

C/o Travel Agency Commissioner, Area 2

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DECISION

In the Matter of:

Browne's Travel Sarl

Rte de Lausanne 341

1293 Bellevue, Geneva

Switzerland

(IATA Numeric Code: 81-2 1111 5)

Applicant,

Vs.

Agency Administrator

IATA

International Air Transport Association

33, Route de l'Aéroport

P.O.Box 416

1215 Geneva 15 Airport

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 substitute Travel Agency Commissioner appointed in accordance with the provisions of Resolution 820d, Paragraph 4.

Parties

2. The Applicant is Browne's Travel S.a.r.l., a travel agent with its registered office in Bellevue, GE, Switzerland. The Applicant has been an IATA Accredited Agent since 11 April, 1998. At the hearing before the substitute Travel Agency Commissioner, the applicant was represented by Mr. Mike Browne, its owner.

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 the region comprising Switzerland and Liechtenstein. 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 Two (Europe, Middle East and Africa), is Geneva, Switzerland. The country field office for Switzerland and Liechtenstein, which exercises management responsibility for the BSP Switzerland and Liechtenstein (herein after referred to as 'Switzerland' for short), is situated in Geneva.

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. Under the terms set out in Resolution 818, Section 1, Subparagraph 1.1, an Agency Programme Joint Council (The Council') has been established for the region comprising Switzerland and Liechtenstein. Among its authority and terms of reference the Council shall make recommendations to the Passenger Agency Conference regarding accreditation criteria in respect of financial standing.

7. At the hearing before the substitute Travel Agency Commissioner, the Respondent was represented by Mr. Claudio De Salvo, Country Manager for Switzerland & Liechtenstein and by Mr. Edgar Pereira, Assistant Manager, Passenger Services, IDFS Switzerland & Liechtenstein.

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 818 – 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 are the Locally Established Criteria for Approval and Retention of Agents. 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. The Applicant, as an IATA Accredited Agent, reports and routinely remits its airline sales through the BSP Switzerland. Under that BSP, remittances are made monthly to a designated bank, against a BSP Billing sent electronically to each Accredited Agent. For the calendar year 2006 the Applicant's total BSP sales throughput was CHF 672,604.75 and for the first four months of 2007 it was CHF 252,642.42.

11. The BSP billing for May 2007 sales fell due on 15 June 2007. The Applicant was invoiced CHF 179,134.15 by BSP. Payment is normally effected electronically by direct debit to the Agent's bank account.

12. Per Resolution 818 at Attachment A, Section 1, 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. As that day fell on a Saturday, the Respondent became aware of any discrepancies only on the following work day, that is, Monday 18 June, 2007.

13. The laid down procedure for BSP Management on becoming aware of short payment or non-payment is to demand of the Accredited Agent immediate settlement. In this case, that demand was made by the Respondent's Geneva office, on 18 June.

14. The Respondent states that it first called the Agent by telephone to inform it of the discrepancy and followed up with an E-mail asking the Agent to check immediately with its bank as to the reason why the payment did not go through and asked the Agent to settle the amount that same afternoon and send proof of payment by fax or E-mail by 17:00 hours that same day. That notification to the Agent also stated that failure to provide proof of payment would 'start the Irregularity notice process as well as the Default one following IATA resolution.'

15. The Agent stated that it was materially impossible to meet the Respondent's demand for payment by 17:00 hours as the E-mail request was sent by the Respondent only at 16:25 hours. The Agent immediately contacted its bank to determine the reason why the unexpected problem had arisen. The bank undertook to investigate and respond by mid-day the next day, 19 June.

16. At mid-day of next day, 19 June, the Agent's bank confirmed that it had failed to correctly effect a coding change related to the Agent's new direct debit authorization form which IATA had requested from Agents in Switzerland in November of 2006. The bank asked that the Agent request the Respondent to reprocess the billing for an immediate settlement. This the Agent did but the Respondent stated that at this stage it could not reprocess the billing and that the Agent should pay the amount manually. The Agent by mid afternoon that day authorized the payment and so notified the Respondent by E-mail at 15:50 hours, including a copy of its authorization. That payment order was due for execution by its bank on 20 June. However, that message was received by the Respondent only at 17:30 hours of 19 June. In the meantime, in the absence of

confirmation of a bank error and proof of payment the Respondent had notified the Agent that default procedures were instituted.

