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DEPARTMENT: Office of the County Attorney
THROUGH: Alison Rogers, County Attorney *ARR*
FROM: Fred H. Wagner, Assistant County Attorney *[Signature]*
DATE: June 11, 2008
ISSUE: FTA Charter Service Complaint Docket No. 2007-13

RECOMMENDATION:

That the full FTA opinion be placed in the records, as the copy submitted at the May 7, 2008, meeting omitted some pages. That the Board accept for filing with the Board's minutes the full FTA opinion, as the copy submitted at the May 15, 2008, meeting omitted some pages.

BACKGROUND:

On May 7 15, 2008, the Board of County Commissioners voted not to appeal the decision of the FTA on Docket Number 2007-13. A complaint was filed by Beach Boy Trolley August 29, 2007, alleging the County violated FTA charter service regulations by entering into an agreement with Winterfest of Pensacola to lease vehicles. It was alleged that the County should not have found that Winterfest was "willing and able" to operate a charter service. Also the complaint claimed Winterfest was an agent of the County, and thus the County was illegally conspiring to create an illegal charter brokerage.

The FTA found that the County and Winterfest did not conspire to violate the FTA's charter provisions. However, the initial determination by Escambia County Area Transit, acting as the County, that Winterfest was a "willing and able" charter provider was made in error. The FTA found that the County should have known that Winterfest did not have a vehicle for use as a trolley, and also lacked a corresponding DOT number to act as a charter operator.

Despite this finding, no penalty was levied, as the FTA did not find a pattern of violations on the part of the County. No impact on past, present or future funding from FTA will result from this decision, and this was confirmed by FTA's Counsel. As Winterfest is now also a charter provider under the FTA guidelines, the County should not take any action that would favor one charter operator over another.

APR:FHW:kbt

*CAT. I-3
Revised Recm.*

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

REGION IV
Alabama, Florida, Georgia,
Kentucky, Mississippi,
North Carolina, Puerto
Rico, South Carolina,
Tennessee, Virgin Islands

230 Peachtree St., N.W.,
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404-865-5600
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April 30, 2008

Mr. Travis Lakin
General Manager
Escambia County Area Transit
1515 W. Fairfield Drive
Pensacola, Florida 32501

Mr. Thomas E. McKean
President
Beach Boy Trolley Corporation
3811 W. Nine Mile Road
Pensacola, Florida 32526

Re: Beach Boy Trolley Corporation v Escambia County Area Transit
Charter Service Docket No. 2007-13

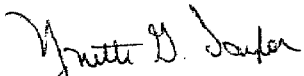
Dear Mr. Lakin and Mr. McKean:

The Federal Transit Administration has rendered its Decision in the above referenced matter, a copy of which is enclosed. Please note that this Decision applies the charter service regulations as they existed on August 29, 2007, the date on which the original Complaint was filed.

The parties are reminded that the Federal Transit Administration (FTA) amended the charter regulations in a Final Rule which appeared in the Federal Register on January 14, 2008. A copy of the Final rule may be found on the FTA public website. This Final Rule requires that any private charter operators wishing to provide charter service register on FTA's Charter Registration Website: <http://www.fta.dot.gov/CharterRegistration>.

Should either party wish to appeal the Decision, the process is set forth at 49 C.F.R. §604.19 of the old rule and also in the Decision itself. Should you have any questions regarding this matter, please contact Mr. Paul Jensen, Regional Counsel, at 404/865-5625.

Sincerely,



Yvette G. Taylor, Ph.D
Regional Administrator

BEFORE THE FEDERAL TRANSIT ADMINISTRATION

In the matter of:)
Beach Boy Trolley Corporation) CHARTER COMPLAINT
Complainant) 49 U.S.C. 5323(d)
v.
Escambia County Area Transit) CHARTER SERVICE DOCKET
Respondent) No. 2007-03

DECISION

SUMMARY

Beach Boy Trolley Corporation, hereinafter referred to as "complainant", filed this complaint with the Federal Transit Administration (FTA), alleging that Escambia County, otherwise referred to as Escambia County Area Transit (ECAT) and hereinafter referred to as "respondent", leased transit vehicles in violation of the FTA charter regulation, 49 CFR Part 604. The complainant specifically alleges that respondent leased equipment to an operator (Winterfest) not legally engaged in providing transportation services. The complainant alleges that Winterfest owned no equipment; that Winterfest had no legal authority to operate transportation services; that Winterfest had no commercial auto insurance coverage; that Winterfest had no valid business address or legitimate business operation; that the respondent provided Winterfest \$20,000 in "miscellaneous appropriations" to assist it in establishing a transportation business; and donated a van to Winterfest in support of its operations.

