

**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
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**Third-Party Complaint of
The Association of Retail Travel
Agents (ARTA)
against
The International Air Transport
Association (IATA), Cathay Pacific,
Aer Lingus, and Icelandair**

DOCKET OST 96-1995

ORDER

By this order, we dismiss the third-party complaint of the Association of Retail Travel Agents (ARTA) against the International Air Transport Association (IATA), Cathay Pacific Airways Limited, Aer Lingus Shannon Limited, and Icelandair in Docket OST 96-1995, filed December 2, 1996.

The Complaint

ARTA alleges violations of both the federal aviation statute and the antitrust laws in its complaint. ARTA states that IATA has announced a proposal to launch a Web site on the Internet through which member airlines can advertise and sell international passenger air transportation in the United States at prices below tariff rates. It states that Cathay Pacific has already used the Internet to sell seats at below-tariff prices by auction and that Aer Lingus and Icelandair have used the Internet to "dump" unsold seats, also at prices substantially less than tariff rates. ARTA maintains that all of this conduct violates 49 U.S.C. §41510, which prohibits air carriers, foreign air carriers, and ticket agents from selling foreign air transportation at prices different from those specified in the carriers' tariffs or otherwise providing rebates on foreign air transportation.

ARTA maintains further that this conduct also violates the Sherman Antitrust Act, 15 U.S.C §§1-2, and hence 49 U.S.C. §41712, which prohibits unfair and deceptive practices and unfair methods of competition in air transportation and its sale. ARTA contends that the respondents violate Section 2 of the Sherman Act in attempting to monopolize the sale of foreign air transportation by foreclosing travel agents from participating in the Internet sales and that they violate Section 1 in joining in a concerted refusal to deal with travel agents for those sales. ARTA asks that the Department take enforcement action to enjoin the challenged conduct.

The Responses

ARTA's complaint drew answers calling for its dismissal from all four respondents. IATA states that it does not maintain a Web site for the sale of foreign air transportation and thus is not engaging in the conduct challenged by ARTA. In addition, IATA cites the Department's long-standing enforcement policy of not taking action against rebating absent evidence of consumer harm or anticompetitive behavior. Regarding the antitrust allegation, IATA states that it is considering mounting a Web site to provide information on its members' services, which, as a trade association activity for its members' benefit, would not require any new agreement among them. IATA denies that it has participated in any boycott of U.S. travel agents or attempted to monopolize any relevant market; it contends that ARTA has presented no evidence to support its allegation that IATA or any group of airlines has engaged in restrictive practices. Moreover, IATA maintains, ARTA has not identified any relevant market to be monopolized or presented any evidence showing (1) a specific intent on IATA's part to eliminate competition in that market, (2) predatory conduct on IATA's part toward that end, or (3) a dangerous probability that such conduct, if successful, would create a monopoly in the market at issue. Finally, IATA cites the wide-spread use of the Internet by air carriers and other sellers of air transportation as evidence that IATA itself could not possibly monopolize the sale of air transportation via the Internet.

Cathay Pacific argues that its three Internet auctions have been above-board, open to all comers including travel agents, and the source of significant savings for the traveling public. Even if these auctions may have resulted in a slight, temporary shift in the distribution of its tickets, Cathay Pacific asserts, it has not attempted either individually or as part of a group to foreclose travel agents from participating in the sale of travel between the United States and Hong Kong. Rather, it characterizes its three "CyberAuctions" as the type of

promotional, competitive, and pro-consumer activities that the Department has long encouraged.¹

Cathay Pacific denies any intent to supplant travel agents in the distribution of its tickets. The official rules for both the first and third auctions encouraged successful bidders to buy their tickets through travel agents, and the carrier paid its normal commission on such sales. Cathay Pacific maintains that its auctions can have had little effect on either air transportation or the sale of air transportation in the U.S.-Hong Kong market or the Los Angeles-Hong Kong and New York-Hong Kong city-pair markets given the auctions' minuscule scope and Cathay Pacific's lack of market power. Cathay Pacific also challenges ARTA's allegation of conspiracy, claiming that it acted alone and made no agreements with other carriers or groups. In light of the Department's long-standing policy of allowing technical rebating, Cathay Pacific argues, and given the absence of anticompetitive conduct, fraud, or invidious discrimination, there is no basis for enforcement action, and the complaint should be dismissed.

