



U.S. Department
of Transportation
**Federal Transit
Administration**

REGION V
Illinois, Indiana,
Michigan, Minnesota,
Ohio, Wisconsin

200 West Adams Street
Suite 320
Chicago, IL 60606-5253
312-353-2789
312-886-0351 (fax)

March 8, 2013

Tom Menzel
Executive Director
Bay Area Transportation Authority
3233 Cass Road
Traverse City, MI 49684

Re: *National School Transportation Association v. Bay Area Transportation Authority*
School Bus Complaint Docket No. 2011-04

Dear Mr. Menzel:

Enclosed please find the Federal Transit Administration's (FTA) determination regarding the above referenced school bus complaint, alleging BATA's school bus operations are in violation of 49 U.S.C. Section 5323(f) as implemented under 49 C.F.R. Part 605.

Should you have any questions, please do not hesitate to contact Regional Counsel Cecelia Comito at 312-353-4118.

Sincerely,

A handwritten signature in cursive script, appearing to read "Marisol Simon".

Marisol Simon
Regional Administrator

cc: National School Transportation Association
Michigan Department of Transportation

BEFORE THE FEDERAL TRANSIT ADMINISTRATION
1200 New Jersey Avenue, SE
Washington, DC 20590

National School Transportation Association
Complainant

v.

Docket No. 2011-04

Bay Area Transportation Authority
Respondent.

DECISION

Summary and Background

The Federal Transit Administration (FTA) is hereby issuing a decision on the above-referenced matter brought by the National School Transportation Association (NSTA or Complainant), Docket No. 2011-04, against the Bay Area Transportation Authority (BATA or Respondent). Upon reviewing the allegations in the Complaint and the subsequent filings of both Complainant and Respondent, FTA has concluded that the service in question violates 49 U.S.C. § 5323(f) and FTA's implementing regulations regarding school bus service at 49 C.F.R. Part 605. Respondent is hereby ordered to cease and desist engaging in such illegal services.

Complaint History

a. NSTA Complaint

By letter dated April 19, 2011, NSTA filed its complaint (Complaint). NSTA's Complaint alleged that BATA's Suttons Bay Flex Routes (Flex Routes) that began in September of 2010 are violating FTA's school bus regulations, 49 C.F.R. Part 605, by primarily, if not only, serving students of Suttons Bay Public Schools (SBPS) in Suttons Bay, Michigan, as a replacement for the discontinued school bus service operated by SBPS. According to NSTA, BATA entered into negotiations with SBPS in early 2010 to take over school bus operations for SBPS so that SBPS could reduce its expenses. NSTA alleged that, once SBPS announced it would discontinue its school bus services, BATA's Flex Routes began offering services evidencing characteristics of school bus operations.

In support of its allegations, NSTA submitted several exhibits.¹ In addition, NSTA requested several documents from BATA pursuant to a Records Request and provided them as further exhibits (Exhibits A-J).²

¹ NSTA submitted a Traverse City Record-Eagle article on BATA seeking a collaboration with Traverse City Area Public Schools dated November 18, 2009 (Exhibit 1); a Traverse City Record-Eagle article on "More schools looking at BATA" for student transportation dated September 20, 2010 (Exhibit 2); a Traverse City Record-Eagle article on the possibility of BATA transporting SBPS students dated February 13, 2010 (Exhibit 3); a Traverse City

b. BATA's Response

BATA, a subrecipient of Michigan Department of Transportation (MDOT) that serves Grand Traverse and Leelanau counties (a non-urbanized area), timely filed its response by letter dated June 15, 2011. In its response, BATA denied the allegation that it is providing school bus service. Instead, according to BATA, the transportation authority is complying with the school bus regulations and providing lawfully permitted "tripper service."

BATA stated that the flexible routes it offers are one of three types of services offered (the other two are point-to-point or dial-a-ride services and a fixed route in Traverse City) and have "fixed stops, but may deviate up to $\frac{3}{4}$ of a mile from any of the stops upon request of a passenger. This flexibility is required by MDOT pursuant to the Americans with Disabilities Act." According to BATA, these Flex Routes are "a modification of a demand-response system and are often found in rural areas where there are many people moving in the same direction at given times." BATA began operating the Flex Routes in Suttons Bay beginning in September 2010 and stated that the routes "will continue to be modified to enhance ridership."

