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of Transportation
**Federal Transit
Administration**

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DECISION
School Bus Operations

KEMPS BUS SERVICE, INC.,
Complainant,

v.

LIVINGSTON-WYOMING CHAPTER OF NYSARC, INC.
Respondent

I. Introduction

This decision is the conclusion an administrative complaint process pursuant to 49 C.F.R. Part 605, Subpart D, initiated as a result of a complaint received from Kemps Bus Service, Inc. ("Complainant") against the Livingston-Wyoming Chapter of NYSARC, Inc. ("NYSARC Respondent"). NYSARC Respondent receives Federal Transit Administration ("FTA") funding from the New York State Department of Transportation ("NYSDOT Respondent") under the Elderly and Persons with Disabilities Program, 49 U.S.C. Section 5310, as a subrecipient of NYSDOT. As a result of our review of the submissions in the complaint process, FTA has concluded that certain portions of NYSARC Respondent's operation fail to comply with FTA requirements pertaining to school bus operations at 49 U.S.C. Section 5323(f) and 49 C.F.R. Part 605.

II. Background Facts and Process

Complainant filed a complaint with this office dated August 26, 1998 alleging that NYSARC Respondent has violated the requirement not to engage in school bus operations as a recipient of Federal funds under 49 U.S.C. Section 5301 *et seq.* According to Complainant, NYSARC Respondent has bid on school bus contracts against Complainant, a private bus operator. By letter dated September 2, 1998, FTA forwarded this complaint to NYSARC Respondent and joined NYSDOT Respondent in the process since NYSDOT is FTA's direct recipient.

NYSDOT Respondent, by letter dated September 10, 1998, provided its response. This response stated that NYSARC Respondent is a subrecipient in its 5310 program and explained that on a prior occasion, NYSDOT Respondent had found that NYSARC Respondent had engaged in school bus operations with Section 5310-funded vehicles and instructed NYSARC Respondent to

cease such operations. According to NYSDOT, this action occurred as a result of a complaint filed by Kemps Bus Service, Inc. alleging illegal school bus operations. In subsequent meetings between these entities, it was agreed that NYSARC would discontinue school bus operations with FTA-funded vehicles. NYSDOT Respondent, therefore, viewed the matter as having been satisfactorily resolved because NYSDOT Respondent interpreted the school bus regulation to only apply to operations using Federally-funded vehicles. FTA forwarded a copy of NYSDOT Respondent's September 10, 1998 response to Complainant, providing the thirty (30) day period for rebuttal.

NYSARC Respondent submitted its response to the complaint by letter dated September 24, 1998. In that response, NYSARC admitted to having previously used Section 5310 vehicles for their school bus operations although NYSARC stated that they have subsequently discontinued that practice. According to NYSARC's response and the accompanying affidavit of Joseph Antinore ("Antinore Affidavit"), NYSARC transports handicapped children under the age of 5, as well as school age children to their own facilities, Head Start facilities, special education destinations and destinations operated by others, pursuant to various contracts, school board bids and with counties. In the Antinore Affidavit, reference is made to an attached "UMTA Grant". Review of this document indicates that it is not an "UMTA grant"; rather, it is a copy of an agreement between NYSDOT respondent and NYSARC Respondent.

FTA forwarded a copy of NYSARC Respondent's response to the Complainant by letter dated October 6, 1998 to provide the opportunity for a rebuttal. Complainant submitted its rebuttal replying to NYSARC Respondent's response by letter to FTA dated October 12, 1998. Thereafter, NYSARC Respondent submitted by letter dated October 16, 1998, a sur-reply to Complainant's reply. By letter dated October 21, 1998, Complainant sent a sur-sur-reply. The Complainant's sur-sur-reply correctly points out that a sur-reply is technically beyond the formal administrative complaint process. FTA, however, in the interest of refining the respective positions of the parties, will take into consideration both parties additional submissions.

III. Analysis and Determinations

NYSDOT, NYSARC and Complainant have each stated that in the recent past, NYSARC Respondent engaged in impermissible school bus operations with two Section 5310 vehicles. This aspect of the NYSARC Respondent's school bus operations has apparently been resolved and, today, the parties have narrowed the issue to NYSARC Respondent's continuing engagement in school bus operations with privately financed vehicles. NYSARC Respondent does not deny that it is engaging in the transportation of children to schools using private vehicles¹. Instead,

¹ NYSARC in part argues that the handicapped children it transports are too young to be considered school age. Similarly, NYARC maintains that some of the destinations are not "schools" as intended to be covered by the school bus regulations. According to the Antinore Affidavit, some school transportation is done within the Head Start program. It is correct that transportation funded under contracts where they are reimbursed by Head Start funds, if done in accordance with FTA's charter regulations, would be a permissible exception to the charter regulations; therefore, this decision will only address those contracts for transportation of handicapped children reimbursed by county or school districts, as these would be contemplated by

NYSARC Respondent asserts that it is not required to abstain from school bus operations with private vehicles. The crux of the difference between the parties positions rests in their understanding of FTA's requirements with respect to school bus operations for school districts or counties using privately-financed vehicles or facilities.

