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BPB28iii08

DECISION

In the Matter of:

BNW Travel Management Ltd

201-1110 Hamilton Street

Vancouver B.C.

Canada V6B 2S2

(IATA Numeric Code: 61-9 0531 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 Area One, appointed in accordance with the provisions of Resolution 820d.

Parties

2. The Applicant is BNW Travel Management Ltd, an IATA Accredited Agent with registered office in Vancouver, B.C. The Applicant was incorporated in Vancouver in March 1994 and has been on the IATA Agency List for most of its existence. At the hearing, the Applicant was represented by Mr Jonathan McLean, counsel.

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, which 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 particular responsibility for managing 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. A country office responsible for BSP Canada management is located in Montreal.

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 Mr Eric Vallières, counsel, seconded by Mr Charles Beeman, counsel, with Mr Leslie Lugo, Senior Legal Counsel, IATA, in attendance.

Rules Governing this Proceeding

7. This review proceeding is conducted under Resolution 820e, amplified by the Travel Agency Commissioner's Rules of Practice & Procedure ('RP&P') which are published on the website of the Travel Agency Commissioners (www.travel-agency-commissioner.aero). The essence of this review is its informality and its aim to seek a rapid and practical outcome.

IATA Agent Accreditation

8. In Canada, as in most other countries, except the USA where a comparable but separate accreditation system for airlines' sales agents obtains, only IATA Accredited Agents may hold and issue Standard Traffic Documents and report and remit on them through the BSP. Most airlines have long since stopped supplying their appointed travel agents with dedicated ticket stocks for issuance on their behalf. Instead, IATA provides Accredited Agents with stocks of Standard Traffic Documents, in either paper or electronic medium, on behalf of all BSP Airlines, which in the case of BSP Canada total 104, including 18 airlines that are not Members of IATA. A Standard Traffic Document is neutral until issuance when it is 'imprinted', physically or virtually, with the Carrier Identification Plate of the issuing airline and becomes that airline's traffic document (i.e. ticket or equivalent).

9. Thus, in order to be in the business of issuing airline tickets, a travel agent must in practice be an Accredited Agent in good standing with IATA. Exclusion from the IATA Agency Programme would be tantamount to being driven out of business as a travel agent, except, perhaps as a non-ticket issuing sub-agent of an IATA Agent. Many small travel agents follow that course of their own volition, particularly as by subscribing to TIDS (viz. paragraph 21 below) they can keep a firm foot in the camp of selling other travel and tourism products.

10. IATA accreditation thus carries significant benefits for the travel agent concerned, particularly the ability to work with all airlines on the basis of a single common contract and operational rules. The downside is that loss of IATA status means effective exclusion from access to most airlines' business. It is accordingly essential to all stakeholders in the Agency Programme that caution be observed in working with the programme, the more so where the

right of an individual travel agent to earn a living is placed in jeopardy as a consequence of a decision taken under its auspices.

Contractual Considerations

11. The Passenger Agency Conference is composed of those IATA Members who appoint a delegate to it. Per the IATA Articles of Association, the remit of the Conference is to take action on matters relating to relationships between airlines and recognized passenger sales agents and other intermediaries... “ [viz. Provisions for the Conduct of the IATA Traffic Conferences, Section IV.3.(ii)].

12. The Resolutions of the Passenger Agency Conference 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 to apply and follow Conference Resolutions.

13. The basic 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, by virtue of §2, is Resolution 804 – Passenger Sales Agency Rules Canada, Bermuda & St. Pierre et Miquelon. The resolutions mentioned above are published in the Travel Agent’s Handbook, a progressively updated publication, furnished by IATA annually to all Accredited Agents by electronic medium. The January 2007 edition of that publication applies to the review proceeding giving rise to this decision.

14. §13 of the Passenger Sales Agency Agreement provides that termination of the Agreement follows, *inter alia*, where the Agent is removed from the Agency List. §13.2 specifies that notice of termination shall be in writing and may be given at ‘any time’, which provision is then qualified “unless provided for to the contrary in the Passenger Sales Agency Rules, the notice shall take effect no sooner than the last day of the month following the month in which the notice of termination is given.” From this the logical inference to be drawn is that notice must be given sufficiently in advance to allow the orderly dismantlement of the contractual arrangement, in the interest of all parties.

15. In the Passenger Sales Agency Rules, at §12.2, procedures have been laid down governing termination. The notice in writing must state the effective date of removal which shall be no sooner than fourteen days from the day the notice is given.

