

BEFORE THE FEDERAL TRANSIT ADMINISTRATION

Imperial Travel Services,
Complainant

v.

Charter Service Docket No. 2006-15
49 U.S.C. Section 5323(d)

Greater Lafayette Public Transportation Corporation,
Respondent.

DECISION

Summary

On September 12, 2006, Imperial Travel Services ("Imperial") filed a complaint with the Federal Transit Administration ("FTA") alleging that Greater Lafayette Public Transportation Corporation a/k/a CityBus ("CityBus" or "Respondent") was providing charter service in violation of FTA's charter regulation, 49 Code of Federal Regulations ("C.F.R.") Part 604, and followed up with additional allegations on October 31, 2006. Imperial alleged that CityBus was violating the charter regulations by providing charter service directly to customers.

On December 1, 2006, CityBus responded to the complaint. CityBus stated that it subcontracted with private operators who lacked capacity. CityBus stated that they stopped subcontracting with private providers in August 2006.

On January 11, 2007, Imperial filed a number of additional exhibits. On February 13, 2007, Imperial filed its rebuttal alleging that CityBus falsified private operator's requests for buses, claiming they needed wheelchair accessible vehicles when they did not.¹

Subsequently, on March 14, 2007, CityBus responded to Imperial's additional allegations.

On June 8, and 15, 2007, Imperial sent additional letters to FTA regarding CityBus's illegal charter operations.

On June 11, 2007, FTA sent a letter to CityBus reminding it of its obligations to comply with the charter regulations.

Imperial forwarded an anonymous letter to FTA on August 7, 2007, further detailing illegal charter operations by CityBus.

¹ James Calloway, President of Imperial, alleged that fraudulent transactions were going on between CityBus and others in the charter bus industry. FTA referred the "fraudulent" allegations to the United States Department of Transportation's Office of Inspector General ("OIG") in March 2007, since FTA did not have the authority or resources to conduct investigations involving fraud. The OIG completed its investigation on July 30, 2007, and referred the matter back to the FTA for any further action as appropriate.

Upon reviewing the allegations in the complaint and the subsequent filings of both the Complainant and the Respondent, FTA has concluded that CityBus² has been consistently violating the charter regulations and must immediately cease and desist from providing unauthorized charter service. The unauthorized charter service which was provided constitutes a "pattern of violations," and FTA intends to withhold an amount equivalent to the gross proceeds generated as a result of the unauthorized charter operations. Any mileage accrued as a result of unauthorized charter operations should not be used to calculate the useful life of the vehicles. Failure by CityBus to immediately cease and desist from providing unauthorized charter service could result in loss of federal funds, as well as suspension of draw down privileges.

Complaint History

Imperial's complaint against CityBus was filed on September 12, 2006. Attached to the complaint was a newspaper article stating that CityBus would no longer be providing charter trips as of August 31, 2006. Imperial also attached a letter it had sent to CityBus regarding the article and the fact it was aware that CityBus intended to provide charter service for the Feast of the Hunter's Moon Festival (the "Feast") in October 2006. FTA forwarded the complaint to CityBus and initiated the thirty-day conciliation period.

On October 31, 2006, Imperial filed a formal complaint stating that CityBus was contracting with private operators (Morgan Coaches, Cliff Hall, Inc., Carriage Coaches, and Hallmark) to operate charters; CityBus was operating direct charters with customers; and realleging that CityBus was providing illegal service for the Feast. Attached to the complaint was a letter from CityBus stating that it was "subcontracting" charter service through Morgan, Inc. which it believed was permissible under the regulations and stated that the Feast service was public transportation. Also attached were a Morgan Motorcoach Charter Agreement form; a CityBus Charter Service Information Form; a CityBus Commercial Charter Coach Order Form; and a printout from the Federal Motor Carrier Safety Administration showing that Cliff Hall's common carrier license had been involuntarily revoked.

