

DECISION 2010-08-01

Travel Agency Commissioner Area 2

Helene Cedertorn
Nybohovsbacken 34B, 117 63 Stockholm
Sweden

The Case:

Request for Review of Notice of Irregularity by the Agency Administrator dated the 1st of June 2010

Applicant:

EMDI Travel Agency Poryazova and son LTD
31, Tzar Shishman Str.
1000 Sofia, Bulgaria
Represented by: Office Manager Emil Poryazov

Respondent:

The Agency Administrator
International Air Transportation Association (referred to as "IATA")
128, Vitisha Blvd, 1st floor
Sofia – 14 63
Bulgaria
Represented by: Jordan Karamalakov, Country Manager Bulgaria, Kazakhstan, Azerbaijan and Kyrgyzstan

Background, arguments etc:

In a letter dated the 1st of June 2010 IATA sent a Notice of Irregularity to the Applicant (recorded as two instances of irregularity) and charged the Applicant an Administrative Fee of BGN 200. The reason for the Notice of Irregularity was that the remittance for passenger transportation sold, covering the period 01-15 May 2010 was not fully received by 31st of May, the relevant remittance date as per the BSP calendar of Bulgaria.

By an e-mail the 1st of July 2010 the Applicant informed the undersigned of that delivery of documents by courier from the Applicant to the address of the undersigned had failed and that it had complaints with regards to IATA and the Administrative Fee. At request copies of the documents were received by e-mail the 2nd of July. The failure to deliver the documents by courier depended on change of address by the undersigned; the original documents were however later received. The undersigned asked for some clarifications in an e-mail the 4th of July. The Applicant clarified in an e-mail the 5th of July that it submitted payment of 72 000.00 BGN for sales the period 01-15 May in time, but due to bank problems the amount of 69 310.48 BGN was paid late.

The Applicant has submitted a copy of the IATA Notice of Irregularity dated the 1st of June, a copy of BSP debit note of the administrative fee, a translated copy of a letter from the Applicant to the Respondent dated the 21st of June 2010 with a copy of a translated letter from the Applicant to Eurobank EFG Bulgaria dated 2nd of June 2010, copies of two payment orders and a translated copy of a letter from Eurobank EFG Bulgaria AD to the Applicant dated the 15th of June.

The Respondent provided a response in an e-mail dated the 13th of July 2010 and made the following statement (summarized by the undersigned): Based on the presented documents EMDI requested two bank transfers for BGN 54,310.48 and BGN 15,000.00 on 31 May 2010 at 14:17 and 14:20 local time respectively. Both transfers were ordered under conditions "RINGS". Conditions RINGS provide obligation for the servicing bank (in this case Eurobank EFG Bulgaria JSC) to execute payments with SAME DAY VALUE if such orders are submitted to the bank before 15:00 local time. In contrary the payment orders are marked for execution on 01 June 2010. Eurobank EFG confirms that such omission was caused by error in their software. - IATA has no doubts that such delays in payments were exactly caused by problem in the software, not due to for example the lack of liquidity in the bank just on the last day of the month. - The late payment however caused some costs for using overdraft to settle funds to airlines on 31 May. Having in mind the facts above, IATA leaves to the Travel Agency Commissioner to decide if the rules of Bona Fide Bank Error are applicable in this particular case.

Travel Agency Review was granted by the undersigned the 28th of July 2010.

The parties have agreed to that an oral hearing is not necessary. As the evidence presented is written and not disputed to its authenticity or content, and the positions of the parties are clear, I find that the review could be based on written submissions, with no oral hearing.

Rules of interest

To become an Accredited Agent an Agent signs a Passenger Sales Agency Agreement in accordance with IATA Resolution 824. In this contractual relationship the Director General of IATA represents the IATA Members (or in other words the IATA airlines) and acts for and behalf of these.

The Agreement stipulates that terms and conditions governing the relationship between the Carrier and the Agent are set forth in the Resolutions contained in the Travel Agent's Handbook (hereafter referred to as the Handbook) as published from time to time under the authority of the Agency Administrator. The Handbook is local and varies by country and incorporates, amongst other things, Passenger Sales Agency Rules. For Bulgaria these rules are incorporated by IATA Resolution 818g (from the 1st of June 2010).

The Passenger Sales Agency Rules are consequently to be considered as part of the contractual relationship between the individual Agent and the IATA Members. The rules of primary interest here are related to Bona Fide Bank Error (see Res 818g Attachment A Section 1.7.3. – same wording as Res 818 Attachment A Section 1.7.7. in effect prior to 1st of June 2010);

“1.7.3 Bona Fide Bank Error

a bona fide bank error is one of the following circumstances substantiated by evidence acceptable to the Agency Administrator:

1.7.3.1 Credit Arrangement or Automatic Transfer of Funds

when on the date the cheque or other method of payment was presented to the Bank for payment, sufficient funds should have been available in the account on which the cheque or other method of payment was drawn by virtue of a valid written line of credit or other written arrangement, dated and executed between the bank and the Agent prior to the Reporting Period involved, and the bank erroneously fails to honour such line of credit or other arrangement, or

1.7.3.2 Sufficient Funds

if the bank erroneously fails to honour a valid cheque or other method of payment when sufficient collected funds are in the Agent's account on which the cheque or other method of payment was drawn and available for immediate withdrawal at the time the cheque or other method of payment was presented to the bank for payment;”

If it is established that a non-payment or dishonouring of payment is due to a bona fide bank error, as provided for in Paragraph 1.7.3., and settlement of all amounts due is received on demand, the Irregularity if recorded, shall be rescinded (see Res 818 Attachment A section 1.7.2.1.(d)).