Aer Lingus acknowledges selling air transportation on the Internet at below-tariff prices but denies ARTA's allegation of "dumping." The carrier states that its use of the Internet for direct sales to passengers affords benefits to the public without violating federal laws. Like the other respondents, Aer Lingus cites the Department's long-standing policies of allowing the sale of air transportation at below-tariff prices and not interfering with carriers' choices of distribution methods. Aer Lingus denies that it has violated Section 2 of the Sherman Act, claiming that it lacks the requisite ability or intent to monopolize any relevant market and is not selling its services at prices below its marginal costs. It states that its rules for purchasing tickets through the Internet do not exclude travel agents from this medium; it also states that its selling directly to passengers can

¹ According to Cathay Pacific, it used the first auction, held from October 13 to October 26, 1995, to highlight its newly-upgraded business class service between Los Angeles and Hong Kong during a non-peak period. For the 50 round-trip tickets offered for travel during Thanksgiving week, Cathay Pacific received 2,254 bids. It used the second auction, held during March of 1996, to introduce members of the AAdvantage frequent flyer programs to its own Internet site. It offered 100 First Class Plan AAhead AAdvantage Awards for flights from the U.S. to Hong Kong and received 475 bids, which were made in frequent flyer miles rather than money. Cathay Pacific used the third auction, held between May 15 and July 31, 1996, to generate interest in its new New York-Hong Kong service. It offered 387 seats from Los Angeles or New York to Hong Kong for use in 1997 and received 14,760 bids.

mean lower prices, a benefit in and of itself, as well as enhanced competition. Aer Lingus likewise denies that it has violated Section 2 of the Sherman Act, which requires group activity, claiming that it has acted solely on its own. Aer Lingus cites ARTA's failure to allege any consumer fraud or invidious discrimination as additional grounds for dismissing the complaint.

Icelandair argues that ARTA's complaint conflicts with the Department's longstanding policy on rebating, fails to assert any colorable claim under the antitrust laws,² and patently contravenes consumers' interests. Icelandair admits that it auctioned a limited number of seats for round-trip travel to Europe in the fall of 1996 and that it set minimum bid prices below tariff levels, but it denies any anticompetitive conduct on its own or in concert with others. It also denies knowing the specifics of any IATA website, planning to sell seats on any such website, or agreeing with IATA or other carriers on what type of fares might be offered or on whether such fares would be available to travel agents.

Icelandair relates that the seats it put up for auction had not sold through normal distribution channels and thus stood to produce no revenue. Mindful that American, USAirways, Continental, and Cathay Pacific had held Internet auctions in the past to reduce seat inventories and generate additional traffic, Icelandair decided to experiment with its own auction.³ Icelandair maintains

² Not only does Icelandair make the same antitrust arguments as the other respondents, but it also argues that ARTA's allegations are legally flawed in that travel agents, as selling agents for the airline, are by definition not the airlines' direct competitors in the sale of air transportation. *Brian Clewer, Inc. v. Pan American World Airways, Inc.*, 674 F.Supp. 782 (C.D. Cal 1986), *aff'd*, 811 F.2d 1507 (9th Cir. 1987), *Illinois Corporate Travel v. American Airlines*, 889 F.2d 751, 753 (7th Cir. 1989). In addition, Icelandair cites *Third-Party Complaint of Pacific Travel International v. American Airlines, Inc.*, Order 95-1-2 (January 4, 1995), a case in which the Department's Enforcement Office took no action against a carrier's imposition of restrictions on travel agents that did not apply to itself.