FTA forwarded the complaint to CityBus for a response. CityBus provided a response on December 1, 2006. In its response, CityBus relied on *Blue Bird Coach Lines, Inc. v. Linton*, 48 F. Supp. 2d 47 (D.D.C. 1999) for the contention that the Feast service was "public transportation" not charter. CityBus argued that if the transit agency controlled the service, the service benefited the public at large and was open door service, then the service was "public transportation." CityBus stated that it was utilizing charter exception 49 CFR Section 604.9(b)(2) when it entered into contracts with private providers. CityBus relied on FTA's Triennial Review findings that it was in compliance with the regulations when determining that these arrangements were permissible. With regard to allegation that CityBus provided charter service directly to customers, CityBus claims that Cliff Hall created the "CityBus" forms, not CityBus and that the service was run through Cliff Hall and CityBus was a "subcontractor." CityBus does acknowledge it used its buses when Cliff Hall was having trouble obtaining insurance because it was legally obligated to honor a pre-existing contract. Attached was a copy of a Bus Transportation Agreement between CityBus and the Tippecanoe County Historical Association for the Feast service; copies of FTA letters allowing leased service (from 1988, 1992, and 1993);

² CityBus is a recipient of Section 5307 funds; therefore, it is required to comply with the charter regulations.

subcontract agreements between Morgan Coaches and CityBus and CityBus and Cliff Hall; willing and able determinations for Imperial; and an affidavit from CityBus's General Manager. In the affidavit, the General Manager stated that CityBus has provided the Feast service since the 1980's. He stated that until 2006, the service was provided as a subcontractor through a private provider, but that in 2006 it was provided as regular, short-term service.

On January 11, 2007, Imperial filed its rebuttal along with a number of attachments. Included with the attachments were the following: a number of CityBus willing and able notices; a letter from Brenda Pease (a former Morgan, Inc. employee); a number of CityBus charter forms for various charters, including ones for Purdue University; an email from John Metzinger (Development Director for CityBus) to Roni Anthrop (also of CityBus) stating a charter should be "billed through Morgan Coach"; a direct CityBus charter form; a phonebook advertisement showing that CityBus advertises that it provides local charters; and a list of CityBus riders by fare classification.³ Ms. Pease states in her letter that CityBus changed charter request forms to indicate that wheelchair vehicles were requested when the customer had not requested accessible vehicles.

On March 14, 2007, CityBus responded to Imperial's rebuttal. In its response, CityBus states that Imperial has misstated the regulations with regard to providing charter service. CityBus claims that it only provided service under one of the charter exceptions. CityBus states that in its last two Triennial Reviews, FTA did not find it was out of compliance with the charter regulation. CityBus contends that Ms. Pease's statements are inaccurate and that the notation of "w/c" was simply to identify the fact CityBus was providing a wheelchair accessible vehicle. CityBus states that any advertisements on its vehicles (i.e., for Purdue Athletics) were paid ads; it is not operating beyond its service area; it has tried to change its Yellow Pages ad unsuccessfully for years; and Cliff Hall ran a legitimate charter business, not a sham business as Imperial alleges. Attached were copies of CityBus's last two Triennial Reviews from FTA; affidavits from CityBus's Operations Manager and Development Manager; Yellow Pages ads for CityBus; and advertisements for Purdue students to ride free on CityBus.

On June 8, 2007, Imperial provided further statements regarding the allegation that CityBus was providing illegal charter service.

On June 11, 2007, FTA sent a letter to CityBus reiterating that it should be complying with the charter regulations.

On June 15, 2007, Imperial filed a letter with a newspaper article about CityBus and the current complaint. In the article, the General Manager acknowledges that they earned \$87,000 from subcontracted charters last year.

On June 25, 2007, CityBus sent FTA a letter from attorneys for Purdue University stating that Purdue is a university exempt from taxation under Section 115(a) of the Internal Revenue Code. The letter also indicates that Purdue University believes it is an agency or instrumentality of the State of Indiana.

³ Included on the list is a category called "unclassified" which includes contracted non-regular service, such as school trips for West Lafayette Schools, charters, etc. Purdue staff and student rides are also listed.

On August 7, 2007, Imperial sent FTA a copy of an anonymous letter from a CityBus driver. The driver alleges that CityBus provided charter service for the Lafayette Catholic Schools, the YMCA & Hanna Center, WalMart-Mellers, Purdue Conferences, College Station Apartments, the Feast service, and trolleys for weddings and special events.

