

Brian P. Barrow

A1/2007/03

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DECISION

In the Matter of:

Helen Thompson Travel

61 Hayden Street
Toronto , M5R 2Y4
Ontario - Canada
(IATA Numeric Code: 67 689425

Applicant,

vs.

Agency Administrator

IATA

International Air Transport Association
800 Place Victoria
PO Box 113
Montreal - H4Z 1M1
Quebec – Canada

Respondent.

Introduction

1. The review giving rise to this Decision has been made on the authority of IATA Resolution 820e – Reviews by the Travel Agency Commissioner, in which the powers and duties of the Travel Agency Commissioner are set out. The undersigned is Deputy Agency Commissioner (Area One–Canada)-cum-acting-Agency Commissioner Area One, appointed in accordance with the provisions of Resolution 820d – Office of Travel Agency Commissioner.

Parties

2. The Applicant is Helen Thompson Travel of Toronto ('HTT'), a division of Highbourne Enterprises Inc., incorporated in the Province of Ontario. HTT is an IATA Accredited Agent. At the hearing before the Travel Agency Commissioner conducted in Toronto on 4th June 2007, the Applicant was represented by HTT's President, Mr Simon Parry and Mr Bruce Bishins, Vice President – Travel Distribution & Industry Relations.

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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 airline Members that include administering the Agency Programme and managing the Billing and Settlement Plan ('BSP') in Canada. The BSP is an industry centralised sales reporting and settlement system. The Agency Administrator has specific responsibility for the management of these activities.

4. At the hearing before the Travel Agency Commissioner, the Respondent was represented by Mr Leslie Lugo, Senior Legal Counsel, and Mr Agostino Forte, Regional IDFS Manager, Canada & Bermuda.

Contractual and Regulatory Considerations

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

6. With regard to the BSP, IATA also publishes the BSP Manual for Agents, itself an attachment to Resolution 850 – Billing and Settlement Plans.

7. The underlying contractual instrument in this matter is the Passenger Sales Agency Agreement (also known as Resolution 824). Under that agreement, IATA acts for those of its Members that appoint the travel agent signatory as their sales agent. Incorporated by reference into that agreement, per §2, is Resolution 804 – Passenger Sales Agency Rules – Canada and Bermuda and the BSP Manual for Agents (being Attachment "I" to Resolution 850). The Agreement and Rules mentioned above are reproduced in the Travel Agent's Handbook, an annual, progressively updated publication, which is furnished by IATA, via electronic medium, to all IATA Accredited Agents. Also included in that publication is Resolution 832 – Reporting and remitting Procedures.

8. As the Applicant filed the request for review in 2006 in respect of contemporary events, the editions of the IATA publications in use that year apply. However, since there have been intervening changes to BSP Canada rules which should not be simply ignored, account will be taken of them in the course of this review.

9. The Provisions of Resolution 820e, §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 on these grounds.

10. The Passenger Agency Conference has been created on the authority of Article IX.3.c. of the IATA Articles of Association. The conference is governed by the Provisions for the Conduct of the IATA Traffic Conferences. Article IV.3.(ii), of those provisions sets out PAConf's terms of reference as being "... Conference ... shall take

action on matters relating to relationships between airlines and recognized passenger sales agents and other intermediaries but excluding remuneration levels.” At Article VIII.1, it is stated: “Only action in the form of a resolution of the Traffic Conference shall be binding upon the Members thereof, ...” By virtue of Article VIII.7, conference resolutions are binding on all Active Members of IATA. The BSP Manual for Agents is an Attachment ‘I’ to Resolution 850, so responsibility for approving its contents and publication is vested in the Passenger Agency Conference.

