

VERÓNICA PACHECO-SANFUENTES

TRAVEL AGENCY COMMISSIONER, AREA ONE – DEPUTY TAC 2
110 – 3083 West 4th Avenue
Vancouver, BC V6K 1R5
CANADA

DECISION 2013 - # 35

In the matter of:

Royal Enterprise PLC Tour & Travel Agency

IATA Code 18210150

Haile Gebreselassie Road

House No. 493/11 Z-Building

Addis Ababa, Ethiopia

Represented by its Managing Director, Mr. Hussein Sayed Abdella

The Applicant

vs.

International Air Transport Association (“IATA”)

King Abdallah II Street, Al Shaab roundabout

Business Park, Building GH8

P.O. Box 940587

Amman 11194, Jordan

Represented by the Passenger Agency Manager

Africa & Middle East, Ms. Ruba Al-Sharif

The Respondent

I. The Case

The Applicant (also called hereinafter as “the Agent”), sought a Travel Agency Commissioner’s review of IATA’s (also called “The Respondent”) Notice of Termination dated April 9th, 2013, due to a late payment of the 2013 Agency annual fees. The referred payment was made by the Applicant on April 5, 2013, but it was allocated by the Respondent to former years’ agency annual fees.

Telephone: + 1 (604) 742 9854
Fax: + 1 (604) 742 9953
e-mail: Area1@tacommissioner.com
website: travel-agency-commissioner.aero

Interlocutory relief was requested by the Applicant and granted by this Office. The interlocutory decision became effective and, thus the Applicant was reinstated in to the BSP system, once it provided the additional financial security that was required, based on the Respondent's risk assessment.

II. The Applicant's arguments in summary

- In the termination letter IATA states having <<sent us a warning on February 2013>>, corresponding the Agency annual fees for the year 2013; <<however, we did not receive the said warning>>;
- On March 25, 2013 <<we received a call from IATA's Office in Nairobi asking us why Royal didn't pay the annual fee for the year 2013>>, the Applicant explained that they did not receive any notification in that regard, <<then a notification was immediately sent to us>> by email. The Applicant started the payment process with its bank right away and finally, once all formalities were completed, on April 5, 2013 <<the cash was transferred in to IATA's account>>. On that same date the proof of payment was sent to IATA-Nairobi;
- Despite <<having this fact at hand a termination letter was written to Royal on April 9, 2013>>, when in fact <<the fee for the year 2013 was paid before the date of termination>>;
- The Applicant argues that according to Res. 818g, Section 14.2, for the collection of the annual fees for the year 2013 IATA <<was required to send the invoicing to Royal in Nov. 2012, but they sent us an email in March 2013>>, upon which the Applicant swiftly settled the required fee;
- Pursuant the same above quoted Section of the applicable Resolution, <<IATA must send payment invoices for the years 2011 and 2012 on the specified dates so that Royal could have processed and settled the payment through the Ethiopian foreign currency regulations>>. The Applicant could not settle the payments <<due to the fact that IATA did not send us>> the invoices;
- The Applicant stressed that despite the lack of proper communication from IATA, once <<we identified the non-payment during our correspondences with the IATA office we settled the payment for the years 2010, 2011 and 2012

immediately. In fact, we found that our company has paid for the year 2010 in due time¹>>, so this second payment for the same year (2010) was a double payment;

- The Applicant received a letter from the Respondent dated April 29, 2013 <<explaining that the payment made for 2013 was used to settle an older outstanding invoice. However, this is not fair and not accepted by the law>>;
- In general, the nonpayment for the years 2010, 2011 and 2012 <<were due to the fact that IATA did not send us payment invoices, which is beyond the control of Royal>>, had the Applicant been timely informed, << Royal would have made the necessary corrections and saved itself from the hassle it is facing due to termination>>;
- <<Due to the termination, Royal cannot refund tickets and clear the ADM's at hand and this would seriously affect our business and relationship with our customers>>.

III. The Respondent's arguments in summary

<<- Agent IATA Accreditation code: 1821015

- Agent did not pay annual fees for 2013
 - Invoice was sent by Mail and email
 - Reminder was sent to the email address IATA had on file: royal@telecom.net.et, royal@ethionet.et and nebiyat400@yahoo.com on 17th Feb 2013 (attached)².

§ It is the agents' responsibility to ensure that they communicate any changes to contact details in advance to IATA

- Agent was terminated on 09 Apr. 2013>>

The Respondent added that those were the email addresses that <<are registered in our database>>.

¹ According to the evidence on file, the payment corresponding the 2010 annual fees was made on December 17, 2009 by the Applicant.

² Copy of these reminders emails, sent in Feb. 2013, were sent to this Office, copying the other Party

IV. Oral Hearing

Pursuant Paragraph 2.3 of Resolution 820e and Rule #14 of the Rules of Practice and Procedure for Area 2, this Commissioner, acting upon both Parties' consent on waiving their right for an oral hearing, had decided to base her decision only on the written submissions that have been filed by both of them.