16. There is also an emergency procedure, set out in §12.2.2., which can be invoked by the Agency Administrator “when evidence is produced that an Agent uses its IATA accreditation to engage in, and profit from, activities which, if associated with IATA, may prove detrimental to the good standing of IATA.” In such circumstances the Agency Administrator may remove the Agent from the Agency List and notify all Members of the action being taken. Notice to the Agent must be given. §12.2.2. contains a ‘notwithstanding’ clause cross-referred to §4 of the Passenger Sales Agency Agreement which appears from the context of the latter to be a misprint.

17. The provisions of Resolution 820e, - Reviews by the Travel Agency Commissioner, at §1.1.5, allow an Accredited Agent who has received notice from the Agency Administrator of impending removal from the Agency List to seek review by the Travel Agency

Commissioner. Those of §1.1.10 allow similar recourse where the Agent considers the Agency Administrator has not followed correct procedure, as delegated by the Passenger Agency Conference, to that Agent's direct and serious detriment. The Applicant has relied on these provisions to bring its request for review and the undersigned has accepted to conduct a review. Per the provisions of §1.1.7, an Agent whose Carrier Identification Plates have been withdrawn by the Agency Administrator may seek interlocutory relief by the Travel Agency Commissioner to stay that action pending the outcome of a review. That was the case in the instant proceeding. On 10th December 2007 conditional relief was granted pending the outcome of this review.

18. Per §17 of the Passenger Sales Agency Agreement, the law applicable to the contract is that of the principal place of business of the Agent, which in this case is that of British Columbia and of Canada.

Background to the IATA Numeric Code

19. Each Approved Location of each IATA Accredited Agent is assigned a unique IATA Numeric Code which serves to identify the holder as an IATA endorsed entity. The code number has accounting and financial control significance and its use is, understandably, subject to constraints, to protect the integrity of the system.

20. IATA is a worldwide operating body that manages a successful and efficient global sales accounting and control system through its BSPs. In consequence, with the passage of time, its Agency List has become the travel and tourism industry's acknowledged hallmark list of reliable travel sales intermediaries. In addition to being distributed to IATA Members, that list is made available, for a consideration, to various industry suppliers, such as hotel chains, car rental companies and providers of transport, including to non-IATA airlines. Allied transport trade associations also work within the parameters of the IATA unique numbering system which in consequences has the *de facto* status of a global industry norm. It would be no exaggeration to assert that, nowadays, an Accredited Agent's IATA Numeric Code is the access key to all major travel and tourism suppliers' computer reservations and sales accounting and reward systems. Without one, a travel agent would stand scant chance of survival as an independent full service enterprise.

21. Recognizing the importance to the travel and tourism industry of the unique IATA identifier, the IATA Passenger Agency Conference, a decade ago, authorized IATA to make available the Travel Industry Designator Service (TIDS) to non-IATA travel agents who do not issue airline Traffic Documents. TIDS numbers are compatible with the IATA Numeric Code and slot into the computer reservations and accounting systems of industry suppliers who have already adopted the IATA Numeric Code system as their own. The number of travel agents availing themselves of TIDS in Canada (i.e. 1950+) represent approximately 40% of the total of IATA listed sales intermediaries in that country.

IATA Numeric Code Rules

22. Resolution 822 sets out in detail the rules and procedures for devising, allocating and publishing IATA Numeric Codes. The need for legibility of such codes when entered on Traffic Documents is emphasized. The codes are used by a variety of sales outlets across the industry.

23. Per §2, code numbers assigned to users in accordance with Resolution 822 shall at all times remain the property of IATA and shall not be lent, subcontracted or hired to a third party by the assignee.
24. The resolution provides that a Numeric Code assignee can be either an Accredited Agent, a non-IATA sales intermediary belonging to a defined category, an airline sales office, including that of a non-IATA carrier and a Member's General Sales Agent.
25. §10 of the resolution provides that where an "IATA Agent" fails, without good cause, to comply with any of the requirements of the resolution, such failure shall constitute grounds for the Agency Administrator to initiate review under the provisions of the Sales Agency Rules (in the case of Canada, Resolution 804). That paragraph is directed solely at Accredited Agents and does not include any other category of Numeric Code assignee.
26. The Passenger Sales Agency Rules, specify at §12.10 the circumstances in which an Accredited Agent may display the IATA logo and specifically proscribe its use in such a way as to "misrepresent an existing industry service such as the IATA Travel Agency Identity (ID) Card".
27. Until January 2008, Resolution 822 did not contain a comparable constraint with regard to the IATA Numeric Code, other than the prohibition on lending, subcontracting or hiring of the code to a third party.