11. The BSP Manual for Agents consists of two principal parts: 13 core chapters, common to all BSPs and chapter 14 which contains procedures, instructions and information peculiar to the local operation of the BSP in question. For each BSP there is a Local Customer Advisory Group – Passenger (LCAGP), composed of airline managers, that advises the BSP management on BSP operational matters. Self-evidently, chapter 14, not being a Conference-adopted resolution, it has no authority to contradict, change or in any way overrule the contents of the core manual or of any other resolution of the Passenger Agency Conference.

12. A key distinguishing feature of the Agency Programme is that only sales intermediaries that are IATA Accredited Agents have access to the BSP and its ticketing system which is common to all BSP Airlines. Conversely, all IATA Accredited Agents must report and settle through the BSP sales made for BSP Airlines. In consequence, being in the Agency Programme is essential for the vast majority of travel agents in order to stay in business. That state of affairs places IATA in a very strong position vis-à-vis travel agents, the more so as the evaluation, accreditation and termination processes for Agents are entirely delegated by the Member airlines to IATA itself.

13. To sum up, the airlines have over the years developed a common industry sales distribution system with IATA increasingly positioned at its centre. The standard IATA Passenger Sales Agency Agreement and its incorporated resolutions thus governs the business relationships between more than 60,500 travel agents and 265 or so, IATA Members across the world.

14. IATA Members have put in place two levels of consultation with the travel agents, national and international. The purpose of the consultation process is to bring about improvements in the Agency Programme with travel agents’ understanding and co-operation, as well as to address effectively problems met in the operation of the Agency Programme. IATA is on record, however, as insisting that consultation does not mean sharing the final decision making function which remains vested solely in the Passenger Agency Conference and, where delegated, to committees composed of airline representatives.

Grounds for this Review Proceeding

15. Under the Travel Agency Commissioner’s Rules of Practice and Procedure, an Applicant is entitled to file a letter of request for Review with the Travel Agency Commissioner, setting out the pertinent facts. On 11 December 2006 HTT submitted a detailed account of its cause for grievance which the Travel Agency Commissioner accepted and treated as the requisite letter of request.

16. IATA’s letter of response, to which were attached numerous appendices, is dated 11th May 2007.

17. The cause for the lengthy elapse of time between the parties' letters was that there was an intervening litigation initiated by IATA in the Superior Court of Ontario against HTT which had the effect of placing the Travel Agency Commissioner review process in limbo. That court case having been decided in mid-April, the Travel Agency Commissioner's review was reactivated by the Travel Agency Commissioner then handling the matter and the solicited letter of response was duly received.

18. In summary, HTT has asserted that IATA was violating its own prevailing reporting and remitting rules to HTT's serious detriment; that IATA had placed HTT in the position that HTT was having to violate Ontario laws pertaining to the maintenance and operation of trust accounting with respect to passenger funds; that IATA was handling ADMs contrary to its own rules; that IATA was in violation of Canadian law on the use of Pre-Authorized Debits (PADs) and that IATA intended to impose new financial standards and methodologies, without first obtaining proper consent and agreement to do so within prevailing IATA rules.

Considerations

19. Although this review proceeding was initiated by HTT in December 2006 when it sent its letter of request, the underlying cause for the grievance predates that letter and remains relevant.

20. In addition to his HTT position, Mr Bishins is also the president of the Canadian Standard Travel Agent Registry ('CSTAR'), a co-operative association of Canadian based travel agents. In that CSTAR capacity, Mr Bishins wrote to the Secretary of the Passenger Agency Conference ('PACConf') on 15th June 2006, drawing attention to alleged shortcomings stemming from the then recent migration of BSP Canada to new operational platform, *BSPLink* and to ISIS, from misuse of the Agency Debit Memo (ADM) procedures by a small number of BSP Airlines, to the detriment of CSTAR members and from the repeated violation of a Canadian Banking Association rule through the improper debiting procedure of travel agents' accounts by BSP Canada.

