

ACTING AGENCY COMMISSIONER, AREA ONE

29, Route de l'Aéroport, P.O. Box 833

CH-1215 Geneva 15 Airport, Switzerland

Daytime office phone: +41 22 799 3900, daytime office fax: +41 22 799 3902

E-mail: agency.commissioner@bluewin.ch

BPB/mb/ma/24viii07/C

DECISION

In the Matter of:

Costa Rica Express S.A.

P.O. Box 819

San José 1000

Costa Rica

(IATA Numeric Code: 77-61312-6)

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 Costa Rica Express S.A., an IATA Accredited Agent with registered office in San José, Costa Rica. The Applicant has figured on the IATA Agency List since January 1950 and is the oldest IATA Accredited Agent in the country. At the hearing, the Applicant was represented by Mr Orlando Castro Quesada, 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, 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 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 Members.

6. At the hearing, 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

7. It is relevant to note that the Passenger Agency Conference is composed of all those IATA Members who appoint a delegate to it. Per the IATA Articles of Association, it is a sovereign body within IATA and its Resolutions are binding on all Members that operate passenger services, whether or not they have appointed a delegate to the Conference. The IATA Secretariat is similarly bound and is not empowered to alter or overrule a Conference Resolution.

8. The contractual instrument in this matter is the Passenger Sales Agency Agreement (Resolution 824), signed by the Applicant. 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 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, a progressively updated publication, furnished by IATA annually, to all IATA Accredited Agents using an electronic medium. Also included in that publication is Resolution 832 – Reporting and Remitting Procedures. The January 2007 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. As an IATA Accredited Agent the Applicant 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.

11. For the BSP Billing Period 18-24 June 2007, the Applicant was invoiced CRC 4.199.205,00, electronically. On 4th July, the Applicant caused to be remitted to BSP Clearing Bank the amount of CRC 4.194.205,00, which in fact represented a short payment of CRC 5.000,00 (USD 9,44).

12. Per Resolution 832, the BSP Clearing Bank is required to report on the Remittance Date to the BSP Management all travel agent payment discrepancies in the current settlement. Under the BSP Costa Rica procedure, the Clearing Bank actually sends an electronic list of all remittances received, to the Respondent, first thing on the day following the Remittance Date, at which point any deficiencies become known to BSP Management.

13. The informal procedure for BSP Costa Rica Management on becoming aware of payment irregularity is to telephone the Accredited Agent concerned and simultaneously to send a hand-delivered letter, demanding immediate settlement. In this case, that demand was made by the Respondent's San José office, on 5th July and was met that same day by the Applicant.

14. The Respondent in its 5th July letter to the Applicant cited Resolution 832, § 1.7.5.1(a) and § 1.7.10, as its authority to notify the Applicant of two instances of irregularity being recorded for failure to pay on time. That notice also cited Resolution 832, § 1.7.1 as the authority for levying a USD 50,00 administrative charge.

15. Finally, in that notice, the Respondent cited Resolution 808 as authority for asking the Applicant to provide a Bank Guarantee for USD 67.000,00, within 30 days.

16. Mr Castro contests the Respondent's actions, on the grounds that the short payment was the result of an erroneous transcription, attributable to the smallness of the print appearing on the BSP Billing. He asserts that the underpayment was insignificant, did not harm and was made good, as soon as the Respondent called for it. It is not in dispute that the Applicant's bank account was adequately funded on the Remittance Date.

17. Questioned on why he had copied out by hand the amount payable on the BSP Billing itself, Mr Castro explained that it was his practice to do so, to help his accountant avoid making a transcription mistake. Since this incident, a magnifying glass had been acquired to read the BSP Billing.

Review Approach Taken

18. By common accord, the hearing was conducted by teleconference, on 22nd August 2007, linking up Geneva, Miami and San José. That teleconference was preceded by a fairly extensive exchange of written communications between the parties and the undersigned. Those communications established that there was no disagreement on the outlined facts, as set out above. It followed that the outcome of the review would turn on the applicable IATA regulations.

19. In the course of the hearing the relevant regulations contained in the Travel Agent's Handbook were examined and explanations given. It was stressed by the Respondent that its field offices have, of late, been placed under a strict directive to apply the reporting and remittance rules as published, without deviation. In the light of that directive, the Appellant had been in violation of its contractual obligations, notwithstanding the small 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.

20. It emerged in the course of the hearing that the Applicant had endeavoured to seek discretionary intervention at a senior level of IATA Management, in order to obtain redress, but without success.