Review of Agent Rules

28. The Agency Administrator's review of an Agent called for in Resolution 822, §10 as to be conducted under the provisions "of the Sales Agency Rules" is not specifically defined in the Passenger Sales Agency Rules. Those Rules do, however, provide per §3.2 that the Agency Administrator may initiate a review by the Travel Agency Commissioner where the Agency Administrator has reasons to believe that the Accredited Agent or Location does not continue to meet the criteria for qualification.
29. Another form of review open to the Agency Administrator, without reference to the Travel Agency Commissioner, is foreseen in Resolution 832, §3.3 and is conducted only as a consequence of a serious financial irregularity on the part of the Agency concerned, such as a default. Under Resolution 820e, §1.3 the Agency Administrator is empowered to initiate a review, to be conducted by the Agency Commissioner, in the dozen or so circumstances set out in that section.
30. In all the above instances, due process is envisaged in the review procedure.

Applicant's Petition

31. The Applicant's petition, in the form of a request for review, was sent to the Travel Agency Commissioner on 3rd December 2007 in accordance with Rule 4 of the RP&P of the Travel Agency Commissioner. It set out briefly the decision for which review was requested and was filed within the 30 days period foreseen in Resolution 820e, §1.2.2.1.

32. In brief, the request sought the following:
- a) review and reversal of the Respondent's decision to terminate IATA accreditation of Applicant;
 - b) suspension of said decision pending completion of the review;
 - c) an interlocutory order to stay actions under said decision and to require reinstatement of the Appellant forthwith, pending completion of the review.
33. The statement of facts accompanying the request for review described the Applicant's corporate status, pointed to 14 years of uninterrupted IATA accreditation, asserted its *bona fides* in complying with IATA rules and regulations and referred to the Applicant's travel sales volume of the previous year, placing it among the four most productive travel sales outlets in Western Canada.
34. Attached to the request for review was an affidavit sworn on 3rd December 2007 by Mr Daniel Burns, shareholder, director and CEO of the Applicant, setting out his account of the events linked to this review.
35. In the course of his testimony Mr Burns explained that on 29th November 2007, whilst he was in Ottawa, he was contacted by his Vancouver management and informed that IATA had that morning taken termination of accreditation action in respect of the Applicant. His efforts to contact IATA by telephone were unsuccessful. Later that day, a representative from Air Canada called at the travel agency and removed Carrier Identification Plates. That action effectively prevented the Applicant from issuing airline tickets and from changing or refunding airline tickets previously issued by it.
36. The Applicant asserts it did not receive prior notice of the impending action and that written notice did not arrive until after the termination action was initiated, and then only after the Applicant's repeated requests to the Respondent for an explanation of why the action had been taken. That information, when received, was in the form of a letter dated 27th November but franked 29th November 2007, from the Respondent's Miami office and signed by its Assistant Director – Agency Services. The original of the letter sent through postal channels is date stamped as having been received on 10th December 2007.
37. The gist of the letter of termination of IATA Accreditation was that:
- a) the Applicant was improperly providing its IATA Numeric Code to third parties, including offers made to the general public to acquire the use of the code in exchange for a fee, as set forth in websites described in the letter;
 - b) the Respondent construed the above actions as violating the IATA Passenger Sales Agency Agreements in that they, *inter alia*, amounted to lending, sub-contracting or hiring to a third party the IATA Numeric Code;
 - c) the Applicant's IATA accreditation was being immediately terminated, per the terms of the IATA Agency Agreements.
38. The letter of request for review of 3rd December 2007 and its attachments were forwarded to the Respondent by the Travel Agency Commissioner, with an invitation to answer by means of a letter of response, in accordance with Rule 8 of the RP&P. That letter of response was sent on 21st December 2007. In summary, the Respondent submitted that:
- a) the relief sought by the Applicant should be denied;

- b) the intervening action of the Travel Agency Commissioner granting interlocutory relief rendered that part of the request for review moot;
- c) the Respondent stood its ground on the reasons for terminating the Applicant's IATA accreditation and denied several of the allegations made in the letter of request;
- d) in accordance with the Travel Agency Commissioner's interlocutory order it had returned all uplifted Carrier Identification Plates to the possession of the Applicant.