FTA accepted the complaint after determining that the complaint was not without obvious merit and on September 6, 2007, advised both parties to attempt to conciliate the

dispute in accordance with 49 C.F.R. §604.15. By letter dated October 18, 2007, an extension to the conciliation was granted and authorized. On February 11, 2008, complainant advised that the conciliation efforts had failed and provided documentation in support. By letter dated February 19, 2008, FTA directed both parties to proceed with the formal complaint process.

FTA emphasizes that the 2006 Winterfest Christmas holiday and the surrounding events which lead to the lease of respondent's equipment to Winterfest and the use of that equipment for the Winterfest Christmas holiday are the subject of this complaint. As such, additional facts and information provided, but not related to this event, will not be addressed as they are considered outside the scope of this complaint. FTA would also emphasize that this decision is rendered pursuant to the FTA charter regulation in existence at the time these events transpired and should not necessarily be interpreted to apply in all aspects to the new charter rule published at 73 Fed. Reg. 2325 (2008) effective April 30, 2008.

STATEMENT OF FACTS AND CHRONOLOGY OF EVENTS

Complainant, Beach Boy Trolley Corporation, is a private, for-profit charter operator engaged in the business of providing charter and other transportation services in and about the State of Florida.

Respondent, Escambia County, is the designated recipient of federal funding from the FTA and provides public transportation in and about Escambia County, Florida. Escambia County owns the property and equipment which is the subject of this complaint but operates the service through its service provider, Escambia County Area Transit (ECAT).

Winterfest of Pensacola, Inc., (Winterfest) is a Florida not for profit corporation which has, over a period of years, sponsored special events in downtown Pensacola, Florida such as a Christmas holiday themed festival featuring singers and performers, designed to attract visitors, both local and from out of town. Respondent supports and promotes its service organizations, such as Winterfest, through donations in the form of surplus equipment and miscellaneous appropriations.

On June 18, 2006, respondent published a "Notice of Proposal to Provide Charter Services" in an attempt to identify any willing and able private charter provider which might be interested in providing charter service in the Escambia County service area. This notice covered the time period during which the Winterfest event was to be held, i.e. late November and December of 2006.

On June 26, 2006, Winterfest responded to the notice and informed respondent that it was willing and able; had the desire and physical capability of providing the vehicles(s) requested; and possessed the legal authority, including the necessary safety certification, licenses and other legal prerequisites, to provide charter service in the service area specified. In its letter, Winterfest also requested that respondent provide the necessary

equipment or service should it lack capacity or accessible equipment pursuant to 49 C.F.R. §604.9(b)(2). Finally, Winterfest formally requested the reservation of six or seven of respondent's trolleys for late November and the month of December for the Winterfest event in downtown Pensacola.

On July 12, 2006, respondent replied to Winterfest's June 26th letter and advised Winterfest that it had been found willing and able to provide the service as requested in the public notice of June 18th.

On October 1, 2006, respondent entered into a contract to lease trolleys to Winterfest.

On October 12, 2006, the Escambia County Board of County Commissioners approved a \$20,000 "Miscellaneous Appropriations Agreement for Winterfest for FY 2006/07. By way of background, the Board noted that ... "The County makes payment in support of the activities of certain outside agencies approved by the Board".

On November 2, 2006, resolution #R2006-208 was passed by the Escambia Board of County Commissioners authorizing the conveyance, by donation, of a 1996 Dodge Ram Van (Serial Number 2B7HB21Y7TK141941) to Winterfest. The Resolution noted that Winterfest had requested that the County convey the van to it for use in support of Winterfest's holiday celebration program and that it was in the best interest of the County to convey the van to Winterfest.

On August 29, 2007, complainant filed its complaint with the FTA alleging that on October 1, 2006, the respondent had entered into an illegal contract to lease equipment to an entity (Winterfest) not authorized to provide charter services in violation of 49 C.F.R. Part 604.