FTA's statute, 49 U.S.C. Section 5323(f) expressly provides that:

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

Thereafter, the statute provides three (3) bases for exemptions from this absolute prohibition on school bus operations. Similarly, the FTA regulations, 49 C.F.R. Part 605, Section 605.1(b) sets forth the statutory purpose, as follows:

By the terms of section 3(g) no Federal financial assistance may be provided for the construction or operation of facilities and equipment for use in providing public mass transportation service to an applicant unless the applicant and the Administrator enter into an agreement that the applicant will not engage in school bus operations exclusively for the transportation of students and school personnel, in competition with private school bus operators.

NYSARC Respondent finds "implicit" in these provisions an interpretation that these requirements only apply to school bus operations using Federally assisted assets. NYSARC points to Section 605.12 as indication that the school bus requirement is satisfied if its operations are not conducted with Federally funded assets². This is not the meaning of Section 605.12. Such a limiting construction of the regulatory framework would nullify other provisions of the regulations. Further clarity as to the intent of this section can be found in the Preamble to 49 C.F.R. Section 605, April 1, 1976:

These regulations added a new Part 605 to UMTA regulations to protect private school bus operators who are in competition with Federally-assisted operators in providing transportation for school students ...the proposed regulations prohibited such bus operations by Federally-assisted operators unless such operators were expressly permitted under section 3(g) of the Urban Mass Transportation Act of

the school bus regulations. Although the parties have narrowed their argument to the issue of school bus operations using private vehicles, NYSARC Respondent's has also alluded to another argument that the activities complained of herein do not fall within the scope of the school bus regulations because they involve the exclusive transportation of handicapped children. This line of reasoning is inconsistent with recent FTA decisions on school bus service. See FTA letter of May 4, 1989 to the State of New Hampshire.

² NYSARC also relies on an administrative decision by NYSDOT, Case 32280; however, to the extent that this decision touches upon some of the issues herein, a State entity considering a Federal regulatory scheme is not persuasive.

1964... Even if a Federally-assisted operator is allowed to engage in school bus operations under one of the exemptions listed in section 3(g) and 164(b), the operator cannot use Federally-assisted buses, facilities and equipment in those operations. (Emphasis supplied).

This illustrates that even if an affirmative showing has been made to the Administrator to obtain an exemption pursuant to Section 605.11, Federally-assisted assets cannot be used under any circumstances. If an exemption has been granted, a recipient may engage in school bus operations so long as it is done with privately financed assets. As Complainant has pointed out, this construction, as well as the overall purpose of the Act to protect private school bus operators from competition, was recognized in Chicago Transit Authority v. Adams, 607 F.2d 1284, 1292 (7th Cir. 1979). Thus, the statutory framework establishes that there is a total prohibition on school bus operations, unless it is for "tripper" service as defined therein³ or the Administrator has granted an exemption in accordance with Section 605.14 for school bus operations using non-Federally assisted assets.

Moreover, FTA has made a clear distinction between requirements which only prohibit the use of Federally-assisted assets and general prohibitions as to types of activities. For instance, in 49 C.F.R. Part 604, the Charter regulations, "charter service" is specifically defined as "transportation using buses, vans, or facilities funded under the Acts" (emphasis supplied). This is in direct contradiction to the School Bus regulations that define "school bus operations" as "transportation by bus exclusively for school students, personnel and equipment". This again reveals the clear intent behind the express language of both the statute and the regulations.

Lastly, FTA's certification and assurance process requires all grantees annually to make certain assurances to FTA prior to receipt of Federal assistance. In one such certification and assurance entitled "School Transportation Agreement", a grantee agrees to engage in school transportation operations only to the extent permitted by one of the exemptions outlined in the regulations. Neither NYSDOT Respondent or NYSARC Respondent have argued that they have such an exemption in place, nor would they appear to qualify to fit within one of these categories to apply for such an exemption.

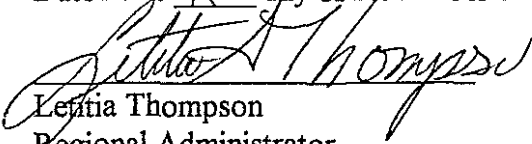
IV. Conclusion and Order

NYSARC Respondent, NYSDOT Respondent's subrecipient, has conducted and is continuing to conduct some school bus operations in violation of the FTA statute and its regulations. Accordingly, FTA finds that NYSARC is conducting impermissible exclusive school bus operations.

³ Further illustration of this point can be found in the October 12, 1982 Advance Notice of Proposed Rulemaking (ANPRM) in the Federal Register. Although this ANPRM was finally withdrawn on Jan. 4, 1990, it further supports this broad interpretation of the school bus operation ban.

Therefore, NYSARC is ordered to cease and desist from conducting school bus operations which are in violation of FTA's school bus regulations. NYSDOT is ordered to ensure that its subrecipients, including NYARC, are complying with the school bus regulations. Further, in accordance with 49 U.S.C. Section 5323(f)(2), an applicant violating the school bus provisions may not receive other financial assistance while not in compliance with FTA requirements. Therefore, NYSDOT Respondent shall provide a written report to FTA within thirty (30) days on the status of compliance by its subrecipients and the measures it is taking to ensure compliance.

Dated this 16 day of November 1998.


Letitia Thompson
Regional Administrator