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, or facilities funded under the Acts of a group of persons who pursuant to a common purpose, under a single contract, at a fixed charge . . . for the vehicle or service, have acquired the exclusive use of the vehicle or service in order to travel together under an itinerary either specified in advance or modified after leaving the place of origin. This definition includes the incidental use of FTA funded equipment for the exclusive transportation of school students, personnel, and equipment. 49 C.F.R. § 604.5(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 in Section 604.9(b) 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 service based on capacity and accessibility restraints of private providers. Section 604.9(b)(2). Additionally, there are exceptions for "special events" (Section 604.9(b)(4)) and for providing service for non-profits (Section 604.9(b)(5)). However, the threshold question to be addressed before a recipient provides any charter service is whether or not there are any willing and able private providers.

The Complainant's allegations relate to all these requirements. They allege that CityBus has been providing service when there are "willing and able" private providers and that CityBus is providing charter service when the exceptions do not apply.

Discussion

Federal funds are provided to transit agencies to allow them to provide public⁴ transportation. The charter regulations were meant to carve out limited exceptions that allow recipients of federal

⁴ As part of Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), the definition of "mass transportation" was changed to "public transportation." Section 3004(d)(7)

funds to provide charter service under very limited circumstances. The intent of the regulations was to prevent transit agencies from competing with private charter operators.

A. Willing and Able Notice

Imperial filed a response to CityBus's annual "willing and able" notice every year and based on the evidence, it was always determined to qualify as a "willing and able" provider. Therefore, CityBus was prohibited from providing charter service unless one of the exceptions applied. As an aside, CityBus's willing and able notice should have only stated that it was offering service using buses or vans. It should not have stated any other characteristics of the vehicles. It also should have clearly stated that to the extent there was at least one "willing and able" private provider it was prohibited from providing charter service unless one of the exceptions applied. CityBus's annual "willing and able" notice often included the size of the vehicles and did not include the prohibition language as required 49 CFR Section 604.11(a)(7). The deficiencies in the notice especially the lack of the prohibition language makes CityBus's entire process suspect.

To the extent there was at least one "willing and able" private provider, CityBus should not have been providing charter service, unless one of the exceptions was involved. Also, if CityBus intended to enter into contracts with private providers to allow it to do certain types of charter service, then that should have been included in the notice and it would have needed to enter into such agreements with all private providers determined to be "willing and able," including Imperial. The "willing and able" notice did not include a reference to the possibility of entering into agreements with "willing and able" private providers.

B. Exceptions

Under the charter regulations, a public transit agency can lease equipment or services to a private provider to the extent that the private provider has exceeded its capacity or it needs accessible vehicles. The regulation, 49 CFR Section 604.9(b), states:

- (1) A recipient may provide any and all charter service with FTA funded equipment and facilities to the extent that there are no willing and able private charter operators.
- (2) A recipient may enter into a contract with a private charter operator to provide charter equipment to or service for the private charter operator if:
 - i. The private charter operator is requested to provide charter service that exceeds its capacity; or
 - ii. The private charter operator is unable to provide equipment accessible to elderly and handicapped persons itself. 49 CFR Section 604.9(b)

CityBus states that it was providing equipment and services to private providers under one of the above exceptions. CityBus attaches copies of two subcontracting agreements between itself and Cliff Hall, Inc. and Morgan Coach, Inc. (See, Exhibit E to CityBus's response dated December 1, 2006) The agreements both state that CityBus will be providing transportation services "on behalf" of the private providers. Attached to each of the contracts is a document entitled "Exhibit A." The "Exhibit A" documents show what Cliff Hall and MCI were meant to pay CityBus to

use the buses and the other numbers show what CityBus intended for the customer to be charged. This arrangement with Cliff Hall and MCI is very similar to the arrangement that Champaign-Urbana Mass Transit District (CUMTD) had with Illini Swallow (*See*, Charter Complaint No. 2004-10) where for a significant number of years CUMTD had had an arrangement with Illini Swallow to operate charters on its behalf for a 10% fee. For a 10% fee paid to Illini Swallow, CUMTD operated the charter service. The 10% fee was essentially a finder's fee. FTA determined that this arrangement was a violation of the charter regulations.