21. Mr Bishins sought a meeting with IATA, with a view to obtaining solutions to the problems outlined in his letter. PACConf noted Mr Bishins letter and the Conference Secretary and PACConf's legal adviser, Mr Lugo met with CSTAR representatives, on 13 July 2006. The undersigned was present at that meeting with a view to help engineer a way ahead acceptable to both parties. That involvement was contributory to the undersigned recusing himself from the ensuing Travel Agency Commissioner proceeding. However, six months later, at the request of one of the parties and with the concurrence of the other, the undersigned agreed to stand in and to conduct the review to finality. Travel Agency Commissioner Stephen Lonergan, who had been appointed ad interim, also concurred in that course of action and stepped aside.

22. The issues brought to the June 2006 PACConf's notice were discussed at that meeting and IATA undertook to look into certain of them. It was noted that in acting on global ADM problems in general, the 2006 meeting of PACConf had begun to address part of the shortcomings raised by CSTAR. Items on the agenda of the June 2007 PACConf meeting indicate that the impetus for that reform is being sustained.

23. By letter of 26 August 2006, Mr Lugo informed Mr Bishins that IATA had reviewed the matters left open at the July meeting. As a result, it had concluded that there was no violation of Canadian regulations or legislation by the *BSPLink* debit procedures which were, furthermore, considered by IATA as compatible with the Canadian Payments Association rule cited by CSTAR as being violated. This answer, which did not cover all matters raised at the July meeting, failed to satisfy Mr Bishins, hence the subsequent individual action of HTT to file a request for review of certain grievances by the Travel Agency Commissioner.

24. A number of other travel agents, some of them members of CSTAR, also took steps to seek review of grievances stemming from alleged misuse of ADMs and the shortcomings of *BSPLink* but, in the event, only the HTT request is under consideration in the present proceeding.

25. As summarized in paragraph 18 above, HTT's request for review reiterates in part the CSTAR grievances expressed in June 2006 to PAConf.

26. The volume of documentation in this case is considerable. It includes copies of communications between the parties, from the parties to other persons, letters from a score of Canadian travel agents describing their on-going problems with some of the current BSP Canada payment arrangements and with some BSP Airlines' ADM practices, PAConf documentation, IATA Resolutions, BSP Manuals for Agents, and Travel Agent Handbooks. During the undersigned's seven years tenure as a Travel Agency Commissioner this case has proven to be the best documented and closest argued review to come before him. Both parties have taken particular care in presenting their respective cases.

27. The contractual rules for effecting settlement applicable in Canada in 2006 and in 2007, per Resolution 832, Section 1.6.2.5 and elsewhere provide that each Agent for each Sales Transmittal shall also submit a written 'Sales Report Settlement Authorization' calculated in accordance with rules provided. The maximum amount to be debited by the Processing Centre through drawing on the Agent's trust or other bank account is entered in advance on the authorization by the agent. A small margin of latitude is foreseen, to take care of minor errors.

28. HTT argues that the otherwise admirable provisions of *BSPLink* are at variance with the binding contractual rules, in that the Processing Centre can and does debit HTT's account for sums in excess of those authorized. This occurs typically when a BSP Airline raises an Agency Debit Memo which, notwithstanding the Agent's attempts to dispute it, is nevertheless incorporated by the Processing Centre in the BSP Billing and its value is debited thereafter automatically from the Agent's bank account.

29. Recent agenda and reports of various concerned joint industry and other IATA bodies reflect that misuse of ADM procedures by some BSP Airlines does indeed continue to create problems for Agents. That state of affairs gives rise to unjustified expense through labour-intensive investigation and corrective action and from monies forfeited as a result of unauthorized debits on disputed ADMs that are never made good.

30. There are, for the third year running, proposals on the Agenda of PAConf seeking to adjust the operation of Resolution 850m which sets out the ADM procedures. Those proposals variously aim a) to clarify the latency period for Agent dispute of an

ADM, b) to discontinue the facility of raising an ADM for a fare taken off a GDS automatically, without any alteration by the Agent, which fare is later declared 'erroneous' by the BSP Airline, and c) to remove from the BSP billing cycle for bilateral settlement between BSP Airline and Agent an ADM that has been duly disputed for cause. The significance of taking a disputed ADM out of the BSP arena is that when the dispute becomes bilateral, the Agent is no longer at risk to being subjected to IATA default procedures which would have the effect of preventing it from continuing to do business through the BSP with other airlines with which the Agent has no dispute.