In support of its argument that it is providing lawful tripper service, BATA quoted FTA's Final Policy Statement on FTA's School Bus Operations Regulations, 73 Fed. Reg. 53384 (Sept. 16, 2008), and the regulation defining tripper service. BATA also summarized the *Rochester-Genesee Regional Transportation Authority v. Hynes-Cherin*, 531 F.Supp.2d 494 (W.D.N.Y. 2008) Decision, which overturned FTA's finding of school bus service in violation of FTA's school bus regulations. In its response, BATA argued that because the Flex Routes were "open to the public" as required to meet the definition of tripper service, the transportation services at issue were not in violation of FTA's school bus regulations. In support of its response, BATA included several exhibits.³

Record-Eagle article on "BATA proposal on Suttons Bay schools agenda" dated April 9, 2010 (Exhibit 4); a Traverse City Record-Eagle article on "Suttons Bay eliminates busing for students" dated April 13, 2010 (Exhibit 5); a calendar announcement for a "Transportation Open Forum" by BATA on SBPS' website to be held August 24, 2010 (Exhibit 6); an unsigned report on the August 24, 2010 public meeting involving BATA, SBPS, and members of the public (Exhibit 7); a Traverse City Record-Eagle article on "Suttons Bay students board BATA-driven buses" dated September 8, 2010 (Exhibit 8); report by Duane Kooyers on his observations of the Flex Routes dated September 28, 2010 (Exhibit 9); and a letter by investigator hired by NSTA, Thomas M. Williams, on his investigation of the Flex Routes dated October 26, 2010 (Exhibit 10).

² NSTA submitted the following additional exhibits in its complaint: NSTA Request for Records from BATA, dated May 17, 2010 (Exhibit A); BATA's "Proposed Expansion to Current Leelanau County Routes" (Exhibit B); BATA Board Meeting Agenda, March 31, 2010 (Exhibit C); Email from Executive Director of BATA Tom Menzel to Carrie Thompson, dated April 30, 2010 (Exhibit D); April 2010 Monthly Report from Tom Menzel to BATA Board of Directors (Exhibit E); SBPS webpage, visited July 26, 2010 (Exhibit F); Letter of Intent for SBPS to provide contract services to repair buses for BATA, dated May 5, 2010 (Exhibit G); Bus Purchase Agreement, dated June 17, 2010 (Exhibit H); SBPS Announcement of Transportation Open Forum, visited August 23, 2010 (Exhibit I); BATA Response to NSTA's Request for Records, dated June 28, 2010 (Exhibit J).

³ BATA provided the following exhibits: Affidavit of Thomas Menzel, dated June 14, 2011 (Exhibit A); BATA's Reduced Fare Program Application for Students (Exhibit B); Photos of BATA Buses (Exhibit C); Photos of BATA's Flex Route Bus Stops and Cash Box (Exhibit D); BATA Report to Michigan Department of Transportation (MDOT), May 4, 2011 (Exhibit E); Letter from Michael Murray, SBPS Superintendent, dated June 14, 2011 (Exhibit F); BATA's Flex Route 1 Schedule (Exhibit G); Three Letters from Public Riders (Exhibit H).

c. NSTA's Rebuttal

By letter dated June 24, 2011, FTA advised NSTA of BATA's response and requested that NSTA provide its rebuttal no later than thirty (30) business days from receipt of FTA's letter. NSTA submitted its rebuttal by letter dated July 29, 2011. Prior to its submission, on July 25, 2011, NSTA acknowledged by letter that it had received FTA's June 24, 2011 letter and requested a ten (10) day extension to submit its rebuttal. On July 26, 2011, BATA submitted a letter objecting to NSTA's request for an extension of time. However, because the service at issue was currently operating, FTA wanted to consider all of the views of the parties during the investigation of this matter and, thus, granted the extension.