On March 18, 2008, Winterfest of Pensacola, Inc. contacted FTA and requested that complainant's complaint be dismissed and that Winterfest be granted party status to respond to the complaint.

On March 24, 2008, respondent filed its response to the complaint.

On April 10, 2008, complainant filed a rebuttal to respondent's response.

On April 15, 2008, FTA denied Winterfest's request to intervene.

THE COMPLAINT

By letter dated August 29, 2007, complainant filed this complaint with the FTA alleging that the respondent had entered into an illegal contract to lease equipment to an entity (Winterfest) not authorized to provide charter services in violation of 49 C.F.R. Part 604. For the reasons previously stated, complainant maintains that Winterfest did not meet the definition of a willing and able private charter operator. 49 C.F.R. §604.5(p) defines a willing and able private charter operator as one which has the desire, physical capability,

and legal authority to provide charter service in the area in which it is proposed to be provided. The rule explains at 54 Fed. Reg. 42248 (1987) Q & A #7 that a private operator must have at least one bus or van to be determined willing and able. In addition, a recipient of FTA funds may only enter into a contract with a private charter operator to lease charter equipment and provide service to that private charter operator if that provider either lacks the necessary equipment to provide the charter service in question or is unable to provide accessible equipment. 49 C.F.R. §604.9(b)(2).

In summary, complainant maintains that respondent failed to use due diligence to properly access the legal authority of Winterfest; that Winterfest was not a legitimate charter operator; and that respondent knowingly facilitated Winterfest's operations by donating a van, appropriating funds in its support, and leasing equipment to an illegitimate entity not engaged in providing transportation services.

THE RESPONSE

Respondent argues that the provisions of the charter rule do not state that a willing and able private provider must "own" buses or vans but must merely "have", "provide", or "have the physical capability of providing" such equipment. Respondent maintains that it determined Winterfest to be "willing and able" based upon Winterfest's letter of June 26, 2006 referenced above and did not look behind Winterfest's assertions of its "willing and able" status since there was no indication that the information submitted was falsified. Accordingly, respondent admits that there was no investigation of Winterfest's ability to supply a vehicle nor was there a request made for a title or titles of vehicles Winterfest might have owned. Respondent furthermore acknowledges that "... a DOT number (a number issued by the U.S. Department of Transportation through the Florida Department of Transportation authorizing an entity to operate for-hire vehicles for the transportation of passengers) would be required at such a time as Winterfest would operate or own vehicles, but as they were starting, and did not have a vehicle until November of 2006 ... the number would not be required until such time they were to operate, or at least know they could".

Finally, respondent argues that its donation of the 1996 Dodge Ram Van (Serial Number 2B7HB21Y7TK141941) to Winterfest on November 2, 2006 (and titled in Winterfest's name on November 9, 2006) was made pursuant to a request from Winterfest and in accordance with Florida Statutes with a finding of public purpose made at a public meeting that the donation served a community benefit. Respondent notes that:

"... Winterfest was an ongoing organization ... and decided to enter the charter business for themselves. Escambia County was supporting the events that draw tourists to downtown, not establishing a charter business. Escambia County has no financial or other interest, in Winterfest, other than the desire to benefit the citizens of the County by promoting its service organizations. Winterfest saw the need of surplus property of the County and went through the proper statutory method of obtaining it".

The respondent does not dispute that it leased trolley vehicles to Winterfest on or about October 1, 2006 in accordance with Winterfest's previous request dated June 26, 2006 for the use of such equipment during the Winterfest event which was held in late November and December of that same year.

Respondent concludes that complainant has failed to show that Winterfest is an alter ego of ECAT or the County or that either has an economic interest in Winterfest. It asserts that its only interest is to further the public good and that its actions were never a subterfuge to avoid FTA's charter rule or act through a sham operator to provide charter service indirectly which it could not provide directly.

THE REBUTTAL

Complainant reiterates its allegations as set forth above and again specifies that the 2006 Winterfest event is the subject of this complaint. The Complainant offered several clarifications of facts but reasserts that Winterfest was not a "willing and able provider" when Winterfest declared itself "willing and able" on June 26, 2006; was not "willing and able" on July 12, 2006 when the respondent declared Winterfest "willing and able"; nor was it "willing and able" on or about October 1, 2006 when respondent effectively entered into a contract with Winterfest to lease it vehicles for the Winterfest event in November and December of 2006.