31. These PAConf initiatives reflect a willingness on the IATA Members' part to seek out and devise solutions to the problems encountered by the industry in the operation of the BSP. They also evidence the travel agency community's preparedness to put forward constructive solutions, offering benefits to all parties. What links the two is industry dialogue.

32. At the Canadian national level, as reflected in the documentation submitted at this proceeding, constructive industry dialogue has been going on since the *BSPLink* problems began to surface. CSTAR not being a part of the Canada Council consultative arrangements has perforce conducted its own campaign for reform in parallel with the official consultative machinery. In the event, the Canada Council has worked on solutions to travel agent problems. That the efforts are beginning to speak for themselves is evidenced by the results. Not all the problems exposed have been resolved, not all the solutions offered are complete, but the signs point towards a willingness on the part of all parties to reach viable solutions.

33. HTT expressed the particular wish that this review be conducted and completed before the 2007 PAConf meeting, scheduled to begin ten days after the hearing. In view of the time that has elapsed since the review was requested, the undersigned was sympathetic to that wish and has expedited the timetable. This decision, issued before PAConf meets, reflects the state of the governing IATA rules as they stand on 8th June 2007. However, it is possible that matters covered in this review will be taken into account by PAConf when it considers the next round of adjustments needed to the Agency Programme for Canada in particular and the ADM procedures in general.

Findings

34. The HTT letter of request cited five grounds for seeking Travel Agency Commissioner review. All were considered at the 4th June hearing in Toronto and each is now briefly summarized individually (the undersigned composed the wording of the counts).

Count 1. IATA has allegedly failed to adhere to the PAConf prescribed reporting and remitting rules

35. There is substance to HTT's assertion. The governing PAConf resolutions lay down certain procedures and some of the recently evolved IATA practices are at variance with those requirements. Technological development has engendered practices that have outpaced the official IATA rules – the PAConf Resolutions. The prime example cited is the replacement of the Sales Report Settlement Authorization ('SRSA')

and its built-in safeguards by another procedure, to the Agent's disadvantage. That change was effected without recourse to a PAConf resolution amendment.

36. HTT is at pains to stress its unconditional support for the *BSPLink* platform and its wish not to jeopardize its success and development. That sentiment will be reflected in this decision. However, HTT's insistence that due process must not be overridden by operational expediency is right and calls for further corrective action by IATA.

37. The initial gap between the *BSPLink* requirements and the SRSA procedure has, in fact, been narrowed over recent months but a gap still remains and needs to be bridged and/or closed, without delay. HTT's initiative has in that connection helped set in train the study of requisite industry corrective measures in which it would be pragmatic to take into account HTT's input.

Count 2. Pressure allegedly imposed on HTT by IATA BSP to infringe Ontario trust accounting laws with respect to passenger funds

38. Whereas IATA and the bank in question remain of the view that the procedures heretofore in place conformed with Ontario legal requirements, the bank's Ombudsman and HTT believe otherwise. To meet HTT halfway, IATA revised the contents of the Pre-Authorized Debits ('PADs') Agreement, which action is considered below.

39. The documentation provided by HTT in support of its contention is compelling and the fact that an 'improved' PADs Agreement was drafted during the currency of this extended review proceeding shows that there was room for improvement on this score.

40. The Province of Ontario is understood to be particularly exigent with respect to travel trust accounts and although it may set possibly the strictest standards in Canada, no harm would flow either to the public or the industry in applying them nationally with regard to the IATA Agency Programme.

