

ACTING TRAVEL AGENCY COMMISSIONER, AREA ONE

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DECISION

In the Matter of:

Vemsa – Viajes Ejecutivos

Mundiales, S.A.

Apdo. 668-1005

Barrio México

Costa Rica

(IATA Numeric Code: 77-53184-5

Applicant,

vs.

Agency Administrator

IATA

International Air Transport Association

703 Waterford Way

(NW 62nd Avenue)

Suite 600

Miami, Florida 33126

U.S.A.

Respondent.

Introduction

1. The Review giving rise to this Decision has been made on the authority of IATA Resolution 820e, in which the powers and duties of the Travel Agency Commissioner are set out. The undersigned is the acting Agency Commissioner for Area One appointed in accordance with the provisions of Resolution 820d.

Parties

2. The Applicant is Viajes Ejecutivos Mundiales, S.A. ('VEMSA'), a travel agent with its registered office in San José, Costa Rica. The Applicant has been an IATA Accredited Agent since December 1994. At the hearing before the Travel Agency Commissioner, the applicant was represented by Mr Juan Rafael Oliver, its General Manager.

3. The Respondent is the Agency Administrator of the International Air Transport Association ('IATA'), acting for Member airlines which have delegated certain functions to IATA. IATA exists by virtue of a Canadian Act of Parliament (Statutes of Canada 1945, Chap. 51, as amended in 1975) and is the worldwide association of airlines that operate internationally. It performs common services for its 265, or so, Airline Members that include administering the Agency Programme and managing the Billing and Settlement Plan ('BSP') in Costa Rica. The BSP is an industry centralised sales reporting and settlement system. The Agency Administrator has particular responsibility for the management of these activities.

4. IATA divides the world into three parts, Areas One, Two and Three. The Agency Administrator's main base in Area One, the Americas, is Miami, Florida. The country field office for Costa Rica, which exercises management responsibility for the BSP Costa Rica, is situated in San José.

5. The Agency Programme consists principally of resolutions adopted by the IATA Passenger Agency Conference which lay down the rules and regulations governing business relations between IATA Accredited Agents and IATA Member Airlines. Those resolutions are set out in the Travel Agent's Handbook.

6. Certain administrative functions and procedures have been delegated by the Passenger Agency Conference to the Regional Assembly - Latin America & the Caribbean ('Regional Assembly'). They are set out in § 2.1.2 of Resolution 808.

7. At the hearing before the Travel Agency Commissioner, the Respondent was represented by Ms Diana Larrañaga, Assistant Director, Agency Services – Area 1 and by Mr Luis Carlos Arce, IATA Country Manager, Costa Rica

Contractual Considerations

8. The basic contractual instrument in this matter is the Passenger Sales Agency Agreement (IATA Resolution 824). Under that agreement, IATA acts for those of its Members that appoint the travel agent signatory as their sales agent. Incorporated into that agreement is IATA Resolution 808 – Passenger Sales Agency Rules and the BSP Manual for Agents (Attachment 'I' to Resolution 850). The Agreement and Rules mentioned above are published in the Travel Agent's Handbook, an annual publication, furnished by IATA, using an electronic medium, to all IATA Accredited Agents. Also included in that publication is Resolution 832 – Reporting and Remitting Procedures. The January 2006 edition of that publication applies to the review proceeding giving rise to this decision.

9. The Provisions of Resolution 820e, - Reviews by the Travel Agency Commissioner, at § 1.1.10 allow an Accredited Agent to seek review by the Travel Agency Commissioner on grounds that the Agency Administrator has allegedly not followed correct procedure as delegated by the Passenger Agency Conference, to that Agent's direct and serious detriment. The Applicant has relied on that provision to bring its request for review and the undersigned has accepted to conduct a review.

Facts

10. The Applicant as an IATA Accredited Agent reports and routinely remits its airline sales through the BSP Costa Rica. Under that BSP, remittances are made weekly to a designated bank, against a BSP Billing sent electronically to each Accredited Agent. For the calendar year 2005 the Applicant's total BSP sales throughput was USD 6,151.184.13 and for the first eleven months of 2006 it was USD 9,203.068.98.

11. For the BSP Billing Period 11th – 17th September 2006, the Applicant was invoiced CAC 50.165.240.00 on 25th September, via *BSPlink*. On 27th September, the Applicant caused to be remitted to BSP Clearing Bank the amount of CAC 50.156.240.00, which in fact represented a short payment by CAC 9.000.00 (USD 16.98).