According to CityBus's contracts with Cliff Hall and MCI, it had the same arrangement. In exchange for a 10% fee, CityBus provided the charter service. This arrangement is a violation of the charter regulations. A transit agency can enter into a contract with a private provider to provide equipment or service if the private provider does not have enough accessible vehicles or does not have enough capacity. 49 CFR Section 604.9(b)(2) However, this exception is not for providing direct charter service, but for leasing vehicles or service to a private provider, so the private provider can provide the service. CityBus could have leased vehicles or service to Cliff Hall or MCI if they met one of the exceptions (accessibility or capacity constraints), but it could not provide service on Cliff Hall or MCI's behalf. All the service that CityBus provided for Cliff Hall and MCI constituted impermissible charter service. The service was impermissible service, since CityBus could not provide service as a subcontractor for Cliff Hall or MCI.

These contracts demonstrate that Cliff Hall and MCI were not using their vehicles and drivers to the charter customers for the service, but rather CityBus was using the two private providers as brokers. The arrangement was meant to be a "subcontracting" arrangement whereby CityBus was providing charter service to customers and the transaction was passing through the private providers. However, the exception in the regulation is for the public transportation agency to provide charter equipment or service for the private provider if the request exceeds the private provider's capacity or it needs additional accessible vehicles. The arrangement as created does not meet the parameters of the exception. For example, attached to the Complainant's January 11, 2007, submission is a check made out to "Cliff Hall, Inc. c/o CityBus" from a charter customer (Exhibit 8-I). The documentation is for a charter involving CityBus trolleys. If this was a straightforward arrangement, then the check would be made out to Cliff Hall alone.

Further documents are provided showing that "W/C"⁵ was listed on many of the CityBus Charter Information forms. CityBus indicates that on many occasions the "W/C" designation was added to describe the bus used as opposed to the Respondent's explanation that the designation was added to circumvent the charter regulations. The bottom-line is that CityBus is required to comply with the regulations, not the private provider who is leasing the buses or service from the public transit agency. It is CityBus's responsibility to ask whether a private provider is leasing vehicles because it either lacks capacity or needs accessible vehicles. CityBus has stated⁶ that on many occasions the "W/C" designation was used to describe the vehicle rather than because a customer or private provider requested a wheelchair accessible vehicle. If no request was made for wheelchair accessible vehicles, then that particular exception would not apply. In other

⁵ The "W/C" notation stands for wheelchair accessible vehicle.

⁶ *See*, pgs. 2-3 of CityBus's Response dated March 14, 2007, which refers to Mr. John Connell's affidavit, Exhibit BB.

E. Triennial Review Findings

Although FTA's two most recent CityBus Triennial Reviews (TR) did not find charter violations, it does not prevent FTA from finding that CityBus is violating the charter regulations. It is unclear what information was provided to the TR reviewers. If the reviewers had been provided with all the facts, the findings could have been completely different. If the TR reviewers were told that CityBus was only providing charter service based on capacity and accessibility needs of private providers without fully understanding how the transactions were actually structured, then the incorrect information may have been the basis for determining that the Respondent was in compliance with the charter regulations when in fact it was not. The TR process is an overview of a Grantee's operations; it is not a detailed examination of day-to-day operations.

Conclusion

All the service CityBus provided on behalf of Cliff Hall and MCI constituted impermissible charter service since the service did not qualify for one of the exceptions. The service provided directly to Purdue was also impermissible charter service since Purdue did not qualify for one of the exceptions.

CityBus failed to properly follow the "willing and able" determination process. To the extent there was at least one "willing and able" private provider, in this case Imperial, it was prohibited from providing charter service unless one of the exceptions applied. CityBus entered into "subcontracting" arrangements with two private providers and there is no documentation to support that any of the services qualified for the regulatory exceptions.

Remedy

Complainant has requested that Respondent immediately cease and desist its charter operations. FTA finds that Respondent has been providing impermissible charter service and orders it to immediately cease and desist any such further service. Refusal to cease and desist in the provision of this service could lead to additional remedies on the part of FTA. FTA has the authority to order the full or partial withholding of federal funds under SAFETEA-LU, 49 U.S.C. Section 5323(d). SAFETEA-LU provides that the Secretary of Transportation shall bar a recipient from receiving Federal transit assistance in an amount the Secretary considers appropriate if there is a pattern of charter violations. 49 U.S.C. Section 5323(d)(2) FTA finds that there has been a pattern of violations⁷ and therefore, bars CityBus from receiving an amount equivalent to the gross proceeds generated from its unauthorized charter operations.⁸ Additionally, the mileage for improper charter use cannot accrue towards the useful life of the federally funded vehicles. Any mileage accrued as a result of impermissible charter service should be subtracted from the useful life mileage for the vehicles.