WINTERFEST'S REQUEST FOR INTERVENTION

By letter dated March 18, 2008, Winterfest of Pensacola, Inc. contacted FTA and requested that complainant's complaint be dismissed and that Winterfest be granted party status to respond to the complaint. Winterfest maintained that the complaint was without merit and without legal or factual basis and that Winterfest had the desire, the physical capability of providing the vehicles requested (through ownership and lease), possessed the legal authority and other legal prerequisites to provide charter service in the ECAT service area. On April 15, 2008, FTA denied Winterfest's request.

The purpose of the complaint process set forth at 49 C.F.R. §604.15 is to allow interested parties, who believe that a recipient is in violation of the requirements of the charter rule, to submit a written complaint to the FTA Regional Administrator outlining their complaint. Should the complaint be accepted, the complainant and respondent are required to provide written evidence in support of their positions. Upon a review of the written evidence, the Regional Administrator may decide to issue a decision on the evidence received, request additional information if he or she determines additional information is necessary, and/or hold an informal evidentiary hearing.

In this instance, written evidence was provided by both the complainant and the respondent in the form of the complaint itself, letters and memorandums detailing the failed conciliation process, respondent's response to the complaint, and rebuttals filed by complainant. We believe that sufficient time has been provided over the past eight

months for both parties to submit documentation in support of their positions and that the record speaks for itself. In addition, FTA believes that allowing Winterfest to intervene at this point in the proceeding is unwarranted. Although under 5 U.S.C. §555(b), a federal agency has broad discretionary power to allow third parties to intervene in administrative proceedings, courts have upheld an agency's decision to deny a third party intervention when other parties to the proceeding adequately represent the would-be intervenor's viewpoint or intervention would broaden unduly the issues considered. Advanced Systems Technology, Inc. v. United States, 69 Fed. Cl. 474 (Fed. Cl. 2006); Nichols v. Bd. of Trustees of Asbestos Workers Local 24 Pension Plan, 835 F.2d 881 (C.A.D.C. 1987).

In this matter, the complainant has filed its complaint against ECAT, a recipient of federal funding. The complaint is specific in nature against ECAT and makes specific allegations ECAT is uniquely positioned to answer. It is doubtful in FTA's opinion that Winterfest could provide additional substantive evidence not available to ECAT. In addition, allowing Winterfest to raise issues beyond those set forth in the complaint such as those currently in litigation between Winterfest and the complainant would unduly broaden the issues currently before the FTA for consideration and resolution and would inhibit FTA from issuing a timely decision. Winterfest's request to intervene was accordingly denied.

DISCUSSION

The foundation of this complaint is found at 49 C.F.R. §604.5(p) and 49 C.F.R. §604.9(b)(2). Section 604.5(p) defines a willing and able provider as an entity

“...having the desire, having the physical capability of providing the categories of revenue vehicles requested, and possessing the legal authority, including the necessary safety certification, licenses, and other legal prerequisites, to provide charter service in the area in which it is proposed to be provided”.

Section 604.9(b)(2) then permits an exception to the rule and allows a recipient to lease equipment to such a provider if

“... the private charter operator is requested to provide charter service that exceeds its capacity; or ... the private charter operator is unable to provide equipment accessible to the elderly and handicapped persons itself”.

Respondent freely admits in its letter of response to FTA that ECAT declared Winterfest a willing and able provider and leased equipment, specifically trolleys, to Winterfest. Complainant maintains that Winterfest was no more than a sham operator or “broker” however since it owned no vehicles with which it could provide charter service. As a result, complainant asserts that respondent violated 49 C.F.R. §604.9(b)(2) by leasing equipment to Winterfest.

