio is not over 20%, FTA cannot tell TARTA how to manage its fleet.

However, the use of the trolleys for "Trolley Direct Trip for Six" constitutes impermissible charter. TARTA cannot use the trolleys for private parties of six or more people. TARTA needs to immediately cease and desist from providing this service and should remove it from its website.

I. Regulatory Information

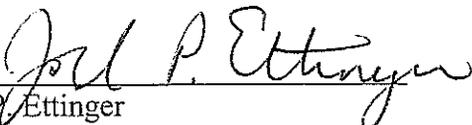
Tecumseh Trolley alleges that TARTA is providing information related to the charter regulations over the telephone and on its website. The Complainant does not allege that the information provided is incorrect. There is no FTA regulation which prevents recipients from providing that information either over the phone or on its website. If the information provided were incorrect then FTA could direct TARTA to provide the correct information, but that is not the case in this instance.

Remedy

Complainants have requested that Respondent immediately cease and desist its charter operations. TARTA has stopped providing charter service pursuant to FTA's prior decision. It has completed the "willing and able" determination process and has determined that there are seven qualified private providers. Both Complainants are on that list. TARTA is referring business to all the private providers on the list. TARTA is complying with its remediation plan. However, it must immediately cease and desist from providing the "Trolley Direct for Trip Six" service.

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

08-25-04
Date