

DECISION 2011-05-31

A2-2011-06

Travel Agency Commissioner Area 2

Helene Cedertorn
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Sweden

The Matter:

Request for Travel Agency Commissioner (TAC) Review of decision dated the 7th April 2011 by IATA to declare the Agent in default and suspend the automatic ticketing authority of the Agent

The Applicant/Agent:

ATV, Agence de Tourisme et de Voyages
BP 861, Nouakchott, Mauritania
Represented by: Brahim Ouldbacar Vall, Director General

The Respondent/IATA:

The Agency Administrator of the International Air Transportation Association (IATA)
Rue de Thann Angle Boulevard Djily, MBAYE
BP 50726, CP 18524, Dakar RP, Sénégal
Represented by: Fabrice Sahiri, Country Manager of IATA

1. Decisions/Formalities:

IATA sent a Notice of Irregularity dated the 4th of February 2011 to the Agent claiming that the December 2010 BSP's sales were partly paid and that the Agent still owed MRO 14 849 417. According to the notification this situation constituted an irregularity counting as two listed instances of irregularity. The Agent was requested to make effective settlement of the total amount within the next 24 hours and provide proof of payment during the same time frame, otherwise IATA would have the obligation to declare the Agency in default pursuant IATA Resolution 832, section 1.7.5.

The 7th of April 2011 IATA sent a new Notice of Irregularity through which IATA declared the Agent in default of payment stating that the Agent owed the sum of MRO 14 849 417.

In an e-mail the 20th of April 2011 the Applicant requested TAC Review of IATA's declaration of the Agent in default. The request was based primarily on the basis that payments were, according to the Agent, made in accordance with the BSP Invoice of December. Evidence in the form of a certificate of confirmation from the bank was sent to IATA after the notification of irregularity dated the 4th of February. The position of the Agent is that the decision the 7th of April is unfair and unreasonable.

IATA responded the 6th of May (letter dated 5th of May) and maintained its position.

The Agent responded to IATA's arguments the 9th of May.

Travel Agency Commissioner Review was granted by the undersigned the 12th of May 2011.

IATA provided final response in an e-mail the 23rd of May 2011.

1(8)

The parties have agreed to waive their rights for an oral hearing. As the positions of the parties are clear the undersigned finds that the review could be based on written submissions, with no oral hearing.

2. The position of the Applicant/Agent in summary

The Agent received notification of irregularity from BSP/CWA on the 4th of February 2011. The reason stated was that the bank report related to the payment of the BSP invoice of December 2010 was only partially settled. So in this case the IATA Resolution 832 applied. The Agent immediately verified the following:

- The BSP invoice of December 2010: MRO 16.757.201
- Check Remittance: MRO 16.757.201
- The balance: 0

The Agent requested and obtained certificate of confirmation from the bank (copy of bank confirmation is presented). The Agent forwarded the evidence to the Respondent thinking it was a mistake on their part.

The Agent thought the problem was resolved.

The Agent received to his surprise on April 7th a notification of formal default on the basis of the letter dated the 4th of February 2011.

3. The position of the Respondent/IATA in summary

The basis of the Agent's request for review is that IATA's action is "unfair and unreasonable", IATA accordingly provides this response in accordance with paragraphs 1.1.5, and 1.1.10 of Resolution 820e. Please find below a full description of the series of events resulting in the default of the agent due to non-compliance with the requirements of the Resolutions;

- On 06th January 2011, Mauritania Airways was suspended from BSP operations in Central West Africa as a result of the airlines inability to pay for the negative balances in the BSP in accordance to Resolution 850 Attachment F.
- Communication (copies presented in English and in French) was sent to all agents and airlines in Central and West Africa countries via BSPlink the 6th January. Find below the chronology of the events since this date.
- the following actions were taken and duly communicated to all concerned stakeholders:

All BSPs to exclude the negative balances from the settlement and pass them back to the Agents.

BSP Travel Agents were asked to:

- 1. Stop immediately all ticketing and refund transactions through the GDSs and BSPlink.*
- 2. Settle all outstanding billings directly with the Airline.*
- 3. Report and settle all refunds or other credit/debit transactions, which will be made in future reporting periods directly with the Airline.*
- 4. Consequently adjust the total amount to be remitted to the Clearing Bank at the end of current reporting period by excluding the total amount due to or from the BSP Airline.*

- By the remittance date on 19th January 2011 (Dec 2010 Sales) 12 Agents did not follow IATA's instruction as communicated and only paid as per billing (no manual adjustment as per our instruction were done by these agents).