Considerations

21. The thread that runs unbroken through the Agency Programme is the stress laid on protecting the financial integrity of the industry's distribution system and on ensuring that the airlines' legitimate interests are never unduly put at risk. The BSP itself is the result of many decades of careful analysis, planning, trial and error, and prudent management by industry accounting and marketing professionals.

22. Per the Report to the 64th IATA AGM, June 2007, IATA's 80 BSPs processed more than USD 187 billion in 2006. The loss rate of airlines' moneys on sales settled under Agency Programme rules was just 0.017%, down by half compared to the average annual loss rate of the previous four years.

23. That the BSP performs to its designers' most demanding expectations is thus self-evident. Few, if any, other major commercial activities can match such a consistently secure and efficient reporting and collection system. In seeking to improve on near perfection, excessive zeal should be avoided, bearing in mind that the better is the enemy of the good.

24. Resolution 832 comprehensively addresses the gamut of reporting and remitting discrepancies that might be committed by a travel agent, to the financial detriment of the airlines. It covers failure to report, faulty reporting, non-payment and late payment of BSP Billings, as well as intentional under-payment, for whatever reason. Prevention of knowing and wilful evasion of contractual obligations on the part of an Accredited Agent is the main thrust, but failure to pay stemming from financial inability, comes a close second. The Passenger Agency Conference has laid down a rigorous code of reporting and remitting of conduct for travel agents, to protect the airlines' moneys; justifiably so. That it works is eloquently reflected in the data published in the above-quoted report to the 2007 IATA AGM.

25. The reporting and remitting rules of Resolution 832 evolved over decades of practical experience. Under them, late payment of a BSP Billing, if corrected 'immediately' (i.e. within 24 hours of summons), gives rise to preliminary disciplinary measures. Further delay in settlement, however, engenders default action (i.e. collective boycott) by the IATA and the BSP Airlines that is fierce in its impact and effective as a deterrent.

26. However, the resolution appears to ignore peccadilloes the financial consequences of which are not significant for the airlines. The absence of tight rules from the Passenger Agency Conference on this aspect of remitting discipline is significant, for the Conference has left well enough alone. After all, the accidental misreading of a long string of figures that gives rise to an underpayment of less than USD 10,00 which is made good 'immediately' is but a technical fault and does not constitute the same kind of fiduciary threat as the failure to pay on time an entire BSP Billing. Accordingly, it does not call for the same stringent stream of penalties and precautionary measures.

27. An example of the practical good sense of those who wrote the rules is seen in Resolution 832, § 1.6.2.2 (b). Those provisions say that, if the BSP Billing has not been

received by the agent by the Remittance Date, the agent should make his own calculation of what is due and remit that amount to the BSP Clearing Bank. If it turns out that the agent underestimated, then he has 24 hours in which to remit the underrage and no penalty flows from the incident (emphasis added), unless BSP Management has reason to believe that there has been deliberate circumvention.

28. In the absence of specific provision in Resolution 832 to manage accidental underrages, it would be normal practice to construe silence in favour of the party that did not have a hand in writing the resolution. In any event, the Passenger Agency Conference has the power, if it sees the need for them, to adopt clear rules on faults without financial consequence. Upon adoption and implementation, those rules would be incorporated into the Passenger Sales Agency Agreement and become contractually binding on each Accredited Agent. Unless and until that happens, the ambiguity will continue to prevail and, if disputed, has to be construed in favour of an aggrieved travel agent.

29. It is implicit in the contract between the travel agents and the airlines that room for involuntary minor shortcomings and for tolerance of them, on both sides, is part of the agreement. Errors are committed all the time by agents, airlines and IATA staff members. Human beings are fallible and a system that does not provide leeway for corrective management of insignificant failures that do no financial damage to the airlines, in a practical if discreet manner, would both labour under a severe, self-imposed disadvantage and be storing up a pile of grief for itself. Fortunately, such leeway already exists in the Agency Programme Resolutions. In fact, it was routinely exercised until the recent past, before the advent of zero tolerance. The received wisdom is that it remains necessary but needs to be exercised with prudence.

30. In these circumstances, it would be to the industry's advantage to instruct its BSP Field Managers to treat minor and clearly accidental underrages that are immediately corrected as closed incidents, unaffected by the zero tolerance policy. It would be difficult to envision the kind of actions described in this decision ever happening to a travel industry giant whose legal department puts a price tag on the agent's good name.

Findings

31. The Applicant short paid the BSP Billing by CRC 5000,00 (USD 9,44). That short payment stemmed from an understandable misreading of the not very legible and similar figures appearing in the BSP Billing. Such misreadings are not unknown where the low unit value currency gives rise to long strings of figures.