In its rebuttal, NSTA argued that BATA is not engaging in permissible tripper service, but instead, is engaging in prohibited school bus operation. NSTA averred that BATA could not rely on the sole requirement that the transportation service be "open to the public" because that would permit FTA recipients and subrecipients subject to the school bus regulations to circumvent the requirements. Moreover, according to NSTA, the Flex Routes are not "open to the public" as FTA requires because there are no marked bus stop locations informing the general public of the availability of these routes, the bus stops are inconveniently located in mostly residential neighborhoods, there are no route maps available, and the one-way direction that the routes take during the morning and the afternoon correspond to the school schedule. Furthermore, the Flex Routes' buses used are former school buses merely repainted, they do not have the usual electronic signage that normal transit buses have, the buses do not stop at regular route bus stops as evidenced by the lack of bus stop signs designating the Flex Routes' stops as bus stop locations, and they were created solely for the purpose of providing school bus transportation. Therefore, NSTA stated that BATA's response and evidence were insufficient to prove that BATA was meeting the definition of tripper service, and BATA was required to follow FTA's notice requirements if it wished to engage in school bus operations, which it failed to do.

NSTA also stated that, in investigating the matter, it had discovered that all of the Flex Routes had been discontinued in the summer, *i.e.*, after the school year ended, only to resume in September when the new school year began. To replace the discontinued routes, NSTA found that BATA was offering a summer Flex Route schedule, "slated to vanish when the September school year starts," that was "unusable for general public purposes because it provides one trip, per day, in the morning, one-way only, so once it deviates from the Northport Village Route a rider is not ever provided a return trip in the opposite direction." Moreover, NSTA contended that the seven Flex Routes, prior to their "cancellation" during the summer, looked like "reproductions of driver manifests," which "included numerous neighborhood street addresses . . . for student pick-ups and drop-offs," instead of regular route maps or route timetables that BATA provides for its other services (*e.g.*, Village Connector routes).

In support of its rebuttal, NSTA provided several exhibits.⁴

⁴ In its rebuttal, NSTA provides the following exhibits: Affidavit of Thomas Menzel (Exhibit 1); letter from Michael Murray, Superintendent of SBPS, dated June 14, 2011 (Exhibit 2); Letter and BATA Report to MDOT from Carrie Thompson, BATA Office Manager, dated June 8, 2011 (Exhibit 3); BATA Flex Route Schedules Effective December 13, 2010 (Exhibit 4); BATA village Connector Timetable (Exhibit 5); Northpoint Route Map (Exhibit 5b); Photos of BATA Buses (Exhibit 6); BATA Summer Flex Routes, Effective June 20, 2011-August

Discussion

a. Overview of Legal Requirements

FTA recipients must comply with a number of statutory requirements, including the school bus transportation prohibition under 49 U.S.C. § 5323(f), which states in pertinent part:

- (1) Financial assistance under this chapter may be used for a capital project, or to operate a public transportation facility, only if the applicant agrees not to provide school bus transportation that exclusively transports students and school personnel in competition with a private school bus operator.

The purpose of this provision is “to prevent competition with private school bus operators, competition perceived by Congress to be unfair.” *Chicago Transit Authority v. Adams*, 607 F.2d 1284, 1292-93 (7th Cir. 1979) (citing H.R. Rep. No. 93-410, at 87 (1973) (Conf. Rep.); S. Rep. No. 93-355, at 87 (1973) (Conf. Rep.)). By regulation, “school bus operations” is defined as “transportation by bus exclusively for school students, personnel and equipment in Type I and Type II school vehicles as defined in Highway Safety Program Standard No. 17.” 49 C.F.R. § 605.3. Under the regulations, “tripper service” is exempt from the definition of school bus operations. 49 C.F.R. § 605.13. “Tripper service” means

[R]egularly scheduled mass transportation service which is open to the public, and which is designed or modified to accommodate the needs of school students and personnel, using various fare collections or subsidy systems. Buses used in tripper service must be clearly marked as open to the public and may not carry designations such as “school bus” or “school special.” These buses may stop only at a grantee or operator’s regular service stop. All routes traveled by tripper buses must be within a grantee’s or operator’s regular route service as indicated in their published route schedules.