- On 04th February 2011, IATA issues demand letters to 12 agents for outstanding amounts (Suspended Airline Transactions).
 - 04 Agents responded and remitted the amounts due in accordance to the demand letter. However 08 agents did not respond/react.
 - On 10th February, the Agents Association in Mauritania sent a letter to IATA seeking clarification regarding the demand letters. They sought clarification concerning why IATA had issued demand letters as the agents had paid as per billing.
 - IATA responded on 10th February to the agents association confirming that all Agents in accordance with Resolution 850 Attachment F and as communicated by IATA were obliged to exclude transactions (debits and credit amounts) concerning the suspended airline from their billings which were due for current and future period(s) and remit the total amount outstanding (difference). Non compliance would result in IATA initiating default action in accordance with the Resolutions. Agents had to undertake a manual adjustment to their billings and remit accordingly. (A copy of the Resolution was also provided).
- The amounts due from the agents were higher than the billing amounts as a result of refunds being processed by the suspended airline (Negative billing).
- During this period the IATA CWA Office tried contacting the concerned travel agents encouraging them to remit as requested.
 - On 07th April 2011, IATA issued a final Demand Letters to the remaining 8 agents that had outstanding balances. None of them paid those outstanding amounts.
 - On 07th April 2011, Default Action was taken.

IATA's view on the text of Res 850 attachment F section 2.1. (ii)

" 2.1 IMMEDIATE ACTION BY ISS MANAGEMENT IN THE EVENT OF A GOVERNMENT BLACKLISTING OF A BSP AIRLINE"

When official notification is received of a blacklisting of a BSP Airline by a government regulator ISS Management determines that the BSP Airline should be suspended from BSP operations, the ISS Management shall immediately:

(a) Inform the BSP Airline concerned and all other BSP Airlines;

(b) Instruct all Agents:

— to suspend immediately the use of the Carrier Identification Plate (CIP) of the BSP Airline concerned, and in the case of automated or electronic ticketing, to suspend immediately the use of its name and numeric code as ticketing airline;

— to suspend immediately the use of any auto-mated systems for processing or refunds or other credit/debit transactions on behalf of the BSP Airline;

— to report as usual any sales, refunds or other credit/debit transactions made on behalf of the BSP Airline up to the date of the suspension to the Data Processing Centre (DPC);

— to settle all outstanding either directly with ISS Management for control and reconciliation of the special account detailed in paragraph 2(c), or directly with the BSP Airline concerned;

— consequently, to adjust the total amount to be remitted to the Clearing Bank at the end of the current reporting period by excluding the total amount due to or from the BSP Airline;

— to report and settle all refunds or other credit/debit transactions which will be made in future reporting periods directly with ISS Management for control and reconciliation of the special account detailed in paragraph 2(c), or directly with the BSP Airline concerned;

— to continue to report as usual any refunds made on behalf of the BSP Airline to the Data Processing Centre (DPC);"

Reporting is automatic (not manual) in BSP Central & West Africa. This is applicable in the case of manual documents issued by agents and to be reported to the DPC.

Based on the above facts, IATA deems this to be a breach of instruction and there is no case that can be brought before the TAC for review, and IATA move for dismissal of the request.

A copy of the communication via BSP to the Agents has been submitted (only English version included herein but also copy of French version was submitted by IATA). Parts of the text state the following:

"To : ALL BSP PARTICIPANTS IN MAURITANIA
Date : 06th JANUARY 2011
Subject : Suspension of Airline **MAURITANIA AIRWAYS (YD - 425)**

Dear BSP Participants,

IATA has suspended airline **MAURITANIA AIRWAYS (YD / 425)** with immediate effect, as they have ceased operations.

In accordance with the provisions in Resolution 850 Attachment F

BSP Travel Agents should:

- **Stop immediately all ticketing and refund transactions through the GDSs and BSPlink and report and settle any outstanding amounts including refunds directly with the Airline.**

As soon as we have more information, we will communicate this to you.

If you have any further questions, please do not hesitate to contact the Customer Service of IATA sub-regional office by logging a query to

<http://www.iata.org/worldwide/africa/Pages/enquiry.aspx>

4. The Applicant's summarised arguments in response of the IATA submission:

1. IATA says the suspension is "as a result of the airlines inability to pay for the negative balances". Please note that in the first communication, the reason was that the airline "has ceased operations". This is why many passengers were left without transportation.

2. IATA says that the first communication was sent on January 6th through BSPlink. By checking the history of this link, you will find that it was sent only on January 14th. The concerned period (December 2010) was checked, invoiced, paid and closed.

3. IATA states "All BSPs to exclude the negative balances from the settlement and pass them back to the Agents": How and according to what law or resolutions? Nothing was received in this sense. The sole communication received by our association (submitted) from IATA was talking about "negative" as well as "positive" differences.

4. IATA notes 4 points that "the Agents were asked to". As you may have remarked, only point 1 and 2 can correspond to the instruction of January 6th. In which document the agents "were asked to" for the other points IATA wrote?