In B&T Fuller Double Decker Bus Company, et al. v. VIA Metropolitan Transit Authority, TX-02/88-01 (November 14, 1988), FTA (then UMTA) considered the lease of federally funded equipment by VIA Metropolitan Transit Authority (VIA), a recipient of federal funding, to entities which VIA maintained were "willing and able private providers". The complainant in this matter alleged that VIA provided charter service under sham arrangements with private operators (brokers) which lacked equipment thereby necessarily requiring them to lease VIA's equipment. VIA had responded that subleasing to brokers was not prohibited under the charter regulation; that it had not contracted with brokers since all of the operators with which it had contracted owed at least one bus or one van; and that it was entitled to sublease vehicles to any entity which owns a bus or a van, regardless of whether that entity is licensed to operate such vehicles in charter service.

FTA ruled that VIA had leased vehicles to entities which were not "private charter operators" within the meaning of the charter regulation and ordered VIA to cease and desist from these practices. In explaining its conclusion, FTA examined the basic intent of the regulation and found that it was written and developed to protect private charter operators from unfair competition by FTA recipients. In this decision, FTA stated:

"... competition may come directly from the recipient's provision of service to charter customers, or indirectly from the conclusion of arrangements which allow the recipient to provide service through an intermediary". Id.

FTA then examined the exception under 49 C.F.R. §604.9(b)(2).

"Although the charter regulation does not define the term "private charter operator," it is clearly the intent of the regulation that such operator be the owner of at least one bus or one van which it is licensed to operate as a provider of charter transportation. The intent of the rule that leasing by grantees be restricted to owners of vehicles can be gathered, first of all, from the goal of the regulation as stated above. Secondly, the regulation requires that to lease buses from a grantee, an operator must have exhausted its capacity or have no accessible equipment. This requirement would be meaningless if the operator were a broker. For this reason, UMTA disagrees with VIA's conclusion that a broker may be a private charter operator". Id.

FTA also considered VIA's contention that it met the requirements of the charter regulation when it subleased vehicles to any entity which owned a bus or a van, regardless of whether that entity was licensed to operate such vehicle in charter service. FTA found that VIA's interpretation could lead to substantial abuse.

"It is common for organizations such as schools, nursing homes, social or recreational clubs, or even businesses whose mission is unrelated to

transportation, to own a bus or a van. VIA has, for instance, submitted evidence showing that one of the "private charter operators" to whom it has leased vehicles is a catering service, most of whose vehicles are cargo vans. Mere ownership of a vehicle does not transform such an organization into a "private charter operator" for the sake of the regulation. If the regulation is to fulfill the purpose for which it was intended, it is essential that recipients be allowed to lease vehicles only to legitimate operators of a least one vehicle which they are licensed to operate in charter service, and which is not merely a tool for use in an unrelated activity". Id.

FTA concluded:

"It is, however, apparent that VIA has subleased vehicles to entities which are not "private charter operators" under the criteria set forth above. These include the above-mentioned catering service, as well as travel agencies, convention organizers, and one entity, identified as "J&P Enterprises", whose business activity is not specified. UMTA finds that such practices, even if they are not a deliberate attempt to circumvent the regulation, are at least contrary to its intent and purpose, and should be prohibited". Id.

FTA concedes that the facts in the instant complaint are not identical to those in the case set forth above. VIA leased equipment to a myriad of entities in an obvious attempt to conduct charter service indirectly through brokerage arrangements which it was prohibited from doing directly. And while it is true that Escambia County donated a surplus van (a question exists as to whether the van was a passenger van or a cargo van) to Winterfest and made a financial donation to it during this same period, FTA is not persuaded that such activities, in and of themselves, were an attempt to create a brokerage arrangement to circumvent FTA's charter regulation. According to the response provided by the respondent, Winterfest is a local not for profit corporation that for years has put on events in the downtown area, such as a Christmas holiday themed festival featuring singers and performers throughout downtown Pensacola, designed to attract visitors, both local and from out of town. During these years, transportation for the event was provided by private charter providers, including the complainant. Respondent maintains that Escambia County was only supporting events that draw tourists to downtown; had no interest in establishing a charter business; and that Escambia County had no financial or other interest in Winterfest other than the desire to benefit the County by promoting its service organizations. Respondent concludes that the donation of a surplus van and funding by the County to Winterfest during the period in question was done at Winterfest's request pursuant to Florida Statutes, with a finding of public purpose made at a public meeting that served a community benefit. FTA agrees that donations made to a non-profit service organization not engaged in the provision of private charter service for the benefit of the public would not necessarily constitute a brokerage arrangement.