17. On 20 June the Respondent received confirmation of payment, made within 48 hours of Respondent's request for immediate payment.

18. On 21 June the Agent received the written declaration of default sent by the Respondent the previous day. The Agent was offended by the tone of letter and felt that the letter was inappropriate in view of the circumstances and inappropriately referred to misdemeanors committed by the Agent. The Agent invoked subparagraph 1.7(a) of Section 1, at Attachment A to Resolution 818 which states that the Agency Administrator's actions described in that Paragraph, in respect of the non-receipt by the Clearing Bank of submissions or Remittances by the due date, shall not apply when the Agency Administrator can determine that the agent had adequately undertaken all of the required reporting and remittance procedures, and that such non receipt had been caused by extraneous factors. A bank error was such an extraneous factor. The Respondent, on the other hand, claimed that at the time default procedures were taken, at closing of the day on 19 June, it had not yet received proof of the stated bank error and that since payment had not been made on demand (i.e., within 24 hours) it had no option than to initiate the default procedure. And on 21 June the Respondent assumed that the Agent would disregard its letter of default since the payment demanded had been effected on 20 June.

19. By 25 June the Agent had not received confirmation that the declaration of default was withdrawn. It sent a message that morning to the Respondent. The Agent received no reply. The Respondent replied the morning of 26 June stating that it would follow up and reconfirmed that all procedures were duly followed.

20. On 26 June the Agent requested from its bank a written confirmation that it had made an error in the coding of the direct debit authorization. The bank's written admission of its error was received by the Agent on 27 June and the Agent faxed a copy that letter to the Respondent. The Agent then called the Respondent by telephone to ascertain the status of withdrawal of the declaration of default. The Agent was not able to reach the Respondent. By mid-morning of 28 June the Agent informs the Respondent by E-mail of its intention to ask the matter to be reviewed by the Travel Agency Commissioner. Late that same morning the Agent visited the Commissioner's office and handed the original version of the bank's statement. The Commissioner's secretary then delivered that letter to the Respondent. It turned out that the Respondent had indeed received the fax copy but claimed it could not take such copy into consideration, that it needed the original version, but failed to so inform the Agent at the time.

21. In the afternoon of 28 June the Respondent notified the Agent by E-mail confirming receipt of the bank's letter and that any instances of irregularity were rescinded. No mention was made concerning the declaration of default.

22. On 29 June the Agent received a registered letter from the Respondent confirming that the instances of irregularity were rescinded – no mention was made of rescinding its letter of default.

23. The Respondent, on 28 July, also asked the Agent to increase its bank guarantee from CHF 60,000 to 130,000 within 15 days. The Respondent stated that its office instituted in May 2007 a review of all bank guarantees from Agents in Switzerland, an exercise which had last been carried out in 2002. The increase in the amount of the bank guarantee requested from the Agent was commensurate with its sales turnover. The Agent called the Respondent but was not able to reach it. On two occasions that day the Agent sent an E-mail to the Respondent to seek guidance on how best to proceed with the increased guarantee because it needed to change the bank which would provide the increased guarantee. But it needed first to be released from its current bank guarantee. The Agent received no reply to its message.

24. The Agent sent to the Respondent another E-mail on 29 June asking to learn the outcome of the review of its financial statements, handed at the IATA reception desk in December of 2006 seeking a release from having to provide a bank guarantee. The Agent received no reply to this E-mail either.

25. The Agent then went on vacation until 8 July. It arranged that in the meantime its certified accountants evaluate the financial standing of its business in accordance with the financial criteria for Switzerland set out in Section 2 of the Travel Agent's Handbook. The Agent requested its certified accountants to carry out the exercise with a view to show that its finances were in order and thus no longer needed to provide a bank guarantee.

