

BEFORE THE FEDERAL TRANSIT ADMINISTRATION

Area Transportation, Inc.,
Complainant

v.

School Bus Complaint
49 U.S.C. § 5323(f)

Mass Transportation Authority,
Respondent

DECISION

Summary

Area Transportation, Inc. ("Complainant") filed a complaint dated August 18, 1998, with the Federal Transit Administration ("FTA") alleging, in sum, that the Mass Transportation Authority of Flint, Michigan ("Respondent") is providing service in violation of FTA's school bus regulation, 49 CFR Part 605. The service specifically complained of pertains to respondent's bus service along "school secondary routes." Respondent answered on September 22, 1998, and complainant replied on October 16, 1998. Upon reviewing the allegations of the complaint and the filings of both complainant and respondent, FTA has concluded that the service in question does violate FTA's regulations regarding school bus service. Respondent is hereby ordered to cease and desist in providing such illegal services.

Complaint History

Complainant filed its complaint on August 18, 1998 along with exhibits 1 through 21.¹ The complaint alleges that the respondent is providing illegal school bus service by providing transportation along its "school secondary routes." Specifically, complainant alleges that this service is not open to the public because: (1) respondent does not inform the general public of the complained of routes; (2) respondent publishes the schedules for these routes separately from the transit schedule; (3) drivers of buses along these routes regularly dissuade the general public from boarding their buses; and (4) bus stops along these routes are not marked as MTA public transit stops, nor do the secondary route buses stop at regular public transit stops that fall along the secondary route. Complainant requested a cease and desist order as well as respondent's disqualification for receipt of any future FTA grant assistance.

Respondent filed its answer on September 22, 1998. In it, respondent denied that it was providing illegal school bus service, and attached as an exhibit a declaration from the

¹ These exhibits included: declarations from an individual who was denied service on one of the school secondary routes and another individual who worked as the Transportation Supervisor for the Flint School District; schedules and ride guides for a number of different primary and school secondary routes run by respondent; and photographs of a variety of respondent's vehicles.

General Manager of the Flint Mass Transportation Authority. Respondent asserts that its service is not illegal because all members of the public are encouraged to ride on any and all of its routes.

Complainant replied on October 16, 1998, attaching exhibits 22 through 28.² This reply reiterated the assertion that respondent's school secondary service is not open to the public, and again requested a cease and desist order accompanied by the disqualification of respondent from the future receipt of FTA funds.

Discussion

As complainant has accurately stated, school bus service may be provided by a recipient of Federal transit assistance in only three narrow instances. In the absence of one of these three exceptions, recipients of Federal transit assistance are barred from engaging in school bus service. According to 49 U.S.C. Section 5323(f):

no Federal financial assistance shall be provided under this chapter . . . to any applicant . . . unless such applicant and the Secretary shall have first entered into an agreement that such applicant will not engage in school bus operations, exclusively for the transportation of students and school personnel, in competition with private school bus operators. . . .

The code then goes on to enunciate the three narrow exceptions to this rule:

[1] This subsection shall not apply to an applicant with respect to operation of a school bus program if the applicant operates a school system in the area to be served and operates a separate, and exclusive school bus program for this school system; [2] This subsection shall not apply unless private school bus operators are able to provide adequate transportation, at reasonable rates, and in conformance with applicable safety standards; and [3] This subsection shall not apply with respect to any State or local public body or agency thereof if it (or a direct predecessor in interest from which it acquired the function of so transporting schoolchildren and personnel along with the facilities to be used therefore) was so engaged in school bus operations any time during the twelve-month period immediately prior to November 25, 1974. . . . (49 U.S.C. 5323(f)).

These three exemptions are implemented in 49 CFR Part 605.11. Respondent has admitted, in its answer, that it does not fit within any one of these three exemptions. As such, the sole issue for this decision is whether the service being provided by respondent is permissible tripper service, as defined in 49 C.F.R. Part 605.3(b) and set out in 49 C.F.R. Part 605.13, or impermissible school bus service.

² These exhibits included: a declaration from the co-founder of ATI (complainant); resolutions from the Flint Board of Education; notes and a log taken by an investigator for the Ohio Bus Association; a letter from complainant's attorney to respondent; and agreements between complainant and both Fenton Public Schools and Linden Community Schools.

Trippler service is defined as:

regularly 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 grantee or operator's regular service stop. All routes traveled by tripper buses must be within a grantee or operator's regular route service as indicated in their published route schedules.

(49 CFR 605.3(b))

Thus, by definition, there are four elements that must be examined to determine if respondent's service is permissible or impermissible: (1) whether the service is open to the public; (2) whether the buses used in the service are marked; (3) where the buses used in the service stop; and (4) what the routes used in the service are. Each of these elements is discussed in turn below. However, it is important to note that should respondent fail to meet only one of these elements, its service would not fall within the definition of tripper service, and would instead be impermissible school bus service.