49 C.F.R. § 605.3. Mass (public) transportation is statutorily defined as “transportation by a conveyance that provides regular and continuing general or special transportation to the public, but does not include school bus. . . transportation” 49 U.S.C. § 5302(a)(10).⁵

In *Rochester-Genesee Regional Transportation Authority v. Hynes-Cherin*, 531 F.Supp.2d 494, 507-16 (W.D. N.Y. 2008), which BATA has raised in its response, the U.S. District Court overturned FTA’s interpretation of its school bus regulations at 49 C.F.R. Part 605 and held that the Rochester-Genesee Regional Transportation Authority (RGRTA) could add 240 entirely new express school bus routes in order to serve the Rochester City School District’s (RCSD) students

2011 (Exhibit 7); News Article “BATA Introduces New Fixed Route Service,” dated June 20, 2005 (Exhibit 8); BATA Summer Flex Route Schedule and Map, Effective June 20, 2011-August 2011 (Exhibit 9); Photos of Route 1, 1600 E. Kohler Road Area, Suttons Bay 2 (Exhibit 10); News Article “Schools in Crisis: Busing Battle,” dated July 28, 2011.

⁵ This citation is pre-MAP-21 (*Moving Ahead for Progress in the 21st Century*). The MAP-21 citation for the definition of “public transportation” is 49 U.S.C. § 5302(14) which modified the definition of “public transportation.” Since this complaint was filed pre-MAP-21, FTA is using the pre-MAP-21 definition of “public transportation.” The change in the definition has no impact on this decision.

pursuant to an agreement with RCSD. According to the District Court, the routes did not constitute “school bus operations” because if any member of the public could ride—even hypothetically—a bus on the routes at issue, then it was not “exclusively” transporting students. *Id.* at 507-09. The court in *Rochester-Genesee Regional Transportation Authority* interpreted FTA’s definition of tripper service to permit “completely redesign[ing] its transit system to accommodate school children as long as all routes are accessible to the public and the public is kept informed of route changes.” *Id.* at 512 (quoting *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1019 (7th Cir. 1999)).

Subsequent to the *Rochester-Genesee Regional Transportation Authority*, FTA issued its final policy on its school bus operations regulations to clarify its guidance on these matters. 73 Fed. Reg. 53384 (Sept. 16, 2008) (Final Policy). The Final Policy provides:

FTA shall construe the term “tripper service,” as it has historically, to include modifications to fare collection or subsidy systems, modifications to the frequency of service, and de minimus route alterations from route paths in the immediate vicinity of schools to stops located at or in close proximity to the schools. Consistent with that construction, FTA shall interpret the definition of ‘school bus operations’ to include service that a reasonable person would conclude was primarily designed to accommodate students and school personnel and only incidentally to service the nonstudent general public.

Id. at 53,384-85. FTA’s Final Policy is consistent with the statutory prohibition on operating school bus transportation by FTA funding recipients and Congressional intent to prevent unfair competition between Federally funded grantees and private school bus operators. Thus, FTA’s final policy makes clear that:

With respect to a grantee’s regularly scheduled public transportation service, FTA shall interpret the definition of “tripper service” under 49 CFR 605.3(b), as it historically has interpreted that definition, to allow a grantee to (1) utilize “various fare collections or subsidy systems,” (2) modify the frequency of service, and (3) make de minimis route alterations from route paths in the immediate vicinity of schools to stops located at or in close proximity to the schools.

...

FTA shall interpret the term “exclusively” in the definition of “school bus operations” under 49 CFR 605.3(b) to encompass any service that a reasonable person would conclude was primarily designed to accommodate students and school personnel, and only incidentally to serve the nonstudent general public. Additionally, grantees may create new routes to serve school students and personnel if a reasonable person would conclude that the grantees designed the routes to serve some segment of the nonstudent general public.

Id. at 53,390. Therefore, tripper service may include only *minor* modifications to a transit agency’s route paths and frequency of service.

