

TRAVEL AGENCY COMMISSIONER, AREA TWO

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BPB/ma/07vii08 (with 3 factual corrections, as flagged)

DECISION

In the Matter of:

TUI Nederland N.V.

Volmerlaan 3

2288 GC Rijswijk

Nederlands

(having several IATA Numeric Code numbers)

Applicant,

vs.

Agency Administrator

IATA

International Air Transport Association

Route de l'Aéroport 33

P.O. Box 416

1215 Geneva 15 Airport

Switzerland

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 Two, appointed in accordance with the provisions of Resolution 820d.

Parties

2. The Applicant is TUI Nederland N.V., an IATA Accredited Agent with registered head office in Rijswijk, Netherlands. TUI has been an IATA Accredited Agent, listed under one name or another, for many decades.

3. The Respondent is the Agency Administrator of the International Air Transport Association ('IATA'), acting for Member airlines that 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 230 or so Members that include administering the Agency Programme and managing the Billing and Settlement Plan ('BSP') in the Netherlands. The BSP is an industry centralised sales reporting and settlement system. The Agency Administrator has particular responsibility for the management of these activities. (N.B. The expression 'Agency Administrator', a term of art defined in Resolution 866, as "...the IATA official designated by the Director General as holder of that office, or authorized representative.")

4. IATA divides the world into Areas One, Two and Three. The Agency Administrator's main base in Area Two, Europe/Africa/Middle East, is Geneva, Switzerland. The management of the Agency Programme and the BSP in the Netherlands is the responsibility of the Amsterdam office of the Respondent.

5. The Agency Programme consists principally of resolutions adopted by the IATA Passenger Agency Conference. They lay down the rules, regulations and procedures governing business relations between IATA Accredited Agents and IATA Members. These resolutions also provide the regulatory framework within which the Respondent works with IATA Accredited Agents, including the Applicant.

Contractual Considerations

6. The Passenger Agency Conference is composed of all those IATA Members (i.e. airlines) who appoint a delegate to it. Per the IATA Articles of Association, it is a sovereign entity within IATA and its resolutions are binding on all Members that operate air passenger services, whether or not they have appointed a delegate to the Conference. The IATA Secretariat is not empowered to alter, overrule or ignore a Conference resolution.

7. 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 are 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, a progressively updated publication, furnished by IATA annually to all IATA Accredited Agents, using an electronic medium. The January 2008 edition of that publication applies to the review proceeding giving rise to this decision.

8. 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 laid down by the Passenger Agency Conference, to that Agent's direct and serious detriment. The present review has thus been brought under that provision.

9. The Applicant's situation is perhaps noteworthy in that not only does it operate five IATA Approved Locations in the Netherlands, as well as having a franchised office holding IATA accreditation, but, by virtue of its complex corporate structure that includes subsidiaries with their own corporate status, sells through more than 230 outlets across the country. The Applicant also has a significant tour operating activity. The Applicant's 2007 BSP throughput was in the region of €18 million.

Hearing

10. A hearing before the Travel Agency Commissioner took place in Amsterdam on 11th June 2008. The Applicant was represented by Ms Benedikte van den Heuvel, Manager, IATA Department and Ms Merijnen Kreek, Legal Department. Ms Christina Zandberg, Director, Capacity & Yield was also in attendance. The authorized representative of the Agency Administrator who spoke for Respondent was Mr Manfred Blondeel, Country Manager the Netherlands assisted by Mr Bas Dekker, Assistant Manager Risk Management.

Facts

11. As an IATA Accredited Agent the Applicant reports and routinely remits its airline passenger transportation sales through the BSP Netherlands. Under that BSP, remittances are made monthly to the Settlement Bank, against a BSP Billing sent to each Accredited Agent in the Netherlands.

12. The Applicant has availed itself of the provisions of the Passenger Sales Agency Rules, at Attachment 'A', §1.6.2.1(f), whereby a multiple location Accredited Agent may centralise the BSP sales reporting and remitting function for all locations through one designated office in the BSP country/area concerned. The Applicant's Enschede office, although not its registered head office, serves that centralised function.

13. The consolidated BSP Billing for the month of February 2008, which amounted to €10,234,646.53 was adjusted by the Applicant to take account of an Agency Credit Memo in process, to become €10,231,452.58. That adjusted amount was settled on the Remittance Date. Shortly thereafter, the Respondent informed the Applicant that the adjusted amount had, in fact, been short stated and underpaid by €30. The Respondent accordingly summoned the Applicant to settle the outstanding amount, immediately. That was done within the hour.

14. The same day, the Applicant received from the Respondent a Notice of Irregularity in respect of said €30, notifying it that two instances of irregularity would be listed against the Applicant as a result of the incident. Under the Passenger Sales Agency Rules as they apply to the Netherlands, should an Agent incur four instances of irregularity within a period of twelve consecutive months, it would be placed in default, a draconian measure designed to protect the airlines' monies.