39. Accompanying the letter of response was the Respondent's statement of defence in which it added as grounds for the termination action the alleged wrongful commercialization of the IATA Numeric Code, thereby undermining the integrity of the IATA Agency Programme and serving to undermine IATA's name and reputation, harming IATA Members and other providers of travel products and services by falsely inducing them to provide discounts to persons who are not *bona fide* travel professionals.

Hearing

40. A hearing was conducted in Vancouver over two days on 28th and 29th February 2008. At the hearing, the Applicant called one witness, Mr Daniel Burns, owner, director and CEO of the Applicant. There were no other witnesses on behalf of the Applicant. The Respondent elected to call no witnesses.

41. In the course of his lengthy testimony the witness explained in detail, with supporting documentation, the business model on which his enterprise is based.

42. He refuted the assertion that the Travel Consultant program is aimed at passing off members of the general public as travel agents. He explained that the established operating procedure is for each Travel Consultant to refer potential purchasers of travel products to the Applicant's team of employed travel agents who actually effect the booking and handle the transaction settlement aspects of each purchase. The function of the Travel Consultant is thus to identify and refer purchasers to the Applicant for sales servicing.

43. All told, the Applicant has 3268 Travel Consultants on its books and a small, permanent in-house team of travel agents. Each Travel Consultant pays an entrance fee of CAD499 and an annual fee of CAD199 in consideration of being listed as a Travel Consultant and benefitting from the support services and advantages associated with that status. These advantages include a share of sales commissions earned on certain transactions referred to the Applicant, customer access to special pricing arrangements negotiated by the Applicant with industry suppliers, access to the Applicant's privately developed computer system, and such personal advantages in kind that may be made available to the Travel Consultant by the industry supplier at its discretion.

44. It was demonstrated that the Applicant's sales business comes in by way of referral from its Travel Consultants. Per Mr Burns, no other promotional activity, including use of websites to promote its product is employed by the Applicant. No evidence to contradict this was adduced by the Respondent.

45. Cross examination and documentary evidence indicated that Travel Consultants were responsible for generating more than CAD9 million in sales for the Applicant in 2007 and

contributed CAD786.169 in fees and charges. Mr Burns cited an investment of over CAD400.000 by the Applicant to develop software specific to the Travel Consultant program's needs.

46. It was shown that in 2007, 19% of the Applicant's travel and tourism revenues were derived from sales of air transportation and the balance came from sources not directly linked with air transportation.

47. Mr Burns testified that making the Applicant's IATA Numeric Code known to Travel Consultants was done for the main purpose of identifying each sales transaction as coming from the Applicant, so facilitating commission tracking and payment. He acknowledged that inclusion of the IATA Numeric Code on the identity card, issued by the Applicant to each Travel Consultant, could be discontinued without adversely affecting the Applicant's business model, but observed that such a requirement should apply to all IATA Accredited Agents that follow the same practice in Canada. The documentary evidence (Exhibit 'R') reproduced the obverse and reverse sides of a photo identity card of another major travel agent which operates a similar business model to that of the Applicant and also uses the name of IATA and an IATA Numeric Code on identity cards issued by it to its 'Independent Contractors'.

Findings

48. The requirement of due process, either as laid-down or implied in the relevant IATA resolutions, was not satisfied by the Respondent when purporting to terminate the Applicant's IATA accreditation. Evidence of a review of the Agent's situation by the Agency Administrator prior to the purported termination action was not adduced.

49. There is a disconnect between the review requirement set out in Resolution 822, §10 and the various review procedures envisaged in the relevant Agency Programme resolutions. The resultant ambiguity can hardly be construed against the Applicant.

50. Serving of the requisite prior notice of termination to the Applicant, as specified in the Passenger Sales Agency Agreement at §13.2 and in the Passenger Sales Agency Rules at §12.2.1, was not demonstrated.

51. Justification for the exceptional and extreme action of immediate termination of IATA accreditation was not offered by the Respondent.

52. The Applicant's business model, although comparatively recent in the travel industry, is not unique. It is to be found elsewhere in Canada, as well as in several other developed markets. It depends principally on the efficient aggregation of multiple sales referral tributaries, many of them small and intermittent. The Applicant takes effective control of the sales referrals made by its Travel Consultants and is fully in control of collection and settlement of monies on referrals that become sales. The Travel Consultants operate independently to identify potential customers, but depend on their referrals being consummated as sales by the Applicant in order to derive income from them. The Applicant, as the IATA Agent, is at all times in control financially and remains contractually responsible and liable for the reporting and settlement of all airline sales effected, so satisfying the essence of the IATA Agency Programme's requirements. This issue was ventilated and analysed at length during the final argument of the parties. I conclude that the business

model as described and used by the Applicant, does not violate the Respondent's rules that proscribe lending, subcontracting or hiring the IATA Numeric Code to third parties.