26. Upon its return from vacation, on 9 July, the Agent forwarded to the Respondent the assessment made by its certified accountants. That same afternoon the Respondent informs the Agent that it did not meet the financial criteria because of an insufficient equity return ratio. The Agent immediately challenged this finding, stating that such ratio was not contained in the official financial criteria for Switzerland. The respondent, however, claimed it was 'decided by the LCAG' a few years ago.

27. On 10 July the Agent sent to the Respondent an E-mail requesting a meeting to discuss the matter. It also asked that the request for the increased bank guarantee be placed in suspense and that otherwise it would seek recourse by requesting that the matter be reviewed by the Travel Agency Commissioner. No reply was received from the Respondent. The Agent sent a reminder E-mail on 11 July, to which again it did not receive a reply. On 12 July in the morning both parties sent messages which appear to have crossed each other. On the one hand the Respondent requests a telephone discussion with the Agent rather than a face-to-face meeting. The Agent on the other hand sent a message stating its grievances on the way the Respondent has acted following the discovery of a bona fide bank error and challenging the use by the Respondent of a ratio not part of the official financial criteria.

Review Approach Take

28. Following the appointment of the undersigned as substitute Travel Agency Commissioner on the 3rd of August, a hearing before the undersigned was set up to take place by common agreement of the parties in Geneva on 21 August, 2007. Prior to the hearing, the Respondent submitted its response to the Agent's request for review. The Agent in turn summarized its grounds for appeal.

29. At the opening of the hearing, the undersigned reviewed the contents of the material before it and sought to clarify the facts of their dispute. It followed that the resolution of the dispute would turn on the applicable IATA regulations as well as to the handling of the situation by both parties.

30. 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 as a field office it was under a strict directive to apply the rules as published, without any deviation whatsoever. In the context of that directive, the Respondent decided that the Appellant had been in violation of its contractual obligations, notwithstanding the underlying reason which caused it.

Findings

31. The undersigned finds that the Agent undertook immediate steps to ascertain why its bank failed to settle the direct debit which the bank received from the BSP Clearing Bank and also arranged for its bank to pay the amount due as soon as possible. If the Respondent had sent its message to the Appellant the morning of 18 July instead of late that afternoon, the Appellant could have been in a position to arrange payment the following day.

32. On the other hand, the Appellant for its part should have immediately requested the written confirmation from its bank that a bank error was at cause and not wait eight days to do so. It learned of the bank error on 19 July but waited until 26 July to obtain written confirmation.

33. I also find that since the Respondent is held to a strict application of the Rules, then it also should adhere strictly to all those Rules when invoking them. Firstly, the Respondent demanded that payment be made by the close of the day it was demanding it (in fact, it gave the Agent only hours to do so). Per Resolution 818 where the Agency Administrator issues a demand for payment, the deadline for the Clearing Bank's receipt for such from the Agent is the close of business on the first day it is open for business following the day of the Agency Administrator's demand (Subparagraph 1.7(c) of Section 1 at Attachment A refers). This means at least 24 hours. In the case before me, if the Agent had literally met the demand, the Clearing Bank could only have confirmed the payment early the following day of its receipt, that is, on 20 July. As it happens, the Agent's payment was effected that day i.e., within 48 hours of demand). In its communication to the Agent, the Respondent claimed that the Agent had paid three days late.

34. Secondly, the Respondent addressed to the Agent its declaration of default before the close of business day on 19 June, the very same day the Agent was given as deadline to pay. Then the Respondent on 28 June, after receipt of formal proof of a bank error, officially notified the Agent that 'the notice of irregularity has been withdrawn with immediate effect.' No reference is made to withdrawal of its declaration of default.

35. In its request for review the Agent stated that it was not made aware of the implementation date of the bank transfer code change and queried why the Respondent did not monitor a computer system change which, however small, could go wrong. I find that the Agent has no basis to complain in this regard. Any prudent businessman

itself monitors whether the billings it receives are correct and whether its bank account was debited as anticipated.