In addition to these rules the Res 818g (and previously also Res 818) provides for a possibility to implement Administrative Charges in situations of failure to comply with BSP procedures and instructions (Res 818g Attachment A section 1.7.1(a) (ii),) as well as Clearing Bank Charges in the amount debited to IATA by the Clearing Bank as a result of the Agent’s failure to remit as prescribed (Res 818g Attachment A section 1.7.1(b)). – In Bulgaria these kind of fees have been implemented by incorporation in the BSP Manual, section 14.10 “Sanctions, Administrative & Bank Fees”; The Administrative Fee for late overdue remittance is 200 BGN at the first instance in 12 consecutive months, plus costs incurred as a consequence of the late or dishonoured payment (see BSP Manual section 14.10.1) and in addition the Agent will be charged any interest debited by the Clearing Bank to the BSP Bulgaria as a result of late payment or failure to remit due payment, if the interest exceeds BGN 50 (see BSP Manual section 14.10.2).

I also want to point out a rule incorporated in Res 818g Attachment A section 1.7.2.1(c) stating that in addition to any action prescribed in the Subparagraph 1.7.2.1, the Agency Administrator shall debit the Agent for costs incurred as a consequence of late or dishonoured payment.

Travel Agency Commissioner Review – rules and conclusions

The procedures under which the Travel Agency Commissioner (referred to as TAC) operates are contained in IATA Resolution 820e. The section of interest in this matter is to be found in Resolution 820e section 1.1.10 stating;

“...the Commissioner shall review and rule on cases initiated by:

...1.1.10 an Agent who considers that the Agency Administrator (as defined) has not followed correct procedures as delegated by the Passenger Agency Conference, to that Agent's direct and serious detriment in order to determine whether the decision under review was made in accordance with applicable Resolutions and based on credible fact. " - In this context it is worth to note that the TAC does not have authority to overrule resolutions, or change the material content of any rules.

In this matter there is no dispute with regards to the fact that the payment due was not paid fully in time. The question here is therefore if the failure to pay the full amount in time is excused under the IATA Resolutions, or for some other reason. – I am hereby able to establish that the Applicant has submitted evidence from its bank that the failure to pay in time was due to an error by the bank. There is furthermore no dispute that sufficient funds were available at the account of the Applicant at the time when the payment order was made. Based on these facts a bona fide bank error as provided for in the resolutions is established, and the Notice of Irregularity dated the 1st of June 2010 shall be rescinded (see rule 1.7.3.2 quoted above).

The Administrative Fee has also been challenged by the Applicant. I am hereby able to establish that the fee is duly incorporated in the BSP Manual for Bulgaria in accordance with the resolutions. - The general principle, as reflected in the IATA Resolutions and in accordance with principles recognized in most jurisdictions, is that the risk of late payments rests with the payer (the Agent). The Agent is the party able to control its payments and failures to pay in time, even if caused by a third party contracted by the Agent, could not in general terms be at the risk of IATA. However the rules of bona fide bank error are there to limit the effects of late payments in certain situations related to failures by the bank utilized by the Agent. It is my interpretation that these rules are implemented to avoid disproportionate effects when an Agent, despite the late payment, has acted with proper care and used what normally should be reliable methods for payment.

The rule regarding the consequences of bona fide bank error (see above description of Res 818 Attachment A section 1.7.2.1.) is however quite clear that it is the Notice of Irregularity that should be rescinded, and there is no mentioning of waiving fees or costs. An Administrative Fee is in general terms there to cover costs for administration in a specific situation. At late payment by an Agent there will no doubt be certain costs for administration as manual intervention will be required. The fee is as mentioned duly incorporated in the BSP Manual for Bulgaria and it cannot be seen as disproportionate in this particular case. I therefore find that there are no grounds in the IATA Resolutions, or elsewhere, to waive the Administrative Fee in this matter.

The Agency Administrator may however not charge the Applicant with additional costs at this point of time. Any additional costs incurred should have been communicated and charged to the Agent when known by IATA, or at the latest such costs should have been specified before the TAC in this review.

Decision

The Notice of Irregularity dated the 1st of June 2010 (recorded as two instances of irregularity) shall be revoked. The Administrative Fee of 200 BGN however stands. The

Applicant shall not be charged with any further costs potentially incurred by IATA due to the Applicant's failure to pay in time.

(I want to add, as there are different levels of the Administrative Fee at the first and second instance of late payment according to the BSP Manual of Bulgaria, that it is my interpretation that should the Applicant within the next twelve months have another instance of late payment, such late payment should be seen as the first instance within 12 consecutive months, with regards to application of the Administrative Fee.)

Decided in Stockholm 2010-08-01.

Helene Cedertorn

(This decision is sent this date by e-mail to the parties. Original signed copies will be sent by postal mail.)

Note:

The parties may, if considered aggrieved by this decision, seek review by arbitration in accordance with the provisions of Resolution 818g, section 12.