53. The reproduction of the Respondent's name and of the IATA Numeric Code on the Applicant's in house staff identity cards is not essential to the successful operation of the Applicant's business model. Its discontinuation would not affect the efficiency of that model. Describing a Travel Consultant as a 'travel agent' on the Applicant's identity cards could mislead and calls for correction, in the interests of transparency.

54. Whatever the situation may have been in 2007, that prevailing since 1st January 2008 makes it plain that the use of the IATA Numeric Code on an Accredited Agent's in-house identity cards is not permissible per Resolution 822, §2. The Respondent has not authorized the use of the IATA Numeric Code by the Applicant, a third party in the context of that resolution, to be used on its in-house staff identity cards.

55. The issuance by the Applicant to its employees and to its Travel Consultants of in-house identity cards is not a matter of regulatory concern to the Respondent. However, the Respondent's proprietary material such as its name, logo and the IATA Numeric Code must not appear on such credentials without the owner's prior authorization.

56. The Members of IATA have agreed rules and procedures for granting rebated and free travel to the staff of travel agents accredited by IATA (viz. Resolutions 204c, 880 and 886 in the Travel Agent's Handbook). In practice, the application of those resolutions and the airlines' control procedures take no account of and are unaffected by the existence of in-house credentials furnished by Accredited Agents to their staff members.

57. Other suppliers of travel and tourism products and services, whose businesses are neither regulated by nor of concern to IATA, are at liberty to make their own business decisions as to whom they grant concessions and favours and on what terms.

58. The Applicant appears to have been duly diligent in bringing to the notice of and demonstrating to the competent regulatory authority of British Columbia that its business model conforms to the requirements of B.C. travel agent regulations. The assertion by the Respondent that the business model fails the B.C. regulatory test was not sustained.

59. The Respondent's action in 2003 which resulted in the Applicant promptly discontinuing the inclusion of the Respondent's logo on its in-house staff identification cards points to the existence of an established IATA review procedure for such matters. On that occasion, a structured procedure was followed by the Respondent and gave rise to a satisfactory outcome for both parties. No explanation was offered as to why a comparable review procedure was not followed in November 2007.

60. Whereas the Applicant's use of the Respondent's name and IATA Numeric Code without its prior authorization on in-house identity cards may have been contrary to the spirit if not to the actual letter of IATA resolutions as they stood in 2007, it was not demonstrated that such conduct brought IATA's name into disrepute, as asserted by the Respondent. On the face of it, this was a contravention of the rules that called for due two-way communication review process. In the event, the Respondent proceeded to impose, *ex parte*, the sanction of immediate termination, a course of action that would have effectively shut off the Applicant's access to BSP Airlines' business.

Decision

61. By virtue of the powers conferred upon the Travel Agency Commissioner by Resolution 820e, and in particular, by §3 of that resolution, it is decided as follows:

- a) the Respondent's action of termination is annulled as being without adequate foundation;
- b) the Applicant shall be reinstated in good standing, with immediate effect, on the IATA Agency List;
- c) the interim relief granted by the interlocutory order of 10th December, as amended, becomes moot, as a consequence of the Applicant's immediate and unconditional reinstatement as an Accredited Agent in good standing; in consequence, the Applicant is at liberty to continue appointing Travel Consultants in accordance with the terms of its published programme;
- d) the Applicant's good record emerges intact from this incident and BSP Canada Airlines should be so informed by the Respondent, when it notifies them of the reinstatement action;
- e) consequent on the amendment to Resolution 822, §2, which became effective on 1st January 2008, the Applicant shall recall all in-house identity cards furnished to its Travel Consultants and employees that bear the name of IATA and/or an IATA Numeric Code and destroy them. It shall promptly provide an account of its recall and destruction action to the Respondent. A period of 45 days from the date hereof shall be allowed to the Applicant to carry out that requirement and to file the account with the Respondent.

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

63. For good order's sake and per Resolution 820e, §4.1 and Rule 17 of the RP&P, it is noted that 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 28th Day of March 2008, in Geneva.

Brian Barrow
Travel Agency Commissioner, Areas One & Two

NOTE: to ensure timely receipt by the parties, an electronic copy of this Decision is sent on 28th March 2008, with the original signed copy being sent by registered post.