12. Per Resolution 832, the BSP Clearing Bank is to report on the Remittance Date to the BSP Management all travel agent payment discrepancies. Under the locally operated procedure, the BSP Clearing Bank releases the list of all remittances received, electronically to the Respondent, first thing on the day following the Remittance Date.

13. The laid down procedure for BSP Management on becoming aware of short payment is to demand of the Accredited Agent immediate settlement. In this case, that demand was made by the Respondent's San José office, on 28th September and payment was made good that same day by the Applicant.

14. The Respondent in its 28th September faxed notice to the Applicant cited Resolution 832 § 1.7.5.1(a) and § 1.7.10 to notify the Applicant of two instances of irregularity being recorded for failure to pay on time and stated that a charge of USD 50 administrative costs.

15. Also in that notice the Respondent cited Resolution 808 as authority for asking the Applicant to provide a Bank Guarantee for USD 302.000.00, within 30 days.

16. The Applicant contested the Respondent's actions, asserting that as the short payment had been the result of a clerical error, it should not give rise to an exceptional punitive measure. The Applicant asserted that its accountant had entered on the transfer order the figures '156' instead of '165' in the amount due and the remittance was made accordingly. The underpayment was minimal and had been made good, as soon as the Respondent spotted it. It is not in dispute that the Applicant's bank account was adequately funded on the Remittance Date.

17. In response to the Applicant's request for understanding and relief on grounds of the minor error committed by an employee and the disproportionately severe sanctions decreed, which the Applicant considered would have a serious consequences for its operational ability, the Respondent's country manager had been unable to depart from the written instructions emanating by its head office.

Review Approach Taken

18. There having been no movement in the parties' positions, a hearing before the undersigned was accordingly set up to take place in San José, on 6th December 2006.

On the eve of the hearing, the Applicant submitted a written memorandum formally summarizing the grounds for appeal. At the opening of the hearing, the undersigned reviewed the contents of that memorandum and ascertained that there was consensus between the parties as to the facts of their dispute. It followed that the resolution of the dispute would turn on the applicable IATA regulations.

19. The undersigned accordingly reviewed with the parties the relevant regulations contained in the Travel Agent's Handbook. It was made clear by the Respondent that its field offices are all under a strict directive to apply the rules as published, without any deviation whatsoever. In the context of that directive, the Appellant had been in violation of its contractual obligations, notwithstanding the almost insignificant amount of the underpayment and the reasons for it. The efficient and fair management of the BSP indeed necessitates a consistent, fair and firm interpretation of the rules, in the general interest.

Findings

20. The undersigned finds that there was a small short payment which was made good, on demand, the day following the Remittance Date. That short payment was not attributable to insufficient funds but to the BSP Billing total being partly misread by the Applicant's employee who inverted two digits in transcribing the billing amount onto an instruction sheet to its bank. The standard penalty for that kind of technical shortcoming, foreseen in Resolution 832, is the recording of two instances of irregularity against the Agent concerned.

21. Resolution 832, § 1.7.5 calls for the recording of two instances of 'Irregularity' where remittance is made after the Remittance Date and § 1.7.1 provides for the recovery of additional costs to actions caused by correcting a recorded settlement irregularity.

22. Resolution 808, § 3.4 sets out the circumstances in which an Agent can be required to provide a financial guarantee. That requirement is not penal in nature but is a precautionary measure, to require 'additional financial support' in circumstances where the Agency Administrator is not satisfied with the state of the Agent's finances.

23. The Regional Assembly exercises certain direct powers and also has certain delegated powers. In essence, it works within the confines of the Passenger Agency conference resolutions, except where it has been specifically assigned additional discretionary powers. Its terms of reference and powers are set out in Resolution 808, § 2.1.2. The undersigned's reading of those powers reveals no delegated authority to depart from the financial qualifications criteria of Resolution 808, referred to above, although it is clear that the Regional Assembly is empowered to recommend to the Passenger Agency Conference 'Improvements' to Resolution 808.