⁷ FTA determines that the unauthorized charter service provided to MCI, Cliff Hall and Purdue constitute a "pattern of violations."

⁸ CityBus has thirty (30) days to calculate the gross proceeds that were generated as a result of the unauthorized charter service between July 2003- Present. CityBus produced a spreadsheet of charters for the OIG that it operated from July 26, 2003, through March 23, 2007. FTA would like an updated spreadsheet through December 2007 which lists all charter service provided during that timeframe, as well as the dollar amounts associated with the service.

words, the vehicles were not leased to a private provider because the customer requested vehicles that could accommodate wheelchairs and the private provider did not have those type of vehicles.

C. Purdue University Service

CityBus alleges that it provided service to Purdue University under Section 604.9(b)(5) since Purdue is a “governmental entity” as an institution of the State of Indiana. (*See*, letter dated June 18, 2007, from Stuart & Branigin to Martin Sennett, General Manager of CityBus) The exception under Section 604.9(b)(5) requires that the governmental organization certify to one of the following if it wishes to utilize this exception: (i) it will have a significant number of disabled passengers on its charter; the purpose of the trip is consistent with the function and purpose of the organization; and the trip will comply with Title VI of the Civil Rights Act and Section 19 of the Federal Mass Transit Act of 1964; or (ii) it is a social service organization; the purpose of the trip is consistent with the function and purpose of the organization; and the trip will comply with Title VI of the Civil Rights Act and Section 19 of the Federal Mass Transit Act of 1964; or (iii) it is an organization eligible to receive public welfare assistance funds for transportation of a group of transit dependent persons; the purpose of the trip is consistent with the function and purpose of the organization; and the trip will comply with Title VI of the Civil Rights Act and Section 19 of the Federal Mass Transit Act of 1964. CityBus did not provide certification from Purdue attesting to its status under any of these exceptions. Since CityBus didn’t provide any documentation, FTA has no evidence that Purdue qualified under one of these exceptions.

D. Feast of the Hunter’s Moon Festival

The Complainant alleges that CityBus provided impermissible charter service for the Feast of the Hunter’s Moon Festival (the “Feast”). Attached to the complaint dated October 31, 2006, is a CityBus letter dated October 26, 2006, in which CityBus states the service it provides for the Feast is an established route. However, in its response dated December 1, 2006, CityBus acknowledges that the route is “not part of a daily bus route.” (CityBus Response at pg. 2) CityBus further states that prior to 2006, the service was “provided as a subcontractor to a private charter company” and in 2006, it was provided as a “regular, short-term service route.” *Id.* Neither of these types of service falls under one of the existing charter exceptions.

CityBus cites to *Blue Bird Coach Lines v. Linton*, 48 F. Supp. 2d 47 (D.D.C. 1999) for the proposition that the Feast service is public transportation not charter. CityBus contends that it controlled the service, but it entered into a contract with the Tippecanoe County Historical Association (TCHA) to provide the service. The Agreement dated October 2, 2006, listed the routes and times that the service would be provided, as well as the fee TCHA intended to pay for the service as a subsidy for the Feast attendee riders, specifically \$16,366. This set of facts is very different from the *Blue Bird Coach* situation where there was no contract and the riders paid individual fares. The existence of an agreement between TCHA and CityBus also contradicts the contention that the service was “regular, short-term service.” The service was provided for a specific group, attendees of the Feast.

Appeal

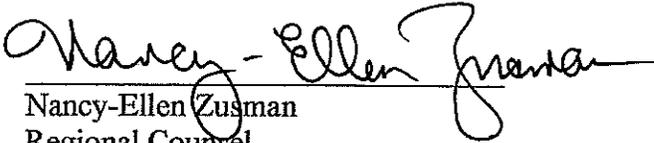
In accordance with 49 C.F.R. § 604.19, the losing party may appeal this decision within ten days of receipt of the decision. The appeal should be sent to James Simpson, Administrator, FTA, 1200 New Jersey Avenue, SE, 5th Floor- East Building, Washington, D.C. 20590.



Marisol Simon
Regional Administrator

JAN 9 2008

Date



Nancy-Ellen Zusman
Regional Counsel

1/9/08

Date