Count 3. IATA has allegedly violated its own rules as to the handling of Agency Debit Memos ('ADMs')

41. This issue was acknowledged as being not limited to BSP Canada but one with worldwide (except USA) implications. The rules with respect to the issuance and processing of ADMs continue to cause problems. The documentary evidence demonstrates that PAConf perseveres in exploring actively ways and means of overcoming the on-going problems stemming from ADM misuse.

42. The advent of *BSPLink* (i.e. new IATA technology) to BSP Canada has changed the way BSP Airlines submit ADMs. In particular, the previous practice of the ADM being sent by BSP Airline directly to the Agent changed and *BSPLink* has become the conduit. That has had the effect of interposing the BSP Management in the process and of frustrating the bilateral ADM dispute and settlement mechanism that had previously worked satisfactorily. In consequence, HTT has been deprived of previously agreed safeguards which were in place that ensured the right to effectively dispute a doubtful ADM. The insertion of *BSPLink* into the process has been instrumental in muddying the waters, particularly where the BSP Airline does not or cannot activate *BSPLink* dispute facilities.

43. It does not help IATA or BSP Management that a considerable number of BSP Airlines have, two years on, still to publish their 'ADM policies', as required by Resolution 850m. PAConf could help, particularly in respect of small airlines, by offering a 'model' ADM policy to which BSP Airlines would be at liberty to subscribe, either verbatim or with amendments to suit the airline's own needs.

44. The HTT assertion is thus sustained. In the event of an instance being cited for a Travel Agency Commissioner review, in which details of the actual financial damage caused are given, it could well result in the complaint being upheld.

Count 4. IATA has allegedly violated Canadian Pre-Authorized Debits (PADs) regulations

45. This part of HTT's grievance is linked to Count 2. Since the Request for Review was filed by HTT, IATA and the Canada Council have worked together and revised the PADs Agreement. The revised text was recently publicly released. HTT maintains, however, that there remain legal and procedural shortcomings even in that revised agreement. HTT has undertaken to submit draft changes, with a view to achieving the desired result.

46. There is substance to several of the points of grievance expressed by HTT in this connection and, as a result of the hearing, IATA is now more sensitive to the thrust of HTT's legal and practical concerns. An opportunity thus presents itself to resolve remaining points of contention in the revised PADs Agreement.

47. For as long as the extant PAConf resolutions continue to lay down a procedure whereby the Agent pre-authorizes the amount BSP Canada may debit from its trust account to settle an identified BSP Billing, IATA remains vulnerable to expressions of grievance that it is in violation of those rules by doing things that depart from those resolution requirements, to an Agent's detriment.

48. The *ex-post facto* insertion into the BSP Billing debit of disputable ADM amounts or indeed, of other charges that are not air transport sales related, may make good operational sense but they need firm contractual grounding, with safeguards observed.

Count 5. IATA's intended new financial standards and methodologies are allegedly to be imposed without proper consent and agreement within prevailing PAConf rules

49. In November 2006, BSP Canada informed Agents that henceforth, following recent changes to Resolution 800f, new financial standards would apply to them. In essence, a Review Engagement report would no longer be accepted and, instead, an Audit Report would be required annually of each Agent or, alternatively, the Agent could furnish IATA with a financial guarantee in the form of a surety bond.

50. This change, which would have borne down heavily on small travel agents, was protested by HTT. In the event, its implementation was deferred and the Canada Council worked with IATA to devise a less onerous set of requirements which has recently been placed on the agenda of the June 2007 PAConf meeting for consideration and endorsement.

51. HTT has challenged the grounds and justification for BSP Canada to tighten financial requirements with regard to established Agents such as itself. (HTT has been an Accredited Agent for 25 years and during that time has never fallen foul of the reporting and remitting rules).

52. The statistical data available from the Canada Council's reports and in PAConf agenda documentation, in fact, show that not only are defalcation losses in BSP Canada negligible, in monetary and in percentage terms, but that they have in fact been steadily decreasing in recent years. Why then, asked HTT, were the proposed changes sought in such short order? A satisfactory response was not forthcoming.