At some point, however, and as explained by respondent in its response, Winterfest decided to become an operator itself. Winterfest apparently perceived that problems existed with existing trolley service providers it had been using for the event and asked ECAT if there were other transportation options. It was this perception that undoubtedly spawned Winterfest's letter to respondent on June 1, 2006 when it suggested that the County could provide a van, presumably for its use in the 2006 Winterfest event. Winterfest then issued its June 26, 2006 letter in response to respondent's June 18, 2006 public charter notice stating that it was willing and able to provide the service. This was followed by respondent's declaration that Winterfest was "willing and able". Respondent then entered into a contract to lease equipment to Winterfest in October of 2006 followed by the donation of the van to Winterfest in November of that same year.

FTA is reluctant to find that the respondent consciously conspired with Winterfest to create a brokerage relationship. Winterfest has had a close working relationship with respondent for years as an "event sponsor". Escambia County supported these events, through its event sponsors, to draw tourists to downtown with the intent to benefit its citizens and serve a public purpose. Any financial benefit to the respondent due to this relationship was arguably not the receipt of charter revenue generated by transportation services but rather increased sales and tax revenues as the result of increased tourism, shopping, etc., due to special "events" such as the Winterfest event.

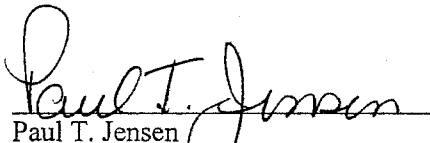
Because of this close working relationship between Winterfest and respondent however, FTA believes that respondent knew or should have known that Winterfest was not the owner of a bus or van licensed to operate as a provider of charter transportation. In fact, respondent admits in its response that Winterfest had not been issued a DOT number authorizing it to operate motor vehicle(s) for hire for the transportation of passengers and stated in its response that "...but as they were starting, and did not have a vehicle until November of 2006...the number would not be required until such time they were to operate, or at least know they could". And yet despite this understanding, on July 12, 2006, respondent found Winterfest to be willing and able to provide the charter services it had requested in its June 18, 2006 charter notice. It then entered into a contract to lease vehicles to Winterfest on October 1, 2006 to provide the service it had requested. At those times, no evidence has been provided demonstrating that Winterfest owned any vehicles and/or had the authority to operate vehicles for hire for the transportation of passengers nor is there any evidence to suggest that respondent would have any reason to believe that it had.

As a result, even if respondent did not intend to create a brokerage relationship with Winterfest, its resulting lease of equipment to Winterfest had the same effect. As stated in B&T Fuller, supra, it is clear that for a private provider to be considered willing and able that it must own a bus or a van which it is licensed to operate, otherwise the requirement of the rule, which authorizes a grantee to lease equipment to a private operator which lacks capacity, would be meaningless. Accordingly, FTA finds that respondent violated 49 U.S.C. §604.9(b)(2) by leasing equipment to an entity which did not have the physical capability or legal authority to provide charter service as requested in respondent's charter notice of June 18, 2006.


CONCLUSION

Based on the evidence provided, FTA finds that Escambia County (Escambia County Area Transit) violated FTA's charter service regulations pursuant to 49 C.F.R. Part 604 by leasing equipment to an entity which did not meet the definition of "willing and able" as set forth at 49 C.F.R. §604.5(p). Because FTA finds that a pattern of violations has not been established by complainant however, there is no basis to justify the imposition of a penalty. In addition, because FTA has promulgated new regulations at 73 Fed. Reg. 2325 (2008), FTA encourages each party to this complaint to familiarize itself with the new rule. Pertinent to the issues set forth in this complaint, FTA would specifically commend the parties' attention to 49 C.F.R. §604.8; Leasing FTA Funded Equipment and Drivers.

In accordance with 49 C.F.R. §604.19, a party adversely affected by this decision may appeal within ten days of receipt of this decision. The appeal should be sent to James Simpson, Administrator, Federal Transit Administration, 1200 New Jersey avenue, SE, Washington, DC 20590.


Paul T. Jensen
Regional Counsel

4/30/08
Date


Yvette G. Taylor, Ph.D
Regional Administrator

4-30-08
Date