

DECISION 2015-08-06

TRAVEL AGENCY COMMISSIONER – AREA 3

Jo Foged
685 Remuera Road
Remuera, Auckland 1050
New Zealand

Applicant:

Agency Administrator, International Air Transport Association, IATA,
Geneva, Switzerland
Represented by Mr. Rodney D'Cruz, Manager Agency Management Asia/Pacific,
IATA, Singapore

Respondent:

Fortune Tours and Expo Pvt Ltd
New Delhi, India
Represented by Mr. Virender Taluja, Director

Complainant:

Lufthansa German Airlines
Gurgaon, India
Represented by Mr. Wolfgang Will, Director South Asia

The Case and Decision

On 14 April 2015 the Agency Administrator sought a review of the Agent from this Office under sub-paragraph 1.3.11 of Resolution 820e. The subject clause reads as follows:

<<The Agency Administrator, on his own initiative or at the request of any Member..., shall initiate a review to determine whether the Agent or Location has breached the Passenger Sales Agency Agreement, including IATA Resolutions incorporated into it, when the Agency Administrator has determined that a credible case has been made, in particular, in respect of any of the following:

1.3.11: the Agent has persistently failed to settle amounts owing against Agency Debit Memos (ADMs) whether or not such ADMs have been subject to dispute>>

This case has arisen from a dispute between the Agent and Lufthansa (LH) and involves the cancellation of a group of 35 passengers booked to travel on LH flights from Mumbai to Paris on 18 June 2010 returning on 22 June 2010, the subsequent cancellation of the group and the 10% advance deposit (being forfeited) and the cancellation fee sought by

LH from the Agent has remained unpaid. The amounts involved are INR 98,420 for the advance deposit paid by the Agent and now being sought as a refund and INR 217,930 representing a 25% cancellation fee.

The total group had been confirmed on the flights deemed suitable until on 17 May 2010, the Agent advised that the connecting time was too short and to book the FRA-CDG sector on a later flight. On 19 May 2010 LH advised that the original connection was guaranteed but space would be sought on the later flight.

Later that day the Agent requested LH to cancel the group booking as it had been "postponed" and that revised dates would be advised.

On 21 May 2010 LH advised the Agent that 33 passengers were confirmed on the later flight with 2 waitlisted and did the Agent still wish to cancel the group which was answered in the affirmative.

LH had issued 2 ADMs against the Agent. One was for the advance deposit which had been paid but as the group size had been reduced by more than 10% (viz 100%), then this advance deposit was forfeit. At a later meeting between the Agent and LH Management, LH states that it offered to credit this deposit against a future group. This offer is not recalled by the Agent. A future group did not eventuate in any case.

The second ADM was for a 25% cancellation fee resulting from the fact that the group had been cancelled 30 days before departure. On that point LH stated that it had calculated the fee for 31 passengers only as a gesture of good will.

Both of the conditions described above were incorporated in the contract.

The Agent requested LH to provide it with an ACM for the advance deposit and to withdraw the ADM on the grounds that cancellation had occurred on the 31st day "counting both days 19 May date of cancellation and departure date of 18 June". Also, as LH had yet to confirm seats for 2 passengers, the contract, which was completed in the name of a Consolidator and not the Agent, could not be signed as a clause in the contract reads as follows:

"No waitlist bookings are permitted. Confirmed bookings for Outbound and Inbound sectors are a mandatory requirement for booking the groups"

With respect to this clause LH stated as follows:

"All flight details had been conveyed to the Agent and initially agreed upon, even after the subsequent change in bookings in respect of the Paris to Frankfurt flight as per the Agent's request the seats were confirmed and the same was conveyed to the Agent. As

explained to the Agent, merely 2 seats remained waitlisted on the flight from Paris and Frankfurt whereas 33 seats had been confirmed. Without prejudice to the aforesaid, it is relevant to note here that the reasoning provided by the Agent, at the time of cancellation of the group booking, was that the trip had been postponed and not that two seats remained waitlisted."

Without going into detail there followed months of message exchanges between the Parties. The Agent, in order to nullify the effect of the ADM, used Billing Discrepancy Reports (BDR) a document that LH had removed from its ADM dispute process once the BSP Dispute Functionality had been introduced in 2009.

During this period LH withdrew the Agent's authority to issue its tickets.