5. The deadline of remittance date was the 19th of January. Why did IATA not send an irregularity notice on 20th January as usual? IATA did not because there was no amount more than the billing that could be expected. 2 weeks later, IATA found that pressure on agents may oblige them to support the airline deficit.

6. There was no final demand on 7th April as IATA states, there was only a direct default action taken after 2 months of silence.

On IATA's view of Resolution 850 attachment F section 2.1. (iii):

7. According to IATA the section 2.1. (iii) concerns only the manual reporting. In the 31st edition, 1 June 2010 (Amendments as agreed by Mail Vote A184), the point 2.1.(vii) is deleted because manual reporting no longer has sense. So, what is concerned in this point is "automatic transactions" which need reporting from the system before invoicing. We have some automatic transactions done on GDSs on 6th January but not reported. Why does IATA continue to refer to version prior last amendments? How can "manual reporting" which is not normal be allowed while the automatic one which is normal not permitted?

Conclusions of the Agent:

8. Despite of any sense that words may have, the resolution 850 attachment F treats the situation arising after suspension. The thing is simple: there can be only one reference date instructed by ISS management: before this date, the situation is normal and should be treated as usual, after this date all transactions should be treated as per 850 attachment F.

The non-retroactivity of law is a universal principle. If not, only a Prophet or a Clairvoyant can manage travel agency.

9. The base of the default is resolution 832 point 1.7.5. The Agent received from IATA only 3 communications: 1) the suspension notice on 14th January, 2) the irregularity notice dated February 4th, and 3) the default notice on April 7th. Nothing else.

5. The Respondents' final comments:

IATA has acted in accordance with the requirements of Resolution 850 Attachment 'F'. In the event of an airline being suspended, Paragraph 2.1, inter alia, requires IATA to instruct all Agents to report as usual any sales or other credit/debit transactions made on behalf of the BSP Airline up to the date of the suspension, and if instructed by ISS Management to settle all outstanding billings directly with the airline, and consequently, to adjust the total amount to be remitted to the clearing bank at the end of the reporting period by excluding the total amount due to or from the airline.

In this particular case, communication of airline suspension was uploaded into BSPlink on 6th January. Remittance of agents is monthly in Mauritania. Agents issued tickets and refunds from 1st to 31 Dec but remittance was only on 19th Jan (value date).

After suspension of the airline, next remittance to be made by agents was on 19th January for tickets issued and refunds done from 1st Dec - to 31st Dec. The instruction sent was for agents in Mauritania to adjust the next amount to be remitted (on 19th Jan) by removing amounts of tickets issued on behalf of Mauritania Airways and adding all amounts of refunds due by the airline.

This is in line with what has been communicated by IATA to agents in relevant market. IATA took necessary action as a result of the non settlement of the amount demanded.

6. Relevant Rules

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 or the Carrier) 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 Mauritania these rules are to be found in IATA Resolution 818g. 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 main interest here are to be found in Resolution 818g Attachment A; section 1. "Reporting and Remitting" and section 2. "Consequences of default to BSPs and BSP Airlines". In addition Resolution 850 Attachment F "Suspension of operations by a BSP Airline" will be found in the Handbook and thereby also this Resolution is incorporated into the contract between the Agent and the Airlines.

The relevant versions of the Resolutions are, in the context of this review, the versions from 1st of June 2010 (some changes will be in effect the 1st of June 2011).

7. Travel Agency Commissioner Review – Rules

The procedures under which the Travel Agency Commissioner (referred to as TAC) operates are contained in IATA Resolution 820e. The section of main 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.

8. The Review

There is a general confusion on what rules to apply in this matter. The reference in the notification from IATA to the Agent dated the 4th February 2011 to Resolution 832 section 1.7.5. is not accurate as this resolution does no longer apply in Mauritania. The mentioned section concerns Bona Fide Bank Error, and in the opinion of the undersigned this makes no sense in this context. The correct reference should likely have been made to Resolution 818g Attachment A section 1.7.2. "Overdue or Dishonoured Remittance". This section provides for what actions that shall be taken by the IATA Agency Administrator at short payment of BSP Billings by an IATA Accredited Agent. Also the notification dated the 7th of April inaccurately makes a reference to Resolution 832.

To use the wrong reference in a decision under the PSAA is in itself serious, because it may have the effect that the rules as adopted by the PaConf and as communicated to the Agents are not correctly applied. It may also deprive the Agent of its possibilities to correctly argue against the decisions. These points are valid even if the erroneously referenced rules have similar content as the correct rules.