32. The short payment was acted on by the Respondent on the day following the Remittance Date and the underrage was made good that same day.

33. Had the BSP notified the Applicant of the underrage on the Remittance Date, it is fair to assume that corrective action would have been taken before the end of that business day and the questions of disciplinary proceedings would not have arisen. The Respondent thus contributed to preventing the Applicant from correcting matters on the Remittance Date. This deviation from prescribed procedure by the BSP Settlement Bank harmed the Applicant's interests.

34. The written notice of irregularity was delivered by hand, whereas the provisions of Resolution 832, § 1.9 require that a Notice of Irregularity be sent by “*registered letter or certified letter with return receipt*”.

35. The local postal service does not readily lend itself to the use of registered letters, so the BSP Management applies common sense and offers the next best thing: a telephone call confirmed by the notice in writing which is delivered by hand, on the same day. This is a minor deviation from prescribed procedure that does no harm and is also in travel agents’ best interests.

36. It is within the powers of the Passenger Agency Conference to review and amend Resolution 832 at any time. The detection of travel agents’ underrages, given their rarity, could be usefully accelerated, at relatively little cost, to allow corrective action to be taken, at the agent’s expense, within the Remittance Date limits.

37. Resolution 832 provides for short payment in the context of a late BSP Billing situation (per § 1.6.2.2.). In such cases the Agent is asked to make its own calculation of what is due and to settle it by the Remittance Date. Any negative balance between the Agent’s calculated remittance and the actual amount due must then be made good ‘immediately’ (i.e. by close of bank hours the day following the demand), failing which irregularity procedures kicks in.

38. The Respondent relies on that provision as covering a short payment made against an on-time BSP Billing. Would that such were the case, for leeway to correct is provided in such instances; but it is not the case.

39. Short payment is dealt with in Resolution 832 only in the context of late BSP Billing and there are no officially sanctioned rules for dealing with accidental minor short payments made in settlement of on time BSP Billings. They are, after all, a comparative rarity. That would appear to be supported by the list of the seven deadly irregularities set out at the beginning of § 1.7, which makes no mention of short payments.

40. Traditionally, resolving such minor discrepancies was within the purview of the locally based BSP Manager. The undersigned considers that the BSP Managers should be entrusted to handle such minor irregularities, so long as they do not put at risk the BSP Airlines’ moneys. However, reporting or remitting shortcomings that do create such a risk are another matter altogether, and merit severe and rigorous treatment.

Decision

41. The request for review was justified. The incident that gave rise to IATA disciplinary action, although, by the narrowest of interpretations, in accordance with IATA’s policy of zero tolerance, reveals the downside consequences of such a policy, if applied indiscriminately across the spectrum of travel agent activities.

42. The test of an act of misfeasance by an Agent before imposing the full brunt of collective disciplinary measures, to the agent’s detriment, must surely be ‘did the act of misfeasance put at risk a BSP Airline’s moneys?’

43. In this case, the Applicant's understandable and paltry error created no such danger. At worst, it created a little extra administrative work for BSP Management, for which it was duly charged.

44. The Applicant has a blameless recorded of 57 years of IATA accreditation, under continuous ownership and management by the same family. Its good name is particularly important in the context of the business community of a small country. Being listed as having committed financial irregularities is a serious matter for the Applicant, and in the circumstances was simply not justified. The two instances of irregularity are accordingly to be withdrawn and delisted in the next applicable IATA bulletin.

45. There is no call for the Applicant to produce a USD 67.000,00 financial guarantee. That call is accordingly hereby cancelled, without prejudice to the Respondent's ongoing right to conduct its periodic financial reviews and take the requisite action, as a result, in accordance with the governing Conference resolutions.

46. The USD 50,00 fee for the additional work generated may stay. There was additional work, even if it would have been less had the Applicant been alerted on the Remittance Date of its error.

47. The undersigned reserves the right to oversee that the terms of this decision are duly executed and to decide on any matters of procedure that may arise from such execution.

48. The parties are not liable to pay any fee or costs to the undersigned in respect of the present decision.

49. Per Resolution 820e, § 4.1, the Applicant may, if it considers itself aggrieved of this decision, seek review by arbitration in accordance with the provisions of Resolution 808, § 12.

Decided this 24th Day of August 2007, in Geneva.

Brian Barrow
Acting Agency Commissioner, Area One

NOTE: to ensure timely receipt by the parties, an electronic copy of this Decision is sent on 24th August 2007, with the original signed copy being sent by registered post.