³ The auction applied to ten departures during the period from September 12 through October 24 and provided for bids for round-trip travel from New York-JFK to Copenhagen, Stockholm, Oslo, London-Heathrow, Glasgow, Hamburg, Luxembourg, and Amsterdam. Travel to and stopovers in Iceland were prohibited. Bids were due at least ten days before the outbound flight's departure from New York. The lowest acceptable bids were \$250 for the September flights and \$150 for the flights in October. Tickets were non-refundable and could not be exchanged for tickets purchased previously. The *(footnote continued on next page)*

that the successful bidders benefited from the low fares and that the auction did not divert business from travel agents, as it applied only to seats that agents had been unable to sell. Icelandair denies that it has taken any steps to foreclose travel agents from selling its regular tickets or discounting them—rather, it claims, it sells most of its tickets through travel agents and anticipates that it will continue to do so.

Disposition and Analysis

We will dismiss ARTA's complaint, as none of the conduct that it challenges warrants enforcement action.

For many years, the Department has consistently declined as a matter of discretion to take any action against sellers who give rebates on international air transportation in violation of 49 U.S.C. §41510, provided that their rebating is not part of a pattern of direct consumer fraud or deception or violations of the antitrust laws and does not constitute invidious discrimination. Notice of Proposed Rulemaking, Statement of Enforcement Policy on Rebating, 53 *Fed.Reg.* 41353 (October 21, 1988); see *Complaint of Cosmos Travel Agency against British Airways and Cosmopolitan Travel Service*, Order 92-2-46 (February 25, 1992). Our enforcement policy reflects the pro-competitive policy goals of the Airline Deregulation Act of 1978 and the International Air Transportation Competition Act of 1979, currently enumerated in 49 U.S.C. §40101. Thus, the uses that Cathay Pacific, Aer Lingus, and Icelandair have made of the Internet to sell their services do not warrant enforcement action under 49 U.S.C. §41510, the anti-rebating statute. IATA does not offer a Web site through which its members may advertise and sell international air transportation at below-tariff rates, so the issue of enforcement does not arise.

Besides declining to bring enforcement action in cases of rebating, as a general matter we have consistently read the pro-competitive policy directives in 49 U.S.C. §40101 as allowing each airline the same freedom to choose the channels and the terms for distributing its services that firms in other unregulated industries enjoy.

As for competition, the pleadings do not indicate any combination or conspiracy in restraint of trade or instances of monopolization or attempts to monopolize in violation of 49 U.S.C. §41712 or Sections 1 or 2 of the Sherman Act. The Section

auction resulted in sales of approximately ten seats per flight to travelers with extremely flexible plans.

One allegation must fall because all four respondents deny acting in concert, and ARTA has not presented any evidence to the contrary. In addition, although ARTA characterizes IATA as a “ready-made combination of international air carriers joining together in a concerted refusal to deal with . . . retail travel agents in the sale and distribution of airline seats being offered [at] below-tariff [rates] through IATA’s . . . Web page,” ARTA’s Complaint at 4-5, this Web site envisioned by ARTA does not even exist; hence, neither do the sales from which ARTA contends its members are excluded.

ARTA has also not presented any evidence to support its allegation that in auctioning or selling seats through the Internet, Cathay, Aer Lingus, and Icelandair have attempted to monopolize the sale of air transportation. ARTA does not identify any relevant market in which any attempted monopolization is allegedly taking place. Rather, it merely contends that the carrier respondents’ sales of seats at below-tariff prices “materially foreclose[s]” its members “from competing in the sale of that international air transportation to the U.S. public” and thus constitute “exclusionary or predatory conduct” and hence an attempt to monopolize. ARTA’s Complaint at 4. In other words, ARTA seems to be arguing that a carrier’s decision to exclude travel agents from participating in any sales of its services at below-tariff fares amounts to a violation of Section 2 of the Sherman Act. ARTA has not cited any legal precedent in support of this theory, nor has it attempted to distinguish the cases cited by Icelandair in support of the latter’s argument that for antitrust purposes, travel agents are not the airlines’ competitors in the sale of air transportation.

ACCORDINGLY, we dismiss the third-party complaint of the Association of Retail Travel Agents against the International Air Transport Association, Cathay Pacific Airways Limited, Aer Lingus Shannon Limited, and Icelandair in Docket OST 96-1995.

This order is issued under authority assigned in 14 CFR §302.205 and shall be effective as the final action of the Department within 30 days after service.

By:

Samuel Podberesky
Assistant General Counsel for
Aviation Enforcement and Proceedings

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