V. Considerations leading to Decision

According to the evidence on file, submitted by both Parties and undisputed by either one of them, the following are the facts on which this Commissioner will base her decision:

- A procedure for **collecting the 2013 Agency annual fees** from the Applicant was opened by the Respondent, in the course of which it alleged having sent an **invoice** by mail and email to the Applicant; however, no proof was submitted to demonstrate this fact (the onus was on the Respondent) and its reception has been denied by the Applicant;
- No proof was provided by the Respondent (on whom the burden of proof lied) indicating that any type of communication –either by regular mail or by email– would had been sent to the Applicant during the years 2010, 2011, 2012 and 2013 in connection with the respective annual Agency fees, except for the **reminder** emails (addressed to 3 different email addresses that the Respondent had on the Applicant's file, one of them being the one that the Applicant has used during this review process) that were sent on February 2013 **for the 2013 fees**;
- In addition to these reminder-emails, which the Applicant claims not having received either, the Respondent phoned the Applicant in March 2013, requesting the 2013 fees' payment. Settlement of that outstanding fee was made by the Applicant on April 5, 2013, right after completing the bank formalities and before the termination date;

- The Applicant paid the annual fees for the year 2010 on December 19, 2009;
- Upon termination, and once the Applicant's situation vis à vis the outstanding Agency annual fees corresponding the years 2012, 2011 and 2010³ was clarified the Applicant settled all those fees, sending proof of payment to the Respondent;
- Pursuant Ethiopian bank regulations, the Applicant is required to have an invoice demanding a settlement in order for the banks to process a payment in foreign currency.

Based on those facts, from the undersigned perspective, the core of the matter in this case is dual; on one hand, (1) it is to determine whether or not proper procedure was followed by the Respondent when collecting from the Applicant the Agency annual fee for the year 2013; and, on the other hand, (2) it will be to determine whether or not the Respondent is allowed, according to the applicable Resolutions, to start a procedure having for cause the collection of one particular year annual fees and suddenly, after its own investigation, demand the payment for previous years and impose the sanction for alleged non-payment for those past years' fees.

(1) Procedure for the 2013 agency annual fees

Leaving aside the fact that no proof was provided to demonstrate that timely communication was sent to the Applicant by the Respondent, as mandated in Sections 14.2 and 14.3, failing the Respondent in its obligation to comply with these rules; it did send reminders to the Applicant in February 2013 and in March 2013 phoned him directly aiming not only at collecting the referred fees but also in an attempt to avoid the termination of this Agent.

On the other hand, it has been proved that once aware of this outstanding fee, the Applicant immediately undertook the necessary steps to get the payment done, which was made on **April 5, 2013**, before the Termination Notice was sent by the Respondent. It is worth to note that the said payment could not had been done sooner,

³ As indicated above, the Applicant ended up paying twice for the 2010 fees

due to events beyond the Applicant's control, as it has been explained, considering the Ethiopian banks' requirements to process settlements in foreign currency. Consequently, even though the Respondent did not follow correct procedure, as outlined in Res. 818g, Sections 14.2 and 14.3, since it did not send the proper invoice nor notice before December 2012 when demanding the **2013 Agency annual fees**, it did undertake proactive steps, such as sending reminders in February 2013 and calling the Applicant directly to check with him the situation, as any business partner would do, in order to communicate to the Applicant its obligation to honour the annual fees for the year 2013; on its turn, the Applicant fulfilled its obligation of paying the fees that were due for its accreditation once it was made aware of it by the Respondent.

Notwithstanding the above mentioned facts, particularly the 2013 annual fees' payment done by the Applicant on April 5, 2013, as indicated above, on April 9, 2013 the Respondent issued a Termination letter against the Applicant indicating that it was <<due to non-payment of IATA 2013 Annual Fees>>.

According to an explanation provided by the Respondent to the Applicant⁴, the reason why the Respondent terminated the Agent, despite having it paid the 2013 annual Agency fees was because <<the amount paid before the termination date was used to settle an older outstanding invoice and therefore the 2013 annual fees still showed as open on the date of your termination>>. The applicable Resolutions **do not allow** the Respondent to collect fees for one year from an Agent and, once payment is received for that concept, it cannot allocate those funds to former outstanding fees. In simple words, in order to respect the due process, the Respondent cannot collect funds for AB purposes, and then allocate that payment to CD outstanding purposes, without having timely and properly notified the Agent in question about not only the pending obligations but also about the way the payments would be treated, so the Agent could clearly know ahead of time how and when to pay each obligation and, particularly, be aware of the drastic consequences that non-compliance will imply to him.