15. The Applicant had asked the Respondent, at the time, to withdraw the Notice of Irregularity, on the grounds that there had been a human error, of no financial significance, which had been immediately corrected. The Applicant had also contended that the consequences of that minor mishap were disproportionate to any harm done. Furthermore, it pointed out that §9.4 of the BSP Manual for Agents provides discretion to the Agency Administrator when managing such minor discrepancies as it permits him to take no action, as decided locally.

16. The Respondent, however, had confirmed to the Applicant that the decision to list two instances of irregularity had to stand. A directive emanating from the highest level of IATA management, sent to all BSP field managers, had been issued prior to the incident under consideration, to the effect that no deviations from the requirements of the reporting and remitting procedures were to be tolerated. The Respondent also stressed the importance it attached to applying the rules even handedly to all Accredited Agents, without distinction.

17. The Applicant's name was accordingly to be included on a periodic list sent by the Respondent to BSP Airlines identifying Agents that have recently incurred instances of irregularity under BSP rules. This is a requirement incumbent on the Agency Administrator of the Respondent, per Resolution 818, Attachment 'A', §1.7.8. That prospect was the cause for the Applicant seeking review.

18. A specimen of the list was not available but it was ascertained that it is not the practice to distinguish in such periodic lists between the different degrees of gravity of instances of irregularity contained in them.

Considerations

19. The corporate structure of the Applicant, reflective of its evolution over time and its range of travel and tourism activities, makes it somewhat different from most multiple location travel agents. A practical and workable centralised reporting and remittance procedure has accordingly been developed between the Applicant and the Respondent, within the parameters of Resolution 818 and its forerunners.

20. The incident under review has, however, alerted both parties to the potential downside consequences of the current arrangement, whereby two minor errors within a period of twelve months, not necessarily committed by the central reporting office, would in theory at least, give rise to grave consequences for the entire commercial entity. The prospect, for both parties, of the triggering default action following two separate occurrences of clerical error without financial significance, must give serious food for thought for the parties.

21. The Respondent advised at the hearing that this incident has resulted in an internal review of the current arrangements with the Applicant, with a view to making appropriate adjustments. That review will involve consultations with the Applicant, aimed at arriving at the optimum arrangement for both parties. The Applicant welcomed this and undertook to furnish an up to date organisation chart of its corporate structure to facilitate that review.

Findings

22. The action of the Respondent's Amsterdam office in sending the Applicant a Notice of Irregularity was in accordance with the IATA top management's policy of 'zero tolerance' with respect to Agent BSP reporting and remittance discrepancies. To that extent the notice was sent in conformity with correct procedure. However, the provisions in the current edition of the BSP Manual for Agents are at odds with the zero tolerance instruction and early restatement in appropriately updated form would serve a useful purpose.

23. For reasons that were not made clear at the hearing, the Agency Administrator (as defined) did not publish the Applicant's name and address in the periodic financial discrepancy list. Thus no published record exists of the incident. That omission on the part of the Respondent would call for an explanation should the Applicant be declared in default, in the coming twelve months in consequence of four alleged instances of irregularity.

24. The Applicant's financial standing is not in question and it is understood that it was not and is not the Respondent's intention to place it in doubt.

25. In its oral arguments made at the hearing the Applicant made three points that merit reiteration. Firstly, in what is an ongoing, solid and time-tested commercial relationship, a policy of give and take on minor errors would be more fitting than the rough justice of 'zero tolerance', a concept with pejorative overtones having its origins in the battle by law enforcement agencies against crime. Secondly, the Respondent should consider introducing proportionality between its remedial measures and defective occurrences such as the one under review. Thirdly, the act of listing an Agent as having incurred instances of irregularity is more than a warning notice to BSP Airlines; it also constitutes a public black mark against the Agent concerned and could have adverse repercussions on its financial good name, even if such is not the Respondent's intention.

26. The point was also made that a preliminary warning mechanism in cases such as the one under review, is desirable, to take account of *bona fide* errors.

Decision

27. The fact that the two instances of irregularity communicated by the Respondent to the Applicant that triggered off the present review have never been promulgated by the IATA office concerned, per the requirements of the Passenger Agency Conference, came to light in the closing stages of the hearing and contributed to bringing it to a rapid conclusion. Those instances have thus not acquired official standing and are accordingly to be disregarded by the Respondent. The Notice of Irregularity sent has, however, served as the *de facto* informal preliminary warning to the parties that their present business arrangement needs reappraisal.

28. It would serve little useful purpose for the undersigned to pursue the matter of the purported instances of irregularity further. The belief that they had been promulgated caused the aggrieved Applicant to seek review. It would appear the Applicant was misled. The Respondent's Amsterdam office, however, appears to have done its duty. A misunderstanding shared by both parties, has now been cleared up and a jointly engineered remedy to the underlying cause of the initial problem is urgently in hand. It is accordingly decided that no action is required of the undersigned, other than to write and publish this decision for the guidance of the parties' future conduct.

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

30. For good order's sake and per Resolution 820e, §4.1, it is noted that the Applicant may, if it considers itself aggrieved of this decision, seek review by arbitration in accordance with the provisions of Resolution 818, §11.

Decided this 7th Day of July 2008, in Geneva. This Decision corrects that published on 16th June 2008.

Brian Barrow
Travel Agency Commissioner, Area Two