- The basic question here however is not if the rules for short payment was correctly communicated and described by IATA – the basic question is if there was a short payment by the Agent at all, under the Resolutions as they stand. To investigate this there is a need to review Resolution 850 Attachment F "Suspension of Operations by BSP Airline";

The key point is if the Respondent under the text as it stands is able to require settlement directly with the airline and exclude amounts due to or from the BSP Airline relating to the time before the actual date of the suspension of the airline, when the Agent pays the BSP Billing. As described above the text of the Resolution has changed and will change with effect from 1st June 2011, of interest here is the version of 1st of June 2010. I note that the Applicant is correct in that the version quoted by the Respondent is not the accurate version considering mail vote A184, with effect from 1st of

June 2010. - I take this opportunity to point out the difficulties to keep track of versions, when changes are made late before the actual date of effectiveness resulting in that the published print version may not have the accurate wording. However this is out of scope for this review as the sections of key interest in this review have the same content before and after the changes.

I note that according to Resolution 850 attachment F section 2.1. first section (b) the ISS Management shall, if it determines that the BSP Airline should be suspended from BSP operations, immediately instruct all Agents, to amongst other things suspend immediately the use of the name and numeric code of the concerned Airline as ticketing airline. In addition – of special relevance here - the text states that Agents shall be instructed to report as usual any sales, refunds or other credit/debit transactions made on behalf of the BSP Airline up to the date of the suspension to the Data Processing Centre (DPC).

Furthermore the Agent is instructed to settle all outstanding either directly with ISS Management for control and reconciliation of the special account detailed in paragraph 2(c), or directly with the BSP Airline concerned and consequently, to adjust the total amount to be remitted to the Clearing Bank at the end of the current reporting period by excluding the total amount due to or from the BSP Airline.

- To allow a commercial contract to retroactively change the basic conditions in certain defined circumstances may possibly be legal in many jurisdictions, though it may be seen as unreasonable and not enforceable depending on the circumstances. In this matter there is no clear evidence of local law with regards to this, and I do not find, due to outcome, that it is necessary for me to get a legal opinion on this topic in order to rule in this matter. (I want to point out that it is different in criminal law under which an act cannot become criminal retroactively; this would be a clear violation of human rights at least as recognized in most jurisdictions.) However to allow for some kind of retroactive effect in commercial contracts would, at least in my opinion, require that this effect is clearly stipulated in the contract between the parties. The parties must be able to foresee and understand what may be required of them. I do have this opinion also in the Airline – Agent relationship despite the fact that the monies belong to the Airline and are held in trust by the Agent. It is still important to uphold certain minimum standards when it comes to being able to plan and foresee what may be required of the Agent.

IATA has claimed that the rule “to report as usual any sales, refunds or other credit/debit transactions made on behalf of the BSP Airline up to the date of suspension to the Data Processing Center” is only applicable in case of manual documents, issued by Agents and to be reported to the DPC. – According to Resolution 866 the term Data Processing Center means the entity contracted by ISS Management under a BSP to manage and process reported Agency sales; to provide reports to the BSP and the Clearing Bank of amounts due. On the website of IATA one can read under the heading “How a BSP works” a description stating that “The agent reports all sales and refunds at the end of the reporting period. This is done electronically, through BSPlink. All transactions are forwarded to a central BSP Data Processing Centre (DPC). “

– In the opinion of the undersigned this definition (supported by the description) does not say anything about manual documents only, and the text of Resolution 850 Attachment F seems to include any sales, refunds or other credit/debit transactions. With this as background I can only say that the text of Resolution 850 seems clear enough that sales up until the date of the suspension should be reported as usual, meaning that there is no mandate in the text to ask for transactions before the suspension date to be handled in any other way.

I do not find it necessary to investigate further exactly what date the suspension notification was sent to the Agents, if it was the 6th or the 14th of January. Both dates are after the December Reporting Period and could therefore, in line with my argumentation above, not have any effect on

the December BSP payments. I note however that the burden of proof for such communication rests with the Respondent.

Altogether the contract between the Agent and the Airlines in the form of Resolution 850 attachment F does not, in my opinion, allow for transactions before the suspension date to be reported in any other way than as usual with the effect that settlement of BSP Billings shall be made based on the usual reporting up until the date of the suspension. (This of course means that for example refunds relating to the period before this date could be challenge, if not handled accurately by the Agent.) In this situation consequently the decision by the Respondent was not in accordance with correct procedures as delegated by the PaConf, to the Agents' direct and serious detriment. The decision to declare the Agent in default is therefore declared null and void. The Agent shall therefore be reinstated as IATA Accredited Agent with full ticketing authority with immediate effect.

9. Decision

The decision by the Respondent to declare the Applicant in default and suspend the automatic ticketing authority of the Applicant is declared null and void. The Applicant shall immediately be reinstated as IATA Accredited Agent with full ticketing authority.

Decided in Stockholm 2011-05-31

Helene Cedertorn

Signed original copies of this decision will be sent by postal mail to the parties. In addition the decision will be sent by e-mail this date to the relevant parties for information purposes.

Note:

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