⁴ Email sent to the Applicant by the Respondent on April 29, 2013 – IATA Customer Services-Eastern Africa

(2) Due process for past years' annual fees

As indicated in the precedent numeral:

- The Respondent sent to the Applicant reminder emails (on Feb. 17, 2013) for the Agency annual fees corresponding the year **2013**;
- The Applicant paid the said fees on April 5, 2013;
- The Respondent terminated the Applicant <<due to non-payment of IATA **2013** Annual Fees>> on April 9, 2013.

As it appears from the evidence on file, while the Respondent attempted to collect the **2013** Agency annual fees, it seems that it came to the realization that some annual fees from previous years had not been paid by the Applicant, and thus, upon termination, requested for either its payment or proof of it in case it had already been done. Concretely it asked for proof of settlement for the years 2010, 2011 and 2012.

As indicated in previous cases⁵, Sections 14.2 and 14.3 of Resolution 818g state the due process to be followed when collecting the annual fees from Accredited Agents during one particular year. Those rules are silent –as well as the rest of the applicable Resolutions- in regards to situations where former years' fees have not been settled by Agents. Therefore, pursuant the Law principle according to which analogy cannot be applied when imposing sanctions, the termination that is stated in the above mentioned rules **cannot** be applied when former years' annual fees have not been paid by Agents nor have them been duly and timely communicated to them.

As indicated in numeral (i) above mentioned, when opening up a procedure having “AB” for cause, a sanction for not having fulfilled “BC” cannot be applied. The reason for opening a procedure and eventually for applying a punishment within that procedure has to be the exact same and it has to be fully communicated to the Party subject to the investigation.

Nevertheless, by the above set criteria it is not to say that Agents are in any way exempt of fulfilling neither their annual fee payment obligation, nor that the Respondent cannot

⁵ Network Travel vs. IATA (decision dated 5July2013) and Ethio-Arab Travel & Tours (decision dated 21 June 2013)

pursue the collection of an unsettled due fee at any time. It simply means that considering that no precise procedure has been established in the applicable Resolutions for this purpose, the Respondent would have to ensure that proper communication is delivered to the Agent⁶ indicating:

- The year for which payment does not seem to have been received,
- The expected time for the Agent to comply; and,
- By clearly mentioning the eventual sanction that non-compliance with this obligation would entail for the Agent in question.

OBSERVATIONS:

1.- This Commissioner would like to underline and praise the Respondent's action of having pro-actively **called** the Applicant directly, once it realised that no payment had been made by it for the 2013 Agency fees. This simple **phone call** was the most efficient way of communicating with the Applicant and it proved to be the one that triggered not only its immediate payment but that brought to light the whole lack of effective communication that had preceded this case, which was at the origin of the absence of payment of former years' Agency fees.

2.- This Commissioner notes that the original letter of termination issued by the Respondent to the Applicant referred to it as a "Cargo Agency". However, upon clarification requested from this Office, the Respondent amended that mistake in the Applicant's denomination, reflecting its true nature as a "Passenger Sales Agency".

3.- Considering that its analysis will not have any bearings on this decision, this Office will not elaborate on the argument concerning the alleged letter sent by the Respondent to another Accredited Agent in regards to a supposed payment exemption made in favour of a particular Agent of the annual fees for the year 2011-2012.

⁶ In accordance with the general rule set out in Res. 824, Section 16 or via a valid electronic email addressed to "management" that the Agent would have provided to the Respondent, as stated in Paragraph 1.9.1 of Res. 818g, Attachment "A" and in the BSP Manual for Agents.

VII. Decision

Having carefully reviewed all the evidence and arguments submitted by the Parties in connection with this case,

Having looked at the applicable Resolutions,

It is hereby decided:

- Concerning the collection of the Agency annual fees for 2013 the Respondent did not follow the procedure enshrined in Sections 14.2 and 14.3 of Res. 818g ;
- Concerning the collection of 2010, 2011 and 2012 agency annual fees, proper and timely communication had to be undertaken by the Respondent before imposing any sanction to the Applicant;
- Considering that the Applicant has paid all the outstanding annual fees (*id est*, the ones for the years 2010, 2011, 2012 and 2013), its temporarily reinstatement should become permanent.

Decided in Vancouver, the 12th day of July, 2013

Verónica Pacheco-Sanfuentes
Travel Agency Commissioner Area 1
acting as Deputy TAC2

Right to ask for interpretation or correction

In accordance with Res 820e, § 2.10, any Party may ask for an interpretation or correction of any error which it may find relevant to this decision. The timeframe for these types of requests will be 15 days after receipt of the electronic version of this document.

Right to seek review by arbitration

As per Resolution 820e, Section 4 any Party has the right, if it considers aggrieved by this decision, to seek review by Arbitration, in accordance with the provisions of Resolution 824, Section 14, once the above mentioned time frame would have elapsed.

Note: The original signed version of this decision will be sent to the Parties by regular mail, once the referred period for interpretation/corrections would have expired.