1. Is respondent's service open to the public?

Complainant states that the complained of service is not open to the public, whereas respondent disagrees. On the basis of the following reasons, FTA finds that respondent's service is not open to the public. First, and most pointedly, is the declaration of Thomas Pilon that includes his first hand account of being denied service when attempting to board one of respondent's "school secondary" route buses. Second, there is the 1994 report by an investigator for the Ohio Bus Association (OBA), who recounts his observations of respondent's school secondary route service passing by adult passengers without stopping even when hailed, as well as the negative driver comments made to him when he attempted to board one of these buses. Statements such as these are direct evidence that respondent's service is not open to the public.

In addition to the direct evidence, there are several other facts that weigh against a finding of open door service. Most notably, there is the absence of notice to the public in general with regards to these routes. Secondary route guides are primarily available by mail upon telephone request, as opposed to where ever general transit schedules are published and provided. Also, secondary route stops are not adequately marked, nor do the secondary route buses stop at regular route stops. When combined with the direct evidence above, these facts serve as a strong indication that respondent's secondary route service is not open to the public.

2. How are respondent's buses marked?³

Complainants contend that the buses used in the complained of service do not provide any signs showing route names or destinations and that the buses used in the school secondary route service do not bear the distinctive markings of MTA transit buses. Respondents state that all of its buses operate with transit signage including a route number designation or destination sign indicating to the public the route of the vehicle. FTA finds that respondent's school secondary service buses do not carry adequate signage to indicate the route name and/or destination.

Attached to the complaint were pictures of two of respondent's buses – one was what may be thought of as the "usual" transit-type bus, and one was of a school bus which had been repainted in respondent's colors and with respondent's logo. The former included lit up signage on the front and side of the vehicle. While the photograph does not show what these signs state, it is assumed that they are used to indicate both the route number and destination name for the vehicle. The latter photo shows a display of only a route number, placed on the front windshield of the bus so that those outside the bus may read it. This signage is small in comparison to the signage in the former vehicle and appears as if it may at times be partially obscured due to the placement of the rear view mirrors on the bus.

In light of this and of the fact that the schedules for these route numbers are not as available to the public as regular route service schedules (see above), FTA finds such signage inadequate to fully inform the public of the bus's destination.

3. Do respondent's buses stop only at regular route stops?

Complainant argues that the school secondary route buses stop only at unmarked stops. Respondent admits that, due to insufficient funding, the stops along the secondary routes are not marked with signs mounted on posts, but states that these stops are temporarily marked by paint. Respondent does not deny, however, that these stops are off of the regular routes of its transit buses.

FTA finds that respondent's secondary route buses are not stopping only at regular route stops. The 1994 OBA report cited above noted that the school secondary route bus being observed stopped only at unmarked bus stops and did not stop for adults waiting at regular route stops, even when the bus was hailed by those potential passengers. Additionally, the route guides provided along with the complaint clearly show that in many cases, the school secondary routes travel over primary routes, yet these secondary guides do not indicate stops along the primary route. Taken together, these facts demonstrate that respondent's school

³ FTA notes that, because it has found that one of the elements of zipper service is missing, respondent's service must be deemed impermissible school bus service, and any further analysis is not necessary for such a finding. We shall, however, go through and analyze each element as it pertains to respondent's service.

secondary route buses stop only along the secondary route and not along the regular route.

4. What routes are used in respondent's service?

There is no question that the school secondary routes cover a greater area than the primary routes by traveling deeper into residential areas that exist along many of respondent's regular routes. As such, FTA finds that the respondent's secondary route buses do not all travel within its regular route service as indicated in its published route schedules.

In light of the above analysis, FTA finds that respondent has violated FTA regulations by providing illegal school bus service.

Remedy

Complainant has requested that respondent be barred from any further receipt of Federal transit assistance. Complainant interprets the Federal statute in question (49 U.S.C. § 5323(f)) as mandating this penalty. FTA disagrees with complainant's interpretation. FTA's authority in pursuing regulatory penalties, such as the one argued for by the complainant, is discretionary. See United States ex rel. Allen Lamers v. City of Green Bay, 168 F.3d 1013, 1999 U.S. App. LEXIS 2665 (1999) (stating that the FTA's decision to pursue or not pursue regulatory penalties is discretionary). Because cutting respondent off from all future Federal transit assistance is such an extreme penalty, FTA prefers to use its discretion and first order respondent to cease and desist in its provision of the illegal service. Should the respondent fail to do so, further steps may then be taken.

Conclusion and Order

FTA finds that respondent has been providing impermissible school bus 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 the FTA.

In accordance with 49 CFR 604.19, you may appeal this decision within ten days to Gordon J. Linton, Administrator, FTA, 400 Seventh Street, S.W., Room 9328, Washington, D.C., 20590.


Joe Ettinger
Regional Administrator

5-5-99
Date