The addition of 240 new routes solely to accommodate the needs of school students, as was the case in *Rochester-Genesee Regional Transportation Authority*, was not tripper service. Rather, those newly created routes were school bus operations because a person could reasonably conclude that the 240 new routes were created to serve students and not the nonstudent general public. The decision in *Rochester-Genesee Regional Transportation Authority* was contrary to 49 U.S.C. § 5323(f) and is inconsistent with the holdings in other Federal cases. Accordingly, as stated in the Final Policy, FTA adheres to this decision as judicial precedent only within the area encompassing the Western District of New York.

b. Regularly Scheduled Mass Transportation Service

BATA provides separately published route maps and timetables for each of its bus services: Cherriot, Village Connector, and the Flex Route services at issue. While publication of a route and timetable for its services are indications of being regularly scheduled mass transportation, upon closer comparison, the route map and timetable for the Flex Route services differ significantly from the Cherriot and Village Connector route maps and timetables. For example, the Winter Flex Route route maps, which are most recently effective from August 27, 2012 until June 2013⁶, merely show the path that each bus takes and arrows to signify the direction the bus is taking, while both the Cherriot and Village Connector route maps show actual bus stop locations. The Winter Flex Route timetables provide bus stop locations, but many of them are specific residential addresses (*e.g.*, 670 SW Bayshore), while the Cherriot and Village Connector timetables generally provide more general bus stop locations (*e.g.*, 12th @ Pine, or Fife Lake Gazebo).

Furthermore, the Cherriot and Village Connector timetables show that the Cherriot and Village Connector routes operate throughout the day; however, the Winter Flex Routes only operate one-way in the morning, one time per day, and one-way in the afternoon, one time per day. There is only one Summer Flex Route (as opposed to five Winter Flex Routes), which runs only one loop in the morning from 6:30 a.m. – 8:45 a.m. The loop begins and ends at Bata South Cass Road, with 26 different stops along the way. Only one stop – Bata Transfer Hall Street – is repeated. Thus, once passengers are dropped off at these stops in the mornings, they must find alternate transportation for their return trip.

The imprecise nature of the route maps, the seemingly residential stops being made, the irregularity of the timetables, and the changes between the Winter Flex Routes, which correspond to the school year schedule, and the Summer Flex Route, indicate that these routes are not part of BATA's regular mass transportation or public transportation service.

c. Designed or Modified to Accommodate the Needs of School Students and Personnel

Transit operators subject to the school bus requirements may design or modify routes to accommodate the needs of school students and personnel and those routes may still qualify as permitted tripper service. However, as stated above, these designs or modifications only may

⁶ BATA's webpage for the Winter Flex Routes merely give June 2013 as its approximate end date. <http://www.bata.net/suttonsbay2.htm> (last visited Feb. 7, 2013).

include minor modifications to route paths and frequency of service or de minimis route alterations. 73 Fed. Reg. at 53390. BATA has created an entirely new set of bus routes—the so-called Winter Flex Routes—that operate only during the school year with minimal bus service offered under the Summer Flex Routes.

Moreover, these Flex Routes appear to have been designed specifically to meet the needs of the SBPS students. Many of the bus stop locations are in residential areas,⁷ and BATA stated in its response, and various newspaper articles indicate, that it worked closely with SBPS in order to provide suitable transportation to SBPS students.⁸ The SBPS website also states that “[t]he bus routes match very closely the routes that SBPS ran in the past.”⁹ Based upon the current Winter Flex Route schedules, the first bus stop location is the Suttons Bay School, and when the school children are dismissed for the day, all of the Winter Flex Route buses would be waiting to transport the students and drop them home along the routes. In addition, the Winter Flex Route bus stop locations for the 2011-2012 year¹⁰ were very close in proximity, with some being as close as one minute apart.¹¹ These locations are unusual for rural bus service, even if flex routes in rural areas that may “deviate up to ¾ of a mile from any of the stops upon request of a passenger” are common, as BATA states in its response.

Accordingly, these routes appear to be designed specifically to meet the needs of the SPBS students and represent school bus service that is not permitted under the regulations rather than tripper service.

d. Fare Collections and Subsidy Systems

BATA and SBPS have entered into an agreement whereby SBPS will purchase 400 passes from BATA annually to be used by SBPS students.¹² In addition, BATA has a “Reduced Fare Program,” which offers reduced fares to students eligible for the program. These types of arrangements are not in violation of the school bus regulations.

e. Open to the Public

While BATA argues that its Flex Routes are available and open to the public, the letter of private investigator, Mr. Thomas M. Williams, suggests otherwise. In this letter, Mr. Williams stated that he rode a Flex Route bus, but, following his transport, SBPS personnel called the Sheriff’s office with a complaint that a suspicious person was riding the bus, out of concern for the children. Moreover, in the same letter, Mr. Williams stated that he had conversed with the bus driver, who stated that Mr. Williams was the first adult person to ride on this particular Flex Route alone. These events demonstrate that SBPS and other members of the public do not view the Flex Route services as open to the public, but rather, as school bus operations.