36. The undersigned also found that whilst the Respondent acted within the rules when it demanded an increase of the Agent's bank guarantee to be commensurate with the Agent's turnover, the Respondent failed to adhere to the conditions provided for such rules. The Respondent demanded that the Agent provide the increased bank guarantee within 15 days from the date of demand. Resolution 818, at Attachment A, section 1, Subparagraph 2.2.2 provides that the Agency Administrator shall give an Agent a date to comply with its conditions not earlier than 30 days and no later than 60 days from the date of such notification. At the hearing the Respondent undertook to re-examine this practice.

37. In respect to the financial review, the Agent claimed that IATA had been holding the financial documents its company since December, 2006. It claims it deposited its documents at the IATA reception to be handed to a Mrs. Valerie Jackson. The Respondent answered that it had no knowledge of the documents and an internal search had not revealed them. I find that the Respondent cannot be held responsible for their absence. The Agent should have either mailed these by registered mail or demanded a receipt when handing them at IATA reception. Furthermore, the Appellant should not have waited some six months to follow-up on the status of a financial review it had requested.

38. In the meantime the Agent provided 2005 and 2006 financial accounts which were evaluated by the Respondent. The Agent was informed that its accounts failed to meet the equity return ratio. The Agent challenged this, stating that such ratio was not published in the criteria for Switzerland contained in the current Travel Agent's Handbook. The Respondent replied that it was a criterion 'decided by the LCAG a few years ago' and contained in the local criteria posted on its web site. At the hearing the Respondent recognized that the LCAG (a local customer advisory group comprising only airline representatives) has no deciding role in the matter. Furthermore, it was established that this criterion had been withdrawn following consultations between the national agents' association and the IATA country representative at the time.

39. At the hearing the Respondent consequently undertook henceforth to only apply criteria as provided for in Resolution 818 at Subparagraph 1.1.2.2 and 2.1.4, that is, established criteria as adopted by the Conference and as recommended by the Agency Programme Joint Council and published in the Travel Agent's Handbook.

40. Lastly, I find that whereas the Respondent expected at all times a timely answer to its telephone calls and messages to the Appellant, it itself was less than diligent in replying to the Appellant's overtures.

Decision

41. The request for review was justified. The Agency Administrator's representatives were overzealous in following the procedures as delegated by the Passenger Agency Conference. In view of the Agent's unblemished record of nearly 10 years, action to institute delinquency and default procedures was hasty, deadlines were imposed contrary to the governing rules. The demand for payment within only hours of

demand is contrary to Resolution 818, Attachment A, Section, Subparagraph 1.7(c), i.e. the deadline for the Clearing Bank's receipt for payment from the Agent is on the first day it is open for business following the day of the Agency Administrator's demand. The wording of the declaration of default and its subsequent withdrawal appear improvised and do not accurately reflect the provisions of the applicable Resolution. At the hearing the Respondent undertook to review both the timing of its actions and the texts of its letters, and otherwise to ensure that its practices conform to the governing rules. Given the numerous procedural shortcomings that have come to light in the course of this case, some of them acknowledged by the Respondent, I hereby request that the Agency Administrator arrange to correct its procedures and ensure they are correctly implemented.

42. In so far that the Respondent initiated its delinquency and default procedures to merely pressure the Agent into responding and not by actually implementing them, the lack in following correct procedures did not cause the Agent direct and serious detriment.

43. The financial review of an Agent's accounts must at all times conform to those provided for in the applicable Resolution. The Respondent failed to apply the criteria approved by the Passenger Agency Conference as published in the 1 January, 2007 edition of the Travel Agent's Handbook (TAH) at Section 2 – Locally Established Criteria for Approval and Retention of Agents. Nothing else, posted on a website without demonstrated industry body authorization, can be construed as overruling the TAH. The Respondent at the hearing took note of this and undertook henceforth to only apply approved criteria. The Appellant was to submit up-to-date financial accounts for evaluation by the Respondent's financial assessor. The undersigned reserves the right to seek confirmation that this exercise was carried out in conformity with the applicable criteria.

Conclusion Remark

44. 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 10th Day of September, 2007, in Geneva.

Robert Gesinus
Substitute Travel Agency Commissioner, Area 2

NOTE: to ensure timely receipt by the Parties, an electronic copy of this Decision is Sent on 10th September, 2007, with the original Signed copy being sent by registered post.