In July 2012 LH had its outside Legal Counsel seek recovery of the outstanding INR 217,930 plus 18% interest per annum from the Agent with the implication that failure by the Agent to do so would be an offence under the Indian Penal Code. This approach was rebutted by the Agent's Legal Counsel and no resolution was derived from this action.

LH wrote to the Agency Administrator in November 2014 seeking his intervention in the dispute which led to the request to this Office in April 2015 for a review of the Agent's accreditation under the Resolution 820e clause described in the initial part of this Decision.

That brings the description of the events leading to this review to a conclusion.

Having examined the factors involved in this case, it is apparent that there are a number of core issues. They are as follows:

1. The validity of LH's cancellation charge in light of the non-signing of the contract.
2. The correct computation of the day on which the group was cancelled.
3. The relevance of the 2-waitlisted passengers to sub paragraph 2(f) of the contract.
4. The forfeiture or otherwise of the 10% advance deposit.

With regard to point 1. above, the contract was sent to both, the Agent and the Consolidator, at the same time, hence, the terms and conditions under which the Agent accepted the fare quoted and the space was acquired were known. Furthermore, the Agent had previously used LH for its group travel requirements and was, therefore, already familiar with the Airline's group booking conditions. The pragmatic interpretation of that situation is that the Agent, having received the service requested of the Carrier and being aware of the conditions under which those services were provided, was bound by same. The existence of a signed contract is not relevant under those circumstances. Also, the Agent was not to be the signatory, but was instead using a third party, yet such third party had no direct involvement with the group.

In connection with point 2. above, LH is entitled to charge the 25% cancellation fee as the group was cancelled 30 days **before** the scheduled departure date and thus fell into the "between 15 and 30 days before departure" bracket detailed in the contract. The Agent included the departure date in its computation, thereby, arriving at 31 days which is not correct.

The point in 3. above is that, if the Agent's approach was accepted, then the contract could not be signed if there was a single passenger waitlisted and, as a consequence, if taken in isolation, the Agent would be free from any sanctions in the event that the group was cancelled, thus, not sharing any risk in the cancellation of the space acquired. In the subject case, 33 of the 35 passengers were confirmed (94.3% of the group) and it would be normal for the 2 waitlisted passengers to be confirmed prior to departure. The group was confirmed in total on the first set of flights, so the condition was satisfied. Furthermore, the contract was dated 18 May 2010 which indicated that the consummation of same was intended to be at the beginning of the process.

On point 4. above, as described in the earlier part of this Decision, the group numbers had been reduced in excess of the 10% yardstick, in fact 100%, and, hence, the condition has to be applied.

LH has provided detailed documentation including evidential information which has made this complex case easier to analyse.

As required by sub paragraph 2.3 of Resolution 820e, both Parties were placed on notice that in the writer's judgement an oral hearing was not necessary and that the decision would be based on the written information submitted. No objection to that method of handling this case was received.

Based on the foregoing, I find that the Agent has withheld moneys rightfully owed to LH and, consequently, it is hereby decided as follows:

1. The 10% advance deposit of INR 98,420 is forfeited.
2. The 25% cancellation fee of INR 217,930 charged by LH is to be paid. The 18% interest per annum sought by LH is not within my remit to include in this decision.
3. Such payment is to be made within 7 business days from the date of this decision failing which the Agent is to be suspended until full settlement has been made.

Decided this 6th day of August 2015 in Auckland.

Jorgen Foged
Travel Agency Commissioner Area 3

Notes:

1. As per Resolution 820e, Section 4, any Party has the right, if it considers itself aggrieved by this Decision, to seek review by Arbitration in accordance with the provisions of Resolution 824, Section 14.
2. The Parties are advised that according to Subparagraph 2.10 of Resolution 820e, any of them may request an interpretation of this Decision, or for a correction of any error in computation, any clerical or typographical error, or any omission in this Decision. Such request must be made within 15 days of receipt of the electronic version of this Decision.

