

TRAVEL AGENCY COMMISSIONER, AREAS ONE & TWO

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BPB/ma/13ii08

DECISION

In the Matter of:

Clark Tours

7a ave. 14-76 zona 9

Guatemala, C.A.

(IATA Numeric Code: 82-59787-4)

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 Agency Commissioner for Areas One & Two, appointed in accordance with the provisions of Resolution 820d.

Parties

2. The Applicant is Clark Tours, an IATA Accredited Agent with registered office in Guatemala. The Applicant has been on the IATA Agency List since April 1948 and has operated continuously as a family owned firm since its establishment in 1927. It specializes in tourism services and employs about 90 people in the country. At the hearing of 12th February 2008, the Applicant was represented by its General Manager, Mr Mark H. Rogers.

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 and to him. 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 operating 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 Panama. 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 responsible for Guatemala is situated in San Salvador, El Salvador.

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 David Hernandez, the IATA Country Manager responsible for, El Salvador, Guatemala & Belize.

Contractual Considerations

7. 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. All IATA Accredited Agents are similarly bound. The IATA Secretariat is required to apply Conference Resolutions as instructed and is not empowered to ignore, alter or overrule them.

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 Guatemala. Under that BSP, remittances are made weekly to a designated bank, against a BSP Billing sent electronically to each Accredited Agent.

11. For the third BSP Billing Period of December 2007, the Applicant was invoiced Q204.915.12. On the morning of 3rd January, the Applicant remitted that amount to the Respondent's Clearing Bank, in the form of a bank cashier's cheque drawn on 2nd January. However, the Remittance Date for settlement of the BSP Billing was 2nd January which means the payment was made one day late.

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.

13. When it became aware, that day, of the 3rd January late payment, the Respondent notified the Applicant of two instances of irregularity being recorded for failure to pay on time (in Guatemala, six instances of irregularity in a consecutive 12 months period would give rise to the Agent being declared in default).

14. The Respondent also requested the Applicant to furnish immediately for one year an irrevocable bank guarantee in favour of the Respondent, in the amount of Q.777.666.51. That request was placed in abeyance pending the outcome of the Travel Agency Commissioner's review.

15. The Applicant explains that the evidence shows it had taken all the necessary measures to pay on time but that its employee overlooked the fact that the first working day of 2008 was not a Monday but a Tuesday. From that human misperception of time flowed the mistake of presenting the cashier's cheque obtained the previous day, early in the morning, but one day late. The Respondent does not doubt the truth of the Applicant's account of events but is bound by the rules to follow a certain course of action, notwithstanding the fact that the payment had been effected before the Respondent was able to notify the Applicant of the irregularity. It is not questioned that there were sufficient funds in the Applicant's possession to meet its BSP commitments in full. An extract from the Applicant's bank statement for the month of January confirmed that at the material time, the Applicant's account was adequately garnished to meet its BSP commitment.

Review Approach Taken

16. By agreement with the parties, the hearing was conducted by teleconference, on 12th February 2008, linking up Geneva, Miami and San Salvador. That teleconference was preceded by an extensive exchange of written communications and other documents between the parties and the undersigned. Those preliminary communications established that there was no disagreement on the facts, as set out above. It followed that the outcome of the review would turn on the applicable IATA regulations.

Considerations

17. The efficient and economical operation of the BSP implies strict fiduciary discipline on the part of Agents reporting and remitting through it. The Applicant acknowledges this.

18. It is not disputed by the Respondent that the late payment was erroneous. It did not and could not bring any advantage to the Applicant.

19. The Applicant enjoys a sound financial record and standing with no previous incidence of remittance discrepancy in 60 years of IATA accreditation. The outcome of the Applicant's last annual financial review was entirely satisfactory. Nothing in the matter under review reflects adversely on or places in doubt that good financial standing.

20. The Respondent's staff are under strict orders, with respect to reporting and remitting discrepancies, to apply the IATA Resolutions immediately and to the letter. Experience has demonstrated that with regard to protecting the BSP Airlines' monies, it is better to be safe than sorry.

21. Errors happen from time to time and the Travel Agency Commissioner review machinery can help serve to identify their cause and to assess the gravity of their consequences, actual and potential. It also permits the parties to draw lessons from the experience, in order to diminish risk of recurrence.

Findings

22. An error was committed by the Applicant which led to a one day late remittance being made. The error was corrected before notice of its occurrence was received from the Respondent.

23. The Respondent's actions were the correct ones to take in the circumstances, implemented in strict conformity with the rules, as required by the Respondent's senior management. The requisite precautions were taken expeditiously.

24. This review confirms that the Applicant's late payment was entirely attributable to human error which was self-corrected, and did thus not stem from any financial cause.

25. The Applicant's financial standing and unblemished record with regard to its BSP fiduciary obligations, taken into consideration with facts that emerged during the hearing, show that there is no compelling reason to require the Applicant to provide the requested bank guarantee.

Decision

26. The recording of two instances of irregularity was procedurally correct. That action of the Respondent in that respect is upheld.

27. The request by the Respondent for a bank guarantee in favour of the Respondent is not upheld and should be immediately withdrawn.

28. This decision is made without prejudice to the outcome of the Respondent's periodic financial review of the Applicant's audited accounts. Should that review ever show that grounds exist for imposing a financial guarantee under the Applicant's published rules for that practice, that conclusion will supersede and replace the ruling in the preceding paragraph.

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

30. 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 13th Day of February 2008, in Geneva.

Brian Barrow
Agency Commissioner, Areas One & Two

NOTE: to ensure timely receipt by the parties, an electronic copy of this Decision is sent on 13th February 2008, with the original signed copy being sent by registered post.