53. It was argued by HTT that the proposal now before PAConf to resume acceptance of Review Engagement reports in Canada, provided that a surety bond of CAD 10,000 is also put up, is nevertheless unjustified since it will do nothing to curtail fraud where characteristic big losses will dwarf the amount recuperable through a surety bond. That argument merits PAConf reflection.

54. No documentary evidence was adduced at the hearing to show how much a CAD 10,000 surety bond will cost. Hearsay has it that ACTA may be able to negotiate such bonds on favourable terms for its members. That would not, however, be of help to HTT or other small travel agents who are not members of ACTA. HTT advised the hearing that it had reason to believe that securing an individual bond could turn out to be an expensive exercise.

55. The corresponding financial provisions applicable in European countries, as reproduced in the corresponding Travel Agent's Handbook, reflect different and more commercially sensitive interpretations of Resolution 800f in several countries than has been the case for Canada. That dichotomy between different national approaches, although understandable, nevertheless illustrates the risks of unilateralism and the merits of studying industry best practices.

56. The complex and convoluted course of the present review, which has turned out to be something of a test case, would appear to call for the undersigned to use his terms of reference imaginatively. Bearing in mind what is said in § 24 above, a comprehensive decision in the HTT case, going beyond the usual narrow boundaries, could serve to obviate in the minds of other travel agents the need to seek a review of their particular grievances.

57. Thus on the facts as presented, the undersigned finds that on each of the counts the Agency Administrator has acted to HTT's detriment. However, probably because of the actions initiated by CSTAR and HTT in the course of 2006 and later, the degree of detriment is not actually considered as having reached the stage of being serious. Protest action served to attenuate the consequences of IATA's actions, actual and projected. But it could have been otherwise. PAConf's provision of the Travel Agency Commissioner review process has provided a helpful safety valve on this occasion.

Decision

58. The parties shall, in the 90 days from the date of this decision, work together through the framework and machinery of the Canada Council, to reconcile the current

de facto Pre-Authorized Debits procedure with the *de jure* Sales Report Settlement Authorization procedure that it purports to replace. The resulting procedure will thereupon be put to the Canada Council for endorsement and then to PAConf mail vote, for adoption in the form of a resolution.

59. The reconciled procedure shall meet the standards of Ontario trust accounting laws, be compatible with Canadian Banking Association regulations and shall ensure due process flows from ADMs presented through BSPLink.

60. The June 2007 meeting of Passenger Agency Conference shall be asked by the Conference Secretary to hold off from acting upon Agenda Item G5, to enable the Canada Council to reconsider its recommendation in the light of the findings in the present decision and to effect such adjustments as it deems appropriate. The aim of any revised proposal will be to ensure that no Accredited Agent shall be unduly disadvantaged for the sake of BSP operational expediency and that BSP Airlines shall continue to be reasonably protected by the Agency Programme in Canada. The resulting Canada Council recommended procedure shall be put to PAConf mail vote, tied in with the projected mail vote described in § 58.

61. PAConf's attention shall be drawn by the Conference Secretary to the continuing problems created by some BSP Airlines' lack of preparedness to adhere to the spirit and to the letter of Resolution 850m and the pressing need to resolve that issue.

62. In connection with the June 2007 PAConf meeting agenda proposals aimed at repairing ADM procedural deficiencies, the Conference could be usefully reminded of the need for urgent corrective decisions to be taken, if downline disputes, reviews/litigations are to be avoided.

63. 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 804, § 15.

Decided this 8th Day of June 2007, in Geneva.

Brian Barrow
Deputy Agency Commissioner (Canada) Area One-cum-
acting Travel Agency Commissioner, Area One

NOTE: to ensure timely receipt by the parties, an electronic copy of this Decision is sent on 8th June 2007, with the original signed copy being sent by registered post.