DECISION 2015-08-06 - INTERPRETATION
TRAVEL AGENCY COMMISSIONER – AREA 3

Jo Foged
685 Remuera Road
Remuera, Auckland 1050
New Zealand

Applicant:

Agency Administrator, International Air Transport Association, IATA
Geneva, Switzerland
Represented by Mr. Rodney D'Cruz, Manager Agency Management Asia/Pacific,
IATA, Singapore

Respondent:

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Interpretation

Following the circulation of the core decision, the Agent sought an interpretation of the decision as provided for in sub-paragraph 2.10 of Resolution 820e. The grounds for same was that the decision included a statement as follows:

"The group was confirmed in total on the first set of flights so the condition (paragraph 2(f) of the contract) was satisfied."

The Agent pointed out that there were 2 wait-listed passengers on the inbound sector CDG - FRA on both the first and second set of flights. This situation was overlooked by the writer and, as a consequence, the request for an interpretation was allowed.

There was a message exchange with Lufthansa ("LH"), who did not consider that the request was in compliance with sub-paragraph 2.10. LH had focused on the "any error in the computation, any clerical or typographical error or omission of a similar nature" and had overlooked the "or" preceding this clause which allowed the Commissioner to give an interpretation of the decision.

As the core issue was the purpose of the inclusion of paragraph 2(f) in the contract, Lufthansa was requested to explain the reason for its inclusion. This was described as follows:

"While we had made a genuine attempt to explain the purpose of inclusion of sub para 2(f) in the contract, we would again reiterate that the sole purpose of Clause 2(f) in the contract is that ordinarily, a group booking can only be made if seats are coming/showing as 'available' in the system database of an airline, otherwise, the entire group needs to be re-evaluated in the next higher class. We thus submit, keeping in consideration the purpose as aforesaid, in the present case, Lufthansa gave a special exception to the Agent by booking two waitlisted seats in the group with the consideration that the two-waitlisted bookings would have got confirmed later, in normal course.

We would yet again reiterate that the aforesaid understanding had been agreed/confirmed by the Agent, which is evident from a perusal of the group deposit, which had been taken from the Agent for the entire group including the two-waitlisted passengers. In this regard, it is pertinent to mention that the Agent herein, with a motive to get the Group Bookings made on the price which was earlier offered to them, agreed to the aforesaid understanding, since the Agent was aware of the fact that any fresh bookings would only be made on a payment of a higher price as compared to the price offered earlier. Thus, in order to avoid any additional costs the Agent gave its consent to Lufthansa to make the group booking along with two-waitlisted seats".

To this the Agent countered with the belief that the PNR should not have been created with 2 wait-listed passengers, as that was contrary to para 2(f) of the contract. Furthermore, why was an ADM for the 10% deposit raised until and unless the complete itinerary was confirmed in accordance with clause 2(f) of the contract?

An analysis of the foregoing is that the Agent accepted the fare for the group, which was predicated by the booking class being utilised for their travel. If the group was to be confirmed in total at the outset for the whole journey then a higher booking class, and fare, would have been involved. It is reasonable to believe that had the group actually traveled the 2 waitlisted passengers would have been confirmed and traveled on the flights requested.

It is reasonable also for the Agent to be exposed in part to the risk that the group travel and the utilisation of the seats booked would not eventuate as was the case here where the group was "postponed". It is notable that a future date for the same group to travel was never advised. The Agent's interpretation of the group travel booking process cannot be practically applied in today's environment.

The writer finds that the explanation made by the Airline is relevant to a "real life" circumstance related to the cancellation penalty involved in this case.

Based on the foregoing, the decision rendered on 6 August 2015 is hereby repeated with an amendment in **bold**:

1. The 10% advance deposit of INR 98,420 is forfeited.
2. The 25% cancellation fee of INR 217,930 charged by LH is to be paid. The 18% interest per annum sought by LH is not within my remit to include in this decision.
3. Such payment is to be made within **14 business days** from the date of this interpretation failing which the Agent is to be suspended until full settlement has been made.

Decided this 3rd day of September 2015 in Auckland

Jorgen Foged
Travel Agency Commissioner Area 3

Notes:

1. As per Resolution 820e, Section 4, any Party has the right, if it considers itself aggrieved by this Decision, to seek review by Arbitration in accordance with the provisions of Resolution 824, Section 14.
2. The Parties are advised that according to Subparagraph 2.10 of Resolution 820e, any of them may request an interpretation of this Decision, or for a correction of any error in computation, any clerical or typographical error, or any omission in this Decision. Such request must be made within 15 days of receipt of the electronic version of this Decision.