24. At page 13 of the Travel Agent's Handbook (1 January 2006 edition), the Regional Assembly has caused to be included a section entitled "All countries: financial Guarantee Requirements". That section outlines five grounds for which financial guarantees will be required:

- "- New applicants – for a period of two years pursuant Resolution 800f
- Payment Irregularities

- Defaults – as a condition for reinstatement once all debts have been settled
- Unsatisfactory Financial Statements
- Changes of Ownership – whenever a change in ownership or control of the Agent is 30% or more of the total stock issued”

25. The absence of punctuation in the published original leads the undersigned to conclude that the list is intended to be informative as distinct from authoritative. Four of the five grounds listed are in fact actual specific requirements in Passenger Agency Conference resolution provisions but “- Payment Irregularities” do not appear to be similarly provided for. In practice, there can be major and minor payment irregularities. The major ones appear to be the provisions of Resolution 832 § 1.7. For example, in Costa Rica, 6 instances of recorded financial irregularities in twelve consecutive months give rise to default action, cash basis and a full financial review (§ 1.7.10). Another major irregularity would be that described in § 1.7.13. But it would require a long leap of the imagination to categorise accidental underpayment by an almost insignificant amount as other than a minor irregularity.

26. Were it, indeed, the Passenger Agency Conference’s intention that minor financial irregularities should trigger off an immediate requirement for a financial guarantee, then the Resolution itself would surely say so. Absent that requirement in the currently published text of Resolution 808, the undersigned does not construe the Resolution as requiring it.

27. It was established that in the instant case the cost of producing a \$ 302,000 bank guarantee for one year, taking account of setting up costs and foregone potential interest, would be in the region of \$ 15,000 to \$ 20,000, for an underpayment of less than \$ 20, rectified within the day of demand. That would constitute a disproportionate additional penalty. Furthermore, the damage to the Applicant’s good name in a small market where such matters quickly become known, would also be disproportionately severe.

28. The question also arose at the hearing as to why in the modern electronic banking environment of Costa Rica it was not the BSP Settlement Bank’s practice to notify the BSP Management immediately a deficient remittance is received. From the Respondent’s explanation, the batch process currently in place makes such information available to the Respondent only on the following day. That procedure may well not conform with the letter of Resolution 808, just as communicating by fax instead of by registered letter called for in the Resolution does not strictly conform with the prescribed requirement. Such a prompt notification service would furthermore justify the administrative charge of \$ 50 for the bother caused.

29. There is scope for modernizing Resolution 808, to reflect contemporary conditions, in a way that avoids the mandatory application of disproportionately harsh remedies for minor shortcomings. Had the Applicant been alerted on the Remittance Date of the underpayment, then in the present case rectification would have been effected on the Remittance Date, with no harm done and no instances of irregularity having to be recorded. The normal give and take of commercial dealings conducted in good faith, militates in favour of such an improved procedure.

Decision

30. Under the provisions of Resolution 820e, § 1.1.10 the Travel Agency Commissioner is empowered to review a matter such as this. However, the Resolution is silent on how the Travel Agency Commissioner is to formulate a decision upon reviewing an alleged Agency Administrator shortcoming. Remedies for the other causes for review are covered in § 3.1 but that for review of the Agency Administrator's actions is absent. In the absence of specific guidance, the undersigned will apply the kind of remedy available in § 3.1.4 by granting relief to the Applicant.

31. It is accordingly decided that the action of the Respondent of recording two instances of irregularity for the late payment, as required by Resolution 832 § 1.7.5.1(c), is upheld and the administrative charge of \$ 50 for cost recovery is allowed.

32. The request of the Respondent that the Applicant provide a financial guarantee is disallowed, as having been made without due cause shown, either at the time or since.

33. However, it always remains open to the Respondent to conduct a financial review of the Applicant. If such a review indicates that the Applicant no longer satisfies the financial criteria applicable to an Accredited Agent, the appropriate precautionary measures could be set in train. It is understood that all Agents in Costa Rica undergo an annual financial review and that for the Applicant is in any case imminent.

Conclusion Remark

34. The parties are not liable to pay any fee or costs to the undersigned in respect of the present decision. Per Resolution 820e, § 4.1, the Applicant may, if it considers itself aggrieved by this decision, seek review by arbitration in accordance with the provisions of Resolution 808, § 14.

Decided this 11th Day of December 2006, in Geneva.

Brian Barrow
Acting Travel Agency Commissioner, Area One

NOTE: to ensure timely receipt by the parties, an electronic copy of this Decision is sent on 11th December 2006, with the original signed copy being sent by registered post.