⁷ While not all Flex Route bus stop locations are located in residential areas, including Suttons Bay School, Suttons Bay District Library, Suttons Bay Friendship Center, the majority are.

⁸ See, e.g., NSTA Compl., Exhibits 3-5, 8.

⁹ <http://www.suttonsbay.k12.mi.us/index.php?page=transportation> (last visited Feb. 7, 2013).

¹⁰ The Winter Flex Route bus stop locations for the 2012-2013 school year continue to be close in proximity.

¹¹ For Flex Route timetable schedules, see <http://www.bata.net/suttonsbay2.htm> (last visited Feb. 7, 2013).

¹² See NSTA Compl., Exhibit E.

Furthermore, from the photographs provided, the buses used for the Flex Routes are former school buses,¹³ differentiated only by the painted white color, and “BATA” marked on the buses. In contrast, a BATA bus featured on the BATA website sports a blue and green design, and it has the usual electronic signage seen on normal transit buses. Additionally, the SBPS website states that BATA will use four-way flashers when picking up or dropping off students, but purports that the flashers will not have the ability to stop traffic. Use of flashers suggests to the public that the buses are used for school bus service rather than open to the public.

Based upon the photographs provided of the Flex Route bus stops, most of the bus stops also lack signage indicating that a Flex Route bus actually stops at any of the locations shown. Thus, in most cases there is nothing to inform the general public of the availability of these routes. The lack of signage is a further indication that the Flex Routes are not, in fact, open to the public. BATA argues that the Flex Routes merely need to be accessible to the public in order to preclude a finding of “exclusively” transporting school students per the definition of “school bus operations.” As stated above, however, FTA’s policy is to interpret “exclusively” to “encompass any service that a reasonable person would conclude was primarily designed to accommodate students and school personnel, and only incidentally to serve the nonstudent general public.” 73 Fed. Reg. at 53390. BATA provided three handwritten letters that are purported to be from members of the public who have ridden the Flex Route buses., These letters, taken together with the other facts relating to the Flex Route service, however, demonstrate only that the Flex Routes only incidentally serve the nonstudent general public. Based upon the foregoing, a reasonable person would conclude that the Flex Route bus services are primarily designed to accommodate students.

f. Regular Service Stops Requirements

BATA has schedules for the Winter Flex Routes. As discussed above, however, these schedules are significantly different from BATA’s other published schedules, which support the conclusion that these routes are operated separately and distinctly from BATA’s regular and continuing public transportation service.

g. Approval of School Bus Operations

49 U.S.C. § 5323(f)(1)(B) provides that the prohibition on school bus operations does not apply “unless a private schoolbus operator can provide adequate transportation that complies with applicable safety standards at reasonable rates” 49 C.F.R. §§ 605.16 through 605.19 set forth the procedures for when a grantee wishes to provide school bus operations. These procedures include the notice requirement to all private school bus operators in its urban area, *see* 49 C.F.R. § 605.16, or a certification in lieu of notice stating that there are no private school bus operators within its urban area. 49 C.F.R. § 605.17. The Administrator of FTA then will issue an approval or disapproval. 49 C.F.R. § 605.19. Although BATA stated in its response that no private operators exist to provide the service at issue, BATA must comply with these procedures in order to provide the services it is currently providing under its Winter Flex Routes.

¹³ In its response, BATA stated that without the purchase of SBPS’ buses, it would not have been able to operate these routes.

Conclusion

Based upon the foregoing, FTA has determined that BATA is providing school bus services in violation of 49 U.S.C. § 5323(f) and 49 C.F.R. Part 605. Therefore, BATA is ordered to cease and desist from this school bus service as soon as it is feasible, and provide FTA with a schedule for cessation of such service within ninety (90) days of receipt of this decision. This decision is subject to judicial review pursuant to 5 U.S.C. §§ 701-706.



Marisol Simon
Regional Administrator
Federal Transit Administration



Date